



**REPORT**  
**Nova Scotia Freedom of Information**  
**and Protection of Privacy**  
**Report of Review Officer**  
**Dulcie McCallum**  
**FI-08-12**

**Report Release Date:** December 2, 2009

**Public Body:** Atlantic Lottery Corporation

**Issues:** Whether the Atlantic Lottery Corporation [*“ALC”*] appropriately applied the *Freedom of Information and Protection of Privacy Act* [*“Act”*] and, in particular:

1. Whether the ALC properly exercised its discretion in severing information under s. 15(1)(a), 15(1)(c) or 15(1)(k).
2. Whether the release of the personal information contained in the Record would constitute an unreasonable invasion of personal privacy pursuant to s. 20(1).
3. Whether the information included in the disclosure decision was open, accurate and complete in accordance with the duty to assist [s. 7].

**Record at Issue:** Pursuant to s. 38 of the *Act*, ALC has provided the Freedom of Information and Protection of Privacy [*“FOIPOP”*] Review Office with a copy of the complete Record including the information withheld from the Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the FOIPOP Review Officer or her delegated staff.

Part 1 and 4 of the Record – the ALC Investigation Reports Reports from the investigations into retailer/ticket seller and ALC employee wins launched by the ALC during 2005. Note the Parts of the Record in this list for #1 and #4 are the same documents. The reports from the ALC investigations for the provinces of Newfoundland, Prince Edward Island and New Brunswick have been released, with severances pursuant to s. 15 and 20. The ALC has not released any of its 83 investigations for the province of Nova Scotia that are still under investigation by the RCMP.

9 documents (encompassing 25 pages) are emails that are responsive.

56 documents (encompassing 510 pages) are “investigation records.”

Part 2 of the Record - the ALC Press Releases of Big Winners

All press releases about winners of \$25,000 or more in any game sponsored by the ALC since January 1, 2001, for all four Atlantic Provinces but excluding news releases currently available at [www.alc.ca](http://www.alc.ca).

838 documents (encompassing 867 pages) are “winners media releases.”

Part 3 of the Record – the ALC Verification for Retailers’ Wins

Files, including but not limited to, the documents related to verifying the wins of the 44 retailers who claimed prizes of at least \$25,000 between January 1, 2001 and December 31, 2006, for Newfoundland, Prince Edward Island and New Brunswick (except 4). The ALC has not released any of the verification for Retailers’ Wins for the province of Nova Scotia that are still under investigation by the RCMP.

48 documents (encompassing 450 pages) are “win verification” files.

Part 4 of the Record – see Part 1 above

Documents related to the 25 investigations the ALC conducted between January 1, 2001 and December 31, 2006. ALC acknowledged in its December 14, 2007 decision that a consultant study identified further investigation documents that were responsive to the Applicant’s Application for Access to a Record, and so expanded the scope of this last item. These documents appear to be identical to the documents in Part 1, and for ease of reference, I will address both as Part 1 in the remainder of this Review Report.

**Findings:**

1. The ALC provided a copy of the part of the Record related to the New Brunswick investigations during the final stage of the formal Review. On the Record, the ALC claims a new exemption, under s. 14 “advice”, though there is no reference to it in its decision letter to the Applicant. This late exemption is being made over two years since the original Application for Access to a Record and is well beyond the policy of the Review Officer for the time in which a late exemption can be claimed. In any event, based on s. 14(3) of the *Act*, the exemption in s. 14(1) cannot apply to a record that has been in existence for over five years, which this Record has been.

2. The ALC's internal investigation information, which was handed over to the RCMP for its investigation, does not fall within the definition of law enforcement information as defined by the *Act*. The ALC has the ability to investigate under s. 30 of the *Gaming Control Act* but that legislation does not provide for a penalty or sanction being imposed at the conclusion of the investigation. The information held by the ALC in relation to its internal investigation does not fit within the definition of law enforcement and therefore neither s. 15(1)(a) nor s. 15(1)(c) exemptions of the *Act* apply.
3. The ALC failed to demonstrate there would be any harm to the security of property or system if the information was released and therefore the exemption in s. 15(1)(k) of the *Act* does not apply.
4. The ALC has recently produced the New Brunswick investigation reports' portion of the Record because the RCMP investigation in New Brunswick is now complete. The portion of the Record that is outstanding is all 83 ALC internal investigation reports in Nova Scotia. The RCMP advised the ALC not to release the Nova Scotia portion of the Record. No affidavit was provided by the RCMP. The RCMP do not have the authority to determine if something is available from the ALC under the provincial access to information legislation. That decision rests solely with the ALC and is subject to a Request for Review to the Review Officer. A policing body's reluctance for a public body to release what it may consider relevant documentation to one of the policing body's ongoing investigations is not the test for a public body to apply to its own Record.
5. While records related to Newfoundland and Labrador, Prince Edward Island and New Brunswick were part of the Application for Access to a Record and have been provided to the Applicant, the ALC has claimed a blanket exemption of all 83 Nova Scotia ALC internal investigations and, as such, is more comparable to the Ontario case where the Ontario lottery corporation had refused all of its record and the Commissioner ordered its release.
6. The Applicant focused his/her concerns regarding the s. 20 exemptions to the information severed in the winners media releases, as such, the other severances were not examined.
7. The ALC's Policy states that it does not supersede access to information legislation. That is correct and in the case

of at least Nova Scotia, the right of access to information under the *Act* supersedes the ALC Policy.

8. The ALC's Policy governs how long the personal information the ALC collects from winners at the time of win verification can be released publicly by the corporation: one year without further consent being obtained. The Policy dictates how long the ALC can use the personal information. It does not determine if someone has a right to access a record from a public body, the ALC, under the *Act*.
9. The information in the Record, severed by the ALC under s. 20 of the *Act* did fall within the definition of personal information of the winners.
10. Because the third party winner's personal information has already been in the public domain in the same format [media release], release of the information is presumed not to constitute an unreasonable invasion of personal privacy and, therefore, the ALC is not required to withhold the information requested.
11. In this age of information, if the ALC believes that its Prize Claim Form leads winners to believe that after the passage of one year, their personal information would obscure over time, it is mistaken as most of the information is available on the internet. The Prize Claim Form makes no reference to the *Act*.

**Recommendations:**

The Review Officer recommends that:

1. The ALC release:
  - a. Any information previously withheld under s. 15.
  - b. All information that was severed from the winners media releases.
2. The ALC re-affirm its decision to withhold personal information from the following documents, the severances which were not under Review:
  - a. The investigation Record and all related documents.
  - b. The win verifications.
3. The ALC reconsider its decision to apply the discretionary exemption at s. 14 in the closing stages of this Review, and release the information severed pursuant to s. 14 in the New Brunswick investigation Record.
4. The ALC amend its Prize Claim Form to make it clear that the personal information provided to the ALC as part of the win verification process is subject to the provisions of the *Freedom of Information and Protection of Privacy Act*.

5. For greater clarity, the ALC amend its Winners Information Publicity Policy to make it clear that its agreement with winners regarding the collection and use of their personal information is subject to the Nova Scotia *Freedom of Information and Protection of Privacy Act* and amend its consent forms to make reference to *and subject to the provisions of the Freedom of Information and Protection of Privacy Act*.
6. The ALC make it clear in all documentation with winners that the ALC's promise to contain the use it makes of personal information gathered during the win verification process, is distinct from someone making an application for information, which will be governed as an access to information matter [disclosure] under the *Act*.

**Key Words:** access, balance, burden, disclosure, discretion, duty to assist, harm, indemnity, investigation, law enforcement, lottery, media, personal information, PIA, Privacy Impact Assessment, policy, privacy, reasons, release, representation, security, Wayback Machine, winners.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act, ss. 2, 3(1)(e), 3(1)(i), 4(2)(b), 5, 7, 15(1)(a),(c),(k), 20(1), 20(3)(f), 20(4)(a), 26, 27, 45, 45(1), 45(2); Canada Business Corporations Act; Gaming Control Act, ss. 10(c), 35; Prince Edward Island Lotteries Commission Act; Newfoundland and Labrador Lotteries Act; New Brunswick Gaming Control Act; Alberta Freedom of Information and Protection of Privacy Act, s. 1(h).*

**Case Authorities Cited:** *FI-07-58, FI-07-62, FI-08-66, Ontario Order P-1833, Ontario Order P-352, FI-02-53, Ontario Order PO-2657, British Columbia Order F06-18, Ontario Order PO-1799, Re House, [2000] N.S.J. No 473,(S.C.).*

**Other Cited:** *"Citing Late Exemptions," Nova Scotia Freedom of Information and Protection of Privacy Review Office; IPC Practices, Number 9, Ontario Information and Privacy Commissioner; Atlantic Lottery Corporation Prize Claim Form; ALC Winners Information Publicity Policy.*

## REVIEW REPORT FI-08-12

### BACKGROUND

On November 3, 2006, the Applicant, a member of the media, submitted the original Application for Access to a Record to the Atlantic Lottery Corporation [“ALC”].

Over the following five months, through numerous discussions between the Applicant and the ALC, the original request was modified. In the end, the ALC clarified with the Applicant on April 19, 2007 that the Application for Access to a Record was as follows:

- (1) *Copies of the reports from the investigations (into retailer/ticket seller/employee wins) launched by ALC during 2005.*
- (2) *Copies of all press releases about winners (of \$25,000 or more) in any game since January 1, 2001, but excluding news releases currently available at [www.alc.ca](http://www.alc.ca) (December 2005-present).*
- (3) *The files, including but not limited to, the documents related to verifying the wins of the 44 retailers who claimed prizes of at least \$25,000 between Jan. 1, 2001 and Dec. 31, 2006.*
- (4) *Documents related to the 25 investigations ALC conducted between Jan. 1, 2001 and Dec. 31, 2006.*
- (5) *The number of retailer wins of at least \$10,000 in each year since 2001.*

On May 14, 2007, the ALC denied access to items 1 through 4, and provided the Applicant with the statistics requested in item 5.

That decision was the subject of a previous Request for Review that was resolved and closed through Mediation. The resolution cannot be disclosed. However, as a result of that file being closed, the Applicant received a new decision from the ALC on December 14, 2007. That decision provided as follows:

*The RCMP has advised us that they have completed their reviews in Newfoundland and Labrador and Prince Edward Island. The RCMP have also advised that they have completed their reviews in the province of NB with the exception of a review of four files. All files involving Nova Scotia retailers continue to be reviewed by the RCMP. We can therefore provide in part, records relevant to the following:*

- 1) *Copies of the reports from the investigations (into retailer/ticket seller and ALC employee wins) launched by ALC during 2005.*
- 2) *Copies of all press releases about winners (of \$25,000 or more) in any game since January 1, 2001 but excluding news releases currently available at [www.alc.ca](http://www.alc.ca);*

- 3) *A copy of the files, including but not limited to, the documents related to verifying the wins of the 44 retailers who claimed prizes of at least \$25,000 between January 1, 2001 and December 31, 2006; and*
- 4) *A copy of the documents related to the 25 investigations ALC conducted between January 1, 2001 and December 31, 2006.*

*As ALC previously communicated in May 2007, KPMG's review of records identified retailer wins and investigations that were not readily available at the time your request was first filed. As such, our response to parts 1, 3 and 4 of your application has expanded to include copies of all records related to investigations into retailer wins carried out during this time period. ALC is committed to openness and transparency and will continue to update Atlantic Canadians on an annual basis about winning by retailers and retailer employees. In addition, ALC had decided to waive all fees with respect to this application.*

*Our records indicate that there were no ALC employee wins for amounts of \$25,000 or more nor were there any related investigations from January 1, 2001 to December 31, 2006.*

*ALC's response to part (2) of your application includes all news releases from January 1, 2001 to December 31, 2006. News releases from January 1, 2007 to present are currently available on ALC's website and have not been provided. News releases related to winners are currently maintained for one year and can be found on our website at [www.alc.ca](http://www.alc.ca).*

*You will note that certain information has been removed from the records released to you in accordance with the provisions of the Nova Scotia Freedom of Information and Protection of Privacy Act. Where information has been severed, we have indicated within the record the applicable exemption under the Act. Information severed from the records under the Act includes personal information that would constitute an unreasonable invasion of a third party's personal privacy, and information that could be harmful to ALC's internal security practices.*

*The RCMP has advised us that releasing any information on four New Brunswick retailer win files and all Nova Scotia retailer win files could potentially interfere with or harm an on-going or unresolved law enforcement matter. The Nova Scotia RCMP have confirmed to ALC that the Nova Scotia retailer files are viewed as one file for purposes of their review and assessment of the material in the files which is still ongoing. These records are therefore denied pursuant to clause 15(1)(a) of the Nova Scotia Freedom of Information and Protection of Privacy Act. These will be released to you consistent with the applicable requirements of the Act when we are advised that the RCMP proceedings are completed.*

In addition, the ALC clearly identified, as required by s. 7(2)(e) of the Act, that the Applicant was entitled to request a review of its December 14, 2007 decision.

On January 21, 2008 (received January 29), the Applicant filed a Form 7 with the Review Office requesting a Review as follows:

*The applicant requests the review officer review the following decision, act or failure to act of the head of the public body;*

*(b) severing of information pursuant to sections 15 and 20 of the Act.*

*The applicant requests that the review officer recommend that the head of the public body give access to the record as requested in the Application for Access to a Record.*

On January 29, 2008, the Review Office advised the ALC of the Request for Review and indicated that the responsive records were required within 15 days in accordance with the Regulations. On February 13, 2008, the ALC requested an extension of 30 days in which to provide the Record to the Review Office. Notwithstanding the silence in the *Act* regarding this discretion, this request was granted based on the circumstances, such as the ALC's timeliness in making the request to the Review Office, the large volume of information [in excess of 1800 pages] and the impact on its operations to prepare the Record.

On February 15, 2008, the ALC made its first Representation when it provided the first of two parts of the Record and a partial Records Index to the Review Office. Details of the Representation will be discussed below in the Public Body's Representations.

On March 12, 2008, the remaining pages, with a final total of 1879 pages, and a complete Records Index were submitted to the Review Office.

On June 30, 2009, the Investigation Summary was provided to the parties. Mediation was not attempted.

On August 20, 2009 the matter was forwarded to formal Review. The Applicant and the ALC both requested an extension for the time to provide written Representations to the Review Officer, both of which were granted.

On October 23, 2009, as the Review Officer, I asked the ALC if it had a Privacy Impact Assessment ["PIA"] in relation to the collection, use and disclosure of the winners' personal information. In response, on October 26, 2009, the ALC confirmed there was no PIA but directed the Review Office to its Winners' Information Publicity Policy, a copy of which had been provided with its Representations, which will be discussed below.

In its final Representations to the Review Office, the ALC indicated that it was in a position to release the remaining four New Brunswick internal investigation reports as the RCMP investigations had been completed. On November 2, 2009, I asked the ALC if this part of the requested Record had been provided to the Applicant. On November 3,



2009, the ALC confirmed that it would be reviewing the four outstanding investigative reports relating to New Brunswick and issuing a decision and the documents to the Applicant within 10 days. The ALC was contacted again on November 18, 2009 to inquire whether the New Brunswick investigative reports portion of the Record had been released to the Applicant. On November 25, 2009, the ALC provided the Review Officer with a copy of a letter sent to the Applicant regarding the New Brunswick investigation reports. The ALC also included the severed copy of the Record provided to the Applicant. It would appear that the severances under s. 15 and s. 20 were applied in the same format as the severances that were previously applied and are the subject of this Review and will be treated the same. However, the ALC also chose to apply the exemption at s. 14. This late exemption will be discussed below.

## **RECORD AT ISSUE**

Pursuant to s. 38 of the *Act*, ALC has provided the Freedom of Information and Protection of Privacy [“FOIPOP”] Review Office with a copy of the complete Record including the information withheld from the Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the FOIPOP Review Officer or her delegated staff. The Record at issue in this Review is comprised of the following:

### Part 1 and 4 of the Record – the ALC Investigation Reports

Reports from the investigations into retailer/ticket seller and ALC employee wins launched by the ALC during 2005. Note the Parts of the Record in this list for #1 and #4 are the same documents. The reports from the ALC investigations for the provinces of Newfoundland, Prince Edward Island and New Brunswick have been released, with severances pursuant to s. 15 and s. 20. The ALC has not released any of its 83 investigations for the province of Nova Scotia that are still under investigation by the RCMP.

9 documents (encompassing 25 pages) are emails that are responsive.

56 documents (encompassing 510 pages) are “investigation records.”

### Part 2 of the Record - the ALC Press Releases of Big Winners

All press releases about winners of \$25,000 or more in any game sponsored by the ALC since January 1, 2001, for all four Atlantic Provinces but excluding news releases currently available at [www.alc.ca](http://www.alc.ca).

838 documents (encompassing 867 pages) are “winners media releases.”

### Part 3 of the Record – the ALC Verification for Retailers’ Wins

Files, including but not limited to, the documents related to verifying the wins of the 44 retailers who claimed prizes of at least \$25,000 between January 1, 2001 and December 31, 2006, for Newfoundland, Prince Edward Island and New Brunswick

(except 4). The ALC has not released any of the verification for Retailers' Wins for the province of Nova Scotia that are still under investigation by the RCMP.

48 documents (encompassing 450 pages) are "win verification" files.

Part 4 of the Record – see Part 1 above

Documents related to the 25 investigations the ALC conducted between January 1, 2001 and December 31, 2006. ALC acknowledged in its December 14, 2007 decision that a consultant study identified further investigation documents that were responsive to the Applicant's Application for Access to a Record, and so expanded the scope of this last item. These documents appear to be identical to the documents in Part 1, and for ease of reference, I will address both as Part 1 in the remainder of this Review Report.

### **APPLICANT'S REPRESENTATIONS**

All of the information provided by the Applicant during the Review process has been reviewed by the Review Officer. The Applicant consented to being identified as a member of the media.

On January 24, 2008, the Applicant made a Representation to the Review Office attached to the Form 7, which provided as follows:

1. The Applicant's Request for Review centres on two issues – severing of identifying information in the press releases and the severing of information in the investigation files based on the ALC's claim that it could harm enforcement.
2. The Applicant disagrees with the decision to withhold press releases since by their nature they are and have been public.
3. The ALC's policy to only make the information public for up to one year should not overrule a request made under the *Act*.
4. The Applicant is not aware of how long the policy has been in place but refers to and provides a copy of the Representation, Indemnity and Release Form, which makes no mention of withholding the winner's name.
5. The Applicant wants the ALC to release the identifying information withheld from the severed copy of the press releases provided to him/her.
6. The ALC has released the files examined by the RCMP that warrant no further investigation. The entire file should be released as it has been cleared by the RCMP.
7. If the ALC's concern is that the release of the entire file could harm its internal security practices, the applicant requests an explanation as none was given with the ALC decision. S/he understands the ALC security practices have recently changed since this Application for Access to a Record was submitted.

On October 17, 2009, the Applicant made a Representation to the Review Office, which provided as follows:

With respect to s. 15, the Applicant wants the information released based on the following:

1. The Applicant indicates that the reason for his/her Request for Review of whether the ALC severed information from the Record was that the ALC did not fully explain how releasing the requested information could potentially interfere with or harm law enforcement efforts.
2. Citing *FI-07-72* and referencing s. 15 of the *Act*, the Applicant quotes that s. 15 is a “discretionary exemption that requires the public body to provide the Review Office with evidence as to how it exercised its discretion to refuse the Record because the law enforcement exemption applies. That evidence must demonstrate that disclosure could reasonably be expected to harm law enforcement, harm the effectiveness of investigative techniques or reveal the identity of a confidential source.”
3. Citing *FI-99-103*, the Applicant points to the requirement for an explanation of just how releasing information would harm law enforcement and quotes “it is not enough for a public body to merely accept a statement that law enforcement would be harmed.”
4. The Applicant submits that the ALC has merely stated that the RCMP has advised that the release of the information could potentially interfere with or harm an ongoing investigation, which does not meet the test articulated in the cases cited.

With respect to s. 20, the Applicant is concerned about some of the personal information severed, as follows:

5. The Applicant’s particular concern is the withholding of information from press releases. The Applicant understands that the ALC has an internal policy that limits how long the press releases about significant wins are available. The Applicant does not accept that an internal policy can supersede an access to information request under the *Act*.
6. The information was available to the public at one time and in fact was the information that the ALC wanted media outlets to use. The arbitrary limit on the time the information is available is not consistent with the nature of the initial release of the information.
7. The ALC has not explained how the release of the complete information in the press releases would constitute an unreasonable invasion of privacy considering it was the ALC that put the information in the public domain in the first place.

The Applicant clearly expressed a focus on the severances under s. 20 in the press releases, and not on the s. 20 severances throughout the other parts of the responsive Record. As such, none of the other s. 20 severances will form part of this Review.

## PUBLIC BODY'S REPRESENTATIONS

Acknowledging that it would have other opportunities, the ALC made its first Representation to the Review Office on February 15, 2008 when it provided the first of two parts of the Record to the Review Office. That Representation was as follows:

### Severing of Information under Section 20 of the *Act*

1. Section 20 of the *Act*, a mandatory exemption, requires a public body to refuse to disclose personal information if that disclosure would be an unreasonable invasion of a third party's personal privacy.
2. It is an unreasonable invasion of a third party's personal privacy if the information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities or creditworthiness. The ALC submits that information about individual lottery winners of \$25,000 or more would most certainly fall within this category. To provide names, addresses and other personally identifying details about individual prize winners would provide immediate public insight into the individual's finances and would be considered an unreasonable invasion of that prize winner's personal privacy.
3. Referencing s. 20(4)(a) of the *Act*, the ALC notes that if a person consents to the release of his/her personal information, it would not be an unreasonable invasion of the person's privacy and the information could be released. Prizewinners sign a document which gives the ALC the right to publicize the prize claimant's name, home community and photograph without any claim for broadcasting, printing or other rights. The ALC submits this consent does not authorize it to use or distribute the information for any other purpose.
4. The ALC submits that the consent provision [s. 27(b) of the *Act*] requires the individual to identify the information and consent in writing to disclosure. On that basis, the ALC concludes that the winner's release form signed at the time of the win does not constitute consent for the purpose of the information requested in the Application for Access to a Record.
5. The above requirements are reflected in the ALC's Winner Information Publicity Policy, which provides that the ALC has a right to publicize a winner's personal information for a period of up to one year from the date the prize is claimed. The ALC states that other than provided for within the policy or as required by law it will not publicize or identify winners or disclose their personal information. Quoting from the ALC Winners Information Publicity Policy ["Policy"]:

*The Atlantic Lottery Corporation (ALC) is committed to openness and transparency in relation to the winners of its lottery games, subject to its obligation to respect and protect the privacy and personal information of these winners. The ALC recognizes that players have a legitimate right to know whether the prizes that we promote have been won and by whom and that publicizing winners for this purpose is required for the ALC to adhere to its commitment to Social Responsibility. However, winners have a right*

*to privacy and to the protection of their personal information after this obligation is satisfied.*

6. In addition to complying with the *Act*, and equivalent legislation in the other three Atlantic Provinces, the ALC is bound by the federal *Personal Information Protection and Electronic Documents Act* [“*PIPEDA*”] that restricts it to use personal information only for the purpose that was identified and communicated to the individual concerned when the information was collected. Use or disclosure of information for a purpose other than the purpose for which it was collected – media publication in order to inform the public for a period of time as to the results of the draw – is not authorized without the consent of the winner. The ALC submits that there should be a time limit after which the identity of the prize winner would no longer be published.
7. In conclusion, the ALC has refused to disclose any information that could personally identify individual winners in order to protect their personal privacy as required under s. 20 of the *Act*.

#### Severing of information under Section 15 of the *Act*

8. Subsection 15(1)(c) of the *Act* states that a public body may refuse to disclose information if it could reasonably be expected to harm the effectiveness of investigative techniques or procedures used in law enforcement. Law enforcement is defined very broadly as any investigation that could lead to a penalty or sanction being imposed. The procedures the ALC uses, while not consistently followed in the past, now form a critical part of its investigative techniques used to protect against theft, fraud or misappropriation of ALC assets. Disclosure could be expected to undermine the effectiveness of these procedures in the future because a third party could thwart legitimate investigations.
9. Subsection 15(1)(k) of the *Act* states that a public body may refuse to disclose information to an applicant if the disclosure could be expected to harm the security of any property or system. To validate tickets, the ALC employs security procedures to ensure authenticity. To reveal these would allow for the replication of a fraudulent ticket.
10. The files that are the subject of ongoing investigations in Nova Scotia and New Brunswick have been withheld [in full] under s. 15(1)(a) of the *Act*.

On October 15, 2009, the ALC submitted a final Representation. The ALC reproduced the modified Application for Access to a Record and its decision issued December 14, 2007 and identified the issues as follows:

1. *Does the Act authorize ALC to sever the information withheld under section 15? If so, did ALC properly exercise its discretion in severing information under section 15?*
2. *Does the Act require ALC to sever the information withheld under section 20? If so, would the release of the personal information contained in the Record constitute an unreasonable invasion of personal privacy?*

## Section 15

The ALC relies on s. 15(1)(a) and (k) of the *Act* in removing certain information from what was given to the Applicant including portions of the investigative reports and win verification files. The ALC claims that s. 15(1) is the exemption that allows a public body to exercise its discretion in making a decision to provide or deny access to information.

With respect to s. 15(1)(a) and harm to law enforcement, the ALC submits the following:

1. That it launched investigations into retailer/ticket seller and ALC employee wins during 2005. Subsequently the RCMP launched its own investigations into potential fraud. The ALC cooperated with RCMP investigations by providing a number of its complete investigation files. The ALC submits that the RCMP meets the definition of “law enforcement” found in s. 3(1) of the *Act*. The files currently under investigation by the RCMP are exempt as their release could reasonably harm law enforcement.
2. In the other Atlantic Provinces where the RCMP investigation is complete, the ALC has released its investigative files. Newfoundland and PEI have been provided to the Applicant. On November 25, 2009, the ALC provided the Review Office with a copy of a letter to the Applicant, indicating that the remaining New Brunswick investigation files were being provided on that date.
3. There are 83 files from Nova Scotia still under investigation by the RCMP. The ALC relies on s. 15(1)(a) of the *Act* to refuse access on the basis that release would likely result in harm to law enforcement by interfering with an ongoing investigation.
4. Citing *Canada Packers Inc. v. Canada (Minister of Agriculture)* (1988), the ALC notes the test of proof of harm does not require “detailed and convincing evidence” but there does need to be evidence of a “reasonable expectation of probable harm.”
5. The ALC reviews Ontario order *PO-2657* which held that it is more appropriate to examine the circumstances in each case whether the law enforcement exemption should be applied particularly where charges have not been laid versus concluding the exemption applies in every insider win case. The Ontario Provincial Police were asked for Representations in that case and indicated that disclosure of the records could taint potential witnesses and/or suspects by providing them with information that would not otherwise be available to them and could deprive them of a fair trial should there be a prosecution. The Assistant Commissioner indicated that it was unreasonable to conclude the exemption applied to all the records of insider win investigative files simply because the files were handed over to the police and that some wins could result in charges being laid. There was also insufficient evidence that disclosure would inform potential witnesses or suspects.
6. In a subsequent Ontario decision, similar to the facts of this Review, the Adjudicator distinguished order *PO-2657* because the Ministry and the Ontario Lotteries had tendered “qualitatively different and more persuasive evidence

- respecting the harms anticipated as a result of disclosure than the evidence before Assistant Commissioner Beamish in PO-2657.” This evidence was provided in affidavit form from the police. Unable to elaborate for reasons of confidentiality, she found the exemption applied as the Ministry had met the “detailed and convincing” test.
7. The ALC submits it is not claiming the exemption over all files - just the 83 Nova Scotia files that remain under investigation by the RCMP.
  8. The ALC submits that the RCMP investigation could lead to charges being laid, and as a result, the reasonable expectation of harm is based on the following:
    - a. The RCMP investigation relates to possible fraud and charges have not yet been laid;
    - b. Release could “tip-off” individuals being investigated;
    - c. Release could taint potential witnesses and if the matter proceeds to trial, the witnesses could collude with each other based on the information released; and
    - d. If individuals are prosecuted, the disclosure of the records could allow for public scrutiny and therefore influence prospective jury members and deprive individuals of a fair trial.
  9. The ALC submits its exercise of discretion was reasonable in the circumstances given the potential risks associated with the release of the information.
  10. The ALC cites two Nova Scotia decisions. The first, *FI-99-103*, is to assert that a public body is expected to prove that disclosure would “damage or be detrimental to law enforcement” and that the exemption should be applied where there is an active investigation where charges have not been laid. The second case, *FI-99-95*, involved a case where the police had made submissions asserting it was impossible to determine if a document was useful to an investigation until all documents had been reviewed. Therefore it was considered safe to assume that all documents related to possible fraud were useful to an investigation.
  11. The ALC represented that it will disclose the 83 files once it is advised by the RCMP that the investigation is complete.

The ALC represents that should the Review Officer conclude that the evidence does not meet the “real harm” test, the Record should be shielded from disclosure based on s. 15(1)(k) of the *Act*. The ALC submits the following in that regard:

1. Section 9 of the *Atlantic Lottery Regulations* [“*AL Regulations*”] made under the *Gaming Control Act* s. 127, states that it is a condition for entitlement to collect any prize that the claimant satisfies the ALC that s/he is a winner. As a result, the ALC has devised internal procedures to confirm and satisfy itself as to any win’s validity.
2. The ALC employs security tools and processes to ensure authenticity and should these be known to the public the integrity of the security system and the lottery process would be compromised. The ALC provides some description of the verification process.

3. Citing an Ontario Order that held that the release of a portion of the security system does not necessarily undermine the entire system, the ALC submits that it is critical that none of its investigative procedures and techniques are disclosed as to do so would undermine current and future procedures.
4. The ALC states that the release could reasonably be expected to injure the financial interests of its shareholder provinces because:
  - a. Validation information could be used to thwart an investigation, which is essential to protect against fraud; and
  - b. Release would limit the ALC's ability to scrutinize false claims.
5. The shareholder provinces depend on the profitable operation of the ALC. The ALC wants to ensure public confidence in the lottery and its investigation process into wins. Fraud would likely increase if this information were released.
6. Citing ON *Order PO-1799*, the ALC submits that the integrity of the lottery system is of paramount importance to its success and any changes required to remedy a breach of security would result in a significant financial investment.

#### Section 20

With respect to s. 20, the ALC submits it was required by s. 20(1) and s. 20(3) to sever the information based on the following:

1. The burden is on the Applicant to show the release would not be an unreasonable invasion of a third party's personal privacy.
2. Subsection 20(3)(f) presumes there is an unreasonable invasion if the personal information describes the third party's finances, which presumption can only be overcome if any of the exceptions in s. 20(4) apply.
3. Citing Ontario *Order PO-1880*, the ALC states that for information to be personal information it must be about an individual in a personal capacity, information from which the individual could be identified. The ALC provides details of the kind of information contained in the Record that would be considered personal information about lottery winners, retailers and third parties [names, phone numbers, community names, occupations etc.] and financial information [lottery winner, game played, size of prize won, etc.].
4. With respect to whether s. 20(4) applies to overcome the presumption of unjustified invasion, the ALC relies on its consent form that winners are required to complete in exchange for their prize. This is consistent with s. 9 of the *AL Regulations*. As part of the Prize Claim Form the claimant is required to execute a Representation, Indemnity and Release Form. Section 7 of the Form is consistent with the *AL Regulations* but the Form adds an additional aspect – a limitation on the 12 months during which the ALC can use the personal information [cites s. 7 of the Form].
5. The ALC Winners Information Publicity Policy also provides, in Article 2, that the ALC reserves the right to publicize a winner's name for a period of up to one year from the date the prize was claimed.



6. Winners must agree to consent to have personal information published but they are not required to actually authorize the ALC to use or disclose personal information absent such consent.
7. The winners have consented to disclosure for a period of only one year and for a limited purpose [cites Ontario *Orders P-180, P-181, P-1355 and PO-2645*].
8. The Prize Claim Form authorizes the use and disclosure of specific personal information for a specific purpose and limits the ALC's right to disclose the personal information.
9. The Form gives the winners a reasonable expectation that their personal information would be used for promotion of the ALC or management of its business and despite being disclosed once, would be practically obscure over time.
10. The ALC submits that it is unreasonable for a winner who signs the required Form to contemplate the possibility that this consent would lead to the disclosure as part of a comprehensive disclosure of the ALC winner database. To hold otherwise would require a loose application of the informed consent principle.
11. Citing Ontario *Orders P-180 and P-181* where it was held that the lottery winners' consent was not a consent for the purpose of the personal information exemption, the ALC argues that the consent it has received is not "unlimited and for all purposes."
12. Despite the fact that the information is published on the internet and it is available through internet archives, the ALC relies on the principles that *disclosure once is not a disclosure for all time* and *privacy may be defined as the right to determine for himself, when, how and to what extent he will release personal information* as enunciated in the United States Supreme Court [cites *United States Department of Justice v. Reporters' Committee for Freedom of the Press* 489, U.S. 749 (1989) and *R. v. Duarte*, 1990 1 S.C.R. 30].
13. Notwithstanding the availability of information in the age of the internet, the ALC submits that the Applicant should not be able to access personal information based on the consent given that is mandatory and given in exchange for a prize.
14. There is personal information of third parties [non-winners] whose privacy should not be discounted.

At no time in this Review has the ALC provided arguments regarding the severing of any of the personal information in any of the documents other than the press releases. This is consistent with the understanding that the Applicant was not taking issue with these severances, only the information severed in the press releases.

## ISSUES

1. Whether the ALC properly exercised its discretion in severing information under ss. 15(1)(a), 15(1)(c) or 15(1)(k).
2. Whether the release of the personal information contained in the Record would constitute an unreasonable invasion of personal privacy pursuant to s. 20(1).
3. Whether the information included in the disclosure decision was open, accurate and complete in accordance with the duty to assist [s. 7].

For greater clarity, based on the severances that are under Review:

Part 1 and 4 of the Record – the ALC Investigation Reports

1. Did the ALC properly exercise its discretion in severing information under s. 15(1)(a) from two of these documents?
2. Did the ALC properly exercise its discretion in severing information under ss. 15(1)(a), (c) and (k) from two of these documents? Did the ALC properly exercise its discretion in severing information under s. 15(1)(c) and (k) from 33 of these documents?
3. Would the release of the entire Record requested by the Applicant harm the ALC's internal security practices? Did the ALC provide sufficient evidence to support the harm claimed?

Part 2 of the Record - the ALC Press Releases of Big Winners

4. Would release of the personal information contained in archived press releases constitute an unreasonable invasion of personal privacy [s. 20(1)]?
5. Did the ALC properly exercise its discretion in severing information under s. 15(1)(a) from four of these documents?

Part 3 of the Record – the ALC Verification for Retailers' Wins

6. Did the ALC properly exercise its discretion in severing information under s. 15(1)(a) from one of these documents?
7. Did the ALC properly exercise its discretion in severing information under ss. 15(1)(c) and (k) from 31 of these documents?
8. Would the release of the entire Record requested by the Applicant harm the ALC's internal security practices? Did the ALC provide sufficient evidence to support the harm claimed?

## **DISCUSSION**

The purpose of the *Act*, which has been given a broad and purposeful approach, states in part, as follows:

***2 The purpose of this Act is***

*(a) to ensure that public bodies are fully accountable to the public by*

***(i) giving the public a right of access to records, ...***

***(iii) specifying limited exceptions to the rights of access, ...***

***(iv) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and***

*(v) providing for an independent review of decisions made pursuant to this Act; and*  
***[Emphasis added]***

The Applicant's right to access information is specified under the *Act* in s. 5, which provides:

*5(1) A person has a right of access to any record in the custody or under the control of a public body upon complying with Section 6.*

*(2) The right of access to a record does not extend to information exempted from disclosure pursuant to this Act, but if that information can reasonably be severed from the record an applicant has the right of access to the remainder of the record.*

The ALC is a unique public body established by the four provincial governments to manage the gaming business on behalf of all Atlantic Canadians. It was incorporated under the *Canada Business Corporations Act* on September 3, 1976. The shareholders in the corporation are the Nova Scotia Gaming Corporation, the Lotteries Commission of New Brunswick, the Prince Edward Island Lotteries Commission and the Province of Newfoundland and Labrador. Like all of the shareholder provinces, the Nova Scotia Gaming Corporation appoints two directors to the ALC. The Nova Scotia directors are appointed by Governor-in-Council [Cabinet].

#### Late exemption

By letter dated November 23, 2009, the ALC provided the Review Office and the Applicant with a copy of the severed version of the New Brunswick investigation reports. In addition to the severances under s. 20 and s. 15, which are consistent with the severances applied in the records disclosed earlier, the ALC has severed portions of the record under s. 14(1). Section 14 is a discretionary exemption that allows a public body to refuse to disclose information that would reveal advice, recommendations, or draft regulations to a public body or minister. While referenced on the Record, the ALC does not refer to s. 14 in its latest decision letter.

The Review Office recognizes that there are instances where a public body may need to claim an exemption after it has issued its decision to the Applicant. As a result, the Review Office developed a policy in September 2004 to address the proper approach to late exemptions. That policy states:

*After the public body has been notified by the Review Office that a Request for Review has been received, the Public Body may claim additional exemption sections within 15 days of the review notification.*

*The Public Body must give written notice to the Applicant and to the Review Office of any additional exemption sections claimed. Any additional exemption*

*sections claimed outside the 15 day period may not be considered during the review process.*

The release of the New Brunswick investigation files comes nearly two years after the original decision letter, and was provided while this Report was being drafted. In addition, no written notice of the late exemption was provided to either the Review Office or the Applicant – indeed, the reliance on the exemption in s. 14 is not even noted in the letter covering the release of these additional records. The Applicant has had no opportunity to provide Representations to the Review Office considering this exemption.

To apply a new, discretionary exemption this late in the game is inconsistent with the purposes of the *Act*, and I decline to accept it in this Review.

For greater certainty, one salient fact related to the exemption at s. 14(1) does bear consideration. The severances appear in two separate memos. The first is dated January, 2004; the second is dated March, 2002. Subsection 14(3) states as follows:

*14 (3) Subsection (1) does not apply to information in a record that has been in existence for five or more years.*

On the facts before me then, if had I accepted the late exemption, it would appear highly unlikely that the advice exemption would be applicable as a result of the time limit established by s. 14(3) of the *Act*.

#### Section 7 – Duty to Assist

Although not included in the Form 7 as an identified issue, the Applicant has indicated that the reasons for the exemptions’ applicability have not been thoroughly explained to him/her.

As indicated in previous Reports [refer to *FI-07-58*], even if a duty to assist issue is not specifically raised by an applicant, the Review Officer should consider whether or not a public body has complied with the duty to assist under the *Act*. As such, I will consider the completeness of the decision letter.

*7(2) The head of the public body shall respond in writing to the applicant . . . stating*

*(a) whether the applicant is entitled to the record or part of the record and . . .*

*(ii) where access to the record or to part of the record is refused, the reasons for the refusal and the provision of this Act on which the refusal is based; . . .*

**[Emphasis added]**

The burden rests with the ALC to demonstrate that the Applicant has no right to access the Record by citing the exemptions under the statute *and* giving reasons. What is at the heart of this Review is the basis on which the ALC exercised its discretion to not release the full Record. No reasons were given by the ALC in its decision letter to the Applicant. Representations were received by the Review Office from the ALC with respect to the exercise of its discretion. While it is important that Representations to the Review Office address the issue of discretion, it is also important that the ALC should have provided an explanation as to the factors it considered in exercising its discretion in its decision letter[s] to the Applicant to whom it owes a duty to assist and to whom it is required to provide reasons for any refusal under the statute.

It is well established in Nova Scotia and Canadian law that citing the section of the *Act* and its associated words, is simply not enough and that public bodies must provide applicants with their rationale for the exercise of their discretion. In two recent Review Reports [refer to *FI-07-62* and *FI-08-66*], I discussed how a public body's exercise of discretion should properly be considered. I apply that analysis here without repeating the discussion.

In its Representations to the Review Officer, the ALC provided some details regarding its exercise of discretion. The ALC did not provide thorough reasons to the Applicant in its decision letter as to why or how it exercised its discretion to refuse access. The ALC failed in its duty to provide reasons to the Applicant for how it exercised its discretion to withhold portions of the Record.

### Section 15 – Law Enforcement Exemption

The ALC claims that the portion of the Record that was created as a result of an internal investigation should not be released because this Record was handed over to the RCMP whose investigations in Nova Scotia are not yet completed. The portions of the Record relating to the investigations were withheld under s. 15 of the *Act*, which provides as follows:

*15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*

*(a) harm law enforcement; . . .*

*(c) harm the effectiveness of investigative techniques or procedures currently used, or likely to be used, in law enforcement; . . .*

*(k) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.*

Law enforcement is defined in the Interpretation section of the *Act*, which provides as follows:

*3(1) In this Act,*

*(e) “law enforcement” means*

- (i) policing, including criminal-intelligence operations,*
- (ii) investigations that lead or could lead to a penalty or sanction being imposed, and*
- (iii) proceedings that lead or could lead to a penalty or sanction being imposed;*

The ALC is a unique public body that is responsible for managing lottery schemes in the four Atlantic Provinces with four different governing statutes. The ALC also may be subject to four different access to information and privacy laws. For the purpose of this Review, the only relevant legislation is the Nova Scotia *Freedom of Information and Protection of Privacy Act*, which does apply to the ALC.

Subsection 10(c) of the Nova Scotia *Gaming Control Act* states the following as its purpose:

*The objects of the [Nova Scotia Gaming] Corporation are to ensure that lottery schemes conducted and managed by the Corporation are conducted and managed in accordance with the Criminal Code (Canada) and this Act and the regulations.*

The *Gaming Control Act* does not appear to confer any powers of enforcement on the ALC though s. 35 does allow for Cabinet or the Minister responsible to initiate an audit or investigation. This power is not given further definition nor given any specificity under the statute.

*35(1) The Governor in Council or the Minister may, at any time, order an audit or investigation into the accounts or affairs of the Corporation.*

It is similar in the other Atlantic Provinces that the governing legislation does not appear to confer any powers of enforcement on the ALC: Prince Edward Island's *Lotteries Commission Act*, Newfoundland and Labrador's *Lotteries Act*, and New Brunswick's *Gaming Control Act* are similar to the Nova Scotia legislation. The *Gaming Control Act* appears to grant substantial powers to the Nova Scotia Gaming Commission to determine if individuals have committed an offence against the regulations governing gambling in this Province, not the ALC.

The result is that for the purpose of the internal investigation for which the ALC is responsible, the portion of the Record withheld under s. 15 of the *Act* does not fall within the definition of law enforcement as it does not involve information about criminal-intelligence or information that could lead to a penalty or sanction being imposed. Handing over its internal investigation information to the RCMP, where a sanction could be imposed, does not change the nature of the information held by the ALC for the purpose of access to information legislation. This case is in comparison to where the Application for Access to a Record is to the public body, such as the police, that is actually doing the investigation.

This finding is particularly reinforced when the definition of law enforcement in the Nova Scotia legislation, which is linked to criminal intelligence or penalty, is compared to its counterpart in Alberta. The Alberta definition, by way of comparison hand, reads as follows:

*1(h) “law enforcement” means*

- (i) policing, including criminal intelligence operations,*
- (ii) a police, security **or administrative investigation**, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, **including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or***
- (iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings **or by another body to which the results of the proceedings are referred;***  
*[Emphasis added]*

However, case law supports the finding that, given a definition of law enforcement substantially similar to that in the Nova Scotia statute, this information does not fall within the definition of law enforcement. The Ontario Information and Privacy Commissioner has established that, in order for a public body to claim harm to law enforcement, the public body must “carry enforcement or regulatory responsibility.” [refer to *Order P-1833*]. The Ontario Commissioner was asked to rule on a decision to withhold access to internal investigation records. The Commissioner reasoned that the report could not be protected by the law enforcement exemption:

*In my view, the investigation conducted by the ministry was an internal investigation into the operation of a training school. Upon completion of the investigation, the ministry was not in a position to enforce or regulate compliance with the Training Schools Act or any other law. Rather, it determined that the allegations warranted further investigation and forwarded the report to the local Crown Attorney's office. In my view, the ministry had investigatory responsibility for ensuring the proper administration of the training school, but it was the police force and Crown Attorney's office which had regulatory responsibilities of law enforcement as envisioned by section 14(2)(a) of the Act. Therefore, I find that section 14(2)(a) is not applicable in the circumstances of this appeal.*  
*[Emphasis in original]*  
*[ON Order P-352]*

In its original decision, the ALC cited s. 15(1)(c), which permits a public body to withhold information that may reveal investigative techniques, as an additional reason for withholding information. However, its Representations address only ss. 15(1)(a) and 15(1)(k). For clarity, I find that the exemption pursuant to s. 15(1)(c) is equally linked to definition of law enforcement and, therefore, does not apply in this case.

The ALC also relied on the exemption that protects information from release if it will harm the security of property or a system. In this case, the ALC argues that release of the information regarding the verification of wins process will compromise the integrity of its security system that could then lead to compromised investigations, increase in lottery fraud, and impact on the financial position of the ALC to the detriment of the four shareholder Atlantic Provinces who benefit from its profitability.

*All access legislation in the country includes exemptions for records that could, if disclosed, harm law enforcement. In the Nova Scotia legislation, as in others, the head of a public body must prove that disclosure “could reasonably be expected” to harm law enforcement. Disclosure must be shown to do more than “interfere” with law enforcement. That the police would be more comfortable doing this investigation without the disclosure of the severed parts of this report does not meet the expectations of ss.15(1)(a).*

*The British Columbia Government’s Manual applies a “harms test” to s. 15 of the B.C. Act, which uses the same language and number as this Act reads:*

*To harm a law enforcement matter means that disclosure would damage or be detrimental to law enforcement... a fear that disclosure would hinder, impede, or minimally interfere with a law enforcement matter does not satisfy this test.” (Section C.4.6., p.10)*

*The Federal Court, in Rubin v. Canada (Minister of Transport) (1997), 221, N.R. 145 (Fed C.A.), said that “(w)here the harm foreseen by release of the records sought is one about which there can only be mere speculation or mere possibility of harm, the standard (of proof) is not met. [NS Review Report FI-02-53]*

I have not been provided with any evidence of substance by the ALC to conclude that the security of its win verification system would be compromised by the release of the Record.

**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.**  
**[Emphasis in original]**  
*[Ontario Order PO-2657]*



I find that on a review of the section of the Record where the s. 15(1)(k) exemption is cited, there is nothing in the information itself that would compromise future effectiveness of its security processes.

*The “investigative techniques” ICBC used can only be described as routine, not specialized or out of the ordinary. I do not see how disclosure of the findings of the investigation in this case could reasonably be expected to harm the effectiveness of such “investigative techniques” in the future.  
[British Columbia Order F06-18]*

The ALC relies on an Ontario case that acknowledges the importance of the integrity of the security system of a lottery corporation. That case held:

*I accept the OLG’s position that the integrity of the provincial lottery system is of paramount importance to its successful operation, and that any changes required to remedy a security-related breach would require [sic] a significant financial investment on the part of the OLG and the government of Ontario.  
[Ontario Order PO-1799]*

That case is distinct from the one at hand. There the lottery corporation provided clear details and convincing evidence to show what specifics in the record needed to be withheld in order to avoid a large investment by the public body and the province that would result from a breach in its win verification security system. No such evidence was provided by the ALC in this case. Merely claiming security would be compromised is not sufficient.

### Section 20 – Personal Information Exemption

The second exemption relied upon by the ALC is based on the claim that the information severed is personal information the disclosure of which would contravene the individual’s right to privacy. Personal information is defined in the Interpretation section of the *Act*, which provides as follows:

*3 (1)(i) “personal information” means recorded information about an identifiable individual, including*

- (i) the individual’s name, address or telephone number, . . .*
- (vii) information about the individual’s educational, financial, criminal or employment history,*

Section 20 is a mandatory exemption and, therefore, once information has been identified as falling within the definition of personal information and the release of the information would be an unreasonable invasion of personal privacy, the public body is required to withhold or sever it.

*20(1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. . .*

*(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if. . .*

*(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;. . .*

*(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*

*(a) the third party has, in writing, consented to or requested the disclosure;. . .*

In deciding whether or not the exemption applies, a public body must first establish that it is personal information. In all Canadian jurisdictions, oversight bodies have encouraged public bodies to give a broad and liberal interpretation to the definition of “personal information” and not to restrict those words to the examples listed in the statutes. Said simply, to qualify as personal information, it is reasonable to expect that an individual will be identified if the information is disclosed.

Once it is established that it is personal information about an identifiable person, the public body must work its way through s. 20 of the *Act* as outlined by the Supreme Court of Nova Scotia in the *Re House* case, in which Justice Moir discussed the process to be followed in assessing whether personal information should be released. Justice Moir stated as follows:

*. . . I propose to consider this appeal in the following way:*

*1. Is the requested information “personal information” within s. 3(1)(i)?*

*If not, that is the end. Otherwise, I must go on.*

*2. Are any of the conditions of s. 20(4) satisfied? If so, that is the end.*

*Otherwise. . .*

*3. Is the personal information presumed to be an unreasonable invasion of privacy pursuant to s. 20(3)?*

*4. In light of any s. 20(3) presumption, and in light of the burden upon the appellant established by s. 45(2), does the balancing of all relevant circumstances, including those listed in s. 20(2), lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not?*

*[Re House, [2000] N.S.J. No 473, (S.C.) at para. 8]*

The phrase in s. 20 of the *Act* “shall refuse to disclose” is to read that the public body must refuse to disclose information. That means that s. 20(1) is a mandatory

exception to the general public's right of access to information if the public body determines that disclosure would be an unreasonable invasion of personal privacy. Where requested information falls under this exception, the head of the public body or the FOIPOP Administrator as his or her delegate has no discretion and cannot release the information.

If the public body is able to meet that test by demonstrating that the information is personal information [s. 3(1)(i)], the information does not fit under the presumption that it is not an unreasonable invasion [s. 20(4)] or that the personal information is presumed to be an unreasonable invasion of privacy [s. 20(3)], then the onus shifts to the Applicant to establish that the release of the personal information would not constitute an unreasonable invasion of a third party's personal privacy [s. 45(2)].

*45(1) At a review or appeal into a decision to refuse an applicant access to all or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part.*

*(2) Where the record or part that the applicant is refused access to contains personal information about a third party, **the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.***  
*[Emphasis added]*

This Review is a prime example of where the right to access for one party potentially intersects with the right to protection from an unreasonable invasion of third parties' personal privacy. The Ontario Office of the Information and Privacy Commissioner in its *IPC Practices, Number 9*, provides the following recommended approach for responding to requests for personal information:

*. . . the institution has the discretion to choose whether to release the records after considering any applicable exemptions and weighing the requester's right of access against any other individual's right to the protection of his or her privacy.*

Although the Review Office never reveals the content of the Record including the information that has been severed, I can reveal the types of information that were severed. The kinds of personal information severed by the ALC, relating to the media releases only, can best be described as follows:

- Dates
- Community names
- Third party names [winners]
- Third party names [other than winners]
- Retailer outlet [business names]
- Occupation [of winners]
- Employers [of winners]
- Dollar amount won
- Alternate prize option won

- Number of winners in a group
- Season in which the win occurred
- Number of children of winners
- Geographical locale.

The first part of the *House* test is whether the information is personal information as defined by the *Act*.

I find the information falls within the definition of personal information as an individual could reasonably be identified from the information. The second part of the *House* test is to determine if s. 20(4) of the *Act* applies such that disclosure is presumed not to be an unreasonable invasion of personal privacy. The question for this Review is whether the third party winners have consented in writing to the disclosure for the purposes of FOIPOP by signing the Form and because the information was previously public. Subsection 20(4) establishes a presumption of when information will not be considered an unreasonable invasion of privacy. Where a third party, in this case a winner, has consented in writing to the disclosure, the presumption that it is not an unreasonable invasion applies.

One must keep in mind that this information has been in the public domain. It was widely available and disseminated publicly. In this case, if the Applicant had applied during the year when the media release was publicly available, the *Act* would not have applied [s. 4(2)(b)]. In this case, the Applicant was informed in the decision letter that some of the releases were available on the ALC website and were therefore not included, although the ALC did not specifically indicate that the current press releases were excluded from the *Act* by way of s. 4(2)(b). The Applicant could have accessed all of the personal information about the winners from the media releases that could be on the website of the ALC for a period of up to 12 months. That information is now archived with the ALC and its use is restricted by the one-year consent policy. After the one-year period, the ALC cannot use the personal information it gathered. But a distinction must be made between the use by the ALC for its own purposes [s. 26] and how the ALC is to respond to an Application for Access to a Record [s. 27], which is a disclosure not a use.

*Use of personal information*

*26 A public body may use personal information only*

- (a) for the purpose for which that information was obtained or compiled, or for a use compatible with that purpose;*
- (b) if the individual the information is about has identified the information and has consented, in the prescribed manner, to the use; or*
- (c) for a purpose for which that information may be disclosed to that public body pursuant to Sections 27 to 30.*

*Disclosure of personal information*

*27 A public body may disclose personal information only*

- (a) in accordance with this Act or as provided pursuant to any other enactment;*
- (b) if the individual the information is about has identified the information and consented in writing to its disclosure;*
- (c) for the purpose for which it was obtained or compiled, or a use compatible with that purpose;. . .*

Section 27 allows for the disclosure of personal information under this *Act*. Therefore the issue of whether or not the Forms that are signed by the winners constitute consent for the purposes of FOIPOP is not relevant. It could be a factor for consideration in deciding if the disclosure would be an unreasonable invasion of privacy. Section 27 of the *Act* also contemplates that consent could be obtained from the individuals, but this would be a separate consent, obtained at the time of the Application for Access to a Record, not the ones signed at the time of the lottery win.

The ALC must follow the analysis from *House* and demonstrate that to release the archived media releases would be an unreasonable invasion of personal privacy.

For a complete discussion, I return to the issue of consent under the second step in *House*. In its final Representations, the ALC attached as an appendix the Prize Claim Form, which all winners must sign to accept their prize. That form includes the following Representation, Indemnity and Release. It states, in part, as follows:

*7. the Claimant(s) hereby gives ALC the right to publish, through all types of media broadcasting, including the internet, for the purposes of promoting the win, the Claimant's name, hometown and photograph without any claim for broadcasting, printing or other rights for a period of up to twelve months from the date of prize award. . .*

From my review of the records, it appears that the ALC has modified this form over the years to bring its written consents more in line with the time restriction the ALC includes in its Policy Statement. The Policy Statement provides as follows:

*ALC reserves the right to publicize a winner's name, hometown and photograph for a period of up to **one year** from the date the prize was claimed. ALC will endeavour to notify winners of planned or anticipated publicity involving them, as required.*

*ALC also reserves the right to invite the media to a press conference with winners. However, the Corporation also recognizes its obligations with respect to privacy...and apart from the winner's name, hometown and photograph, and any other information voluntarily provided by the winners, no personal or confidential information about winners will be divulged by ALC.*

*If ALC wishes to engage in winner publicity beyond that referred to above, including any winner publicity beyond the one year from the date the winner(s) in*

*question claimed a prize, ALC will need express written consent from the winner...*

*Other than as specifically provided for above or as required by law, ALC will not publicize or otherwise publicly identify winners or disclose identifying personal information of winners.*

***[Emphasis in original]***

***[Emphasis added]***

What a winner agrees to with the ALC regarding use of personal information is a condition of being given the prize. A winner is signing a document at the time the prize is claimed that agrees to let the ALC use his/her personal information for up to 12 months. This authorizes the ALC to use personal information because the winner has consented.

In addition to the Philosophy section cited by the ALC in its Representations, the Policy clearly states in the Scope section:

*The scope of this Policy extends to all ALC employees including all levels of management as well as the ALC Board of Directors. It applies to all verbal and written requests, both internal and external, for information about winners.*

***This Policy supplements, and does not supersede, ALC's obligations under PIPEDA and/or provincial access to information and protection of personal information/privacy legislation, which legislation would be complied with by ALC.***

***[Emphasis added]***

What is stated in the Policy and what is agreed to by the claimant or winner cannot usurp the right to access of an applicant under provincial legislation. The Purpose section of the *Act* clearly specifies that it is the statute that will specify the "limited exceptions to the right of access" not a public body policy. Such policies must be in line with the provisions of the *Act*. In fact, the Policy clearly states it "supplements, and does not supersede, ALC's obligations under PIPEDA and/or provincial access to information and protection of personal information /privacy legislation, which legislation would be complied with by ALC." Policy regarding access to information will never trump the provisions of the *Act*.

What must be distinguished is this: winners have the expectation under the Policy that the ALC will not continue to use their personal information that was collected as part of the win verification process beyond the 12 months without a new consent. However, because the information has been in the public domain, winners cannot reasonably expect the ALC to keep their personal information confidential for all purposes. The ALC simply does not have the capacity to do so and has not represented to the winners, in any way whatsoever, that it would.

The consent form signed by a winner and the Policy make it clear that the winner is consenting to the ALC's use of personal information for specific purposes. The Policy also makes it clear that the policy does not supersede the access and privacy legislation that applies to the ALC with which it must comply. The ALC is correct in stating that it only has the consent of a winner to use his/her personal information for a period of one year from the time a prize is claimed because that is the basis on which the winner's consent was given. Placing this time restriction on the ALC's use may be an appropriate contained use of personal information contemplated by the federal privacy legislation. However, that must be distinguished from provincial access to information legislation. The ALC's Policy is correct in making it clear to the winner that the policy does not supersede the law. That is the very point. The error is when the ALC confuses its limited use of a winner's personal information versus when an applicant who has a right to access information can apply under the *Act*, which is a disclosure and falls under s. 27, not a use under s. 26.

To conclude that personal information, the release of which a winner consented to at the time the prize was claimed and is information contained in the media releases, is now unavailable under access to information legislation because it would be an unreasonable invasion of personal privacy would result in an absurdity. Once personal information has been in the public domain, a public body cannot shield itself from an Application for Access to a Record under right to access to information legislation by its promise to not use the information under a privacy policy. It is no longer a use, it is a disclosure.

From a reasonable person's perspective observing this situation, it is absurd for an applicant to be refused information already made public and subsequently archived by a public body the bulk of which information remains publicly accessible through internet archives such as the "Wayback Machine" ([archive.org](http://archive.org)).

I find that the ALC has not demonstrated that the release of the personal information in the Record, if released to the Applicant, would constitute an unreasonable invasion of personal privacy. The Applicant, therefore, bears no burden under s. 45(2) of the *Act* in this case.

Therefore, I have found the s. 20 exemption has not been made out by the ALC. I find that where a third party winner has consented in writing to the use of personal information for winner announcement purposes, information that has already been in the public domain and it is highly probable that it remains public through the internet, that disclosure under the *Act* will be presumed not to be an unreasonable invasion of his/her personal privacy and that it should be made available to the Applicant in response to his/her Application for Access to a Record.

Although not necessary, as I have found that the exemption does not apply, I thought it would be appropriate to comment on one specific aspect of the information withheld as personal information. The ALC indicated that s. 20(3)(f) was applicable as the Records contained information that would reveal the finances of third parties. Ontario *Order PO-2657*, specifically addresses lottery wins:

*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.*

**[Emphasis in original]**  
*[ON Order PO-2657]*

## FINDINGS

1. The ALC provided a copy of the part of the Record related to the New Brunswick investigations during the final stage of the formal Review. On the Record, the ALC claims a new exemption, under s. 14 "advice", though there is no reference to it in its decision letter to the Applicant. This late exemption is being made over two years since the original Application for Access to a Record and is well beyond the policy of the Review Officer for the time in which a late exemption can be claimed. In any event, based on s. 14(3) of the *Act*, the exemption in s. 14(1) cannot apply to a record that has been in existence for over five years, which this Record has been.
2. The ALC's internal investigation information, which was handed over to the RCMP for its investigation, does not fall within the definition of law enforcement information as defined by the *Act*. The ALC has the ability to investigate under s. 30 of the *Gaming Control Act* but that legislation does not provide for a penalty or sanction being imposed at the conclusion of the investigation. The information held by the ALC in relation to its internal investigation does not fit within the definition of law enforcement and therefore neither s. 15(1)(a) nor s. 15(1)(c) exemptions of the *Act* apply.
3. The ALC failed to demonstrate there would be any harm to the security of property or system if the information was released and therefore the exemption in s. 15(1)(k) of the *Act* does not apply.
4. The ALC has recently produced the New Brunswick investigation reports' portion of the Record because the RCMP investigation in New Brunswick is now



- complete. The portion of the Record that is outstanding is all 83 ALC internal investigation reports in Nova Scotia. The RCMP advised the ALC not to release the Nova Scotia portion of the Record. No affidavit was provided by the RCMP. The RCMP do not have the authority to determine if something is available from the ALC under the provincial access to information legislation. That decision rests solely with the ALC and is subject to a Request for Review to the Review Officer. A policing body's reluctance for a public body to release what it may consider relevant documentation to one of the policing body's ongoing investigations is not the test for a public body to apply to its own record.
5. While records related to Newfoundland and Labrador, Prince Edward Island and New Brunswick were part of the Application for Access to a Record and have been provided to the Applicant, the ALC has claimed a blanket exemption of all 83 Nova Scotia ALC internal investigations and, as such, is more comparable to the Ontario case where the Ontario lottery corporation had refused all of its record and the Commissioner ordered its release.
  6. The Applicant focused his/her concerns regarding the s. 20 exemptions to the information severed in the winners media releases, as such the other severances were not examined.
  7. The ALC's Policy states that it does not supersede access to information legislation. That is correct and in the case of at least Nova Scotia, the right of access to information under the *Act* supersedes the ALC Policy.
  8. The ALC's Policy governs how long the personal information the ALC collects from winners at the time of win verification can be released publicly by the corporation: one year without further consent being obtained. The Policy dictates how long the ALC can use the personal information. It does not determine if someone has a right to access a record from a public body, the ALC, under the *Act*.
  9. The information in the Record, severed by the ALC under s. 20 of the *Act* did fall within the definition of personal information of the winners.
  10. Because the third party winner's personal information has already been in the public domain in the same format [media release], release of the information is presumed not to constitute an unreasonable invasion of personal privacy and, therefore, the ALC is not required to withhold the requested information.
  11. In this age of information, if the ALC believes that its Prize Claim Form leads winners to believe that after the passage of one year, their personal information would obscure over time, it is mistaken as most of the information is available on the internet. The Prize Claim Form makes no reference to the *Act*.

## RECOMMENDATIONS

The Review Officer recommends that:

1. The ALC release:
  - a. Any information previously withheld under s. 15.
  - b. All information that was severed from the winners media releases.

2. The ALC re-affirm its decision to withhold personal information from the following documents, the severances which were not under Review:
  - a. The investigation Record and all related documents.
  - b. The win verifications.
3. The ALC reconsider its decision to apply the discretionary exemption at s. 14 in the closing stages of this Review, and release the information severed pursuant to s. 14 in the New Brunswick investigation Record.
4. The ALC amend its Prize Claim Form to make it clear that the personal information provided to the ALC as part of the win verification process is subject to the provisions of the *Freedom of Information and Protection of Privacy Act*.
5. For greater clarity, the ALC amend its Winners Information Publicity Policy to make it clear that its agreement with winners regarding the collection and use of their personal information is subject to the Nova Scotia *Freedom of Information and Protection of Privacy Act* and amend its consent forms to make reference to *and subject to the provisions of the Freedom of Information and Protection of Privacy Act*.
6. The ALC make it clear in all documentation with winners that the ALC's promise to contain the use it makes of personal information gathered during the win verification process, is distinct from someone making application for information, which will be governed as an access to information matter [disclosure] under the *Act*.

Respectfully,

Dulcie McCallum  
Freedom of Information and Protection of Privacy Review Officer