



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER 168

Appeal 890287

Ministry of Consumer and Commercial Relations



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O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987 as amended (the "Act") which gives a person who made a request for access to a record under subsection 24(1) the right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

On January 5, 1990, the undersigned was appointed Assistant Commissioner and received a delegation of the power to conduct inquiries and make Orders under the Act.

The facts of this case and the procedures employed in making this Order are as follows:

1. On February 27, 1989, the requester wrote to the Ministry of Consumer and Commercial Relations (the "institution") seeking access to:

A_ The following (requested) document is described on page 8 of the 1986_87 Annual Report of the C.C.R. Minister.

"Lotteries:

A three member task force reviewed social gaming in the province during the year and reported its findings to the Minister"

B_ I request a copy of that report, please.

2. On June 21, 1989, the acting Freedom of Information and Privacy Co_ordinator (the "Co_ordinator") for the institution wrote to the requester advising that access to

the requested record was refused pursuant to subsections 12(1)(b), (e), (f), 13(1), 13(2)(j) and 18(1) of the Act.

3. The requester appealed the institution's decision, and notice of the appeal was given to the appellant and the institution.
4. The record at issue, which is a 206 page report prepared by the Lotteries Branch Task Force entitled "Lotteries Task Force Report", was obtained and examined by the Appeals Officer. Efforts were made by the Appeals Officer to mediate a settlement of the appeal.
5. During the course of mediation, the appellant indicated to the Appeals Officer that he was only interested in information in the report which dealt with Nevada tickets and more specifically, their use by charitable organizations for fund raising. Nevada tickets are break_open, instant_win type lottery tickets. The appellant was interested in knowing what plans the government had for the ongoing use of these tickets for fund raising. The appellant also wanted to know if in the course of preparing the report the authors had obtained demographic information about the purchasers of Nevada tickets.
6. After reviewing the record and with the consent of the institution, the Appeals Officer was able to confirm to the appellant that the report in question did not contain any demographic information of the type he was seeking. Thereupon, the appellant agreed to narrow his request to information regarding Nevada tickets and the plans of the

government regarding these tickets and their use by charitable organizations for fund raising.

Accordingly, the record at issue in this appeal can be described as those portions of the "Lotteries Task Force Report" which contain information regarding Nevada tickets and the plans of the government regarding these tickets and their use by charitable organizations for fund raising.

7. By letter dated December 18, 1989, the institution informed the Appeals Officer that it was relying solely on subsections 12(1)(c) and 13(1) of the Act to deny access to the record.
8. Because the institution maintained its position with respect to the application of subsections 12(1)(c) and 13(1), a mediated settlement was not possible.
9. Notice that an inquiry was being conducted was given to the institution and the appellant by letter dated January 18, 1990. Enclosed with the Notice of Inquiry was a copy of a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal, and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. The Appeals Officer's Report indicates that the parties, in making representations, need not limit themselves to the questions set out in the Report.

10. Written representations were received from the institution. In its representations, the institution indicated that it was now relying solely on subsection 13(1) of the Act to exempt the record. The appellant chose to rely on the representations made in his letter of appeal.

11. I have considered all representations in making my Order.

The sole issue arising in this appeal is whether the requested record falls within the discretionary exemption provided by subsection 13(1) of the Act, and, if so, whether any of the exceptions listed in subsection 13(2) apply to require the head to disclose the record or parts thereof.

In considering the specific issue arising in this appeal, I have been mindful that one of the purposes of the Act, as set out in subsection 1(a), is to provide a right of access to information under the control of institutions. The provision of this right is in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific.

Further, section 53 of the Act provides that the burden of proof that a record or a part thereof, falls within one of the specified exemptions in the Act, rests with the institution.

Subsection 13(1) of the Act reads as follows:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The "Lotteries Task Force Report" was prepared by three employees of the institution and completed on July 1, 1986. The introduction to the report states that the mandate of the task force was to:

...conduct an in_depth study of the lottery licencing system in the Province; to investigate and research the practical aspects of charitable fund raising and to report their findings on problems, abuses, current regulations and licencing practices, or any other factors that directly or indirectly affected the functions of charitable organizations authorized to operate under the provisions of the Criminal Code of Canada Section 190, and Order_in_Council No. 274/70.

The institution was asked on a number of occasions during mediation and in the Appeals Officer's Report to clearly indicate which portions of the record responded to the appellant's narrowed request, namely, those dealing with Nevada tickets, and more specifically, their use by charitable organizations for fund raising. Despite these requests, the institution consistently maintained that only Appendix VII, which deals specifically with Nevada tickets, responded to the appellant's narrowed request.

I do not agree with the position taken by the institution and I find that information which responds to the appellant's narrowed request can be found in the general sections dealing with the scope of charitable gaming, problems with current licensing practices, the major recommendations and the specific appendices which deal with Nevada ticket lotteries or charitable gaming. The record at issue, as I have defined it, consists of 85 pages.

The general purpose of the section 13 exemption has been discussed in Order 94 (Appeal Number 890137) dated September 22,

1989. At page 5 of that Order Commissioner Sidney B. Linden stated:

...in my view, section 13 was not intended to exempt all communications between public servants despite the fact that many can be viewed, broadly speaking, as advice or recommendations. As noted above, section 1 of the Act stipulates that exemptions from the right of access should be limited and specific. Accordingly, I have taken a purposive approach to the interpretation of subsection 13(1) of the Act. In my opinion, this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision_making and policy_making.

Commissioner Linden addressed the term "advice" in Order 118 (Appeal Number 890172) dated November 15, 1989. At page 4 of that Order he stated:

In my view, "advice" pursuant to subsection 13(1) of the Act, must contain more than mere information. Generally speaking, advice pertains to the submission of a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process.

I agree with the views of Commissioner Linden with respect to the operation of section 13 of the Act.

Having examined the record at issue in this appeal, it is clear to me that, among other types of information, it does contain advice or recommendations of a public servant. Further, the advice or recommendations relate to a suggested course of action which will ultimately be accepted or rejected during the deliberative process.

In light of the above, I find that the portions of the record at issue in this appeal containing advice or recommendations fall within the purview of subsection 13(1) of the Act.

Having found that some portions of the record satisfy the requirements for exemption under subsection 13(1), I must now determine whether any of the subsection 13(2) exceptions apply. As the title of the record at issue identifies it as the report of a task force, I shall first consider whether the exception under subsection 13(2)(j) applies to the record.

Subsection 13(2)(j) of the Act states:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

...

(j) a report of an interdepartmental committee task force or similar body, or of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to the Executive Council or its committees;

Subsection 13(2)(j) is unusual in the context of the Act in that it is a mandatory exception to the application of an exemption for a type of document, a report. In other words, even if the record at issue contains advice or recommendations pursuant to subsection 13(1), the head must disclose the entire record if it is a report of an interdepartmental committee task force or similar body, or of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to the Executive Council or its committees.

In the Appeals Officer's Report, the institution was asked to comment on why subsection 13(2)(j) of the Act would not apply to the record at issue. In its representations, the institution submitted the following:

It is the respondent's submission that although the record at issue is a report of a task force within an institution, that task force was not established to prepare a report on a particular topic, but to recommend and advise the Minister on possible legislative schemes and terms and conditions to be used in the licencing and regulation of Nevada Tickets. The respondent further submits that to release this information would substantially prejudice or undermine any legislative or regulatory system that the Minister proposes to implement if such legislation or regulations are derived from the advice or recommendations contained in the report.

The respondent further submits that if the Minister chooses to accept any or all of the proposed regulatory schemes contained in the report then those portions of the report will be submitted to the executive counsel or its committees and therefore falls outside the exception contained in s.13(2)(j).
(sic)

I do not agree with the representations made by the institution with respect to the availability of subsection 13(2)(j) in the circumstances of this appeal. In my view, the mandate of the Task Force as referred to on page 6 of this Order clearly indicates that the Task Force was established for the purpose of preparing a report on a particular topic, namely, the lottery licensing system in the Province and the practical aspects of charitable fund raising through lotteries.

Further, in my view, the institution has failed to provide sufficient evidence to support a conclusion that the report of the Task Force is to be submitted to the Executive Council or its committees. In reaching this conclusion, I have considered the fact that the report is almost four years old. Therefore, I find that the exception under subsection 13(2)(j) applies to the record at issue in this appeal.

Accordingly, I order the head to disclose the record at issue in this appeal, as described in Appendix A to this Order, and the copy of the record I have provided to the head, to the appellant within twenty (20) days following the date of this Order. The head is further ordered to advise me in writing, within five (5) days of the date of disclosure, of the date upon which disclosure was made.

Original signed by: _____
Tom Wright
Assistant Commissioner

May 24, 1990
Date

APPENDIX A

Appeal Number 890287

The following is a list of what the head should disclose to the appellant.

The Cover Page

The Introduction:

page 1.1.

The Summary of Major Recommendations:

page 1.2

page 1.3 (as indicated).

The Scope of Charitable Gaming:

page 1.2.

Issues in Licencing:

page 2.1

page 2.3 (as indicated)

page 2.4 (as indicated)

page 2.5.

Issues and Recommendations _ Nevada Ticket Lotteries:

pages 2.9 and 2.10

page 2.13

page 2.15 (as indicated).

Municipal Survey Findings:

page 4.1

page 4.2 (as indicated)

page 4.5 (as indicated)

pages 4.6 _ 4.12,

page 4.13 (as indicated),

page 4.14,

page 4.15 (as indicated)

pages 4.16 and 4.17.

Charitability:

pages 6.1 _ 6.8.

Revisions to Order_in_Council:

pages 7.1 _ 7.17.

Appendix VII _ Nevada Ticket Lotteries:

pages 9.1 _ 9.22.

Appendix X _ Suppliers to Charitable Gaming:

page 12.1 (as indicated)

page 12.4 (as indicated)

page 12.5 (as indicated).

11. Appendix XII _ Other Recommendations:

pages 14.1, 14.5 and 14.6

page 14.7 (as indicated)

page 14.9 (as indicated)

page 14.10 (as indicated)

pages 14.11 _ 14.13.