



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2465

Appeal PA-040134-1

Ontario Lottery and Gaming Corporation



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NATURE OF THE APPEAL:

The Ontario Lottery and Gaming Corporation (the OLGC) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the cheque number relating to lottery winnings allegedly collected by the requester's husband. The OLGC applied the exemption found in section 21(5) of the *Act* to refuse to confirm or deny the existence of responsive records.

The requester (now the appellant) appealed the OLGC's decision. The appeal was assigned to a mediator, but mediation did not resolve the issue. The appeal then moved to the adjudication stage and was assigned to me to conduct an inquiry.

I placed the appeal on hold, pending the Ontario Court of Appeal's decision in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal dismissed (May 19, 2005), S.C.C. 30802. That decision addressed the interpretation of section 21(5).

Once the Court of Appeal rendered its decision in *Ontario (Minister of Health)*, I sent a Notice of Inquiry to the OLGC, initially, and invited its representations. The OLGC provided representations. I then sent the Notice of Inquiry and a complete copy of the OLGC's representations to the appellant. In response, the appellant provided a letter and some handwritten notes on a copy of the OLGC's representations. The appellant's response did not directly address the issues set out in the Notice of Inquiry.

Due to the lack of contact information, it was not possible to provide notice of the appeal to the appellant's husband nor to seek his representations.

DISCUSSION:

NON-EXISTENCE OF THE RECORD

In this order, I do not uphold the OLGC's refusal to confirm or deny the existence or non-existence of a record. I therefore confirm that, in this case, no record responsive to the appellant's request exists.

As outlined in order provisions 2, 3 and 4, I will delay the release of this order to the appellant.

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD

Section 21(5) gives the OLGC discretion to refuse to confirm or deny the existence of a record in certain circumstances. It states:

A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

A requester in a section 21(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 21(5), the OLGC is denying the

requester the right to know whether a record exists, even when one does not. This section provides the OLGC with a significant discretionary power that should be exercised only in rare cases [Order P-339].

Before the OLGC may exercise its discretion to invoke section 21(5), it must provide sufficient evidence to establish both of the following requirements:

1. Disclosure of the record, if it exists, would constitute an unjustified invasion of personal privacy; and
2. Disclosure of the fact that the record exists, or does not exist, would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5), stating:

The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy. It puts a constraint on that discretion that is a reasonable reflection of the policy and purposes of the Act. In other words, it is a reasonable interpretation of the subsection and its grant of ministerial discretion, given the fundamental purposes of the Act.

[Orders PO-1809, PO-1810, upheld on judicial review in *Ontario (Minister of Health)*, cited above]

Part one: disclosure of the record (if it exists)

Definition of personal information

Under part one of the section 21(5) test, the institution must demonstrate that disclosure of the record, if it exists, would constitute an unjustified invasion of personal privacy. An unjustified invasion of personal privacy can only result from the disclosure of personal information.

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual. Paragraph (h) of the definition specifies that this includes "the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual."

The OLGC's representations state that paragraph (h) of the definition would apply to the information at issue in this appeal, if it existed. The OLGC states that:

[t]he type of record requested could relate to an identifiable lottery winner. In effect, the request for the cheque number amounts to a request for access to the list of all lottery prize winners. By requesting access to the cheque number, the requester is effectively requesting confirmation that a specific individual is on the winners list.

I am satisfied that the fact of an individual being identified as a lottery winner is recorded information about an identifiable individual and I therefore find that information of the nature requested, if it exists, qualifies as personal information.

Unjustified invasion of personal privacy

The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be "an unjustified invasion of privacy" under section 21(5). Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Section 21(2) lists some criteria for the OLGC to consider in making this determination; and section 21(3) identifies certain types of information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2). A section 21(3) presumption can be overcome, however, if the personal information at issue is caught by section 21(4) or if the "compelling public interest" override at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

The OLGC takes the position that disclosing any responsive information, if it exists, would constitute a presumed unjustified invasion of privacy under section 21(3)(f), and that the factor found in section 21(2)(e) would be relevant. These sections provide:

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

With regard to the application of the presumption in section 21(3)(f), the OLGC states:

Disclosure of the existence or non existence of the record containing the requested information would reveal the fact that an individual did or did not win a lottery prize. Whether an individual plays lotteries or whether an individual won or did not win a lottery prize is the personal information of that individual.

In Orders M-173, MO-1184, MO-1469 it was determined that one-time payments such as lump sums paid in connection with retirement packages, one-time awards in settlement of human rights complaints or wrongful dismissal claims do not fall within section 14(3)(f). I agree that such payments do not describe an individual's "finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness". The record at issue in this case, if it exists, also relates to a one-time payment, and for this reason, I find that section 14(3)(f) does not apply.

With regard to the factor favouring non-disclosure in section 21(2)(e), the OLGC quotes former Assistant Commissioner (later Commissioner) Tom Wright's comments in Order P-181. In that case, the former Commissioner found that disclosure of the name and community of residence of lottery winners of \$10,000.00 or more would constitute an unjustified invasion of personal privacy as disclosure could unfairly expose lottery winners to pecuniary or other harm. The OLGC states:

While subsection 21(2) contains factors that tend to favour the disclosure of information, section 21(2)(e) is directed to the protection of personal privacy. Subsection 2(e) addresses unfair exposure to "pecuniary or other harm". Tom Wright, IPC's Assistant Commissioner stated in Order 181 regarding the release of information about lottery winners:

If the personal information that appears in the record were to be released by the institution to any member of the public, I cannot ignore what I feel would be the potential harm which could result. [...] In my view, the release of such information would, in fact, increase the likelihood that the privacy of the lottery winners would be invaded. In reaching this conclusion, I have accepted the principle that disclosure of the record to the appellant must be viewed as disclosure to the public generally.

In his discussion of section 21(2)(e), former Commissioner Wright also noted that "the individual lottery winners have received substantial sums of money". Similarly, during the appeal before me, the appellant has indicated that the alleged prize was substantial. I agree with former Commissioner Wright's view that disclosure to the appellant must be viewed as disclosure to the world. Similar to his findings in Orders P-180 and P-181, and the conclusion reached by Adjudicator Anita Fineberg in Order P-1355, which also dealt with lottery winnings, I find that section 21(2)(e) applies in this appeal.

On the subject of what weight should be given to this factor, I note that the representations I received on section 21(2)(e) (which I have reproduced in full above) do not mention any factual underpinning for finding the factor applies in this case; rather, the OLGc cites Order P-181, apparently on the assumption that this factor will apply because it has been applied in other orders relating to lottery winnings. Section 21(2)(e) contemplates a high onus, i.e. it must be established that “the individual to whom the information relates **will be** exposed unfairly to pecuniary or other harm” (emphasis added). Although it was not possible to notify the affected party in this case, in my view the OLGc was, itself, in a position to provide at least some evidence of unfair harm to lottery winners, given its position in the lottery and gaming industry and its experience with people who win lottery prizes. Accordingly, although I am prepared to find that section 21(2)(e) applies, I accord it relatively low weight.

As noted previously, the appellant’s representations did not directly address the issues referred to in the Notice of Inquiry. However, in her request letter she identifies a situation that could be seen as a possible “relevant circumstance” favouring disclosure. This circumstance arises from the allegation in her letter to the effect that she was the actual winner and gave the winning ticket to her husband to cash. According to her, he “kept on saying he put [it] in the bank in my name out of Toronto”, but she never received the money.

I acknowledge that the appellant does not provide specific evidence to support her apparent belief that her lottery winnings may have been misappropriated. However, I note that she goes beyond the bare bones of such an allegation, referring to a bank deposit outside of Toronto. In the unique circumstances of this case, where the alleged winner was the appellant’s husband and her request is for a cheque number only, I am prepared to find that this is a relevant circumstance favouring disclosure, and I accord it moderate weight.

I must therefore balance the factor in section 21(2)(e), which I have accorded relatively low weight, against the appellant’s belief that funds were misappropriated, which I have accorded moderate weight.

In my view, given the weight accorded to these two factors in my analysis above, the factor favouring disclosure is more compelling, and I therefore find that disclosure of the cheque number (if it exists) is not an unjustified invasion of personal privacy. Therefore, part one of the test for section 21(5) is not met. As both parts of the test must be met, I find that section 21(5) does not apply.

Part two: disclosure of the fact that the record exists (or does not exist)

I have already concluded that section 21(5) does not apply because the first part of the test is not met. However for the sake of completeness I will also consider part two.

Under part two of the section 21(5) test, the institution must demonstrate that disclosure of the fact that a record exists, or does not exist, would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

Concerning the application of section 21(5), the OLG states:

If the requested record exists it would contain personal information within the meaning of section 2(1) of the *Act* and also [paragraph (b) of the definition] as it pertains to financial transactions in which the individual has been involved. The financial transaction would be the lottery win, which pertains to personal information.

I agree that disclosing the fact of whether or not an individual won or collected a lottery prize is personal information. In my view, however, the analysis under part one applies equally to the question of whether disclosing the mere existence or non-existence of the record would be an unjustified invasion of privacy. For the reasons expressed above, I find that disclosing the existence or non-existence of a cheque number would not be a presumed unjustified invasion of personal privacy under section 21(3)(f), and the factor favouring privacy protection at section 21(2)(e) (unfair exposure to financial or other harm) would again receive low weight. In addition, the appellant's particular interest in the information in the circumstances of this appeal, i.e. her belief that she was the winner and her husband has never given her the money, is a relevant circumstance favouring disclosure, and is accorded moderate weight.

As under part one, the circumstance favouring disclosure is more compelling, and accordingly, disclosing the existence or non-existence of records is not an unjustified invasion of personal privacy. Therefore, part two of the test is also not met. Neither part one nor part two of the test is met, and I therefore find that section 21(5) does not apply.

CONCLUSION:

As stated at the beginning of this order, I have found that section 21(5) does not apply. No record responsive to the appellant's request exists. As this is confirmed in this order, I will delay its release to the appellant as outlined in order provisions 2, 3 and 4, below.

ORDER:

1. I do not uphold the OLG's decision to rely on section 21(5).
2. In this order, I have confirmed the non-existence of any record responsive to the appellant's request. I have released this order to the OLG in advance of the appellant in order to provide the OLG with an opportunity to review the order and determine whether to apply for judicial review or to request a reconsideration.
3. If I have not been served with a Notice of Application for Judicial Review or a reconsideration request by **May 2, 2006**, I will release the order to the appellant by **May 8, 2006**

4. In accordance with the requirements of section 54(4) of the *Act*, I will give the appellant notice of the issuance of this order by a separate letter, concurrent with the issuance of the order to the OLGC.

Original signed by: _____
John Higgins
Senior Adjudicator

_____ April 13, 2006