

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3090

Appeal PA11-460

Ontario Lottery and Gaming Corporation

June 14, 2012

Summary: The appellant made a request to the Ontario Lottery and Gaming Corporation for records which contain directives or directions used to ban individuals from entering Ontario casinos for reasons other than the self exclusion program. The OLG issued a decision letter, advising that no responsive records exist. During the intake and mediation stages of the appeal, the appellant indicated that her request included records known as Directions to Exclude. In this appeal, the adjudicator finds that the OLG narrowly interpreted the request and that the Directions to Exclude records fall within the scope of the request. However, the OLG was not ordered to issue a new decision letter, as the Directions to Exclude records are the subject matter of a related appeal at this office. The adjudicator also finds that the OLG's search for other responsive records was reasonable and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 24.

OVERVIEW:

[1] This order disposes of the issues raised as a result of a request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ontario Lottery and Gaming Corporation (OLG) for the following information:

I wish to receive copies of all communications, correspondences, information, documents, contracts, agreements since April 2000, to the

present day, between the Ontario Lottery and Gaming (Corporation) and each of:

1. Ontario Ministry of Energy and Infrastructure
2. Ontario Ministry of Finance
3. [a named company]
4. [a named company]
5. [two named casinos]¹

Responsive records may be redacted/severed as appropriate for protection of personal privacy...

[2] The OLG subsequently sought clarification of the request from the requester. Following discussions by way of email with her, the OLG advised her that, for ease of reference, the request had been separated into four requests. This appeal relates to the fourth request, which the OLG interpreted as follows:

2011-00148: We have interpreted this request to be for any communications from 2000 to the present between OLG and the named parties in your initial request regarding directives or directions used to ban individuals for reasons other than individuals participating in the Self Exclusion program.

[3] The OLG asked the appellant to confirm, in writing, that its interpretation of the request was correct. The requester subsequently responded by email, confirming that the above interpretation was correct and that she wanted all responsive records related to the request.

[4] The OLG subsequently issued a decision letter, advising the requester that no records responsive to the request exist.

[5] The requester (now the appellant) subsequently appealed the OLG's decision to this office.

[6] During the intake stage of the appeal, the appellant provided the analyst with records that she received from the Alcohol and Gaming Commission through a prior access request, known as Directions to Exclude (DTE),² as an example of the type of records that she believed should exist in response to her request. After discussions with the OLG, the analyst determined that there was some confusion with respect to the interpretation of the request, and she sought clarification from the appellant as to

¹ The named casinos are two resort casinos in the Niagara region.

² DTE's are issued by the Alcohol and Gaming Commission and direct Ontario casinos to refuse admittance of an individual for a variety of reasons, including, for example, cheating at play.

whether she was seeking “case specific records” or general records relating to directions and guidelines. The appellant clarified that she was seeking access to all general and case specific records. The appeal then moved to the mediation stage of the appeals process.

[7] During the mediation of the appeal, the OLG advised the mediator of its view that DTE records were not within the scope of the request, and would not be included as responsive records in the context of the appeal. The OLG noted that it had recently received a new access request from the appellant in which she was specifically seeking access to DTE records, and that it was in the process of responding to that request. The OLG also advised the mediator that it had interpreted the request in the appeal before me to be for broad and general guidelines, policies, directions and directives in relation to excluding individuals for reasons other than self-exclusion, and confirmed that there are no records responsive to this broader request for records.

[8] The appellant advised the mediator that, regardless of her new access request for DTE records, she still wished to pursue access to DTE records as part of this appeal, and that she objected to the OLG’s position that DTE records are not within the scope of this request. Therefore, the scope of request remains at issue.

[9] In addition, the appellant advised the mediator that she is of the view that general records such as broader guidelines, policies, directions and directives must exist. Accordingly, the reasonableness of the OLG’s search is at issue.

[10] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. Representations were received and shared in accordance with this office’s *Practice Direction 7*.

[11] For the reasons that follow, I find that the scope of the request which gave rise to the appeal before me, PA11-460, includes DTE records, but that there would be no useful purpose served in ordering the OLG to issue a new decision letter respecting access to the DTE records as they are the subject of another request. I also find that the OLG’s search for responsive records was reasonable and I dismiss the appeal.

ISSUES:

A: What is the scope of the request? What records are responsive to the request?

B: Did the institution conduct a reasonable search for records?

DISCUSSION:

Issue A: What is the scope of the request? What records are responsive to the request?

[12] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[13] The OLG submits that the appellant initially made a broad access request and that in response, it sent a letter to the appellant, seeking clarification of the request. The appellant responded by email, confirming that she was seeking access to the following:

- Contractual agreements;
- Communications, correspondence, information and documents regarding the nature, topics and specific issues of fiscal management of all casinos in the province, exclusion of problem gamblers from casinos, and exclusion of individuals from casinos for any reason other than problem gambling; and
- All types and all formats of records from 2000 to the present from all departments and individuals at the OLG from 2000 to the present.

[14] In response, the OLG states that it sent an email to the appellant, separating her request into four requests, and interpreting the request in this appeal to include any communications from 2000 to the present between the OLG and the named parties in the request regarding directives or directions used to ban individuals for reasons other than individuals participating in the self exclusion program. The OLG provided me with a copy of the email sent to the appellant in which it also asked her for written

confirmation of the OLG's interpretation of the request. The OLG further provided me with a copy of the appellant's email response, in which she stated that the interpretation was correct, and asked the OLG to provide all responsive records on this issue.

[15] Included in the OLG's representations was an affidavit signed by the staff member who wrote the interpretation of the request on behalf of the OLG. She states that she was aware of general policies and procedures in relation to the self exclusion program, but did not know if it had similar policies and procedures in relation to exclusions for other reasons, or what is referred to as "involuntary trespasses." However, she drafted the interpretation statement to apply to any similar policies or procedures or general directions about carrying out trespasses. The staff member states:

This is why I used the words "directives or directions used to ban individuals." These words are my own and not derived from the written request. I felt they fairly interpreted the request, because the requester had used the words "regarding the nature, topics, specific issues." I did not contemplate a search for directions to casinos about specific individuals.

[16] The OLG states that it acknowledges that the interpretation statement is ambiguous. For ease of reference, it is reproduced as follows:

2011-00148: We have interpreted this request to be for any communications from 2000 to the present between OLG and the named parties in your initial request regarding directives or directions used to ban individuals for reasons other than individuals participating in the Self Exclusion program.

[17] However, the OLG submits that I should affirm this narrow interpretation because the appellant's communication strongly suggests that she had an interest in obtaining records other than those regarding specific incidents.

[18] The OLG states that the appellant specifically requested the following:

Regarding the nature, topics, specific issues:

- a) Fiscal management of all casinos in Ontario;
- b) Exclusion of problem gamblers from any, all Ontario casinos; and
- c) Exclusion of any other persons, for any reasons, in addition to problem gambling, in any, all Ontario casinos.

[19] The OLG states:

The requester asked for records "regarding the nature, topics, specific issues" pertaining to involuntary exclusions from the [named] resort casinos. "Nature" means "the fundamental qualities of a person or thing." "Topic" means "the subject or theme of a discourse of one of its parts." These words suggest an interest in matters other than specific incidents.

"Specific issues" is in a list with the words "nature" and "topics" and should be read consistently with these two "broadening" words. In the context, "specific issues" suggests an interest in records about the management of involuntary exclusions. The requester did not use the words "specific incidents."

The requester's intent can also be derived from her three-point bullet list, and in particular, bullet 1. The request for records pertaining to "fiscal management of all casinos in Ontario" signals an interest in obtaining records about OLG's management of casinos. Consider how the request would have read if the requester had used the words "specific incidents" in place of "specific issues." There would have been a logical mismatch between her heading and bullet point 1. This is a strong indication that the request was not for records about specific incidents.

[20] The OLG further states that it sought clarification in accordance with its statutory duty, not once, but twice and that the OLG's specific narrow interpretation of the request, which was agreed to by the appellant, was reasonable in the unique circumstances of this request.

[21] Lastly, the OLG submits that during the mediation of this appeal, the appellant filed a new request for DTE records. It responded to that request by issuing an interim access decision, in which it declined a fee waiver and provided a fee estimate to the appellant.³

[22] The appellant submits that the DTE records are responsive and fall within the scope of her request for the following reasons:

- The DTE records are "communications" in the accepted, simple plain English definition of the word;
- The DTE records are very specific and very easily identifiable records;

³ The appellant subsequently appealed the interim decision to this office and an appeal file was opened, which is now at the adjudication stage of the appeals process.

- There is evidence that the OLG has at least 241 DTE records in its possession and likely more;
- In the request, there is no reference to DTE records being excluded from the scope of the request, regardless of whether a record is “case specific” or not;
- There is no basis for the OLG to unilaterally and arbitrarily exclude DTE records from the request; and
- There is no link between this request for DTE records and any other request made by the same appellant for DTE records.

Analysis and findings

[23] As previously stated, following communications with the appellant, the OLG asked her to confirm that the request was for the following information:

We have interpreted this request to be for any communications from 2000 to the present between OLG and the named parties in your initial request regarding directives or directions used to ban individuals for reasons other than individuals participating in the Self Exclusion program.

[24] The appellant subsequently confirmed to the OLG that her request was for the above information.

[25] As indicated in the OLG’s representations, the staff member who interpreted the request and wrote the interpretation statement, had a specific narrow meaning in mind when she drafted it, namely that the request was for general records and did not include DTE records. As previously indicated, the staff member states in her affidavit:

This is why I used the words “directives or directions used to ban individuals.” These words are my own and not derived from the written request. I felt they fairly interpreted the request, because the requester had used the words “regarding the nature, topics, specific issues.” I did not contemplate a search for directions to casinos about specific individuals.

[26] The OLG acknowledges that the interpretation statement is ambiguous and that it narrowly interpreted the request. However, the OLG is of the view that I should affirm this narrow interpretation because the requester’s clarification of the request strongly suggests that she had an interest in obtaining records other than those relating

to specific incidents. The basis for this belief is that the appellant used broad words, such as "nature," "topics," and "specific issues." The OLG states:

"Specific issues" is in a list with the words "nature" and "topics" and should be read consistently with these two "broadening" words. In the context, "specific issues" suggests an interest in records about the management of involuntary exclusions. The requester did not use the words "specific incidents."

[27] The OLG maintained its position regarding the scope of the request through the intake and mediation stages of the appeals process, where the appellant indicated that DTE records were part of the scope of her request.

[28] I have carefully considered the representations of the OLG and all of the circumstances of this appeal. I find that the approach taken by the OLG throughout this matter resulted in defining the scope of the request too narrowly. It has been well established by this office that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.⁴

[29] Although the OLG made two attempts to clarify the request with the appellant, it appears that the OLG did not advise the appellant that it was applying a narrow interpretation of the request. In order to be considered responsive to the request, records must "reasonably relate" to the request.⁵ In my view, the OLG's interpretation of the request, as it paraphrased the request when it was clarified with the appellant, can be reasonably interpreted to include the DTE records. As set out above, the OLG's interpretation refers to "any communications . . . regarding directives or directions" used to ban individuals from casinos for reasons other than the self exclusion program.

[30] Further, during both the intake and mediation stages of the appeal, the appellant maintained her position that the scope of the request included the DTE records.

[31] Accordingly, I find that the OLG did not act in accordance with its obligations to the appellant under section 24(2) when it unilaterally narrowed the scope of the request. In my view, the DTE records fall within the scope of the request, as they are reasonably related to the request, as originally submitted and as subsequently clarified by the OLG and the appellant.

[32] However, in light of the circumstances of this case, I find there would be no useful purpose served in ordering the OLG to issue a new decision letter based on a revised interpretation of the initial request, given that the appellant had already submitted a new request for the DTE records she seeks, and has received a decision

⁴ Orders P-134 and P-880.

⁵ Orders P-880 and PO-2661.

from the OLG, which is currently under appeal at this office. The appellant's right to obtain the DTE records will be addressed in that appeal.

Issue B: Did the institution conduct a reasonable search for records?

[33] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.⁶ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[34] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.⁷ To be responsive, a record must be "reasonably related" to the request.⁸

[35] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.⁹

[36] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.¹⁰

[37] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.¹¹

[38] The OLG submits that it conducted a reasonable search for responsive records, that there is "good reason" to believe that no responsive records exist and that no reasonable purpose would be served by an order to conduct another search.

[39] The OLG provided affidavits from two staff members which detailed the search. In her affidavit, a Manager from the Information, Access and Privacy Services (the manager) states that she sent a search email to designated contacts in the following departments, asking them to search for responsive records:

⁶ Orders P-85, P-221 and PO-1954-I.

⁷ Orders P-624 and PO-2559.

⁸ Order PO-2554.

⁹ Orders M-909, PO-2469, PO-2592.

¹⁰ Order MO-2185.

¹¹ Order MO-2246.

- Policy and government relations;
- Marketing, communications and stakeholder relations;
- Issues management;
- Regulatory standards;
- Office of the CEO; and
- The Chair's office/Board of Directors.

[40] The manager states that she received "nil response" from the six departmental contacts. I asked staff from this office to clarify with the OLG what "nil response" meant. The OLG clarified that "nil response" meant that the six departments that were asked to conduct searches notified the manager that they had conducted the searches, but did not find responsive records.

[41] The manager also states that she spoke with OLG's Director of Security Services (the director), who advised her that the OLG has a security and trespass guideline for its own sites, but it is not provided to or shared with the resort casinos,¹² as they have their own operational guidelines that are submitted to and approved by the Alcohol and Gaming Commission of Ontario.

[42] The director also provided an affidavit and states that the access request was forwarded to him and was for communications regarding directives or directions used to trespass individuals from a named casino, other than those related to the OLG's self exclusion program. The director states that the OLG does not issue any directives or directions to the resort casinos about individuals it "trespasses" from its properties.

[43] In addition, the director states:

OLG enters a record of all trespasses it issues in iTrak. The casinos have access to iTrak, and whenever a record is added to iTrak, it automatically generates an e-mail to the casinos. The e-mail is for the casinos' information and does not direct them to take any steps. ...

I note that a "Direction to Exclude" [DTE] is a formal direction from the Alcohol and Gaming Commission of Ontario to OLG that is issued under the authority of the *Gaming Control Act*.

OLG also enters a record of the DTE's it receives from the AGCO in iTrak, and the auto-generated e-mail is sent to the casinos for the casinos' benefit. I understand that the casinos also receive a copy of the actual DTE's from the AGCO itself.

¹² The casinos that are the subject matter of the request are resort casinos.

Despite my understanding of the request and my knowledge of the OLG's handling of trespasses, I did search my e-mail for any informal communications with the resort casinos in which I sent directions or provided guidance on how to handle a trespass scenario. I did not locate any responsive e-mails. ...

[44] The appellant states that she is of the view that general records, including policies, guidelines, direction and directives should exist in relation to excluding individuals from casinos for reasons other than self exclusion.

[45] The appellant also submits that the OLG and the other companies, casinos and ministries named in the request each have legislative responsibilities under the *Gaming Control Act* and its related regulations to operate gaming premises in the province. These responsibilities, the appellant argues, cannot be fulfilled without the proper communication of guidelines, policies, directives and directions.

[46] Lastly, the appellant submits that it is inconceivable that written records related to the operation of gaming premises in the province do not exist and they must be part of the responsive records, as requested.

Analysis and findings

[47] In the circumstances, I am satisfied that the search the OLG conducted for records responsive to the request was reasonable.

[48] With respect to the requests for responsive records, the OLG described in detail the individuals who were consulted in order to determine whether records exist, and the searches conducted for responsive records. The OLG also provided evidence that, although there is a security and trespass guideline for OLG sites, it does not provide the guideline to the resort casinos, as they have their own operational guidelines, which are submitted to and approved by the Alcohol and Gaming Commission of Ontario.

[49] Returning to the appellant's position that policies, guidelines, direction and directives should exist in relation to excluding individuals from casinos for reasons other than self exclusion, I would emphasize that the issue is not whether additional records ought to exist, but rather whether the OLG has conducted a reasonable search for such records as do exist as required by section 24 of the *Act*.

[50] This office has interpreted an institution's "search obligations" under section 24 in such a way that a reasonable search is one in which an experienced employee

knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.¹³

[51] In my view, the fact that the appellant may not accept the explanations provided to her about the lack of responsive records does not by itself render her belief that additional records should exist a reasonable one. I find that the appellant's representations do not provide a reasonable basis for concluding that there may be additional records.

[52] Based primarily on the affidavit material provided to me, I am satisfied that the OLG has adequately discharged its responsibilities under section 24 of the *Act* to conduct a "reasonable" search for additional responsive records.

[53] In conclusion, I find that:

- the OLG improperly interpreted the request narrowly and that DTE records fall within the scope of the request;
- there would be no useful purpose served in ordering the OLG to issue a new decision letter given that the DTE records are the subject matter of a related appeal at this office; and
- the OLG's search for responsive records was reasonable.

[54] Accordingly, I dismiss the appeal.

ORDER:

The appeal is dismissed.

Original signed by: _____
Cathy Hamilton
Adjudicator

_____ June 14, 2012

¹³ Orders M-909, PO-2469, PO-2592 and PO-2831-F.