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

ORDER PO-2282

Appeal PA-030277-2

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NATURE OF THE APPEAL:

The appellants are a husband and wife. On June 24, 2001, the appellants attended a casino operated by the Ontario Lottery and Gaming Corporation (the OLGC) and an incident occurred during which, it is alleged, two OLGC employees wrongfully detained and assaulted the husband. As a result, on September 26, 2001, the appellants commenced civil proceedings in the Ontario Superior Court of Justice against the OLGC and the two employees, seeking damages for their alleged losses.

On November 19, 2001, the husband made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the OLGC for access to a videotape of the incident (among other records). The OLGC replied by offering the husband an opportunity to view the videotape at the casino's offices. On January 21, 2002, the husband appealed the decision of the OLGC, taking the position that it ought to have provided him with a copy. As a result, this office opened appeal PA-020021-1.

On April 20, 2002, during the mediation stage of the appeal, the husband wrote to this office to advise that, in the context of the civil litigation discovery process, the OLGC had provided him with a copy of the videotape and that, as a result, he was withdrawing his appeal.

On June 16, 2003, the appellants made a new request for the videotape under the *Act*. In their request, the appellants explained the basis for their new request:

> Now that we have the video under the Court Process there is an argument that we can give same to the Press and T.V. because of The Canadian Charter of Right and Freedoms, and the Freedom of the Press and the public's right to know. There is another argument that because of the Rules of Practice that we cannot give said video to the Television and Press. Which piece of legislation (charter freedom) or regulation governs and is predominant is perhaps an issue for a judge, and that issue is imposed on us because we received the video under the Court Process; *however, if we receive the video under the* [Act], *we should then be able to give same to the T.V. Stations perhaps to join with us in the Appeal.*
>
> The video is the truth and the public should have the right to know.
>
> *We thus hereby apply for said video from you under the* [Act].
>
> [emphasis in original]

In response, the OLGC stated:

> . . . [W]e have previously supplied a copy of the videotape to [you]. Under the circumstances the [OLGC] is not prepared to provide an additional copy of the tape … Further we consider that any requests for an additional copy of the videotape to be frivolous and vexatious pursuant to section 27.1 of the [*Act*].

The appellant appealed the OLGC's decision to this office.

Mediation was not successful in resolving the issues in the appeal and the matter was streamed to the adjudication stage of the process.

I sent a Notice of Inquiry setting out the issues in the appeal to the OLGC, and received representations in response. I then sent the Notice and the OLGC's representations to the appellant who, in turn, provided representations.

The sole issue for me to decide is whether the appellant's request for access to the videotape is "frivolous or vexatious" under section 10(1)(b) of the *Act*.

DISCUSSION:

FRIVOLOUS OR VEXATIOUS REQUEST

General principles

Section 10(1)(b) reads:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> > the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Section 5.1 of Regulation 460 reads:

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,
>
> > (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
> >
> > (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

Section 10(1)(b) provides institutions with a summary mechanism to deal with frivolous or vexatious requests. The institution has the burden of proof to substantiate its decision that a request is frivolous or vexatious [Order M-850].

The OLGC takes the position that the appellants' request is frivolous or vexatious because:

- it is part of a pattern of conduct that amounts to an abuse of the right of access [Regulation, section 5.1(a)]
- it is made in bad faith [Regulation, section 5.1(b)]
- it is made for a purpose other than to obtain access [Regulation, section 5.1(b)]

I will first include some of the OLGC's general representations, and then deal with each of the three grounds on which the OLGC relies.

General representations of the OLGC

The OLGC describes the applicable civil discovery process and explains how it unfolded in this case:

> The discovery process in this civil litigation is governed by Rules 30-35 inclusive of the Rules of Civil Procedure [the Rules], which are enacted pursuant to the authority of the *Courts of Justice Act* . . . Rule 30 . . . relates to documentary discovery. It was pursuant to that rule that the OLGC produced unedited and edited copies of a video tape of the interaction between [the husband] and OLGC staff at the time in question, save for an interval of time when [he] was within an area not subject to video taping. Those copies of the video tape were provided directly to the [appellants], along with other documentation produced pursuant to Rule 30 at the appropriate stage of the civil proceeding.
>
> Documents produced by one party in litigation to another party are subject to the deemed undertaking provisions of Rule 30.1, the full wording of which rule is attached as Appendix "A" to this submission.
>
> Pursuant to subsection (3) of Rule 30.1, all parties and their counsel are deemed to undertake not to use evidence or information to which the rule applies for any purposes other than those of the proceeding in which the evidence was obtained, subject to exceptions stated elsewhere under the rule.
>
> The [husband] is a retired lawyer. He claims to be conversant with the deemed undertaking rule. Having tapes in his possession which were produced to him pursuant to the [Rules], he now seeks to secure identical information in the form of identical "documentation" (i.e. the video tape) solely for a purpose and for a use other than those of the proceeding in which that evidence was produced, as is apparent from the text of his request dated June 16th, 2003.

The OLGC then submits that the court considered the issue of access to the video tape in a pre-trial conference:

> A Pre-Trial Conference in the civil action extant between the [appellants] and the OLGC was conducted on September 29th, 2003, before Mr. Justice Flynn of the Ontario Superior Court. The issue of [the husband's] continuing wish to pursue production of another copy of the video tapes for the purposes outlined in his request of June 16th, 2003, was fully discussed before Mr. Justice Flynn who endorsed the Trial Record of the case as follows:
>
> > . . . - parties not able to resolve any issues. Two weeks required for trial. [Appellant] reminded of implied undertaking rule as to the production to anyone else not associated with the defence of this case of the tape produced by the Defendant, OLGC. Apparently [appellant] persists in making a FOI application for release of contents of tape to the media. I warned him about the possibility of a contempt motion succeeding against him.
>
> Attached as Appendix "B" to this Response is a true copy of the handwritten endorsement of Justice Flynn, as transcribed above.

Pattern of conduct that amounts to an abuse of the right of access

The OLGC submits:

> [The husband'] request, now made, is both duplicative of his earlier request for production of the video tapes and further redundant or superfluous given that he has now long had the very "document" and information that he persists in seeking the right of access to. That such abuse is sought to be made of the right of access by the requesters in this case is obvious and self-declared by them, as noted above, when placed in the context of the ongoing litigation between the parties and the clear purport and intention of Rule 30.1 of the Rules . . .
>
> It is, therefore, the position of the OLGC that there are reasonable (and ample) grounds to conclude that the present request is part of a pattern of conduct that amounts to an abuse of the right of access.

In my Order PO-1688, an affected party and the requester were involved in litigation against one another. The affected party took the position that it was "improper" for the requester to use the *Act* as opposed to the discovery process under the Rules. I did not accept this submission, and stated as follows:

> The relationship between the access provisions contained in the Act and the civil litigation process is addressed in section 64(1) of the *Act*. This provision states that:

> This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

The application of section 64(1) was cogently summarized by former Commissioner Sidney B. Linden in Order 48, where he made the following points:

> ... This section makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the [*Act*] is unfair ... Had the legislators intended the *Act* to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. No such exemption exists, and, in my view, subsection 14(1)(f) or section 64 cannot be interpreted so as to exempt records of this type without offending the purposes and principles of the *Act*.
>
> I am supported in my view by the decision in the case of *Playboy Enterprises Inc. v. Department of Justice* [677 F.2d 931(1982)], heard in the United States Court of Appeals, District of Columbia Circuit. In that case, which was decided under the U.S. freedom of information legislation, the government put forward the argument that, because its claim of privilege with respect to a certain record had been sustained in discovery proceedings in other cases, those determinations should be given "controlling weight" in the decision as to whether the record should be released under the U.S. freedom of information legislation. The court answered by stating that "... the issues in discovery proceedings and the issues in the context of a freedom of information action are quite different. That for one reason or another, a document may be exempt from discovery does not mean that it will be exempt from a demand under the *Freedom of Information Act*."

These comments were subsequently relied upon by [then] Assistant Commissioner Irwin Glasberg in Order P-609.

In *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.), Mr. Justice Lane stated the following with respect to the relationship between the civil discovery process and the access to information process under the *Act*'s municipal counterpart, in the context of a motion to clarify an earlier order he had made granting a publication ban:

> The order which I made on October 18, 1996 herein was not intended to interfere in any way with the operation of the *Municipal Freedom of Information and Protection of Privacy Act* legislation, nor ban the publication of the contents of police files required to be produced under that Act. My order was directed toward the preservation of the integrity of the discovery process by prohibiting publication of information obtained by one party from the other under the compulsions of that discovery process, including publication by third parties of such information. In my view, there is no inherent conflict between the *Act* and the provisions of the Rules [of Civil Procedure] as to maintaining confidentiality of disclosures made during discovery. The *Act* contains certain exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the *Act*; if so, then so be it; the Rules of Civil Procedure do not purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.
>
> Although that seems to me to be the effect of the order as it presently reads, it is desirable to clarify by adding at the end of the sentence: "this order does not restrict the jurisdiction of the Information and Privacy Commissioner/Ontario under the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56 to direct the production of documents or information even though such documents or information may have been the subject of discovery in this action."

I adopt the principles enunciated by Assistant Commissioner Glasberg and the Ontario Court (General Division) cited above. Based on these principles, I conclude that there is no reason in the circumstances why the request under the *Act* should be deemed "improper", nor why this appeal should not proceed.

I accept the OLGC's submission that the appellants have a copy of the document they now seek under the *Act*. However, I do not accept that this fact alone renders the appellants' request an abuse of the right of access. The above authorities make it clear that the access provisions under the *Act*, and other non-*Act* processes such as the discovery procedures under the Rules, operate independently, and disclosure or non-disclosure under one scheme generally does not affect whether or not the same record may be disclosed under the other scheme.

Further, disclosure under the *Act* may have different implications for the recipient. Here, it appears that the appellants are bound by the Rules not to use or disclose the copy of the videotape they received pursuant to the discovery process in the litigation. By contrast, if a

record is disclosed under the *Act*, the *Act* does not itself impose any limitations on subsequent use or disclosure.

I am reinforced in my view by a decision of former Commissioner Sidney B. Linden in Order P-164 involving the Ontario Human Rights Commission. In that case, an individual who had authored a report for the OHRC, and had a copy in his possession, made a request for it under the *Act*. The OHRC granted access to the appellant on the basis that he was the author, and purported to attach conditions preventing the appellant from further disclosing the report. Later, the OHRC issued a decision denying access under the *Act*, taking the position that the request was an abuse of process. Commissioner Linden held that because of the conditions the OHRC purported to disclose, the appellant was not given access to the report under the *Act*. Commissioner Linden also rejected the abuse of process argument, for the following reasons:

> I find no merit in the institution's argument. I have been provided with no independent evidence to show that the appellant had a copy of the requested record in his possession at the time of the request. However, even had it been proven to my satisfaction that he had indeed a copy of the record, this fact would not have been dispositive of the issue.
>
> A major purpose of the *Act* is to provide public access to records within the custody or under the control of institutions. As I have stated in Issue A above, the *Act* contemplates that this access, when provided under the *Act*, will be unconditional, and for all purposes. Thus, a requester may well have a copy of the requested record in his or her possession at the time of making a request, but may be prohibited from using it publicly, or from revealing its existence to other interested members of the public. For this reason, it is appropriate for a person in the appellant's position, as a former employee of an institution, to obtain a response from an institution under the *Act* when he or she is unsure whether a government record may be disclosed to other members of the public.
>
> The institution argues that even though the appellant already had a copy of the record, he was given access to the record in response to his request. However, the institution's response shows that the access was clearly conditional, the record was for his own use only, and as I have found in Issue A above, no access was given for the purposes of the *Act*.
>
> In my view, the appellant's request was an attempt to obtain access to the record as a public record under the *Act* and was perfectly consonant with the purposes of the *Act*. I find nothing improper in the requests by other members of the public for the same record.
>
> . . . . .
>
> In summary, I find that while the actions of the appellant subsequent to his request and appeal may be regrettable from the point of view of the institution, his request and appeal of the institution's decision do not constitute an abuse of process.

Here, the appellants have indicated that they wish to make further use of the videotape, if disclosed under the *Act*, uses which appear not to be permitted under the Rules. For similar reasons as those articulated in Order 164, I find that the appellants' request does not constitute an abuse of process under section 10(1)(b) and Regulation section 5.1(a).

Bad faith

"Bad faith" has been defined as:

> The opposite of "good faith", generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfil some duty or other contractual obligation, not prompted by an honest mistake as to one's rights, but by some interested or sinister motive. ... "bad faith" is not simply bad judgement or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will [Order M-850].

The OLGC submits:

> It is the position of the OLGC that in addition to engaging in a "pattern of conduct", the . . . request is made in bad faith as defined in Order M-850.
>
> Mindful of the fact that the requesters are specifically conversant with the implied undertaking rule under the Rules of Civil Procedure, and that [the husband] has been cautioned by a judge at the Ontario Superior Court in September of 2003, that the implied undertaking rule is to be taken very seriously, the persistence of the request sustains the OLGC's belief, on reasonable grounds, that the request is made in bad faith.
>
> Rule 30.1 contemplates negation of the implied undertaking when and if the information which is subject to it is introduced into evidence or referred to at a judicial hearing. The OLGC is, of course, accepting of that. It is submitted that the reason the information is protected to that point is to foster a climate conducive to resolution of the dispute at hand and to permit parties to conduct their cases and advance their respective interests without fear that the other side will make mischief with the subject information, or use it for any other purpose outside of the four corners of the private litigation between the parties. That the rule considers negation of the implied undertaking at a certain point in the proceeding, in a certain way and within a certain forum, is consistent with the public nature of judicial proceedings which are subject to judicial control. To permit the requesters to secure a further copy of the video tape pursuant to the instant request undermines the implied undertaking rule. It is not the intent of [*Act*] to undermine judicial process.

For essentially the same reasons as above, I do not accept the OLGC's position. I accept that a judge of the Superior Court has "warned" the husband about "the possibility of a contempt motion succeeding against him." This warning, however, falls well short of an actual ruling, and conflicts with the judgment of Mr. Justice Lane of the same court on the point of the relationship between the civil discovery process and the *Act*. Therefore, I find that the appellants' request is not made in bad faith under section 10(1)(b) and Regulation section 5.1(b).

Purpose other than to obtain access

The OLGC submits:

> . . . [T]here are reasonable grounds to conclude that the request . . . is made for a purpose other than to obtain access. That this is so is made apparent by the fact that the [appellants] already have obtained access to the very "document" and information they are seeking to secure with the instant request. It is apparent from the request . . . that they are motivated, not by a desire to obtain access, but by some other objective, namely to further the litigation against OLGC.

I do not accept this submission. The appellants have made it clear that they seek access to the videotape in order to make use of it in ways that may not be permitted under the Rules, an objective that is not improper for the reasons cited above.

The OLGC makes further submissions on why the videotape, if disclosed under the *Act*, would cause harm to personal privacy and law enforcement interests. These issues are not before me, and are to be determined by this office only in the event the OLGC's decision under the *Act* is to deny access to the record pursuant to those exemptions, and the appellants appeal.

Conclusion

The request is not frivolous or vexatious under section 10(1)(b).

ORDER:

I order the OLGC to issue a decision to the appellants under Part II of the *Act*, using the date of this order as the date of the request.

Original Signed By: May 18, 2004
David Goodis
Senior Adjudicator