



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

# **ORDER PO-2828**

**Appeal PA08-132-2**

**Ontario Lottery and Gaming Corporation**



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## **NATURE OF THE APPEAL:**

The Ontario Lottery and Gaming Corporation (the OLGC) received an initial request under the *Freedom of Information and Protection of Privacy Act* for a copy of the surveillance record and digital photograph of the requester relating to an incident that occurred in an Ontario Provincial Police (OPP) holding cell in a casino. The OLGC ultimately disclosed the surveillance record and a copy of the digital photograph to the requester.

The requester then had a comparative analysis conducted of the records. After receiving the results of the comparative analysis, the requester took the position that there were inconsistencies between the two records. The requester then filed a request for a digital copy of the “actual surveillance record that corresponds to released photograph”. This second request is the subject of this appeal.

The OLGC failed to reply to the second access request within the requisite time frame under the *Act*. Under section 29(4) of the *Act*, failing to respond to a request for access to a record within the statutory time frame results in a “deemed refusal” to provide access, which gives rise to a right of appeal. Accordingly, this office opened file PA08-132-1, and sent a Notice of Inquiry to both the appellant and the OLGC.

The OLGC issued its decision letter. In its decision letter the OLGC advised that because the memory card is reused, the original photograph that was on the memory card on the camera that took the digital photograph of the requester no longer exists. In addition, the OLGC advised that there are no other videotapes of the requester within its custody or control. As a result of the OLGC issuing its decision letter, appeal PA08-132-1 was closed.

The requester (now the appellant) appealed the decision, alleging that the OLGC did not conduct an adequate search for responsive records. In the appeal letter, the appellant also takes the position that the “public interest override” at section 23 of the *Act* should apply.

Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process.

I commenced the adjudication by sending a Notice of Inquiry setting out the facts and issues in the appeal to the OLGC, initially. As section 24 (reasonable search) is not listed as one of the sections that may be overridden by section 23 of the *Act*, I determined that it was not necessary for the application of the “public interest override” in section 23 to be addressed in this appeal. The OLGC provided representations in response to the Notice. I then sent a Notice of Inquiry to the appellant along with a complete copy of the OLGC’s representations. The appellant provided representations in response. I determined that the appellant’s representations raised issues to which the OLGC should be provided an opportunity to reply. Accordingly, I sent the representations of the appellant to the OLGC inviting its reply submissions. The OLGC provided representations in reply.

## **DISCUSSION:**

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 and 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 [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

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 [Order MO-2246].

### ***The Representations of the OLGC***

The OLGC submits that it provided the requester with copies of a surveillance video and a digital photograph pursuant to his earlier access request. The OLGC submits that the video and the photograph show the same scene - one in which the requester is in the custody of the OPP at its holding cell in the casino. It submits that the video displays the appellant, the OPP and a photographer. A bright flash on the video appears to mark the point at which the photographer took the photograph released to the appellant. After the appellant made the request at issue in this appeal, the OLGC submits that it undertook another search, but no further records were found. The OLGC submits that it has already disclosed the "actual surveillance record" and "actual photograph" that the appellant seeks. In support of its submission that it conducted an adequate search for responsive records, the OLGC provided an affidavit sworn by its Freedom of Information Co-ordinator (FOIC) that detailed its search efforts.

The OLGC submits that in response to the appellant's first request, the FOIC worked with a lawyer for the casino to identify and provide access to the surveillance tapes and photograph. It submits that by virtue of being the casino's representative in a related lawsuit commenced by the appellant, the lawyer had knowledge of the incident to which the request relates as well as the nature of the records sought by the appellant. The OLGC submits that it was a part of the lawyer's professional responsibility to ensure that a proper search for records was conducted in

the related lawsuit. Accordingly, the OLGc submits that it was reasonable for the FOIC to rely on the casino's lawyer's efforts to locate and identify records when conducting the search at issue in this appeal.

As set out in the FOIC's affidavit, the casino's lawyer provided her with:

- a sworn and certified Affidavit of Documents prepared by the casino in a civil action commenced by the appellant, deposing that all documents relating to the action have been listed and containing a certification from the casino's lawyer that he has explained the necessity of making full disclosure of all relevant documents;
- an affidavit provided in the civil action sworn by the casino's risk manager that identifies surveillance tapes provided to the requester and sets out that "[t]here are no other tapes or video recordings"; and
- a letter that details the chain of custody of the surveillance tapes provided to the appellant.

OLGC submits that when the FOIC received the request under consideration in this appeal, she contacted the casino's lawyer, who further confirmed that:

- the casino's security officer who took the photograph of the appellant in the holding cell, only took a single photograph;
- there is only one video surveillance camera in the holding cell;
- the OPP returned to the casino's lawyer the only video tapes it had obtained from the casino and those are the only surveillance videos in existence.

The FOIC deposes that as a result of the information the casino's lawyer provided during the first search, and his more recent confirmation, the OLGc has conducted a reasonable search for responsive records.

### ***The Representations of the Appellant***

In his representations, the appellant cites the following five factors as the basis for his position that the OLGc failed to conduct a reasonable search for responsive records:

- OLGc's denial of the known extent of the casino's surveillance record;
- the four-year delay in locating and disclosing the photograph he received as a result of his earlier request, the dubious circumstance of its generation and his allegation that the digital file was modified;

- differences noted between that photograph and the released casino surveillance tape;
- the failure to supply accurate information about casino surveillance camera locations; and
- the casino's lawyer's lack of impartiality, as well as the questionable foundation for the lawyer's conclusions which are relied upon by the OLG.

The appellant asserts that the casino's lawyer had long maintained, in error, that a compilation tape, provided to the appellant through Crown disclosure in a related criminal case, was the only surveillance video record in existence. The appellant submits that this was proven to be wrong at a subsequent "OPP production to review and copy the compilation tape." Later, the appellant says, the casino "finally released hours more of incident surveillance on 5 other tapes." The appellant submits that the casino's lawyer's error is confirmed in the affidavit of the casino's risk manager.

The appellant further claims that the casino failed to list the photograph in its affidavit of documents. He submits that it was only disclosed as a result of his access request and that it took the casino four years to provide it to him. In addition, the appellant claims that:

The digital file information indicates the original image was taken at 22:26:53 on [a specified date], one year before the incident. More importantly, it also indicates the image was last modified on [a specified date] - six weeks after OLG reported [the casino] was unable to locate the record, eight months before its release.

The appellant submits that based on the conclusions of the analysis he arranged to be conducted on the photograph and the surveillance tape, they are not consistent. In particular, he asserts that the position of the female officer's hands as shown by the photograph substantially differs from the position of her hands as revealed by the surveillance tape at the instant a camera flash burst is seen to occur on the video. He concludes that one of the two records must therefore not be genuine. He submits that the OLG's response to his access request "does not repudiate the expert conclusions, nor does it offer any explanation for the observable differences in the two documents revealed by the variation in the female OPP officer's hands positions. Instead, OLG simply accepts and repeats the convenient [casino] attorney assurances there are no other records; though he is proven previously incorrect regarding the very two documents at issue." The appellant asserts that the OLG failed to compare the records to satisfy itself of their authenticity.

The appellant submits that it is not sufficient for the OLG to rely on the evidence provided by the casino's lawyer to satisfy its obligation to conduct a reasonable search. The appellant questions the casino's lawyer's impartiality as well as the foundation for the lawyer's conclusions. The appellant submits that the lawyer was "misinformed at least twice, regarding the very records involved in this appeal, the photograph and the surveillance record". The appellant further submits:

Though a lawyer may instruct his or her client on their obligation to fully disclose in accord with the rules of civil procedure that does not mean full disclosure is accomplished. Nor do LSUC [Law Society of Upper Canada] rules provide guarantee of complete and full disclosure by any defendant in any civil matter.

As further evidence of the inadequacy of the search, the appellant submits that the casino lawyer previously supplied a portion of the casino floor plan to denote surveillance camera locations in a certain area, but that the released plan fails to divulge at least three cameras that he knows to be in the area.

As a means to remedy the search issue, the appellant suggests that the OLG should conduct “an actual search, independent of [the casino] to the degree possible, for the identified undisclosed documents” and in particular:

[The] OLG should detail its process in a report to [this office] which identifies all persons who conducted the search, provided information or were connected with the possible creation, storage, search and retrieval of the requested records ( 1- the photograph that corresponds to the released video, and 2 - the video that corresponds to the released photograph), and provide the results of the search; including details of the possible destruction of any [casino] records, and information about storage locations, access, maintenance and retention policies and practices, etc. Only then can a determination be made as to the reasonableness of any OLG search in the given circumstances.

[And that] the OLG should be ordered to provide its report forthwith to this office in affidavit format, sworn by the person or persons who conducted the actual search and to include supporting background material and documentation to justify their representations.

### ***The Reply Submissions of the OLG***

In reply, the OLG submits that the appellant’s representations contain no new information to impugn the reasonableness of the OLG’s search or to justify going back to the casino with another request for information. It submits that it “has gone back to [the casino] twice based on the requester’s concerns about the authenticity of the records provided by the [casino].” The OLG submits that it has done everything reasonable in its power to answer this request and that the appeal should be dismissed.

### ***Analysis and Findings***

The appellant’s position is that based on his analysis, one or the other of the records that were disclosed to him are not genuine. He asserts that the OLG should conduct “an actual search, independent of [the casino] to the degree possible, for the identified undisclosed documents”.

When an appellant 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 and PO-1954-I].

The appellant alleges that the OLGC did not conduct a reasonable search partly because of the manner in which it conducted itself in the civil proceeding, namely failing to list the photograph and surveillance tape in the casino's productions in its affidavit of documents in that civil action, and its delay in providing the photograph to the appellant. Whether the OLGC delayed in providing the responsive records to the appellant, intentionally or otherwise, or whether the OLGC previously failed to list a record in an affidavit of documents, is not the issue before me in this appeal. The question I have to address is whether the OLGC has now identified all the responsive records that resulted from a reasonable search.

The appellant asserts that there is a discrepancy between the two records and that he is concerned about the digital file information relating to the photograph. That said, he admits that "to the best of my knowledge and recollection I concur the casino holding cell has only one surveillance camera and that only one photograph was acquired."

### **The Surveillance Tape**

The existence of only one surveillance camera in the OPP holding cell area was also confirmed by the casino's lawyer.

The appellant further acknowledges that the surveillance tape that was in the custody of the OPP was ultimately disclosed to him. He writes:

Obviously, [the casino] was aware of custody transfer of its surveillance tapes and that OPP held custody of the video (a standard operating procedure in the circumstance); yet it repeatedly denied knowledge of the extent of incident surveillance, instead it chose to play semantics.

[The casino] must have been aware the tapes were held by the OPP, otherwise how could its lawyer provide his assurance to OLGC regarding the surveillance record chain of custody? The video tape his client created - the very existence of which was previously thrice denied were provided in the custody OPP until he retrieved them.

On the evidence before me I am satisfied that the holding cell has only one surveillance camera, and that was how the images of the appellant while in the OPP holding cell were captured. I am also satisfied that the surveillance tape that was disclosed to the appellant originated from the OPP.

### **The Photograph**

There is evidence of an assertion by the individual that took the photograph that this is the sole photograph of the appellant while in the holding cell. It is also not disputed by the appellant that one photograph of him was taken while in the OPP holding cell.

Hence, I accept that there was only one photograph taken of the appellant while in the OPP holding cell.

### **Conclusion**

I am satisfied on the evidence before me that there is only one surveillance tape and only one photograph that captured the image(s) of the appellant on that day in the OPP holding cell. The OLG identified a surveillance tape and a photograph as responsive to the appellant's request. These were disclosed to the appellant. The OLG submits that there are no other responsive surveillance tapes or photographs. In response, the appellant claims that the analyses he obtained show a lack of correspondence between the two records.

The reports tendered by the appellant in support of his position do not contain any assertion that the records were somehow doctored by the OPP, the casino or the OLG. Furthermore, one of the reports points out that "[i]t is possible [that] the image revealed by any photograph is not acquired at the precise instant that the flash is shown to occur in a corresponding video frame. An interval can occur between flash emission, image acquisition and its videotape record."

I have compared the images captured on the OPP holding cell surveillance tape to the photograph taken of the appellant in the OPP holding cell that day, a copy of which was found in the materials the appellant provided to this office. The surveillance video is shot from a different angle than the photograph, but both are consistent with the circumstances that unfolded that day. In my opinion, I can see no discrepancy between the images.

In any event, in my view, simply asserting a difference between the two records does not result in an inevitable conclusion that the OLG has not conducted a reasonable search for responsive records.

In some circumstances, referring to an earlier search does not relieve an institution from conducting a more current one [see in this regard Order M-254]. However, I am satisfied that since the request at issue in this appeal is mainly predicated upon the appellant's position that the surveillance tape and photograph do not correspond, the OLG's reliance, in part, on the earlier searches to support its position that there are no other responsive records, complemented by the further steps taken to address the appellant's position with respect to the adequacy of its search, is reasonable.



As set out 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 [Order MO-2246]. The appellant has failed to provide sufficient evidence to establish that there are responsive records in addition to those that were located and disclosed to the appellant.

In all the circumstances, I find that the OLGC has conducted a reasonable search for responsive records.

**ORDER:**

I uphold the reasonableness of the OLGC's search for responsive records and dismiss the appeal.

Original Signed by: \_\_\_\_\_  
Steven Faughnan  
Adjudicator

\_\_\_\_\_ September 23, 2009