Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3017

Appeals PA06-308 and PA07-65-2

Ontario Lottery and Gaming Corporation

December 5, 2011

Summary: A broadcast journalist requested information from the Ontario Lottery and Gaming Corporation about insider wins in paper form, and from the OLG's winners' database. The Ontario Provincial Police are conducting an investigation into insider wins. Information relating to charges arising from an insider win is excluded from the scope of the *Act* under section 65(5.2) (records relating to an ongoing prosecution). The application of that section in the circumstances of this appeal is not retroactive. In addition, some information is exempt under section 14(1)(a) (law enforcement), sections 18(1)(c) and (d) (economic and other interests), and 21(1) (personal privacy). Section 23 (the public interest override) applies to some of the information that is exempt under section 21(1). The OLG is ordered to disclose the information that is not exempt, and information that is subject to the public interest override; and to prepare a revised fee estimate; and to provide notice to some individuals for whom section 14 is no longer claimed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (definition of personal information), 14(1)(a), 18(1)(c) and (d), 21(1)(a) and (f), 21(2)(a), (c), (e), (f), (h) and (i), 23, 57(1), 65(5.2).

Orders and Investigation Reports Considered: Orders M-796, M-1033, P-1258, P-984, PO-2085, PO-2465, PO-2556, PO-2607, PO-2657, PO-2664, PO-2703, PO-2789, PO-2791, PO-2812, PO-2991.

Cases Considered: *Ministry of the Attorney General and Toronto Star*, 2010 ONSC 991 (Div. Ct.); *Dell Computer Corp. v. Union des Consommateurs*, 2007 SCC 34; *Niagara Escarpment Commission* v. *Paletta International Corp.,* 2007 CanLII 36641 (Div. Ct.); *Gustavson Drilling*

(1964) Ltd. v. Minister of National Revenue, [1977] 1 S.C.R. 271; *Dikranian* v. *Quebec (Attorney General)*, 2005 SCC 73; *R. v. Puskas*, [1998] 1 S.C.R. 1207; *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.); *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

OVERVIEW:

[1] This order concludes a series of appeals and orders involving a group of requests made by the Canadian Broadcasting Corporation (CBC or "the appellant") to the Ontario Lottery and Gaming Corporation (OLG) for information about lottery wins. These requests and appeals were made under the *Freedom of Information and Protection of Privacy Act* (the *Act*). This order deals with information about "insider" wins, a special category of winner defined by OLG, which includes OLG staff and officials, lottery retailers and their immediate families.

[2] The subject of fraudulent insider wins was dealt with by the CBC television program, *the fifth estate*, in several broadcasts. As a consequence, Ombudsman Ontario (the Ombudsman) launched an investigation that culminated in the publication of a report entitled *A Game of Trust* in March 2007. In the Executive Summary of his report, Ombudsman André Marin included the following comments:

> Without question, insiders have won big over the years. The Corporation confirms that from 1999 to November 2006, at least 78 retail owners and 131 retail employees have won major lottery prizes, and there could be more. Retailers have also no doubt won thousands of smaller prizes. Certainly many of these wins are legitimate, *but it is equally clear that millions of dollars have been paid out in what are dishonest claims*. In 2003 and 2004, the OLG identified five suspicious wins by "insiders" – all of which are detailed in this report – yet only one of the claimants was denied a prize. […]
>
> […]
>
> …[A]lthough some tighter security measures were taken before the fall of 2006, it remains incontrovertible that the OLG was shirking its responsibility in protecting against fraudulent insider wins. […]
>
> [Emphasis added.]

[3] Subsequently, OLG took a number of steps to beef up its investigation of insider wins, as noted by the Ombudsman in his report. In addition, the Ombudsman made a number of recommendations that were implemented by the OLG, including oversight by the Alcohol and Gaming Commission of Ontario.

[4] The two appeals dealt with in this order (PA07-65-2 and PA06-308) pertain to several categories of electronic and paper records relating to insider wins. Appeal PA07-65-2 addresses the portions of the OLG's electronic winners' database that relate to insider winners. In Appeal PA06-308, the CBC requested documents used to verify insider lottery wins, namely: major winner forms; insider win forms; and checklists.

[5] The group of requests submitted by the CBC relating to lottery wins has already resulted in four orders being issued by this office.

[6] In Orders PO-2657 and PO-2664, Assistant Commissioner Brian Beamish ordered partial disclosure of records relating to two specific lottery wins by insiders. In Order PO-2789, Adjudicator Daphne Loukidelis ordered partial disclosure of records relating to a third insider win. In Order PO-2812, issued in Appeal PA07-65, I dealt with the portions of the OLG winners' database relating to winners who had not been identified as insiders.

[7] Both Appeals PA06-308 and PA07-65 went through an initial round of mediation. Following the issuance of Orders PO-2657 and PO-2664, at the request of OLG and the CBC, a second mediation was conducted in relation to Appeal PA06-308 and the portions of the database in PA07-65 that related to insiders. To accommodate this, the insider portions of the records in Appeal PA07-65 were transferred into Appeal PA07-65-2, and the non-insider portions continued to be addressed in Appeal PA07-65. The latter appeal was resolved by Order PO-2812.

[8] During the second mediation, which dealt with Appeals PA07-65-2 and PA06-308, Deloitte Financial Advisory issued a report (the "Deloitte Report") entitled "Ontario Lottery and Gaming Corporation: A data analytic review of lottery transactions."

[9] The Ontario Provincial Police (OPP) are investigating insider wins. The OPP has participated in these appeals by means of representations submitted on its behalf by the Ministry of Community Safety and Correctional Services (the ministry). After the Deloitte Report was issued, the OPP investigation was broadened to include a review of suspicious insider behaviour identified in the Deloitte Report. Because of this, the second mediation did not proceed further. As the CBC wished to pursue access to the withheld portions of the database in Appeal PA07-65-2, and to the records at issue in Appeal PA06-308, these two appeals (which, as noted above, are dealt with in this order) were returned to the inquiry stage of the appeal process.

[10] The representations provided in Appeal PA07-65 address many of the issues that I must decide in this order, given that Appeal PA07-65-2 deals with the "insider" portions of the same database that was at issue in Appeal PA07-65. Accordingly, I have advised the parties that, in deciding this case, I will consider the representations provided in Appeal PA07-65. Representations in Appeal PA07-65 were received from

the OLG, the ministry (on behalf of the OPP) and the CBC. They were exchanged in accordance with Practice Direction 7 issued by this office.

[11] In conducting this inquiry, I invited and received representations concerning Appeals PA06-308 and Appeal PA07-65-2 from the OLG, the ministry and the appellant. The OLG indicated that it claims the section 14 law enforcement exemption for all the records, but takes no position on the application of this exemption for its own part; rather, it effectively adopts the ministry's position in this regard. In its initial representations in these two appeals, the ministry identified a number of insider wins to which the section 14 exemption no longer applies.

[12] I then sent letters providing notice of Appeals PA07-65-2 and PA06-308 to the insider winners who: (1) had claimed lottery a prize; (2) had at that time been identified as winners whose records were not exempt under section 14; and (3) were owners of lottery retail outlets or employees or other individuals who performed services for lottery retailers. For ease of reference, I will refer to these individuals in this order as the "notified insider winners." Only one of these individuals provided representations, in which she stated that she was opposed to information about her being disclosed.

[13] As with Appeal PA07-65, the representations I have received in Appeals PA07-65-2 and PA06-308 were exchanged in accordance with *Practice Direction 7* issued by this office.

[14] In its final representations, the ministry identified additional insider wins to which the section 14 exemption no longer applies. These insider winners have not been notified of these appeals. As outlined in more detail below, this order requires the OLG to provide notice to these individuals and to make access decisions under sections 18(1)(c) and (d), 21(1) and 23, taking their representations and the provisions of this order into account.

Details of the two appeals

Appeal PA07-65-2

[15] This appeal arises from a request for access by the CBC to "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 CBC's request was for information relating to winners from 1992/1993 to the date of the request. The request specifically asked for:

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

[16] 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].

[17] The CBC does not seek access to de-identified data.

[18] 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.

[19] 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.

[20] The CBC requested a fee waiver. Subsequently, the OLG wrote to the CBC denying the request for the fee waiver and reducing its fee to $1,380.00. During adjudication, the OLG reduced this fee by a further $300.00, so the amount currently claimed is $1,080.00. The amount of the fee remains an issue, but the CBC withdrew its appeal pertaining to fee waiver. The OLG also withdrew its reliance on section 18(1)(a).

[21] The OLG issued a further decision letter in which it claimed the application of section 14(1) (law enforcement) for some parts of the database. 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 these exemptions were 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.

[22] In addition, the CBC claims that, pursuant to section 23 of the *Act*, there is a compelling public interest in disclosure that outweighs the purpose of the section 18(1)(c) and (d) and section 21(1) exemptions.

[23] As already discussed, following the issuance of Orders PO-2657 and PO-2664, the parties asked that the portions of the database that relate to insider winners be returned to the mediation stage. As a result, Appeal PA07-65-2 was opened to deal with the insider winners. Portions of the database concerning non-insiders were at issue in Appeal PA07-65, and these were dealt with in Order PO-2812.

Appeal PA06-308

[24] This appeal involves requests by the CBC for paper records relating to insider winners who won prizes between 1995 and 2006. In particular, the CBC requested all insider win paper forms from 1995 to the date of the request as well as all statistics, checklists and other paper documentation regarding insider wins in the stated time period. Again, the CBC does not seek access to de-identified data.

[25] The OLG located responsive records and issued a decision providing full access to some of them, and partial access to other records. Severances were made under section 21(1) of the *Act* (personal privacy). The records remaining at issue consist of major winner forms, insider win forms and check lists for insider wins from 1995 to the date of the request. In these records, the OLG has disclosed only the amount of the prize claim, the date the OLG received the claim, the winner's affiliation to the OLG and whether it is a group win or a single win. Most of the information in these records, including the winners' names, has not been disclosed and remains at issue.

[26] At the close of the second mediation, the possible application of section 14 (law enforcement) and section 18 (economic and other interests), had been added to this appeal. The late raising of these exemptions is also an issue.

[27] Although the CBC initially advised that it was appealing the fees charged by the OLG, and its refusal to grant a fee waiver, it subsequently withdrew these aspects of Appeal PA06-308.

Summary of Conclusions

[28] In this order, I have made the following determinations:

- information about an insider win that is the subject of ongoing criminal charges is excluded from the scope of the *Act* under section 65(5.2), and the application of this section is not retroactive;

- the late raising of sections 14(1)(a), (b) and (f) and section 18(1)(c) and (d) is permissible in the circumstances of these appeals; and

- information concerning insider wins for which the ministry continues to support the application of section 14(1)(a) is exempt under that section.

[29] With respect to records that pertain to the lottery wins of the notified insider winners (who, as outlined in paragraph 12, are individuals for whom section 14 is no longer claimed), I have made the following further determinations:

- the information that the OLG claims is exempt in the winners' database under sections 18(1)(c) and (d) in Appeal PA08-65-2 is exempt under those sections, and some related information in the paper records at issue in Appeal PA06-308 is also exempt under those sections;

- all of the personal information in the records, with the exception of the names of insider winners and their prize amounts in the winners' database, is exempt under section 21(1); and

- in Appeal PA06-308, some personal information of the notified insider winners that is not exempt under sections 18(1)(c) and (d) is to be disclosed to the CBC under the public interest override at section 23.

[30] In addition:

- the OLG is ordered to provide notice under section 28 of the *Act* to insider winners identified in the records who have *not* been notified of these appeals and who: (1) have claimed lottery prizes; (2) have now been identified as winners whose records are not exempt under section 14; and (3) were owners of lottery retail outlets or employees or other individuals who performed services for lottery retailers, or employees of the OLG; and to issue a further access decision in accordance with section 28, taking into account any representations it may receive from these individuals, as well as the findings I have made in this order under sections 18(1)(c) and (d), 21(1) and 23; and

- the OLG must issue a new fee estimate relating to the information actually being disclosed in Appeal PA07-65-2, and that fee may be appealed by the CBC without paying an additional appeal fee, even if the CBC decides to pay the fee and obtain access to the records.

RECORDS:

[31] The records at issue in Appeal PA07-65-2 are the parts of the OLG's electronic database to which the CBC continues to seek access, and for which access has been denied by the OLG, that relate to insider winners.

[32] The records at issue in Appeal PA06-308 are the undisclosed portions of major winner forms and insider win forms and checklists relating to insider lottery wins from 1995 to the date of the request. A "major win" is a lottery prize of $50,000 or more. An "insider win" is a lottery prize of $10,000 or more that is won by an individual affiliated with the OLG.

ISSUES:

A. Does the exclusion for records relating to an ongoing prosecution in section 65(5.2) of the *Act* apply?

B. Should the late raising of discretionary exemptions be permitted?

C. Do the law enforcement exemptions in sections 14(1)(a), (b) and (f) apply?

D. Do the exemptions relating to economic or other interests in sections 18(1)(c) and (d) apply?

E. Do the records contain personal information?

F. Does the personal privacy exemption in section 21(1) apply?

G. Is there a compelling public interest in disclosure that outweighs the purpose of the exemptions in sections 18(1)(c) and (d), or section 21(1), as contemplated in section 23?

H. Should the OLG's exercise of discretion under sections 14 and 18 be upheld?

I. Should the fee in Appeal PA07-65-2 be upheld?

DISCUSSION:

A. Does the exclusion for records relating to an ongoing prosecution in section 65(5.2) of the *Act* apply?

[33] Section 65(5.2) states:

> This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

[34] The purposes of section 65(5.2) include maintaining the integrity of the criminal justice system, ensuring that the accused and the Crown's right to a fair trial is not infringed, protecting solicitor-client privilege and litigation privilege, and controlling the dissemination and publication of records relating to an ongoing prosecution.[1]

[35] The term "prosecution" in section 65(5.2) of the *Act* means proceedings in respect of a criminal or quasi-criminal charge laid under an enactment of Ontario or Canada and may include regulatory offences that carry "true penal consequences" such as imprisonment or a significant fine.[2]

[36] The words "relating to" require some connection between "a record" and "a prosecution." The words "in respect of" require some connection between "a proceeding" and "a prosecution."[3]

[37] Only after the expiration of any appeal period can it be said that all proceedings in respect of the prosecution have been completed. This question will have to be decided based on the facts of each case.[4]

[38] In its representations in Appeals PA07-65-2 and PA06-308, the ministry submitted that records pertaining to an individual against whom criminal charges had been laid, and which were ongoing, were excluded from the *Act* under section 65(5.2). In both cases, this submission appears in an affidavit by the OPP's case manager for investigations of OLG insider lottery wins. In later representations, the ministry subsequently advised that the prosecution of that individual has been completed, and there are no longer any law enforcement reasons to withhold records pertaining to him. However, the ministry indicates that criminal charges have now been laid in relation to one additional insider win, and those prosecutions are ongoing.

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[1] *Ministry of the Attorney General and Toronto Star*, 2010 ONSC 991 (Div. Ct.) ("*Toronto Star*").
[2] Order PO-2703.
[3] *Toronto Star*, cited at footnote 1. See also *Canada (Information Commissioner) v. Canada (Commissioner, RCMP)*, 2003 SCC 8, [2003] 1 S.C.R. 66 at para. 25.]
[4] Order PO-2703.

Retroactivity/Retrospectivity

[39] The CBC submits that, because it made its requests before the *Act* was amended to include section 65(5.2), and because the amendment was not retroactive, section 65(5.2) cannot apply. The CBC relies on Order P-1258 in this regard.

[40] In Order P-1258, and also in Order M-1033, the requests were submitted after amendments were made to the *Act* and its municipal equivalent, the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*), which excluded certain categories of records from their scope. Both orders therefore concluded that the amendments applied. Those cases are both distinguishable, since in the present appeals, the requests were submitted before the legislative change occurred.

[41] However, Orders P-1258 and M-1033 both assume that, if the requests had been filed prior to the amendments in question, the law as it existed on the date of the requests would govern. Given that in both cases, the amendment in fact predated the filing of the request, these statements were *obiter*.

[42] Order M-796 declined to apply the same exclusion dealt with in Order M-1033, on the basis that the appeals were already underway when the amendment to the *Act* was made. It also assumed that amendments made after the date of the request should not be considered in the context of an appeal. In that order, however, the Toronto District School Board expressly argued that the newly enacted exclusion should apply retrospectively; in other words, that it should apply in a situation where all of the events necessary for the amendment to apply occurred before it came into force.

[43] In the appeals under consideration in this order, the requests were made before the amendment adding section 65(5.2) to the *Act* became law and the appeals were also filed before this legislative change took place. However, the ongoing criminal charges referred to above were laid *after* the amendment took place. The laying of the charges is a condition precedent to the application of section 65(5.2). This fact situation distinguishes this case from Order M-796, which therefore must be reviewed under the law governing the temporal application of legislation.

[44] The law presumes that legislation is intended to apply prospectively, rather than retroactively or retrospectively, and presumes further that it is not intended to interfere with vested rights.[5]

[45] "Retroactive" has been defined as "new legislation . . . applied so as to change the past legal effect of a past situation," while "retrospective" is defined as "new legislation . . . applied so as to change only the future effect of a past situation."[6]

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[5] R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008) ("*Sullivan*") at 669-70.
[6] *Sullivan* at 673.

[46] Accordingly, it is necessary to address two questions in order to deal with this issue:[7]

> (1) Would applying section 65(5.2) to exclude records relating to the ongoing prosecution in this case be a retroactive or retrospective application?
>
> (2) Would applying section 65(5.2) interfere with vested rights of the appellant?

[47] I will address these questions in turn.

Would applying section 65(5.2) to exclude records relating to the ongoing prosecution in this case be a retroactive or retrospective application?

[48] With respect to retroactivity, there is a strong presumption that legislation is not intended to have retroactive application unless the legislation contains language clearly indicating that it, or some part of it, is meant to apply retroactively or unless the presumption is rebutted by necessary implication.[8]

[49] The effect of an amendment is addressed as follows in section 52 of the *Legislation Act, 2006*:

> 52(1) This section applies,
> …
>
> (c) if an Act or regulation is amended.
>
> …
>
> (3) Proceedings commenced under the former Act or regulation shall be continued under the new or amended one, in conformity with the new or amended one as much as possible.
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> (4) The procedure established by the new or amended Act or regulation shall be followed, with necessary modifications, in proceedings in relation to matters that happened before the replacement or amendment.

[50] In this case, where the requests were filed and the appeals commenced prior to the coming into force of section 65(5.2), section 52(3) of the *Legislation Act* suggests that the appeal should be decided in conformity with the statute as amended. Under the common law of retroactivity, it is also significant that the events giving rise to the application of section 65(5.2) occurred after that section came into force.

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[7] See Order PO-2991.
[8] *Sullivan* at 679.

[51] In *The Interpretation of Legislation in Canada,*[9] Pierre-André Côté sets out a three-part analysis to determine whether legislation is being applied retroactively. The three-part test involves the identification of the legal facts to which legal consequences attach; the temporal positioning of these facts to determine whether they occurred before, during or after the commencement of the legislation; and determining whether the legislation applies a legal framework to facts that have arisen entirely before its commencement.

[52] As already noted, one of the conditions precedent for the application of section 65(5.2) is the commencement of a prosecution by laying charges. In this situation, I conclude that:

- under section 65(5.2), the "legal fact" to which consequences attach is the laying of criminal charges;
- the charges were not laid until after the amendment adding this section to the *Act* came into force; and
- for this reason, despite the fact that the requests and appeals were filed before section 65(5.2) came into force, the legal framework is not being applied to facts that "arose entirely before" the commencement or coming into force of the amendment adding section 65(5.2).

[53] Accordingly, I conclude that applying section 65(5.2) in this case is not a retroactive application. As stated in *Côté:*[10]

> The courts have often held that a statute cannot be called retroactive merely because some facts necessary for its application have occurred prior to its commencement. *When facts subsequent to commencement are required for the statute to apply, there is no retroactivity*.

[54] In its representations on this issue, the CBC mentions *Dell Computer Corp. v. Union des Consommateurs,*[11] without making a specific argument as to how it applies here. In my view, that case is distinguishable. It considers a statutory amendment that was cited in an attempt to defeat a previously established contractual right of arbitration. As all necessary elements to establish the right to binding arbitration had already occurred before the amendment took effect, this would have been a clear retroactive application, which the Supreme Court of Canada rejected. By contrast, I

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[9] Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (Quebec: Les Éditions Yvon Blais, Inc., 1991) ("*Côté*") at 118-120.
[10] at 124.
[11] 2007 SCC 34.

have concluded that in the circumstances of these appeals, the application of section 65(5.2) would not be retroactive.

[55] *Dell Computer* is also distinguishable because it addressed the question of whether the arbitration proceedings could occur at all. Unlike the situation in *Dell Computer*, the appeals under consideration in this order have proceeded. The impact of section 65(5.2) relates to whether access can be granted under the *Act*, not to the jurisdiction of this office to conduct an inquiry into that question.[12]

[56] Turning to the question of retrospectivity, it is also significant that the criminal charges were not laid until after section 65(5.2) came into force. Accordingly, the "situation" giving rise to the application of this section did not exist until after it came into force, and applying it to preclude the appeals in this case does not "change the future effect of a past situation" and is therefore not a retrospective application.

Would applying section 65(5.2) interfere with vested rights of the appellant?

[57] It is presumed that the Legislature does not intend legislation to be applied in circumstances where its application would interfere with vested rights.[13]

[58] This presumption may result in the continued application of legislation that existed at the time the rights of the individual crystallized.[14]

[59] Unlike the presumption against retroactive application, the presumption of non-interference with vested rights is weaker and, in some contexts, easily rebutted.[15] This is because most legislation affects rights which would have been in existence but for the legislation. In *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue,*[16] the Supreme Court of Canada stated that "most statutes in some way or other interfere with or encroach upon antecedent rights."

[60] There are no vested rights in matters that are merely procedural. In determining whether the amendment adding section 65(5.2) to the *Act* interferes with vested rights, I must begin by considering whether the amendment is procedural in nature.

[61] Legislation is purely procedural if it affects only the means of exercising a right. If the application of the legislation makes exercising a right practically impossible, it is

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[12] See *Ontario (Minister of Health v. Big Canoe)*, [1995] O.J. No. 1277.
[13] *Sullivan* at 711.
[14] *Côté* at 105 and 140.
[15] *Niagara Escarpment Commission* v. *Paletta International Corp.,* 2007 CanLII 36641 (Div. Ct.), at paras. 42-43.
[16] [1977] 1 S.C.R. 271 at 282.

not purely procedural.[17] In my view, the addition of section 65(5.2) to the *Act* was not merely procedural in nature, as it removes a specified class of records from the scope of the *Act*.

[62] Where an amendment is not merely procedural, two further requirements must be met to establish that it interferes with vested rights: (1) the legal situation of the requester must be tangible and concrete, and (2) it must also be sufficiently constituted at the time of the commencement of the amendment.[18]

[63] Under the first of these requirements, in order to be tangible and concrete, it is insufficient that members of the public or a certain segment of the public may take advantage of the legislation that was repealed or revoked. The individual must have taken steps towards availing himself or herself of that right.[19]

[64] In my view, the appellant has satisfied this requirement by making written requests to the OLG for access to records. In doing so before the amendment adding section 65(5.2) to the *Act* came into force, the appellant acquired a specific right, as opposed to the general right of a member of the public to avail himself or herself of the *Act*. The appellant was in a distinct legal position from other members of the public.

[65] This leads to the second requirement, namely, whether the legal situation of the appellant was sufficiently constituted or crystallized at the time of the coming into force of section 65(5.2).[20] In order to have a vested right, the legal situation must have inevitability and certainty.[21]

[66] The Supreme Court of Canada's decision in *R.* v*. Puskas*[22] ("*Puskas*") provides guidance in this situation. This case related to *Criminal Code* amendments that eliminated the right of two criminal accused to appeal to the Supreme Court of Canada as of right. Under the former law, that right accrued if their acquittals or a stay of proceedings were overturned by a Court of Appeal and new trials were ordered. The Supreme Court ruled that the right to appeal did not vest until the judgment appealed from was rendered by the court below. In particular, it held that:

> . . . a right cannot accrue, be acquired, or be accruing until all conditions precedent to the exercise of the right have been fulfilled.
>
> Under the former s. 691(2) of the *Code*, there were a number of conditions precedent to the acquisition of the right to appeal to this Court

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[17] *Côté* at 163.
[18] *Dikranian* v. *Quebec (Attorney General)*, 2005 SCC 73 at para. 37-38; *Côté* at 144.
[19] *Dikranian* at para. 39; *Côté* at 144.
[20] *Dikranian* at para. 37.
[21] *Niagara Escarpment Commission* (see citation at footnote 15, above) at para. 42.
[22] [1998] 1 S.C.R. 1207.

> without leave. The first is that the accused is charged with an indictable offence. The second is that he is acquitted of that offence at trial. The third is that the acquittal must be reversed by the Court of Appeal, and the fourth is that the Court of Appeal order a new trial. Until those events occur, the accused does not acquire the right to appeal to this Court without leave, nor does it accrue, nor is it accruing to him or her.[23]

[67] Therefore, before a right can be said to have vested, all the conditions precedent required for the right to be exercised must have been completed before the amendment came into force.

[68] As in *Puskas*, there are a number of conditions precedent that must be satisfied in order to receive access to records that have been requested under the *Act*. The requester must have made a written request for access to an institution [section 24(1)(a) and (b) of the *Act*]; the requester must have paid the prescribed fees [sections 24(1)(c) and 57, as applicable]; and a decision must have been made by the head of an institution or, on appeal, by this office, to grant access to the record [section 50(1)]. Until all of these conditions precedent are satisfied, the right to obtain a record requested under the *Act* does not vest. Because the OLG denied access to the record, and no decision reversing that decision had been made, the appellant did not have an existing right of access on the date of the amendment, and its legal situation was therefore not sufficiently constituted at the time when section 65(5.2) came into force as to form a vested right of access.

[69] In the recent case of *Niagara Escarpment Commission,*[24] the Divisional Court also considered the issue of vested rights. The respondent, Paletta, had submitted a draft plan of subdivision application, and requested that it be referred for a hearing before the Ontario Municipal Board (the Board). After its request for a referral was made, the *Niagara Escarpment and Development Act* (the NEPDA) was amended in a manner that altered the Board's jurisdiction to hear the matter. The Divisional Court found that Paletta did not have a vested right to a hearing. The Court stated:

> Paletta takes the position that once it made a bona fide request to have its application referred to the Board in 1998, it had a vested or accrued or accruing right to a hearing…. Therefore, Paletta submits, this Court should not interfere with the Board's decision to proceed with a hearing, even though the Board did not address either [the amendment in question, found in] s. 24(3) of the NEPDA or vested rights, as the Board nevertheless had jurisdiction to proceed.

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[23] *Puskas* at paras. 14-15.
[24] cited at footnote 15, above.

For reasons that follow, I find that Paletta did not have a statutory or common law vested, accrued or accruing right to a hearing and determination by the Board.

…

Accrued or vested rights must have inevitability and certainty. In the words of the Supreme Court in *Dikranian*, supra, they must have "crystallized". While a party may claim it has an accruing right, it can do so only "if its eventual accrual is certain and not conditional on certain events" ([*Puskas*] at para. 14).

Professor Ruth Sullivan has observed that the presumption that the legislature does not intend to interfere with vested rights is weaker than the presumption against retroactive application of legislation and, in some contexts, "easily rebutted" (R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Butterworths, 2002) at p. 546). Ultimately, she suggests, the courts are concerned about unfairness when determining whether there is an interference with accrued or accruing rights.

Paletta claims that it has a right to a hearing and determination by the Board because it requested a referral to the Board under s. 51(15) of the *Planning Act* before the NEPDA was amended in 1999. …

…

Paletta claims that it is in the same position as the female complainants in *Bell Canada v. Palmer*, [1974] 1 F.C. 186 (C.A.) where the Federal Court of Appeal held that they had an accrued right to pursue an equal pay claim. There, the complainants had launched an equal pay complaint and a referee had been appointed to determine the complaint. After their complaint, the legislation was changed to remove the right to an order for compensation if an equal pay complaint succeeded. As well, the referee procedure was abolished. The Court held that the complainants had an accrued right to equal pay, as provided by the statute that they had sought to enforce. They had taken the only procedural step they had to take – namely, a complaint to the Minister seeking the appointment of a referee. In these circumstances, they had an accrued right to pursue the complaint under the previous procedure and in light of the law as it stood before the amendments (at paras. 13 and 15).

In my view, that case is distinguishable. There, the complainants had accrued a substantive right under the statute and commenced the

> procedure to enforce the right. Here, Paletta had no similar vested, accrued or accruing substantive right to approval of its subdivision plan at the time of the legislative amendment to the NEPDA.
>
> At most, Paletta had a hope or expectation that its application might be approved by the Board….
>
> …
>
> *There is no vested or accrued right to approval of a plan of subdivision until the Board has made a determination, nor can there even be said to be an accruing one here, when the Board has not begun the actual hearing process*.
>
> …
>
> The referral to the Board for a hearing is not an appeal right, as in *Puskas*. There has been a referral to the Board to determine whether an application for subdivision should be approved, a decision that would be made on the basis of applicable statutory principles and planning policies.
>
> In my view, the requirement to obtain development permits pursuant to s. 24(3) of the NEPDA before a hearing and decision by the Board does not violate any vested, accrued or accruing right of Paletta.[25] [Emphasis added.]

[70] In my view, given that the appellant's right of access had not yet been determined in this appeal, in circumstances where the OLG had denied access to the relevant information and the matter was yet to be adjudicated by this office, the CBC did not have a vested right of access under the *Act*.

[71] Accordingly, I conclude that applying section 65(5.2) to records that relate to an ongoing prosecution, even where the charges are laid after the date of the request, or after the filing of an appeal, would not offend the presumption against vested rights.

[72] Therefore, and in view of the authorities cited above, to the extent that allowing the consideration of section 65(5.2) in the circumstances of these appeals is not in accordance with the views expressed in Orders P-1258, M-796 and M-1033, I decline to follow them.

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[25] *Niagara Escarpment Commission* (cited above at footnote 15) at paras. 34, 35, 43, 44, 45, 46, 47, 52, 55 and 56.

[73] In my view, as noted above, this outcome is consistent with section 52(3) of the *Legislation Act, 2006*, quoted above, which provides that "[p]roceedings commenced under the former Act or regulation shall be continued under the new or amended one, *in conformity with the new or amended one as much as possible*." (Emphasis added.)

[74] This outcome also respects the important purposes behind the addition of section 65(5.2) to the *Act*, as discussed by the Divisional Court in *Toronto Star.*[26] The Court stated that:

> The purposes of s. 65(5.2) . . . include maintaining the integrity of [the] criminal justice system and ensuring that the accused and the Crown's right to a fair trial is not infringed, protecting solicitor-client and litigation privilege, and controlling the dissemination and publication of records relating to an ongoing prosecution.

[75] It is also consistent with the decision of the Court of Appeal in *Ontario (Solicitor General) v, Ontario (Information and Privacy Commissioner,*[27] where the Court relied on section 14(1)(f) (right to a fair trial) to quash an order of this office and deny access to a report about wrongdoing at a training school in circumstances where criminal charges were laid after this office had issued its order, but before the matter was heard by the Divisional Court.

[76] For all these reasons, I conclude that the application of section 65(5.2) in these appeals would not be retroactive or retrospective, nor would it offend the presumption against interference with vested rights.

Does section 65(5.2) apply to the records at issue that pertain to insider winners who are subject to an ongoing prosecution?

[77] As already noted, in its decision in the *Toronto Star* case,[28] the Divisional Court has determined that, in order for section 65(5.2) to apply, there must be "some connection" between the records and an ongoing prosecution.

[78] In its representations in Appeal PA07-65, the ministry argued that section 65(5.2) applied to the records concerning an insider win that had resulted in the laying of criminal charges. The prosecution of this individual is now complete, but in its final representations in the appeals under consideration in this order, the ministry states that charges have been laid as a result of another insider win, and that matter is ongoing. The ministry does not expressly claim that section 65(5.2) applies to these records.

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[26] cited above at footnote 1.
[27] [1993] O.J. No. 2556, leave to appeal refused [1993] S.C.C.A. No. 560.
[28] cited above at footnote 1.

[79] However, the ministry also submits, in both appeals, that records at issue "constitute a portion of the evidence with respect to the ongoing OPP investigations." In confidential representations, the ministry also explains the relationship between the records and the ongoing prosecution of criminal charges in connection with an insider win.

[80] Other than stating that it takes no position on the application of this section in its representations in Appeal PA06-308, the OLG has not provided representations on this issue.

[81] Regardless of the position taken by the OLG or the ministry, if the evidence demonstrates that this provision applies to records, they are not accessible under the *Act*.

[82] The CBC submits that section 65(5.2) cannot apply because the records were created by the OLG for its own purposes and not for any prosecution. The CBC also refers to Orders PO-2657 and PO-2664, and notes that the records were generated by the OLG at a time when criminal charges were not considered, rather than being created by the OPP for the purposes of the prosecution.

[83] The CBC also argues that, if section 65(5.2) applies, it should only apply to records that pertain to insider wins that are the subject of a prosecution. At the time of the ministry's final representations, only one insider win was the subject of criminal charges. Consistent with the position taken by the CBC, the ministry has never argued that this provision applies to any records relating to insider wins other than those that are the subject of an ongoing prosecution. I conclude that the provision can only apply to records about an insider win that relates to an ongoing prosecution, and only one such prosecution has been identified.

[84] The CBC also refers to Orders PO-2703 and PO-2791,[29] which refer to records originally prepared for purposes other than a prosecution. The CBC concedes that both orders were decided before the decision of the Divisional Court in *Toronto Star,*[30] but argues that the distinction between materials created for a prosecution and those created for other purposes is consistent with that decision. The CBC also submits that, even applying the "somewhat revised" test for section 65(5.2) established in that case, the records are not excluded under that provision.

[85] The CBC also argues that the purposes of section 65(5.2) identified in *Toronto Star*, which I have quoted above at paragraph 74, are not engaged.

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[29] The CBC actually cites Order PO-2719, but this order does not address section 65(5.2); it is apparent that the CBC intended to refer to Order PO-2971.
[30] cited above at footnote 1.

[86] With respect to the CBC's submissions that records which were not prepared specifically for the prosecution itself, but for some other purpose, and its argument that the records in this case do not engage the purposes for which section 65(5.2) was enacted (as identified in *Toronto Star*), I note that in its decision in that case, the Divisional Court upheld the application of this provision to "ministerial briefing notes concerning the handling and progress of the prosecution." Arguably, such records were not prepared specifically for the purpose of the prosecution, and in my view, this is an indication of the Court's view of how broadly this provision should be applied.

[87] Moreover, and in any event, based on the ministry's statement that the records form part of the evidence considered in its criminal investigation, and based on its confidential representations concerning the use of the records in both appeals in the ongoing prosecution of criminal charges, I find it reasonable to conclude that there is "some connection" between the records and the ongoing prosecution arising from the insider win identified by the ministry in its most recent representations. Accordingly, I find that section 65(5.2) applies to the records at issues in both appeals that pertain to that particular win, and they are excluded from the scope of the *Act*. I therefore uphold the OLG's decision to deny access to those records.

[88] As a consequence of this determination, it is not necessary to consider whether section 14(1)(f) (right to a fair trial) applies, as its potential application is limited to these same records.

B. Should the late raising of discretionary exemptions be permitted?

[89] 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:

> 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. [31]

[90] This issue arises in several ways in these appeals.

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[31] 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.).

[91] In Appeal PA07-65-2, the OLG originally relied on sections 18(1)(a) and (d) and section 21(1). After the 35-day time frame for claiming additional exemptions had expired, the OLG dropped its reliance on section 18(1)(a) but added exemption claims under sections 14(1)(a), (b) and (f) and section 18(1)(c), and sought to expand its claim under section 18(1)(d) to encompass additional information.

[92] In Appeal PA06-308, the OLG originally relied on section 21(1). Following the end of the second mediation, and therefore also after the expiry of the 35-day time frame, the OLG issued a new decision relying on sections 14 and 18.

Sections 18(1)(a) and (c)

[93] I have already addressed the late claim for section 18(1)(c) and (d) in Order PO-2812, issued in Appeal PA07-65. I stated:

> 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.

[94] The CBC indicates that, with respect to the issue of late raising, it relies on its previous submissions on this subject in Appeal PA07-65. I took these submissions into account in Order PO-2812. In my view, as regards the disposition of this issue with respect to sections 18(1)(c) and (d), there is no material difference between the records at issue in Appeal PA07-65, addressed in Order PO-2812, and the records at issue in this order. I therefore reach the same conclusion on this issue as in Order PO-2812, for the reasons articulated there. I will therefore consider whether sections 18(1)(c) and (d) apply to the information for which the OLG has claimed them.

Sections 14(1)(a), (b) and (f)

[95] The late raising of sections 14(1)(a), (b) and (f) was not addressed in Order PO-2812 because those exemptions were not claimed for the portions of the winners' database that were addressed in that order, namely those portions relating to winners

who had not been identified as insiders. In view of the determination I have made concerning section 65(5.2), and the fact that it is not necessary to consider section 14(1)(f) as a consequence, I will confine my analysis to the late raising of sections 14(1)(a) and (b).

[96] In its representations, the OLG notes that the OPP investigation of insider winners was launched after its initial decision, and although it took several months to do so, it later raised the potential application of this exemption in Appeal PA07-65 (and, by extension, in Appeal PA07-65-2). It submits that:

> … the nature of the interest protected by section 14 weighs heavily in favour of hearing its claim to the exemption. There is an important public interest in the protection of the OPP's investigation that would potentially be prejudiced if the OLG's claim to the exemption … is not heard.

[97] The OLG also submits that the late raising of this exemption did not delay the completion of the appeal.

[98] In Appeal PA06-308, the OLG claimed the section 14 exemption following the completion of the second mediation. While the OLG did not specifically provide representations on the late raising of this exemption in Appeal PA06-308, the nature and importance of the interests protected by this exemption is underscored by the representations provided by the ministry on behalf of the OPP.

[99] The CBC's representations allege that the "continuing change of the OLG's position" caused prejudicial delay, necessitating modifications to the Notice of Inquiry, and that this also caused interference with the mediation process. The CBC also submits that the OLG's changing position amounts to a pattern of behaviour that "evidences an intention to delay the appeal process."

[100] A complete review of the history of these appeals makes it clear that the process was not delayed by the late raising of this exemption. In fact, at the relevant time, both appeals were delayed by the mutual decision of the parties to seek a second round of mediation following the issuance of Orders PO-2657 and PO-2654, and by the notification of affected parties (the notified insider winners) following the second mediation. The need to invite representations on section 14 following the decision to raise it in both appeals did not contribute in any significant way to the time required to resolve them.

[101] I am also satisfied that the law enforcement interests protected by section 14 were raised and discussed during the second mediation, and in fact, it was these concerns that led to the decision to abandon the second mediation and return the matters to the adjudication stage.

[102] Most importantly, I agree with the OLG that, in the circumstances of this case, the law enforcement interests protected by sections 14(1)(a) and (b) are of significant importance, and that these exemption claims should be heard in both appeals. The importance of ensuring the integrity of the OLG's lotteries is an important public interest identified in the Ombudsman's report, and it was also an important purpose behind the Deloitte report. Protecting information whose disclosure could reasonably be expected to prejudice law enforcement investigations of insiders, or the ability to prosecute fraudulent insider winners, is a crucial aspect of ensuring that integrity.

[103] Accordingly, I will consider the potential application of sections 14(1)(a) and (b) in these appeals.

C. Do the law enforcement exemptions in sections 14(1)(a) and (b) apply?

[104] As already noted, the OLG relies on sections 14(1)(a) and (b) with respect to parts of the database in Appeal PA07-65-2 and the records at issue in Appeal PA06-308. The OLG states that the OPP is in the best position to provide representations concerning these exemptions. In effect, the OLG adopts the ministry's position with respect to section 14. The ministry indicates that it is no longer necessary to rely on section 14 with respect to a number of insider wins, including those of the notified insider winners. The ministry subsequently expanded this group to include additional insider winners.

[105] Sections 14(1)(a) and (b) state:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result.

[106] The ministry's representations also appear to raise the possible application of section 14(1)(l), but in view of my findings below, it is not necessary to address this section.

[107] The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

> "law enforcement" means,

> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
>
> (c) the conduct of proceedings referred to in clause (b)

[108] The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law that could lead to court proceedings [Orders M-16, MO-1245].
- a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085].
- a children's aid society investigation under the *Child and Family Services Act* which could lead to court proceedings [Order MO-1416].

[109] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[32]

[110] Where section 14 uses the words "could reasonably be expected to," 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.[33] Although the expectation of harm must be reasonable, it need not be probable.[34]

Section 14(1)(a)

[111] This exemption applies where disclosure could reasonably be expected to interfere with a law enforcement matter.

[112] Previous orders have determined that the "matter" in question must be ongoing or in existence. The exemption does not apply where the matter is completed, or

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[32] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[33] Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.); *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[34] *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.) at para. 60.

where the alleged interference is with "potential" law enforcement matters.[35] The institution holding the records need not be the institution conducting the law enforcement matter for the exemption to apply.[36]

[113] In *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, the Divisional Court determined that the term "matter" may extend beyond a specific investigation or proceeding.[37]

[114] With respect to the database records, the ministry submits that:

- the database records are an investigative resource that is actively being used by OPP investigators to determine patterns of play associated with lottery ticket insider wins, and an important source of evidence in the event that charges are laid;

- the focus of the OPP investigation is to determine whether there have been any violations of the *Criminal Code* or any other law in connection with the lottery insider wins under investigation;

- release of information pertaining to such wins has the potential to reveal detailed evidence that could frustrate the ability of the OPP to continue their investigation of insider wins;

- individual insider win cases under investigation cannot be considered in isolation from the investigation as a whole;

- records have been provided by the OLG to the OPP for the purposes of the investigation, including records containing information that is also contained in the database;

- although the database has not been given to the OPP, it has been provided with the source documents from which the information derives; and

- the public dissemination of information must be carefully managed in order to achieve the objective of facilitating the investigation.

[115] Referring to *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*,[38] the ministry submits that:

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[35] Orders PO-2657, PO-2085 and MO-1578.
[36] Order PO-2085.
[37] cited above at footnote 34.
[38] cited above at footnote 34.

> The interpretation of section 14(1)(a) was recently considered … in relation to a request to the ministry for access to firearms databases maintained by the OPP. Referencing the Supreme Court of Canada's decision in *Heinz*[39] that the "plain and ordinary meaning of the word, 'matter' is very broad", the Court found that the IPC's interpretation of the word "matter" for the purposes of section 14(1)(a) was too narrow. The Court concluded that a law enforcement matter "… does not necessarily always have to apply to some specific ongoing investigation or proceeding." The Ministry submits that the investigation undertaken by the OPP Criminal Investigation Branch in relation to lottery insider wins between 1999 and 2007 is an ongoing law enforcement matter and investigation. The individual lottery ticket insider win cases that [comprise] the matters under investigation cannot be considered in isolation from the investigation as a whole. The investigation will continue until all investigative avenues have been exhausted.

[116] The ministry subsequently provided additional representations in Appeals PA07-65-2 and PA06-308, accompanied by affidavits, to support its claim that the records pertaining to insider wins that are under investigation by the OPP are exempt under section 14(1)(a) and other exemptions. The affidavits were sworn by an OPP Staff Sergeant, who is the case manager assigned to the ongoing police investigation into OLG insider wins. The investigation is being conducted by the OPP's Investigation and Enforcement Bureau.

[117] The affidavits refer to the Deloitte Report, which was issued after the ministry provided its representations in Appeal PA07-65. The affidavits state that:

> The Deloitte Report reviewed the [OLG]'s winner database between July 1, 1995 and June 16, 2008. The report identified suspicious criminal and regulatory infractions across a database that included in excess of 10,000 [OLG] retailers. As a result of the Deloitte Report, the OPP Investigation and Enforcement Bureau has broadened its investigation to review the suspicious behaviour identified in the Deloitte Report and conduct criminal and regulatory investigations where warranted. …

[118] The affidavit provided in Appeal PA07-65-2 goes on to make the following further statement concerning the database records:

> While previous representations by the Ministry indicated that at that particular time "investigative harms were unlikely to be associated with disclosure of 1993 to 1998 [OLG] winner's database records," for the reasons set out in this affidavit, the Ministry's position has changed as a

[39] *H.J. Heinz of Canada Ltd. v. Canada (Attorney General)*, [2006] 1 S.C.R. 441.

> result of such new ongoing law enforcement investigations as a result of the Deloitte Report. Therefore the OPP Investigation and Enforcement Bureau requests that the law enforcement exemptions to disclosure under [the *Act*] that were previously claimed continue to be applied to the records in respect of insider winners in the [OLG] winner's database from and after July 1, 1995.

[119] The affidavits also state that the records at issue in both appeals "constitute a portion of the evidence with respect to the ongoing OPP investigations," and reiterate that "[d]isclosure of the records … while investigations are ongoing would also reveal detailed evidence that would interfere with and cause harm to the OPP investigations and could frustrate the ability of the OPP to continue these investigations."

[120] The affidavits continue:

> Release of the records would reveal the specific facts and records the OPP is examining and would likely taint potential witnesses and/or suspects, providing them with facts and information they might not otherwise have knowledge of. … Potential suspects would have the opportunity to study the information in the disclosed records and would thereby be able to provide answers to questions they would not otherwise be able to answer and to collude with each other in developing a consistent position with respect to the facts under investigation. This would defeat the investigative and interview process.

[121] In response to the representations of the ministry, the CBC submits that:

- the fact that an investigation is ongoing is not sufficient in itself to establish that the law enforcement exemptions apply;
- the information in the database that has actually been given to the OPP is not identified;
- the information provided by the ministry is vague and speculative and does not adequately consider the nature and scope of the information being requested and the overall scope of the investigation;
- information about potential or concluded investigations is not exempt;
- it is necessary to consider whether any of the information is already in the public domain;
- information about winners has already been made public by OLG;

- the *fifth estate* program has already publicized the issues being investigated;

- the information requested from the database is limited in scope; and

- the ministry has not provided cogent, case-specific detailed and convincing evidence of a reasonable expectation of the harm contemplated by sections 14(1)(a) or (b), and instead relies on vague boilerplate language.

[122] In particular, the CBC refers to the statement by Assistant Commissioner Beamish in Order PO-2657 to the effect that "the circumstances of, and the records relating to, any particular insider win claim and investigation are unique." In this regard, the CBC also refers to a recent statement by Adjudicator Loukidelis in Order PO-2910, relating to the Family Responsibility Office:

> The quality and cogency of the evidence respecting the possible application of section 14(1) must be reviewed on a case-by-case basis against the individual circumstances and context of an appeal, and the actual content of the records for which the exemption is claimed.

[123] The CBC also refers to Order PO-2789, issued by Adjudicator Loukidelis. The CBC notes the similarity of the ministry's representations in these appeals with their representations provided in the appeal leading to Order PO-2789, and submits that the ministry "did not turn its mind to the unique and particular information in the current appeals…."

[124] In assessing the CBC's arguments relating to Orders PO-2657, PO-2664 and PO-2789, which dealt with requests for information about a small number of specific insider winners whose identities were already publicly known, it is necessary to consider the nature of the information at issue and the context and effect of the analysis by the Assistant Commissioner.

[125] In Order PO-2657, Assistant Commissioner Beamish dealt with a request for information about two named individual winners of a $21 million 6/49 jackpot in July 2006. The Assistant Commissioner's analysis was conducted in order to determine whether there was evidence that the OPP was investigating this particular insider win, and he specifically invited the OPP to produce such evidence, which it did not do. The Assistant Commissioner was not satisfied that he had received evidence to link that insider win with an ongoing investigation.

[126] Similarly, in Order PO-2664, the Assistant Commissioner addressed another request for information about a named insider winner, a retail store owner who had claimed to be the winner of an Ontario 49 jackpot of $1,011,350. Again, he was not satisfied that he had evidence linking that insider win with an ongoing investigation.

[127] In both cases, the Assistant Commissioner noted that the records had been generated by OLG rather than the OPP at a time when criminal charges were not contemplated. He observed that the sole purpose of the records was to determine whether the affected parties' claim to the prize was legitimate.

[128] He also rejected the ministry's argument that the investigations of other insiders were sufficiently linked to justify a conclusion that, taken together, those investigations constituted a law enforcement "matter" as contemplated by the Divisional Court in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*.[40]

[129] In doing so, he observed as follows in Order PO-2657 (and also quoted this statement in Order PO-2664):

> Without some detailed and convincing evidence connecting all the various insider winners, I find that the information in these records relates to the specific circumstances of the claim made by the affected parties and that they *can be* considered on their own particular facts and not in connection with the investigation of all other insider winners. [Italicized emphasis in original; underlined emphasis added.]

[130] In Order PO-2657, he went on to state:

> I find that OPP investigations into insiders' lottery wins do qualify as "law enforcement" matters as defined in section 2(1) of the *Act*.
>
> However, I am not satisfied that the information in the records at issue in the present appeal relates to matters or investigations that are in existence. … I have not been provided with any explanation as to how these records are directly related to an investigation and charges that have been laid against another insider winner. *At best, I interpret the Ministry's response as saying that because the records at issue relate to an insider win claim, they are relevant to investigations of other such claims where charges have or may be laid.* [Emphasis added.]

[131] In Order PO-2664, he made a similar statement, and noted that the ministry conceded that the insider winner whose records were requested in that case is "currently not actively being investigated."

[132] However, I note that in Order PO-2789, Adjudicator Loukidelis found information about the win, including precisely the type of information that forms the bulk of what is

[40] cited above at footnote 34.

at issue in Appeal PA06-308, to be exempt under section 14(1)(a), with the exception of information of an administrative nature, or information that is in the public domain. As I have just noted, the records before me here do not relate to information that is in the public domain. Since the CBC does not seek de-identified information, it would also not be possible to sever and disclose information of an administrative nature which would, in any event, be meaningless on its own.

[133] On the question of whether the current OPP investigation qualifies as a law enforcement "matter," I find it significant that Orders PO-2657 and PO-2664, as well as Order PO-2789, all dealt with requests for records relating to specific individual insider wins.

[134] By contrast, in the present case, the records at issue in Appeal PA07-65 consist of thousands of entries in the OLG's winners' database that pertain to insiders, and in PA06-308, the records consist of insider win forms and checklists pertaining to a substantial number of insider winners. The evidence before me does not demonstrate that any of the insider winners mentioned in the records before me have been publicly identified as such, or that any other information at issue concerning these winners is in the public domain.

[135] In addition, I note that, after the Assistant Commissioner issued Orders PO-2657 and PO-2664, the Deloitte Report was issued. In my view, that report had a very significant impact on the question of whether the records at issue in this order relate to an identifiable law enforcement "matter" as contemplated by the Divisional Court in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*.[41]

[136] In the Deloitte Report, data from a number of sources, including the OLG's winner database, were analyzed to identify suspicious patterns of insider wins. As stated in the introduction to the report:

> 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.

[137] As noted in the affidavits provided by the ministry after the Deloitte Report was issued, the report identified transaction anomalies that could reveal suspicious criminal and regulatory infractions and, as a result of the report, the OPP broadened its investigation to review this suspicious behaviour. Because the Deloitte Report did not identify specific wins and specific insiders, but rather, patterns of behaviour, I accept the OPP's evidence that the individual winners cannot be considered in isolation from all the other winners.

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[41] cited above at footnote 34.

[138] The affidavits also contain confidential information explaining how the records are being used by the OPP in its investigation. Given the contents of the database that are at issue in Appeal PA07-65-2 and the insider win forms and other records at issue in Appeal PA06-308, I am satisfied that the records at issue in both appeals are an important investigative resource for the OPP investigation.

[139] Against this background, useful guidance is provided by the Divisional Court's decision in *Ministry of Community Safety and Correctional Services*. That judgment quashed Order PO-2455, which had required disclosure of portions of a firearms database maintained by the Provincial Weapons Enforcement Unit ("PWEU"), an umbrella organization that includes a number of police forces including the OPP. This office had ordered the ministry to disclose all database fields and data contained in the SOURCE database, listing firearms that have come into the possession of the police, but severing part of the serial numbers of the firearms listed in that database.

[140] In rejecting the application of section 14(1)(a) to this database, Adjudicator Steven Faughnan had stated:

> The Ministry also submits that the SOURCE database is used by the police in the course of these law enforcement matters. But its representations only refer to one specific initiative involving the PWEU that took place in April 2003. There is no indication in the Ministry's representations that this specific initiative is ongoing, or that other specific ongoing law enforcement matters may be involved.
>
> …
>
> … While I am satisfied that the SOURCE database relates generally to law enforcement, the Ministry has failed to establish that the records at issue relate to any specific law enforcement "matter".

[141] In quashing this decision, the Court stated:

> Under s. 14(1)(a) of FIPPA, the Ministry may refuse to disclose a record where such disclosure could reasonably be expected to interfere with a law enforcement matter. We agree with the Ministry that the keeping of such data falls within the definition of "a law enforcement matter". The plain and ordinary meaning of the word "matter" is very broad. *We find that "matter" does not necessarily always have to apply to some specific on-going investigation or proceeding.* The Adjudicator, in our view, erred in taking too narrow a view of the word "matter" in this particular case.
>
> …

> Section 14(1)(b) specifically addresses interference with "investigations" and "proceedings". The meaning of "a law enforcement matter" must, therefore, be broader, or it would be redundant. Furthermore, if "law enforcement" includes "policing", then "a law enforcement matter" should include "a policing matter".[42] [Emphasis added.]

[142] In my view, it is clear that the OPP's investigation of insider wins pertains to law enforcement as that term is defined in section 2(1) of the *Act*. Moreover, in the context of a request for the winners' database as it pertains to insiders, and for the OLG's investigative records pertaining to all insider wins over a substantial period of time, in circumstances where the OPP is conducting an investigation in order to identify individuals who should be charged with criminal offences, and where the records have been identified as an important investigative resource to which the OPP has access, the decision in *Ministry of Community Safety and Correctional Services* points to a conclusion that these records do, in fact, relate to an ongoing law enforcement "matter."

[143] I agree that where records pertaining to particular, identified insider wins are requested, it is appropriate to consider whether the identified wins relate to a particular law enforcement investigation or "matter." However, such an approach is not appropriate in a broad request of the kind made here, given the nature and circumstances of the OPP investigation as they exist following the issuance of the Deloitte Report. Rather, in my view, it is appropriate to view the records as being analogous to the SOURCE database. As already noted, in *Ministry of Community Safety and Correctional Services,* the Divisional Court quashed a decision that did not apply section 14(1)(a). Accordingly, I find that in the circumstances of this appeal, the OPP investigation is a law enforcement "matter" for the purposes of section 14(1)(a).

[144] While the records were originally prepared by OLG for win validation purposes, it is clear that the OLG's investigations could well produce evidence of criminal fraud, and moreover, the records are now being used by the OPP to investigate the transaction anomalies identified in the Deloitte Report. In that situation, I find that premature disclosure of the identities of the individuals for whom the ministry continues to assert the application of section 14(1)(a), and specific information about their wins, could reasonably be expected to have precisely the consequences identified by the ministry. Such consequences would constitute interference with a law enforcement matter.

[145] This conclusion is reinforced by the statement in *Ontario (Attorney General) v. Fineberg,*[43] to the effect that "the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context."

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[42] at paras. 72-73.
[43] cited above at footnote 32.

[146] Subject to the exceptions noted below, I therefore conclude that, while the OPP's investigation is ongoing, the records at issue in both appeals are exempt under section 14(1)(a).

[147] There are two important exceptions to this finding.

[148] As noted previously, the CBC's request for database records covers the time period from 1992/1993 to the date of the request. The ministry's submission about the time period covered by its investigation effectively negates all of the section 14 claims for any records in the database prior to July 1, 1995, and logic would also dictate that this would also apply to any associated paper records in Appeal PA06-308. Accordingly, I find that the law enforcement exemptions in section 14 of the *Act* do not apply to such records.

[149] Also, and very significantly, the affidavits provided by the ministry identify individuals for whom the section 14 exemptions are no longer claimed. The group identified in the ministry's earlier affidavits (the "notified insider winners") was expanded in a later affidavit which, in other respects, repeats the contents of the initial affidavits. I find that the section 14 exemptions do not apply to records relating to the lottery wins of individuals identified as insiders for whom section 14 is no longer claimed, in either of these affidavits.

[150] In light of these conclusions, it is not necessary to consider whether section 14(1)(b) applies.

D. Do the exemptions relating to economic or other interests in sections 18(1)(c) and (d) apply?

[151] As noted at the beginning of this order, notice of these appeals was sent to a group of insider winners (the "notified insider winners") with respect to whom the ministry had advised that it no longer supports the application of section 14. Subsequently, the ministry has expanded this group to include additional insider winners. I found, above, that section 14 does not apply to any of these winners. However, I will order the OLG to provide notice to the additional individuals for whom section 14 is no longer claimed, who were not previously notified of these appeals, and to make a new access decision concerning the records about the lottery wins of those additional insider winners.

[152] My findings on section 18(1)(c) and (d) in this order only apply to the records relating to lottery wins of the notified insider winners. As part of the new access decision to be made by the OLG, I will order it to include an access decision on section 18(1)(c) and (d) for the records pertaining to the lottery wins by the newly notified insider winners, taking into account the conclusions reached in this order.

[153] Sections 18(1)(c) and (d) state:

> 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.

[154] For sections 18(1) (c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[44]

[155] 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.[45]

[156] 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.[46]

[157] The OLG claims that these exemptions apply to data fields 3, 9, 12, 13, 14, 15, 16, 21, 28, 33, 37, 43, 46, 47, 54 and 57 in the winners' database in Appeal PA07-65-2. The OLG also claims these exemptions in Appeal PA06-308, and similar information appears in the records at issue in that appeal. In essence, this is information about a winning ticket's purchase and validation.

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[44] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above at footnote 32.
[45] Orders P-1190 and MO-2233.
[46] 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 Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233.

[158] In Order PO-2812, I determined that these provisions apply to the fields listed above in the portion of the database that relates to winners who were not identified as insiders. In doing so, I distinguished Orders PO-2657 and PO-2664, where some disclosure was ordered because the information was already in the public domain. In those cases, the names of the winners and other details concerning the purchase and validation of their tickets were already public.

[159] As regards the information at issue in these appeals, while the names and prize amounts of individuals who won over $50,000 may have been named by the OLG at the time the prizes were given out, they would not have been identified as insider winners. As in Order PO-2812, there is no evidence to suggest that any information at issue in the appeals under consideration in this order, for which section 18(1)(c) and (d) are claimed, is in the public domain. OLG submits that, on this basis, Order PO-2812 provides greater guidance than Orders PO-2657, PO-2664 and PO-2789 for the resolution of these appeals.

[160] The CBC submits that, because the records relate to insider winners, very different considerations apply than were present in Order PO-2812. In particular, the CBC submits that the need for greater public scrutiny of insiders, as noted in Orders PO-2657 and PO-2664, militate against a finding that section 18(1)(c) and (d) apply. I note, however, that the issue of public scrutiny was primarily addressed in those orders in the application of the personal privacy exemption at section 21(1), and I will consider this in my discussion of that exemption, below. In addition, it plays a significant role in assessing whether to apply the public interest override at section 23 of the *Act*, and again, I will address this point below.

[161] In Order PO-2812, I conducted an extensive review of the representations submitted on the application of sections 18(1)(c) and (d), which I will not repeat here. My conclusions concerning the application of these exemptions were as follows:

> 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.

[162] With respect to Appeal PA07-65-2, I conclude that the evidence and argument provided to me do not support a different outcome than the one in Order PO-2812 for the portions of the database that are at issue in Appeal PA07-65-2. Public availability of these portions of the database is not established, and for the same reasons articulated in Order PO-2812, I find that data fields 3, 9, 12, 13, 14, 15, 16, 21, 28, 33, 37, 43, 46, 47, 54 and 57 in the winners' database in Appeal PA07-65-2 are exempt under section 18(1)(c) and (d) of the *Act*.

[163] In Appeal PA06-308, the OLG has only provided brief representations concerning sections 18(1)(c) and (d). Its initial representations refer to a reconsideration of its position, following Orders PO-2657 and PO-2644, to accord with the decisions made in those orders. It points out that, unlike the situation in those two orders, the identities of the insider winners in Appeal PA06-308, are not publicly known. I note, however, that the OLG has never claimed that the identities of the notified insider winners are exempt under section 18(1)(c) or (d). Rather, it claims that they are exempt under section 21(1), which is addressed below.

[164] The records at issue in Appeal PA06-308 contain a great deal of information that is not found in the database at issue in PA07-65-2, including narrative information

derived from the interviews with notified insider winners conducted by OLG staff. This includes information identifying the lottery retailers owned by them, or where they work or provide services, and other information about their lottery activities. I am not satisfied that the OLG has provided detailed and convincing evidence to support the application of sections 18(1)(c) and (d) to information in these records, except to the extent that it reproduces or reveals the information I have found exempt in the database under these sections, other information about the purchase and validation of tickets, or unique information about a ticket that could assist an individual making a fraudulent claim to a lottery prize.

[165] Specifically, the retailer location device (RDL) numbers in fields 28, 37 and 46 also appear in most of the records at issue in Appeal PA06-308. In a confidential portion of the affidavit submitted with its initial representations in Appeal PA07-65, the OLG provides evidence to support the exemption of these numbers, and I find that they are also exempt in Appeal PA06-308. Similarly, ticket control numbers, also referred to in the affidavit, are also exempt where they appear in the records at issue in Appeal PA06-308

[166] The records in Appeal PA06-308 also contain information about the times and locations that tickets, including winning tickets, were purchased, validated or redeemed. Because the records at issue in Appeal PA06-308 contain narrative information about the interviews of insider winners, they also contain additional information about the circumstances of purchase, and other information about notations or other unique markings on particular tickets. With several exceptions, I am satisfied that disclosure of this information could reasonably be expected to lead to the harms identified in sections 18(1)(c) and (d), for the reasons articulated in the extract from Order PO-2812 set out above, and I find it exempt under sections 18(1)(c) and (d).

[167] One exception arises where the ticket was purchased or validated at the store owned by, or the place of employment of, an insider winner. The other arises where the ticket was validated or redeemed at the prize office. In my view, purchase or validation at these locations could not reasonably be expected to produce the harms mentioned in sections 18(1)(c) and (d), similar to the conclusions of Assistant Commissioner Beamish in Order PO-2664. However, where the winning ticket was purchased, validated or redeemed at some other location, I find that any information in the records in PA06-308 that could disclose that other location is exempt under these sections.

[168] In addition, for the most part, information about the purchase or validation of other tickets by insiders, including on the same day as the winning ticket was purchased, is not exempt under section 18(1)(c) or (d). Again, similar to the conclusions reached by Assistant Commissioner Beamish in Order PO-2664, I find that this information would not assist an individual in making a fraudulent claim to the winning prize. In some of the records at issue in Appeal PA06-308, however, the

context of such information could lead to accurate inferences being drawn about the time of purchase or validation of the winning ticket, and in such cases, this information is exempt under sections 18(1)(c) and (d).

[169] The records at issue in Appeal PA06-308 also reveal information about the OLG's investigative process, such as the nature of the questions asked of insider winners. Assistant Commissioner Beamish found that this type of information was not exempt under section 18(1)(c) and (d), and in that respect, I reach the same conclusion here.

[170] To summarize, in Appeal PA07-65-2, the information in data fields 3, 9, 12, 13, 14, 15, 16, 21, 28, 33, 37, 43, 46, 47, 54 and 57 in the winners' database is exempt under sections 18(1)(c) and (d) of the *Act*. With respect to Appeal PA06-308, I will provide OLG with copies of the records pertaining to lottery wins by the notified insider winners which show, with blue highlighting, the information I have found exempt under sections 18(1)(c) and (d) in the analysis set out above. These copies will be sent to the OLG with this order.

[171] I will also order the OLG to take these findings into account in making severances, under sections 18(1)(c) and (d), of the additional records for which section 14 is no longer claimed, once notice to the affected insider lottery winners has been given.

E. Do the records contain personal information?

[172] I will now consider whether the portions of the records in both appeals that are not exempt under section 14 or sections 18(1)(c) and (d), constitute personal information, and to whom it relates. This consideration, and the discussion of sections 21(1) that follows, only pertains to insider wins of the notified insider winners.

[173] The term "personal information" 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;

[174] 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.[47]

> Sections 2(3) and (4) refer to information about individuals in a business, professional or official capacity. These sections state:
>
> (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.

[175] 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

[47] Order 11.

professional, official or business capacity will not be considered to be "about" the individual.[48]

[176] 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.[49]

[177] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[50]

[178] In Order PO-2812, I determined that parts of the winners' database qualify as personal information with respect to individuals not identified as insider winners. I stated:

> 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

[48] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[49] Orders P-1409, R-980015, PO-2225 and MO-2344.
[50] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

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.

[179] In Appeal PA07-65, the OLG claimed that fields 59-74 and 76-78 of the winners' database constitute personal information. In essence, this information consists of the names, home addresses and telephone numbers of insider winners.

[180] The OLG has not made additional representations on this issue in Appeal PA07-65-2 subsequent to the issuance of Order PO-2812, nor has it provided specific representations on this issue in Appeal PA06-308. However, the issue of whether the records contain personal information, and to whom it relates, is relevant to the application of the mandatory exemption in section 21(1), and in the case of Appeal PA06-308, it must be addressed regardless of the lack of specific representations from the OLG.

[181] As already noted, in the appeals being addressed in this order, the CBC does not seek access to de-identified information.

[182] The CBC submits that, because the lottery winners are insiders, it is likely that all or most of the information relates to them in their professional capacity as lottery retailers or other insiders. In this regard, the CBC refers to Order PO-2657.

[183] The records at issue in Appeal PA06-308 are similar to those dealt with in Order PO-2657. Assistant Commissioner Beamish made the following findings in that order:

> I find that the records at issue do contain the personal information of the two affected parties, including their names, language, ethnic origin, marital status and their names where it appears with other information. This includes information relating to the relationship between the two affected parties, their dispute over the proceeds of the winning lottery ticket and the fact that affected party 2 has retained counsel.
>
> However, some of the records also contain information about the affected parties which is not personal information. This information is associated with the affected parties in their professional capacity as owners and operators of a retail store. In particular, the information relating to the name, address, phone number, hours of work and operation of the store is not personal information. This is professional or business information that does not fall within the definition of personal information in section 2 of the *Act* [see Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].
>
> …
>
> Some of the records also contain the personal information of individuals not notified of this proceeding. These are primarily individuals who assisted affected parties 1 and 2 with the processing of their claim with the OLG or provided statements to the OLG regarding the claim.

[184] In Appeal PA07-65-2, the database contains the names of insiders, as well as their home addresses and personal telephone numbers, found at fields 59-74 and 76-78 of the winners' database. There is nothing to distinguish my conclusion in Order PO-2812 to the effect that this qualifies as personal information; this finding is not altered by the fact that, unlike the individuals whose wins were dealt with in Order PO-2812, they are identified as lottery insiders. In addition, because the CBC does not seek access to de-identified information, I find that the prize amounts and games constitute the personal information of these individuals.

[185] In Appeal PA06-308, it is clear that the records at issue contain the personal information of insider winners, including their identity as lottery winners, which is in their personal capacity. Their home addresses and other personal contact information are also their personal information. If their names are not severed, the amount and

other particulars of their wins also constitute their personal information, since it is about identifiable individuals in their personal capacity.

[186] In addition, the records in Appeal PA06-308 include narrative descriptions of the interviews conducted by lottery officials with insider winners in connection with their purchase and validation of lottery tickets, including a variety of personal details about their ordinary activities around that time, other lottery tickets purchased or validated, and patterns of lottery play. Some of the records also reveal the ethnicity, immigration history or nationality of insider winners, and information about their languages skills or difficulties. All of this clearly qualifies as personal information.

[187] The records in Appeal PA06-308 also contain these kinds of information about other individuals, including family members and persons who were present in the store where tickets were purchased or validated, or who were told about the win, or who accompanied them when they claimed their prizes or were interviewed by the OLG. In some instances, information of other store employees that refers to them in a personal capacity also qualifies as personal information. In particular, information that identifies someone as being related to a lottery winner is that individual's personal information.

[188] However, information in the records at issue in Appeal PA06-308 that simply identifies individuals in their capacity as store owners or employees, including information relating to the name, address, phone number, hours of work and operation of the store is not personal information, pursuant to section 2(3). However, some of these individuals also have other jobs, and information about their other positions, when combined with their ownership or employment with a lottery retailer, would create a composite picture of their employment across more than one employer. In that circumstance, I find that the information about their other employment qualifies as their personal information. Some of the records also contain the employment history of these individuals, which also qualifies as their personal information.

[189] I now turn to consider the question of whether the personal information in the records at issue in both appeals, other than information I have exempted under sections 14(1)(a), 18(1)(c) or 18(1)(d), is exempt under section 21(1).

F. Does the personal privacy exemption in section 21(1) apply?

Introduction

[190] The OLG initially claimed that the personal information at issue in both appeals is exempt under section 21(1) of the *Act*.

[191] In its initial representations in Appeal PA06-308, the OLG modified this position, and stated:

> The OLG … is prepared to partially release the records at issue in accordance with the IPC's analysis in Orders PO-2657, PO-2644 and PO-2789, subject to any finding the IPC makes on the application of section 14.

[192] In those decisions, a substantial amount of personal information was ordered disclosed because of the desirability of subjecting the activities of the OLG to public scrutiny, and because disclosure would promote informed choice in the purchase of goods and services.[51]

[193] However in its final set of representations, the OLG has changed its position, and now seeks to distinguish the records at issue in Orders PO-2657, PO-2644 and PO-2789. The OLG refers to the large number of individuals whose information is at issue in these appeals. It states that the requests under consideration in PO-2657, PO-2644 and PO-2789 were for information about specific insider wins that had become a matter of public interest and were the subject of an investigation by the CBC, in circumstances where the identities of the winners was publicly known. In the appeals under consideration in this order, the identities of the winners are not publicly known, and their specific wins have not been the subject of public discussion. Accordingly, the OLG submits that I should decide these appeals on the same basis as in Order PO-2812.

[194] Of the notified insider winners who were notified, only one provided representations. That individual stated that she is opposed to the records about her being disclosed, and argues that they are confidential.

[195] The CBC strongly relies on Orders PO-2657, PO-2644 and PO-2789 to argue that, in this case, the disclosure of the personal information of insider winners would not be an unjustified invasion of personal privacy, and as a consequence, it should be disclosed.

[196] It is important to note that my conclusions under section 21(1) pertain only to the portions of the records at issue in both appeals that relate to lottery wins of the notified insider winners, who (as explained above) are individuals who: (1) had claimed a lottery prize; (2) had at that time been identified as winners whose records were not exempt under section 14; and (3) were owners of lottery retail outlets or employees or other individuals who performed services for lottery retailers. As already explained, the ministry subsequently indicated that there are a number of additional individuals for whom section 14 is no longer claimed, but those individuals have not had notice of this appeal. As the OPP investigation proceeds, it is likely that the number of individuals for

[51] These factors favouring disclosure are found at sections 21(2)(a) and (c) of the *Act*.

whom the ministry no longer relies on section 14 will increase. I will address the implications of this below, in the section of this order entitled, "Conclusions and Implementation."

[197] In addition, it is important to note that my findings under section 21(1) do not include information I have previously found exempt under section 14(1)(a). As well, it does not include information I have previously found exempt under section 18(1)(c) and (d).

Analysis

[198] 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.

Section 21(1)(a)

[199] In Order PO-2812, I found that the exceptions to the mandatory exemption provided by sections 21(1)(a), (c) and (d) did not apply to the personal information in the winners' database that relates to winners not identified as insiders. The CBC has not provided representations arguing that I should reach a different conclusion under section 21(1)(c) (personal information collected and maintained to create a publicly available record), and (d) (disclosure authorized under an Act of Ontario or Canada), and there is no distinguishing factor in these appeals that would lead to a different conclusion concerning those exceptions.

[200] However, in these appeals, the CBC argues that my conclusion in Order PO-2812, that the section 21(1)(a) exception to the exemption (which relates to consent) did not apply, should be distinguished and that I should apply section 21(1)(a).

[201] Section 21(1)(a) states:

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

[202] The CBC's argument in favour of applying section 21(1)(a) in Appeal PA07-65, dealt with in Order PO-2812, was summarized in that order as follows:

> 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."

[203] In concluding that the section 21(2)(a) exception does not apply, I stated:

> 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-2657], 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.

[204] In its representations in Appeals PA07-65-2 and PA06-308, the CBC submits that:

- the individuals to whom the information pertains consented to disclosure pursuant to the consistent practice of the OLG to obtain consent from major lottery winners to publish information about their wins;

- Assistant Commissioner Beamish noted that the consent forms would be used to ensure the integrity of the lottery;

- my decision in Order PO-2812 was predicated on the fact that the records in question related to non-insiders, and that order must therefore be "strongly distinguished" on that basis;

- in the context of insiders, issues surrounding consent and lack of invasion of privacy are governed by Assistant Commissioner Beamish's decisions in Orders PO-2657 and PO-2664;

- Assistant Commissioner Beamish found that insider winners do not purchase lottery tickets on the same terms as the public, and should anticipate that their claims will be subject to a higher standard of scrutiny; and

- insider winners' consent is broader than consent given by non-insiders, as they are aware of their potential conflict of interest and the need for higher scrutiny of their wins.

[205] In my view, it is not clear that the insiders' signing the consent form establishes the application of section 21(1)(a). The CBC's representations are predicated on the idea that the insiders' status as such would inform their reasonable expectation of privacy. This is an important factor to consider under section 21(2), as Assistant Commissioner Beamish has done, and as I will do below. Clearly, however, the issue that arises under section 21(1)(a) has to do with the legal effect of signing the consent, and I am not persuaded that it has any different effect with respect to insiders than it had for non-insiders in Order PO-2812. Accordingly, as I did in Order PO-2812, I find that section 21(1)(a) does not apply.

Section 21(1)(f)

[206] Section 21(1)(f) provides an exception to the mandatory section 21(1) exemption where it is established that disclosure would not be an unjustified invasion of personal privacy. This section 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.

[207] 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).

[208] Section 21(4) lists instances in which disclosure would *not* be an unjustified invasion of privacy, and if any of these applies, the information is not exempt under section 21(1). Having reviewed the records, I am satisfied that section 21(4) does not apply.

[209] Section 21(3) provides that, in certain instances, disclosure will be presumed to be an unjustified invasion of privacy. Sections 21(3)(d), (f) and (h) state:

> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (d) relates to employment or educational history;
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
>
> (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[210] I agree with Assistant Commissioner Beamish's determination in Orders PO-2657 and PO-2664 that the presumption in section 21(3)(f), relating to information that describes an individual's finances, income, assets, or financial history or activities (amongst other things) does not apply to lump sum payments such as lottery wins.[52]

[52] See also Order PO-2465.

[211] I find that information about an individual's employment history is subject to the presumed unjustified invasion of privacy found in section 21(3)(d), and information that indicates an individual's racial or ethnic origin is subject to the presumption in section 21(3)(h). I therefore find, subject to the discussion of the public interest override, below, that this information is exempt under section 21(1).

[212] For the remaining personal information in the records, it is necessary to determine whether disclosure would constitute an unjustified invasion of personal privacy under section 21(2). This section states:

> 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;
>
> (b) access to the personal information may promote public health and safety;
>
> (c) access to the personal information will promote informed choice in the purchase of goods and services;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (g) the personal information is unlikely to be accurate or reliable;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[213] In Order PO-2812, I distinguished the conclusions reached by Assistant Commissioner Beamish in Orders PO-2657 and PO-2664 on the basis that the information before me related to winners who had not been identified as insiders,

whereas the information at issue in those two orders related to particular winners who were, in fact, insider winners.

[214] In my view, the conclusions I reached under section 21(2) in Order PO-2812 are of limited assistance because of the fact that the records pertained to winners who had not been identified as insiders. Given that the information at issue in Appeals PA07-65-2 and PA06-308 pertains to insider winners, and in view of the important transparency and public interest concerns identified in Orders PO-2657, PO-2664 and PO-2759 with respect to insider winners, which are also identified in the Ombudsman's report entitled, *A Game of Trust*, I conclude that the findings in the latter orders are more relevant than Order PO-2812 in this regard.

[215] However, as noted below, the circumstances in the appeals I am considering in this order are different in that the identities of the insider winners in this case, and other particulars about their wins, are not publicly known, but in Orders PO-2657, PO-2664 and PO-2789, their identities and a great deal of additional information about their wins was in the public domain. This was a significant factor in the findings of Assistant Commissioner Beamish in Orders PO-2657 and PO-2664, and of Adjudicator Loukidelis in Order PO-2789, about some aspects of section 21(2). The Assistant Commissioner made essentially the same findings in Orders PO-2657 and PO-2664, and very similar conclusions were reached by Adjudicator Loukidelis in Order PO-2759. For the sake of simplicity, in the discussion that follows, I will refer for the most part, to the Assistant Commissioner's analysis in Order PO-2657.

Section 21(2)(a) public scrutiny

[216] In Order PO-2657, the Assistant Commissioner stated as follows in this regard:

> In order for section 21(2)(a) to apply, it must be demonstrated that the disclosure of the personal information must be desirable in order to subject the activities of the institution to public scrutiny (See Orders M-1174, PO-2265 and PO-2544.)
>
> I have decided that the factor set out in this section applies and the disclosure of the personal information in the records is desirable for the purpose of subjecting the activities of the OLG to public scrutiny, particularly as those activities relate to the verification of insider wins. I also conclude that this factor should be accorded significant weight.
>
> With respect, I do not agree with the position taken by the OLG that the alleged investigation by the OPP into the insider winners is sufficient to ensure that the activities of the OLG are exposed to public scrutiny. Any investigation carried out by the OPP will focus on the activities of the potential insider winners and not on the activities of the OLG. While the

> information in the records may relate to possible fraud by an insider winner, the information is also related to the OLG process for evaluating and authorizing payments to insider winners.
>
> The activities of the OLG that have been the subject of public discussion raise issues not only about the number and circumstances of insider wins but also about the means and process pursuant to which the OLG investigated and authorized such claims. The information at issue is relevant to these matters and it is from this perspective that the information requires further public scrutiny. The OPP will not be scrutinizing these records from this perspective and, therefore, the investigation by the OPP will not "subject the activities of the institution to public scrutiny."
>
> …
>
> To conclude, I find that disclosure of the information at issue is desirable to subject the activities of the OLG to public scrutiny and I accord this factor significant weight.

[217] I agree with these conclusions, but in my view, for the reasons that follow, the application of section 21(2)(a) in the appeals under consideration in this order is limited to the names of the notified insider winners, and the amounts of their prizes in the winners' database that is at issue in Appeal PA07-65-2.

[218] As identified in the Ombudsman's report, it is vital to establish public confidence in the activities of OLG and its approach to insider wins. However, I also note that disclosure in the circumstances of this case is considered to be "disclosure to the world." In other words, based on this order, if I fail to apply section 21(1) to deny access to the additional personal information set out in the records, and someone other than the CBC seeks access to the records at issue here, it would quite likely be granted.

[219] The remaining personal information found in the records in both appeals is described above in the discussion of "personal information." It includes home addresses and telephone numbers, as well as a significant amount of detail concerning lottery purchases and activities relating to the purchase and validation of lottery tickets generally, and to the claiming of lottery prizes, and a significant amount of other personal information, including everyday activities of the notified insider winners. This is personal information pertaining to a substantial number of insider winners who, unlike those dealt with in Orders PO-2657, PO-2664 and PO-2759, are not publicly known as insiders, and their wins have not attracted public attention. I am not satisfied that it is necessary, in the interest of public scrutiny, to make their information, except the limited information discussed below, generally available.

[220] In my view, the interest in public scrutiny in section 21(2)(a) is addressed by disclosing, from the portions of the database at issue in Appeal PA07-65-2, the names and prize amounts of insider winners who were the owners of lottery retail outlets, and employees or other individuals who performed services for lottery retailers, and I find that section 21(2)(a) applies to that information of the notified insider winners. On the other hand, the CBC is asking for the remaining personal information for investigative journalism purposes, and argues that there is a strong public interest in allowing it to have access to the remaining personal information at issue in both appeals. I will address this argument in my discussion of the public interest override, below.

[221] As well, I note that some of the records at issue in Appeal PA06-308 contain personal information of individuals who were not themselves owners of lottery retail outlets, or employees or other individuals who performed services for lottery retailers. In my view, these individuals are unlikely to be suspected of lottery fraud because they are not directly involved in businesses that sell lottery products, and although some of them may be relatives who qualify as insiders under the OLG's definition cited at the beginning of this order,[53] I find that information about them is not subject to section 21(2)(a).

Section 21(2)(c) informed choice

[222] In Order PO-2657, the Assistant Commissioner stated as follows in this regard:

> I also accord significant weight to the factor set out in section 21(2)(c). I find that there is a direct connection between the personal information in the records and the promotion of informed choice among consumers. A significant amount of money is spent by members of the public on the purchase of lottery tickets sold by the OLG on an annual basis. For example, the Ombudsman reported that in the 2005 fiscal year, the OLG generated $2.3 billion in overall revenue related to lottery tickets. The Ombudsman stated, at page 1:
>
> > Without question, government lotteries are big business in Ontario and the Province has come to rely on the money generated.
>
> The OLG has, for the most part, a monopoly on lottery gaming activities in the province of Ontario. The public has a right to be informed before it expends significant amounts of money on lottery tickets as opposed to the other gaming alternatives, or, in fact, spends money elsewhere. The public has a right to know whether the OLG is administering the lottery scheme in a manner that is fair to all lottery players.

[53] in paragraph 1.

[223] I agree with these conclusions, but again, for the reasons articulated under section 21(2)(a), I find that in the circumstances of the appeals under consideration in this order, the application of this factor is limited to the insider winners' names and prize amounts in the winners' database.

Section 21(2)(e) unfair pecuniary or other harm

[224] In Order PO-2657, the Assistant Commissioner found that this factor did not apply. A significant basis for this finding was the fact that there had already been significant media coverage of the lottery win of the affected parties. As already noted, that is not the case here, with respect to the notified insider winners.

[225] However, the Assistant Commissioner also stated as follows:

> In my view, the evidence of the affected party and the OLG does not establish that the individuals to whom the information relates in the records *will* be exposed *unfairly* to pecuniary or other harm as a result of the disclosure of the personal information contained in the records.
>
> …
>
> The Ombudsman has identified a very real problem with the frequency of insider wins and the manner in which the OLG has verified their legitimacy. The Ombudsman's report refers to numerous incidents where insider winners were improperly treated as legitimate winners. Based on the Ombudsman's investigation, I am of the view that insider winners should, in fact, expect a lesser degree of privacy than ordinary members of the public. Insider winners should anticipate that their claims will be subject to a higher standard of scrutiny, including potential scrutiny by the public.
>
> …
>
> The OLG states in its reply representations that insider winners "have no less of an expectation of privacy when they buy a lottery ticket than any other member of the public." This ignores the fact that this expectation of privacy on the part of insider winners has been created and fostered by the OLG itself. It is fully within the power of the OLG to create policies and procedures that make clear to insider winners that they should not expect the same level of privacy protection as do members of the general public.

> In arriving at this conclusion, I have also taken into account the fact that affected party 1 has failed to submit representations in this appeal.
>
> Accordingly, I have concluded that this factor is not established. On the contrary, I give significant weight to the fact that the personal information at issue relates to insider win claimants as a factor supporting disclosure.

[226] In my view, this analysis also applies in the appeals under consideration here. Although I do not have evidence that the lottery wins of the notified insider winners in this case have been the subject of discussion in the media, their status as insiders, who have a reduced expectation of privacy, is significant. I also note that only one of the notified insider winners chose to make representations, but did not address this factor.

[227] Accordingly, I find that this factor does not apply.

Section 21(2)(f) highly sensitive

[228] To be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause significant personal distress to the subject individual.[54]

[229] In Order PO-2657, Assistant Commissioner Beamish found that the evidence did not support the application of this factor. Again, he referred to the fact that there had already been discussion of the affected parties' lottery win in that case, which has not occurred here, but he also referred to the limited privacy expectations of insider winners. He gave the factor limited weight.

[230] In my view, it is significant that only one of the notified insider winners provided representations in these appeals. Taking this into account, combined with the limited privacy expectations of insider winners, I give this factor limited weight.

Section 21(2)(h) supplied in confidence

[231] The Assistant Commissioner also gave this factor limited weight in Order PO-2657. In his analysis, the Assistant Commissioner refers to the consent form signed by lottery winners. He states:

> In my opinion, the consent contemplates that, when matters of the integrity of the institution are at issue, the personal information in the records will be used by the OLG in the manner that it sees fit. Given the form of the consent signed by affected party 1, and the fact that the integrity of the OLG has been called into question as it relates to insider

[54] Order PO-2518.

> lottery wins, this factor deserves little weight. On the contrary, given the observations of the Ombudsman relating to the integrity of the OLG's processes, one could argue that the signature of affected party 1 on this consent form is a factor in favour of disclosure of personal information gathered through the insider win verification process.

[232] The one notified insider winner who provided representations argues that the information about her lottery win is "confidential," but does not indicate that the information in the records was, in fact, supplied in confidence to the OLG, or provide other evidence to support such a conclusion.

[233] I agree with the analysis of the Assistant Commissioner in Order PO-2657, and accord this factor limited weight.

Section 21(2)(i) unfairly damage reputation

[234] The Assistant Commissioner's analysis of this factor is specific to the fact that the lottery wins under discussion in Orders PO-2657 and PO-2664 were already the subject of public discussion in the media, and the possible implication that the affected parties were not the rightful claimants. In Order PO-2789, Adjudicator Loukidelis reached a similar conclusion, quoting the findings in Order PO-2664 in this regard.

[235] In the appeals before me, there has been no such public discussion of the insider winners, and I am not satisfied that any unfair damage to reputation is likely to result from disclosure of the insider winners' names and prize amounts. I therefore give this factor limited weight.

Summary and Conclusions

[236] I have found that the factors at section 21(2)(a) and (c) weigh strongly in favour of disclosure of the names and prize amounts from the portions of the database at issue in Appeal PA07-65-2, which pertain to notified insider winners.

[237] I have accorded limited weight to the factors in sections 21(2)(h), (f) and (i). In addition, I find it significant that insider winners should have a reduced expectation of privacy compared to members of the general public as a circumstance that weighs strongly in favour of disclosure of the names and prize amounts of the owners of lottery retail operations, and employees or other individuals who performed services for lottery retailers, in the winners' database.

[238] Accordingly, with respect to that information, I am satisfied that the factors in favour of disclosure outweigh those that would protect the privacy interests of the notified insider winners. Therefore, I find that the exception to the exemption found in section 21(1)(f) applies to the notified insider winners' names and prize amounts found

in the winners' database because disclosure would not be an unjustified invasion of personal privacy. As section 14 is not claimed for these winners, and I have not found this information exempt under section 18(1)(c) or (d), I will order it disclosed.

[239] With respect to the remaining information, as I am not satisfied that the factors favouring disclosure under section 21(2) apply in favour of the information being disclosed to anyone who asks, and a finding that this information is not exempt under section 21(1) is, in effect, disclosure to the world, I conclude that the exception to the exemption in section 21(1)(f) is not established, and in this circumstance, subject to my discussion of the public interest override, below, I find this information is exempt under section 21(1).

G. Is there a compelling public interest in disclosure that outweighs the purpose of the exemptions in sections 18(1)(c) and (d), or section 21(1), as contemplated in section 23?

[240] Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, **18**, 20, **21** and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [Emphasis added.]

[241] In this order, I have found that portions of the records are exempt under section 14(1)(a). The public interest override does not apply to information that is exempt under this section.[55]

[242] 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.

[243] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[56]

[244] 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. Previous orders

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[55] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.
[56] Order P-244.

have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, 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.[57]

[245] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[58]

[246] A public interest is not automatically established where the requester is a member of the media.[59]

[247] Any public interest in *non*-disclosure that may exist also must be considered. If there is a significant public interest in the non-disclosure of the record then disclosure cannot be considered "compelling" and the override will not apply.[60]

[248] The CBC argues that there is a strong public interest in disclosure of information about insider lottery wins. In particular, the CBC submits that:

- investigative journalism, as practiced by the CBC, is essential to the fulfilment of the purposes of the *Act* and there is a clear relationship between the records in question and the fulfilment of this purpose;

- the CBC has requested the records in order to provide an informative and reliable report to Canadians, who would otherwise have no knowledge of the OLG's previous conduct and the erroneous allocation of lottery winnings;

- the public interest in knowing whether or not the OLG has acted in an effective, fair and responsible manner in administering the Ontario lottery is fundamental to safeguarding lottery security, which depends on public scrutiny and debate of the internal administration and function of the OLG; and

- the fact that the records in question relate to insider winners means that there is an increased need for, and expectation of, public scrutiny and as such there is no risk of an unjustified invasion of privacy.

[249] The OLG submits that:

- the public interest has been addressed through the disclosure of de-identified information, which has led to an internal investigation, the

[57] Orders P-984, PO-2607 and PO-2556.
[58] Order P-984.
[59] Orders M-773 and M-1074.
[60] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.), Orders PO-2072-F and PO-2098-R.

Ombudsman's report, a public commitment to lottery prize integrity by the OLG, and a new regulatory framework for retailer registration;

- the Ombudsman's recommendations specifically address the investigation of insider wins;

- conducting a further analysis to test a hypothesis about practices that have already been remedied is not "compelling;"

- the privacy of lottery winners should not be sacrificed when the police are already investigating;

- investigative journalism must not usurp the law enforcement function of the police; and

- the public interest in disclosure does not extend to information that would jeopardize the security of the lottery system.

[250] Adjudicator Beamish considered similar submissions in Order PO-2657. He stated:

> I agree with the appellant's position that the public interest is served by bringing greater scrutiny to the process through which the OLG investigates the claims of insider winners. I reject the OLG's contention that the Ombudsman's report, and the subsequent OPP investigation, is sufficient for this purpose. In fact, in my view this suggestion is a misreading and misinterpretation of the Ombudsman's observations and findings. As noted by the Ombudsman at page 51 of his report:
>
> > I am not convinced, however, that the public can rely on the [OLG] alone to ensure that real reform takes place. The danger is too great that the OLG will continue to fall back into its old habits of coddling retailers and dismissing consumers' legitimate complaints.
>
> Clearly, the Ombudsman did not see his report as the end of the process, or as the final resolution of all the problems identified in the OLG's insider win process. Had I found that the information in the records relating to the OLG's insider win process was exempt from disclosure, I would have given serious consideration to the application of section 23 to require its disclosure. However, I will be ordering the disclosure of that information. The appellant, and through her the public, will have an opportunity to examine the nature of that process and the rigour to which it was applied in this case.

[251] I agree with these conclusions. I also note that, in Order PO-2789, Adjudicator Daphne Loukidelis dealt with the need for public scrutiny with respect to an insider lottery win. She stated:

> There can be little dispute, in my view, that there is a public interest in the subject matter of the records at issue. Indeed, the appellant has provided persuasive representations regarding the need for ongoing public scrutiny of the [OLG]'s prize claim process generally, and the investigation of insider wins, specifically. As Assistant Commissioner Beamish did in Orders PO-2657 and PO-2664, I reject the [OLG]'s position that the Ombudsman's investigation has satisfied the public need for scrutiny.[61]

[252] In addition, unlike the situation in Orders PO-2657, PO-2664 and PO-2789, where a substantial amount of information was disclosed about particular insider wins because so much information was already in the public domain, including the identity of the winners and the particulars of the purchase and validation process, this was not the case for the insider winners whose information is at issue here. I found, above, that not applying section 21(1) to information beyond the insider winners' names and prize amounts would lead to "disclosure to the world" of detailed personal information, including in possible future access requests, and I was not satisfied that it is necessary, in the interest of public scrutiny, to make that type of information generally available to anyone who asks for it.

[253] However, in the context of section 23, it is very significant that the CBC is conducting investigative journalism which is, in my view, in the public interest with respect to insider wins that occurred during the time period addressed in these appeals. On this basis, I am satisfied that, in the specific circumstances of these appeals, there is a compelling public interest in disclosure in order to scrutinize the activities of the OLG and the steps it has taken to protect the public against lottery fraud.

[254] Moreover, in this regard, the comments in the Executive Summary of the Ombudsman's report, quoted at the beginning of this order, bear repeating here:

> Without question, insiders have won big over the years. The Corporation confirms that from 1999 to November 2006, at least 78 retail owners and 131 retail employees have won major lottery prizes, and there could be more. Retailers have also no doubt won thousands of smaller prizes.

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[61] As in Orders PO-2657 and PO-2664, Adjudicator Loukidelis found in Order PO-2789 that the disclosure she had already ordered would satisfy the public interest. However, in all three of these orders, the section 21(1) exemption applied more narrowly than I have applied it in this case, because in those appeals, a great deal of the information about insider wins was already in the public domain and attracted less of a privacy interest than I have found in the circumstances of this appeal.

> Certainly many of these wins are legitimate, *but it is equally clear that millions of dollars have been paid out in what are dishonest claims*. In 2003 and 2004, the OLG identified five suspicious wins by "insiders" – all of which are detailed in this report – yet only one of the claimants was denied a prize. […]
>
> […]
>
> …[A]lthough some tighter security measures were taken before the fall of 2006, it remains incontrovertible that the OLG was shirking its responsibility in protecting against fraudulent insider wins. […]
>
> [Emphasis added.]

[255] In the circumstances, it is clear that the subject of insider wins "rouses strong interest or attention." Moreover, although the fact that the appellant is a member of the media does not guarantee a conclusion that there is a compelling public interest in disclosure, I am satisfied that this is an important factor here, and one that distinguishes the request by the CBC from requests by individuals who are not engaged in investigative reporting, and may have purposes for requesting the information that do not engage the public interest.

[256] I therefore find that there is a compelling public interest in disclosure of the records to the CBC.

[257] On the question of whether there is a compelling public interest in non-disclosure, I am satisfied that such an interest exists with respect to the information I have exempted under sections 18(1)(c) and (d). I applied the exemption on the basis that disclosure of the information for which it was claimed would subject the OLG to the possibility of further lottery fraud. In particular, I adopted my findings in Order PO-2812, including the following:

> 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.* [Emphasis added.]

[258] In my view, this is a compelling public interest in non-disclosure that is more significant than the public interest in disclosing the information I have found exempt under sections 18(1)(c) and (d), because it protects the integrity of the lottery and the economic interests of Ontarians. As already noted, the section 18(1)(c) and (d) exemptions are intended, respectively, to protect the ability of institutions to earn money in the marketplace, and to protect Ontarians' broader economic interests.

[259] Accordingly, the public interest in disclosure of information I found exempt under sections 18(1)(c) and (d) is not "compelling," and section 23 does not apply to it.

[260] By contrast, I am not persuaded that any such public interest in non-disclosure applies to the information I found exempt under section 21(1). The question to consider there is whether the compelling public interest in disclosure outweighs the purpose of the exemption, and I now turn to that question.

[261] Clearly, the purpose of section 21(1) is to protect personal privacy. However, as extensively noted elsewhere in this order, insider winners have a diminished expectation of privacy concerning their wins, and in view of the contents of the Ombudsman's report and the Deloitte Report, I conclude that the public interest in scrutinizing the activities of the OLG in this regard is very compelling indeed. I also agree with Assistant Commissioner Beamish's views in Order PO-2657, in which he rejected the argument that the Ombudsman's report and the OPP investigation provide sufficient public scrutiny of the process through which the OLG investigates the claims of insider winners.

[262] I have recognized the privacy interests of the notified insider winners, and the personal information of other individuals in the records, by applying section 21(1) to all of their information except the notified insiders' names and prize amounts in the winners' database,[62] with the result that the exempt information is not available on simple request to anyone who asks for it. In the unique circumstances of these appeals, however, and in view of the CBC's pursuit of investigative journalism concerning insider winners, including the fact that, without the CBC's initiatives in this regard, the issue of insider lottery fraud might never have come to light, I find that the public interest in disclosure to the CBC of the personal information of the notified insider winners that I exempted under section 21(1) *does* outweigh their privacy interests.

[263] However, this conclusion does *not* apply to the personal information found in the records that relates to individuals other than the notified insider winners. The notified insiders were owners of lottery retail operations, or employees or other individuals who

[62] Even if I had found the notified insider winners' names and prize amounts exempt under section 21(1), I would have applied section 23 to this information because, in my view, the public interest in its disclosure is very compelling and outweighs the purposes of all these exemptions for the reasons outlined in the discussion of section 21(2)(a) at paragraphs 216-221, above.

performed services for lottery retailers. It is their information that attracts the compelling public interest in disclosure, and not the personal information of others.

[264] In addition, in my view, the compelling public interest in disclosure does not outweigh the privacy interests of the notified insider winners for information that does not relate in any way to their lottery activities or the verification of their lottery wins. Information of this nature about the notified insider winners, which is *not* subject to the public interest override in section 23, includes the following:

- their home addresses, telephone numbers, and any personal identification numbers they provided to verify their identities;
- information about their personal financial circumstances, including how they plan to spend their lottery winnings;
- information about their immigration to Canada, including their ethnicity or former nationality;
- any issues relating to language skills or difficulties;
- contacts with their friends or relatives about their wins;
- their marital history;
- identifying information about their children or relatives; and
- information about their employment history or other current employment.

[265] Accordingly, I will order the disclosure of the records at issue to the CBC relating to the notified insider winners, with the exception of the following:

- information I have found exempt under sections 18(1)(c) and 18(1)(d) (subject to the discussion of the exercise of discretion, below);
- personal information of individuals other than the notified insider winners; and
- personal information of the notified insider winners that does not relate in any way to the verification of their lottery wins, including the information described in the preceding paragraph.

[266] For greater particularity, information in the records at issue in Appeal PA06-308 that pertains to lottery wins of the notified insider winners, and is exempt under sections 18(1)(c) and (d), is highlighted in blue on copies of these records which are

being sent to the OLG with this order. In addition, in these same records, I have highlighted the information that remains exempt under section 21(1) in yellow on these copies.

H. Should the OLG's exercise of discretion under sections 14 and 18 be upheld?

[267] The exemptions in section 14(1)(a) and sections 18(1)(c) and (d) 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.

[268] 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; or
- it fails to take into account relevant considerations.

[269] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[63] This office may not, however, substitute its own discretion for that of the institution.[64]

[270] The OLG has provided brief representations that directly address its exercise of discretion under section 18(1)(c) and (d), to the effect that it exercised its discretion in good faith, and that it considered relevant factors in deciding that its security interests weighed in favour of claiming the exemption. The ministry submits that the OLG properly exercised its discretion to withhold records where disclosure would interfere with a law enforcement investigation being conducted by the OPP, an implicit reference to the OLG's exemption claim under sections 14(1)(a) and (b). In this order, I have upheld the section 14(1)(a) claim.

[271] The CBC submits that the OLG claimed these discretionary exemptions in bad faith, and has been a "moving target" in an attempt to delay the appeal process. It says that the OLG failed to consider the purposes of the *Act*, in particular, that the exemptions are intended to be limited and specific. It also refers to the consent forms signed by lottery winners. Consequently, the CBC argues that purpose of the *Act* weighs heavily in favour of disclosure. The CBC also refers to the age of the information.

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[63] Order MO-1573.
[64] Section 54(2).

[272] I do not agree that the OLG acted in bad faith, or sought to delay the process. The history of the matter is complex, and included a second mediation undertaken at the request of both parties. Nor, in my view, do the limited consents provided by lottery winners serve to negate the interests protected by section 18(1)(c) and (d), or section 14(1)(a), which I have upheld in this order. In addition, given the nature of the ongoing investigation by the OPP arising from the Deloitte Report, which encompasses information dating back as far as 1995, I am not satisfied that the age of the information is a relevant factor.

[273] It is evident that, in claiming section 18(1)(c) and (d), the OLG seeks to protect the important public interest of the security of its lottery validation process. With respect to section 14(1)(a), the OLG's decision to continue to rely on this exemption with respect to some insider wins is based on concerns raised by the OPP about the integrity of its investigation.

[274] The importance of the interests protected by both of these exemptions is noted in the discussion of whether the OLG should be permitted to raise them outside the 35-day time frame established under section 11.01 of the IPC's Code of Procedure, as discussed above. On this basis, I decided to allow the late raising.

[275] I also note that, with respect to sections 18(1)(c) and (d), I addressed the OLG's exercise of discretion in Order PO-2812, which I found to be proper.

[276] The public interest in disclosure of information about insider wins has also been addressed through the decisions I have made in this order, including the application of sections 21(2)(a) and the public interest override in section 23.

[277] I am satisfied that, with respect to the information whose exemption from disclosure I have upheld in this order, the OLG's exercise of discretion under section 14(1)(a) and sections 18(1)(c) and (d) was proper.

I. Should the fee in Appeal PA07-65-2 be upheld?

[278] As noted earlier in 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.

[279] 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 CBC submitted at the inquiry stage of Appeal PA07-65. At that time, the fee estimate was further reduced by $300.00 to $1,080.00.

[280] The CBC continues to take 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 Appeal PA07-65-2. The CBC has stated that, in its view, a fee of between $360 or $540 would be reasonable, but this appears to apply to the entire database.

[281] As frequently noted in this order, Appeal PA07-65-2 only deals with portions of the winners' database that relate to insiders. As I have upheld the OLG's claims that some of the information about insider winners in the database is exempt under sections 14(1)(a), 18(1)(c) and (d) and 21(1), and only the notified insider winners' names and prize amounts are to be disclosed, this limited disclosure would have an impact on the fees to be charged.

[282] In Order PO-2812, I considered this same fee estimate with respect to the non-insider portions of the database, with respect to information the OLG had agreed to disclose, and stated:

> 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 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. … 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. …

[283] In my view, the situation in Appeal PA07-65-2 is similar to the one that I addressed in Order PO-2812. In view of the fact this appeal only relates to the limited portion of the database that relates to winners identified as insiders, and that not all of that information is to be disclosed, I conclude that a new fee estimate is required, and I will order the OLG to produce one. If the CBC disagrees with the estimate, it may file a new appeal of that estimate without paying an additional appeal fee. If the CBC decides to pay the fee and receive the records despite its disagreement with the fee, it may nevertheless file an appeal and the issue can be addressed without delaying the CBC's access to the records.

[284] With respect to the new fee estimate, I note that the OLG initially decided to disclose parts of the database in de-identified form. I am ordering the OLG to disclose the names of the notified insider winners and the amount of their wins. The de-identified information was not at issue in this appeal, and I will not make any order provisions that relate to it. To the extent that the information that the OLG was initially prepared to disclose from the database would not now constitute personal information, if the CBC wishes to obtain access to it, this is a matter for discussion between the CBC and the OLG, and could also impact the amount of the fee to be charged.

CONCLUSIONS AND IMPLEMENTATION:

[285] In this order, I have made the following determinations:

- information about an insider win that is the subject of ongoing criminal charges is excluded from the scope of the *Act* under section 65(5.2), and the application of this section is not retroactive;

- the late raising of sections 14(1)(a), (b) and (f) and section 18(1)(c) and (d) is permissible in the circumstances of these appeals; and

- information concerning insider wins for which the ministry continues to support the application of section 14(1)(a) is exempt under that section.

[286] With respect to records that pertain to the lottery wins of the notified insider winners (who, as outlined in paragraph 12, are individuals for whom section 14 is no longer claimed), I have made the following further determinations:

- the information that the OLG claims is exempt in the winners' database under sections 18(1)(c) and (d) in Appeal PA08-65-2 is exempt under those sections, and some related information in the paper records at issue in Appeal PA06-308 is also exempt under those sections;

- all of the personal information in the records, with the exception of the names of insider winners and their prize amounts in the winners' database, is exempt under section 21(1); and

- in Appeal PA06-308, some personal information of the notified insider winners that is not exempt under sections 18(1)(c) and (d), is to be disclosed to the CBC under the public interest override at section 23.

[287] In addition, the OLG must issue a new fee estimate relating to the information actually being disclosed in Appeal PA07-65-2, and that fee may be appealed by the CBC without paying an additional appeal fee, even if the CBC decides to pay the fee and obtain access to the records.

[288] These conclusions do not resolve the question of access to information that is not exempt under section 14 in relation to insider winners who have not had notice of these appeals. As explained earlier in this order, notice was provided to insider winners for whom the ministry indicated there is no reason to continue to deny access under the section 14 exemptions (the "notified insider winners"), but since that notice was given, the ministry has expanded the number of insider winners to whom this applies, and will likely continue to expand this group.

[289] To address that issue, I will order the OLG to provide notice under section 28 of the *Act* to insider winners identified in the records who have *not* been notified of these appeals and who: (1) have claimed lottery prizes; (2) have now been identified as winners whose records are not exempt under section 14; and (3) were owners of lottery retail outlets or employees or other individuals who performed services for lottery retailers, or employees of the OLG; and to issue a further access decision in accordance with section 28, taking into account any representations it may receive from these individuals, as well as the findings I have made in this order under sections 18(1)(c) and (d), 21(1) and 23, and treating the date of this order as the date of the request.

[290] As previously noted, information in the records at issue in Appeal PA06-308 that pertains to lottery wins of the notified insider winners, and is exempt under sections 18(1)(c) and (d), is highlighted in blue on copies of these records which are being sent to the OLG with this order. In addition, in these same records, I have highlighted the information that remains exempt under section 21(1) in yellow on these copies. Information that is not highlighted in yellow or blue in these records is not exempt and must be disclosed.

ORDER:

1. Information that relates to the insider win that is the subject of an ongoing prosecution is excluded from the scope of the *Act* under section 65(5.2) and I uphold the OLG's decision to deny access to it.

2. Information concerning insider wins after July 1, 1995, for which the ministry continues to support the application of section 14(1)(a), is exempt under that section and I uphold the OLG's decision to deny access to it.

3. Subject to the payment of any outstanding fee, as referred to in order provision 6, below, I order the OLG to disclose the names and prize amounts of the notified insider winners from the winners' database in Appeal PA07-65-2, to the CBC no earlier than **January 6, 2012** and no later than **January 11, 2012**.

4. I order the OLG to disclose all the information in the records at issue in Appeal PA06-308, pertaining to lottery wins by notified insider winners, that is not highlighted in yellow or blue on the copies of the records that are being sent to the OLG with a copy of this order, to the CBC no earlier than **January 6, 2012** and no later than **January 11, 2012**.

5. For greater certainty respecting order provisions 3 and 4, I will include a list of the notified insider winners with the copy of this order that is provided to the OLG.

6. I order the OLG to issue a new fee estimate relating to the information actually being disclosed in Appeal PA07-65-2, within the time frame outlined in order provision 4, above, and that fee may be appealed by the CBC without paying an additional appeal fee, even if the CBC decides to pay the fee and obtain access to the records.

7. I order the OLG to provide notice under section 28 of the *Act* to insider winners identified in the records who have *not* been notified of these appeals and who: (1) have claimed lottery prizes; (2) have now been identified as winners whose records are not exempt under section 14; and (3) were owners of lottery retail outlets or employees or other individuals who performed services for lottery retailers, or employees of the OLG; and to issue a further access decision in accordance with section 28, taking into account any representations it may receive from these individuals, as well as the findings I have made in this order under sections 18(1)(c) and (d), 21(1) and 23, and treating the date of this order as the date of the request.

Original signed by: December 5, 2011
John Higgins
Senior Adjudicator