

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## ORDER PO-3254

Appeal PA11-560

Ontario Lottery and Gaming Corporation

September 12, 2013

**Summary:** The appellant made a request for records of telephone contacts between the Ontario Lottery and Gaming Corporation (OLG) and himself from December 2003 to 2011. The OLG granted partial access to responsive records, with severances made pursuant to section 18(1) (economic and other interests) of the *Act*. The appellant clarified that he sought access to the detailed phone billing records for that time period, which the OLG stated were with its telephone service provider and outside its custody or control. In this order, the adjudicator finds that the OLG has properly severed portions of the record pursuant to section 18(1)(d) of the *Act*. The adjudicator finds the detailed billing records from the service provider are under the control of the OLG pursuant to section 10(1) of the *Act* and orders the institution to conduct a further search for responsive records and issue an access decision.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 10(1) and 18(1).

**Orders and Investigation Reports Considered:** Orders PO-2657, PO-2664 and PO-2812

### OVERVIEW:

[1] The appellant submitted a request to the Ontario Lottery and Gaming Corporation (the OLG) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

...call logs and recording[s] having to do with calls I had made to the OLG (Ontario Lottery Corporation) and return calls from the OLG to me. I would like to request all the call logs and recordings for calls made by me on the 26 of December 2003 between 4:30 pm est. and 5:30 pm est. from [identified telephone number 1] and [identified telephone number 2]. I would also like to have the call logs and recordings for calls made from the lottery corporation to my home from the years 2003 through to 2011 to [identified telephone number 3], [identified telephone number 4] and [identified telephone number 5], as well, I would like to have all the calls and recordings from September 2010 till 2011 in relation to these numbers [identified telephone number 3], [identified telephone number 4] and [identified telephone number 5]. The information I am requesting are all communicates [sic] with me.

[2] The OLG granted partial access to responsive records, with severances made pursuant to section 18(1) (economic and other interests) of the *Act*. In the decision, the OLG indicated that no calls were logged from the phone numbers provided for the period December 26, 2003 between 4:30 and 5:30 p.m. and that there were no calls recorded from telephone number 5 during the time period from 2003 to 2011.

[3] The appellant appealed the OLG's decision.

[4] During the course of mediation through this office, the appellant clarified that he was not satisfied with the OLG's search for responsive records. He further clarified that he seeks access to the detailed phone billing records for the period from 2003 to 2011, for calls between the OLG and his telephone numbers. The appellant takes the position that the OLG has an obligation to search for these detailed phone billings records by requesting them from its telephone service provider.

[5] The appellant is also pursuing access to the undisclosed portion of an incident report, withheld under section 18(1).

[6] The parties were unable to resolve the appeal through mediation. The file was moved to the adjudication stage of the appeal process for an inquiry, in the course of which the adjudicator then assigned to the file requested and received written representations from the OLG and the appellant on the issues in dispute. The file was re-assigned to me to complete the adjudication process.

## **RECORDS:**

[7] There remains one record at issue in this appeal, comprised of the withheld portions of a two-page incident report.

## **ISSUES:**

- A. Are responsive records “under the control” of the institution within the meaning of section 10(1) of the *Act*?
- B. Does the discretionary exemption at section 18(1)(d) apply to the withheld information?
- C. Did the OLG exercise its discretion under section 18(1)(d)? If so, should this office uphold the exercise of discretion?

## **DISCUSSION:**

### **Issue A: Are responsive records “under the control” of the institution under section 10(1)?**

[8] Although the parties were asked to address the issue of “reasonable search” in addition to “custody or control”, the issue of whether the OLG conducted a reasonable search for records is subsumed in the issue of whether potentially responsive records in the possession of its telephone service provider are within its control. The OLG does not dispute that if they are, it has an obligation to conduct a search for the responsive information which they may contain.

[9] Section 10(1) of the *Act* states, in part, that “[e]very person has a right of access to a record or a part of a record in the custody or under the control of an institution.” A record will be subject to the *Act* if it is in the custody OR under the control of an institution; it need not be both.<sup>1</sup>

[10] The parties agree that some responsive records at issue (detailed phone billing records with the OLG’s telephone service provider) are not in the custody of the OLG. If they exist, they are in the physical possession of and are maintained by the provider. Therefore, the sole issue in relation to these records is whether they are “under the control” of the OLG within the meaning of section 10(1).

### **Representations**

[11] The OLG asserts that it provided the appellant with the records in its custody and control, namely the logged notes recorded in its database, ONYX, as well as copies of call recordings from 2007-2011. It states that the billing records it receives from its provider for its toll free number are consolidated. The OLG submits that it therefore does not have possession of the call details for the toll free number.

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<sup>1</sup> Order P-239, *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

[12] In its representations, the OLG submits that it made inquiries with its provider about the existence of detailed billing information for the time period in question. It was advised that there is no guarantee this information still exists in the provider's archived records and the provider would charge a fee to conduct a search for the information.

[13] The OLG submits that if the information being requested by the appellant still exists, it is within the provider's possession and not in its control or authority. The OLG also asserts that the appellant can submit a request directly with the provider regarding the existence of the OLG's detailed billing information, if what the appellant is seeking is confirmation of communications between himself and the OLG Customer Support Centre. Alternatively, the OLG states in its representations that if the IPC finds that the requested information is within its control, the OLG should be allowed to issue a fee estimate to the appellant with respect to any invoiced costs associated with the search and/or retrieval of this information by the provider.

[14] The appellant believes that the OLG should be able to retrieve call detail information from its provider and this information is therefore within its control. The appellant asserts that OLG has the right to the records because they are its records and proof of billing.

## **Analysis**

[15] The courts and this office have applied a broad, liberal and purposive approach to the custody or control question.<sup>2</sup> To that end, this office has developed a non-exhaustive list of factors to consider in determining whether or not a record is in the custody or control of an institution, including:

- Was the record created by an officer or employee of the institution?
- What use did the creator intend to make of the record?
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?
- Is the activity in question a "core", "central" or "basic" function of the institution?

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<sup>2</sup> *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072 *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.); Order MO-1251; and *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal by IPC denied, March 30, 2011.

- Does the content of the record relate to the institution's mandate and functions?
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
- If the institution does have possession of the record, is it more than "bare possession"?
- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?
- Does the institution have a right to possession of the record?
- Does the institution have the authority to regulate the record's content, use and disposal?
- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?
- To what extent has the institution relied upon the record?
- How closely is the record integrated with other records held by the institution?
- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?<sup>3</sup>

[16] Relevant to the circumstances of this appeal, the following factors may apply where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?<sup>4</sup>
- Is the individual, agency or group who or which has physical possession of the record an "institution" for the purposes of the *Act*?

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<sup>3</sup> See Orders 120, P-239, MO-1251, PO-2306 and PO-2683, Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, above at note 2; *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 17 (Div. Ct.); *City of Ottawa v. Ontario*, above at note 2.

<sup>4</sup> Order PO-2683.

- Who owns the record?<sup>5</sup>
- Who paid for the creation of the record?<sup>6</sup>
- What are the circumstances surrounding the creation, use and retention of the record?<sup>7</sup>
- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record?<sup>8</sup>
- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the Institution?<sup>9</sup> If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?
- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?
- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? Did the agent have the authority to bind the institution?<sup>10</sup>
- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances?<sup>11</sup>
- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue?<sup>12</sup>

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<sup>5</sup> Order M-315.

<sup>6</sup> Order M-506.

<sup>7</sup> Order PO-2386.

<sup>8</sup> *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.)

<sup>9</sup> Orders M-165 and MO-2586.

<sup>10</sup> *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.); *David v Ontario (Information and Privacy Commissioner) et al* (2006), 217 O.A.C. 112 (Div. Ct.).

<sup>11</sup> Order MO-1251.

<sup>12</sup> Order MO-1251.

[17] Of additional guidance, the Supreme Court of Canada has adopted the following two-part test to determine institutional control of a record not in the institution's possession:

1. whether the record relates to a departmental matter, and
2. whether the institution could reasonably be expected to obtain a copy of the record in question upon request.<sup>13</sup>

[18] According to the Supreme Court, control can only be established if both parts of this test are met. In relation to the second question, the Court stated that:

...all relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder.... The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably should be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption. In applying the test, the word "could" is to be understood accordingly.<sup>14</sup>

[19] The OLG submits that the factors listed above demonstrate that it does not have custody or control of the records. I disagree. Although the OLG does not have physical possession of the records, the information relates to a toll free number that it maintains for the purpose of carrying out its activities. Its own representations, including the affidavit, establish that it has the ability to request a search for the responsive records from its service provider. Although the OLG is not in possession of the records, its provider has indicated that it is prepared to conduct a search for them, albeit for a fee. I find that the OLG is able to obtain the records at issue, if they exist.

[20] The OLG expresses a concern that the cost of such a search could be prohibitive. Nothing in this decision precludes the OLG from applying section 57(1) of the *Act*, obtaining an estimate of the invoiced costs of such a search, and issuing a fee estimate that will enable the appellant to consider whether he wishes to incur the expense of the search through the archived records, or appeal the fee estimate.

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<sup>13</sup> *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 24, [2011] 2 SCC 25 306 [*National Defence*] at para. 50; Order MO-2821.

<sup>14</sup> *National Defence*, para. 56.

[21] Accordingly, I will order the OLG to request that a search for responsive records be undertaken in the records which are in the possession of its service provider and issue an access decision with respect to those records, subject to any fees that may be applicable under section 57(1) of the *Act*.

**Issue B: Does the discretionary exemption at section 18(1)(d) apply to the record?**

[22] Section 18(1)(d) states:

A head may refuse to disclose a record that contains,

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;

[23] The purpose of section 18 is to protect certain economic interests of institutions. The report titled *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 . . .

[24] For section 18(1)(d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result of injury to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario. 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.<sup>15</sup>

## **Representations**

[25] The OLG relies on section 18(1)(d) to exempt certain information on page nine of the record. It submits that the redacted information is exempt from disclosure based on the interests protected by this section of the *Act*— the financial interests of the

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<sup>15</sup> *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).



Government of Ontario and the ability of the Government of Ontario to manage the economy of Ontario.

[26] The record at issue is taken from ONYX, the database used by Customer Service Representatives to enter/log information regarding customer and retailer calls. Most of the record, relating to a query made by the appellant, has been disclosed. One portion, containing purchase/validation information, has been withheld.

[27] The OLG submits that it has a legal obligation to pay the lawful bearer of a winning lottery ticket. To that end, the OLG engages in an investigation process to determine that the person who presents a ticket for payment is actually the lawful and exclusive bearer of the winning ticket. This investigation includes gathering validating information from the ticket claimant, including information about the ticket purchase, other tickets the purchaser may have purchased, their play pattern, etc. This information is compared to information in its data systems to assess whether the person in fact purchased and validated the ticket. The OLG submits that ticket purchase and validation information are key pieces of information used to ensure the integrity of its claims investigation process. If this information were made public, it would assist individuals in making fraudulent claims.

[28] The OLG relies on other orders of this office which have found detailed purchase and validation information gathered by the OLG to be exempt under section 18(1) of the *Act*. It submits that the importance of this information does not diminish over time as fraudulent prize claims can be made at any time.

[29] The appellant's representations do not specifically address the interests protected by section 18(1)(d) of the *Act*.

## **Analysis**

[30] On my review of the material before me, I am satisfied that section 18(1)(d) applies to exempt the withheld information from disclosure.

[31] As described by the OLG in its representations, the information redacted from the record was obtained from the transaction report regarding ticket validations occurring at a retail location, used to assist in responding to the appellant's claim of an improper prize payout. Similar to the facts in PO-2657, some aspects of the winning ticket have already been made public, but other details have not. The redacted information is similar to that found exempt in, among others, Order PO-2664, in which Assistant Commissioner Beamish concluded:

I find that the detailed purchase and validation information that the OLG gathered in the course of its investigation into affected party 1's 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. 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.

[32] My conclusions are also consistent with those in Order PO-2812, in which the adjudicator found, in applying sections 18(1)(c) and (d) of the *Act*:

I am satisfied that there is sufficient evidence before me to support a finding that section 18(1)(c) and (d) apply to the information that the OLG claims is exempt under those sections. In arriving at my decision, I have been persuaded that the detailed information relating to the individual lottery tickets and the purchase and validation information are used by the OLG for the purpose of testing the validity of a claim to a lottery prize by an individual. I am satisfied that if this information were made available to the public, then it would be difficult for the OLG to use these tools as a means of testing the validity of any claim. I am also satisfied that there is sufficient evidence before me to support a finding that the disclosure of this type of information, regardless of its age could reasonably be expected to result in individuals coming forward who might be making false claims to lottery wins.

[33] I am, therefore, satisfied that disclosure of the withheld information could reasonably be expected to be injurious to the financial interests of the Government of Ontario, and it qualifies for exemption under section 18(1)(d).

**Issue C: Did the OLG exercise its discretion under section 18(1)? If so, should this office uphold the exercise of discretion?**

[34] The section 18(1) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[35] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[36] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>16</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>17</sup>

[37] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant<sup>18</sup>:

- the purposes of the *Act*, including the principles that
  - information should be available to the public
  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

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<sup>16</sup> Order MO-1573.

<sup>17</sup> Section 54(2).

<sup>18</sup> Orders P-344, MO-1573.

## **Representations**

[38] The OLG submits that it properly exercised its discretion under section 18(1) when it denied the appellant access to a portion of the requested record, mindful of the principle that information should be available to the public and exemptions to that right of access are limited and specific.

[39] The OLG submits that the withheld information is one of the key pieces of information used during the investigation of a prize claim. The OLG asserts that if this information were made public it would lose its ability to test the validity of an individual's claim to a prize and undermine the public's confidence in the integrity of the prize claims process.

[40] It states that the sensitivity of this information does not diminish with age. It refers to a recent case in which, in 2010, it issued a news release with specific information to assist in locating the rightful owners of a winning ticket from 2003. Information regarding the validation of the ticket was not released. Such public communications regarding suspicious lottery wins lead to challenges by individuals who do not bear the winning ticket, and an effective way to test the individual making such a challenge is to confirm the purchase and/or validation information about the ticket.

[41] I find that the OLG properly exercised its discretion to refuse access to the information at issue. In this instance, the withheld information is very limited and specific and I accept that it is significant to the integrity of its prize claim investigative process. I find that the OLG took into account relevant considerations in the exercise of its discretion, and did not rely on any irrelevant considerations.

[42] Therefore, I uphold the OLG's application of the section 18(1)(d) exemption to the withheld information in the record.

## **ORDER:**

1. I find that the detailed billing records from the OLG's provider are under the control of the OLG under section 10(1) of the *Act*.
2. I uphold the OLG's decision to withhold portions of the record as exempt under section 18(1)(d) of the *Act*.
3. I order the OLG to request a search for responsive records in the possession of its telephone service provider. If additional records are located, I order the OLG to issue an access decision concerning those records in accordance with the provisions of the *Act*, treating the date of this order as the date of the request.

4. I remain seized of this matter in order to ensure compliance with Provision 3.

Original signed by: \_\_\_\_\_  
Sherry Liang  
Senior Adjudicator

\_\_\_\_\_ September 12, 2013