



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

ORDER PO-2270

Appeal PA-030240-1

Ontario Lottery and Gaming Corporation



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NATURE OF THE APPEAL:

The Ontario Lottery and Gaming Corporation (the OLGC) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

1. A list, catalogue or index of policies and procedures used by the Corporation. These are indicated in the 'Records Classification and Retention Schedule' under 'Administrative Records', but may not be exclusive to that heading. I am requesting detailed titles and if available brief descriptions of their contents.
2. A list, catalogue or index of manuals, directives or guidelines that are prepared by the Corporation. This request is for detailed titles of manuals, guidelines, etc even if they contain in whole or in part information that would be exempted from access by the *Act*.

The request also stated:

As section 35 of the *Act* addresses itself to availability, would you also provide information on the location of reading room(s) and the hours of operation to view the materials.

The OLGC located responsive records and made the following decisions respecting access to the responsive records for each part of the request, as follows:

1. The OLGC granted access in part, but denied access to its Human Resource policies in accordance with section 65(6)3 of the *Act*. Further, the OLGC also denied the requester access to its Internal Control Policies as they relate to its accounting and security procedures under section 14(1)(i) of the *Act* (law enforcement).
2. In response to this part of the request, the OLGC advised the requester that there is no single record that lists manuals, directives, or guidelines for all its lines of businesses – Lotteries, Charity Casinos, Slots at Racetrack, and Commercial Casinos.

The OLGC also agreed to make arrangements for the requester to view the records where access has been granted.

The requester, now the appellant, appealed the OLGC's decision.

During the mediation stage of the appeal, the OLGC disclosed all of the records to which it had applied section 65(6)3. As a result, these records are no longer at issue in this appeal. The appellant also agreed that he was only seeking access to the Tables of Contents for three manuals prepared by the OLGC with respect to its charity casinos.

In a letter to the appellant dated November 3, 2003, the OLGc claimed the application of the discretionary exemptions in sections 14(1)(c) and (l) in addition to section 14(1)(i) to the remaining records. The appellant objected to the inclusion of these additional discretionary exemptions by the OLGc. Further mediation was not possible and the matter was moved into the adjudication stage of the appeals process.

I decided to seek the representations of the OLGc initially. The OLGc submitted representations, which were shared in their entirety with the appellant, who also made submissions.

RECORDS:

The records at issue in this appeal consist of the Tables of Contents for the following OLGc Internal Control Policies Manuals:

- Charity Casino System of Accounting & Internal Control Manual
- Surveillance Plan & Procedure Manual
- Security Department Operating Procedures

DISCUSSION:

Is the Ministry entitled to rely on the discretionary exemptions in sections 14(1)(c) and (l)?

In the Confirmation of Appeal provided by this office to the OLGc on July 24, 2003, the OLGc was advised that it was permitted to raise the application of additional discretionary exemptions to the records only until August 28, 2003. The OLGc did not raise any additional discretionary exemptions by that date.

In a letter to the appellant dated November 3, 2003, the OLGc first raised the possible application of the discretionary exemptions in sections 14(1)(c) and (l) of the *Act*.

Part IV, paragraph 11.01 of the *IPC Code of Procedure* provides:

- 11.01 In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

In the Notice of Inquiry provided to the parties, I asked for representations on this issue. The Ministry responded as follows:

As the manuals in question are mandated by the Alcohol and Gaming Commission of Ontario [the AGCO], OLGC believed that it had an obligation to consult with the regulator with respect to any appeal of the OLGC's decision not to disclose the records in question. The regulator [the AGCO] was contacted and as soon as OLGC received the regulator's response, the OLGC advised of the additional discretionary exemptions.

There is no prejudice suffered by the appellant in OLGC claiming the additional discretionary exemptions as the exemptions were claimed during the mediation period and the discretionary exemptions in sections 14(1)(c), (i) and (l) all relate to the safeguarding of OLGC's patrons, employees, assets and games.

The appellant responded to this portion of the Notice of Inquiry by objecting to the inclusion of these additional discretionary exemptions in the appeal. He notes that a number of delays in the processing of this appeal can be laid at the feet of the OLGC and that he has suffered prejudice as a result of them. The appellant points out that the additional discretionary exemptions in sections 14(1)(c) and (l) were only put forward two days before the file was moved to the adjudication stage of the process but some 68 days after the deadline imposed by the IPC in its Confirmation of Appeal.

In Order PO-2251, Adjudicator Rosemary Muzzi articulated the issue surrounding the late raising of discretionary exemptions as follows:

In Order P-658, former Inquiry Officer Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it would not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*.

The objective of the policy enacted by the Commissioner's office is to provide government organizations with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

In determining whether to allow the Ministry to claim this discretionary exemption, I must balance the maintenance of the integrity of the appeals process against any evidence of extenuating circumstances advanced by the Ministry (Order P-658). I must also balance the relative prejudice to the Ministry and to the appellant in the outcome of my decision.

I adopt this reasoning and approach for the purpose of the present appeal. The OLGc provided me with an explanation as to the circumstances surrounding its failure to claim the application of sections 14(1)(c) and (l) in a timely fashion. In my view, the integrity of the appeals process would not be significantly affected by proceeding to evaluate whether the records qualify for exemption under these sections. Balancing the equity of the positions of both the appellant and the OLGc, I find that there is very little weighing in favour of declining to consider the application of sections 14(1)(c) and (l). Also weighing in the OLGc's favour is the fact that it had already claimed the application of one of the other law enforcement exemptions in section 14(1).

I have determined that I will consider whether these additional discretionary exemptions apply to the records regardless of the fact that they were only claimed by the OLGc late in the mediation stage of the process. It is unfortunate that the OLGc did not receive the feedback it was expecting from the AGCO more promptly so that a decision about which exemptions would be claimed could have been made earlier. This situation precluded any meaningful mediation of the issues since the OLGc was unable to put forward a definitive position with respect to the application of the exemptions to these records. I would urge the OLGc and AGCO to move to better coordinate their communications and decision-making when faced with similar circumstances in the future.

LAW ENFORCEMENT

The OLGc has claimed the application of the discretionary exemptions in sections 14(1)(c), (i) and (l), which read:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
- (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
- (l) facilitate the commission of an unlawful act or hamper the control of crime.

The OLGc takes the position that the information contained in the records is exempt under these sections because it highlights "the fundamental safeguards that OLGc has in place to protect its patrons, employees, assets and games." Specifically, the OLGc submits that the first record, the Internal Control Manual, "contains procedures put in place to protect OLGc assets". It asserts that the Surveillance Manual "is only available to the surveillance staff and senior OLGc

executives” and that the third, described as the Security Manual, “dictates how OLGC protects assets, patrons, staff and premises.”

The OLGC further submits that “the Surveillance and Security manuals are investigative in nature” and “describe the methods OLGC uses to investigate incidents at a gaming site.” With respect to the application of section 14(1)(l), the OLGC states that “[D]isclosure of the investigative techniques, even through the requested records, would make it more difficult to apprehend any criminal activity.”

The appellant points out that the request seeks access only to the Table of Contents for the manuals in question and not the entire documents. The appellant also indicates that in order for the OLGC to demonstrate the application of the exemption in section 14(1)(i), it must establish a “clear and direct linkage” between the disclosure of the requested information and the harm contemplated by that section.

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Because section 14 uses the words “could reasonably be expected to”, the OLGC must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.), *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Although I find that the OLGC’s representations are not particularly persuasive, the records themselves also represent evidence before me and must be carefully examined in the same manner as the evidence tendered by the parties to the appeal. In the present case, the records outline in some detail the nature and extent of the security and surveillance measures in place in Ontario casinos. The Tables of Contents themselves reveal certain information regarding the hierarchies of security staff in place and the “chain of command” that exists at these facilities.

The Tables of Contents also describe the procedures to be followed by the management and employees of the facilities in the event that certain situations arise. In my view, by inference, the records also identify certain situations or events that are not anticipated by the procedures described in the records. I find that the disclosure of this information could reasonably be expected to reveal certain facts that may be of assistance to someone interested in breaching the security of one of the OLGC’s facilities. For example, the fact that the Manuals do not anticipate or outline a procedure aimed at one particular type of emergency might provide an opportunity for a security breach by someone so inclined.

Accordingly, I find that, based on my review of the records as well as the representations of the OLGC, the Tables of Contents contain information whose disclosure could reasonably be expected to facilitate the commission of a crime within the meaning of section 14(1)(l). I find that the information contained in the records is sufficiently detailed and relates specifically to different aspects of law enforcement and security within the casino milieu as to bring it within the ambit of the exemption in section 14(1)(l). Accordingly, I find that the requested information is properly exempt under that exemption.

ORDER:

I uphold the decision of the OLGC.

Donald Hale
Adjudicator

April 28, 2004