OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 00-32

INQUIRY REGARDING MINISTRY OF EMPLOYMENT AND INVESTMENT'S SEARCH FOR GAMING POLICY RECORDS

David Loukidelis, Information and Privacy Commissioner
August 4, 2000

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Summary: Applicant sought gaming policy records from the Ministry of Employment and Investment and two other public bodies. Applicant named several records he said should be in public body's possession. Public body found to not have fulfilled its s. 6(1) search duty, initially or during review and inquiry processes. Public body ordered to conduct further search for records.

Key Words: duty to assist – every reasonable effort – respond openly, accurately and completely.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 6(1).

Authorities Considered: B.C.: Order 257-1998; Order 00-15; Order 00-26; Order 30. **Ontario:** Order P-1721.

1.0 INTRODUCTION

This order – like the concurrently-released Order 00-33 and Order 00-34 – deals with the applicant's wish to have access to records relating to the installation of slot machines at racetracks in British Columbia. By a letter dated July 12, 1999, the applicant sought access to records under the *Freedom of Information and Protection of Privacy Act* ("Act") from the Ministry of Employment and Investment ("Ministry"). He made related access requests for similar information to two other public bodies, the British Columbia Lottery Corporation ("Lottery Corporation") and the British Columbia Racing Commission ("Commission"). Those requests are dealt with in Order 00-33 and

Order 00-34, respectively. The same issue is raised in all three cases – did each public body fulfill its duty, under s. 6(1) of the Act, to make every reasonable effort to assist the applicant and to respond without delay openly, accurately and completely?

In this case, the applicant first wrote to my office on June 28, 1999, asking for information about whether certain racetracks had applied to install slot machines. My office referred this letter to the Ministry on July 5, 1999. This was followed by a July 12, 1999 request by the applicant to the Ministry for

> … information on matters concerning the Gaming Policy announced by the Minister of Employment and Investment on March 13, 1997 and the statement that "British Columbia's new gaming policy … will include the placement of slot machines in age-restricted locations at racetracks if requested by the tracks".

The applicant specified that his request was for

> … details of all communications related to the installation of slot machines at racetracks (letter, fax, memorandum, minutes of meetings, reports, reviews, court filings, etc.), the Minister of Investment and Employment, the staff of the Gaming Policy Secretariat and the Lotteries Advisory Committee have issued since the announcement of the aforementioned gaming policy, March 13, 1997. Including, but not limited to, any communications regarding slot machines with the undermentioned parties … .

A list of 14 parties, including the British Columbia Racing Commission, was given.

The applicant clarified this request in a letter to the Ministry dated July 16, 2000, in which he set out a more definitive description of what he meant by "details of all communications". This description included a request for "any and all information and documentation within the possession" of the government relating to a particular regulation that had been made under the *Lottery Corporation Act* (relating to the installation of slot machines generally at any location within the Province), as well as

> … any and all information and documentation within the possession of the Government of British Columbia, its agents and your Ministry in particular pertaining to the provincial government's policy whereby "slot machines (will be placed) in age-restricted locations at racetracks if requested by the tracks", including (but not limiting the generality of the foregoing):
>
> - any and all memoranda, notes, records, reports, research material, correspondence, instructions, directions, computer data, etc. with reference to the formulation, development and/or interpretation of the said policy,
>
> - the exercise or mode of exercise of the said policy (including any and all criteria, guidelines or directions and when and how they were developed and how they were to be applied) and any and all processes or procedures relating to the said policy, etc.

The Ministry responded promptly, on July 30, 1999, and told the applicant it had "conducted a thorough search of [its] information holdings". It disclosed some records to the applicant. On August 9, 1999, the applicant wrote to the Ministry again. His letter included the following passage:

> Further to your letter of July 30, 1999 with respect to the above noted matter, please be advised that we are seeking more information than that which you have supplied namely, the correspondence between ourselves and the Ministry of Employment and Investment, which information quite obviously we would already possess. In fact, you did not even supply all of the correspondence which should be in the file which we possess.
>
> However, as to our file, we request any and all internal information and documentation pertaining to this matter, including any and all briefing notes or other memoranda from staff to the Minster and vice-versa memoranda or notes to file made by staff or the Minister and any and all communications, letters, notes, reports, memoranda etc. made to third parties or received from third parties, etc.
>
> We will therefore reiterate our request for information in more detail … . [emphasis in original]

This letter was followed by another letter from the applicant to the Ministry on August 20, 1999, in which he again took the position that further records should exist and should be provided to him. The impetus for that letter apparently was a telephone call to the applicant from a Ministry representative, in which he was assured that the Gaming Policy Secretariat had disclosed all records relevant to his access request.

By a letter dated August 27, 1999, the Ministry told the applicant that it had not previously disclosed correspondence between the Ministry and the applicant because the applicant was already in possession of that information and that, to the extent he sought internal Ministry information relating to the installation of slot machines at racetracks, "all files have been searched thoroughly and all records have been provided to date".

The applicant wrote to the Ministry again on September 11, 1999 and asked for information relating to the background, negotiation, development and formulation of a Memorandum of Agreement on Gaming Policy between the Union of British Columbia Municipalities ("UBCM") and the provincial government dated June 17, 1999. (The applicant sent a similar request, dated August 19, 1999, to the Minister of Municipal Affairs.) The Ministry's response to this further access request is dated September 28, 1999. The Ministry said it had conducted a thorough search of its records and that it had located none responsive to the request. However, the Ministry of Municipal Affairs' response to this request, dated September 13, 1999, provided the applicant with a number of responsive records and added that the "Ministry of Employment and Investment was the lead Ministry in initiating the Memorandum of Agreement".

Dissatisfied with the Ministry's responses, on September 19, 1999 the applicant requested a review, under s. 52 of the Act, on the basis that further records must exist and that the Ministry had failed to disclose all responsive records. In the applicant's words, his request for review was based on the grounds of "gross incredulity" (emphasis in original). The applicant says he does not believe it is possible that the government does not have any information about "an announced and published government policy and a regulation (law)".

The applicant's request for review was brought concurrently with two other similar s. 52 review requests based on s. 6(1), relating to the Commission and the Lottery Corporation. The applicant wanted the three requests for review to be dealt with together in one inquiry because they are interrelated. The Ministry objected, as did the Lottery Corporation. On December 20, 1999, I decided to conduct three separate inquiries.

On January 5, 2000, just before the inquiry, the Ministry provided the applicant with some further records. The Ministry's initial submission in the inquiry explained that it had not provided these records to the applicant before because it had been "determined that those records were not within the scope of the Applicant's request because they were not 'communications'". Having later reconsidered that interpretation, the Ministry disclosed those records to the applicant.

2.0 ISSUE

The only issue to be considered in this inquiry is whether the Ministry has performed its duty, under s. 6(1) of the Act, to make every reasonable effort to assist the applicant and to respond to the applicant without delay openly, accurately and completely. The Ministry accepts that it has the burden of proving that it has discharged its s. 6(1) duty.

3.0 DISCUSSION

3.1 Scope of the Inquiry – After the filing of initial submissions in this inquiry, the Ministry took the position that its scope had been expanded beyond that set out in the applicant's request for review and the Notice of Written Inquiry, to also address the applicant's September 11, 1999 request for a copy of the Memorandum of Agreement between the provincial government and the UBCM. It was later agreed that this issue would form part of the inquiry and the Ministry had time to make submissions on that issue as well.

After the close of this inquiry, the applicant delivered a further reply submission to this Office. The Ministry objected to this, but in its letter of objection made further submissions in response to the applicant's further submission. I think the Ministry's objections are well-founded. I have not considered the applicant's further reply submission (or the Ministry's response to it) because the making of a further reply submission is not contemplated by the process set out in the Notice of Written Inquiry, because the further reply makes points that could have been raised in the applicant's initial submission and because it was, in any case, late.

3.2 Applicable Principles – Section 6(1) of the Act reads as follows:

> 6. (1) 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.

Given my findings in this case, it is worth repeating what I have said before – for example, in Order 00-15, Order 00-26 and Order 00-30 – about the standards imposed by s. 6(1) on a public body's search for records. Although the Act does not impose a standard of perfection, a public body's efforts in searching for records must conform to what a fair and rational person would expect to be done or consider acceptable. The search must be thorough and comprehensive. In an inquiry such as this, the public body's evidence should candidly describe all the potential sources of records, identify those it searched and identify any sources that it did not check (with reasons for not doing so). It should also indicate how the searches were done and how much time its staff spent searching for the records. The question here is whether the Ministry has discharged its s. 6(1) search obligations in light of this.

3.3 Has the Ministry Searched Adequately For Records? – The applicant received very few records in response to his initial access request. The applicant's view is that it

> … is inconceivable that these statements of fact by government [that it has no further information] are true and indeed there is evidence that these statements by government and its agents lack credulity [*sic*].

The applicant's interest in this information stems at least in part from the fact that he has been trying since December of 1998 to obtain approval for the installation of slot machines at a racetrack in British Columbia. He says that, for some reason, since that application, an "impasse has arisen".

The evidence the applicant relies on to support an inference that more information must exist consists of statements made by the Minister in March of 1997 and statements made by both the author of a 1998 report on "Gaming Policy Highlights", as well as by the Lotteries Advisory Committee in a "Backgrounder" document to which the applicant refers. For example, the Minister's March 1997 press release says, in part, the following:

> Miller said Peter Clark, a senior civil servant, will lead the implementation of these changes through the new Lotteries Advisory Committee. The committee will work closely with charities and operators in developing the changes necessary for successful implementation. The committee will also work with racing representatives to help ensure the continued viability of the British Columbia horse racing industry, and its estimated 3,000 direct jobs. This will include the placement of slot machines in age-restricted locations at racetracks if requested by the tracks.
>
> Richard Macintosh, chair of the British Columbia Gaming Commission, has agreed to serve on the Lotteries Advisory Committee upon the completion of his term with the

> Gaming Commission. "Mr. Macintosh's gaming expertise and knowledge of charitable gaming will be an invaluable contribution to this initiative", said Miller.
>
> The new chair of the B.C. Gaming Commission will be announced shortly. Gaming Commission members will work with the Lotteries Advisory Committee to implement the policies announced today.

Similarly, the "Backgrounder" to the establishment of the Lotteries Advisory Committee indicates that it was established by Cabinet under the *Lottery Act* "to implement the government's new gaming policy". It also says the Commission

> … will ensure that the British Columbia Gaming Commission, the Gaming Audit and Investigation Office in the Ministry of the Attorney General, the British Columbia Lottery Corporation and the Racing Commission are fully involved and apprised of their respective roles and responsibilities regarding implementation matters.

Peter Clark was appointed as chair of the committee (which was later replaced by the Gaming Policy Secretariat).

From these and similar statements, the applicant infers that the Ministry must have created records in relation to slot machines at racetracks but has not disclosed them. The applicant also refers in his submissions to correspondence and a study and said that "[i]t would appear that government is not in possession of this correspondence or the … study; at least it has not been disclosed" by the Ministry (emphasis in original). The applicant finds it hard to accept that, although the government adopted a new gaming policy (including, he says, as to placement of slot machines in age-restricted locations at racetracks), there are no records as to why or how the policy was implemented and the processes to be followed to implement the policy.

The applicant also notes that – apart from a draft regulation dated October 28, 1997 and some edited minutes of a meeting – the Ministry has not provided him with any records related to the *Lottery Act* regulation referred to above. However, the applicant points out that, in a court decision respecting litigation between the Lottery Corporation and the City of Vancouver, the court said that the

> … Minister responsible for the [Lottery] Corporation has purported to authorize the Corporation to manage casinos including those with slot machines. This has led the directors of the Corporation to enter into an agreement with Gateway to place slot machines in their casino and to pass the regulations discussed above.

The applicant reasons that if

> … the government's statement is true, then there is no evidence that the Minister authorized the making of the aforesaid Regulations as mandated by statute. It means legislation mandating the keeping of records is not being followed.

From all of this, the applicant concludes that there may be "a deliberate and concerted effort to conceal information, records or documents" in relation to the subject of his access request.

In support of its initial submissions – and in particular its position that it has fulfilled its duty to respond to the applicant openly, accurately and completely – the Ministry provided an affidavit of a Ministry Information and Privacy Analyst. This affidavit indicates that, on July 13, 1999, the analyst sent e-mail messages to each of the 16 Program Area Coordinators ("PAC") at the Ministry, asking if their respective program areas had records relating to the applicant's access request. Only two program areas had records responsive to the request. The Communications Division provided the press release referred to earlier. The Gaming Policy Secretariat provided all other responsive records disclosed to the applicant.

The Gaming Policy Secretariat is now part of the Ministry of Labour, but the Ministry continues to provide it with support in relation to access to information requests. In the words of the Ministry, the mandate of the Gaming Policy Secretariat is to "oversee and coordinate the implementation of government gaming policy in a timely and effective manner, as well as to provide appropriate and sound policy advice and support to the Minister responsible for gaming in British Columbia".

When the applicant provided further clarification of his access request on July 16, 1999, the Ministry's analyst decided that the Gaming Policy Secretariat was the only area that might have relevant records, so staff conducted a search within that program area only. Staff spent at least three hours looking for responsive records. Two senior policy advisors, one of whom was described as the Ministry's "lead employee on horse racing issues", carried out this search. These two individuals were provided with copies of the applicant's July 12 and 16, 1999 letters, to assist them in searching for relevant records.

The information and privacy analyst deposed that she "learned of the existence" of the records that the Ministry ultimately released on January 5, 2000 only during the course of consultations with the Lottery Corporation. The Ministry did not initially release them because it believed, apparently, that they were not "communications", but rather were internal documents. On reconsideration, it determined these documents did come within the scope of the applicant's access request and so released them. On January 6, 2000, the information analyst was provided with one further document – a public document entitled "Gaming Review – Expansion Options and Implications" – which she then provided to the applicant.

The Ministry argues that its efforts in locating and retrieving records relevant to the applicant's request are those which a fair and rational person would expect to be done or would find acceptable. The Ministry also submits that its search efforts have been thorough and comprehensive and that it has explored all potential avenues.

To the extent that the applicant requests information about the regulation made under the *Lottery Corporation Act*, the Ministry notes that it is the directors of the Lottery

Corporation who make regulations under that Act. The Minister was not required to approve such regulations. The Ministry says that, for this reason, it should not be surprising at all that the Ministry does not have records relating to the drafting or making of the regulation.

I gave an extension of time to the Ministry for the filing of its reply submission in this inquiry. (The Ministry sought this extension because it said it had not had an opportunity to address, in its initial submission, "a subsidiary access request, response and request for review" that the applicant had, in effect, asked be added to the inquiry in his initial submission. This matter relates to the applicant's September 11, 1999 letter to the Minister about the UBCM memorandum of agreement.) However, before the deadline for reply submissions passed, the Ministry wrote to ask for another extension, this time on the basis that, just before the deadline for delivery of its reply,

> … a representative of the Gaming Policy Secretariat conducted a further search for records and was able to locate additional records that are within the scope of the Applicant's request … representatives of the Gaming Policy Secretariat [also] … identified additional files which may not have been searched previously, but which should be searched in order to ensure that all potential search avenues are pursued.

At that time, I wrote to the parties and said I would not grant a further extension – the inquiry had already been extended three times – and noted that the only issue for me to review in this inquiry is the application of s. 6(1) of the Act to the records in dispute, specifically as regards the adequacy of the Ministry's search for the records at the time of its response to the applicant. The applicant and the Ministry then filed reply submissions. The Ministry filed four additional affidavits in support of its reply submission.

The Ministry maintains, relying on Ontario Order P-1721, that the Act does not require a public body to prove to a degree of absolute certainty that requested records do not exist. In that order, Assistant Commissioner Tom Mitchinson said the following, at p. 15:

> Where a requester provides sufficient detail about the records which he is seeking and the Ministry indicates that further records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.
>
> Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the Ministry's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

I agree, generally, with this statement. The applicant here has, in my view, provided a reasonable basis for drawing an inference that some records responsive to his requests (including his September 11, 1999 request) may, in fact, exist. Aside from some of the

public statements that were made, the applicant has obtained copies of relevant records from other public bodies that, by inference at least, one could reasonably expect also to be in the possession of the Gaming Policy Secretariat.

The Ministry also maintains that, for purposes of this inquiry, the only issue for me to consider is whether – at the date of the inquiry and not at the date of the initial response – the Ministry has demonstrated that it made every reasonable effort to identify records responsive to the request. The Ministry relies on Order No. 257-1998, in which my predecessor found that "at the end of the day" – *i.e.*, at the inquiry stage – a public body's s. 6(1) search efforts were acceptable. He therefore declined to order the public body to conduct a further search. The public body had found additional records during the inquiry process and my predecessor apparently took this into account in making his decision.

An applicant should not have to initiate the review process under the Act in order to ensure that a public body has discharged its s. 6(1) duty. The Act requires a public body to meet the above-described search standards – and its other duties under s. 6(1) – at the time it responds to an applicant. It can still meet its s. 6(1) duties after an applicant makes a request for review under s. 52 of the Act: any steps taken by a public body after its initial search and response – including during the review and inquiry processes – will be relevant to any order I might make. But the first question to be considered in an inquiry such as this is whether, at the time it responded to an applicant's access request, the public body met its duty to make every reasonable effort to assist" the applicant and to "respond without delay … openly, accurately and completely" to the applicant.

Nothing before me indicates that the Ministry has deliberately withheld relevant records from the applicant. Still, the events as they have unfolded indicate to me that the initial search efforts – specifically within the Gaming Policy Secretariat – were not carried out as diligently as they should have been. This is borne out, in my view, by the discovery, at the time this inquiry was held, of several additional files in the custody of the Gaming Policy Secretariat.

I am also concerned, based on all of the information before me, that the Ministry construed the applicant's access requests too narrowly. This concern is borne out by the Ministry's submissions in this inquiry. One example of this relates to a report prepared by Ernst & Young, dated July 1997. The Ministry did not disclose this report to the applicant because, as the Ministry says in its reply submission, it was considered to be outside the scope of the applicant's request. The report is entitled "Financial Feasibility Analysis of the Impact of Slot Machines On the Lower Mainland Race Tracks". The applicant's access request seeks "any and all information and documentation" and specifically refers, among other things, to "any and all memoranda, … reports, research material" and so on.

I am also troubled by the Ministry's largely unexplained interpretation of "communications" in a way that does not accord with the common understanding of the meaning of that term and that cannot, in any case, be squared with the plain language of the applicant's request. Another example relates to the applicant's September 11, 1999, access request. At paragraph 2.10 of its reply submission, the Ministry says the following:

> It is not surprising that there are no records relating to the *interpretation* of the Memorandum of Agreement referred to by the Applicant (the "Agreement"). The Agreement was finalized on June 17, 1999, which was the same date that government announced a freeze on any gaming expansion. Given the freeze on gaming expansion at that time, the Gaming Policy Secretariat has not had occasion, nor have circumstances required, any interpretation of the Agreement. [emphasis added]

The applicant's September 11, 1999 request regarding this agreement was for records "pertaining to the background, negotiation, development and formulation of the above-noted agreement", not records respecting its "interpretation". With its reply submission, the Ministry submitted a further affidavit sworn by Vicki Hudson, who was involved in the processing of the applicant's request respecting the UBCM agreement. Her affidavit acknowledges that searches were undertaken for records respecting the background, negotiation, development and formulation of the UBCM agreement, not just records relating to its interpretation.

Based on the material before me, I have concluded that the Ministry has not demonstrated that it discharged its duty to the applicant under s. 6(1) of the Act when it received and processed the applicant's access request. On the evidence before me, I am satisfied that, in the first instance, the Ministry did not adequately search for records that were responsive to the applicant's request.

Although the Ministry has evidently carried out subsequent searches for responsive records, I have decided – after careful reflection – that this is not a case where later efforts militate against an order that the Ministry perform a further search for records. I am not persuaded that the Ministry's evidence of its efforts during the review and inquiry processes – especially in light of its narrow interpretation of the requests – were sufficient to obviate the need for an order under s. 6(1).

4.0 CONCLUSION

For the reasons given above, having found that the Ministry did not perform its duty under s. 6(1) of the Act to search for records responsive to the applicant's request, under s. 58(3)(a) of the Act, I order the Ministry to perform its duty under s. 6(1) of the Act to the applicant by searching again for records responsive to the applicant's request

(including as set out in his September 11, 1999 letter to the Ministry). Under s. 58(4) of the Act, I require the Ministry to complete this search within 30 days after the date of this order and to deliver to me (with a copy to the applicant directly and concurrently), within 10 days after completion of its search, an affidavit sworn by a knowledgeable person as to the efforts in undertaking that search and the results of that search.

August 4, 2000

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia