



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2358

Appeal PA-030277-3

Ontario Lottery and Gaming Corporation



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NATURE OF THE APPEAL:

BACKGROUND:

The Ontario Lottery and Gaming Corporation (OLGC) is an agency of the Ontario Government that operates province-wide lottery games, charity and aboriginal casinos, slots facilities at racetracks, and commercial casinos. Like other operators of casinos, the OLGC employs security measures to ensure the integrity of the gaming, the safety of patrons and the protection of assets. These security measures include the use of video cameras to monitor and record activity on the casino premises.

The OGLC states that Ontario Provincial Police officers assigned to the Investigation and Enforcement Bureau of the Alcohol and Gaming Commission of Ontario, which regulates casinos, maintain a full-time policing presence within gaming facilities to conduct criminal investigations in relation to gaming activities and work closely with local police in relation to other offences. The OGLC also employs its own surveillance and security personnel who work closely with the on-site OPP officers.

On June 24, 2001, the appellants, a husband and wife, attended a casino operated by the OLGC and an incident occurred during which, the husband has alleged, two OLGC employees wrongfully detained and assaulted him. 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.

The first access request, refusal and appeal (PA-020021-1)

On November 19, 2001, the husband made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a videotape of the incident. 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 he is entitled to a copy of the videotape. As a result, this office opened appeal PA-020021-1. Subsequently, the husband received a copy of the videotape from the OLGC in the context of the civil litigation discovery process, and therefore withdrew his appeal.

The second access request and "deemed refusal" (PA-030277-1)

The husband subsequently was informed (rightly or wrongly) that the uses to which he is permitted to put a videotape, obtained through the civil discovery process, are subject to restrictions. As a result of this concern, the husband and wife jointly made a new request to the OLGC under the *Act* for access to the videotape.

The OGLC did not provide an access decision within 30 days as required by the *Act*. A failure to comply with this requirement is deemed by the *Act* to be a refusal of the access request, which may be appealed to this office. The requesters appealed the OLGC's "deemed refusal" and this office opened Appeal PA-030277-1. The OLGC subsequently issued a decision. As a result, this office closed Appeal PA-030277-1.

The “frivolous and vexatious” decision and appeal (PA-030277-2)

The OLGC’s decision was to refuse to provide a copy of the videotape on the grounds that the request was frivolous and vexatious. The requesters appealed the decision and this office opened Appeal PA-030277-2. That appeal was resolved by Order PO-2282. In Order PO-2282, Senior Adjudicator David Goodis determined that the request was not frivolous or vexatious and ordered the OLGC to give the appellants an access decision.

The current refusal and appeal (PA-030277-3)

On June 17, 2004, the OLGC issued a decision refusing access to the videotape based on the exemptions from the duty to disclose found in sections 14(1)(i) (endanger security of a building) and 14(1)(l) (facilitate commission of an unlawful act) of the *Act*. On June 21, 2004, the requesters (now the appellants) appealed this decision, and Appeal PA-030277-3 was opened.

On receipt of this appeal, this office assigned a mediator to attempt to resolve the appeal. Mediation was unsuccessful and this inquiry commenced. Initially, a Notice of Inquiry setting out the facts and issues in this appeal was sent to the OLGC, which was requested to make representations. The OLGC was asked to identify any portion of its representations that it did not want this office to share with the appellants for reasons of confidentiality. The OLGC made representations. It did not request that any of these representations be kept confidential. Accordingly, the OLGC’s representations in their entirety were sent to the appellants, who were invited to respond and did so.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1), in part, as follows:

“personal information” means *recorded information about an identifiable individual*, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information. [Order 11]

For information to be “about an identifiable individual”, it must be reasonable to expect that an individual may be identified if the information is disclosed. [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)]

The OLGC submits that “the video-taped image of an individual is not personal information as defined by section 2 of the *Act*”. The OLGC offered no reasoning or authority to support this interpretation of the term “personal information”.

The videotape shows the face of the appellant’s husband and reveals his sex and indications of race or ethnic origin. It reveals his location and activities at a specific time. Whether this information is “personal information” does not depend on the means by which it is recorded or the medium in which it appears. [See Orders M-528, MO-1378, P-1561-R and MO-1410]

I find, therefore, that the information in the videotape is the appellant’s husband’s personal information.

DISCRETION TO REFUSE REQUESTER’S OWN INFORMATION/LAW ENFORCEMENT

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Section 49(a) provides:

49. A head may refuse to disclose to the individual to whom the information relates personal information,
 - (a) where section 12, 13, **14**, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information;

The OLGC states that the records qualify for exemption under sections 14(1)(i) and (l). I will consider whether the records qualify for exemption under sections 14(1)(i) and (l) as a preliminary step in determining whether they are exempt under section 49(a).

These sections state:

- A head may refuse to disclose a record where the disclosure could reasonably be expected to,
- (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

- (l) facilitate the commission of an unlawful act or hamper the control of crime.

Where sections 14(1)(i) and (l) use the words “could reasonably be expected to”, the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient. [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]

It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption. [Order PO-2040; *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)]

The OLGC’s representations

It is clear that, as the OLGC asserts, the casino’s video camera system is “a system or procedure established for the protection of items” and is designed to protect the security of a building and to prevent and detect unlawful acts. The OLGC does not claim that it is intended to protect vehicles.

The OLGC describes the kinds of harm that are contemplated in terms such as compromising the integrity of the games, exploiting the games, planning or committing criminal acts, and facilitating unlawful acts. There is no indication of which methods of exploiting games or which criminal acts could be facilitated by viewing the tape.

As to how the disclosure of the videotape could facilitate these harms, the OLGC explained that it is “the level and kind” of video surveillance that must be kept from the general public. The OLGC explains that, “The videotapes clearly identify the extent of surveillance coverage in the gaming facility. The videotape shows how surveillance cameras scan the facility floor”. It further explains that the cameras are in smoked domes “for the specific reason of not allowing the public to identify what is being viewed”. The OLGC further explains that knowledge of the level and kind of video surveillance could reveal “systemic weaknesses of the system of surveillance” and equipment used.

The OLGC does not indicate what the systemic weaknesses are and how viewing this tapes could be expected to reveal them, gives no examples, and makes no reference to any of the views on the videotape to illustrate how any of these alleged harms might occur. There is very little detail as to how any of this might occur.

The appellant's representations

The appellant states:

What the OLGC is objecting to is a simple little video, which discloses that OLGC has video producers (also known as cameras) in their ceilings; however, everybody, or nearly everybody knows that they have said cameras in the ceilings e.g.

- (a) true T.V. Shows i.e News and Newsmagazine Shows, e.g. including but not limited to a newsmagazine show by one of the major USA Television Networks to the effect that "beat ups" in the back rooms were commonplace at Vegas Casinos with said show being one of the mostly highly ever advertised newsmagazine shows
- (b) fictional T.V. and "Movies" e.g. the movie called "Oceans Eleven" both 1 & 2 shown also on T.V.
- (c) books
- (d) newspapers, and
- (e) magazines
- (f) OLGC now admit that casino signs also disclose same.

Have provided this information already, and thus OLGC is objecting to what everybody, (or nearly everybody) knows.

If we and/or the public just see the said video of the writer in the Casino, it will merely confirm that Casinos take videos as above recited, namely something that the public already knows. (sic)

Analysis

I agree with the appellant that the fact that the casino is monitored by video cameras is public knowledge. The OLGC acknowledges that the presence of cameras is posted and that the location of cameras is apparent from their smoked domes. I do not agree with the appellant that all that would be available to the public from viewing the videotape would be the fact that the casino is monitored by video cameras.

It is apparent that the OLGC's concerns are not just that viewing the videotape would reveal the existence and location of cameras. Its representations indicate that it is also concerned about the revelation of the level and kind of surveillance, how the cameras scan the floor, the extent of coverage, what the camera is viewing at a given time, and gaps in coverage.

The OLGC's evidence that it permits only a select group of people to have access to these videotapes and that smoked glass is used to prevent the public from knowing what is being viewed supports its submission that permitting access to videotape has the potential to permit people to identify "systemic weaknesses of the system of surveillance and equipment used".

It is also clear from viewing the tape that parts of it do provide indications of how the cameras pan, tilt and zoom, reveal some of the areas covered by cameras, and it appears that parts of it may provide some indication of where the coverage of one camera ends and another begins.

However, I am not satisfied that the OLGC has provided sufficient evidence that the viewing of this particular videotape could reasonably be expected to produce this result to meet its onus. While parts of the videotape show how the cameras zoom, pan and tilt or may give some indication of where the coverage of one camera ends and another begins, there are substantial portions where the camera is stationary for periods of time which do not appear to raise these issues. Moreover, many, if not all, of the areas of coverage in this particular videotape, are public areas or areas that anyone with information available through the traditional mass media and the Internet would expect to be covered. Based on the information before me, I can only speculate as to which portions of the tape, if any, contain information that is not already readily available to the public.

Viewing the OLGC's concern about revealing video surveillance coverage in a broader sense, it is not clear to me from the OLGC's representations or from viewing the tape that it identifies the extent of such coverage in the facility. The tape appears to cover a relatively small area of the casino premises for a relatively short period of time. It is a compilation of portions of tapes from various cameras, each of which therefore has been edited. This alters what a person would otherwise see and therefore reduces the ability of someone viewing the tape to draw accurate inferences about the level and kind of surveillance.

It is also possible further editing could address the concerns raised by the OLGC. There is no persuasive evidence to indicate otherwise. Section 10(2) of the *Act* obliges an institution to disclose as much of any responsive record as can reasonably be severed without disclosing material that is exempt. In the case of videotapes, this severing might be done through various kinds of editing such as cutting or obscuring. In the Notice of Inquiry sent to the OLGC, I specifically asked the OLGC "to consider whether there is any portion of the videotape which should be disclosed pursuant to section 10(2) and to make representations on that subject". This provided an opportunity for OLGC to address whether some form of editing would meet any of its concerns.

The OLGC's response was, "No portion of the videotape should be disclosed", with no further detail or explanation. This response gives me no assistance in determining whether the entire tape must be withheld to meet the OLGC's concerns or whether editing can accomplish this.

I have also considered the possibility that even if disclosure of this tape alone could not reasonably be expected to result in the harms contemplated in sections 14(1)(i) and (l), viewing this tape together with other videotapes would have this result. However, there is no evidence

that such an opportunity will arise. Even if this videotape is released, there is no evidence that it will provide an opportunity to compare it with other videotapes or that disclosure of this videotape will lead to the disclosure of additional videotapes.

If the videotape is disclosed to the appellant in this case, it is because it contains his own personal information, and he is exercising a right that he has under section 47 of the *Act*. As stated in previous orders of this office, one of the primary purposes of the *Act* is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. [Orders MO-1323, MO-1855]

The OLGC's descriptions of both the kind of harms it seeks to prevent and the manner in which these harms could result are vague and general, and do not provide the kind of "detailed and convincing" evidence required to establish the application of section 14(1)(i) or (l). They do not specifically point to anything about the level and kind of surveillance at this casino that does not reflect what the public already know about surveillance systems in casinos. Detailed descriptions of the types of surveillance systems in use at casinos, the scope of coverage of cameras, the level of detail cameras can capture, the makes and models of cameras sold for use in casinos, and legislative standards for casino surveillance systems are posted on the Internet. The OLGC did not identify any specific aspect of the design, operation, or capabilities of the system that would be revealed by viewing the videotape that is not generally known to the public or easily ascertainable.

I therefore find that the videotape does not qualify for exemption under sections 14(1)(i) or (l) and therefore is not exempt from disclosure under section 49(a).

ORDER:

1. I order the Ontario Lottery and Gaming Corporation to provide a copy of the videotape to the appellant by **February 3, 2005**.
2. To verify compliance with the terms of this order, I reserve the right to require the Corporation to provide me with a copy of the videotape that is disclosed to the appellant pursuant to provision 1.

Original signed by: _____
John Swaigen
Adjudicator

December 30, 2004 _____