



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2595

Appeal PA07-249

Ontario Lottery and Gaming Corporation



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NATURE OF THE APPEAL:

This is an appeal under the *Freedom of Information and Protection of Privacy Act* (the *Act*).

On January 2, 2007, the Ontario Lottery and Gaming Corporation (the OLGC) received a request dated December 19, 2006, for access to the following records:

... all information documents, memos, emails, letters and files with references to either the fifth estate, [named individual] or [named individual].

On January 15, 2007, the OLGC asked the requester if the request could be narrowed to specific individuals. The requester responded on January 18, 2007, indicating that the request could not be narrowed.

On January 24, 2007, the OLGC wrote to the requester indicating that, under section 27 of the *Act*, it was extending the time for responding to the request by an additional 30 days. The reason for doing so was that the request necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the OLGC.

On February 13, 2007, the OLGC wrote the requester again asking whether the requester would agree to narrow the request. The letter reads, in part:

On January 15, 2007 you were notified that we believed your new request of December 19, 2007 was too broad and asked if you could narrow your request to specific individuals. In your email response dated January 18, 2007, you stated that you could not narrow your request as the request is specific enough and that the search for files could be conducted by using the names, fifth estate, [named individual] and [named individual] as keywords.

Please be assured that we would like to cooperate with you, however, we are requesting once again, that you consider narrowing your request to a specific time period, a specific location or department or specific individuals. As you can imagine, your request will take a considerable amount of time to complete and in the spirit of the *Act*, we hope that you will reconsider your previous decision and assist us in narrowing the search parameters.

On March 6, 2007, the OLGC wrote to the requester extending the time limit for responding to the request with a second 30 day extension. The OLGC provided the following explanation:

In light of the scope of this request and the significant effort that will be required to search and retrieve records, we have twice asked you to narrow the scope of the request. You rejected our first request by e-mail on January 18, 2007. We wrote again on February 13, 2007 and asked you to consider narrowing your request to a specific time period, a specific location or department or specific individuals. You have not responded to our letter.

We are extending the time limit for an additional 30 days in order to determine the most effective way to search and retrieve the records, at which point (and only

if the search is required under the Act) we will provide you with a fee estimate and provide you with other information so you may chose whether or not you would like us to retrieve responsive records.

On March 30, 2007, the OLGc advised the requester that they were applying a third time extension for responding to the request by an additional 60 days. The letter states, in part:

As we advised you in our letter of March 6, 2007 due to the scope of the request, significant effort is required to search and retrieve the records. As such we are extending the time limit for an additional 60 days from the date of this letter as we continue to determine the most effective way to search and retrieve the records. We will then provide you with a fee estimate and provide you with other information so that you may choose whether or not you would like us to retrieve the responsive records.

On May 24, 2007, the OLGc issued an interim access decision and fee estimate. The fee estimate included 84 hours at \$30.00 per hour for total of \$2,520.00 for searching for the records, but the fees for record preparation (including any time severing exempt information) and photocopying were indicated as "to be determined". The interim decision did not indicate whether access to the records was likely to be given or the degree of disclosure. Finally, a deposit of \$1,260.00, half of the total estimate, was required before the OLGc would proceed to further process the request.

On June 25, 2007, following an exchange of correspondence between the parties, the requester (now the appellant) filed a deemed refusal appeal on the basis that:

...the fee estimate is not authorized by FIPPA or the Regulations made thereunder and that, as six months have elapsed since the original request and three extensions have been exercised, the request should be deemed to have been refused in accordance with section 29(4) of FIPPA.

On July 5, 2007, a Notice of Inquiry was sent to the OLGc and the appellant stating that the appellant had filed an appeal alleging that OLGc was in a deemed refusal situation. The Notice also advised that if a decision was not issued by July 16, 2007, I would be in a position to issue an order requiring the OLGc to provide a decision letter to the appellant.

DISCUSSION:

The matter before me is whether the OLGc processed the request in accordance with section 26 of the *Act* or whether it is in a deemed refusal situation pursuant to section 29(4) of the *Act*.

Section 26 of the *Act* requires that within 30 days of receiving the request the institution provide the requester with an access decision indicating whether or not access to the record or a part thereof will be given. If access is to be given the institution should, along with the access

decision, provide a copy of the record to the requester. However, the timing of the response may be affected by:

- the application of a time extension pursuant to the conditions set out in Section 27 of the *Act*;
- notice being given to persons who may be affected by the disclosure of the record pursuant to Section 28 of the *Act*; or
- the requirement to pay a fee pursuant to the conditions set out in Section 57 of the *Act*.

Section 26 of the *Act* states that:

Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 25, the head of the institution to which it is forwarded or transferred, shall, subject to sections 27, 28 and 57, within thirty days after the request is received,

- (a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and
- (b) if access is to be given, give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced.

Section 27 of the *Act* states that:

27. (1) A head may extend the time limit set out in section 26 for a period of time that is reasonable in the circumstances, where,

- (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or
- (b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.

(2) Where a head extends the time limit under subsection (1), the head shall give the person who made the request written notice of the extension setting out,

- (a) the length of the extension;

- (b) the reason for the extension; and
- (c) that the person who made the request may ask the Commissioner to review the extension.

If a decision is not issued within the time allowed under section 26 of the *Act*, then an institution is in a “deemed refusal” situation. Section 29(4) of the *Act* states:

A head who fails to give the notice required under section 26 or subsection 28 (7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given.

On January 24, 2007, the OLGC determined that it needed to extend the time for issuing an access decision for an additional 30 days. As the OLGC indicated that it received the request on January 2, 2007, this would extend the original decision date from February 1, 2007, to March 3, 2007.

However, the OLGC did not issue an access decision to the appellant on or before March 3, 2007. Instead, commencing on March 6, 2007, it issued a second time extension, later followed by a third time extension, and still later, a purported interim access decision with a fee estimate.

On April 14, 2004, Intake Analyst Lucy Costa issued Order MO-1777, in which she noted:

Barring exceptional circumstances, which are not present here, when assessing the time and resources it will need to properly respond to a request, an institution must decide and provide written notice within the initial 30-day time limit for responding to the request, the length of any time extension it will need pursuant to section 20 of the *Act* (Orders P-234, M-439 and M-581, MO-1748).

When an institution issues a time extension it is expected that, prior to the expiry of the extension, subject to section 28 and 57 of the *Act*, written notice will be given to the requester as to whether or not access to the record or a part thereof will be given, and for access to the record to then be given to the requester. This is referred to as a final access decision.

The issues of whether the first time extension was in accordance with the *Act* is not before me in this appeal. As noted previously, the question here is whether the OLGC processed the request in accordance with section 26 of the *Act* or whether it is in a deemed refusal situation pursuant to section 29(4) of the *Act*.

In my view, in the circumstances of this case as outlined above, the OLGC was required to issue a final access decision regarding access to the records on or before March 3, 2007. To date, no final access decision has been issued. Therefore, I find the OLGC to be in a deemed refusal situation pursuant to section 29(4) of the *Act*. I further find that the issuance of the other two time

extensions after the required date under the first extension does not remove the OLGC from being in a deemed refusal situation. As well, a deemed refusal is not cured by issuing an interim access decision and fee estimate, and the OLGC remains in a deemed refusal situation despite its interim access decision and fee estimate of May 24, 2007.

During my conversations with the Freedom of Information and Protection of Privacy Co-ordinator for the OLGC, she indicated that a final access decision could be issued by July 31, 2007. The appellant was prepared to accept this further delay. To ensure that the processing of this request is not delayed any further than July 31, 2007, I am ordering the OLGC to issue a final access decision to the appellant by that date.

ORDER:

1. I order the OLGC to issue a final access decision to the appellant regarding access to the records in accordance with the *Act* without recourse to any further time extensions, no later than **July 31, 2007**.
2. In order to verify compliance with Provision 1 of this Order, I order the OLGC to provide me with a copy of the decision letter referred to in Provision 1 no later than **July 31, 2007**. This should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8.

Original signed by:
Tanya Huppmann
Intake Analyst

July 16, 2007