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

ORDER PO-2812

Appeal PA07-65

Ontario Lottery and Gaming Corporation

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NATURE OF THE APPEAL:

The Ontario Lottery and Gaming Corporation (the OLG) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from the Canadian Broadcasting Corporation (the CBC) for access to:

> "electronic extracts of any and all database source files relating in any way to any information about any or all [OLG] winners."

The request was later clarified to include:

> all data available in [the OLG's] winner's database including personal information with the exception of information such as driver's licenses and social insurance numbers [on CD ROM].

The OLG issued a decision letter in which it agreed to provide access to portions of the database and denied access to other portions of the database. The letter stated:

> [OLG] maintains a database that contains information regarding lottery prize claims processed by [OLG] and includes various fields related to product, cheque and redemption information. [OLG] is not prepared to disclose personal information such as names, addresses or telephone numbers of lottery winners and that data will not be provided. Access is also denied to [OLG's] banking information. [OLG] will provide on CD ROM, the prize claim data we are prepared to disclose as well as a list and description of each data element. The prize claim information will cover the time period between 1992/1993 to the date of your request.
>
> …
>
> Access to the personal information contained in the [OLG's] database is denied based on section 21(1) of the *Act*. … Section 18(1)(a)(d) of the *Act* applies to [OLG's] banking information as it relates to financial information and disclosure would be injurious to the economic interests of Ontario.

The OLG also issued a fee estimate of $2,580.00. The OLG stated:

> The *Act* allows for a charge of $60.00/hour spent by any person to produce a record from a machine readable record. The time to sever and produce the record is 43 hours and therefore the total cost is $2,580.00.

The CBC (now the appellant) appealed the decision of the OLG to this office.

The appeal was assigned to a mediator. During mediation, the appellant confirmed that it was appealing the exemptions claimed and the fee estimate. Also during mediation, the OLG provided the appellant with a document entitled "Diagram Report" which contains a description of all of the data fields in the winner's database. Descriptions of the withheld portions of the database were printed in red in the copy of the Diagram Report provided to the parties at mediation.

Therefore, although the OLG's decision letter claimed that section 18(1)(a) and (d) applied to "banking information", the OLG's Diagram Report revealed that the OLG was claiming that, in addition to the personal information and the banking information, some information in the database relating to winning lottery tickets, and the redemption and validation of those tickets, are also claimed to be exempt under those sections..

The initial mediation of this appeal concluded in June 2007 and the appeal was moved to the adjudication stage of the appeal process. Following receipt of the Mediator's Report, the appellant sent a letter to the OLG asking for a fee waiver, a copy of which was provided to this office.

I began my adjudication of this appeal by issuing a Notice of Inquiry to the OLG inviting it to provide me with written representations on the facts and issues set out in the notice. In view of the recent request by the appellant for a fee waiver, I added fee waiver as an issue in the appeal. I also added section 23 (public interest override) as an issue.

Subsequently, the OLG wrote to the appellant denying the request for the fee waiver and reducing its fee to $1,380.00. Then, the OLG issued a revised decision letter in which it claimed the application of section 14(1) (law enforcement) to all of the records in the database that relate to "insider winners who are now under investigation by the [Ontario Provincial Police]." In particular, the OLG claimed that sections 14(1)(a), (b) and (f) applied. In addition, the OLG claimed that the discretionary exemption in section 18(1)(c) also applied. As this exemption was claimed after the expiry of the 35-day period following the Confirmation of Appeal, during which institutions are permitted to raise new discretionary exemptions, I will consider this issue under the heading, "late raising of discretionary exemptions," below.

In the OLG's initial representations dated August 29, 2007, the OLG withdrew its reliance on section 18(1)(a), which is therefore not at issue. The OLG provided representations on the application of sections 14(1), 18(1)(c) and (d), 21(1), 23, exercise of discretion, the late raising of the discretionary exemptions, fee and fee waiver. These representations included a revised and numbered Diagram Report. In the representations, the OLG clarified that the data fields in the Diagram Report numbered 3, 9, 12-16, 21, 28, 33, 37, 43, 46, 47, 54, 57, 59-74 and 76-78 in the Diagram Report are claimed to be exempt pursuant to either sections 21(1), 18(1)(c) or 18 (1)(d). The representations also clarified that the OLG was prepared to disclose the data fields in the Diagram Report numbered 1-2, 4-8, 10, 11, 17-20, 22-27, 29-32, 34-36, 38-42, 44, 45, 48-53, 55, 56, 58, 75 and 79.

I then issued a modified Notice of Inquiry to the appellant inviting it to provide me with representations on the facts and issues set out in the notice and in response to the representations of the OLG. The non-confidential portions of the OLG representations and the Affidavit, and a complete copy of the revised Diagram Report, were shared with the appellant. The other attachments to the representations were not shared because they consisted of correspondence already in the appellant's possession, or publicly available materials.

I also issued a modified Notice of Inquiry to the Ministry of Community Safety and Correctional Services (the Ministry) on behalf of the Ontario Provincial Police (the OPP) because I decided, due to the OLG's claim to the application of section 14(1), that the Ministry may have an interest in the records at issue in this appeal. The Ministry was invited to submit representations on the possible application of sections 14(1)(a), (b) and (f) and section 23, only. The non-confidential portions of the OLG representations and the Affidavit, and a complete copy of the revised Diagram Report were shared with the Ministry. The other attachments to the representations were not shared.

Subsequently I received representations from the appellant and from the Ministry.

After reviewing the Ministry's representations, I decided to issue a Notice of Inquiry to the appellant inviting its representations in response to those of the Ministry. A complete copy of the Ministry's representations, including the attachments, was shared with the appellant. I received representations from the appellant in response.

I then wrote to the OLG inviting representations in reply to the two sets of representations that I received from the appellant. In doing so, I shared a complete copy of the representations received from the appellant with the OLG. I also wrote to the Ministry inviting representations in response to the appellant's representations that related to sections 14 and 23, only. The Ministry was provided with a complete copy of the appellant's representations that relate to those sections.

The OLG submitted representations in reply, and issued a second revised decision letter in which it further reduced the fee payable by the appellant to $1080.00. The Ministry also submitted reply representations which, in my view, raised issues to which the appellant should be given the opportunity to submit sur-reply representations.

At this stage of the inquiry, Assistant Commissioner Brian Beamish issued Orders PO-2657 and PO-2664 which concerned access requests made by this appellant for access to other records of the OLG. Some of the exemptions claimed and some of the information at issue in these two orders are similar to the exemptions claimed and the information at issue in this appeal, except that the information at issue in this appeal is contained in an electronic database.

Consequently, I invited the appellant to submit supplementary representations on the implications of Orders PO-2657 and PO-2664, as well as sur-reply representations. The non-confidential portions of the Ministry's reply representations were shared with the appellant. At the same time, I also invited the OLG and the Ministry to submit supplementary representations on the implications of Orders PO-2657 and PO-2664. I received representations from the OLG, the Ministry and, subsequently, from the appellant.

Subsequent to the issuance of Orders PO-2657 and PO-2664, the appellant requested that the Assistant Commissioner reconsider his decision in these orders. The Assistant Commissioner

released his decision in that reconsideration on June 4, 2009, reaffirming the decisions made in those earlier orders.

Following the exchange of representations, the parties decided that the issues relating to access to the portions of the database that referred to lottery wins of "insiders" should be referred back to a mediator and this was done. Appeal file PA07-65-2 was opened to deal with the issues that were referred back to mediation. The result is that this appeal was split such that the information in the database at issue in this appeal relates only to lottery winners who are members of the general public, and who have not been identified by the OLG as either retailers or employees in the database, i.e. non-insiders. A final determination regarding the disclosure of information relating to individuals identified as insider winners will be made in the context of my order in Appeal PA07-65-2.

As a consequence of the decision of the parties to split the issues in this appeal, the parties agreed that the OLG's claim that information relating to insider winners under investigation by the OPP as exempt pursuant to section 14 (law enforcement) is no longer an issue in this appeal. As the Ministry's representations related to the potential application of section 14 only, I will not be referring to those representations in this order.

Also, following the exchange of representations, the accounting firm, Deloitte LLP, issued a report dated January 26, 2009, entitled *Ontario Lottery and Gaming Corporation, A data analytic review of lottery transactions* (the Report). In the Introduction to the Report, the authors set out the Report's objectives and the scope of its review:

> *We were asked by the OLG to analyze 13 years of lottery play, retailer, and other data to quantify winnings by Insiders and identify lottery ticket transaction anomalies that might indicate inappropriate activities. The results of our analyses on lotteries are contained within this report.*
>
> Through our application of advanced modeling techniques to a unified information resource, it became evident that leveraging OLG's existing data to learn about many different aspects of the lottery business was not only possible but highly valuable. While our work focussed on determining key attributes associated with retail device locations exhibiting potentially inappropriate activity, opportunities to drive broader enterprise value through data analytics emerged.
>
> While our initial focus was on detecting potentially fraudulent behaviours, the broader opportunity exists in leveraging OLG's data to better understand its marketplace, proactively prevent and detect potentially fraudulent behaviours, implement tighter controls and build stronger business processes. In response, OLG requested that we provide suggestions as to how these benefits might be realized.

> We acknowledge that there are distinct benefits of a data centric business model which could help OLG well into the future. At the same time, *our initial and primary intent behind this engagement is to address concerns about the integrity of the lottery delivery process to the general public.* [Emphasis added.]

Throughout this appeal, the parties have been represented by counsel. Any reference that is made in this order to a party's actions shall also be considered a reference to counsel's actions, where appropriate.

RECORD:

The record is the winner's database maintained by the OLG which includes 113 data fields relating to lottery winners who redeemed their lottery tickets at the head office of the OLG. The majority of the prize amounts are equal to or greater than $1,000, which must be redeemed at an OLG prize centre. As noted, the OLG has decided to release portions of the database to the appellant and the appellant has withdrawn its request for certain other portions of the database. The portions of the database that the OLG is prepared to release are numbered 1-2, 4-8, 10, 11, 17-20, 22-27, 29-32, 34-36, 38-42, 44, 45, 48-53, 55, 56, 58, 75 and 79 in the revised Diagram Report shared with the parties at the inquiry stage. The portions of the database that remain at issue in this appeal are numbered 3, 9, 12-16, 21, 28, 33, 37, 43, 46, 47, 54, 57, 59-74 and 76-78. The data fields that are at issue contain the names and contact details for the lottery winners, information about the lottery games played, the amount of the prizes and information relating to the lottery tickets purchased, the place of purchase and the details of the prize redemption.

The OLG estimates that the entire database includes information relating to 800,000 different lottery wins. As noted above, only information in the database relating to members of the general public who have not been identified as insiders is at issue.

In addition to the diagram report describing the database, I have been provided with sample extracts from the database by the OLG.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1), in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,

> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225]. Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015 and PO-2225].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The OLG submits that the personal information of lottery winners is contained in the database including their names, addresses and telephone numbers. It also states that the disclosure of their identities will reveal the fact that they were lottery winners and other information including the game played, the size of the prize won, the time and date the prize was redeemed, the place of purchase of the ticket and whether the ticket was redeemed as part of a group. The OLG argues that the names, in conjunction with this information, qualify as the winners' personal information. It states that severance of names and parts of the address details for the winners is not possible in the context of this appeal as the appellant is not seeking access to any information that is not identifiable.

The appellant did not make any representations on whether the information in the records is personal information. Its argument is essentially that if there is any personal information in the record, then disclosure of the personal information does not constitute an unjustified invasion of personal privacy.

The OLG did not submit any representations in reply on this issue.

Having carefully reviewed the record and the representations, I find that the record contains the personal information of lottery winners. The personal information in the record includes their names as disclosure of their names would reveal the fact that they are lottery winners, the type of game that was played and the circumstances surrounding the purchase and redemption of their tickets (paragraph (h) of the definition). It also includes personal information relating to their address and other personal contact details (paragraph (d) of the definition).

As noted above, the issue of the de-identification of the information in the database was raised by the OLG in its first representations. The OLG stated:

> In light of its specific request for personal information, the OLG takes the position that severance of components of the address is not reasonable and that the entire address is personal information because it could be used to identify individuals as lottery winners.
>
> If the [appellant] wants only some non-specific components of the address and makes submissions to this effect, we respectfully submit that the OLG should have a full opportunity to reply to the [appellant's] submission.

As the appellant did not make any representations regarding the de-identification of the information in the database and did not respond to the OLG's submissions on the issue, I will not make any findings in that regard here. Based on the request and the nature of the appellant's representations, I conclude that it seeks access to personal information, not de-identified information, concerning the individuals identified in the database. Under these circumstances, if the appellant decides that it would like access to de-identified information, it would need to make a new request to the OLG.

PERSONAL PRIVACY

Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21. The section 21(1)(a) to (e) exceptions are relatively straightforward. The section 21(1)(f) exception is more complex, and requires a consideration of additional parts of section 21.

The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f). If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 21.

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. It cannot be rebutted by one or more factors or circumstances under section 21(2) [*John Doe*, cited above]. If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239].

Neither the OLG nor the appellant have made any representations to support a finding that the presumptions in section 21(3) apply to information in the database and, based on my review of the records, I find that section 21(3) does not apply. I will begin my analysis by considering the appellant's argument that the exception in section 21(1)(a) applies. Following that, I will consider the factors in section 21(2) in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f).

Section 21(1)(a)

This section creates an exception to the mandatory exemption in section 21(1). It states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

The OLG disputes the appellant's claim that this exception applies and argues that the winners named in the database did not consent to the disclosure of their personal information for more than a limited period of time and a limited purpose. In support of this argument, the OLG relies on Orders P-180, P-181, P-1355 and PO-2465.

The appellant argues that the consent provided by the lottery winners is unlimited and for all purposes. It states that, pursuant to Regulation 198/00, s. 11(2), to be eligible to claim a lottery prize, an individual must agree to the publication of his or her name, address and a recent photo in any medium. The Regulation does not contain any limits as to the purpose or the timing of the publication of this information. In the alternative, the appellant states that even if a limit could be implied from the consent, "ensuring public accountability of OLG and scrutiny of prize claimants to ensure that their claims are genuine fall within the statutory purposes."

The appellant seeks to distinguish Orders P-180 and P-181 on the basis that the circumstances of the execution of the consent by lottery winners have changed. This information is now published by the OLG on the internet and "is available long after the winners collect their lottery winnings" and some of the information with respect to previous winners is available through internet

archives. In addition, it argues that the previous orders were based on a finding that "the public interest is already adequately and properly served by the institution's accountability both to the Legislature and to the Board of Directors appointed by the Lieutenant Governor in Council." It argues that recent events do not support such a finding in the circumstances of this appeal.

In reply, the OLG argues that the appellant's argument is contrary to the principle that disclosure once is not a disclosure for all time. It refers to the decision of the United States Supreme Court in *United States Department of Justice v. Reporters' Committee for Freedom of the Press* 489 U.S. 749 (1989) and *R. v. Duarte*, [1990] 1 S.C.R. 30 where the court stated that "privacy may be defined as the right to determine for himself when, how and to what extent he will release personal information."

The OLG states:

> Major lottery winners are asked to sign two consent forms. One form is mandatory, and authorizes the OLG to publish information for the following purposes (Appendix D):
>
> (a) to monitor and enforce compliance with the OLG retailer contract and insider win policy;
>
> (b) to assist the OLG in managing and promoting its lottery prize games and in maintaining the lottery integrity thereof;
>
> (c) to publish a press release in any medium regarding the prize claim;
>
> (d) to post a copy of the press release on the OLG website for a period of 30 days; and
>
> (e) to specifically identify insider wins on the OLG's website.
>
> The OLG also asks, but does not require, major winners to sign an audio/visual/photographic release that allows the use of "audio, visual and photographic material" that may constitute personal information for the "promotion of its business" (Appendix E).
>
> Both consents authorize the use and disclosure of specific personal information for a specific purpose. They also only reserve a right of use and disclosure to the Corporation and do not contemplate use by a third-party, even if the third-party's purpose is similar to the OLG's purpose. Furthermore, the language of the mandatory consent contemplates the same temporal limit on publication of winners' identities recognized in P-180 and P-181. The words "to publish a press release" and "to post a copy" would give the winners who signed this consent a reasonable expectation that their personal information, despite being disclosed

once, would become practically obscure over time. Hence, a finding otherwise would conflict with the reasoning in P-180 and P-181. It also would require an extremely loose application of the informed consent principle, and one that would conflict with the privacy-protective purpose of the *Act*.

Section 11 of Regulation 198/00 under the Ontario Lottery and Gaming Corporation Act does not change this, nor does it allow the disclosure of personal information on the basis of sections 21(c) and 21(d). The provision reads as follows:

> 11. (1) It is a condition for a participant to collect a prize in a lottery scheme that the participant,
>
> (a) satisfy the Corporation that the participant is a winner; or
>
> (b) satisfy the arbitrators that the participant is a winner if the right to the prize has been subject to an arbitration under section 11.2 and the Corporation has not paid the prize at the time that the arbitrators make their determination in the arbitration.
>
> (2) The participant is not eligible to collect the prize unless he or she agrees to the following conditions:
>
> > 1. The Corporation is authorized to publish in any medium the participant's name and address and a current photograph, and the participant will not make a claim against the Corporation for broadcasting, printing, royalty or other rights.
> >
> > 2. The participant will give the Corporation, upon request, a valid release for the payment of the prize and will not make any further claim in respect of that prize.

Section 11(2) only establishes a condition of eligibility. It does not authorize the disclosure of personal information, in which case it would begin, "The Corporation is authorized..." In effect, the provision says that an individual must agree to consent but does not actually authorize the OLG to use or disclose personal information absent such consent.

Section 11(2) also does not deem an individual to have consented to the disclosure of personal information or, on any reasonable reading of the provision, contemplate the establishment and maintenance of a publicly-available registry. The Regulation was likely worded in this limited manner because section 15 of

> the Act does not give the Lieutenant Governor in Council the express power to make regulations authorizing the disclosure of personal information. The Act only authorizes the making of regulations, "prescribing the conditions and qualifications to entitlement to prizes in any lottery scheme conducted and managed by the Corporation."

Analysis and Findings

Similar arguments were made by these parties in Orders PO-2657 and PO-2664, which concerned requests by the same appellant for access to records relating to named individual lottery winners who operated retail outlets that sold lottery tickets and who were categorized as "major" and "insider" winners. In those orders, Assistant Commissioner Brian Beamish did not make a determination regarding the application of section 21(1)(a) as it was not necessary to do so in view of his decision to order the disclosure of personal information after balancing the factors in section 21(2). In Order PO-2357, the Assistant Commissioner did comment on the impact of the consent form, to the effect that in the case of insider wins, it might be a factor favouring disclosure under section 21(2)(h), which relates to information supplied in confidence. I also note that, in Orders PO-2657 and PO-2664, the Assistant Commissioner distinguished Orders P-180 and P-181 on the basis that they were decided in the context of non-insiders. I will comment on this further below, given that the information at issue in this appeal also relates to winners not identified as insiders.

I have carefully considered the representations of the parties, the relevant consent language and the wording of the regulation cited by the appellant. I find that the lottery winners have not consented to the disclosure of their personal information as contemplated in section 21(1)(a) and, therefore, this exception to the exemption does not apply. In my view, the consents provided by and/or required of lottery winners contemplate limits on the OLG's right to disclose their personal information which indicate that the consent is not applicable in the circumstances of this appeal.

In my view, a person signing the mandatory consent form would expect that disclosure would occur for either of the following purposes: (1) the promotion of the OLG's lottery business and (2) the management of the OLG's business and its relationship with lottery retailers. It is inconceivable that the lottery winners who signed the required consent form would ever have contemplated the possibility that this consent could lead to the disclosure of their personal information, as part of a comprehensive disclosure of the OLG winner database, to investigative journalists employed by the CBC.

As noted above, like the present case, Orders P-180 and P-181 dealt with individuals not identified as insiders. While the consents now provided by lottery winners appear to be different than those considered in Orders P-180 and P-181, I nevertheless agree with the following comments made by former Commissioner Wright about the limited impact of the consent to publication of information about lottery winners:

> … in my view, it is not reasonable to assume that lottery winners were aware that, after the publication made at the time of the win, any member of the public could contact the institution at any time and obtain information as to the identity of the winner of the specified draw and his or her city or town of residence. I think it is fair to say that only the practices of the institution as they relate to a one-time publicity use of the personal information would have been known to the lottery winner at the time he or she gave the information to the institution. Accordingly, I do not think that the individual could reasonably be expected to have contemplated either the subsequent release of any of his or her personal information on a request basis by telephone, nor that the information would be used to compile a list to be distributed to the public upon request.
>
> In these circumstances, I find that any consent given by the lottery winners is not a consent for the purpose of subsection 21(1)(a) of the *Act*.

Although I accept that the age of the internet has made information available for longer periods of time and easier to obtain than was the case when Orders P-180 and P-181 were decided, I nevertheless conclude that the appellant should not be entitled to obtain access to the personal information of 800,000 people in electronic form from the OLG on the basis of this consent. It is also my view that the appellant's arguments that touch upon the public scrutiny issues relate to the balancing of the factors in favour of disclosure in section 21(2)(a) and the application of section 23, and not to the issue of whether consent has been provided under section 21(1)(a).

For all these reasons, I find that the exception in section 21(1)(a) does not apply.

Sections 21(1)(c) and (d)

Sections 21(1)(c) and (d) provide exceptions to the mandatory exemption at section 21(1) where "… personal information is collected and maintained specifically for the purpose of creating a record available to the general public" (subsection (c)) or "under an Act of Ontario or Canada that expressly authorizes the disclosure" (subsection (d)).

The appellant argues that "[p]aragraphs 21(1)(c) and (d) of [the *Act*] also confirm that lottery winners have consented to disclosure of their personal information." The appellant explains:

> The OLG specifically collects and maintains the personal information of lottery winners for purposes of publishing that information pursuant to the Regulations. They do so in part to provide the public with an opportunity to challenge the claimed lottery winner in the case of fraudulent winnings. Further, the Regulations expressly authorize the disclosure.

For essentially the same reasons expressed above, I do not agree with this submission. There is no indication that the purpose of any of the provisions of the consent or the applicable regulation contemplate that the records are maintained for the purpose of public access. They are created

and maintained by the OLG for the purposes of promoting its business and ensuring that only qualified winners can collect prizes. Nor does the language of the consent or the regulation contemplate disclosure pursuant to an access request; rather, the disclosure contemplated would be made by the OLG in pursuance of one of the identified purposes.

I find that sections 12(1)(c) and (d) do not apply.

Section 21(1)(f)

Section 21(1)(f) provides a further exception to the mandatory personal privacy exemption found in section 21(1). It states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

None of the presumptions set out in section 21(3) apply in the circumstances of this appeal, and accordingly, I must consider the factors set out in section 21(2). As noted above, the list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2) [Order P-99].

The OLG relies on sections 21(2)(e) and (f), which weigh against disclosure, and the appellant relies on the factors in sections 21(2)(a) and (b), which weigh in favour of disclosure. Those sections state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
> >
> > (c) access to the personal information will promote informed choice in the purchase of goods and services;
> >
> > (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
> >
> > (f) the personal information is highly sensitive;

> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The OLG makes the following submissions:

- The factors in sections 21(2)(e) and (f), which weigh against disclosure, are strong.
- The financial information at issue is sensitive, and pecuniary and physical harm to the affected parties will result from disclosure of the records. To support its argument regarding the threat of physical harm, the OLG cites the example of a recent Montreal kidnapping of a lottery winner.
- The affected parties may suffer the harm of unfair public scrutiny by the appellant and the implication will be that they should be suspected of fraud.
- The factors weighing in favour of disclosure are weak. There is no need for further public scrutiny of the OLG given the level of public scrutiny that resulted from and followed the release of the Ombudsman's Report and the investigation of insider lottery winners by the OPP.
- Disclosure of personal information is not desirable and will not promote informed choice because it cannot further the purposes that have already been satisfied. The request moves the focus of public scrutiny from the OLG to the winners whose activities are being scrutinized by the OPP.

The appellant argues that the factors in section 21(2)(a) and (c) weigh strongly in favour of disclosure. Much of its argument relates to the personal information of insiders. Information that relates to identified insiders is the subject of Appeal PA07-65-2, and is not before me in this order.

In addition, however, the appellant argues that disclosure of the information at issue in relation to all entries in the database, including the portions that relate to non-insiders, is required in order to subject the activities of the OLG, which have been publicly called into question, to public scrutiny and to conduct independent statistical analysis. It argues further that the need for public scrutiny has not been satisfied by the Ombudsman's Report, noting that the Ombudsman was "frustrated by the lack of reliable information" available at the time the report was prepared. For example, it states that the Ombudsman was provided with three different numbers of insider winners for the period between 1999 and July 2006 and the disclosure of this database would clarify this.

The appellant explains that the need for public scrutiny continues because the public has the right to know whether the OLG has failed to properly identify insider winners and has a right to receive a detailed statistical analysis relating to insider wins and neither of these issues were addressed by the Ombudsman's Report.

The appellant also argues that 21(2)(c) applies in favour of disclosure because there is a direct connection between the information sought and the promotion of informed choice in the purchase of goods and services. With the disclosure of this record, the appellant submits that it will be able to prepare detailed statistical analysis of insider wins compared to other lottery wins, and the public will be better informed about their chances of actually winning the lottery.

It argues that the factors favouring non-disclosure are weak. It states that 21(2)(e) applies only where it can be established that harm *will* result and mere concern or fear of harm will not invoke this section. It states that the orders relied on by the OLG to support the application of section 21(2)(e) (namely, Orders P-180, P-181, PO-2465 and P-1355) can all be distinguished on this basis. The appellant states that the example of the kidnapping of a Montreal lottery winner provided by the OLG is too remote. With respect to the unfair public scrutiny of winners, the appellant argues that it has a reputation for responsible journalism and states that there is no evidence that it has made false allegations about insider winners in its previous reports on issues related to the OLG.

In reply, the OLG argues that while it accepts the argument that ongoing scrutiny is required, the appellant is seeking to reconduct a statistical analysis that it has already conducted. The only difference is that it wants to include wins from 1993 to 1994 and smaller value prizes. Conclusions have already been drawn about the frequency of insider wins, and this has led to significant reforms. The OLG further submits that under the circumstances, additional disclosure cannot significantly benefit the public interest, but will harm individual privacy. It reiterates that the OPP investigation is the proper means of addressing the remaining issues relating to lottery insiders in a manner that is respectful of individual privacy rights.

In its supplementary representations, the appellant states that the OLG has demonstrated an inability to properly identify and scrutinise insider wins. If the appellant obtains access to all winners' information, it can conduct its own investigation into possible additional improper insider win cases. In addition, it repeats that the full database is required for the purposes of performing statistical analysis. With respect to Orders PO-2657 and PO-2664, the appellant states:

> The IPC rejected all three of OLG's arguments and held that the OPP's investigation, the Ombudsman's investigation and disclosure of de-identified records did not satisfy the public's need for scrutiny of OLG's activities.
>
> …
>
> On the issue of the disclosure of de-identified records, Assistant Commissioner Beamish stated, at pp. 19-20: "The disclosure of de-identified records would not satisfy the need for public scrutiny as significant amounts of relevant personal information would be severed from the records," including personal information "directly relevant to the scrutiny of the OLG process."

> …
>
> In particular, access to the information at issue in this appeal would allow CBC to conduct its own investigation into possible inside win cases that OLG failed to properly identify, and to perform accurate statistical analysis of inside wins compared to other lottery wins. Such investigations advance public scrutiny of OLG and would not be addressed by the OPP. The IPC's rationale for rejecting the OLG's argument in PO-2657 applies equally here.
>
> …
>
> … Indeed, the Ombudsman specifically noted at para. 136 of his Report that OLG did not define the term "insider" precisely and did not apply it consistently. CBC seeks information at issue in this appeal to determine the severity of that problem…. Investigation of the OLG's failure to properly identify inside winners, which further[s] public scrutiny of the OLG, could not be conducted with de-identified information.

With respect to section 21(2)(c), the appellant submits that both of the orders note a direct connection between the personal information and the promotion of informed choice among consumers and that this finding is directly relevant to the issues in this appeal. It states that the personal information in the records will enable the appellant to identify and investigate insider wins and the public will be better informed about whether the OLG is administering the lottery scheme in a manner that is fair to all lottery players.

With respect to section 21(2)(e), the appellant states that the OLG's harm arguments were rejected in the two previous orders. The appellant states:

> Although not all the persons in the winners database are inside winners, their information is needed to determine whether proper procedures were followed and whether frauds were perpetrated on the OLG and lottery players. Moreover, as discussed in CBC's earlier submissions, the disclosure of the identities of the winners would not be the first disclosure of their identities, a factor that was properly taken into account in the earlier Orders.

With respect to the application of section 21(2)(f), the appellant argues that there is no evidence that the information is highly sensitive and the OLG has not established that disclosure could reasonably be expected to cause significant personal distress to the individual. The appellant also states that the lottery winners' identities have already been disclosed in OLG promotions. As the Assistant Commissioner gave little weight to this factor in Orders PO-2657 and PO-2664, little weight should be attributed to this factor here. For these reasons, the appellant submits that this factor does not weigh in favour of non-disclosure.

In its supplementary representations regarding the impact of Orders PO-2657 and PO-2664, the OLG submits:

> [The lottery winners named in the database] are not generally known to the public or the media as lottery winners. Though individuals who have won a prize equal to or greater than $50,000 have been identified by the OLG pursuant to its practice of issuing media releases (see paragraph 25 of the OLG Representations), at this time these individuals' identities as lottery winners is "practically obscure." Those in the database who have won prizes less than $50,000 have likely not been identified to the public as lottery winners. The OLG views the obscurity of winners' identities as a very important distinguishing factor in this case.

Analysis and Findings

The information at issue in this appeal only relates to individuals who have not been identified as insiders. In this way, the circumstances of this appeal are very different than those before the Assistant Commissioner in Orders PO-2657 and PO-2664. On this basis, in my view, those orders are of limited assistance in determining the section 21(2) issues in this appeal.

In the present appeal, I am not satisfied that the evidence supports the appellant's view that there are factors favouring disclosure which outweigh those favouring the privacy interests of lottery winners who, as far as I am aware, are members of the general public. Even if some limited number of them may be individuals who are in fact insiders but have not been identified as such, I do not know who those individuals are, and the great majority of the information in the database is about lottery winners who are members of the general public. In my view, given the importance given to privacy protection under the *Act*, it would not be appropriate to discount the privacy rights of the majority of the individuals represented in the database in order to allow the appellant to attempt to identify a few more insiders. Nor is it by any means certain that, even if the information were disclosed, the latter would occur.

I have therefore decided to proceed on the basis that the assessment of the section 21(2) factors must be based on the interests of lottery winners who are members of the general public.

In that context, I am not satisfied that the application of either of the factors favouring disclosure that the appellant relies on is established.

The evidence that supported the application of the factor relating to public scrutiny (section 21(2)(a)) and promotion of informed choice (section 21(2)(c)) in Orders PO-2657 and PO-2664 does not apply to those lottery winners who are neither retailers nor employees of the OLG. In addition, I do not agree with the appellant that disclosure of the personal information of these individuals "is needed to determine whether proper procedures were followed and whether frauds were perpetrated on the OLG and the lottery players." In my view, the disclosure of this information is unlikely to shed significant light on that determination.

Even if I accept that this personal information is required by the appellant to conduct statistical analysis, in my view, the analysis is not essential in order to scrutinize the operations of the OLG. The analysis of the insider winners previously conducted by the appellant, the OLG, and the recent audit of the OLG conducted by Deloitte have all satisfied the need for public scrutiny of the nature that would result from a statistical analysis.

As well, the appellant's argument that the disclosure of de-identified records would not satisfy the need for public scrutiny under section 21(2)(a) relies, in part, on an interpretation of Orders PO-2657 and PO-2664 that in my view is not applicable here. Assistant Commissioner Beamish's comments and findings about the disclosure of de-identified records in Order PO-2657 and PO-2664 related to a possible investigation of specific lottery wins by insiders who were known to be retailers. His comments were not directed at the disclosure of personal information of lottery winners who are, as far as has been demonstrated, members of the general public.

I also understand that the appellant seeks disclosure of the personal information of members of the general public to assist in its attempts to determine the severity of the OLG problems with under-identification of insiders. Even if this were possible, which in my view is far from certain based on the evidence, it would not justify the violation of the personal privacy of lottery winners who are members of the general public, who must certainly account for the great majority of the individuals whose information is contained in this database.
.
For all of these reasons, I find that the factor favouring disclosure at section 21(2)(a) is not established for the personal information at issue in this appeal.

For the same reasons, I am not satisfied that section 21(2)(c) applies. The disclosure of information relating to members of the general public will not contribute to the promotion of informed choice by lottery players. In addition, any benefit that might be gained from the statistical analysis, and any other investigations that the appellant may conduct, has already been achieved by the statistical analysis previously conducted.

I therefore find that the factors favouring disclosure for the personal information at issue in this appeal is not established.

The section 21(1)(f) exception to the mandatory exemption provided by section 21(1) only applies where it is demonstrated that disclosure "does not constitute an unjustified invasion of personal privacy." As no factor favouring disclosure has been demonstrated to apply, I find that the personal information in the database that is at issue in this appeal is exempt under section 21(1) of the *Act*.

Although it is not necessary for the disposition of this issue, I would add that I also agree with the OLG that making the personal information at issue here publicly available will cause unfair harm to the lottery winners under section 21(2)(e) by exposing them to possible harms such as were suffered by the lottery winners in Quebec who were kidnapped, or to harassment by family

members or others seeking to take advantage of them because of their lottery winnings. For similar reasons, disclosure could reasonably be expected to cause significant personal distress to these individuals and the factor in section 21(2)(f) applies. In my view, these factors favouring privacy protection would outweigh any possible interest in disclosure that could arise in relation to the personal information at issue in the circumstances of this case.

In deciding this issue, I also note that the appellant makes it clear that it does not seek access to de-identified personal information. Accordingly, I will not undertake the exercise of attempting to sever the personal information to permit disclosure without personal identifiers.

To conclude, the personal information at issue in this case is entirely exempt from disclosure under section 21(1) of the *Act*.

LATE RAISING OF DISCRETIONARY EXEMPTION

The time limit and procedures for the raising of discretionary exemption claims are set out in section 11.01 of this office's *Code of Procedure*. The section states:

> 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.

This office has the power to control the manner in which the inquiry process is undertaken [Orders P-345 and P-537]. This includes the authority to set a limit on the time during which an institution can raise new discretionary exemptions not originally raised in the decision letter. The policy now embodied in section 11.01 of the *Code* was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg*, (December 21, 1995) Toronto Doc. 220/95, leave to appeal to the Court of Appeal refused at [1996] O.J. No. 1838 (C.A.). [See also *Duncanson v. Toronto (Metropolitan) Police Services Board*, [1999] O.J. No. 2464 (Div. Ct.)]

Section 18(1)(c) was raised by the OLG after the expiry of the 35 day period mentioned in section 11.01.

In assessing whether or not to exercise the discretion to disallow a discretionary exemption claim that is raised outside the 35 day period contemplated in section 11.01, this office will consider the circumstances of each case.

The OLG argues that its claim to the discretionary exemption in section 18(1)(c) should be heard despite the late raising because no prejudice to the appellant has resulted from the OLG's actions and significant prejudice will result to the OLG from any decision not to hear the claim.

The appellant argues that the claim to the additional discretionary exemption arose 6 months after the time period allotted for it to do so by section 11 of the *Code*. The appellant also argues that the OLG is familiar with the processes under the *Act*, that the appellant has been prejudiced by the delays caused by a continuing change of position by the OLG, that the OLG flouted the mediation process by not raising all exemptions at the appropriate stage, and further, that the OLG has put the appellant in a position where it has to respond to a moving target. It submits that the timely disclosure of this information is key to the transparency and accountability that the *Act* is intended to safeguard and that the OLG has engaged in a pattern of behaviour that demonstrates an intention to delay the appeal process and, thereby, undermine the effectiveness of the appeal.

The appellant cites Order PO-2433 as authority for the position that the late raising should be denied and argues that the OLG should not be permitted to claim late exemptions designed to protect its own interests.

In reply, the OLG argues that section 11 of the *Code* is discretionary and creates a "legitimate expectation of forgiveness in circumstances when there is little or no prejudice caused by delay." It argues further that such an approach is consistent with section 2.01, which requires that disputes be heard on the merits. The OLG also disputes the appellant's claim that the position it takes is not *bona fide*, and states that, while it has made administrative mistakes in making its claim, these mistakes have been made in the context of a threefold increase in the volume of requests it receives under the *Act*, as well as a number of changes in OLG leadership, and that this weighs strongly against an inference of purposeful delay. The OLG also points out that this is one in a series of related requests made by the appellant which are targeted at information which, in the OLG's view, threatens the very security system that it has recently pledged to improve.

In supplementary representations filed after Orders PO-2657 and PO-2664 were issued (both of which also involve information about lottery winners), the appellant submits that the decision to permit section 18(1)(c) to be raised in those orders has no bearing on that issue in this case because the background of the exemption claims, and factors such as the decision to withdraw another exemption claim, are not present here. I agree with the appellant that the circumstances surrounding the additional exemption claim are different here, and the outcome in Orders PO-2657 and PO-2664 do not dictate the outcome in this case.

The analysis of this issue requires the adjudicator to weigh and compare the overall prejudice to the parties. In a typical case, this would involve weighing any delay or unfairness that could harm the interests of the appellant against harm to institutional interests that may be caused if the exemption claim is not allowed to proceed. In individual cases, there may be many other factors to consider. In order to assess possible prejudice, the importance of an exemption claim and the

interests the exemption seeks to protect in the circumstances of the particular appeal can be an important factor.

In this case, in considering the possible prejudice to the OLG in the event that it is not permitted to rely on section 18(1)(c), I have taken into account the OLG's arguments under section 18(1), which are outlined in more detail below. In the context of assessing relative prejudice, this is a separate question from whether or not the exemption claim would succeed. Rather, the question is whether there is the potential for significant harm to an institution's or third party's interests if an exemption claim is not permitted to proceed. In this case, the OLG argues that disclosure of information that identifies a winning ticket, and information about its purchase and validation, would seriously compromise the security of the lottery system, undermining public confidence and the ability of the OLG to provide funding for provincial programs. As noted above, it has recently pledged to improve the security of this system.

I have carefully considered the parties' representations and the circumstances of this case. I am sympathetic to the appellant's arguments regarding the importance of timely disclosure of information under the *Act*, but I note that there have been some delays in the progress of this appeal for reasons unrelated to the OLG's decision to raise discretionary exemptions at a late date. For example, the parties reached a mutual agreement to put this file on hold at one point in the adjudication process in order to attempt to achieve a resolution through mediation after the issuance of Orders PO-2657 and PO-2664, at which point section 18(1)(c) had been raised, and had in fact been applied in those orders. In my view, this lessens the weight of the appellant's argument that it was precluded from engaging in meaningful mediation in this appeal.

I am also not persuaded that the findings of Order PO-2433 should be applied in the circumstances of this appeal. In that order, Adjudicator Bernard Morrow denied the late raising of the discretionary exemptions in part on the basis that by the time that the discretionary exemption was raised, the appellant had already paid the fee hoping to get access to the records. Adjudicator Morrow notes that the appellant might have opted not to pay the fee if he or she had known that the institution was relying on the exemptions in section 18. In my view, the circumstances of that appeal are distinguishable because there, unlike this appeal, the institution had not raised the application of any of the exemptions in section 18 within the appropriate time period. In this appeal, the institution raised the application of section 18(1)(a) and (d) in a timely fashion, a circumstance which in my view puts the appellant in a very different position from the appellant in Order PO-2433. I also note that the OLG dropped the application of section 18(1)(a), thus reducing the issues that needed to be considered in this order.

Weighing the relative prejudice to the parties, I conclude that not allowing the OLG to claim section 18(1)(c) would be more prejudicial to the OLG based on the important financial interests that are closely related to the security of the lottery system. Accordingly, I have decided to permit the OLG to claim this exemption and I will consider its possible application in this order.

In addition, as noted earlier, the OLG clarified that it relies on section 18(1)(d) for more information than originally contemplated. This clarification arose shortly after the expiry of the

35-day period mentioned in section 11.01 of the *Code*, and section 18(1)(d) had been raised previously to exempt other information. For this reason, and based on the foregoing analysis, I also conclude that the OLG should be permitted to claim that section 18(1)(d) applies to the additional information.

ECONOMIC AND OTHER INTERESTS

Sections 18(1)(c) and (d) state as follows:

> A head may refuse to disclose a record that contains,
>
> (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.

Section 18(1)(c): prejudice to economic interests on an institution

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 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].

This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption

requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [Order PO-2014-I].

Section 18(1)(d): injury to financial interests of the government

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 upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to the Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.)].

Standard of Proof

Relying on Order PO-1747, the appellant argues that the OLG must provide evidence to support a "reasonable expectation of probable harm" which, the appellant argues, requires that there be a "clear and direct linkage" between the disclosure of the information and the harm alleged. The appellant submits, more generally, that the mere possibility of harm is not enough; general descriptions of harm are not sufficient; an explanation of how and why harm would be suffered is required; where inferences must be drawn more evidence is required and, the more general the evidence the more difficult it is to establish the linkage between the disclosure and the harm alleged. It concludes that the OLG has failed to meet the required standard in this appeal as its representations are full of bald assertions, unsupported by the evidence and are contrary to logic and reason.

These submissions require me to consider the quality of evidence required to establish that disclosure could "reasonably be expected" to lead to the harms mentioned in sections 18(1)(c) and (d). In my view, for the reasons that follow, the appellant's submission that the OLG must provide evidence to support a "reasonable expectation of probable harm", and its related argument that evidence of a "clear and direct linkage" between the disclosure of the information and the harm alleged is required to accomplish this, are not an accurate assessment of the evidentiary standard required where an exemption in the *Act* requires that a specified harm "could reasonably be expected" to occur if the requested information is disclosed.

Order PO-1747, cited by the appellant, states that in order to satisfy this onus, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm." I note that the requirement for a "clear and direct linkage" to satisfy this evidentiary standard is not in fact referred to in Order PO-1747.

Nor has the requirement for a "clear and direct linkage" been applied or favourably referred to in any decision of the Divisional Court or Court of Appeal interpreting the meaning of "could reasonably be expected to" in relation to any exemption using that phrase in the *Act*, or in its municipal counterpart, the *Municipal Freedom of Information and Protection of Privacy Act*, which also contains many exemptions that use this same phraseology.

I also note that the word "probable" does not appear in the statute, which simply requires that the harm specified in the exemption "could reasonably be expected" if the requested information is disclosed. In *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395, the Court of Appeal expressly rejected the need for probable harm – it stated (at para. 25) that "[t]he expectation of harm must be reasonable, but it need not be probable." In that case, the Court was adopting a lower standard of proof for exemptions intended to protect against bodily harm, and that lower standard does not apply to an exemption such as section 18(1)(c) or (d), but it is, in my view, significant that the *Act* does not expressly refer to "probable" harm. This interpretation is also consistent with the reasons of the Divisional Court in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* [2007] O.J. No. 423 at para. 60.

I therefore reject the appellant's argument that the Ministry is required to provide evidence to demonstrate a reasonable expectation of "probable" harm, based on a "clear and direct linkage" between disclosure and the harm referred to in the exemptions.

Rather, in my view, in the context of sections 18(1)(c) and (d), the words "could reasonably be expected to" are best interpreted to mean that 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 [See Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner),* [2003] O.J. No. 2182 (Div. Ct.); see also *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]. This is the standard that I will apply here.

Representations

The OLG argues that disclosure of the data from the following data fields could reasonably be expected to injure the financial interests of the government of Ontario and the OLG: 3, 9, 12-16, 21, 28, 33, 37, 43, 46, 47, 54 and 57. It explains that the information in these fields reveals either information that would identify the winning ticket or information about the purchase, redemption or validation of the winning ticket.

With respect to the application of section 18(1)(d), the OLG makes a number of arguments, which may be summarized as follows.

1. Purchase, redemption, validation and other information about a winning ticket could be used to thwart an investigation that examines lawful ownership of a ticket which is essential to protect against fraud and can be used to forge a winning ticket. The OLG would be very limited in its ability to scrutinize false claims to lottery winnings if those making such false claims had access to the information of the kind that is at issue here. Relying on Orders P-752 and M-551 the OLG argues that it has an interest in protecting the province against monetary loss caused by fraud.

2. If the OLG is to continue to make large financial contributions to provincial resources and programs, then it needs to be able to protect the public confidence in the lottery and the OLG investigation process. In this respect, the OLG relies on the findings of former Assistant Commissioner Mitchinson in Order PO-1799 where he stated:

> I accept the OLG'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 OLG and the government of Ontario.

3. Public confidence in the OLG investigation process is essential to the operation of the lottery system. The Ombudsman's investigation supports a link between the integrity of the lottery process and the economic interests of Ontarians.

4. Any harm that would flow from disclosure is not lessened by the fact that the time period for making a claim to these wins has expired. The OLG would have to investigate and resolve any challenges to the claims, no matter how out-dated, to preserve public trust in the lottery system.

The OLG also provided affidavit evidence from its Internal Audit Manager, who has the responsibility for managing the operational auditing for all OLG lottery draws and instant win games. The evidence in the affidavit may be summarized as follows.

1. The OLG has to protect itself from the risk associated with individuals who present stolen lottery tickets as their own, those who present forged lottery tickets and other persons who make fraudulent claims. There have been numerous incidents in which individuals have attempted to redeem forged tickets and make other fraudulent claims and that the risk of fraud persists even after a prize has been claimed. There has been a recent increase in the number of persons who have come forward to challenge claimed lottery prizes following recent media coverage about security procedures.

2. Tickets may be stolen, and there are security systems in place to detect stolen tickets. The key to the security of the lottery process is the ticket control number, purchase and validation information and the RDL number (the number assigned to the lottery retailer's ticket device).

3. In portions of the affidavit of the Internal Audit Manager that were withheld from the appellant for confidentiality reasons the Internal Audit Manager provides detailed evidence of how a forged ticket might be prepared and the security information relating to the lottery ticket.

In essence, the OLG agues that losses resulting from fraud or additional investigations to avoid fraud could reasonably be expected to be injurious to the financial interests of the province, which is the harm that section 18(1)(d) is designed to avoid.

The OLG argues that, for the same reasons given under section 18(1)(d), the OLG's own economic interests under section 18(1)(c) are also engaged. In addition, it argues that public confidence in the integrity of the process impacts consumer choice in playing OLG lottery games. It states that the OLG competes with other gaming and entertainment alternatives for business and that the OLG's interest in protecting its competitive position was previously recognized by this office in Order P-941.

The appellant submits as follows:

1. The OLG has not submitted evidence about harm that would result from the disclosure of information relating to fields 3, 9, 12-16, 43, 47, 54 and 57.

2. The OLG does not explain how the disclosure of the ticket control number would expose it to fraud and believes that a potential winner who presents a ticket control number can be easily disposed of as an unentitled individual because they do not have possession of the ticket.

3. Some of the information which the OLG claims is exempt under section 18 is available on the OLG website, and some of the information relating to the validation process is publicly available (citing the insider winners' checklist relating to a disputed lottery win).

4. The public has a right to know what processes are used to validate claims by the OLG and the appellant has a right of access to other publicly available information about the validation process.

5. The OLG runs a provincial monopoly, which the appellant evidently views as a contradiction of the claim by the OLG about potential loss of consumer confidence and the consequences of that. In addition, the appellant argues that the loss of public trust is not a section 18(1)(c) harm.

6. The affidavit evidence submitted by the Internal Audit Manager alleges harm to the OLG and does not include any evidence about harm to the economic interests of the province of Ontario.

In reply, the OLG argues that disclosure of the information the OLG has claimed is exempt under section 18(1)(c) and (d) would harm the integrity of the OLG's security system and reduce consumer confidence because the OLG's ability to respond to challenges to all significant lottery prize claims since 1993 would be frustrated. It states that it is entitled to rely on section 18(1)(d)

as an agency of the government of Ontario and that the prevention of lottery fraud is significant to the economic well-being of the government and all Ontarians.

It argues that its evidence is not speculative. It explains there have been actual events of individuals coming forward to claim prizes that have previously been paid and these claims have increased since the appellant's airing of the recent fraudulent claim to lottery winnings investigated by the appellant. It claims that it has adduced detailed evidence to demonstrate risk, including evidence related to a claim made by an individual 16 years after the winnings were announced and the recent discovery of a forged "Cash for Life" lottery ticket, and states that it has linked that evidence to the need for confidentiality.

In supplementary representations, the appellant argues that the information at issue in the first few pages of records at issue in Orders PO-2657 and PO-2664 was winners' database information, and that this same type of information is at issue in this appeal. It argues that in these two orders, the Assistant Commissioner found that disclosure of information relating to the *investigation process* and any information that had already been made *public* did not qualify for exemption under section 18(1)(c) and (d), and further, that only limited amounts of information was found to be exempt pursuant to these orders.

The OLG also submitted supplementary representations in which it distinguishes Orders PO-2657 and PO-2664 on the basis that, unlike the situation in those orders, the specific details of the location and purchase and validation of lottery tickets is *not* information that is in the public domain in the circumstances of this appeal and it is not related to the investigation process. In addition, unlike the situation in Orders PO-2657 and PO-2664, the appellant is not already aware of the lottery winners' identities, the place of purchase of the tickets and other information of this nature in this appeal.

The OLG also states:

> In this request, the number of wins that are addressed by information in the database is a relevant consideration that weighs against the application of this reasoning. Assistant Commissioner Beamish recognized the potential for fraudulent claims made on a single win, yet in this case the potential for fraudulent claims would apply to many wins. The overall cost of responding to a large number of claims, which the OLG would bear in order to preserve the integrity of its security system, would be great even if each individual claim could be assessed with relative ease.

The information which the OLG claims is exempt pursuant to section 18(1)(c) and (d) is information relating to the actual winning lottery tickets including the ticket control numbers found in fields 3, 12-16, 21, 33 and 54. Other information withheld under this section relates to the particulars of the purchase and redemption of the winning tickets which are found in fields 9, 28, 37, 43, 46, 47 and 57.

I am satisfied that there is sufficient evidence before me to support a finding that section 18(1)(c) and (d) apply to the information that the OLG claims is exempt under those sections. In arriving at my decision, I have been persuaded that the detailed information relating to the individual lottery tickets and the purchase and validation information are used by the OLG for the purpose of testing the validity of a claim to a lottery prize by an individual. I am satisfied that if this information were made available to the public, then it would be difficult for the OLG to use these tools as a means of testing the validity of any claim. I am also satisfied that there is sufficient evidence before me to support a finding that the disclosure of this type of information, regardless of its age, could reasonably be expected to result in individuals coming forward who might be making false claims to lottery wins.

Contrary to what is suggested by the appellant, I find that the evidence submitted by the OLG is sufficiently detailed and convincing, and it applies to all the information withheld under section 18. The OLG's representations include evidence relating to the three categories of information that is contained in all of these fields, namely the ticket information, and the purchase and validation information. I also accept the evidence of the OLG that, where individuals do not have possession of a ticket and claim to own a winning ticket, the OLG must still investigate in order to protect the integrity of the process.

I do not understand the OLG's representations to be that the harm that results is the loss of public trust as is suggested by the appellant. I understand that the OLG's argument is that as a result of a loss of public trust in the integrity of the process, it is reasonable to expect harm to the financial interests of the OLG and, consequently, the province of Ontario, which depends on the revenue generated from sales of lottery tickets. I agree with this analysis. I also find that making this information public could reasonably be expected to bring about costs associated with the scrutiny of individual false or fraudulent claims, and these costs represent harms that will result both to the OLG and the government, as both are dependent on the successful and profitable operation of the OLG for financial resources. In this regard, I give significant weight to the fact that the database contains information relating to a large number of winners and the consequences of an order requiring the disclosure of the information requested are magnified by the sheer volume of the lottery winners that will be affected.

As well, I do not agree with the appellant's suggestion that the Assistant Commissioner's findings in PO-2657 and PO-2664 with respect to the application of sections 18(1)(c) and (d) do not support the application of the exemptions in the circumstances of this appeal. The information that the Assistant Commissioner found to be exempt pursuant to sections 18(1)(c) and (d) was information relating to the process for testing the validity of a claim to a lottery win. For example, he found that questions asked about the date and location of the purchase and redemption of the lottery ticket were not exempt. However, he found that the answers to the questions, i.e. the details of the location and purchase of the lottery ticket and the particulars of the ticket itself were exempt, except to the extent that the information was publicly available.

The context of this appeal is significantly different than in Orders PO-2657 and PO-2664. In this appeal, the process information or questions are not at issue. The information at issue is precisely the same information that the Assistant Commissioner found was exempt in Orders.PO-2657 and PO-2664 except to the extent that this information was publicly available. In this appeal, I am not persuaded that the information is publicly available as it was in Orders PO-2657 and PO-2664, and the exception to the exemption applied by the Assistant Commissioner in those orders is therefore not applicable in the circumstances of this appeal. Simply put, the facts of this case do not support a conclusion that public availability would negate the harm that could otherwise be reasonably expected to result from disclosure. Public availability is not established for any of this information.

For all of these reasons, I find that the OLG has persuaded me that the fields of information that it has withheld on the basis of section 18(1)(c) and (d) are exempt as disclosure is reasonably expected to prejudice the economic interests of the OLG, and to be injurious to the financial interests of the government of Ontario. As a result, I will uphold the decision to the OLG to withhold this information in my order provisions below.

EXERCISE OF DISCRETION

The section 18 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner 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 either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

The OLG claims that it exercised its discretion properly in claiming the exemptions in section 18. It argues that it acted in good faith, considered all relevant factors and decided that its security interests weighed in favour of claiming the exemptions.

The appellant disputes that the OLG exercised its discretion properly. It submits that the OLG claimed the exemptions in bad faith and for an improper purpose, and that its claims are an attempt to delay the process. It also argues that the OLG failed to consider the relevant factors as

set out in previous orders of this office. Among the factors that it states that the OLG failed to consider are the following:

1. The purpose of the *Act* is to ensure that information is available to the public and exemptions to access are limited and specific. The purpose of the *Act* weighs heavily in favour of disclosure due to the consent of the affected parties.

2. There exists a compelling need for the information due to the need for ongoing public scrutiny. The records may reveal that the OLG has failed to properly identify all insider winners which supports the compelling need for disclosure. If the records reveal that the insiders were properly identified and the statistical analysis of the OLG was correct, then disclosure will increase public confidence.

3. The majority of the information is more than five years old.

4. The existence of the OLG security measures (section 18 claims) "cannot overrule all of the other factors."

In conclusion, the appellant argues that it is not enough for the OLG to state that it considered all the relevant factors in exercising its discretion. It must demonstrate that it properly exercised its discretion.

In reply, the OLG states that this request was made as part of a series of requests which are targeted at information whose disclosure would, according to the OLG, threaten the security system and the personal privacy of the individuals whose information appears in the database. It states that its reliance on the discretionary exemptions arises in good faith, relating to its desire to protect these interests. With respect to the manner in which it processed this request, the OLG states that in the context of the threefold increase in the number of access requests it receives, an inference should not be drawn of purposeful delay.

Having carefully considered all of the representations, I am satisfied that the OLG has properly exercised its discretion in connection with the information that I have found to be exempt pursuant to section 18(1)(c) and (d). It has taken into account relevant factors and has not taken into account any irrelevant factors. While the appellant has properly raised the issue of public scrutiny of the activities of the OLG in relation to its treatment of insider lottery winners, I have assessed that factor in relation to the mandatory exemption in section 21(1) of the *Act* in the context of public scrutiny under section 21(2)(a), and concluded that this factor does not apply in the present appeal because the information at issue relates to lottery winners who are members of the general public, and not to any winner demonstrated to be an insider.

In addition, I will consider whether there is a compelling public interest in disclosure that outweighs the purpose of the section 18(1)(c) and (d) exemptions in the discussion of the "public interest override" provided by section 23 of the *Act*, and will also consider whether there is any

such compelling public interest that outweighs the purpose of the personal privacy exemption at section 21(1).

PUBLIC INTEREST OVERRIDE

The appellant claims that section 23 applies to the records at issue and that it overrides the mandatory and discretionary exemptions claimed by the OLG. The appellant also argues that section 14 should be read into section 23 on the basis of the decision of the Ontario Court of Appeal in *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)*, [2007] O.J. No. 2038 (application for leave to appeal filed, File No. 32172 (S.C.C.)). However, for the purposes of this order, it is not necessary for me to make a decision on whether section 14 should be read into section 23 as I have found that section 14 is not at issue in this appeal.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347 and P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564]. A public interest is not automatically established where the requester is a member of the media [Orders M-773 and M-1074]. The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984]. Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

The OLG's position is that the public interest override does not apply in the circumstances of this appeal because the public interest in disclosure is not compelling and the interest in disclosure does not clearly outweigh the purpose of the exemptions. In support of this position, it makes a number of arguments including the following:

- Access to a lottery winner's personal information only promotes policing of individuals.

- The public interest in subjecting the OLG to scrutiny has been satisfied by the disclosure of de-indentified investigation win records, which preceded the issuance of the Ombudsman's Report.

- The public interest in scrutiny of the institution was also satisfied by the conduct of an internal investigation and a public commitment to lottery prize integrity and the development of a new regulatory framework for retailer registration.

- The public interest in the scrutiny of individual lottery winners will be achieved through the OPP investigation. It claims that the balance struck between the interest in disclosing lottery winners' identity and the privacy of the individual was struck appropriately in Orders P-180 and P-181.

- Access to security sensitive information which it claims is exempt pursuant to section 18(1) would defeat the public interest because disclosure of this information would jeopardize the functioning of their security system.

The appellant argues that the public interest override in section 23 applies to information exempt under sections 21(1) and 18(1). It submits that there are serious and legitimate concerns with respect to the number of insider wins and the verification procedures in place at the OLG. The public has a right to scrutinize the incidence of insider lottery wins "by obtaining detailed statistical information, the OLG's identification of insiders and its claim validation process."

After quoting for the Ombudsman's Report, the appellant states:

> How does the number of inside wins compare to the overall number of lottery wins? What procedures are in place to protect against insider wins that are actually fraudulent claims? Were these procedures followed in the case of this lottery win?....As noted above, the OLG has challenged CBC's statistical analysis of the incidence of insider wins, has provided three different "major lottery win" figures for purpose of such analysis and now seeks to deny CBC the information it needs to determine for itself the proper figure in context.
>
> Further, the Ombudsman specifically noted at paragraphs 84 to 93 his concern that insiders were not being properly identified. This publicly important concern can only be addressed if the identities of lottery winners are disclosed, as requested by the Requester.

The appellant also states that the public interest in the ability to make informed choices about lottery purchases and the ability of members of the public to protect themselves against lottery fraud outweighs the OLG interest in revenue resulting from sales. With respect to the personal privacy interests of individual winners, the appellant argues that their privacy interests are also outweighed by the public's right to scrutinize insider wins, further,

> … to assess the OLG's dispute with CBC over the proper statistical analysis – a dispute on which OLG spent $50,000 – and to which CBC can only respond (both on the merits and on the appropriateness of the OLG's spending) if it has access to the statistical data.

In conclusion, the appellant argues that the need for scrutiny has not been satisfied by the investigation conducted by the Ombudsman. It claims that the appellant has an important role to play in this process, a circumstance recognized by the Ombudsman when he stated:

> It is an embarrassment that the failings of the lottery system were not revealed as a result of the Corporation's own introspection, but through the efforts of investigative journalists.

In reply, the OLG argues that:

- The appellant fails to address how the specific records at issue in this appeal will further the public interest.
- Conducting a more precise analysis to test a hypothesis about practices that have already been remedied is an exercise in academics and would not serve a compelling purpose.
- Disclosure would damage the very security system the Ombudsman said must be improved.
- The purposes of section 18 strongly weigh against the application of the override because of the harms that will result from disclosure.
- With respect to the personal information in the records, the OLG states that the balance should weigh in favour of consumer privacy as opposed to the protection of consumers who buy lottery tickets, because lottery winner identities are not essential to perform the statistical analysis the appellant wishes to conduct but might result in private policing, and the OPP are currently investigating lottery winners. In these circumstances, the balance should be struck in favour of privacy.

The parties' supplementary representations also address the application of section 23. The appellant states that the Assistant Commissioner's findings in Order PO-2664 support the application of section 23 to the information that the OLG claims to be exempt. It refers to the following passage from Order PO-2664 and argues that the same compelling public interest would be served by the disclosure of information at issue in this appeal:

> The appellant, and through her the public, will have the opportunity to examine the nature of that [OLG] process and the rigour to which it was applied…"

The OLG states that it accepts the reasoning of the Assistant Commissioner in Orders PO-2657 and PO-2664 but notes that there are significant differences between the facts in those appeals and the facts of this appeal including the number of individuals whose personal information is at issue, the nature of the information at issue, the amount of information in the public domain about these lottery winners and their status as non-insiders.

Analysis and Findings

Having carefully considered the parties' representations and the previous orders issued by this office, I find that section 23 does not apply to override the application of the exemptions in sections 21(1) or 18(1)(c) or (d). I find that there is no compelling public interest in disclosure of the information that I have found to be exempt and that any public interest that may exist in this information does not outweigh the purpose of the applicable exemptions.

In arriving at this conclusion, I have carefully considered the findings and comments of Assistant Commissioner Beamish in Orders PO-2657 and PO-2664. In those orders, the Assistant Commissioner acknowledged the public importance of scrutinizing wins by lottery insiders, but in the end, he found that the public interest override did not apply to the information he had found to be exempt, which is similar to the information I have exempted under section 18(1)(c) and (d) in this case, and he reaffirmed this decision in his reconsideration reasons released on June 4, 2009.

In Orders PO-2657 and PO-2664, Assistant Commissioner Beamish was dealing with individuals who had been identified as insiders and even in that situation, he did not find that there was a compelling public interest in the disclosure of the information he found to be exempt under sections 18(1)(c) and (d). Given that I am dealing with individuals who have not been demonstrated to be lottery insider winners, the public interest in the information exempted under sections 18(1)(c) and (d) is even lower. In the circumstances of this appeal, I find that there is no compelling public interest in the disclosure of this information.

I note, however, that in Orders PO-2657 and PO-2664, the personal information of a number of lottery insider winners was ordered disclosed because it was not exempt under section 21(1) and was in fact subject to section 21(2)(a) because disclosure was desirable for the purpose of subjecting the activities of the institution to public scrutiny. This would also suggest that if the lottery winners whose personal information is at issue in this appeal were identified as insiders, there could be a compelling public interest in disclosure of that information that outweighs the purpose of the section 21(1) exemption.

However, I considered that issue in my discussion of section 21(2)(a) above, and concluded that section 21(2)(a) did not apply to the personal information of the lottery winners at issue here. I made this finding because these lottery winners are members of the general public who have not been identified as insiders, despite the appellant's arguments that lottery insiders are under-identified in the database, and that some of these individuals could, in fact, be insiders. As noted above, this was not a sufficient reason to invade the privacy of a massive number of lottery winners who are members of the general public.

In my view, the same principles apply here. For that reason, even if there were a compelling public interest in the disclosure of information about lottery winners some of whom the appellant speculates could be lottery insiders, this is an insufficient basis for invading the privacy of a massive number of individuals who are not insiders, whose information is clearly contained in

the database. Accordingly, even if there were a compelling public interest, it would not outweigh the purpose of section 21(1), which is the protection of personal privacy. This purpose of the exemption is also one of the purposes of the *Act* itself, as identified at section 1(b).

Accordingly, I find that section 23 does not apply in the circumstances of this appeal.

FEES

As noted in the background section of this order, the OLG initially issued a fee estimate of $2,580.00. In its decision letter, the OLG stated:

> The *Act* allows for a charge of $60.00/hour spent by any person to produce a record from a machine readable record. The time to sever and produce the record is 43 hours and therefore the total cost is $2,580.00.

Subsequently, the OLG issued a revised decision letter reducing the fee to $1,380.00. An additional reduction in the fee estimate was made by the OLG following its review of the representations of the appellant submitted at the inquiry stage of this appeal. At that time, the fee estimate was further reduced by $300.00 to $1,080.00. The appellant takes issue with the amount of the fee estimate and, therefore, the issue of whether the fee estimate is reasonable and in accordance with the *Act* and Regulation 460 is before me in this appeal.

In assessing this issue, I am mindful of the fact that I am only considering the part of the database that remains at issue in Appeal PA07-65. The information relating to identified lottery insiders is now at issue in Appeal PA07-65-2, whose disclosure will be addressed in a subsequent order. The fee of $1,080 therefore relates to more information than what is at issue here.

Section 57(1) requires an institution to charge fees for requests under the *Act*. More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 460.

The parties submitted representations in support of their respective positions regarding the fee estimate and I have carefully reviewed those representations. The OLG states in its initial representations that its fee does not include "the cost of providing access to part of the database" and notes that the request was narrowed to include part of the database during the mediation stage of the appeal. It is not clear whether the OLG intends by this statement to waive the fees in relation to the cost of disclosing the portions at issue as a result of the narrowed request or whether it claims that the fee estimate will be different, and should be recalculated, if it is ordered to disclose portions of the information at issue in this appeal.

The appellant submits that the fee should be between $360.00 and $540.00 and sets out the basis for its claim that the fee estimate is not in accordance with the *Act*. The appellant does not directly comment on the OLG's suggestion that the fee might be different if it were to disclose portions of the database only. However, in connection with its representations on fee waiver, the

appellant notes that it is being asked to pay for the processing of the entire database of records when the records that will be disclosed in the appeal are far fewer than the number of records contained in the database.

As previously noted, the OLG has agreed to disclose portions of this database to the appellant. My order provisions below uphold the OLG decision to withhold all other portions of the database that relate to winners who are not identified as lottery insiders.

Therefore, at this stage of the appeal, the appellant's entitlement to access to portions of the database is confined to those portions that the OLG has already agreed to disclose. If the appellant decides to exercise its right to receive disclosure of the information that the OLG has agreed to disclose, it appears that this may have an impact on the fee estimate previously issued by the OLG. In my view, the OLG is only entitled to charge a fee referable to the processing of the portions of the database that it has agreed to disclose. For these reasons, my order provisions will state that if the appellant notifies the OLG that it wishes to obtain access to the limited portions of the database that it is entitled to at this stage in the appeal, the OLG should issue a revised fee estimate to the appellant. I will reserve the right to make any determinations regarding the revised fee should the parties not be able to reach an agreement as to whether it complies with the *Act*.

FEE WAIVER

Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 460 sets out additional matters for a head to consider in deciding whether to waive a fee. Those provisions state:

> 57. (4) A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,
>
> (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
>
> (b) whether the payment will cause a financial hardship for the person requesting the record;
>
> (c) whether dissemination of the record will benefit public health or safety; and
>
> (d) any other matter prescribed by the regulations.
>
> 8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:

1. Whether the person requesting access to the record is given access to it.

2. If the amount of a payment would be $5 or less, whether the amount of the payment is too small to justify requiring payment.

The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. The fees referred to in section 57(1) and outlined in section 6 of Regulation 460 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees [Order PO-2726].

A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision [Orders M-914, P-474, P-1393 and PO-1953-F].

There are two parts to my review of the OLG's decision under section 57(4) of the *Act*. I must first determine whether the appellant has established the basis for a fee waiver under the criteria listed in section 57(4). If I find that a basis has been established, I must then determine whether it would be fair and equitable for the fee, or part of it, to be waived [Order MO-1243].

Previous orders have determined that the person requesting a fee waiver (in this case the appellant) bears the onus of establishing the basis for the fee waiver under section 57(4) and must justify the waiver request by demonstrating that the criteria for a fee waiver are present in the circumstances [Orders M-429, M-598 and M-914].

As noted above, the appellant sought and was denied a fee waiver at the adjudication stage of the appeal process. With respect to the appellant's claim to the fee waiver, the OLG states in its initial representations that it spent 36 hours answering the request and only a portion of the costs incurred were chargeable. It explains that based on its consideration of the factors set out in section 57(4), it decided not to grant the fee waiver.

The appellant submits that the fee should be waived for the following reasons:

- It is unlikely that processing and collecting the records actually cost the OLG $60 per hour because the OLG's cost breakdown was rounded up to the nearest hour, it is unlikely that record compilation amounted to $60 per hour in lost employee time and it is unlikely that the OLG would use employees earning a salary of $109,200 to perform the searches of the database (section 57(4)(a)).

- Requiring this payment will cause financial hardship to the appellant because if the appellant is required to pay thousands of dollars every time it seeks access to records, it will not be able to continue investigating government agencies. The essential and democratic duty of the press should not be frustrated by cost concerns (section 57(4)(b)).

- The appellant is being asked to pay an amount based on the processing of the entire database when it will be getting access to far fewer records.

With respect to the balancing of factors to determine whether it is fair and equitable to waive the fee, the appellant submits:

- The OLG responded to the request in an obstructive and elusory manner.

- The OLG invoked discretionary exemptions far beyond the deadline for doing so.

- The appellant narrowed the request by dropping the claim to banking information and the OLG responded by expanding the number of records for which it claimed section 18(1).

- Shifting the cost of gaining access to the OLG would not cause a significant interference with the operations of the OLG.

The OLG submitted representations in reply in which it argues that the fee waiver should be denied for the following reasons:

- For the fiscal year ending March 2006, the appellant had an operating budget of $950 million dollars.

- The appellant filed 44 freedom of information requests in its investigation of the OLG's lottery security practices, many of which overlapped. Four of these appeals were the subject of appeals in which the appellant took positions in conflict with long standing orders of this office, namely, Orders P-180 and P-181, and disregarded what the OLG viewed as a security risk.

- The OLG was required to retain additional staff to process these requests.

- Denying the waiver would not be unfair to the appellant.

I find that the appellant's claim for a fee waiver does not fit within any of the grounds listed in section 57(4) of the *Act*, or "any other matter prescribed" in section 6 of Regulation 460, and that it cannot, therefore, be upheld. I have considered the representations of the OLG and the appellant, as well as other relevant factors related to the issue of fee waiver under section 57(4)

of the *Act*. In the circumstances, I am not persuaded by the appellant's evidence that the "actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection [57(1)]" (Section 57(4)(a)). On the contrary, I accept the representations of the OLG regarding the efforts undertaken to respond to the request and, in my view, the cost of responding to the request exceeded the amount of the fee estimate. I have, moreover, required the OLG to issue a new fee estimate to the appellant in relation to the part of the database to which the appellant may obtain access, and reserved the right of the appellant to object to that estimate if it considers it to be contrary to the fees allowable under the *Act*.

Nor am I persuaded that "the payment will cause a financial hardship for the [appellant]" pursuant to section 57(4)(b) because the appellant is a sizeable media organization with a significant budget. This is not a case where my decision on the waiver of fees may determine the appellant's ability to obtain access to the records.

In view of my findings, it is not necessary for me to consider whether it would be fair and equitable to grant the fee waiver. However, for the sake of completeness, I also find that it would not be fair and equitable to grant the waiver in the circumstances of this appeal.

In my view, the OLG's conduct in responding to this request is not a consideration that favours the granting of a fee waiver. The circumstances regarding the late raising of the discretionary exemptions are set out above and they do not support a finding that the OLG's conduct was obstructive and elusive as is suggested by the appellant. Although I accept that shifting the cost of this access request to the OLG would not impose a significant burden on the OLG, I have also considered that the access provisions of the *Act* are based on a user pay principle and it is not intended that the fee waiver provisions undermine that user-pay principle. I have also taken into account that the OLG made efforts to reduce the amount of the fee at every stage of the request and appeal process including upon the review of the representations submitted by the appellant at adjudication.

For all of these reasons, I am not persuaded that there is sufficient evidence before me to support a finding that the fee referable to the limited amount of information that the OLG has agreed to disclose should be waived in the circumstances of this appeal.

ORDER:

1. I uphold the decision of the OLG to withhold personal information pursuant to section 21(1) and other information claimed to be exempt pursuant to section 18(1)(c) and (d) for the parts in the database that are at issue in this appeal.

2. I uphold the decision of the OLG to deny a fee waiver to the appellant.

3. If the appellant notifies the OLG that it wishes to obtain access to the portions of the database that are at issue, and that the OLG has agreed to disclose, I order the OLG to issue a revised fee estimate to the appellant, and once the fee is paid, to forthwith disclose those

portions of the database. I reserve the right to make any determinations that may be necessary should the parties not be able to reach an agreement as to whether or not the revised fee estimate complies with the *Act*.

4. I remain seized of any compliance or other issues that may arise from this order.

Original signed by: August 7, 2009
John Higgins
Senior Adjudicator