Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2131

Appeal PA-010293-3

Ontario Lottery and Gaming Corporation

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BACKGROUND:

The requester (now the appellant) originally made a request for access under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ontario Lottery and Gaming Corporation (the OLGC) for specified information that is routinely collected by Winners Circle slot cards or other player data. This request resulted in a decision later appealed to this office. That appeal, PA-010293-1 was resolved through mediation on the basis of, among other things, a narrowed request. The OLGC subsequently issued a decision based on the appellant's narrowed request, which was also appealed to this office. This second appeal, PA-010293-2, was also resolved and closed.

The appellant then submitted a further, more precise request, the subject of this appeal.

NATURE OF APPEAL:

The request at issue is stated as follows:

> We are seeking to obtain information from the [OLGC] that is collected by Winners Circle slot cards or by other player data with respect to the Thunder Bay Charity Casino and the Kawartha Race Track.
>
> We request:
>
> 1) The number of patrons residing within a circle of 80 km. radius centered on the casino and race track
>
> 2) The number of visits by patrons residing within a circle of 80 km. radius centered on the casino and race track
>
> 3) The number of patrons residing within a circle of 80 km. radius centered on the casino and race track who visit the casino and track more than 13 times in three months.
>
> The data is to cover the latest three-month period.
>
> The data is to be supplied on floppy disc or compact disc with the data attached to the individual postal codes that we have supplied at your request.
>
> If you are unable to attach data to postal codes, please contact me.

Following receipt of the request, OLGC staff contacted the appellant and clarified a number of matters:

- a "visit" represents one calendar day – i.e., if a patron plays then leaves the gaming facility for lunch then returns to play, one visit is counted;

- only site-specific information is requested – i.e., if a regular Kawartha patron has also visited Woodbine, only the Kawartha data is requested; and

- the data was to be provided for each of the approximately 12,000 postal codes provided by the appellant, rather than the approximately 23 FSA's (first three digits of the postal codes).

The appellant confirmed that her preference was for the data to be attached to the individual postal codes. The appellant also asked whether it would be significantly less time consuming and less costly if the FSA's were used instead of the individual postal codes.

The OLGC issued a decision letter in which it stated:

1. The OLGC stores the requested information on a database that contains information about patrons of charity casinos and slot machine facilities at racetracks who are members of a "players club" and who use their account cards while playing. The data bank does not capture table game play or slot play by patrons who do not use their player's cards and therefore, it provides incomplete information. The information would be prepared by creating a computer program to extract the requested information, running the program to download the information, and preparing the data in a readable format.

2. Access to the requested information is denied pursuant to section 18(1)(a), (c) and (d) (economic interests) of the *Act*.

The appellant appealed the OLGC's fee estimate, as well as its decision to deny access.

During mediation through this office, the following things occurred:

- The appellant confirmed that she would like the data to be attached to each of the approximately 12,000 individual postal codes that she provided to the OLGC with her request.

- The OLGC confirmed that it is also relying on the section 21 personal privacy exemption.

- In discussions with the mediator, the appellant raised the possible application of section 23 (public interest override).

The appeal then moved to the inquiry stage.

I initially sought representations from the OLGC. The OLGC raised an additional, preliminary issue that I added to the inquiry. Then the OLGC representations were shared in their entirety with the appellant. The appellant then provided representations in response.

CONCLUSION:

The information at issue does not constitute personal information and therefore the section 21 privacy exemption does not apply. In addition, the section 18 exemption does not apply to the requested information. Therefore, the OLGC must disclose the information to the appellant.

DISCUSSION:

INTRODUCTION

It is important to note at the outset the appellant's intent in requesting the information because it provides the general context for the appellant's representations on all of the specific issues in this appeal.

> The intent of this request is to understand more about the economic and social impact of gambling on the communities surrounding charity and racetrack casinos. Current public data make it difficult if not impossible to know whether or not it would be good public policy to invite a casino into a municipality through referendum or planning and zoning. A better understanding of gambling impact would also help in the allocation of resources for programs to prevent and treat problem gambling. This request looks at a small part of the impact in hopes of adding to the overall picture.

DEFINITION OF RECORD

Introduction

The word "record" is defined in section 2(1) of the *Act* as follows:

> "record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
>
> (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
>
> (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution.

In addition, section 2 of Ontario Regulation 460 states:

> A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the *Act* if the process of producing it would unreasonably interfere with the operations of an institution.

Essentially, the OLGC argues that the information requested by the appellant does not fall within the definition of "record" as set out in section 2 of the *Act* because the selection and collation of data requested by the appellant requires the use of software and technical expertise not "normally used by the institution", and the production of the information would unreasonably interfere with the operations of the institution:

> It is also important to note that there is no single record that cross-references the players club information that the OLGC has collected with the gaming statistics requested. The information requested is not collected or stored in a format that directly answers the request. On the contrary, large numbers of 'records' must be read. Information must be extracted and accumulated from a number of records that identify the patron's play activity. In subsequent steps the OLGC must use the patron's account number to lookup their address and extract their postal code, sort the records in postal code order, run a program to retain only those postal codes that match the postal codes on the list provided by the [appellant], accumulate counts of "patrons resident in the postal code", "number of visits by these patrons", and "number of patrons residing in the postal who visited a site more than 13 times in the time period" and format the results in a form that is clear and readable to the [appellant].
>
> As such the information does not fall within the definition of "record" set out in section 2 of the *Act*.

The appellant responds as follows:

> On Nov. 8, 2001 in [the OLGC's] letter, the records were denied under Reg. 460 #2 because they would "unreasonably interfere with the operations of the institution." (See Document 1 page 2.) On Feb. 21, 2002 after a significantly reduced request, [the OLGC] dropped [its] refusal on the "unreasonably interfere" grounds and, on page 2 states "the information would be prepared . . . by creating a computer program to extract the requested information." (See Document 2 page 2.) A review of OLGC correspondence shows that they had accepted the positions that they had records which would respond to our request, and that they had the capacity to respond.

I agree with the appellant, given the OLGC's own final decision letter of February 21, 2002. While incomplete, the OLGC concedes that it does have the information requested by the appellant. It is also clear that the OLGC decided that it can produce a record for use by the appellant by means of computer hardware and software:

> The information would be prepared by the [OLGC] by creating a computer program to extract the requested information, running the program to download the information, then preparing the data in a readable, understandable format. The [OLGC] has not yet developed or run the computer program because it is denying access to the records . . .

Also, I note that the OLGC advised the appellant that it estimated the applicable fee for access would be either $703.20 (for full postal codes) or $523.20 (for FSA's only). In my view, these relatively modest fees are an indication that producing the records would not be unduly onerous.

In the circumstances, I am not persuaded that the process of producing responsive records would unreasonably interfere with the operations of OLGC. Therefore, the requested information falls within the scope of the definition of "record" in section 2(1) of the *Act*.

PERSONAL INFORMATION/INVASION OF PRIVACY

Introduction

The section 21 personal privacy exemption applies only to information which qualifies as personal information. "Personal information" is defined in section 2(1) of the *Act*, in part, as recorded information about an *identifiable* individual.

Representations

The OLGC makes the following submissions:

> The requested OLGC information relates to the 12000 six digit postal codes that are linked to gaming practices of customers of the Charity Casino and Racetrack Slots.
>
> Postal Codes usually correspond to city blocks or apartment buildings in urban areas and geographical areas in rural settings. In some cases they can reveal quite specific address information.
>
> There has been recognition that privacy interests attach to postal codes. Investigation P97-009 of the Information and Privacy Commissioner of British Columbia recommended that only the first three digits of postal codes should be revealed. The report recognizes that "the entire postal code may reveal the address of claimants who live in small towns."
>
> Similarly, due to the nature of some communities, postal code-related information of OLGC customers could lead to identification of specific individuals if, for example, the postal code relates to a particular building and an individual in that building is know to be a customer of the Charity Casino or Racetrack Slots.

The appellant asserts that she does not seek the personal information of identifiable individuals:

> …We are requesting demographic information that will help customers, communities, professionals and policy makers understand the impacts of a large and growing government industry.

Further, the appellant argues that it is extremely unlikely that the identification of individuals could be made. There is evidence advanced in support of this argument including that: the post office information service claims that it would be extremely rare to have so few residences in a postal code that individuals could be identified; and, the average rural postal code contains 473 points of call while the average urban postal code contains 14 points of call. It is the appellant's submission that it would be extremely unlikely to have fewer than five residents in a postal code. As a direct response to the conclusions in the B.C. matter, the appellant notes that she has found that small towns in Ontario often have only one postal code for the entire town.

Analysis

Information will be considered "identifiable" if there is a "reasonable expectation" that an individual can be identified from it [Order P-230; see also Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

In addition, the "identifiable" threshold may be met where the information would lead one to identify a group of fewer than five individuals to whom the information may relate [see, for example, Orders P-316, P-644].

Having considered the representations and evidence before me, I am not persuaded that there is a reasonable expectation that specific individuals can be identified from the information sought by the appellant.

Investigation P97-009 of the Information and Privacy Commissioner of British Columbia (IPCBC), cited by the OLGC, is distinguishable on its facts from this appeal. The report centers on the investigation of two privacy complaints regarding an insurance company's surveys of its customers.

First, it is important to note that the IPCBC found, as fact, that providing the postal code in the particular circumstances could identify persons living in smaller communities. Presumably, there was some evidence before the IPCBC upon which it could base this conclusion. The evidence advanced in the appeal before me does not provide a sufficient basis for me to reach the same conclusion. The OLGC has not supported its assertion with reliable or cogent evidence. The appellant, on the other hand, has provided information indicating that it is unlikely that any one postal code in Ontario would attach to fewer than five points of call.

Second, in the surveys in question, the insurance company provided certain and substantial information about its customers, in addition to postal codes, to the consultants hired to conduct the surveys and compile the results thereof including: driver's name; resident phone number of driver; age of driver; sex of driver; claim number and type; office location; date of loss; and

plate/policy number. It is not unreasonable to suggest that the IPCBC concluded as it did, that provision of the postal code could allow for identification of specific individuals in smaller communities, because that information was supplied in conjunction with much other personal information about individuals.

By contrast, the only information at issue is postal codes, in the absence of other information from which individuals may be identified.

Since it is not reasonable to expect that specific individuals can be identified from the information sought by the appellant, the information does not qualify as personal information. Consequently, the section 21 exemption does not apply.

ECONOMIC INTERESTS

Introduction

The OLGC claims that sections 18(1)(a), (c) and (d) apply to the information at issue. Those sections read:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

Section 18(1)(a)

General

In order for a record to qualify for exemption under section 18(1)(a) of the *Act*, the OLGC must establish that the information contained in the record:

1. is a trade secret, or financial, commercial, scientific or technical information; **and**

2. belongs to the Government of Ontario or an institution; **and**

3. has monetary value or potential monetary value [Orders 87, P-581].

In Order M-654, Adjudicator Holly Big Canoe discussed the meaning of part 3 of the test in the municipal equivalent to 18(1)(a):

> The use of the term "**monetary value**" in section 11(a) requires that the information itself have an intrinsic value. The purpose of section 11(a) is to permit an institution to refuse to disclose a record which contains information where circumstances are such that disclosure would deprive the institution of the monetary value of the information … (emphasis in original).

Part 2 of the test has also been considered and commented upon. In Order PO-1763, after reviewing Orders P-1281 and P-1114, Senior Adjudicator David Goodis made the following observations about the phrase "**belongs to**":

> The Assistant Commissioner has thus determined that the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right to simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business to business mailing lists (Order P-636), customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, there is a quality of confidence about the information, in the sense that it is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others. [See, for example, *Lac Minerals Ltd.* v. *International Corona Resources Ltd.* (1989), 61 D.L.R. 4th 14 (S.C.C.), and the cases discussed therein].
>
> [Order PO-1736, upheld on judicial review, *Ontario Lottery and Gaming Corporation* v. *Ontario (Information and Privacy Commissioner)*, ([2001] O.J. No. 2552 (Div. Ct.))]

Representations

The OLGC contends that the information at issue is *financial information* as it relates to the OLGC's customers in that it pertains to the identities and particular habits of those customers. The OLGC also claims that it "*owns*" the information because the information is akin to a customer or supplier list thus having monetary value for the institution:

> In Order PO-1763, Senior Adjudicator David Goodis outlined what types of interest will amount to an ownership interest for the purpose of s. 18(1)(a). In this analysis he specifically referred to examples such as customer or supplier lists as information that, when accompanied by a "quality of confidence", amount to ownership. The OLGC information falls within this category.
>
> As discussed above, the OLGC information is collected from those customers of the Charity Casino and Racetrack Slots who are members of a "players club". Members of such club include many of the corporation's most valuable customers. The OLGC Information is, therefore, clearly a form of customer list.
>
> OLGC places a high value on the privacy rights of its customers. Accordingly, the players club information is treated in a confidential manner at all times. The effort of collecting this information, which is not otherwise available, is undertaken because the information has value.

The appellant argues that the information is not financial nor is it otherwise captured by Part 1 of the test. Furthermore, the appellant contends that the information does not *belong to* the OLGC:

> The information does not belong to the government of Ontario or the OLGC as outlined in Orders PO-1763, P-1281, P-1141 and in the adjudicator's own commentary on these orders. In response to order P-1114 and its explanation, the information we seek could not be used as a customer list or to create one. The information requested does not include name or street address and we do not believe there is any way to generate a useable customer list from our request.
>
> The OLGC has stated its right to use this material for marketing and advertising in the OLGC document headed Winner's Circle Rules. These are not confidential uses as commonly understood. The only confidential information would be the identity of the gamblers which is not being requested.

Analysis

Having considered the representations and evidence before me, I find that the OLGC has failed to show the applicability of section 18(1)(a) to the information at issue. In my view, the OLGC's arguments are predicated on the assumption that the information would constitute a customer list, or at least would allow someone to create such a list. For the reasons set out above, I am not satisfied that any individuals could reasonably be identified from the information at issue. Therefore, disclosing the information is not akin to disclosing a customer list, either directly or

indirectly. As a result, I am not satisfied that the information would qualify as commercial information, or any of the other types of information listed in part 1 of the three-part test, or that it "belongs" to the government as required by part 2. Further, I am not persuaded that the list of postal codes has any current or potential monetary value. I find that section 18(1)(a) does not apply.

Section 18(1)(c)

General

Section 18(1)(c) provides institutions with a discretionary exemption that can be claimed where disclosure of the information could reasonably be expected to prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the government's ability to protect its legitimate economic interests (Order P-441).

Representations

The OLGC asserts that disclosure of the information at issue could be expected to prejudice its economic interests. Those interests are,

> maintaining and expanding customer loyalty, developing effective marketing strategies and establishing its facilities as positive elements of the commercial and residential communities in which they are located.

The prejudice would be:

> When customers become members of the players club, they do so on the understanding that the information they provide will be used for certain limited purposes. These purposes do not include external surveys by outside sources into their gaming habits. Awareness that their personal information is being used in such a way is likely to anger existing members of the players club and discourage potential future members from signing up.
>
> The OLGC's economic interests are directly tied to the loyalty of its existing customers and the acquisition of new customers. A belief that their gaming habits are being monitored and tracked for unknown uses is likely to result in decreased usage of the facilities. Additionally, it is likely to decrease the effectiveness of marketing strategies such as the players club upon which significant time and financial resources have been expended.
>
> People's gaming habits can be very personal to them. One's personal information is always very important. It is reasonable to expect that revealing information about both of these things will create a lack of trust in the OLGC facilities in question and jeopardize existing promotional programs.

The OLGC also claims that disclosure of the information could be expected to prejudice its competitive position for the discretionary spending dollar within the leisure industry in Ontario and with gaming facilities outside of Ontario. The OLGC defines the leisure industry as movie theatres, bingo halls, sporting events and other recreational facilities and argues that it is attempting to position itself as an enjoyable recreational option for people of a variety of ages and backgrounds by gradually developing restaurants, bars and concert events at gaming facilities. It adds that:

> If current and potential OLGC customers feel that their behaviour is being tracked and that any judgment of their behaviour will be attached to this tracking, they may feel more comfortable attending other recreational facilities that are more established in or near Ontario such as Bingo halls or sports bars.
>
> Despite the legality of the OLGC facilities, existing and potential customers may have concerns that stigma might be attached to their gaming behaviours. The monitoring of OLGC customers from an outside source would both contribute to such a stigma and could be seen as publication of people's private recreational behaviour.

The appellant makes lengthy representations in response to the OLGC's claims that disclosure of the information could expect to prejudice its economic interests and competitive position. I cite some of the appellant's more compelling arguments.

On the issue of prejudice, the appellant says:

> We do not expect any prejudice. Damage to the OLGC's Winner's Circle marketing strategy would occur only if individual identities and other information tied to those identities were revealed. We are not interested in this individual information and our request would not reveal this.
>
> . . . . .
>
> Nor is the OLGC vulnerable to the loss of customers. The OLGC operates an effective monopoly on slot and table gambling in Ontario.

And,

> . . . Individual gambling activity is tracked and used to generate public information by the OLGC with no apparent injury to business. For example, the KPMG business study for the proposed casino at Gananoque cites the fact that in Thunder Bay as many as 85 per cent of the customers use slots as compared to 15 per cent using table games. Information released by the OLGC is based on tracking the activities of individual gamblers. (See [the appellant's] Document 3)
>
> The OLGC repeatedly uses the word "habit" which carries a personal connotation. We are only interested in residence in a particular marketing area and frequency of attendance at a casino. Data derived from individual records would be totalled and averaged for the marketing areas.

On the issue of the OLGC's competitive position, the appellant states:

> With respect to casinos and slot machines, the OLGC operates in the Ontario gambling industry. In that market, it is the sole purveyor of its particular types of gambling. Bingo halls would appear to be its closest form of competition and news stories indicate that bingo has suffered badly with the introduction of slots and casinos….
>
> We believe it is a stretch to claim that movie theatres, bars and restaurants are in competition with charity casinos and racetrack casinos. If in fact there is competition, it raises the political and economic question of whether or not the OLGC should be competing with the private sector, particularly when it has the competitive advantage of being the only provider of attractions such as lot and table games. (See [the appellant's] Document 7 page 16 section 3.2 and Document 13 page 235)

In response to concerns about confidentiality, the appellant argues:

> On the issue of confidentiality, individuals who join the Winner's Circle Club are informed by the rules on the back of the application form that the information they supply may be used in marketing or advertising. Their acceptance of the use of their data in a collective, anonymous way applies as well to research as it does to marketing.

And,

> The expectation of prejudice is unreasonable. Attending a casino is a public act that is legal, endorsed, and vigorously promoted by the Ontario government. Gamblers we have spoken to gave no indication of feeling a stigma. Gamblers' individual identities are not sought and would not be disclosed ruling out any disclosure of personal information or attachment of stigma.

Analysis

I do not accept the OLGC submission that disclosure of the information at issue could reasonably be expected to prejudice its economic interests or its competitive position.

Once again, the OLGC's argument is based on the assumption that it is reasonable to expect that individuals can be identified from the information at issue, an assumption that I have rejected. Therefore, I am not persuaded that the concerns regarding the reaction of individual customers to disclosure of the information at issue has a reasonable foundation. To put it simply, no one's personal information is being disclosed, so it is not reasonable to expect that disclosure would result in any economic or competitive prejudice to the OLGC.

Section 18(1)(d)

General

To establish a valid exemption claim under section 18(1)(d), the OLGC must demonstrate a reasonable expectation of injury to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario (Orders P-219, P-641 and P-1114).

Representations

The OLGC argues that disclosure of the requested information could negatively impact on facility attendance by current and future customers thus causing a decrease in facility revenues. The OLGC is a source of valuable non-tax revenue to the province used toward a variety of essential services in the interest of public welfare. Any decrease in this revenue would correspond to a decrease in the Government's ability to fund vital programs. This expectation is reasonable because of the strong connection between customer loyalty and profitability in the leisure industry. Disclosure of the information would have a negative impact on customer loyalty.

In response, the appellant reiterates many of her earlier arguments and, in general, insists that there will be no injury to the loyalty of customers or to business given the non-disclosure of personal identities.

Findings

For similar reasons as set out above under sections 18(1)(a) and (c), I find that the OLGC has failed to establish an evidentiary foundation for this exemption.

Conclusion

I find that section 18(1)(a), (c) and (d) do not apply to the requested information.

ORDER:

I order the OLGC to disclose the information at issue to the appellant no later than 30 days after the appellant pays the applicable fee for access.

Original signed by: March 20, 2003
Rosemary Muzzi
Adjudicator