



Information and Privacy
Commissioner/Ontario

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

ORDER P-1399

Appeals P_9600459 and P-9600460

Ministry of Consumer and Commercial Relations



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BACKGROUND:

The Gaming Control Act, 1992 (the GCA) establishes a scheme and structure for the registration and regulation of the suppliers of goods and services to those organizations which have been licensed to operate lottery schemes. This legislation sets up the Gaming Control Commission (the GCC) and the statutory positions of Registrar and Director who have the legal authority to carry out investigations to ensure compliance with the GCA and its regulations. Pursuant to section 31 of the GCA, the Director appoints investigators to determine if there has been compliance with the GCA, regulations, terms of a licence or terms of registration.

“Due diligence” investigations are conducted on behalf of the Registrar with respect to applicants for registration under the GCA. Section 9(1) provides that:

the Registrar may make such inquiries and conduct such investigations into the character, financial history and competence of an applicant for registration or renewal of registration, a registrant or persons interested in the applicant or registrant, as are necessary to determine whether the applicant meets the requirements of this Act and the regulations.

Section 9(2) provides that if the applicant or registrant is a corporation or partnership, the Registrar may make the inquiries into or conduct investigations of the officers, directors or partners of the applicant or registrant. To facilitate the investigation, the Registrar may, pursuant to section 9(3), require information or material from any person who is the subject of the inquiries or investigation or from any person who the Registrar has reason to believe can provide information or material relevant to the inquiries or investigations.

Company A, a business incorporated in Ontario, and Company B, incorporated in the State of Washington, applied to the GCC for registration as gaming suppliers. Companies A and B are wholly owned subsidiaries of Company D (formerly know as Company C).

Pursuant to section 9 of the GCA, an investigation was conducted into Companies A, B, C and D and their officers, directors and interested persons. At the present time, the Registrar has required that further investigation be undertaken and requested additional information from the applicants. The due diligence investigation is still ongoing and will not be completed until the additional information and material has been supplied and the Registrar makes a decision on the application.

NATURE OF THE APPEAL:

The appellant is counsel for Companies A and B. He submitted a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of Consumer and Commercial Relations (the Ministry) for access to his clients’ GCC application files. The Minister of Consumer and Commercial Relations is the “head” of the GCC which is an institution under the Act.

The Ministry identified numerous responsive records and denied access to them in their entirety, issuing a separate decision letter with respect to the records related to each company. The appellant filed appeals of both decisions. This office opened two appeal files, P-9600459 and P-9600460. However, as the issues, parties and subject matters of these appeals are similar in nature, this order will dispose of the matters in both appeals.

During mediation, the appellant confirmed that he also represents Companies C and D, as well as three individuals who are directors or officers of the client companies - Directors A, B and C.

The Ministry claimed that additional exemptions applied to the records at issue such that it is currently denying access on the basis of the following exemptions in the Act:

- law enforcement - sections 14(1)(a), (b), (d), (g) and (e)
- third party information - section 17(1)
- solicitor-client privilege - section 19
- invasion of privacy - section 21(1)

A Notice of Inquiry was sent to the Ministry, the appellant and three individuals whose interests may be affected by disclosure of the records (Directors D, E and F). Representations were received from the Ministry, the appellant and Directors D and E. Director D did not consent to the disclosure of any information related to him. Director E advised that the appellant also represents her interests in this matter and consequently consented to the disclosure to the appellant of information related to her.

As it appeared that some of the records for which the Ministry claimed the application of sections 14(1) and (2), 15, 17(1) and/or 19 may contain the information of the appellant's clients, the appellant and the Ministry were further asked to comment on the possible application of section 49(a). This section provides the Ministry with the discretion to refuse to disclose to the individual to whom the information relates personal information where these exemptions, among others, would apply. Representations were received from the Ministry and the appellant on this issue.

THE RECORDS AT ISSUE:

Appeal P-9600459

In its representations, the Ministry indicates that it is now prepared to disclose Records 1, 4, 5, 7, 8, 9, 10 and 11 in their entirety and portions of Records 2, 3 and 6. It maintains its position with respect to denying access to Records 12, 13, 14, 15, 16 and 17 in their entirety.

Records 14, 16 and 17 are the Personal Disclosure Forms of Directors B, C and E respectively. Based on the fact of the appellant's representation of Directors B and C and the consent of Director E, these records should be disclosed to the appellant in their entirety, as should the reference in Record 2 to Director E. The Ministry has not claimed that any other exemptions apply to these records.

I have set out the records, and portions of the records, remaining at issue in this appeal in Appendix A to this order.

Appeal P-9600460

In its representations, the Ministry has indicated that it is prepared to disclose in their entirety Records 1, 2, 3, 4, 6, 8, 15, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 28(second), 29, 32, 33, 34, 36 and an additional unnumbered record, the By-laws of Company B adopted January 27, 1995. Record 28 is identified in the record index in the Notice of Inquiry as constituting only one document - the Ministry has divided this record into two, both of which it is prepared to disclose.

It is also prepared to disclose portions of Records 5, 7, 16, 17 and 25. The Ministry is still denying access to Records 9, 10, 11, 12, 13, 14, 14(second), 26, 30, 31, 35 and 37 in their entirety. For greater certainty, because of numbering errors in the Notice of Inquiry, the Ministry has confirmed that it is still denying access to the Addendum to the Reports and the GCC system update of November 1995, the Memorandum from Legal Counsel to the Registrar and the attachments to the reports. These were erroneously numbered as Records 13, 14 and 14 in the Notice of Inquiry.

The appellant has confirmed that he is not seeking access to records for which the Ministry has claimed section 19 of the Act. These are the handwritten notes to and from counsel on Records 5 and 7 and Record 13, the memorandum from counsel to the Registrar in its entirety. Accordingly, the notes on Records 5 and 7 and Record 13 in its entirety, are not at issue in this appeal.

Portions of Record 16 which have been withheld contain the information of Director E who, as noted, consents to the disclosure of her information to the appellant. Therefore, this information should be disclosed, as well as Record 37 which is the Personal Disclosure Form of this individual. No other exemptions have been claimed to apply to these records.

I have also set out the records, and portions of the records remaining at issue in this appeal, in Appendix A to this order.

DISCUSSION:

PERSONAL INFORMATION

Section 21(1) of the Act defines "personal information" to mean, in part, recorded information about an identifiable individual. It is the position of the Ministry that the records contain the personal information of individuals whom the appellant does not represent. The appellant agrees with this characterization with respect to some of the information in the records. However, he submits that, based on Order P-721, where the information relates to individuals acting in their

capacity as officers or directors of a corporation it does not constitute the “personal information” of these individuals. This approach was also followed in Orders P-583 and P-677.

Having reviewed the records, I make the following findings:

1. The information about the individuals found in the corporate correspondence which constitutes Records 2 and 3 in Appeal P-9600459, and Records 16 and 17 in Appeal P-9600460 relates to these individuals in their professional capacities as officers and directors of the applicant companies. As it does not constitute personal information, the exemption in section 21(1) cannot apply. As the Ministry has not claimed that any other exemptions apply to these records, they should be disclosed to the appellant in their entirety.
2. The home telephone number of Director D as it appears in Record 6 (Appeal P-9600459) and Record 25 (Appeal P-9600460) constitutes the personal information of Director D.
3. The Personal Disclosure Forms and Applications for Registration as a Gaming Supplier contain personal information related to Directors D and F. These documents are Records 12, 13 and 15 in Appeal P-9600459, and Records 30, 31 and 35 in Appeal P-9600460.
4. Record 9 contains the personal information of one of the appellant’s clients. Records 10, 11, 12 and 14 contain the personal information of the appellant’s clients and others.
5. Record 13 contains no personal information.

DISCRETION TO REFUSE ACCESS TO REQUESTER’S OWN INFORMATION/LAW ENFORCEMENT

Section 47(1) of the Act allows individuals access to their own personal information held by a government institution. I have previously found that the personal information of one or more of the appellant’s clients is found in Records 9-12 and 14. However, section 49 sets out exceptions to this right.

Under section 49(a) of the Act, the Ministry has the discretion to deny access to an individual’s own personal information in instances where certain exemptions, including sections 14(1)(a), (b), (c), (d) and (g) and 14(2)(a) would otherwise apply to that information. The Ministry has claimed that Records 9-14 in Appeal P-9600460 are subject to these exemptions.

These sections of the Act state:

- 14(1) 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;
 - (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
 - (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
 - (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
- (2) A head may refuse to disclose a record,
- (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

For a record to qualify for exemption under section 14(2)(a) of the Act, the institution must satisfy each part of the following three-part test:

1. the record must be a report; **and**
2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Order 200]

In order for a record to qualify for exemption under either section 14(1)(a), (b), (c), (d) or (g) or 14(2)(a), the record must relate to a "law enforcement" matter which is defined in section 2(1) of the Act 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, and
- (c) the conduct of proceedings referred to in clause (b).

The appellant submits that the records do not relate to a “law enforcement” matter as defined in (b) above, as there is not presently, nor could there be in the future, a proceeding in a court or tribunal capable of imposing a penalty or sanction against his clients who have applied for the licences. At most, he submits that the application could be denied.

The Ministry states that, if as a result of the investigations the Registrar refuses to grant the licences, he is required pursuant to section 13 of the GCA to issue a Notice of Proposed Order to Refuse Registration, along with written reasons. The applicant then has the opportunity to request a hearing before the Commercial Registration Appeal Tribunal (CRAT), which is a proceeding before a tribunal. The Ministry states that this situation is analogous to those in Orders P-200, P-403 and P-1049 in which records prepared to assist a tribunal in assessing an individual’s eligibility for certain benefits were found to relate to a “law enforcement matter”. Thus, the Ministry states that it has a law enforcement mandate as defined in paragraph (b) and that the records relate to this mandate.

In the orders referred to by the Ministry, the investigations related to situations in which individuals were previously licenced, registered or receiving certain benefits. The issue to be determined in those cases was whether the licences should be renewed, revoked or benefits cancelled or refunded. As the appellant notes, in this case, the matter is still at the application stage.

However, in my view, the circumstances of this case are analogous in that the nature of the investigations carried out to date and the potential for denial of the licence could lead to proceedings in which a penalty or sanction is imposed. Pursuant to section 17 of the GCA when a person is refused registration, or is refused renewal of a licence, he or she cannot apply to the Registrar for registration until at least two years have passed since the refusal or revocation. Accordingly, I find that Records 9-14 in Appeal P-9600460 relate to a “law enforcement matter”.

I will now consider whether Records 9-14 in Appeal P-9600460 fall within section 14(2)(a). In Order 221, Commissioner Tom Wright made the following comments about part one of the test:

The word “report” is not defined in the Act. However, it is my view that in order to satisfy the first part of the test, i.e. to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact.

I agree with this approach and will apply it to the records at issue. Records 10-14 include a background to the investigatory assignment, the matters which were to be investigated, the results of the investigation, including statements from witnesses and documentation, as well as an analysis of the results and recommendations for further action. In my view, these records consist of formal accounts of the results of the consideration of the information related to the investigation. On this basis, I find that these records constitute “reports” for the purposes of section 14(2)(a) of the Act, meeting part one of the test.

As indicated, the GCC must ensure that applicants for registration satisfy the requirements of the GCA. “Due diligence” investigations, such as the one which is being conducted in this case, are

used by the GCC to collect information to fulfill its statutory mandate. On this basis, I find that Records 10-14 were prepared in the course of a law enforcement investigation by the GCC, an agency which has the function of enforcing and regulating compliance with a law, the GCA. Thus, parts two and three of the test have been met and Records 10-14 qualify for exemption pursuant to section 14(2)(a). As all of these records, with the exception of Record 13, contain the personal information of one or more of the appellant's clients, they are exempt under section 49(a) of the Act. Record 13, which contains no personal information is exempt under section 14(2)(a).

Record 9 is an e-mail from the Registrar to the Manager responsible for "due diligence" investigations. In my view, it does not constitute a "report" for the purposes of section 14(2)(a) in that it merely gives instructions to the Manager. It does not contain any "account of the results of the collation and consideration information". As the first part of the section 14(2)(a) test has not been satisfied, Record 9 cannot qualify for exemption under this section.

I will now consider whether any of the other exemptions in section 14(1) apply to this document. The Ministry submits that disclosure of this e-mail "could interfere with a law enforcement matter" pursuant to section 14(1)(a). In this regard, the Ministry states that, as part of the ongoing investigation, it has requested further information. It states that the untimely disclosure of information could interfere with its ability to obtain such information and material in the future related to the business and individuals involved in the application.

Based on the information provided by the Ministry, I am satisfied that disclosure of Record 9 could reasonably be expected to interfere with a law enforcement matter. As this record contains the personal information of one of the appellant's clients, it is exempt pursuant to section 49(a) of the Act.

INVASION OF PRIVACY

As I have indicated, Records 6, 12, 13 and 15 in Appeal P-9600459 and Records 30, 31 and 35 in Appeal P-9600460 contain the personal information of individuals other than the appellant's clients. I have rejected the appellant's contention that information related to Directors D and F does not constitute their personal information.

The appellant states that "severance can take place with respect to personal information concerning those individuals the Requester does not represent". That is, this information may be withheld from the records. In these circumstances, I uphold the Ministry's decision with respect to the non-disclosure of the personal information contained in Records 6, 12, 13 and 15 in Appeal P-9600459 and Records 30, 31 and 35 in Appeal P-9600460.

ORDER:

1. I uphold the Ministry's decision not to disclose Records 6, 12, 13 and 15 in Appeal P-9600459 and Records 9-14, 25, 30, 31 and 35 in Appeal P-9600460.

2. I order the Ministry to disclose Records 2-3, 14 and 16-17 in Appeal P-9600459 and Records 16-17 and 37 in Appeal P-9600460 to the appellant by sending him a copy by **July 3, 1997** and not earlier than **June 28, 1997**.
3. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ May 29, 1997

APPENDIX A

**INDEX OF RECORDS AT ISSUE
Appeal Numbers P-9600459 and P-9600460**

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED	DECISION RECORD
Appeal Number P-9600459			
2	Letter from General Counsel Company A to GCC, dated May 16/95 (information related to Directors D, E and F)	21(1)	Disclose in full
3	Letter from GCC to Company A, dated May '95 (information related to Director D)	21(1)	Disclose in full
6	Application for Registration as Gaming Supplier - Company A (residential phone number of Director D)	21(1)	Decision upheld
12	Personal Disclosure Form of Director D	21(1)	Decision upheld
13	Application for Registration as a Gaming Supplier - Director D	21(1)	Decision upheld
14	Personal Disclosure Form of Director B	21(1)	Disclose in full
15	Personal Disclosure Form of Director F	21(1)	Decision upheld
16	Personal Disclosure Form of Director C	21(1)	Disclose in full
17	Personal Disclosure Form of Director E	21(1)	Disclose in full
Appeal Number P-9600460			
9	E-mail from Registrar to Manager, Investigations, dated May 2/96	14(1), 14(2), 15, 17(1), 21(1)	Decision upheld
10	Report dated October 26/95 from GCC Investigator to Director of Investigations	14(1), 14(2), 15, 17(1), 21(1)	Decision upheld
11	Report dated April 9/96 from GCC Investigator to Director of Investigations	14(1), 14(2), 15, 17(1), 21(1)	Decision upheld
12	Report dated May 1/96 from GCC Investigator to Director of Investigations	14(1), 14(2), 15, 17(1), 21(1)	Decision upheld
13	GCC System Updates and Addendum to Reports	14(1), 14(2), 15, 17(1), 21(1)	Decision upheld

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED	DECISION RECOR
14	Attachments to Investigation Reports	14(1), 14(2), 15, 17(1), 21(1)	Decision uph
16	Letter from General Counsel Company B to GCC, dated May 12/95 (information related to Directors D, E and F)	21(1)	Disclose in f
17	Letter from GCC to Company B, dated April 11/95 (information related to director D)	21(1)	Disclose in f
25	Application for Registration as Gaming Supplier - Company B (residential phone number of Director D)	21(1)	Decision uph
30	Personal Disclosure Form of Director D	21(1)	Decision uph
31	Application for Registration as Gaming Supplier - Director D	21(1)	Decision uph
35	Personal Disclosure Form of Director F	21(1)	Decision uph
37	Personal Disclosure Form of Director E	21(1)	Disclose in f