

ISSN 1198-6182

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 266-1998
October 7, 1998**

INQUIRY RE: The obligation of the British Columbia Lottery Corporation to assist an applicant under section 6 of the Act.

**Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 250-387-5629
Facsimile: 250-387-1696
Web Site: <http://www.oipcbc.org>**

1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on April 6, 1998 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of whether the British Columbia Lottery Corporation (the Lottery Corporation) complied with section 6 of the Act.

2. Documentation of the inquiry process

By letter dated November 17, 1997 a person describing himself as the "Leader" of the Citizens Commonwealth Federation (the CCF), "a duly and legally constituted political party" wrote to the President of the Lottery Corporation (Guy Simonis) on behalf of the CCF "to obtain the full sums of all FOI requests submitted to [the President] or BCLC by The Motorhome Lottery." The letter continues:

The Party is cognizant that it is exempt from being charged fees and therefore will not pay for any information from BCLC as the Party is indigent as per Form 486 of the Office of Elections BC. Moreover, the FOI Act certainly provides for this exemption as well. You or BCLC may inquire of Elections BC as to our indigent status and you will duly inform the Party that either of you has done so.

The FOI Act clearly states that you or BCLC will make for the orderly transition of requested documents within thirty (30) days.

In closing, the Party thanks you for your assistance with our FOI requests and looks forward that you will ensure their timely delivery.

It would appear that the Lottery Corporation did not respond to this letter because on December 16, 1997 the Leader wrote and asked that I conduct an inquiry under the Act. That letter provides, in part:

Kindly note the request for information was refused by all so named, and nor was any, **precedent and obligatory**, correspondence ever supplied which would indicate that they required additional time to fulfil the request.

The Party encloses a copy of that November 17 request.

Since the Party's letter has not been responded to by BCLC, and of course, Mr. Simonis, I, therefore, and on behalf of the Party, [a duly constituted legal political party] officially request that an open public hearing commence as it pertains to the evidenced failure of the above to comply in accordance with BC FOI Act requirements.

My office proceeded to deal with the request as one concerning the alleged failure of a public body to comply with its duty to assist applicants under section 6 of the Act.

On February 16, 1998 the Lottery Corporation asked the CCF Leader to clarify his information request. He responded February 24, 1998 and asked for "all FOI information regarding the Motor Home Lottery (TML) and its dealings with Guy Simonis and BCLC. This would include every TML FOI request and corresponding letter back from Simonis/BCLC as it pertains to TML's FOI requests."

On March 13, 1998 the parties were advised that a written inquiry would be conducted by me on April 6, 1998.

3. Issue under review and the burden of proof

The issue in this inquiry is whether the Lottery Corporation complied with its duty to assist an applicant under section 6 of the Act. Section 57 of the Act, which establishes the burden of proof in an inquiry, is silent with respect to the burden of proof where a public body's duty under section 6 is at issue. For reasons set out in one of my earlier orders, Order No. 103-1996, May 23, 1996, I find that the burden of proof is on the Lottery Corporation.

4. Preliminary Objections

The Lottery Corporation made a number of preliminary objections concerning the applicant's request for a review under the Act and the contents of the Portfolio Officer's Fact Report. Those objections were described by the Lottery Corporation's lawyer as follows:

2. It is the submission of the Corporation that no written request was made to it to obtain access to a record. In order to get the procedures of the Freedom of Information and Protection of Privacy Act (“Act”) started it is essential that there be a request under section 5(1). Not having made a proper request it is not possible to enter into the procedure described in part 5 of the Act. It is therefore the submission of the Corporation that this inquiry is completed ultra vires the Commissioner.

3. The Portfolio Officer’s Fact Report (“Report”) failed to identify the applicant. The letter which the report calls the “request” was written by Citizens Commonwealth Federation (“CCF”). CCF has no status at law. CCF claims to be registered under the Elections Act but that does not give it personality – only the right to elect to be identified on a ballot [sic], to issue tax receipts and to incur election expenses. While section 5 of the Act does not state that an applicant must be a person, that concept is clear from other provisions in the Act such as section 4(1) which refers to a “person who makes a request”. Similarly in part 5 of the Act section 52(1) refers to “person who makes a request”. It is submitted that CCF is not an applicant. If it is not the “person who makes a request” it cannot under section 52(1) of the Act ask the Commissioner to review a request.

4. The letter dated November 17, 1997 referred to in the Report was not addressed to a “public body” as required by section 5(1) of the Act.

5. Another error in the Report is contained in paragraph 3 which states that the Corporation responded to the “applicant”. The reference is to a letter written by a solicitor to the CCF referring to their letter of November 17, 1997 to Guy Simonis asking to be advised for what it was CCF were asking [sic]. That letter was written at the insistence of the Commissioner’s Office following a letter of January 27, 1998 by the Commissioner’s Office in which they state “you have asked what information that the applicant has requested in his letter to the Corporation dated November 17, 1997. In that letter he asks for “the full sums of FOI requests submitted”. I am afraid I cannot answer that question as the meaning of the request appears to be somewhat obscure”.

6. On February 24, 1998 the CCF in a letter stated that they wanted “**ALL** FOI information regarding the Motor Home Lottery and its dealings with Guy Simonis and B.C.L.C. This would include every TML FOI request and corresponding letter back from Simonis/B.C.L.C. as it pertains to TML’s FOI requests”. Even if the letter of November 17, 1997 was a written request to a public body it does not clearly identify the “record” to which it seeks access. It is submitted that in order to be a proper request under section 5(1) the “record” to which access is sought must be clearly and specifically identified. It is submitted that it is not the intent of the

Act to allow persons to engage in a fishing expedition against a public body by stating that it wishes access to all FOI requests.
(Submission of the Lottery Corporation, Preliminary Objections)

The Lottery Corporation is a “public body” and the President of the Corporation is the “head of the public body” for purposes of the Act. (See definition of “public body” and Schedule 2) I find that the CCF’s November 17, 1997 letter to the President of the Corporation is a “written request to a public body.”

The Lottery Corporation argues that the applicant has not been sufficiently identified by my office and that this is “interesting to note, and significant” and makes it “rather difficult, if not impossible for a public body to reply to the applicant who goes unidentified (because no applicant exists).” At the same time, the Lottery Corporation points out that “the CCF have gone to great lengths to point out that their November 17th letter is not to be dealt with as the work of any other.”

In my view, it is clear that the “applicant” in this case is the CCF and that the Lottery Corporation’s arguments that the applicant has not been sufficiently identified are without merit. It is also clear that the information sought by the CCF relates to any and all records in the custody or control of the Lottery Corporation which relate to the Corporation’s dealings with the Motor Home Lottery and includes any and all records relating to access requests to the Corporation in respect of the Motor Home Lottery. I do not agree with the Lottery Corporation that the CCF’s request for access to information in records that may be within the custody or control of the Lottery Corporation is not sufficiently detailed for the purposes of section 5 of the Act.

The Lottery Corporation also argues that the CCF cannot make an access request because:

... the CCF has no status, is not an entity or person at law and therefore cannot make a request under section 5 of the [Act] since as a non-entity it cannot comply with or be required to comply with the other provisions of the Act. (Reply Submission of the Lottery Corporation)

The Lottery Corporation adds that it “caused a search to be conducted under the *Societies Act of British Columbia* and has determined that CCF is not incorporated as a Society.”

The CCF has status as a registered political party under the *Elections Act*, R.S.B.C. 1996, c. 106. I am satisfied that an interpretation of the words “applicant” and “person” for the purposes of sections 4 and 5 of the Act would include a registered political party, and that such an interpretation would be most consistent with the purposes and objects of the Act. I therefore find that the CCF has status as an applicant under section 5 of the Act. I would point out that the CCF leader also has status to make an access request under the same section.

5. The records in dispute

The records in dispute consist of any and all records within the custody or control of the Lottery Corporation that relate to the Motor Home Lottery.

6. The applicant's case

The CCF says that the Lottery Corporation is required to respond to its request for information under section 5 of the Act.

7. The B.C. Lottery Corporation's case

The Lottery Corporation does not believe it should have to respond to the CCF's request because it believes the CCF is simply on a "fishing expedition." It also points out that the CCF leader carries on business as the Motor Home Lottery:

... it should be noted that [the CCF Leader] carries on business as the Motor Home Lottery and thus the fishing expedition that [he] is on is to obtain copies of documents all of which were produced by him. This is clearly a frivolous and vexatious request designed only to cost the Corporation thousands of dollars. [He] obviously has access to all of those records in his own files. The Act is designed to make available to the public records to which a person does not have access in its own files. (Submission of the Lottery Corporation)

...[The Lottery Corporation] cannot be and should not be required to answer questions that are frivolous and vexatious, a waste of the Corporation's time since the information is being asked for by the authors of that information and thus is information that they already have, that they don't understand, that are merely "fishing expeditions" and are not in any event and for many reasons, a proper request under the Act. (Reply Submission of the Lottery Corporation)

8. Discussion

The issue that I have to decide is whether the Lottery Corporation has complied with its duty to assist an applicant, the CCF, under section 6 of the Act. Section 6(1) of the Act requires the head of a public body (in this case the President of the Lottery Corporation) to "make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely." Section 52 of the Act provides that a "person who makes a request to the head of a public body, other than the Commissioner, for access to a record ... may ask the Commissioner to review any decision, act or *failure to act* of the head that relates to that request ..." I would point out to the Lottery Corporation that although I have power to authorize a public body to disregard requests under section 43 of the Act, I do not have the power under that section to authorize the Lottery Corporation to disregard the CCF's request on the basis that it is

“frivolous and vexatious.” I would also point out that in earlier Orders, I held that if a public body demonstrates that the records sought by an applicant have already been disclosed to the applicant through another process, and there are no other records responsive to the request, it will have discharged its duty under section 6 of the Act. See Order No. 86-1996, February 27, 1996; and Order No. 160-1997, April 23, 1997. However, the Lottery Corporation has not relied on these earlier Orders, nor has it provided me with sufficient information in this inquiry to support a finding that the records in dispute have already been disclosed to the CCF.

Section 6 of the Act provides that the head of a public body “must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.” The CCF is an applicant. Based on the information before me, I find that the Lottery Corporation has clearly failed to comply with its duty under section 6 of the Act to assist the applicant, the CCF.

9. Order

Under section 58(3)(a) of the Act, I require the public body, the British Columbia Lottery Corporation, to perform its duty under section 6 of the Act and make every reasonable effort to assist the applicant, the Citizens Commonwealth Federation, and to respond to that applicant without delay, openly, accurately and completely.

David H. Flaherty
Commissioner

October 7, 1998