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

ORDER PO-2657

Appeal PA06-389

Ontario Lottery and Gaming Corporation

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BACKGROUND:

In July of 2006, a retail store owner (the owner) claimed that he held a winning LOTTO 6/49 ticket entitling him to the $21.5 million jackpot. The retailer was an "insider winner" as that term is defined by the Ontario Lottery and Gaming Corporation (the OLG). The retailer operated the shop with another individual who claims to be his common law spouse and who also claims, in a civil suit, that she is entitled to a portion of the lottery winnings.

Because the retailer was both a "major winner" and an "insider winner", his claim was subjected to an investigation by the OLG to confirm its validity. A "major win" is a lottery prize of $50,000 or more. An "insider win" is a lottery prize of $10,000 or more that is won by individuals affiliated with the OLG. This appeal relates to the records generated by that investigation.

NATURE OF THE APPEAL:

The OLG received a request from a Canadian Broadcasting Corporation (CBC) reporter under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> …all information, documents, emails, handwritten notes and files regarding [two named individual] winners of 21 million dollar 6/49 jackpot in July 2006. Please include insider win forms, claim forms, insider win checklists, investigation notes and occurrence reports related to or about [these two named individuals].

In response to the request, the OLG issued a decision letter refusing to confirm or deny the existence of the records pursuant to section 21(5) of the *Act* (personal privacy – refuse to confirm or deny.) The OLG also stated, in the alternative, that if the records did exist, it would refuse to disclose the personal information in the records pursuant to section 21(1) of the Act (personal privacy.)

The requester (now the appellant) appealed the decision of the OLG to this office.

During the mediation stage of the appeal process, the appellant claimed the application of the public interest override found at section 23 of the *Act*. No further mediation was possible and this appeal was moved to the adjudication stage of the appeal process.

I began my inquiry into this appeal by issuing a Notice of Inquiry to the OLG and to the retailer (affected party 1) and the other claimant to the winnings (affected party 2) inviting them to submit representations. Following receipt of the Notice of Inquiry, the OLG contacted this office and advised that it also wished to claim, in the alternative, the application of the discretionary exemption in section 18 (financial or other interests) to the records, if they exist. Accordingly, I asked the OLG to submit representations on the issue of the late raising of this discretionary exemption and on the application of section 18.

Although I received representations from affected party 2, affected party 1 did not respond to the Notice of Inquiry. I also received representations from the OLG. In those representations, the OLG made submissions with respect to the application of section 21(5) and, in the alternative, sections 18(1)(d) and 21(1). No other paragraphs of section 18 were claimed.

Following receipt of the OLG representations, the OLG advised that it was withdrawing its claim to section 21(5) of the *Act* as it was prepared, in the circumstances of this appeal, to acknowledge that the records requested did in fact exist. As a result, the OLG issued the first revised decision letter to the appellant advising the appellant of its intention to withdraw its claim to section 21(5). In the decision letter, the OLG noted that it continued to assert that the records were exempt under sections 21(1) and stated that it was also relying on sections 18(1)(a) and (c) in addition to section 18(1)(d). For the first time in this proceeding, the OLG also decided that some of the records were exempt pursuant to section 19 of the *Act* (solicitor-client privilege).

The OLG requested an opportunity to submit supplementary representations on these additional discretionary exemptions and on the application of section 21 to the information in the records. Although I decided that the OLG could submit supplementary representations on these issues, the OLG subsequently decided, in lieu of supplementary representations, to submit completely revised representations. At the same time, the OLG advised this office that it intended to claim the application of an additional discretionary exemption, namely, section 14 (law enforcement) on the basis that copies of the records at issue in this appeal had been given to the Ontario Provincial Police (OPP) for the purposes of a law enforcement investigation into insider winners.

Consequently the OLG then issued a second revised decision letter advising the appellant that it also relied on section 14 of the *Act* to deny access to the requested records.

I received and accepted revised representations from the OLG. I have not reviewed or considered the original representations received from the OLG in arriving at my decision in this appeal, and therefore, I did not share those representations with the appellant at any time in the course of my inquiry.

In the OLG's revised representations, the OLG withdrew its claim to sections 18(1)(a) and 19. As a result, sections 14(1), 18(1)(c) and (d), 21(1), the late raising of exemptions and section 23 are issues in this appeal. Sections 18(1)(a), 19 and 21(5) are no longer at issue.

I then issued a modified Notice of Inquiry to the appellant inviting her to make representations on the issues set out in the Notice and in response to the representations of affected party 2 and the OLG. The non-confidential portions of the OLG's representations and the affected party's representations were shared with the appellant.

As the OLG had claimed the application of section 14(1) to all of the records at issue, I decided that the OPP had an interest in the records. I wrote to the OPP and invited them to submit representations on the possible application of section 14(1). I received representations from the OPP.

In response to the Notice of Inquiry, the appellant submitted representations. I decided that the OLG and the affected party should be given an opportunity to reply to the appellant's representations. A complete copy of those representations was shared with the OLG and the affected party. At the same time, I also provided the appellant with a complete copy of the OPP

representations and asked her to submit representations in response. I received reply representations from the OLG and from the affected party. I also received representations from the appellant in response to those of the OPP.

I then provided the OLG with a complete copy of the appellant's representations regarding section 14 and a copy of the OPP representations. I invited the OLG to submit representations in response to those of the appellant only. I also provided the Ministry of Community Safety and Correctional Services (Ministry) with a copy of the appellant's section 14 representations and invited the Ministry, on behalf of the OPP, to submit representations in reply.

I received reply representations on the section 14 issue from the OLG and from the Ministry. Following my review of the Ministry's representations, I wrote to the Ministry inviting it to respond to some specific questions that I set out in my letter. In response, I received supplementary representations from the Ministry.

All parties to this appeal are represented by counsel. Any reference in this order to a party's actions in this appeal shall include activities undertaken on the party's behalf by counsel, unless otherwise indicated.

RECORDS:

The records at issue in this appeal consist of documents relating to the investigation of the affected parties' insider win claim. The Index of Records below provides a description of the responsive records and the basis for the claim by the OLG that the records are exempt.

Page Number	Description	Access	Exemptions
1	Insider Win Form	Denied	18, 21
2	"	"	14, 18, 21
3	"	"	14, 18, 21
4	"	"	14, 21
5	Ticket Receipt	"	14, 18, 21
6	Ticket Validation	"	14, 18, 21
7	Signed Back of Ticket	"	14, 21
8	Ticket Verification Report	"	14, 18
9	Winner's Release Form	"	14, 21
10	Direction Form	"	14, 18, 21
11	Investigation Report	"	14, 18, 21
12	"	"	14, 21, 21(3)(h)
13	"	"	14, 21
14	"	"	14, 18, 21
15	"	"	14, 18, 21
16	"	"	14, 18, 21
17	"	"	14, 18, 21

18	"	"	14, 18, 21
19	"	"	14, 21
20	Occurrence Details	"	14, 18, 21
21	"	"	14, 21
22	"	"	14, 18, 21
23	"	"	14, 18, 21
24	"	"	14, 18, 21
25	"	"	14, 18, 21
26	"	"	14, 18, 21
27	"	"	14, 18, 21
28	"	"	14, 18, 21
29	"	"	14, 18, 21
30	"	"	14, 18, 21
31	Internal Email	"	14, 21
32	"	"	14, 21
33	"	"	14, 21
34	"	"	14, 21
35	"	"	14, 21

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) 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,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,

> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) 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 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].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Representations

The OLG claims that the records at issue contain the personal information of the two affected parties including their home addresses or former home addresses, information about their relationship, languages spoken, employment, friends, family members and legal advisers, information about their claim to a $21.5 million lottery prize and information about previous winnings and historical lottery playing practices.

In affected party 2's representations, she submits that the records at issue contain information about her race, age, sex, marital status, employment history, financial transactions, personal views, and other recorded information about her as an identifiable individual, and that this information is her personal information as that term is defined in the *Act*.

The appellant submits that while some of the records may contain personal information, the personal information in those records is already in the public domain.

The OLG and affected party 2 did not submit reply representations on this issue although they were invited to do so.

Analysis and Findings

I find that the records at issue do contain the personal information of the two affected parties, including their names, language, ethnic origin, marital status and their names where it appears with other information. This includes information relating to the relationship between the two affected parties, their dispute over the proceeds of the winning lottery ticket and the fact that affected party 2 has retained counsel.

However, some of the records also contain information about the affected parties which is not personal information. This information is associated with the affected parties in their professional capacity as owners and operators of a retail store. In particular, the information relating to the name, address, phone number, hours of work and operation of the store is not personal information. This is professional or business information that does not fall within the definition of personal information in section 2 of the *Act* [see Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Affected party 2 submits that the records at issue also contain information relating to her "employment history." Although affected party 2 does not specifically identify the information in the records that she is referring to, I have reviewed the records and note that records 17 and 29 include a statement made by the affected party to the effect that she was employed at the retail store owned by affected party 1. However, affected party 2 also describes her relationship with affected party 1 and her working arrangements in the Statement of Claim that she filed with the Superior Court of Ontario, a copy of which was provided to me by affected party 2. In her Statement of Claim, the affected party describes herself as "joint operat[or] and manag[er] of the store" with affected party 1, and she states that she did not receive a salary for her work at the retail store. The result appears to be that affected party 2 is on the one hand claiming that her relationship with the retail store was an employment relationship and, on the other hand, for the purposes of her claim in the Superior Court, that her relationship was that of an operator who did not draw a salary. In these circumstances, I find that there is insufficient evidence before me to support a finding that any of the information contained in the records at issue relates to affected party 2's "employment history". Therefore, it is not personal information as that term is defined in section 2 of the *Act*. I also note that a single reference to an individual's working status does not represent a "history" as contemplated by the definition of "personal information" in section 2(1)(b) of the *Act* (see Orders P-1018, MO-1922).

In addition, contrary to what is suggested by the OLG, I find that there is no information in records 3, 14 and 24 that relates to affected party 1's employment. The information in those

records relates to the operation of the retail store and the retail store previously owned and operated by affected party 1. This information is professional or business information.

I also find that the information in the records that relates to the lottery ticket purchasing practices of affected party 1 and 2, which is set out in records 3, 14, 16, 17, 24, 25 and 30, does not qualify as information relating to "financial transactions" for the purposes of section 2(1)(b). However, I find that this information qualifies as "personal information" pursuant to section 2(1)(h) as this information, in connection with the names of the affected parties, reveals other personal information about the affected parties.

Some of the records also contain the personal information of individuals not notified of this proceeding. These are primarily individuals who assisted affected parties 1 and 2 with the processing of their claim with the OLG or provided statements to the OLG regarding the claim. I will deal with this personal information after considering the application of section 21(1) to the personal information of the affected parties.

PERSONAL PRIVACY

The OLG claims that the disclosure of the personal information in the records would constitute an unjustified invasion of personal privacy pursuant to section 21(1) of the *Act*.

Where a requester seeks the personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21. The section 21(1)(a) to (e) exceptions are relatively straightforward. The section 21(1)(f) exception is more complex and requires a consideration of additional parts of section 21.

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(1)(f). If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 21. If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

Once a presumed unjustified invasion of personal privacy is established under section 21(3), it cannot be rebutted by one or more factors or circumstances under section 21(2) [*John Doe*, cited above]. If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an

unjustified invasion of personal privacy [Order P-239]. The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2) [Order P-99].

Having reviewed the records, I am satisfied that section 21(4) does not apply in the circumstances of this appeal. Accordingly, I now turn to consider the possible application of the presumptions in section 21(3).

Section 21(3)

The OLG did not make any representations on the application of the presumptions in section 21(3). Affected party 2 submits that the presumptions in sections 21(3)(b), (d), (f) and (h) apply to the personal information contained in the records.

Section 21(3) states, in part:

> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
>
> (d) relates to employment or educational history;
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
>
> (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

Representations

Affected party 2 states:

> It is additionally submitted that Section 21(3)(b) is applicable to the personal information requested, or a large proportion thereof, as most of the information requested relates to an investigation conducted by the OLGC in respect of the lottery win of [the affected party 1] and [affected party 2]. As the report of the Ontario Ombudsman entitled "Game of Trust" indicates, this investigative process is conducted by the OLGC in order to determine whether possible violations of the law (such as fraud) or OLGC rules have occurred. Further, the records

> contain information listed in Section 21(3)(d), (f) and (h) with respect to the Affected Party and as such cannot be disclosed.

The appellant does not directly address the application of section 21(3) presumptions in her representations other than to attempt to discredit the affected party's reliance on the presumptions in circumstances where the affected party's counsel has already made much of the information public in press releases that have been reported in the newspapers. More generally, the appellant argues that much of the personal information has been made public through the civil litigation process and to the extent that it has not, the public interest in its disclosure outweighs the affected party's interest in suppressing the information.

In reply, affected party 2 states that the appellant should have no need to pursue the access request if the information is already in the public domain:

> It is the release of the private information regarding the Affected Party and her opposition that is objected to. The information obtained within the confines of the lawsuit is protected from disclosure under the *Rules of Civil Procedure*. The *Rules of Civil Procedure* also provides appropriate sanctions for violations.
>
> The Requester is not entitled to obtain through the rear-door information that is not available through the front.

Findings and Analysis

I have carefully considered the representations of affected party 2 with respect to the application of the presumptions in section 21(3) and find that they do not apply in the circumstances before me, except in relation to record 12, discussed below. With respect to the claim that section 21(3)(b) applies, there is no evidence before me to suggest that the information "was compiled *and* is identifiable as part of an investigation into a possible violation of law." I find that the information in these records was compiled and is identifiable as part of the process of verifying the claim by the affected parties to the lottery winnings and not as part of "an investigation into a possible violation of law."

Section 21(3)(d) creates a presumption of unjustified invasion of privacy with respect to information that relates to "employment or educational history." I have already found that there is no information in the records that relates to the "employment history" of either of the affected parties. I also find that there is no information in the records that relates to the "educational history" of either affected party. Accordingly, the presumption in section 21(3)(d) does not apply to the records at issue.

With respect to the claim that section 21(3)(f) applies, I adopt the approach taken by Senior Adjudicator John Higgins in Order PO-2465. In that order, the requester sought access to the cheque number relating to lottery winnings allegedly collected by the requester's husband. The

Senior Adjudicator found that section 21(3)(f) did not apply to the information at issue. He stated:

> 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.

As the personal information at issue in this appeal also relates to a one-time payment claimed by the affected parties, I find that section 21(3)(f) does not apply to the personal information in the records.

However, I find that record 12 does contain personal information that reveals the affected parties' ethnic origin and therefore, the presumption in section 21(3)(h) applies to that information. Accordingly, I find that the disclosure of this personal information would constitute an unjustified invasion of the affected parties' personal privacy.

I now turn to consider whether the disclosure of the remaining personal information would constitute an unjustified invasion of privacy having regard to the factors set out in section 21(2).

Section 21(2)

Section 21(2) states, in part:

> (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,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> …
>
> (c) access to the personal information will promote informed choice in the purchase of goods and services;
>
> …
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> …

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The factors in paragraphs (a) and (c) generally weigh in favour of disclosure, while those in paragraphs (e), (f), (h) and (i) weigh in favour of privacy protection. Under section 21(2), I must also consider other "relevant circumstances' in arriving at my decision as to whether disclosure of personal information would constitute an unjustified invasion of the affected parties' personal privacy.

Representations

The OLG submits that the factors set out in section 21(2)(f) and (e) of the *Act* weigh in favour of exempting the personal information in the records from disclosure. The OLG states:

> In the circumstances of this appeal, [affected party 1] and [affected party 2] will suffer from specific harm if his claims information is made public. If it is released, [the affected parties'] conflict will be on display to the world. This is a conflict about money between two individuals and is "highly sensitive" as that term is used in section 21(2).
>
> Moreover, if the records under appeal are disclosed [affected party 1] (who made the initial claim) would be exposed to a public investigation of his claim and an implication, asserted by the CBC, that he should be suspected of fraud…[Affected party 1] should not now be put to task by the general public.
>
> The CBC asked, "How often do clerks steal and get away with it?" It later identified a group of approximately 200 clerks and retailers who had won significant lottery prizes since 1995. It then asked, "Could clerks really be that lucky?" and concluded "Not a chance."
>
> It is also clear that the public has accepted the CBC's suspicion. In fact, the CBC's statistical exercise and its conclusion led to the Ombudsman report in which the Ombudsman revisited the statistics on insider wins. Although he questioned the CBC's statistician and expressed frustration about the lack of reliable data on which to draw valid conclusions about retailer fraud, at paragraph 10 he stated:
>
> > Without a question, insiders have won big over the years. The Corporation confirms that from 1999 to November 2006, at least 78 retail owners and 131 retail employees have won major lottery prizes, and there could be more. Retailers have no doubt also won

> thousands of smaller prizes. Certainly many of these wins are legitimate, but it is equally clear that millions of dollars have been paid out in what are dishonest claims.
>
> The suspicion cast on retailers who have won lottery prizes is clear and this underlies the harm to [affected party 1] that will flow from disclosing information about his claim.

The OLG also submits that the appellant has implicitly acknowledged this harm in the *Fifth Estate* program, which aired in March of 2007, regarding insider wins by lottery ticket retailers. In that program, the image of a retailer who had won a $12.5 million prize was obscured.

The OLG further states that affected party 1 has not waived his privacy rights nor should his expectation of privacy be diminished by virtue of the fact that affected party 2 has decided to launch a lawsuit against him claiming an ownership interest in the winnings. It also refers to previous orders of this office (namely Orders M-603, M-719, P-919 and P-1136) and suggests that they support the proposition that individuals do not waive their right to privacy in records held by an institution by commencing a civil action in which the record may be pleaded. It argues that the requester has the burden of demonstrating why filing a civil action should be a basis for finding a diminished expectation of privacy.

The OLG submits that the factors that weigh in favour of disclosure are weak:

> We submit that the public scrutiny factor in section 21(2)(a) does not apply at all because the disclosure of information about [the affected parties'] claim is not "desirable" for the purposes of subjecting the OLG to public scrutiny. The OLG has been scrutinized and is now engaging in implementing its response to the scrutiny. Disclosure of the named individual's claim information is not desirable because it cannot further a purpose that has already been satisfied. All disclosure will do is lead to the scrutiny of an individual who is already the subject of an OPP investigation.
>
> For similar reasons, the OLG submits that the factor in section 21(2)(c) should be given no weight. The disclosure of the [affected party 1]'s claim information will not "promote informed choice among consumers because the purpose of promoting informed choice has already been achieved by the disclosure of de-identified insider win records.

Affected party 2 also submitted representations on the applicability of the factors set out in section 21(2). After describing the litigation pending between the affected parties, affected party 2 submits:

> The Affected Party submits that any disclosure at this stage of the records would result in the substantial risk of prejudicing the Affected Party in respect of the

> litigation process. Information would be divulged to the public that members of the jury would likely be aware of, and may taint the fairness of the judicial process and detract from the relevant issue in the litigation process (namely, whether ownership to the winning ticket rests with the Affected Party or with [the named individual]).
>
> …
>
> It is noted that the criteria used to consider the justification of invasion of personal privacy listed in sections 21(2)(a) to (d) do not apply to this case. Sections 21(2)(e) and 21(2)(i) are pertinent to this case in that, should the records be disclosed and prejudice to the Affected Party in the ongoing civil litigation process occur as a result, it is highly likely that the Affected party will be unfairly exposed to pecuniary harm through the unlikelihood of an equitable result in the litigation, and that her reputation will be damaged. Further, it is of key importance that the information disclosed by the Affected Party [and by affected party 1] in the course of the investigation by the OLGC was disclosed in strict confidence, and on the understanding that such information would remain confidential as between the Affected Party and the OLGC. Disclosure would therefore violate Section 21(2)(h) of the *Act*.

The appellant states that the factors set out in section 21(2)(a) and (c) weigh strongly in favour of disclosure of the personal information. She disputes the OLG's position that the Ombudsman report satisfied the need for public scrutiny and notes that the Ombudsman reported that he was "frustrated by the lack of reliable information" available from the OLG. She states:

> The fact that the Ombudsman has issued his report does not alleviate the need for public scrutiny. The public has a right to know what procedures the OLG follows in cases of insider wins and what procedures were followed in this specific case. The Ombudsman Report was clear that ongoing public scrutiny of the OLG is necessary.

With respect to the application of section 21(2)(c), the appellant states:

> Order P-559 states that for section 21(2)(c) to apply there must be a direct connection between the personal information sought to be disclosed and promotion of informed choice among consumers. The records are sought in this case to inform Canadians about how the OLG responds to insider wins and challenges to such wins. The Ombudsman clearly concluded that consumer trust was at issue in the OLG's failure to sufficiently investigate insider wins.
>
> Through the disclosure of these records the public will be better informed about their chances of actually winning the lottery and can make an informed choice as to whether or not to purchase lottery tickets.

The appellant argues that the factors that favour non-disclosure are weak. In doing so, she disagrees with the position taken by the OLG with respect to the application of sections 21(2)(e) and (f):

> Section 21(2)(e) contemplates a very high threshold. Reliance on this section requires evidence that the individual will suffer pecuniary or other harm. Numerous Orders state that mere concern or fear of harm is insufficient to invoke this section.
>
> The OLG relies upon Orders PO-2465, P-180, P-181 and P-1355, which concluded that disclosure of information about past lottery winners caused harm as contemplated by section 21(2)(e). These orders, which all rely on the reasoning in Order P-180, can be distinguished as discussed above.
>
> In particular, in Order P-180, Assistant Commissioner Wright expressed concern that lottery winners could suffer harm if the public knew that they had won large amounts of money. Clearly this concern is different when the winner in question is an insider. The public has a right to ensure that proper procedures are followed and that frauds are not perpetrated on the OLG (and the public itself). Speculative concerns that the insiders will be "put to task by the general public" are not sufficient to defeat the presumption of disclosure.
>
> In this particular case, publicizing [the affected parties'] identities is not a real concern. This dispute has already been the subject of significant media attention. They are engaged in litigation in the public court system. It simply is not an unjustified invasion of privacy to disclose information which is already in the public domain.
>
> In particular, the following information is already publicly available through media stories:
>
> - [affected party 1's] name and age;
> - [affected party 2's] name and age;
> - the fact that [affected party 1] claimed a 21 million dollar jackpot;
> - the date of the winning ticket;
> - the name and location of the convenience store owned by [affected party 1];
> - the fact that the ticket was bought at a store owned by [affected party 1];
> - details of [affected party 1's] dispute over ownership of the ticket with his former common law wife, [affected party 2];
> - [affected party 2's] nationality; and
> - the names of the legal counsel involved;

> In addition, the following information was made available when [affected party 2] filed her statement of claim:
>
> - the names and addresses of the legal counsel involved; the addresses of both parties;
> - the names of both parties;
> - the address of the convenience store;
> - [affected party 2's] role in working at the convenience store;
> - details relating to [the affected parties'] personal relationship; and
> - details regarding what [the affected parties] did on the day he claimed the lottery prize.
>
> The OLG has effectively acknowledged the identities of the winners through the withdrawal of its section 21(5) claim. The OLG has thus acknowledged that the disclosure of their identities is not an unjustified invasion of privacy, and therefore at a minimum any records which simply identify the winners are clearly not exempt from disclosure. It is clearly also not an unjustified invasion of privacy to disclose other personal information that is already in the public domain.
>
> Finally, the OLG's claim that the personal information is highly sensitive cannot be maintained in light of the above.

The appellant submits that affected party 2 surrendered much of her right to privacy when she resorted to the court system, and further, that this is particularly so given her reduced expectation of privacy as an insider winner. The appellant disputes that the release of this information will prejudice the jury in the civil proceeding and states that the evidence of the affected party is speculative as it relates to this issue, as is her concern over the unlikelihood of an equitable result in that proceeding. She adds that disclosure of the information is in the public interest.

The appellant also submits:

> Counsel to [affected party 2] seems to rely on subsection 21(2)(i) with respect to possible damage to her reputation. The applicability of this factor is not dependant on whether damage to a person's reputation is present or foreseeable alone, but whether such damage is unfair. Counsel to [affected party 2] claims but provides no evidence that the disclosure of the records will cause unfair damage to her reputation.
>
> The OLG meanwhile claims that gambling is a form of controversial entertainment and disclosure of a person's gambling will expose them to controversy. The OLG has been overseeing legalized gambling in Ontario since 1975 and exists to protect the public. Each year the OLG grosses more than two

> billion dollars from the government lottery business. The existence of the lottery system in Ontario is not particularly controversial - it is the number of insiders who win the lottery which has created a public controversy.

The OLG submitted representations in reply to those of the appellant in which it argues that "disclosure once is not disclosure for all time" and that the right to privacy includes the right to control the degree of dissemination of personal information. In support of its argument, it refers to the decision of the United States Supreme Court in *United States Department of Justice v. Reporters' Committee for Freedom of the Press*, 489 U.S. 749 (1989) which was referred to by former Assistant Commissioner Tom Wright in Orders P-180 and P-181. It argues that the principles enunciated in this decision are consistent with the concept of informational privacy endorsed by the Supreme Court of Canada in *R. v. Duarte*, [1990] 1 S. C. R. 30.

The OLG disagrees with the position taken by the appellant that Order P-180 and P-181 are distinguishable. The OLG submits:

> Lottery winners consent to publication of specific information for a specific purpose. The OLG publishes some of this information on its internet site for a limited period of time and then removes it permanently. No information about the wins that are the subject of these appeals is available on the OLG's website today.
>
> While it is true that publication on the internet makes information accessible for a period of time, when it is taken down from the internet it is removed from public access as it would be if published in any other medium. We acknowledge that the "degree" to which information is published when it is posted on the internet is relatively high. That degree of publication, however, is not absolute, for if internet publication were truly absolute there would never be a need to file a request for information once before published on the internet.
>
> In general, the threat to personal privacy posed by modern technology is a reason to be more rather than less cautious about the retention and control of personal information. For this reason and for the reasons above, we submit that the "disclosure once is not disclosure for all time" applies despite the prior internet based publication of a relatively limited amount of the information subject to appeal.

With respect to the appellant's argument that insider winners have a diminished expectation of privacy, the OLG submits:

> As we have argued, inside winners purchase lottery tickets on the exact same terms as members of the public. And though they can and should expect greater scrutiny *from the OLG* should they win, to suggest that they should expect greater scrutiny from the public is ends-based reasoning. What the Appellant is really saying is "inside winners should be scrutinized," yet from the perspective of the

> inside winner (the proper perspective) they have no less of an expectation of privacy when they buy a lottery ticket than any other member of the public.

With respect to the appellant's argument regarding the disclosures that were made by affected party 2 in the context of the law suit against the other affected party, the OLG submits:

> Although there is likely some personal information contained in publicly filed pleadings (none of which have been put before you by the Appellant), this is not consent for the OLG to disclose information in its control nor does it speak to [the affected parties'] reasonable expectation of privacy.
>
> Litigants do sacrifice some personal privacy, but they do so by choice and within a process that they control. Information in records disclosed to an opponent but not filed are protected from collateral use and court ordered disclosure by the deemed undertaking rule. Documents that are filed in court may be the subject of a sealing order, and although such orders are extraordinary, the important point is that the bias towards disclosure in civil procedure is known in advance and the parties can make choices (including the choice to settle before trial) about the extent to which they are willing to sacrifice their personal privacy throughout the litigation.

The OLG also replied to the appellant's representations regarding the impact of the Ombudsman's Report and the "quality of the OLG's disclosure." It states:

> [The Ombudsman's] statement about being frustrated (made at page 10 of the report) was not about the quality of the OLG's disclosure. Rather, it was about the quality of the OLG's recordkeeping, a problem that he addressed by four of his recommendations (18, 20, 21 and 22), all of which serve the public interest. And while we accept the Appellant's statement that ongoing scrutiny of OLG operations is required, it also is not a justification for disclosure because the request deals with records that have already been scrutinized, as we have argued, to a positive effect.
>
> The only justification for the release of the personal information the OLG has claimed is exempt from public access is to move the focus of the Appellant's journalistic exercise from the OLG to individual lottery winners. This would be associated with a loss of personal privacy that would be extreme. As previously submitted, the OPP investigation (which also involves an examination of all the records under appeal) is a means of addressing the problem in a manner fully respectful of individual privacy rights.

Affected party 2 also submitted representations in reply to those of the appellant. She argues that the public interest engaged by these records does not relate to the issues surrounding possible retailer fraud; rather, they involve a dispute between two individuals regarding the ownership

rights to the winning LOTTO 6/49 ticket. She states that the documents are private and are not at all relevant to the nature of the disputes that the requester submits is subject to public scrutiny. She argues:

> The Requester has failed to meet the onus of cogently demonstrating a connection between the disclosure of private information regarding a personal dispute and the public interest in the OLG activity in this case.
>
> The fact that the Requester seeks to categorize this private dispute in a certain manner however flawed that attempt may be, does not impose upon the private disputants an expectation of greater scrutiny, and to the Requester, any entitlement to broader or greater disclosure of private or non-relevant information.

Affected party 2 also argues that there has been no surrender of the right to privacy by the commencement of her civil action, that the concern of a right to a free trial is hardly a speculative concern as it is a basic constitutional right and that it "hardly requires elaborate submissions to support." In conclusion, she states:

> The suggestion that there will be no harm to the Affected Party caused by the release of private information, particularly taking into account the nature of the information in question, is quite candidly, absurd!

Findings and Analysis

I will now examine the factors set out in section 21(2) to determine whether disclosure of the personal information contained in the records constitutes an unjustified invasion of either of the affected parties' personal privacy.

Section 21(2)(a) public scrutiny

In order for section 21(2)(a) to apply, it must be demonstrated that the disclosure of the personal information must be desirable in order to subject the activities of the institution to public scrutiny (See Orders M-1174, PO-2265 and PO-2544.)

I have decided that the factor set out in this section applies and the disclosure of the personal information in the records is desirable for the purpose of subjecting the activities of the OLG to public scrutiny, particularly as those activities relate to the verification of insider wins. I also conclude that this factor should be accorded significant weight.
With respect, I do not agree with the position taken by the OLG that the alleged investigation by the OPP into the insider winners is sufficient to ensure that the activities of the OLG are exposed to public scrutiny. Any investigation carried out by the OPP will focus on the activities of the potential insider winners and not on the activities of the OLG. While the information in the records may relate to possible fraud by an insider winner, the information is also related to the OLG process for evaluating and authorizing payments to insider winners.

The activities of the OLG that have been the subject of public discussion raise issues not only about the number and circumstances of insider wins but also about the means and process pursuant to which the OLG investigated and authorized such claims. The information at issue is relevant to these matters and it is from this perspective that the information requires further public scrutiny. The OPP will not be scrutinizing these records from this perspective and, therefore, the investigation by the OPP will not "subject the activities of the institution to public scrutiny."

The OLG also argues that the investigation conducted by the Ombudsman was sufficient to satisfy the public's need for scrutiny of the institution's activities. I agree with the position taken by the appellant on this issue and find that, despite the Ombudsman's investigation, the disclosure of the information is nevertheless desirable to subject the activities of the institution to scrutiny by the public. In fact, it is ironic that the OLG is relying on the Ombudsman's report to resist disclosure when, in fact, that report makes it clear that ongoing public scrutiny of the OLG is necessary. This was reflected in the following comments made by the Ombudsman at page 5:

> While the Corporation has certainly been proactive in seeking solutions, however, there *are disturbing signs that the culture that led to the difficulties in the first place is not gone*. It was not conscience or self criticism that smartened the OLG up – it was a public relations nightmare, played out on the public airwaves despite its best efforts at suppression. *A profound cultural shift has yet to occur*, as the Corporation demonstrated in its all-out defensive reaction against *the fifth estate's* statistics. This is not some private company responding to a potential profit-draining scandal. This is a Crown corporation created to protect and serve the public, which knew it had a problem. (emphasis added)

The Ombudsman further recognizes that public scrutiny of the insider win investigation process is required well after the release of his report. At page 50, he states:

> While the OLG deserves some credit for finally taking some decisive action to address the fallout from *the fifth estate*, there is a very real danger that some initiatives will result in mere window dressing. It continues to exhibit a reluctance to get tough when it comes to retailer compliance issues – as its own research shows, most retailers still (as of January 2007) seem to resist even asking people to sign their tickets. The OLG still appears not to recognize that controls need to be designed and enforced to protect the public and the integrity of the system. Compliance cannot be treated as an option merely to be negotiated with retailers.

The OLG also argues that the need for public scrutiny has been satisfied by the disclosure of de-identified records. With all due respect, I do not agree with this position. The disclosure of de-indentified records would not satisfy the need for public scrutiny as significant amounts of relevant personal information would be severed from the records. For example, personal information, such as any pattern of previous lottery wins by the affected parties, is directly

relevant to the scrutiny of the OLG process in validating this particular claim. Similarly, the activities of the affected parties leading up to their claim is also relevant to determining whether the OLG process was sufficient for the purposes of determining whether the claim was legitimate. Further, as noted by the appellant, the insider win claimed by the affected party in this case has already been the subject of public comment in the media. Disclosure of personal information in this particular case will assist in subjecting the insider win process, as applied to the affected party's claim, to public scrutiny.

To conclude, I find that disclosure of the information at issue is desirable to subject the activities of the OLG to public scrutiny and I accord this factor significant weight.

Section 21(2)(c) informed choice

I also accord significant weight to the factor set out in section 21(2)(c). I find that there is a direct connection between the personal information in the records and the promotion of informed choice among consumers. A significant amount of money is spent by members of the public on the purchase of lottery tickets sold by the OLG on an annual basis. For example, the Ombudsman reported that in the 2005 fiscal year, the OLG generated $2.3 billion in overall revenue related to lottery tickets. The Ombudsman stated, at page 1:

> Without question, government lotteries are big business in Ontario and the Province has come to rely on the money generated.

The OLG has, for the most part, a monopoly on lottery gaming activities in the province of Ontario. The public has a right to be informed before it expends significant amounts of money on lottery tickets as opposed to the other gaming alternatives, or, in fact, spends money elsewhere. The public has a right to know whether the OLG is administering the lottery scheme in a manner that is fair to all lottery players.

Section 21(2)(e) unfair pecuniary or other harm

In my view, the evidence of the affected party and the OLG does not establish that the individuals to whom the information relates in the records *will* be exposed *unfairly* to pecuniary or other harm as a result of the disclosure of the personal information contained in the records. I accept the evidence of the appellant that there has already been significant media coverage of the circumstances surrounding the lottery win of the affected parties. In fact, some of this coverage has included interviews with counsel for affected party 2. As a result, portions of the information that will be disclosed as a result of this order is already within the public's knowledge, a fact which mitigates against the argument that harm will result from this disclosure.

I also reject the OLG's claim that previous orders of this office support the position that disclosure of the affected parties' identities will subject them to unfair pecuniary or other harm.

As noted already, the disclosure of their identities, as a result of this appeal, will not be the first disclosure of their identities. That has already happened, most notably in the media.

Further, previous orders of this office did not deal with insider winners, nor were those orders issued with the backdrop of the Ombudsman's report into the problems with the OLG's investigation of insider win claims. In this regard, I agree with the submissions of the appellant and disagree with the position taken by the OLG.

The Ombudsman has identified a very real problem with the frequency of insider wins and the manner in which the OLG has verified their legitimacy. The Ombudsman's report refers to numerous incidents where insider winners were improperly treated as legitimate winners. Based on the Ombudsman's investigation, I am of the view that insider winners should, in fact, expect a lesser degree of privacy than ordinary members of the public. Insider winners should anticipate that their claims will be subject to a higher standard of scrutiny, including potential scrutiny by the public.

Given the Ombudsman's findings, it is no longer acceptable to take the position of the OLG that "insider winners purchase lottery tickets on the exact same terms as members of the public." This comment from the OLG's reply representations supports the Ombudsman's observation, quoted above, that there *are disturbing signs that the culture that led to the difficulties in the first place is not gone*. [emphasis added]

The OLG states in its reply representations that insider winners "have no less of an expectation of privacy when they buy a lottery ticket than any other member of the public." This ignores the fact that this expectation of privacy on the part of insider winners has been created and fostered by the OLG itself. It is fully within the power of the OLG to create policies and procedures that make clear to insider winners that they should not expect the same level of privacy protection as do members of the general public.

In arriving at this conclusion, I have also taken into account the fact that affected party 1 has failed to submit representations in this appeal.

Accordingly, I have concluded that this factor is not established. On the contrary, I give significant weight to the fact that the personal information at issue relates to insider win claimants as a factor supporting disclosure.

Section 21(2)(f) highly sensitive

To be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause significant personal distress to the subject individual [Order PO-2518].

There is insufficient evidence before me to support a finding that the disclosure of the personal information could reasonably be expected to cause significant personal distress to the affected

parties. I have also taken into account the fact that much of the information that will be disclosed as a result of this order has already been disclosed in media reports, by affected party 2's counsel and as a result of the litigation between the affected parties. Further, my comments above with regard to the expectation of privacy that insider winners should reasonably expect are equally applicable when considering the sensitivity of the personal information. Accordingly, I will give this factor little weight.

Section 21(2)(h) supplied in confidence

I also accord little weight to this factor in arriving at my decision. The OLG has referred to previous orders of this office (P-180 and P-181) which have found that the consent to the disclosure of the information relating to the lottery win is limited in terms of the amount of information and the length of time for which disclosure will be made. Without commenting on the application of those orders, in the particular circumstances of this case, I note that the consent form signed by affected party 1 includes the following statement:

> Personal information is collected under the authority of the Ontario Lottery and Gaming Corporation Act. This information will be used to assist the Corporation in managing and promoting its lottery games and *in maintaining the integrity thereof*. [emphasis added]
>
> I consent to the release, publication of the personal information that I have provided to the Ontario Lottery and Gaming Corporation. (emphasis added)

In my opinion, the consent contemplates that, when matters of the integrity of the institution are at issue, the personal information in the records will be used by the OLG in the manner that it sees fit. Given the form of the consent signed by affected party 1, and the fact that the integrity of the OLG has been called into question as it relates to insider lottery wins, this factor deserves little weight. On the contrary, given the observations of the Ombudsman relating to the integrity of the OLG's processes, one could argue that the signature of affected party 1 on this consent form is a factor in favour of disclosure of personal information gathered through the insider win verification process.

Section 21(2)(i) unfairly damage reputation

I give this factor moderate weight as I find that disclosure of the personal information of the affected parties could result in unfair damage to their reputation. The affected parties may well be subjected to the implication that they are not the rightful claimants to the wining lottery ticket or that they somehow acquired the ticket through illegitimate means.

In view of the inferences that were drawn by the media as a result of the recent stories relating to lottery winners, I find that there is a possibility that those same inferences will be drawn with respect to these affected parties. However, I only accord this factor moderate weight at best, for

the same reasons that I have given little weight to the factor in section 21(2)(h) namely, insider winners should be subjected to a greater level of public scrutiny than regular lottery winners.

Summary and Conclusions

I have found that the factors at section 21(2)(a) and (c), which weigh strongly in favour of disclosure and the factor regarding unfair damage to reputation at section 21(2)(i), which weighs moderately against disclosure are relevant considerations which must be balanced against one another in order to determine whether disclosure of the personal information in the records would amount to an unjustified invasion of privacy. I have accorded the other factors in paragraphs (h) and (f) little weight. In addition, I have taken into consideration the fact that insider winners should have a reduced expectation of privacy compared to members of the general public when validating lottery wins, and the consent form signed by affected party 1, as circumstances weighing strongly in favour of disclosure. I am satisfied that the factors in favour of disclosure outweigh those that would protect the privacy interests of the affected parties. For this reason, I find that disclosure of the personal information in the records, other than the personal information in record 12 that I have found to be exempt, would not constitute an unjustified invasion of the affected parties' personal privacy and subject to my findings below, I will order the disclosure of this information.

Personal information of other individuals

As noted above, the records contain a minimal amount of personal information of individuals who assisted the affected parties in forwarding their claim to the winning prize. While it is their personal information, it provides no substantive information regarding these individuals and relates directly and primarily to the claims of the affected parties. However, since these individuals were not provided an opportunity to participate in this request and appeal, I will order that the OLG sever references to their names and contact details from the records. I will deal with this in the order provisions.

LATE RAISING OF DISCRETIONARY EXEMPTION

The OLG raised the application of the discretionary exemptions in sections 18(1)(c) and (d) and 14(1) for the first time in this proceeding following mediation.
The time limit and procedures for the raising of discretionary exemption claims are set out in Section 11 of the *IPC Code of Procedure*. The objective of the policy is to maintain the integrity of the appeals process by ensuring identification of discretionary exemptions early in the appeals process. Section 11 reads:

> 11.01 In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the

> Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.
>
> 11.02 An institution does not have an additional 35-day period within which to make a new discretionary exemption claim after it makes an access decision arising from a Deemed Refusal Appeal.

Sections 18(1)(c) and 14(1) are discretionary exemptions that must be raised within 35 days of the issuance of the Confirmation of Appeal by this office. The policy is reflected in the Confirmation of Appeal, a copy of which was sent to the OLG. It reads:

> In your decision letter, you refused to confirm or deny the existence of records under section 21(5) of the *Act*. If you wish to claim any additional exemptions for records of the type requested, you must advise us of this fact, stating which other exemptions you wish to claim, no later than **February 27, 2007**. No new decision letter will be required in this regard.

This office has the power to control the manner in which the inquiry process is undertaken [Orders P-345 and P-537]. This includes the authority to set a limit on the time during which an institution can raise new discretionary exemptions not originally raised in the decision letter. The adoption and application of this policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg*, (December 21, 1995) Toronto Doc. 220/95, leave to appeal to the Court of Appeal refused at [1996] O.J. No. 1838 (C.A.). [see also *Duncanson v. Toronto (Metropolitan) Police Services Board*, [1999] O.J. No. 2464 (Div. Ct.)] Notwithstanding this policy, this office will consider the circumstances of each case and may exercise its discretion to depart from the policy in appropriate cases.

Representations

The OLG states that it decided to withdraw the section 21(5) claim to refuse to confirm or deny the existence of the records at issue following the issuance of its original decision letter. The OLG states that it had not turned its mind to the application of discretionary exemptions until after the decision to disclose the existence of the records. The OLG therefore submits that it should be entitled to raise the discretionary exemptions in its revised decision letter. The OLG states:

> In light of the prejudice to the public interest associated with failing to consider the harm that would flow from the disclosure of the record under appeal, the OLG submits that the balance weighs in favour of hearing these representations in full.

The OLG concedes that the effect of the late raising of the discretionary exemptions was that the exchange of representations process was delayed. However, the OLG states that the prejudice that would result in the event that they are denied an opportunity to raise these discretionary

exemptions outweighs the prejudice that would result from permitting them to raise the exemptions.

The appellant states that the OLG should not have relied upon the exemption in section 21(5) at first instance and argues that they should not be entitled to rely upon their inappropriate use of section 21(5) in order to extend the time for its submissions. The appellant cites Order PO-2433 and states that the OLG should not be entitled to claim late exemptions designed to protect its own interests and argues that she has been prejudiced by the delay. The appellant states:

> The timely disclosure of publicly important information is imperative. This information is clearly of compelling public interest and its timely disclosure is essential to the promotion of transparency and accountability that the Act is intended to safeguard. In our view, the OLG has engaged in a pattern of behaviour which evidences an intention to delay the appeal process. The integrity of the appeal process is undermined if institutions are permitted to ignore deadlines set by the IPC with impunity.

In reply, the OLG submits that there is no evidence of purposeful delay on its part. It argues that it made the decision to claim section 21(5) out of a *bona fide* concern for the privacy interests of the affected parties and that it should not be penalized for proceeding in that fashion. It also argues that its decision to withdraw the claim to section 21(5) was made following discussions with this office and it should not be prejudiced for failing to consider the possible application of alternative exemptions at the early stage of the process.

Findings and Analysis

The appellant has referred to Order PO-2433 as authority for the proposition that the OLG should not be allowed to rely on the discretionary exemptions in this appeal. In Order PO-2433, Adjudicator Bernard Morrow reviewed previous orders of this office regarding the late raising of discretionary exemptions. He stated:

> In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby delaying the appeal. Finally, she pointed out that in many cases the value of information sought by appellants diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

> The objective of the 35-day policy established by this office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. The 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

In Order PO-2433, Adjudicator Morrow found that the integrity of the adjudication process would be compromised if the Ministry were permitted to raise the discretionary exemptions beyond the 35 day period. However, in the alternative, he went on to consider the application of those exemptions and found that they did not apply.

I am not persuaded that the circumstances of PO-2433 are similar to the circumstances that are before me in this appeal. I accept the position of the OLG that, in the circumstances of this appeal, after having decided to withdraw its claim to section 21(5), it should be entitled to raise the application of the discretionary exemptions. Although I sympathize with the position of the appellant regarding the importance of the timely disclosure of the information, in my opinion, the delays that resulted from the withdrawal of the OLG claim to section 21(5) have not unduly prejudiced the position of the appellant. If the OLG had insisted on maintaining its position regarding the application of section 21(5), this office may have been required to issue an order compelling the disclosure of the existence of the records and then requiring the OLG to make a decision on disclosure. Presumably, the OLG's decision would have been to deny access based on the provisions of the *Act* invoked in this appeal. If this process were followed, the appellant would have faced a two-step process and significantly longer delays than those that resulted from the late raising of the discretionary exemptions.

I will therefore allow the OLG to raise these discretionary exemptions, and I now turn to consider their application to the records at issue.

ECONOMIC AND OTHER INTERESTS

The OLG claims the application of sections 18(1)(c) and (d) to information contained in the following records: 1-3, 5-6, 8, 10-11, 14-18, 20, and 22-29. The OLG provided me with a highlighted copy of the records at issue which indicate the portions of the records to which it contends that section 18 applies.

Section 18(1) states, in part:

> A head may refuse to disclose a record that contains,
>
> (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;

The purpose of section 18 is to protect certain economic interests of institutions. The report entitled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides the discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians [Order P-1398].

For section 18(1)(c) or (d) to apply, the institution must demonstrate that disclosure of the records "could reasonably be expected to" lead to the specified result. To meet this test, 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 [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Representations

With respect to the application of section 18(1)(d), the OLG submits:

> Purchase, validation and ticket information is contained throughout the records under appeal. Since the claim was judged by the OLG to be valid and paid into court, the information [affected parties 1 and 2] provided is as sensitive as the information in the OLG's records.

> Information about the process that the OLG uses to test individuals who claim lottery wins is conveyed by the existence of the responsive records themselves. The types of records in an investigation file speak to the investigation process. In addition, the records in the investigation file contain detailed information on OLG's prize claim investigation process, including information about the questions it asks of prize claimants.

The OLG states that this office has recognized institutions' interest in protecting the province against economic fraud and it refers to Orders P-752 and M-551. It argues that the OLG's interest in maintaining the integrity of its prize claim investigation process is equivalent to the interests protected in those two orders. It submits:

> Public confidence in the OLG's investigation process and the lottery systems must be maintained if it is to continue to make its large financial contribution to the provincial programs.

The OLG also submits that section 18(1)(c) applies to the identified information for the same reasons. The OLG competes with other organizations that offer gaming alternatives and it is facing increased competition from internet gaming companies. The OLG states that it has an interest in protecting its competitive interests. It relies on Order P-941 in support of its submission that this office has recognized that the OLG has an interest in protecting its competitive interests.

It submits that harm will result from the disclosure of these records because it will likely lead to false claims from individuals who do not bear the winning ticket. The only way to challenge these individuals is by making them produce purchase, validation and ticket possession information. Disclosure of this type of information relating to a particular winning ticket would make it difficult to effectively assess whether any challenges to the win are valid. The harm that would result is aggravated by the fact that the lottery win in this appeal was substantial. The OLG also states that the appellant's actions acknowledge that harm would result as certain information about winning tickets was shielded by them from disclosure in a recent media report on the activities of the OLG. It argues:

> The OLG's evidence of harm is contained in Ms. Pittman-Feltman's Affidavit at Exhibit D. She has provided evidence showing that the public communication of information about suspicious lottery wins is likely to lead to challenges by people who do not bear the ticket (paras. 11-15). She has also provided evidence showing that the OLG's only effective way of answering these challenges is to test whether the individuals making the challenge can produce the correct purchase, validation and ticket possession information (paras. 5-8).

In summary, the OLG takes the position that:

> If members of the public know how the OLG tests prize claimants, they will be able to seek information and prepare to fraudulently claim a prize.

It states that the information in the records is different from other information that has been disclosed to the public in reports and via the media. It argues that the test for harm should be applied by this office in a sensitive manner having regard to the difficulty in predicting the type of mischief that the OLG is protecting against. The OLG states that it is entitled to evaluate the potential for harm with a good measure of cynicism and recognition that it is difficult to predict a fraudster's behaviour.

The appellant states that the OLG has not provided the level of detailed and convincing evidence that is required for the application of section 18. She states:

> A bald assertion by the institution to this effect is not enough. Rather, the institution must lead evidence that is both detailed and convincing to establish its claim that the presumptive right of access set out in s. 10 of [the Act] ought not to apply.

Much of the argument raised by the appellant with respect to section 18 concerns the public interest in the disclosure of the records. However, she also submits that some of the information in the records is already publicly available or known to lottery insiders. With respect to the potential challenges to the winning ticket, the appellant notes that the limitation period for a claim is one year and that in the circumstances of this appeal, the right to make a claim to this prize has expired.

The appellant submits:

> For section 18(l) to apply, OLG must demonstrate that disclosure of the records could reasonably be expected to lead to the result specified in sections 18(1)(c) or (d). Put simply, the OLG must demonstrate that the disclosure of the records sought would harm the financial interests of the OLG or the Government of Ontario. The OLG must provide detailed and convincing evidence to establish a reasonable expectation of harm. (*Ontario (Worker's Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner*) (1998), 41 O.R. (3rd) 464 (C.A.)).
>
> The OLG's submissions seem to rely on two speculative arguments for their conclusion that section 18 applies: (a) that the disclosure of the process used to test claims will harm the government and the OLG; and (b) disclosure of the requested documents would somehow attract public suspicion and the possibility of challenges as to whether the ticket truly belongs to [the affected parties].

Neither of these arguments are sufficiently convincing to meet the test required for the section 18 exemption.

(a) Disclosure of the Testing Process

Some of the information relating to the OLG's investigation process is already publicly available. For example, the Insider Win Checklist completed by the clerk who claimed [a named individual's] winning prize is attached as Appendix "E". As the OLG correctly notes, there is no obligation on people who have won lottery prizes, including the "insider wins'", to keep the information about the investigation process confidential. As such, much of that information is already in the public domain, or at least known to lottery insiders.

More importantly, however, this process is at the very heart of the public controversy. The Ontario Ombudsman in his March 2007 report specifically stated that the OGLC should disclose certain information about the verification process, because it is in the public interest for such information to become available so that consumers could protect themselves against fraud.

…

(b) Concerns over Challenges to this Winning Ticket

The OLG expressed concern in its submissions that the publication of the names of the winners of the $21.5 million lottery ticket may attract "challenges". The OLG also suggested "it will face harm that will flow from loss of public trust in the lottery system and a potential legal claim against the ticket." These are very speculative concerns and not supported by evidence.

There is a limitation period of one year to claim lottery winnings. [The affected parties] won the lottery on July 8, 2006. The one year period for a claim has expired, and as such it is already too late for anyone to challenge this lottery win. As a result, these concerns are without foundation.

Additionally, the lottery winners are statutorily required to consent to the public disclosure of their identities. This is presumably done as a means of ensuring that there is scrutiny of winners, particularly insider wins, and to facilitate appropriate challenges to fraudulent win claims. In fact, at paragraph 10 of her affidavit, Ms. Pittman-Feltham states "this is the reason why the OLG publishes winners' pictures and personal information for a short period of time after prizes are paid. Challenges are common." Accordingly, disclosure of the requested records would actually advance the purpose of the Regulations.

The OLG submit in their reply representations:

> The Appellant fails to recognize that the standard for harm under section 18(1)(c) and (d) is contextual. While the OLG accepts that it must do more than speculate about harm, the only test to be satisfied is whether there is a reasonable expectation or reasonable basis for harm. Although it is not necessarily an error to require "clear and convincing" evidence, it will not always be appropriate to demand such evidence. The Appellant cites PO-1747 for the principle that the reasonable basis for harm can be self-evident in some contexts, and when it is, "little explanation need be given." This principle is applicable in these appeals because they engage a security challenge that is characterized by a threat of mischief that is difficult to predict with any certainty but is self-evident. It's the type of challenge referred to by the Divisional Court in *Ontario (Attorney General) v. Fineberg* when its stated, "While the exemptions are to be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context, the result [in the specific case before the Divisional Court] is not inconsistent with this required approach." This statement recognizes that some security threats can be general in nature but, at the same time, self-evident and real.
>
> To be clear, we are not arguing that all security threats can benefit from a relaxed evidentiary burden. Rather, the evidentiary burden depends on the specificity of the threat. *Ontario v. Ontario (Ministry of Labour*) and Order PO-1747 illustrate the contextual nature of the evidentiary burden well.

The OLG argues that "a real threat would be raised if the release of detailed process information is ordered" and such an order "would hamper the OLG's ability to control and improve its interview process. It would also cause harm to the overall integrity of the OLG's security procedures and the lottery itself rather than harm to any single claim."

It argues that the known information about the OLG's process is general in nature and does not reach the level of detail contained in the records under appeal. It claims that lottery winners do not receive a copy of the information in the investigation file as it is confidential. It states:

> Releasing [the file] to the public would cause a threat to OLG's lottery security process of an entirely different magnitude than can be traced to the necessary disclosure of information to claimants.
>
> The Appellant's argument that the harm flowing from the disclosure of information about a winning ticket is naïve. We have clearly established (nor does the Appellant dispute) that information about a winning ticket is a key security control. The mere fact that a prize has been claimed does not eliminate this information's extreme sensitivity.

Findings and Analysis

For the purposes of my analysis, the section 18 information identified by the OLG as at issue is divided into two categories. The first category includes information about the process for evaluating the claims of insider winners and the investigations conducted to verify their claims. Included in this category is information such as questions asked of the insider winner during the investigation process (e.g. the insider win interview form) and information relating to the process involved in verifying insider wins. In other words, this category is comprised of the information that the parties have referred to as the "testing process."

The second category of information includes detailed information about the specific circumstances surrounding the purchase and validation of any particular insider win claim, in this case, that of the affected parties. Included in this category of information are details of the time of purchase and validation of the winning ticket, details of other tickets purchased at the same time and information related to the actual winning ticket and its unique characteristics. This category has been described as information relating to "challenges of this winning ticket."

I note that within each category, there is information that has already been made available to the public, or that has been obtained by the appellant. I will take this into consideration when analyzing the application of section 18 to the two categories.

OLG Investigation Process – the testing process

I have carefully reviewed the records at issue and the representations of the parties. I find that the OLG has not provided me with sufficient evidence to support a finding that disclosure of the information in this category is exempt under section 18(1)(c) or (d). I am satisfied that disclosure of information contained in these records that relate to the process undertaken by the OLG to verify the validity of insider win claims will not result in the harms contemplated by the sections claimed by the institution.

I agree with the position taken by the appellant that many of the questions asked and the types of investigations conducted are already within the knowledge of the public. Indeed, there is a discussion of the types of questions asked of insider winners in the Ombudsman's Report. On page 18 of the report, the Ombudsman describes the investigation process prior to October 2006:

> If the individual was identified as an insider, the "major winner" interview conducted by Prize Office staff would place more emphasis on the ticket purchase and validation history as well as the insider's own playing patterns. The purpose of the Corporations' interview and investigations was to confirm that the ticket was purchased by the individual presenting it. In the case of "online" tickets the Corporation is able to track through its data systems when and where a ticket was purchased and validated. As for instant or scratch and win tickets it knows the

> retail location and time when any given package of tickets was activated, and it can also track validation information for winning tickets.
>
> The higher the prize amount, the more senior the Corporation official who must approve payment. The Corporation's general practice has been to pay prizes under $50,000 to whoever presents the ticket, without in-depth ownership investigation. Players claiming winning tickets worth more than $50,000 would be questioned about purchase details and the information verified through the OLG's data systems. If the purchase details could not be verified, more questions would be asked. When the Corporation was satisfied, the prize would be paid. In cases where details were still in dispute, players would be asked to sign a Statutory Declaration asserting their claim – and payment could be delayed until the ticket expires (generally one year).

Although this passage relates to the verification prior to October 2006, it is clearly public knowledge that insider wins are subjected to a level of scrutiny not applied to wins claimed by the ordinary public. It is also common knowledge that the OLG lottery purchasing system is fully computerized. With this in mind, I am satisfied that the average person, applying a reasonable amount of thought to the issue, would readily determine the avenues of inquiry that the OLG is able to pursue. It would not come as a surprise to learn that the OLG is able to track purchase and verification information as well as playing patterns. There is no particular magic or science in the process undertaken by the OLG to validate wins.

This conclusion is supported by the fact that the appellant submitted, along with her representations, a document called an "*Insider Win Checklist*", obtained from another insider win case. The checklist sets out a series of questions relating to the purchase and validation of the insider's ticket. These questions mirror the lines of inquiry undertaken with the affected parties as set out in the records in this appeal. Again, I note that the process outlined in the checklist and the questions posed to the claimant are quite unremarkable and do not describe a highly technical or intricate process.

In my view, what is important to the integrity of the investigation process are the responses provided by an insider winner as part of the process, not the questions themselves. Knowledge of the set of questions that an insider will be asked will not assist that individual if they do not have the correct answers. Similarly, I am not satisfied that the knowledge that further investigations will take place, for example, through on-site investigations of the location where the ticket was purchased, will result in a fraudulent claim being approved.

Simply put, I am not satisfied that the OLG has provided sufficient evidence to support its main contention. The position that "a real threat would be raised if the release of detailed process information is ordered" is not supportable given the amount of detail about the process already available, and the level of sophistication involved in the process itself (as noted, there are a limited number of avenues of inquiry available to the OLG, most if not all of which can easily be discerned by a reasonably informed individual.) Further, there is nothing about the investigation

process contained in these records, the disclosure of which would make it more difficult for the OLG to investigate future claims by insider winners.

In summary, given the amount of information already in the public sphere relating to the investigation process and the nature of the process itself, I am not satisfied that disclosure of information in the records that reveal the nature of that process will result in the OLG having a more difficult time in investigating insider wins. As a result, I find that disclosure of this information cannot reasonably be expected to prejudice the economic interests of the OLG, or to be injurious to the financial interests of the Government of Ontario.

Accordingly, I find that the generalized information about the investigation process of the OLG does not qualify for exemption under section 18(1)(c) or (d).

Purchase and Validation Details of Winning Ticket – challenges to this winning ticket

I find that the detailed purchase and validation information that the OLG gathered in the course of its investigation into the affected parties' claim does qualify for exemption under section 18(1)(c) and (d) of the *Act*. The OLG has provided me with sufficiently detailed and convincing evidence to support a finding that the disclosure of this information could be used by an individual who wishes to make a fraudulent claim to the lottery prize. For example, knowledge of the specific time that a winning ticket was purchased and validated could assist an unscrupulous individual by supporting a fraudulent claim. Given the size of the prize, I find that disclosure of this information could reasonably be expected to prejudice the economic interests of the OLG and be injurious to the financial interests of the government of Ontario.

I have considered the argument of the appellant that the limitation period for claiming the lottery prize in this appeal has expired. I have also considered the fact that the information contained in this category of records could be used by an individual who disputes the affected parties' claim to the prize in a civil proceeding against them. I also accept the argument of the OLG that the integrity of the lottery process requires that this information be kept confidential.

However, there are a number of exceptions to this finding. As noted by the appellant, certain information about this particular winning ticket has already been made public. For example, the date of the draw, the lottery played and the size of the prize are public knowledge. Similarly, the location of the ticket purchase has been reported in the media, along with the fact that affected party 1 is an insider and purchased the ticket at his own store. Given that this information is already public, I am not satisfied that its disclosure could reasonably be expected to prejudice the economic interests of the OLG or be injurious to the financial interests of the province.

Accordingly, I find that this category of information does not qualify for exemption under sections 18(1)(c) or (d). I will clarify in my order provisions which information relating to the details of the lottery win should be disclosed and which details should be withheld.

LAW ENFORCEMENT

Section 14(1) states, in part:

> (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;
>
> …
>
> (f) deprive a person of the right to a fair trial or impartial adjudication;

The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) 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 term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law [Orders M-16, MO-1245]
- a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085]
- a children's aid society investigation under the *Child and Family Services Act* [Order MO-1416]
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997* [Order MO-1337-I]

The term "law enforcement" has been found *not* to apply in the following circumstances:

- an internal investigation to ensure the proper administration of an institution-operated facility [Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.)]

- a Coroner's investigation under the *Coroner's Act* [Order P-1117]

- a Fire Marshal's investigation into the cause of a fire under the *Fire Protection and Prevention Act, 1997* [Order PO-1833]

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg*, cited above].

Sections 14(1) uses the words "could reasonably be expected to." To establish that these exemptions apply, 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)*, cited above].

It is also 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*]. The exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters [Orders PO-2085, MO-1578].

Representations

The OLG claims that sections 14(1)(a), (b) and (f) apply to the responsive records. It argues that disclosure of the records would reveal specific facts that are being examined and could taint potential witnesses, and that if a prosecution resulted, the disclosed records might influence prospective judges and jury members and thereby deprive the affected party of a fair trial. It argues that the issue here is whether the OLG exercised its discretion reasonably in withholding the records and that it should not be held to the same standard of proof that might be applied to the institution conducting the investigation.

The OLG submits:

> The investigation is ongoing, and as part of it the OPP will review all relevant material, including the records under appeal, in making a determination as to whether criminal charges will be laid….The OLG submits that it has met the standard of proof required for the application of section 14. Firstly, it is entitled to be cautious in protecting against interference with a law enforcement investigation because it is difficult to predict future events in a law enforcement context: *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.). Secondly, the OLG cannot be held to the same standard as the institution that is actually conducting the investigation. In the [OLG's] submission the proper question in this appeal is whether it exercised its discretion reasonably in light of its position as a third party to an ongoing investigation. From its perspective, the OLG considered the potential risk associated with disclosure of the records under appeal and made a reasonable decision to claim section 14.

The appellant responded that in order to show that the exemptions apply to the requested information the OLG must:

> (i) provide detailed and convincing evidence that disclosure would cause harm;
>
> (ii) demonstrate that harm is probable and not merely possible; and
>
> (iii) provide sufficient information and reasoning to the adjudicator to permit the adjudicator to make an informed assessment of the reasonableness of the expectation that harm will result from disclosure.

She states:

> No evidence is provided that there is a specific investigation underway into [the affected party's] lottery win. Instead, it appears information on all insider wins was provided to the OPP as a result of general concerns about the high incidence of such wins.

With respect to the OLG's claim to section 14(1)(f) she states:

> In this case, the OLG provides no evidence of a real and substantial risk. Instead, the OLG state that a "discussion could influence prospective judges and jury members". Similarly, the release of the information "could taint potential witnesses". These speculative assertions are not sufficient in this case.

In order to determine the validity of the section 14 claim, I decided to invite the OPP, and then the Ministry to submit representations on the possible application of section 14(1) to the records. The OPP confirmed that the records at issue in this appeal were turned over to them as part of their investigation into insider winners. The OPP argued that disclosure of these records would

reveal the specific facts that they are investigating and would "taint potential witnesses and/or suspects by providing them with facts and information they might not otherwise have knowledge of." They also state that disclosure could prejudice witnesses and triers of fact, and thereby deprive a person of the right to a fair trial should a prosecution be commenced.

The appellant was given an opportunity to respond to the OPP representations. In her representations, she submits that the OPP have not provided clear and convincing evidence to support a reasonable expectation of harm should the information contained in the records be disclosed. She objects to what she describes as a "catch all" approach to the law enforcement exemption as she states that it is inconsistent with the purposes of the *Act*. She states that the OPP have not provided any evidence that investigations are underway with respect to this insider win and that they have not provided the evidence of what harm could occur from the disclosure of these documents.

As it was unclear to me whether the OPP were actively investigating the circumstances of this insider win, I decided to provide the Ministry, on behalf of the OPP, with an opportunity to submit representations in reply. In its reply representations, the Ministry states:

> [T]hat the requested OLG records fall within parts (a) and (b) of the definition of "law enforcement". These records have been supplied to the OPP by the OLG for the purposes of an ongoing law enforcement investigation.
>
> …
>
> The Ministry is aware that the Divisional Court has confirmed that law enforcement exemptions must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.
>
> With respect to the burden of proof of harm in relation to the application of discretionary exemptions, the Ministry notes that past court decisions have concluded that the expectation of harm in relation to the application of exemptions must be "reasonable" but need not be "probable". Recently, the Divisional Court expressed agreement with this interpretation in relation to the law enforcement exemptions at issue in a judicial review application arising from an appeal of a FIPPA request submitted to the Ministry for disclosure of two firearms databases maintained by the OPP.
>
> …
>
> The Ministry submits that disclosure of the requested OLG records at this particular time may reasonably be expected to interfere with an ongoing law enforcement matter and investigation.
>
> As noted previously, the Criminal Investigation Branch of the OPP is conducting an investigation into lottery ticket insider wins that occurred during the period 1999 to 2007. The OLG has provided the records at issue to the OPP for the

purposes of this investigation. The focus of the OPP investigation is to determine whether there has been a violation of the Criminal Code or any other law in connection with any of the lottery ticket insider wins under investigation.

Release of the requested records to the appellant and other individuals with whom the records may be shared at this particular time has the potential to reveal detailed evidence that could frustrate the ability of the OPP to continue their investigation. Public disclosure of the extent and nature of information received and used by the OPP could lead to investigative harms such as the suppression and/or destruction of potential investigative evidence. Public disclosure could also serve to inform potential witnesses or suspects about the investigative leads being assessed by the OPP. Such knowledge could be exploited by a potential suspect to ultimately escape detection by OPP investigators. This knowledge could also taint information or evidence being supplied by a potential witness to the OPP.

The interpretation of section 14(1)(a) was recently considered in the previously referenced Divisional Court decision in relation to a *FIPPA* request to the Ministry for access to firearms databases maintained by the OPP. Referencing the Supreme Court of Canada's decision in *Heinz* that the "plain and ordinary meaning of the word 'matter' is very broad", the Court found that the IPC's interpretation of the word "matter" for the purposes of section 14(1)(a) was too narrow. The Court concluded that a law enforcement matter "...does not necessarily always have to apply to some specific on-going investigation or proceeding." The Ministry submits that the investigation undertaken by the OPP Criminal Investigation Branch in relation to lottery ticket insider wins between 1999 and 2007 is an ongoing law enforcement matter and investigation. The individual lottery ticket insider win cases that comprise the matters under investigation cannot be considered in isolation from the investigation as a whole. The investigation will continue until all investigative avenues have been exhausted.

Release of the OLG records at issue at this particular time would indirectly reveal specific strategies and methodologies employed by the OPP during the course of the investigation. In such investigations, valuable law enforcement investigative information may be collected from sources and analyzed, but not necessarily immediately used, acted upon, or disseminated. Also, seemingly innocuous or irrelevant information may over time become sensitive or valuable as circumstances change in the context of an ongoing investigation. In this regard, it is important to note that in some circumstances information that is not deemed valuable at an early stage of an investigation may subsequently have critical importance at a later stage as more information and facts are amassed.

The public dissemination of information in such cases must be carefully managed in order to achieve the objective of facilitating the investigation and ensuring

> public safety while at the same time not revealing information that could ultimately frustrate or interfere with the conduct of the investigation or an eventual prosecution should a violation of law be established in relation to any of the lottery ticket insider wins being investigated by the OPP.
>
> Section 14(1)(f) addresses the right of an individual to a fair trial or impartial adjudication. This exemption may be viewed as time-limited in that once the trial is completed, the exemption may no longer be applicable.
>
> …
>
> The investigation being conducted by the OPP Criminal Investigation Branch into lottery ticket insider wins has not, as of this date, resulted in the laying of charges against any individual. In the event that charges are ultimately laid, the Ministry would respectfully ask for the opportunity to provide additional submissions in relation to the potential application of the exemption from disclosure contained in section 14(1)(f) of *FIPPA* and the exclusion for records relating to a prosecution contained in section 65(5.2) of *FIPPA*.

Following receipt of the Ministry representations, I was still not satisfied that the Ministry had responded to the issue of whether this particular insider win was being investigated by the OPP. I therefore wrote to the Ministry and asked them to directly address the following:

> …please advise whether or not the lottery winners whose records are at issue in [this appeal] are currently being investigated by the OPP. Has the OPP law enforcement investigation of these winners been completed? If the law enforcement investigation has been completed, have charges been laid or will charges be laid against these lottery winners as a result?

In response, the Ministry stated that the investigation of the OPP into insider winners "remains ongoing." The Ministry submitted:

> [T]he OPP has advised that this particular case is subject to ongoing review by investigators. The information compiled by the OPP in relation to this case is of particular relevance to a lottery ticket insider win in which charges have recently been laid and is now before the court, as well as other lottery ticket insider wins that are currently being investigated. As new information becomes available through the insider win cases currently being investigated, this particular case is subject to further review.

Findings and Analysis

At the outset, it is important to note that the OLG has claimed the application of section 14(1)(a), (b) and/or (f) to *all of the records* at issue in this appeal. Indeed, the claim is that all of the

responsive records have been delivered to the OPP for the purposes of their "broadly based" investigation into insider winners between the years 1999 and 2007.

Before I turn to consider the application of section 14(1) to these records, it is worth repeating that the records at issue were generated by the OLG, not the OPP, as a consequence of the claim by affected party 1 to the LOTTO 6/49 jackpot.

In my opinion, the circumstances of, and the records relating to, any particular insider win claim and investigation are unique. Different claims involve different winners, different games played, different purchase and validation information and different prizes. As well, the circumstances of all insider winners are not the same. Some may be store owners, others store employees and still others employees of OLG. Without some evidence of a connection between any particular individual insider winners' claims and investigations, the question of whether or not there has been a violation of law will turn on the unique facts and circumstances of each case.

In my view, the position taken by the Ministry in this appeal that "the individual lottery ticket insider win cases that comprise the matters under investigation cannot be considered in isolation from the investigation as a whole" is overly broad. Without some detailed and convincing evidence connecting all the various insider winners, I find that the information in these records relates to the specific circumstances of the claim made by the affected parties and that they *can be* considered on their own particular facts and not in connection with the investigation of all other insider winners.

In my view, it is not reasonable to conclude that section 14 applies to the OLG records of every insider win between 1999 and 2007 simply because the records have been handed over to the OPP and some of those wins may result in criminal charges. It is clear that not all insider wins will result in the laying of charges. Indeed, at this moment in time, charges have been laid in a fraction of the insider wins. By adopting the approach taken by the OLG, I would be concluding that OLG generated documents relating to any of these insider wins are exempt from disclosure for an indeterminate amount of time simply because insider wins are subject to ongoing police investigations. In my view, the better approach is to examine the circumstances in each case to determine whether section 14 is applicable, particularly where charges have not been laid.

Section 14(1)(a) and/or (b)

For the section 14(1)(a) and/or (b) exemptions to apply, the OLG must demonstrate the following:

(i) the activity of the OPP in investigating the insider winners constitutes "law enforcement";

(ii) there are "matters" or "investigations" in existence that are ongoing to which these records relate; and

(iii) the disclosure of the records at issue in this appeal could reasonably be expected to interfere with the ongoing law enforcement matter or investigation.

I find that OPP investigations into insiders' lottery wins do qualify as "law enforcement" matters as defined in section 2(1) of the *Act*.

However, I am not satisfied that the information in the records at issue in the present appeal relates to matters or investigations that are in existence. As previously noted, the information in these records relates to the investigation conducted by the OLG into the claim made by affected party 1. These records were delivered by the OLG to the OPP for the purposes of the OPP's "broadly based" investigation of all insider winners. I have offered the OPP and the Ministry three opportunities to relate these records to an investigation or charges against the affected parties or directly to another specific investigation. They have been unable to do so. At best, I have been provided with a vaguely worded response saying that these records are subject to "ongoing review" and that the information in these records is relevant to a lottery ticket insider win in which charges have recently been laid and is now before the court, as well as other lottery insider wins that are currently being investigated. I have not been provided with any explanation as to how these records are directly related to an investigation and charges that have been laid against another insider winner. At best, I interpret the Ministry's response as saying that because the records at issue relate to an insider win claim, they are relevant to investigations of other such claims where charges have or may be laid.

The Ministry relies on the decision of the Division Court in *(Ontario) Ministry of Community Services and Correctional Services v. (Ontario) Information and Privacy Commissioner, supra*, to support their position that the law enforcement investigation relating to all insider wins must be treated as a whole and not in isolation.

With respect, I do not agree that the principles cited in that decision are applicable to the circumstances of this appeal. That decision dealt with an entire database of information which included a list of firearms that was regularly maintained and updated by the Police. The evidence before the adjudicator and the court was that the entire database was used as a law enforcement tool. The records at issue in this appeal are not analogous. Unlike the records considered by the Divisional Court, the records in this case were not prepared or maintained by the OPP. In fact, they were generated by the OLG at a time where criminal charges were not considered. There is no reference to a police investigation in the records. The purpose of the records was solely to determine whether the affected parties' claim to the lottery jackpot was legitimate, and not whether criminal charges should be laid. In fact, it was only after the legitimacy of insider wins became an issue of public discussion that the OLG turned to the OPP to investigate.

The requirement that the matter or investigation in question be ongoing or in existence under sections 14(1)(a) and (b) was clearly pointed out in the Notice of Inquiry sent to the Ministry. As noted, I provided the OPP and the Ministry with three opportunities to submit representations in this appeal. Despite that, they have not provided me with the detailed and convincing

evidence required to support a finding that these records relate in any way to an *ongoing* "law enforcement matter". Although I am required to approach the law enforcement exemption with sensitivity, the OPP, the Ministry and the OLG's vague assertions regarding these records are not a sufficient basis upon which to find that the exemption applies. In these circumstances, I find that there is insufficient evidence to support a finding that the responsive records relate to a "law enforcement matter" that is in existence or on-going.

My findings are sufficient to dispose of the claim to these exemptions; however I also find that the third requirement for the application of these exemptions has not been satisfied. There is insufficient evidence to support a finding that disclosure of the records could *reasonably* be expected to interfere with a law enforcement matter or investigation. The Ministry suggests that disclosure will interfere with investigations into other insider winners and that some of these winners are related to the win of the affected parties in this appeal. Harms said to result from disclosure include interference with the collection of evidence, revealing specific strategies and methodologies, and tainting information or evidence being supplied by potential witnesses.

In my view, the evidence tendered by the Ministry and the OPP in support of their contention that the disclosure of the information in the records will result in the identified harms falls short of being "detailed and convincing." The Police have failed to make a sufficient evidentiary link between the disclosure of the records and the harms that are addressed by either of these sections. While I accept the Ministry's argument that the expectation of harm must be reasonable, without a more detailed explanation, I am unable to conclude that the harms alleged by the Ministry can reasonably be expected to occur.

For example, the Ministry alleges that the public dissemination of information in cases such as this must be managed in such a way as to ensure "public safety". However, the Ministry fails to explain how a public safety issue is engaged by the records that are at issue in this appeal. In my view, it is not feasible to conclude that harms of this nature could reasonably be expected to result from the disclosure of this information. In fact, without some further explanation or evidence, this particular argument lacks credibility.

There is also insufficient evidence to support the Ministry's allegation that disclosure will inform potential witnesses or suspects about the investigative leads being assessed by the OPP. Again, I stress that the records at issue in this appeal were generated by the OLG, not the OPP. The Ministry has not provided any link between information relating to the OLG's verification process and investigative leads being assessed by the OPP in their subsequent investigation. Similarly, the Ministry has provided no evidence or rationale to demonstrate how disclosure of OLG records could be exploited by a potential suspect to escape detection. Without such evidence, statements such as these remain, at best, unsupported "boilerplate" assertions of harm.

It must be remembered that all insider winners who are being investigated have already gone through the OLG's insider win verification process. They are therefore aware of the questions that were asked of them by the OLG in their investigation and they know what information they provided in response. They will be familiar with the procedures to be followed in verifying their

claim. As a result, I fail to understand how an OPP investigation into their activities will be tainted or affected in any way by the disclosure of information relating to the OLG's investigation into another lottery insider winner.

Finally, I reject the argument made by the Ministry that disclosure of the records would reveal specific strategies and methodologies employed by the OPP during the course of the investigation. As I have repeatedly noted, these records were all prepared by the OLG and relate to the investigation *conducted by the OLG* at a time when the potential of an OPP investigation was not under consideration. I am therefore satisfied that the disclosure of the records would not reveal any information about the strategies and methodologies subsequently employed by the OPP.

For all these reasons, I find that the responsive records do not qualify for exemption under sections 14(1)(a) or (b).

Section 14(1)(f)

The OLG has also claimed the application of section 14(1)(f) to the responsive records. Previous orders have held that for the section 14(1)(f) exemption to apply, the onus is on the institution to show that there is a "real and substantial risk" of interference with the right to a fair trial or impartial adjudication. The exemption is not available as a protection against remote and speculative dangers. [Order P-948; *Dagenais v. Canadian Broadcasting Corp.* (1994), 120 D.L.R. (4th) (S.C.C.); Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, cited above].

In Order MO-2019, I adopted the approach taken by Senior Adjudicator John Higgins in Order P-948 to a claim by the Police to the application of the exemptions provided by sections 14(1)(a) and (f) [sections 8(1)(a) and (f) of the municipal *Act*] and I adopt the same approach here.

The Ministry acknowledges that no charges are anticipated against the affected parties in this appeal. Accordingly, there is insufficient evidence to support a finding of a "real and substantial risk" of interference with a right to a fair trial and in these circumstances, I find that section 14(1)(f) does not apply.

In summary, I find that sections 14(1)(a), (b) and (f) do not apply to exempt the records from disclosure.

PUBLIC INTEREST OVERRIDE

The appellant claims that section 23 of the *Act* applies and that as a result the exemptions set out in sections 14, 18 and 21 do not apply to exempt the information severed from the responsive records. I have already found that the personal information, other than the information referred to above in record 12, is not exempt pursuant to section 21(1) and the exemption in section 14 does not apply to the records. Therefore, I need only consider here whether the information that

I have found to be exempt in record 12 and the information exempt pursuant to section 18 (1)(c) and (d) should be disclosed pursuant to section 23 of the *Act*. The section 18 information relates only to the unpublished details relating to the purchase and validation of this particular insider winner ticket.

Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (application for leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)), the Ontario Court of Appeal held that the exemptions in sections 14 and 19 are to be "read in" as exemptions that may be overridden by section 23.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the records, if they exist, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

Representations

The appellant submits:

> The test for section 23 has two parts: the public interest must (1) be compelling and (2) clearly outweigh the purpose of the exemption that would otherwise be applicable.
>
> In an Information and Privacy Commission inquiry relating to records dealing with the Ipperwash scandal, Commissioner Tom Wright described the purpose and the "first branch" of the test for section 23 as follows:
>
> > One of the principal purposes of the Act is to open a window into government. The Act is intended to enable an informed public to better participate in the decision-making process of government and ensure the accountability of those who govern. Accordingly, in

> my view, there is a basic public interest in knowing more about the operations of government.
>
> "Compelling" is defined as "rousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the Act's central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has available to it to make effective use of the means of expressing public opinion or making political choices (Order P-984).

In Order P-1272, Inquiry Officer Donald Hale described this tribunal's role in applying the second part of the s. 23 test to the personal information exemption (s. 21 of FIPPA) as follows:

> If a compelling public interest is established, it must then be balanced against the purpose of the exemption which has been found to apply. In my view, this balancing involves weighing the relationship of the information against the Act's central purposes of shedding light on the operations of government and protecting the privacy of personal information held by government. Section 23 recognizes that each of the exemptions listed in the section, while serving to protect valid interests, must yield on occasion to the public interest in access to information held by government. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

The records in issue clearly meet this test. There are serious and legitimate concerns with respect to the number of insider wins that have occurred and with respect to the investigative procedures in place at the OLG. The public has a right to properly scrutinize insider lottery wins and the actions of the OLG in investigating those wins.

There has been a significant public outcry related to the recent disclosure of the very high number of "insider" lottery wins. The Ontario Ombudsman's Report concluded that:

> The Corporation ignored court decisions which confirmed its obligation to consumers and ignored the warnings and recommendations of its own officials regarding the need for tighter

> security measures to safeguard the public and the integrity of the system. When it did make security improvements in the past, it did so with no sense of urgency. Instead of increasing vigilance, it sought, to avoid responsibility. Instead of proactively assessing the extent of insider wins and systematically addressing complaints, it chose to focus money and time on marketing a new identity, promoting its products, and protecting the interests of its retailer partners. The OLG knew retailer fraud and theft was a reality and had the opportunity to act to strengthen lottery security. But instead it chose the path of apathy.
>
> All of this raises key questions. Given that the Corporation was well aware of its customers' vulnerability to retailer fraud, why would it have failed to implement any effective prevention systems? And why would it be ready to make those systems weaker? The answer is as simple as it is distressing. Prior to October 2006, there was an inappropriate corporate culture within the OLG: in a phrase the OLG had become fixated on profit rather than public service. It had come to define itself by its role as a cash cow. As the Vice-President, Sales and Service told us, his job is to celebrate big wins and get them on the front page of the newspaper. Profits are maximized by good news stories, not by publicity relating to retailer corruption. [emphasis added]

What procedures are in place to protect against insider wins that are actually fraudulent claims? Were those procedures followed in the case of [the affected parties'] lottery win? These questions go to the heart of the emerging controversy around this issue. It is the central purpose of the Act to provide information to the public and shed light on the ongoing operations of government.

With respect to the OLG's claim to the section 18 exemption, the public interest in giving Ontarians the information they need to make informed decisions about lottery purchases and to protect themselves against fraud by insiders clearly outweighs the government's interest in earning revenues from lottery sales. The Ombudsman specifically noted that the OLG had a corporate culture more concerned with profit than with protecting vulnerable customers - the public accordingly has a right to information in order to take steps to protect itself.

…

The OLG seems to suggest that the Ombudsman report has somehow satisfied the public's need for scrutiny of the OLG. The OLG has promised to implement some of the Ombudsman's report. However, "whether this commitment [to better safeguard the lottery system against fraud] will ultimately be fulfilled remains to be seen." Public scrutiny of the OLG remains essential. Indeed, the Ombudsman

> stated "I am not convinced, however, that the public can rely on the Corporation alone to ensure that real reforms take place. The danger is too great that the OLG will continue to fall back into its old habits of coddling retailers and dismissing consumers' legitimate complaints." The public must remain vigilant. This information is necessary to allow them to do so. The public pours more than $2 billion into lotteries each year. Its trust has been broken and only persistent scrutiny of the OLG's actions with respect to insider wins can help restore that trust. Contrary to the OLG's submissions, holding the OLG up to scrutiny remains essential and in the public interest.
>
> Additionally, there is a public interest in joint wins and how individuals who buy lottery tickets with others can protect themselves against loss of their share of the lottery prize, as is alleged to have occurred between [the affected parties]. This is an issue of great public importance as it is very common for people to pool money with work colleagues, friends or family members to buy tickets and share any winnings. This is a separate issue from the question of insider wins and accordingly is not addressed in the Ombudsman's Report. There is a public interest in how the OLG investigates such claims and how joint purchasers can protect their interest in a lottery win.
>
> The CBC plays an important role in ensuring the public has the information sufficient to scrutinize the action of the OLG. The Ombudsman recognized the important role that investigative journalism played in this controversy: "It is an embarrassment that the failings of the lottery system were not revealed as a result of the Corporation's own introspection, but through the efforts of investigative journalists." The CBC seeks these requested records in the public interest.

In their first party representations, the OLG submitted that the public interest has already been satisfied by the disclosure of de-identified records. It was the disclosure of these records that led to the news reports, the Ombudsman's report and the series of reforms that were implemented after the report was released. The only benefit that would result from the disclosure in this case would be to submit the specific winner to public scrutiny. It argues that this level of scrutiny should be achieved through the process of the OPP investigation. It states: "Any public interest that would justify disclosure has been satisfied and no longer weighs in favour of applying the override (see P-123-124, P-391 and M-539)."

The OLG also states:

> The Ombudsman examined the records and drew conclusions about the OLG's insider win investigation process. We direct your attention to pages 17 to 31 of the Ombudsman Report which discusses the OLG's investigation process and discusses seven case studies in a highly critical examination of the OLG's process. At page 67 of his report, the Ombudsman concluded, "Another area that requires a significant trust facelift is the OLG's practice of paying out millions of dollars to claimants in ridiculously suspicious circumstances - cases that 'smell'

> bad, but where there is simply not sufficient proof of theft or fraud." He then made six recommendations that specifically address the investigation of insider wins: recommendation 2 (create adjudicative process for disputed and suspicious claims), recommendation 9 (amend retailer contracts to require identification when redeeming tickets), recommendation 10 (make other insiders aware of identification requirement), recommendation 13 (conduct review of questions asked and create more structured process), recommendation 18 (train corporate investigators) and recommendation 22 (check insider win history as part of investigation process).
>
> These recommendations, all of which the OLG accepts and has committed to implementing, all flowed from the Ombudsman's examination of the records under appeal. They demonstrate that the public interest cannot be furthered by disclosure to the Appellants. To the contrary, disclosure would damage the very security system the Ombudsman said must be improved.

Findings and Analysis

I agree with the appellant's position that the public interest is served by bringing greater scrutiny to the process through which the OLG investigates the claims of insider winners. I reject the OLG's contention that the Ombudsman's report, and the subsequent OPP investigation, is sufficient for this purpose. In fact, in my view this suggestion is a misreading and misinterpretation of the Ombudsman's observations and findings. As noted by the Ombudsman at page 51 of his report:

> I am not convinced, however, that the public can rely on the [OLG] alone to ensure that real reform takes place. The danger is too great that the OLG will continue to fall back into its old habits of coddling retailers and dismissing consumers' legitimate complaints.

Clearly, the Ombudsman did not see his report as the end of the process, or as the final resolution of all the problems identified in the OLG's insider win process. Had I found that the information in the records relating to the OLG's insider win process was exempt from disclosure, I would have given serious consideration to the application of section 23 to require its disclosure. However, I will be ordering the disclosure of that information. The appellant, and through her the public, will have an opportunity to examine the nature of that process and the rigour to which it was applied in this case.

I have found that only a small amount of information in the records is exempt; that is, the specific details regarding the purchase and validation process relating to the affected parties' claim that have not already been made public. I am not satisfied that there is a compelling public interest in the disclosure of that limited amount of information. The process followed by the OLG to investigate insider wins can be subjected to public scrutiny without the disclosure of the details of this particular winning ticket. For example, disclosure of the exact time that the ticket

was validated will not assist in evaluating the efficacy of the OLG's insider win process. In my view, it is sufficient to know that for any given insider win, time of ticket validation is one of the points of inquiry of the process. As a result, I do not find that section 23 of the *Act* applies to override the OLG's claim to the application of section 18(1)(c) and (d) to the information that I have found exempt under those sections.

Nor am I satisfied that there is a compelling public interest in the disclosure of the limited amount of personal information that I have found to be exempt. Accordingly, I find that section 23 does not apply to the information that I have found to be exempt in this appeal.

ORDER:

1. I order the OLG to disclose all of the records to the appellant, except the portions that I have highlighted on the copy of the records enclosed with this order by **May 9, 2008** but not before **May 2, 2008**.

2. In order to verify compliance with this order, I reserve the right to require the OLG to provide me with a copy of the records disclosed to the appellant pursuant to provision 1.

April 4, 2008

Brian Beamish
Assistant Commissioner