



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2709

Appeal PA07-29

Ontario Lottery and Gaming Corporation



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

BACKGROUND AND NATURE OF THE APPEAL:

In early December of 2006, an individual contacted the Ontario Lottery and Gaming Corporation (the OLGC) alleging that a retailer had kept his winning \$5 million dollar Lotto 6/49 ticket from the May 29, 2004 draw. He advised the OLGC that he purchased the ticket at a particular store in Sudbury and that it had been validated at another location.

As part of the OLGC's duty to investigate every claim received, it conducted an investigation into the matter. The investigation revealed that the \$5 million winning Lotto 6/49 ticket was generated in the Kirkland Lake area. Therefore, it was concluded that the winning ticket could not have been the ticket purchased by the individual in Sudbury. The results were communicated to the individual and the file was closed by the OLGC.

Subsequently, the individual filed a request with the OLGC under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a list of major prize winners, including a list of the persons who operate, and the locations of, lottery terminals, who have won major prizes in the last five years. The requester added that if this information were not available, he would like the information pertaining to the May 29, 2004 prize winner. He advised that he was specifically interested in obtaining information regarding the location at which the winning ticket was purchased and who collected the \$5 million dollar prize. Finally, he asked whether the winner was a lottery terminal operator.

The OLGC issued a decision denying access to the list of major prize winners' names and the list of persons who operate lottery terminals who have won major prizes in the last five years, based on the application of the mandatory exemption in section 21(1) (personal privacy) of the *Act*.

In its decision letter, the OLGC noted that when an individual claims a prize of \$50,000 or more, the winner's name, address and photograph are released through the media to the general public at the time the prize is claimed to ensure the integrity of the games. However, it argues that after the release of this information, any further disclosure would be considered an unjustified invasion of personal privacy. The OLGC also stated:

In response to your request for information pertaining to the May 29th, 2004 draw, which you clarified on November 6th, 2006 as being a Lotto 6/49 ticket, the \$5 million prize went unclaimed. The winning ticket for this jackpot was purchased in the Kirkland Lake, Ontario area.

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

During mediation, the appellant narrowed the scope of his request to the following three points relating to the May 29, 2004 draw:

1. The date the winning ticket was purchased;
2. the notification sent to the retailer who operated the lottery terminal where the ticket was sold; and
3. the specific location where the ticket was sold.

In response to this narrowed request, the OLG C issued a new decision. It stated that no responsive records exist in relation to point 2 of the narrowed request and denied access to any records responsive to points 1 and 3 of the request, citing to the exemptions at sections 18(1)(a), (c) and (d) (economic and other interests). The OLG C explained:

Information such as the date the ticket was purchased and the specific location where the winning ticket was sold are both critical pieces of information in properly resolving a prize claim. Purchase information is one of the OLG C's key controls in determining validity of a major winning ticket before or after the ticket expires.

The appellant stated that he is appealing both the position of the OLG C that no responsive records exist in relation to point 2 of his narrowed request, as well as the exemptions claimed for the records responsive to points 1 and 3 of the request. As further mediation was not possible, the appeal was transferred to the adjudication stage of the appeal process.

This office began an inquiry into this appeal by seeking representations from the OLG C. It provided representations in response. The OLG C agreed to share portions of its representations with the appellant but asked that some portions remain confidential. After reviewing the OLG C's confidentiality request, this office agreed with the OLG C's position. The appellant was then provided with a copy of the non-confidential portions of the OLG C's representations and invited to submit representations. The appellant provided representations in response.

RECORDS:

There are five records at issue in this appeal:

- Record 1: Big Win Report for May 29, 2004 (which shows when and where the unclaimed Lotto 6/49 \$5 million dollar prize was purchased).
- Record 2: Expired/Unclaimed Major Win Report (which identifies the expired or unclaimed major wins for Lotto 6/49 and Lotto 6/49 Encore from May 2004 to June 2005)
- Record 3: Retailer Location Report (which identifies the retailer location device number and name of the location related to the unclaimed prize).
- Record 4: Retailer Location Report (which identifies the address of the retailer location related to the unclaimed prize).
- Record 5: Retailer Location Report (which identifies the contacts for the retailer location related to the unclaimed prize).

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as

required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The OLGC did not locate any records responsive to point 2 of the appellant's narrowed request in which he sought access to "the notification sent to the retailer who operated the lottery terminal where the ticket was sold." During mediation the OLGC explained that the retailer is notified only when the prize is claimed, not after the draw. The appellant is dubious of this response, and indicates that he has been told by at least six retailers that they are notified within two to three days of a draw. Accordingly, the appellant believes that records responsive to point 2 of his request should exist.

Representations

The OLGC takes the position that it conducted a reasonable search to determine whether any records responsive to point 2 of the appellant's narrowed request existed. It submits that the search revealed that the OLGC does not provide any notification to the retailers until the prize has been claimed and that in the circumstances of the information at issue in this appeal, no notification was provided to the retailer. In support of its search the OLGC provided three affidavits sworn by individuals involved in the search for responsive records: the Freedom of Information Coordinator, the Customer Service Manager of the Prize Centre and the Internal Audit Manager, Lotteries.

As evidenced by the affidavits, the Freedom of Information Coordinator sent a request to the Customer Service Manager of the Prize Centre to advise her of the request and to ascertain whether the OLGC notifies the retailer that a winning ticket has been sold at their location before the prize is claimed. The Customer Service Manager of the Prize Centre in turn contacted the Winner's Representative of the Prize Centre and the Internal Audit Manager, Lotteries, to confirm the response to the query. The Freedom of Information Coordinator was advised by the Winner's Representative of the Prize Centre that no responsive records exist because "the ticket must be claimed prior to any notification or commission being processed to the selling retailer." This information was confirmed by the Internal Audit Manager, Lotteries, who the OLGC submits "has extensive background and exposure to lottery issues related to policies, procedures and practices and in this regard is knowledgeable about the policies of the OLGC pertaining to winning tickets." The OLGC submits that its practice is "to only notify retailers and pay their commission for a winning lottery ticket after the prize has been claimed."

The OLGc also submits that “based on the content and consistency of the information provided, [the Freedom of Information Coordinator] concluded her search for this record. It is the OLGc’s position that the scope of the search was reasonable in the circumstances.”

The appellant makes no specific representations on the issue of reasonable search but during mediation, advised the mediator that at least six retailers told him that they are notified by the OLGc that they sold a winning ticket within two or three days of a draw. He states that he does not believe that the OLGc does not have any records responsive to point 2 of his narrowed request.

Analysis and finding

As noted above, although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist. The appellant did not make any representations on the reasonableness of the OLGc’s search for records responsive to point 2 of his request, however, I have considered the comments he made on this issue during mediation, as described above.

In my view, other than a general assertion that several retailers have told him that they are notified of a winning ticket within two or three days of the draw, I find that the appellant has not provided any reasonable basis for concluding that an additional responsive record, specifically a notification of the win sent to the retailer of the winning ticket, might exist. I accept the OLGc’s statement supported by three sworn affidavits from experienced employees, that no notification is given to the retailers until the prize has been claimed.

Accordingly, I am satisfied that the OLGc has taken all reasonable efforts to identify and locate responsive records and that its search was reasonable in the circumstances of this appeal.

ECONOMIC AND OTHER INTERESTS

The OLGc claims the application of sections 18(1)(a), (c) and/or (d) to the records at issue in this appeal. Those sections read:

A head may refuse to disclose a record that contains,

- (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
- (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

- (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For section 18(1)(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information
2. belongs to the Government of Ontario or an institution, and
3. has monetary value or potential monetary value.

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides the discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario," section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians [Order P-1398].

For sections 18(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Representations

Although the OLGC claims that the records are exempt under sections 18(1)(a), (c) and (d), it only makes representations on the application of section 18(1)(d). The OLGC claims that the records at issue are exempt from disclosure based on the interests protected by section 18(1)(d). The OLGC states that the records contain information which, if disclosed, could be abused by individuals to assist in a fraudulent claim that they purchased, possessed or validated the winning ticket. It submits that such fraudulent claims could injure the OLGC's economic and financial interests by interfering with its ability to discharge its responsibilities in managing the provincial economy and adversely affect the OLGC's ability to protect its legitimate financial interests.

The OLGC states that this office has recognized institutions' interests in protecting the province against economic fraud and it refers to Orders P-752 and M-551. It argues that the OLGC's interest in maintaining the integrity of its prize claim investigation process is equivalent to the interests protected in those two orders. It submits:

Whether it is investigating an initial claim to a prize or a challenge to a prize, [the OLGC] is engaged in a process that is important to the province and its taxpayers' financial interests.

Public confidence in the OLGC's investigation process and the lottery systems must be maintained if it is to continue to make its large financial contribution to the provincial programs.

The OLGC submits that this same argument was accepted by former Assistant Commissioner Mitchinson in Order PO-1799 "where he recognized that section 18(1)(d) protected information in the OLGC's transactions records and stated":

I accept the [OLGC's] position that the integrity of the provincial lottery system is of paramount importance to its successful operation, and that any changes required to remedy a security-related breach would require a significant financial investment on the part of the [OLGC] and the government of Ontario.

The OLGC submits that the information at issue in the current appeal is highly sensitive because it is of the type that is used in its investigation process to validate claims. The OLGC states that it requires claimants to produce purchase, validation and ticket possession information which is then compared against the OLGC's records to establish the validity of a winning ticket. It states that this type of information is one of its "key controls" in determining the validity of a major winning ticket and "must be kept confidential in order to maintain the integrity of the system."

The OLGC submits that disclosure of the information could reasonably be expected to be injurious to the financial interest of the Government of Ontario because it could reasonably be expected to give rise to fraudulent claims to the \$5 million dollar unclaimed prize. The OLGC explains that the information contained in the records could be used improperly by individuals

who do not possess the winning ticket to assert entitlement to the prize. It further submits that if this type of information is disclosed “the OLG C would not be able to effectively assess whether any such claims are valid for millions of dollars in prize money.”

The OLG C also submits that the harm that would flow from disclosure is not lessened because the \$5 million dollar winning ticket, or any other unclaimed prize listed in the records, has expired:

First, an expired prize does not preclude an individual from making a claim for the prize. [The Internal Audit Manger, Lotteries] confirms [in his affidavit] that there are many occurrences of claims for expired tickets. (Exhibit L at para. 7)

Second, the harm rendered by disclosing the purchase information in this case is heightened because it is unclaimed. Unlike prizes which are claimed, unclaimed prizes do not have any individuals that can defend against claims made by others. Accordingly, these prizes are much more susceptible to fraudulent claims and, in this regard, fraudulent wins.

Lastly, the harm that the OLG C relies on in asserting its section 18 claim – and the harm recognized in the Ombudsman report – is harm that would flow from loss of public trust in the lottery system. Even though the \$5 million ticket has expired, the OLG C would have a duty to investigate and resolve the matter to preserve this public trust. The OLG C submits that if [the records] are disclosed to the public, it would have no such ability.

The appellant’s representations do not specifically address the possible application of section 18(1)(d) (or any other exemption) to the information contained in the records, rather the appellant’s representations focus on his distrust of the OLG C and why he feels that he should be granted access to the requested information.

The appellant refers to the Ombudsman’s Report “A Game of Trust”, issued in March 2007, and his representations focus on his position that in light of the recent revelations from the investigation that lead to that report, the OLG C cannot be trusted. The appellant feels that he could be a “victim of the corruption and fraud going on at the OLG C.” In particular, the appellant believes that he purchased the winning ticket for the draw that took place on May 29, 2004 for a \$5 million dollar prize that remains unclaimed. He questions whether a lottery retailer, who validated his ticket and advised him that it was not the winning ticket, claimed the prize and collected it after the expiry date.

The appellant’s position is based on the fact that in the three years that he has been attempting to obtain information about the missing ticket he feels that he has been “met with denial, misinformation and lies by the OLG C attempting to cover up what they knew was going on with their retailers.” In the particular circumstances of his situation, the appellant states that in June of 2004 the OLG C issued a press release advising that the winning ticket for the May 29, 2004

draw was missing and that it had been sold in the Sudbury area. He submits that it is unusual for the OLGC to release such information shortly after a draw rather than to do so three weeks before the ticket expires as, he states, is the OLGC's policy. The appellant states that because of that press release he recalled a ticket purchase that he made in Sudbury in which he picked numbers similar to the winning numbers but he could not locate the ticket. He then visited the OLGC office, provided purchase information to staff, and was advised to continue to look for his missing ticket. He questions why he wasn't advised, at that time, that the winning ticket was not purchased in Sudbury, as first reported, but in Kirkland Lake. Additionally, he questions why he was advised to continue to look for his missing ticket given that he had already provided the staff member with the information revealing that he had purchased the ticket in Sudbury. He states that he then recalled that he had validated the ticket and that the retailer had advised him that it was not the winning ticket.

The appellant takes the position that because the missing ticket could be his, the OLGC should release the requested information to him. The appellant submits that although the OLGC claims that it cannot disclose the information because it is sensitive and it might lead to fraudulent claims given that it is the only source of information about a winning ticket it should be compelled to release all of the information that it has in order to restore public confidence in the system. Moreover he submits that the information that he seeks is available and was released before through press releases.

The appellant also states that he does not know how the disclosure of the information that he requested jeopardizes the OLGC's ability to run the lottery system or the government's ability to run the government. He concludes his submissions by stating:

By providing me with the information I requested you will not in any way interfere with the OLGC's ability to operate the lottery system but you will reveal their complicity in cheating the public.

Analysis and finding

In Order PO-2657 and Order PO-2664 Assistant Commissioner Brian Beamish found that detailed information about the specific circumstances surrounding the purchase and validation of a particular insider win claim, including information such as "the time of purchase and validation of the winning ticket, details of other tickets purchased and the same time and information related to the actual winning ticket and its unique characteristics," qualified for exemption under section 18(1)(c) and (d) of the *Act*. In Order PO-2657 Assistant Commissioner Beamish states:

[D]isclosure of this could be used by an individual who wishes to make a fraudulent claim to the lottery prize. For example, knowledge of the specific time that a winning ticket was purchased and validated could assist an unscrupulous individual by supporting a fraudulent claim. Given the size of the prize [\$21.5 million dollars], I find that disclosure of this information could reasonably be

expected to prejudice the economic interests of the OLG and be injurious to the financial interests of the government of Ontario.

I have considered the argument of the appellant that the limitation period for claiming the lottery prize in this appeal has expired. I have also considered the fact that the information contained in this category of records could be used by an individual who disputes the affected parties' claim to the prize in a civil proceeding against them. I also accept the argument of the OLG that the integrity of the lottery process requires that this information be kept confidential.

Assistant Commissioner Beamish made a similar finding in Order PO-2664. However, in both orders Assistant Commissioner Beamish did make exceptions to his findings with respect to information about the particular winning tickets that had already been made public and reported in the media. In Orders PO-2657 and PO-2664 the type of information that he found did not qualify for exemption under section 18(1)(c) and (d) because it had already been released into the public realm included the date of the draw, the lottery played and the size of the prize. He also found that given that the location of the ticket purchase and the fact that one of the claimants purchased the ticket at his own store was already publicly known, he was not satisfied the information qualified for exemption under section 18(1)(c) or (d).

I agree with Assistant Commissioner Beamish's findings in Orders PO-2637 and PO-2664 and find them relevant to the circumstances of the current appeal.

Having considered the representations submitted by the parties, the contents of the records and Orders PO-2657 and PO-2664, I find that the information contained in the records at issue in this appeal qualifies for exemption under section 18(1)(d). In my view, the OLG has provided me with sufficiently detailed and convincing evidence to support a finding that the disclosure of this information could be used to the detriment of the province's financial interests by any individual who wishes to make a fraudulent claim to the \$5 million dollar prize. As a result, I find that disclosure of this information could reasonably be expected to be injurious to the financial interests of the province as contemplated by section 18(1)(d).

Following Assistant Commissioner Beamish's reasoning in Orders PO-2657 and PO-2664, I accept the OLG's argument that disclosure of the information at issue could still reasonably be expected to bring about the harm contemplated in section 18(1)(d) despite the fact that the limitation period for claiming the lottery prize has expired. In particular, I accept that the fact that the limitation period has expired does not preclude a claim being made and also accept that given that this specific prize remains unclaimed it is more susceptible to fraudulent claims. As a result, I am prepared to accept the OLG's argument that the integrity of the lottery process requires that this information be kept confidential.

Finally, I acknowledge that Assistant Commissioner Beamish made exceptions to his finding that purchase and validation information was exempt under section 18(1)(c) and (d) and found that that information that had been made public did not qualify for exemption and should be

disclosed. In the circumstances of the current appeal however, I find that there are no exceptions. Unlike the information in Orders PO-2657 and PO-2664, the information at issue in this appeal relates to a prize that remains unclaimed. As a result, less information about the ticket has been released into the public realm. For example, although it has been made public that the winning ticket was purchased in the Kirkland Lake area, the exact retail store and its location has not been disclosed. Having reviewed the specific purchase and validation information that appears in the records, I am satisfied that, with the exception of the amount of the prize, none of the information is known to the appellant, and, more importantly has not been made publicly available.

Accordingly, I find that all of the information at issue in this appeal, with the exception of the amount of the prize, qualifies for exemption under section 18(1)(d) and, subject to my review of the OLG's exercise of discretion, should not be disclosed to the appellant.

As the amount of the prize is clearly known to the appellant and it is the only information contained in the record that is not exempt under section 18(1)(d), I find that there is no useful purpose to order the OLG to provide the appellant with a severed copy of the records revealing only the amount of the prize.

EXERCISE OF DISCRETION

The section 18(1)(d) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. In situations where an institution has the discretion under the *Act* to disclose information even though it may qualify for exemption, the Commissioner, or her delegate, may review the institution's decision to exercise its discretion to deny access.

I will review the OLG's exercise of discretion in this appeal since it *could* have disclosed the information at issue. I may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In these cases, I may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. I may not, however, substitute its own discretion for that of the institution [section 54(2)].

Representations

In its submissions, the OLGC explains the reasons why it exercised its discretion to withhold the records under section 18(1)(d) of the *Act* as follows:

The OLGC submits that, in denying access to the records ... it exercised its discretion in good faith, with regard to all of the relevant considerations and did not take into account irrelevant considerations. Accordingly, its exercise of discretion should be upheld by [the Office of the Information and Privacy Commissioner].

In determining whether the records requested should be disclosed to the requester, the OLGC considered the concerns discussed above in the submissions pertaining to section 18(1)(d). Specifically, the OLGC took into account the fact that if these records were released, the disclosure would decrease the public confidence in the operation of the institution and would increase the possibility of fraudulent claims.

The OLGC further submits that there is no evidence to suggest that the decision to deny access to these records was made in bad faith, for an improper purpose or because of irrelevant considerations. To the contrary, in determining whether these records should be disclosed to the requester, the OLGC considered whether the ticket's expiration eliminated its concerns about disclosing the records. [The Internal Audit Manager, Lotteries], in [paragraph] 7 of his Affidavit ..., confirmed that this information was still highly sensitive due to the number of claims for expired prizes and therefore could not be released without negatively affecting the integrity of the lottery system.

Although one of the purposes of the *Act* is to make information available to the public, the exemptions highlight the fact that there are instances when the confidentiality of information is critical to protecting the economic and financial interests of the government. In this case, balancing the considerations outlined above led the OLGC to conclude that it would not be appropriate to disclose the information requested. The OLGC submits that it was a proper exercise of discretion.

The appellant does not make any specific submissions on the OLGC's exercise of discretion but his representations make it clear that he feels that the OLGC should have exercised its discretion to disclose the information to him. He submits that the only source of information about winning tickets is the OLGC and it should be compelled to release all information it has in order to restore public confidence in the system. He submits that releasing the information at issue would help to restore the integrity in the lottery system which has been lost due to lottery corruption.

Analysis and findings

With careful consideration of the circumstances of the appeal, including the contents of the records and in view of the representations provided, I am satisfied that the OLGc exercised its discretion under section 18(1)(d) of the *Act* properly.

I am satisfied that the OLGc has properly taken relevant factors, and not irrelevant ones, into consideration in exercising its discretion to withhold this information. In particular, it appears that the OLGc considered the sensitive nature of the information at issue and the circumstances of this appeal. In particular, it appears that the OLGc took into account that the purpose of the exemption at section 18(1)(d) which is to protect the economic and financial interests of the government. In my view, disclosure of the information contained in the records would disclose information that would increase the possibility of fraudulent claims with respect to the unclaimed \$5 million dollar prize. I agree with the OLGc that this would negatively impact the economic and financial interests of the Ontario Government.

Accordingly, I conclude that the OLGc properly exercised its discretion in deciding to withhold the records at issue from the appellant and find that they are properly exempt under section 18(1)(d).

ORDER:

I uphold the OLGc's decision to deny access to the records.

Catherine Corban
Adjudicator

August 15, 2008