



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

ORDER PO-2891

Appeal PA09-64

Alcohol and Gaming Commission of Ontario



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NATURE OF THE APPEAL:

The Alcohol and Gaming Commission of Ontario (the AGCO) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a report of an investigation carried out by the Ontario Provincial Police (the OPP) into activities involving the requester, who is an employee at Niagara Casinos. The request includes the list of individuals who were interviewed during the investigation.

The AGCO located the responsive record and denied access to it, in its entirety, pursuant to sections 14(2)(a) (law enforcement report) and 21(1) (personal privacy) of the *Act*.

The requester (now the appellant) appealed the decision.

During mediation, the mediator pointed out that in making its decision respecting access, the AGCO did not consider the application of the discretionary exemptions provided for under sections 49(a) and (b) of the *Act*. These exemptions allow an institution to refuse to disclose to the requester his own personal information (a) where a law enforcement exemption under section 14 of the *Act* applies, and, (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy. Therefore, sections 49(a) and 49(b) of the *Act* are at issue in this appeal.

As this appeal was not resolved during mediation, it proceeded to the Adjudication stage of the appeals process where an adjudicator conducts an inquiry. Initially, I sent a Notice of Inquiry to the AGCO seeking its representations on the applicability of section 49(a) in conjunction with section 14(2)(a) to the record. I received representations from the AGCO, a copy of which was shared with the appellant, along with a Notice of Inquiry. I also received representations from the appellant. I then sought and received reply representations from the AGCO.

RECORD:

The record at issue in this appeal is a 17 page report by the OPP, Investigation and Enforcement Bureau, AGCO, dated September 15, 2008.

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) as follows:

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

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (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,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (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].

Sections 2(2), (3) and (4) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

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, PO-2225 and MO-2344].

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 AGCO submits that the record contains personal information about identifiable individuals including their addresses, telephone numbers and financial transactions. It also submits that the disclosure of these individuals’ names would reveal other personal information about them.

The appellant did not provide representations on this issue.

Analysis/Findings

Although the record contains information about the appellant and other identifiable individuals in their business capacity, I find that it also contains the personal information of the appellant and of other identifiable individuals in their personal capacity. This personal information is intertwined with the business information. The personal information concerning these individuals includes their home telephone numbers and addresses (paragraph (d)), financial transactions in which they are involved and their employment history (paragraph (b)). In addition, I find that the record contains the names of both the appellant and other identifiable individuals which appear with other personal information (paragraph (h) of the definition of personal information in section 2(1)).

RIGHT OF ACCESS TO ONE’S OWN PERSONAL INFORMATION/LAW ENFORCEMENT

Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

Section 49(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, **14**, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information [Order M-352].

Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

In this case, the institution relies on section 49(a) in conjunction with section 14(2)(a). Section 14(2)(a) states:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the institution must satisfy each part of the following three-part test:

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Orders 200 and P-324]

The word "report" means "a formal statement or account of the results of the collation and consideration of information." Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I].

The title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Orders MO-1238, MO-1337-I].

Section 14(2)(a) exempts "a report prepared in the course of law enforcement *by an agency which has the function of enforcing and regulating compliance with a law*" (emphasis added), rather than simply exempting a "law enforcement report." This wording is not seen elsewhere in the *Act* and supports a strict reading of the exemption [Order PO-2751].

An overly broad interpretation of the word “report” could create an absurdity. If “report” means “a statement made by a person” or “something that gives information”, all information prepared by a law enforcement agency would be exempt, rendering sections 14(1) and 14(2)(b) through (d) superfluous [Order MO-1238].

The AGCO submits that:

In 2008, the Ontario Lottery and Gaming Corporation (OLG) received a complaint alleging various types of wrongdoing by the appellant. As a result, the IEB [Investigations and Enforcement Branch] of the AGCO commenced an investigation into this matter.

Throughout the course of the investigation, the officers spoke with numerous individuals and formed an analysis of the case as set out in this record...

This record is a sixteen page report produced by an OPP officer attached to the IEB. This report describes the outcome of his investigation into allegations of wrongdoing made towards the appellant.

The appellant was registered under the *GCA* [*Gaming Control Act*] as a gaming key employee in order to be legally eligible to carry out the responsibilities of his employment.

The investigation was conducted to determine the validity of allegations related to standards of honesty and integrity that are required of each registrant under the *Gaming Control Act* and as such, focused directly on determining the appellant's compliance with the law.

The report was prepared by the OPP, an organization with an undisputed law enforcement mandate. The report was based on an analysis and review of witness interviews, a review of contracts and other legal documentation, financial information and other materials...

[The record] was written for the purpose of furthering compliance with the law and contains a detailed analysis and conclusion on allegations of wrongdoing related to the appellant. A host of witnesses were interviewed. Their names and contact information are listed. Their opinions were solicited by the investigator during the course of this investigation.

The appellant did not directly address this issue in his representations. However, he concedes that he was subject to an investigation, in which witnesses were interviewed.

Analysis/Findings

The AGCO relies upon the *Gaming Control Act* as authority for the investigation by the OPP officer that resulted in the creation of the record at issue. Section 31 of the *GCA* provides that:

(1) The Registrar may appoint any person to be an investigator for the purpose of determining whether there is compliance with this Act, the regulations, the terms of a licence or the terms of a registration.

.....

(3) Police officers, by virtue of office, are investigators for the purposes of this Act and the regulations...

Based upon my review of the record and the parties' representations, I find that it qualifies as a report for the purposes of section 14(2)(a). I find the AGCO's description of the record to be accurate as it contains a formal, written account of the collation and consideration of the information gathered by the OPP officer who conducted the investigation into the appellant's actions.

In addition, I find that the record contains the investigator's conclusions or opinions of the results of the investigation, including recommendations on whether further action is required. This investigation was authorized by the *GCA* and the AGCO has the function of enforcing and regulating compliance with that legislation. Therefore, I find that the record qualifies as a report prepared in the course of a law enforcement investigation by an agency which has the function of enforcing and regulating compliance with a law.

Furthermore, I conclude that the record is not a routine inspection report. The exception to section 14(2)(a) in section 14(4), therefore, does not apply. As a complaint driven investigation, the investigation at issue in the record was not prepared as a result of a routine inspection [Orders P-136 and PO-1988].

Therefore, subject to my review of the AGCO's exercise of discretion, I find that the record is exempt under section 49(a), in conjunction with section 14(2)(a) of the *Act*.

EXERCISE OF DISCRETION

The section 49(a) 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 AGCO submits that:

The individuals interviewed as part of the investigation provided information to the investigators in confidence and had reasonable expectations that their involvement in the investigation would not be revealed. Disclosure could lead to undesired contact from affected people. The nature of the allegations that were being investigated is extremely sensitive and the disclosure of just a name could lead to potentially serious ramifications for the individuals interviewed. Any disclosure to the general public of the names or other related personal information could taint the individual as their involvement could be taken out of context and negative assumptions made.

[The report] was written for the purpose of furthering compliance with the law and contains a detailed analysis and conclusion on allegations of wrongdoing related to the appellant. A host of witnesses were interviewed. Their names and contact information are listed. Their opinions were solicited by the investigator during the course of this investigation. The disclosure of this information would result in an unjustified invasion of personal privacy of the individuals who cooperated with the investigation for the reasons detailed above.

The appellant did not directly address this issue in his representations. His submissions focus on the harm he perceives will result to him if he does not obtain a copy of the record. He states that:

...at some point in the future I might be asked if I have ever been subject of an investigation and now my response will have to be YES. However, I feel I have no detailed documentation to illustrate the nature of the allegations, details of the investigation or resulting outcome of the findings of being innocent. Not only is this disturbing to me personally but it could have a negative effect on my professional future if I ever have the need to seek employment in the industry of my profession.

I was found to be innocent of the accusations however, none of the individuals who were interviewed have ever been informed of the outcome and as a result there quite possibly could be a feeling of mistrust and questions about my level of honesty and integrity. In other words damage has been done and left without ever being rectified. Today I conduct business with individuals whom I have no knowledge if they are aware of the investigation or not and if so are they aware of the findings of not guilty?

In reality, for my future I ...simply want some type of written documentation that clearly indicates that I am innocent of the accusations against me, whatever they officially might have been and I would like some type of action taken to inform the individuals interviewed of my innocence.

In reply, the AGCO submits that:

In the event that the appellant is again subject to regulatory investigation due to future employment opportunities, it will not be necessary for him to provide details of the AGCO's investigation to the other regulatory authority. In accordance with s. 42(l)(f)(i) of [the *Act*], the AGCO has executed over thirty memoranda of understanding with law enforcement agencies that provide gaming regulation in their jurisdictions... Where there is appropriate legal authority in place, the AGCO would be able to share information directly with another regulatory agency...

The appellant has expressed his ultimate objective for obtaining disclosure of this record to prove that he is 'innocent of the accusations' and that he would like 'some type of action taken to inform the individuals interviewed' of his innocence.

It would be highly inappropriate to disclose to the public at large the names and confidential personal details of any person involved in this investigation for the suggested purpose of enlightening them of the appellant's innocence. The personal privacy of these individuals would be severely compromised.

Further, the appellant is already in possession of a document which is exactly what he states he is seeking through this appeal. This document ...is a letter dated December 24th, 2008 from the Chief Executive Officer of the AGCO to the President of Niagara Casinos. The letter indicates that the results of the investigation have clearly vindicated the appellant of any wrongdoing.

Analysis/Findings

In denying access to the record, I find that the AGCO exercised its discretion under section 49(a) in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations. In particular, the AGCO took into account the purposes of the *Act*, the exemption at issue and the interests that this exemption seeks to protect.

The record at issue is a law enforcement report and contains the personal information of other individuals. As the appellant is already in possession of documented proof of being cleared of the allegations against him, he does not have a sympathetic or compelling need to receive the information at issue, nor, based upon my review of the record at issue, will disclosure increase public confidence in the operation of the AGCO.

Therefore, I uphold the AGCO's exercise of discretion. As the record is exempt under section 49(a) in conjunction with section 14(2)(a), there is no need for me to consider whether it is also exempt under the personal privacy exemption in section 49(b).

ORDER:

I uphold the AGCO's decision and dismiss the appeal.

Original Signed By _____
Diane Smith
Adjudicator

_____ May 19, 2010