



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

ORDER PO-2875-F

Appeal PA08-353

Alcohol and Gaming Commission



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NATURE OF THE APPEAL:

The requester submitted a request to the Alcohol and Gaming Commission (the AGC) pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

...copies of all records pertaining to [a named convenience store] as they pertain to the application for maintaining a lottery terminal at [named convenience store] and all records pertaining to the application's refusal, denial, suspension/and/or revocation.

The AGC issued an access decision, granting partial access to the records. It cited the exemptions in sections 19 (solicitor-client privilege), 14(2)(a) (law enforcement report), 13(1)(advice or recommendation) and 21(1) (personal privacy) of the *Act*, as the basis for denying access to the withheld records. Included with its access decision was an index listing the records and corresponding exemptions.

The requester, now the appellant, appealed the AGC's decision to deny access.

During mediation, the appellant confirmed that he wished to pursue access to all the records in the index. The appellant also raised the issue of the possible application of the exception to the section 13(1) exemption that is set out in section 13(2). The AGC confirmed with the mediator that it is claiming the discretionary exemptions in sections 49(a) and (b); section 49(a) in conjunction with sections 13(1), 14(2)(a) and 19 and section 49(b), in conjunction with section 21(1) because the records appear to contain the personal information of the appellant. Finally, the AGC indicated that it would release Records 27 and 31 in full to the appellant. Accordingly, Records 27 and 31 were no longer at issue.

Mediation efforts did not resolve the appeal and the file was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. After receiving representations from both parties, I determined the following:

- Records 10, 11, 62, 73, 74, 171 and 173 are law enforcement reports for the purposes of section 14(2)(a) and qualify for exemption under section 49(a).
- Records 9, 105, 109, 111, 113 and 139 qualify for exemption under section 49(a) as section 19 applies to them.
- Portions of Records 21 and 22 contain advice or recommendations for the purposes of section 13(1) and are exempt under section 49(a).
- Records 69 – 72, 75 -81, 85, 87 – 88, 114, 115 and 172 qualify for exemption under section 49(b), as the presumption in section 21(3)(b) applies to the personal information contained in those records.

All of my findings were subject to my determination of the appropriateness of the manner in which the AGC exercised its discretion. Having found that the AGC had not provided me with

evidence that it had properly exercised its discretion, I proceeded to issue interim order PO-2870-I, which contained the following order provisions:

1. I order the AGC to exercise its discretion regarding the application of sections 49(a) and (b) and to provide both the appellant and I with an outline of the factors it considered in exercising its discretion by **February 25, 2010**.
2. I remain seized of this matter in order to deal with any issues stemming from the exercise of discretion by the AGC.
3. I uphold the decision and dismiss the appeal otherwise.

In accordance with order provision #1, the AGC provided me with a copy of their representations setting out their exercise of discretion. The AGC provided me with an additional copy of their representations to share with the appellant. I wrote to the appellant and provided him with a copy of the AGC's representations and the opportunity to comment on the AGC's exercise of discretion. The appellant made representations.

DISCUSSION:

This order disposes of the issue of whether the AGC properly exercised its discretion under sections 49(a) and (b).

EXERCISE OF DISCRETION

As noted, the sections 49(a) and (b) exemptions are discretionary, and permit 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)].

Relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

Representations

The AGC submits that it exercised its discretion under section 49(a), in conjunction with section 14(2)(a), to withhold the records after considering the following factors:

- Records are law enforcement reports under section 14(2)(a).

- Records contain the personal information of individuals other than the appellant and these individuals were either witnesses or complainants in matters where the appellant was charged with criminal or quasi-criminal offences.
- Important that witnesses in an investigation are confident that their personal details will not be revealed both in order to obtain information from witnesses and to prevent inappropriate contact by individuals charged with offences.
- Law enforcement methods described in records would be disclosed to the public.
- Past practice of the AGC is to not disclose the personal information of other individuals contained in law enforcement reports.

In exercising its discretion to withhold the records under section 49(a) which I found qualify as advice or recommendation under section 13(1), the AGC submits that it considered the interests that the section 13(1) exemption serve to protect. It further considered that there was an interest in protecting individuals that give advice and to protect the advice from misuse.

For the records that I found to be either solicitor-client communication privileged or litigation privileged under section 19, the AGC exercised its discretion under section 49(a) to withhold these records based on the following considerations:

- Decision-makers and their lawyers must be able to communicate freely with each others.
- Nature of information and communications in contemplation of litigation is extremely sensitive. Disclosure of this information could prejudice to a party's case by impeding the counsel's efforts.
- Preliminary investigations and discussions should be protected in order to preserve the strength of evidence and to prevent individuals from unduly influencing the results of the process.

Finally, in exercising its discretion under section 49(b) to withhold the records subject to that exemption, the AGC submits that:

- The personal information in some of the records relates to witnesses who have provided information about the appellant. These individuals have a reasonable expectation of privacy that their personal information will be protected by participating in a law enforcement investigation.
- The personal information is highly sensitive as disclosure would reveal locations, names of witnesses to potential crimes.
- Disclosure would discourage the reporting of incidents to the police.

The appellant submits that the AGC improperly exercised its discretion or exercised its discretion in bad faith in withholding the records found exempt under sections 49(a) and (b). Regarding the records that were found to be law enforcement reports, the appellant argues that the witnesses that the AGC seeks to protect are OPP officers that do not deserve to have their personal information protected. The appellant submits that disclosure of these reports would explain to him why his lottery terminal license was revoked and that the AGC should not exercise its discretion to withhold the records, thereby hiding their reasons.

Similarly, with respect to the other records withheld under sections 49(a) and (b), the appellant submits that the AGC should not be permitted to exercise its discretion to withhold the records if these records disclose the reasons behind the AGC's decision to revoke his lottery terminal license.

Analysis and finding

Based on my review of the records and the representations of the parties, I find that the AGC properly exercised its discretion to withhold the records which I have found to be exempt under sections 49(a) and (b).

I find that the AGC properly considered the wording of the exemptions and the interests they seek to protect. It considered the fact that the relationship between the requester and the other individuals identified in the records were the subject of law enforcement investigations, as well as the ramifications of any such disclosure. I conclude that the AGC considered the sensitivity of the personal information contained in the record and the possible consequences of disclosing a witness or complainant's personal information to an accused. Finally, the AGC considered its historic practice in dealing with similar information.

I find the appellant's allegations to be unfounded and unsubstantiated by the contents of the records. The records at issue do not contain the personal information of OPP officers nor do they contain evidence which suggests that the AGC acted inappropriately in withholding the records. I am not satisfied that the AGC acted in bad faith or considered irrelevant or improper factors in exercising its discretion not to disclose the records to the appellant.

I am satisfied that the AGC properly exercised its discretion by taking into account the relevant considerations and not taking into account irrelevant factors. I uphold the AGC's exercise of discretion to withhold the records under sections 49(a) and (b) of the *Act*.

ORDER:

1. I uphold the AGC's decision to deny access to Records 9, 10, 11, 62, 69 – 72, 73, 74, 75 – 81, 85, 87 – 88, 105, 109, 111, 113, 114, 115, 139, 171 – 173 in their entirety, and Records 21 and 22 in part.
2. I order the AGC to disclose the portions of Records 21 and 22 which I have found not to be exempt under section 13(1) to the appellant by **April 7, 2010**. For reasons of clarity, I

have highlighted the information that should **not** be disclosed to the appellant on the copy of the Records that I have enclosed with this order.

3. In order to verify compliance with this order, I reserve the right to require the AGC to provide me with a copy of the portions of Records 21 and 22 disclosed to the appellant.

Original signed by: _____
Stephanie Haly
Adjudicator

_____ March 15, 2010