Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3857

Appeal PA16-448

Ontario Lottery and Gaming Corporation

June 18, 2018

Summary: The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for video, audio and all records from the Ontario Lottery and Gaming Corporation relating to a specified incident at Woodbine Slots. The OLG identified responsive records and withheld portions citing the mandatory personal privacy exemption at section 21(1) of the *Act* and also indicated that the appellant could view surveillance video at its offices. At mediation, the appellant indicated that he was not interested in pursuing the information withheld under section 21(1). He continued to request a copy of the video and also claimed that the OLG's search was not reasonable and that other records should exist. Subsequent to mediation, the OLG agreed to provide the appellant with a copy of the video with the faces of other individuals blurred. The appellant objected to the fee associated with the blurring. In this order, the adjudicator finds that the OLG's search was reasonable. He does not uphold the fee estimate and reduces the fee. The issue of viewing the video was determined to be moot.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 24, 57(1).

Orders and Investigation Reports Considered: Order P-6 and PO-3466.

BACKGROUND:

[1] The appellant made a request to the Ontario Lottery and Gaming Corporation (the OLG) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

> Video and audio of my encounter with OLG Security and OPP June 19, 2016 11:30 PM to June 20, 2016 12:30 AM at Woodbine Slots. All records in your control or custody concerning this event (eg. incident report, names of security personnel involved, reason why I was required to leave – any citations, etc.) All records how my complaint to OLG processed and investigated (eg. complaint sent to [named person] Mgr. OLG Woodbine Security, [named person], Operations Manager OLG).

[2] The OLG issued a decision granting partial access to the requested records. The OLG relied on section 21(1) of the *Act* to withhold access to the remainder of the records. The OLG also withheld information it identified as non-responsive to the request. With respect to the surveillance video, the OLG advised the requester that "arrangements can be made for you to view the surveillance video at OLG Woodbine Slots".

[3] The requester, now the appellant, appealed the decision of the OLG to this office.

[4] At the outset of mediation, the appellant confirmed with the mediator that he had viewed the surveillance video, however, he advised that he wanted to be provided with a copy of the video.

[5] Following discussions with the mediator, the OLG undertook a further search for records and issued a supplemental decision providing partial access to a record which the OLG considered outside the scope of the appellant's request. In addition, following consultation with an affected party, the OLG granted partial access to a record, while withholding the remainder as not responsive to the appellant's request.

[6] The appellant advised that he is not seeking access to information severed pursuant to section 21(1) of the *Act*. In addition, the appellant advised that he is not seeking access to the information severed on the basis that it is not responsive to the request. The appellant advised that he would like a copy of the surveillance video. In addition, he advised that he believes further records exist.

[7] As mediation did not resolve the dispute, the appeal was transferred to the adjudication stage, where an adjudicator conducts a written inquiry under the *Act*. As the adjudicator, I initially invited representations from the parties on the issues of reasonable search and manner of access, in relation to the video. Representations were received and shared in accordance with section 7 of IPC's *Code of Procedure* and Practice Direction 7.

[8] During the inquiry, the OLG issued a decision indicating that it would provide a copy of the surveillance video with the faces of patrons, other than the appellant, blurred. It indicated a fee for blurring the faces in the amount of $700.00 and requested a deposit of 50% of the fee. The appellant addressed this issue in his

representations indicating that he was not prepared to pay any amount of fee which was responded to by the OLG in subsequent representations.

[9] In this order, I uphold the OLG's search. However, with regard to the fee estimate, I find that a lesser amount is reasonable. On the issue of the manner of accessing the video surveillance, I find that issue is now moot since the OLG has agreed to provide a copy to the appellant.

RECORDS:

[10] The record remaining at issue is a surveillance video consisting of 3 video files from different views.

ISSUES:

A. Is the institution required to provide the appellant with a copy of the surveillance video?

B. Should the fee or fee estimate be upheld?

C. Did the institution conduct a reasonable search for records?

DISCUSSION:

A: Is the institution required to provide the appellant with a copy of the surveillance video?

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

[12] Once it has been determined that a requester is to be given access to his or her own personal information, sections 48(3) and (4) of the *Act* prescribe the manner and form in which the institution must provide access.

[13] Section 48(3) states that where an individual is to be given access to personal information about the individual, the head shall:

a. permit the individual to examine the personal information; or

b. provide the individual with a copy thereof.

[14] Section 48(4) states:

> Where access to personal information is to be given, the head shall ensure that the personal information is provided to the individual in a comprehensible form and in a manner which indicates the general terms and conditions under which the personal information is stored and used.

[15] Regulation 460 also speaks to the manner of access. Section 3 of Regulation 460 states, in part:

> 3. (1) A head who provides access to an original record must ensure the security of the record. R.R.O. 1990, Reg. 460, s. 3 (1).
>
> (2) A head may require that a person who is granted access to an original record examine it at premises operated by the institution. R.R.O. 1990, Reg. 460, s. 3 (2).

Representations

[16] In the OLG's representations, it indicates that it agreed to redact the faces of other patrons in the surveillance video with blurring and provide a copy to the appellant. It indicates, therefore, that this issue has been resolved.

[17] The appellant, in his representations, suggests that the OLG has already provided him with a still photograph of himself that includes an image of another customer which was not redacted. The appellant notes that his request stems from harassment and racial taunting by an OLG employee yet it has not provided any records regarding how his complaint was processed and investigated.

Finding

[18] While the OLG indicates that the video surveillance is no longer an issue because it has decided to provide it to the appellant, the appellant argues that there is no need for the video to be redacted. However, at mediation the appellant indicated that he was not interested in pursuing information withheld under section 21(1) and therefore this exemption is not at issue in this appeal.

[19] Since the OLG has agreed to provide a copy of the surveillance video to the appellant, I find that manner of access is no longer at issue in this appeal as it is now moot.[1]

B: Should the fee or fee estimate be upheld?

[20] In this case, the OLG provided the appellant with a fee estimate in connection with blurring the faces on the surveillance video. The fee estimate is in the amount of

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[1] *Borowski v. Canada,* [1989] 1 SCR 342 (SCC).

$700.00 exclusive of HST. This estimate is based on a quote from a third party service provider who would be required to complete the facial blurring as the OLG has indicated that it cannot perform the blurring in-house.

[21] Section 57(1) requires an institution to charge fees for requests under the *Act*. That section reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
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> (a) the costs of every hour of manual search required to locate a record;
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> (b) the costs of preparing the record for disclosure;
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> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
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> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

[22] More specific provisions regarding fees are found in sections 6 and 6.1 of Regulation 460. Section 6 deals with requests for access to general records, and section 6.1 with requests for one's own personal information. Section 6.1 reads, in part:

> 6.1 The following are the fees that shall be charged for the purposes of subsection 57(1) of the Act for access to personal information about the individual making the request for access:
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> . . .
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> 4. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

[23] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access.[2] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.[3] In all cases, the institution must include a detailed

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[2] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[3] Order MO-1520-I.

breakdown of the fee, and a detailed statement as to how the fee was calculated.[4]

Representations

[24] In his representations, the appellant states that he was subjected to harassment and racial taunting by OLG staff and it is unfair to expect him to pay a fee as the incident occurred as a result of OLG's failure to hire and train appropriate staff. The appellant suggests that there be no fee involved. His representations included a letter to OLG requesting a fee waiver[5] and he specifically requested that this office review the fee estimate.

[25] The OLG was provided with a copy of the appellant's representations for comment on the fee estimate issue. The OLG provided representation submitting that the fee estimate should be upheld because it is based on costs specified in an invoice received by it and because it is a reasonable fee estimate.

[26] The OLG provided an affidavit from its program analyst, information access and privacy services (the analyst) where it is stated that the OLG solicited three quotes from video production vendors. It refers to Orders MO-2595, MO-2764 and PO-3466 to show that this office has held that costs specified in a quote for services are "costs specified in an invoice," for the purposes of the *Act*'s fee estimate provisions. The three quoted amounts were $150, $700 and $2,497. It was noted that three quotes were obtained as the OLG's objective was to find the lowest cost vendor who could do the work without difficulty, at the quoted cost. It is noted that the analyst chose the vendor who quoted $700 as she was more confident in this vendor than the lower priced vendor based on a reference check with another institution and conversations with vendors. The OLG submits that the analyst was uniquely positioned to exercise her judgement and as she did so reasonably, her choice should be affirmed as a matter of deference.

[27] The OLG also submits that the fee of $700 is also reasonable as it is for an estimated five hours of editing work by a professional video production company and is significantly lower than the highest quoting vendor.

Analysis and finding

[28] I note from the analyst's affidavit that she decided on the vendor who provided the $700 quote over the vendor who provided the $150 quote because she was "significantly more confident that [the vendor] wanted OLG's business, understood OLG's needs, would meet OLG's needs without unanticipated difficulties and had provided a valid estimate." With regard to the lowest bidding company, the analyst noted that it did not provide examples of relevant experience and that there were concerns about its interest in the work and the reliability of its quote.

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[4] Orders P-81 and MO-1614.
[5] The OLG responded to the fee waiver request with a request for supporting information.

[29] Regulation 460 makes a distinction in fees that can be charged to a requester where their own personal information is not found in the records and where their personal information does appear in the records. Section 6.1 of Regulation 460, which applies where the requester's personal information appears in the records, allows an institution to charge for photocopies, cost to provide records on a CD, developing a computer program or other method of producing a record from machine readable records and the cost that the institution incurs in locating, retrieving, processing and copying the records if those costs are specified in an invoice received by the institution.

[30] Although in this instance, the cost to blur the faces is not on an actual invoice as it is a quote for service, it has been found that a quote meets the requirement. In Order PO-3466, former Senior Adjudicator Higgins, citing Orders MO-2764 and MO-2595 agreed that a quote, as opposed to an actual invoice, can satisfy the requirement "specified in an invoice" in section 6.1, paragraph 4.

[31] However, since the appellant challenges the estimated fee, a reasonable amount must be determined. In the circumstances of this appeal, I do not agree with the OLG's position that the charge of $700 for the facial blurring is reasonable.

[32] The OLG provided copies of the 3 quotes received for the facial blurring in its representations. One company sought $2,497.30, inclusive of HST, for editing the 3 videos. The description of services in the quote was for "facial blurring." The second quote, the one on which the OLG relies, totaled $700, excluding HST, to apply facial blurring. This company set out an estimate of the time required to edit the videos ($625) as well as the cost to render 3 new files ($75). The third quote was for $150, excluding HST, and describes the service as "3x mp4 videos to 'blur' people in the video," with "editing and encoding as needed."

[33] In an early decision issued by the IPC, former Commissioner Linden in Order P-6 found that one of the fundamental purposes of the *Act* "is to facilitate access to government information promptly and at the lowest cost to the public." When examining section 57, the Commissioner noted the Legislature's intention to include a "user pay" principle in the *Act* indicating that the government must apply this section in a way that is both reasonable and rational.

[34] The lowest quote, $150, is significantly lower than the mid-range quote, $700. Facial blurring is not an uncommon technique and I do not have sufficient evidence to support that the company with the lowest bid is unable to complete the work for the quoted price, which is suggested as a possibility by the OLG. While the analyst has more confidence in the mid-range company completing the work, her issues with the lower priced company do not support that this company would be unable to complete the facial blurring and at the quoted rate. If the OLG does not have its own facial blurring equipment, it needs to send that work out to a third party company for which it can invoice the appellant. Other than the analyst's view that the mid-range company would meet the OLG's needs and that its estimate was accurate, it is not exactly clear

why the lower priced company would not also be able to meet the required needs. The analyst suggests that another institution had utilized the mid-ranged company with success but this is not a reason to reject the lower priced quote.

[35] In my view, the fee estimate of $700 is too high, given the quote of $150 to do the same work. Keeping in mind the user-pay principle of the *Act* and Commissioner Linden's comments that one of the fundamental purposes of the *Act* is to facilitate access to government records at the lowest cost possible to the public, I find that the lowest bid of $150 is reasonable.

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

[36] 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.

[37] 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]

[38] 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]

[39] 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]

[40] 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]

Representations

[41] In its representations, the OLG also provided an affidavit sworn by the analyst who conducted the search for responsive records. The analyst notes that she believed

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[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 and PO-2592.
[10] Order MO-2185.
[11] Order MO-2246.

the request was clear when it was received. The analyst states that she first requested records from senior managers responsible for security and surveillance as well as the administrative assistant for security and surveillance services. The administrative assistant sent responsive records found from a system that stores records off-site for security incidents, and also suggested that the analyst contact the manager for security services at OLG Woodbine Slots. The analyst confirmed that she contacted this manager who in turn provided her with statements and a reference number for a profile that was created on their customer support system. The analyst then retrieved records from OLG's customer support system from the team lead of OLG support centre.

[42] The analyst refers to the OLG's first access decision where it advised the appellant that arrangements could be made to view the responsive surveillance video at OLG Woodbine Slots. The analyst confirmed that the appellant viewed the responsive video which included video from three camera views. The analyst confirmed that the video does not include audio.

[43] The analyst notes that after the appellant appealed and during mediation, he raised a number of questions and issues which led her to make a written inquiry that was re-directed to the facility surveillance manager at Woodbine Slots. This manager confirmed the start time of the surveillance video and also that only the live video was saved in regards to the incident from the time the surveillance operator tried to conduct a comparison of the suspect to the time he was escorted off the site. In response to the appellant's assertion that there should be a written record pertaining to his identification as a suspicious person, another search was conducted and a record was identified and disclosed to the appellant. The analyst submits that this record, although disclosed to the appellant, was not responsive to the request.

[44] The analyst also notes that after consulting with an affected third party, she disclosed one more record which she also submitted was not responsive to the request.

[45] A copy of the OLG's representations was provided to the appellant who provided his own representations. The appellant submits that he was informed by the Director, licensing and registration, operations division of the Alcohol and Gaming Commission of Ontario, that he believed that audio or generalized audio was available with surveillance videos. He also states that the OLG has not provided any records on how his complaint was processed and investigated. He states that he was not given any indication that people involved were questioned about the event and no information that HR was involved. He states that it is not reasonable that a government agency would not investigate such accusations.

Analysis and finding

[46] As noted above, the *Act* does not require that the OLG prove with absolute certainty that further records do not exist; however, it must provide sufficient evidence to show that it made a reasonable effort to identify and locate responsive records. In

addition, although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist. In this instance, and for the reasons set out below, I find that the OLG's search for responsive records was reasonable.

[47] Despite the appellant's assertion that there should be audio in the three videos, the OLG confirmed that there was no audio. The OLG provided this office with a duplicate copy of the surveillance video and I viewed each of the three videos. I confirm that no audio exists on the copy provided. In addition, the appellant's suggestion that a Director at the Alcohol and Gaming Commission of Ontario "believes" that audio is available is not sufficient evidence to support a finding that audio should exist. I find that the evidence supports that audio for the surveillance video does not exist.

[48] The OLG performed another search for responsive records during mediation. As set out in its representations, and the mediator's report, another record was found in this subsequent search which was, in turn, provided to the appellant. However, the OLG submits that this record was not responsive to the actual request as an explanation for why this record was not found in its initial search. The appellant, who was provided with the OLG's representation, did not dispute that this record was not responsive to his request. Therefore, it appears that the OLG has conducted at least 2 searches for responsive records with its second search not resulting in finding further responsive records. This does not suggest the existence of further responsive records that were not located by the OLG.

[49] The only other suggestions of responsive records existing comes from the appellant's own belief that further records should exist, as outlined above. I have reviewed the records that the OLG located and provided to the appellant (with redactions). They include an employee statement, a supervisor statement, two incident reports and an occurrence report completed by the OLG. The first incident report consists of six pages and commences the day after the incident when the appellant contacted the OLG by phone. These pages detail communications between the OLG and the appellant and concludes on page six that the incident will be closed until the customer calls back. The second incident information is three pages and shows that it was started when the appellant again contacted the OLG to follow up. On the last page of this summary, it is indicated that the issue was unresolved and noted that the incident was closed. This is not suggestive of further responsive records existing concerning the OLG's investigation into the complaint.

[50] Accordingly, I find that the OLG has provided sufficient evidence to show that its search was reasonable and the appellant has not provided a reasonable basis for me to conclude that further responsive records exist.

ORDER:

1. I do not uphold the OLG's fee estimate and reduce it to $150.

2. The OLG's search for records is upheld.

Original Signed by: June 18, 2018

Alec Fadel
Adjudicator