



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER P-705**

**Appeals P-9300266 and P-9400190**

**Ontario Lottery Corporation**



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## **BACKGROUND:**

The Ontario Lottery Corporation (the OLC) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to certain information relating to the business relationship between the OLC and former distributors of OLC's lottery products. In particular, the requester sought access to a list of the gross earnings of the former distributors as well as each distributor's severance package. The OLC had terminated its contracts with these distributors in December 1991.

Pursuant to section 28 of the Act, the OLC notified the distributors whose interests might be affected by the disclosure of the gross earnings and severance package. Following the receipt of representations from some of these individuals, the OLC decided to disclose certain of the requested information, but to deny access to the distributors' gross earnings and severance payments claiming section 21(1) of the Act.

The requester appealed the OLC's decision.

Mediation of the appeal was not successful. A Notice of Inquiry was sent to the OLC, the appellant and the distributors. Representations were received from the appellant, the OLC and 12 of the 45 distributors. One distributor consented to the release of all information pertaining to his distributorship; the others who responded to the notice objected to disclosure.

The OLC subsequently issued a second decision letter exempting the gross earnings information from disclosure pursuant to sections 17(1), 18(1)(c) and (e) and 21(1) of the Act.

## **THE RECORDS:**

Record 1 is a one-page document entitled "Distributors Past Service List". It contains the distributors' code numbers, names, start dates, years and months of service, awards and incentives. The OLC has indicated that the amounts listed under the heading "award" represent the severance payments.

Record 2 is also a one-page document. It contains the distributors' code numbers and summaries of gross revenue for the years 1986-87, 1987-88, 1988-89, 1989-90 and 1990-91. It also lists the severance payment awarded to each distributor and, under the column "entity", whether the distributor was a corporation or an individual. The information under this column is not responsive to the request.

The amounts listed under the heading "Award" on Record 1 and those under the heading "Severance Payment" on Record 2 are not the same, although they are both supposed to represent the amounts received by the distributors upon termination of their contracts with the OLC. The OLC has explained that the "Severance Payments" on Record 2 represent the total of the amounts paid to the distributors for years of service (the amount found in Record 1), plus a sales bonus and office closure expenses.

## **ISSUES:**

- A. Whether the information contained in the records constitutes "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the mandatory exemption provided by section 21(1) of the Act applies.
- C. Whether the mandatory exemptions provided by sections 17(1)(a) and/or (c) of the Act apply.
- D. Whether the discretionary exemptions provided by sections 18(1)(c) and/or (e) of the Act apply.

## **SUBMISSIONS/CONCLUSIONS:**

### **ISSUE A: Whether the information contained in the records constitutes "personal information" as defined in section 2(1) of the Act.**

Personal information is defined in section 2(1) of the Act, in part, as "recorded information about an identifiable individual".

The appellant's position is that all the distributors operated as corporations. Therefore, he maintains that the gross earnings and termination payments cannot be considered to be the "personal information" of the distributors.

At the time of the termination of the distributors' contracts, three distributors conducted business in their personal capacity, 42 operated through corporations and two operated in trust for the OLC. The OLC has confirmed that those persons operating in trust for the OLC did not receive severance payments. The OLC submits that the requested information constitutes the personal information of all of the former distributors including those distributors who had incorporated.

The OLC has provided a copy of a document entitled "Agreement to Operate a Distributorship". This document provides that a distributor may operate as a sole proprietorship or a corporation.

In its representations, the OLC states:

OLC took applications for distributorships only from individuals and provided the option to the individual to conduct the business through a corporation. The individual distributors, although operating their businesses through corporations, were required by OLC to be the controlling shareholder and president of such corporations. Although the "form" of the business relationship between these distributors and OLC was through a corporation, the "substance" of the relationship was with the individual distributor, acting through a corporate vehicle, and OLC.

The OLC further states:

Where a business is operated through a corporation controlled by one person, the courts have recognized that the individual controlling the corporation should be dealt with on an individual basis and without regard to the corporate vehicle used to conduct business. As such, individuals who are sole shareholders and directors of a business are entitled to be compensated for his or her personal losses in circumstances where the actual business was conducted through a corporation.

The OLC also asserts that the Act should be interpreted so as to similarly recognize the personal element of a corporation controlled by an individual:

... one of the underlying purposes of the Act is to protect personal privacy by restricting the release of private personal information. This purpose is met if the Act is interpreted to recognize that information relating to a corporation controlled exclusively by an individual is in reality information relating to the individual who owns and controls the corporation. Therefore, the information relating to distributors who conducted their business through one persons corporations should be considered personal information for the purposes of the Act.

The question of whether information which outwardly pertains to a business and may be categorized as relating to an identifiable individual has been canvassed in a number of previous orders issued by the Commissioner's office. In Order 16, former Commissioner Sidney B. Linden made the following general statement:

The use of the term "individual" in the Act makes it clear that the protection provided with respect to the privacy of personal information relates only to natural persons. Had the legislature intended "identifiable individual" to include a sole proprietorship, partnership, unincorporated associations or corporation, it could and would have used the appropriate language to make this clear.

However, Commissioner Linden went on to state in Order 113 that:

It is, of course, possible that in some circumstances, information with respect to a business entity could be such that it only relates to an identifiable individual, that is, a natural person, and that information might qualify as that individual's personal information.

In Orders P-515 and M-277, Assistant Commissioner Irwin Glasberg followed the approach set out in Order 113 and found that information which outwardly pertained to a business entity in these two cases more properly related to an identifiable individual, constituting the individuals' personal information. In Order P-364, on facts somewhat analogous to those in the present appeal, former Assistant Commissioner Tom Mitchinson concluded that there was a sufficient

nexus between the personal finances of a couple who owned a cattle farming operation and a report containing information about the status of the herd such that the report constituted the personal information of the individual owners.

Having reviewed the records and the representations of the parties, it is my view that the present appeal represents the type of exceptional circumstance envisaged by Commissioner Linden in Order 113. The representations of the OLC on how it structured the distributorship arrangements are particularly compelling on this point. I am satisfied that the severance payments and gross earnings are monies which can be easily attributed to the individuals who controlled the distributorships. As such, I find that this information constitutes the personal information of the distributors.

One of the former distributors has consented to the disclosure of his personal information. Accordingly, this information should be released to the appellant.

As stated earlier, the records contain the names of the distributors, their distribution number, their severance payments and gross earnings. In my view, it is possible to remove the personal identifiers, the names and distribution numbers from the records in accordance with the principles of severance set out in section 10(2) of the Act. Once these personal identifiers are removed, I do not believe that there is a reasonable expectation that any individuals can be identified from the remaining information, the dollar amounts of severance payments and gross earnings (Order P-230).

As the remaining information cannot be said to be about an **identifiable individual**, it cannot constitute "personal information" as defined in the Act. Accordingly, the mandatory exemption in section 21(1) cannot apply and I need not consider Issue B.

**ISSUE C: Whether the mandatory exemptions provided by sections 17(1)(a) and/or (c) of the Act apply.**

For a record to qualify for exemption under section 17(1)(a) and/or (c) of the Act, the OLC and/or the distributors must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a) and/or (c) of section 17(1) will occur.

[Order 36]

If any part of the test is not satisfied, the exemption under section 17(1) will not apply to the records (Order 36).

### **Part One**

In my view, the severance payments and gross earnings of the distributors constitute financial information. Therefore, the requirements of part one of the test have been met.

### **Part Three**

The information at issue consists solely of dollar amounts. It does not include the names or numbers of the distributors, as I have ordered that these identifiers not be disclosed. In these circumstances, I am not satisfied that disclosure of the amounts, without any corresponding information, could reasonably be expected to result in any of the harms described in sections 17(1)(a) and/or (c) of the Act. Accordingly, I find that part three of the test fails. Consequently, the information does not qualify for exemption under section 17(1).

### **ISSUE D: Whether the discretionary exemptions provided by sections 18(1)(c) and/or (e) of the Act apply.**

Sections 18(1)(c) and (e) 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;
- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

In all cases where a claim for exemption is made under section 18(1) of the Act, the onus rests with the institution to demonstrate that the harms envisioned by this section are present or reasonably foreseeable. The evidence submitted by the institution must be detailed and convincing. In the absence of sufficient evidence to support a claim under section 18, the records should be released to the appellant (Orders P-441 and P-454)

### **Section 18(1)(c)**

To qualify for exemption under section 18(1)(c) of the Act, the record in question must contain information whose disclosure could reasonably be expected to prejudice the economic interests or the competitive position of an institution.

The phrase "could reasonably be expected to" has been considered in a number of previous orders dealing with various sections of the Act which use the same terminology. It has been interpreted as requiring that there exist a reasonable expectation of probable harm. The mere possibility of harm is not sufficient. At a minimum, the institution must establish a clear and direct linkage between the disclosure of the information and the harm alleged (Orders M-202 and P-555).

In its representations, the OLC submits that it is presently negotiating termination provisions of contracts and actual termination of contracts. The OLC contends that the parties with whom it is currently negotiating could use the severance payment information to their advantage:

Private entities presently negotiating the termination provisions of contracts or the actual termination of existing contracts with OLC would certainly find the terms of the termination of an existing arrangement very useful. Such information would illustrate the range of termination amounts negotiated and clearly disclose the parameters of the negotiations applied by OLC. As well, the terms of prior contractual termination payments would likely set a bottom line as to the amount of termination payments that OLC should pay on termination of a significant contractual arrangement.

The OLC further submits that there was an expectation of confidentiality when the termination agreements were made and that there should be a prima facie finding that the release of such information would reasonably be expected to prejudice the economic interests or competitive position of the OLC.

With respect to the gross earnings, the OLC states that it regularly negotiates contracts with third parties and that disclosure of the earnings summary would have a negative impact on these negotiations. The OLC goes on to state that this is especially true for lottery retailers who operate in a business environment similar to the former distributor network.

I will turn first to the confidentiality argument raised by the OLC. The fact that there might have been an expectation of confidentiality between the parties is not sufficient to bring the information under the ambit of section 18(1)(c). Rather I must consider whether there is detailed and convincing evidence which demonstrates that the disclosure of the information could reasonably be expected to prejudice the OLC's economic interests or competitive position.

In this case, the OLC suggests that it is presently negotiating termination of certain contracts with other parties and that disclosure of the severance payments made to the distributors would be detrimental to the OLC in these negotiations. However, the OLC has failed to indicate the connection between the severance payments it paid to the distributors and the types of contracts it is currently in the process of terminating.

With respect to the gross earnings, the OLC contends that lottery retailers could use this information to their advantage. The OLC has not provided adequate information respecting the similarity of the former distributorship network and the current arrangement to satisfy me that disclosure of the distributors' past gross earnings would hinder the OLC's ability to appropriately negotiate with its retailers or other parties.

In conclusion, the OLC has failed to provide sufficient evidence to establish the linkage between the disclosure of the information contained in the records and the alleged prejudice to its economic interests or competitive position. As a result, I find that the exemption provided by section 18(1)(c) of the Act does not apply to the records.

**Section 18(1)(e)**

For a record to qualify for exemption under section 18(1)(e) of the Act, the institution must establish that:

1. the record contains positions, plans, procedures, criteria or instructions; **and**
2. the record is intended to be applied to negotiations; **and**
3. the negotiations are being carried on currently or will be carried on in the future; **and**
4. the negotiations are being conducted by or on behalf of an institution or the Government of Ontario

[Order P-219]

The records contain information outlining the severance payments made to the distributors, as well as their gross earnings. They do not contain positions, plans, procedures, criteria or instructions as required by section 18(1)(e). Accordingly, I find that the records do not qualify for exemption under section 18(1)(e).

**ORDER:**

1. I order the OLC to disclose the records to the appellant in accordance with the highlighted copy of the records I have provided to the Freedom of Information and Privacy Co-ordinator of the OLC with a copy of this order. The highlighted portions **should** be released.
2. I order the OLC to disclose to the appellant the records described in Provision 1 within thirty-five (35) days following the date of this order and not earlier than the thirtieth (30th) day following the date of this order.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the OLC to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: \_\_\_\_\_  
Anita Fineberg  
Inquiry Officer

\_\_\_\_\_ June 20, 1994