Information and Privacy Commissioner,
Ontario, Canada

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

FINAL ORDER PO-3969-F

Appeal PA13-502

Alcohol and Gaming Commission of Ontario

June 27, 2019

Summary: This is the final order, following Interim Order PO-3585-I, in the appeal of the AGCO's decision to deny the appellant access to records of a complaint investigation of an AGCO gaming registrant. In this order, the adjudicator finds that the mandatory third party information exemption in section 17(1) does not apply to the correspondence, consultant reports and implementation schedule remaining at issue, and she orders these records disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 17(1).

OVERVIEW:

[1] Under the *Freedom of Information and Protection of Privacy Act* (the *Act*), the appellant requested access to records of a complaint investigation conducted by the Alcohol and Gaming Commission of Ontario (AGCO) into one of its gaming registrants. The AGCO issued a decision denying access to the records responsive to the request and the appellant, in response, appealed the ACGO's decision to the Office of the Information and Privacy Commissioner. Adjudicator Justine Wai conducted an inquiry into the appeal and issued Interim Order PO-3585-I on March 11, 2016, upholding the AGCO's decision to deny access to many responsive records under the discretionary law enforcement exemption at section 14 of the *Act.* She deferred a determination on the records the AGCO claimed were exempt under the mandatory third party information exemption in section 17(1) of the *Act*.

[2] Following her issuance of Interim Order PO-3585-I, Adjudicator Wai conducted an inquiry regarding the records remaining at issue–records 68, 165-189, 219 and 263-267– that the AGCO had withheld under section 17(1). She invited representations from the AGCO, two affected parties and the appellant, on whether the records were exempt from disclosure under section 17(1). The first affected party (the affected party) is the gaming registrant that is the subject of the AGCO complaint investigation. The second affected party is the consultant retained by the affected party. Both the affected party and the consultant provided representations in response. The AGCO responded that it would rely on the representations it had submitted during the initial inquiry. The AGCO also issued a revised decision regarding records 263-267, and disclosed them to the appellant. Accordingly, records 263-267 are no longer at issue. The appellant did not provide representations.

[3] The appeal was then transferred to me to complete the inquiry and issue a decision on the application of section 17(1) to records 68, 165-189 and 219. In this Final Order, I do not uphold the decision of the AGCO and I order it to disclose the records.

RECORDS:

[4] The records that remain at issue are a letter from the affected party to the AGCO (record 68), letters and draft reports from the consultant to the affected party (records 165-189), and an implementation schedule (record 219). Records 165-189 were prepared by the consultant and address the governance of the affected party, which provided records 165-189 to the AGCO.

DISCUSSION:

Section 17(1) and the three-part test to be met

[5] The only issue in this appeal is whether section 17(1) applies to the records. The parts of section 17(1) that are relevant to this appeal state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
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> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency[.]

[6] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[1] In order for a record to be exempt from disclosure under section 17(1), the following three-part test must be satisfied:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information
2. the information must have been supplied to the institution in confidence either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b) and/or (c) of section 17(1) will occur.

Failure to satisfy any one of the three requirements of the section 17(1) test results in the exemption not applying.

The burden of proof

[7] The parties relying on the section 17(1) exemption, the AGCO and the affected parties, bear the burden of establishing all three parts of the test for its application. However, because the exemption is mandatory, the records themselves may satisfy the three requirements based on their content. In order to satisfy the third part of the three-part test, the parties resisting disclosure must demonstrate a risk of harm that is well beyond the merely possible or speculative although they need not prove that disclosure will in fact result in such harm.[2] Parties resisting disclosure should not assume that the harms under section 17(1) are self-evident or can be proven by simply repeating the description of harms in the *Act*.[3]

[8] In this appeal, the AGCO and the affected parties fail to establish part three of

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[1] *Boeing Co. v Ontario (Ministry of Economic Development and Trade)*, 2005 CanLII 24249 (ON SCDC), leave to appeal dismissed, Doc M32858 (CA).
[2] *Ontario (Community Safety and Correction Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras 52-54.
[3] Order PO-2435.

the test, as I describe below. As well, the records themselves do not satisfy the requirements for the application of section 17(1). Because I find below that the harms part of the test is not satisfied in this appeal, I will address only the representations on harms.

The AGCO does not establish the harms in sections 17(1)(a), (b) or (c)

[9] In the representations it submitted during the initial inquiry, the AGCO claims that the exemptions in sections 17(a), (b) and (c) apply to numerous records, including the records at issue. In asserting that disclosure of the records could reasonably result in the harms in section 17(1)(a), the AGCO argues that the affected party operates in three highly competitive industries–the gaming, dining and racetrack industries–and disclosing the information at issue to the affected party's competitors would put it at a disadvantage. Regarding section 17(1)(b), the AGCO asserts that it is in the public interest that the records the affected party provided to it remain confidential, because if they are not, its registrants will be less likely to be as forthcoming in providing such records in the future. It argues that disclosure of the records may reasonably result in similar information no longer being supplied to the AGCO, resulting in it being unable to conduct thorough investigations of registrants. Finally, in respect of section 17(1)(c), the AGCO argues that the affected party will suffer undue loss because of the competitive nature of its industries; the affected party's competitors may gain an economic edge by knowing the intricacies of the affected party's internal practices based on the information in the records.

[10] The AGCO's representations, including its confidential representations, do not convince me that any of the harms in sections 17(1)(a), (b) and (c) could reasonably be expected to occur. The representations are a recitation of the wording of sections 17(1)(a) through (c) and do not address the specific records at issue. They are general assertions of harms, without an explanation of why disclosure of the specific information in records 68, 165-189 and 219 could reasonably be expected to cause the harms claimed. I find that these general representations, that repeat the description of harms in the *Act* and do not address the specific information claimed to be exempt, are not sufficient to satisfy the third part of the test for the application of sections 17(1)(a), (b) and (c).

The affected party does not establish the harms in sections 17(1)(b) or (c)

[11] The affected party provides confidential representations on why it believes the records qualify for exemption under sections 17(1)(b) and (c). In its non-confidential representations on the section 17(1)(b) harms, it states that the records contain more information than what it is statutorily required to provide to the AGCO for registration purposes. It submits that disclosure of information provided by a third party to a government institution beyond what is statutorily required, gives rise to a reasonable expectation of harm under section 17(1)(b). It relies on Interim Order PO-2117-I, which, it submits, upheld a claim of section 17(1)(b) to information in a report that was supplemental to the statutory requirements on the basis that there was a public interest

in ensuring that the information continued to be supplied to the institution. The affected party adds that the cooperation of industry stakeholders, like itself, is necessary for the AGCO to fulfill its mandate of ensuring that gaming in Ontario is conducted in the public interest. It argues that no party would provide records like the ones at issue to an institution if it knew that the confidential information in them could be made public.

[12] Regarding the section 17(1)(c) harms, the affected party submits that the concept of undue loss includes damage to a corporation's reputation as acknowledged in Order P-1175. It argues that disclosure of the records would harm its reputation as a regulated entity that has been in compliance with applicable legislation and has been a contributing corporate citizen in the communities in which it operates. It also submits that disclosure would harm the reputations of certain individuals. An affidavit provided by the affected party and sworn by its Vice-President, General Counsel and Corporate Secretary also states that disclosure of the information in the records would "unduly interfere" with the reputation of the affected party and certain individuals.

[13] The assertions of harms in the confidential and non-confidential representations of the affected party are general and unsupported by evidence, and they do not persuade me. The affected party's representations do not describe, let alone establish, how disclosure could reasonably be expected to result in the section 17(1)(b) or (c) harms. While the affected party refers to records 68, 165-189 and 219 in its representations, it does so without addressing any of the specific information in the records and why disclosure of that particular information could reasonably be expected to result in the section 17(1)(b) or (c) harms occurring. This is true of its confidential representations too. Instead of specifically addressing the harms in relation to the information in the records, the confidential representations contain arguments that are based on solicitor-client privilege concerns, which have already been addressed in Interim Order PO-3585-I. As well, the orders the affected party relies on in its representations are not relevant to this appeal because they involved different records and circumstances than those before me. Finally, I do not accept that section 17(1)(b) is established simply because the records contain information that the affected party was not statutorily required to provide to the AGCO; by itself, this is not determinative in establishing the harm under section 17(1)(b). I find that the affected party's representations are vague and speculative, and they do not establish the harms in sections 17(1)(b) or (c).

The consultant does not establish the harms in section 17(1)(a)

[14] The consultant submits that disclosure of the records that remain at issue would reveal his confidential and proprietary methodology, which, in turn, would harm his business and intellectual property interests. He states that he has a property interest in his methodology not becoming public because it would harm his future commercial interests. These brief representations are general assertions of harms to the consultant's commercial interests without specific information on why those harms could reasonably be expected to occur. The consultant alludes to the harms in section

17(1)(a), which requires him to establish that disclosure could reasonably be expected to "prejudice significantly" his competitive position or 'interfere significantly" with his contractual or other negotiations. However, like the affected party's representations, the consultant's representations do not describe, let alone establish, how disclosure could result in significant prejudice or interference.

[15] After submitting his representations on the application of section 17(1), the consultant confirmed to the AGCO that records 68, 169-174 and 183-187 do not contain his methodology and that their disclosure would not harm his commercial interests. I agree. I find that the consultant's representations are vague and speculative, and they do not establish the harms in section 17(1)(a) for any of the records that remain at issue.

The records do not establish the harms in sections 17(1)(a), (b) or (c)

[16] Having found that the representations of the parties relying on section 17(1) do not establish any of the harms claimed, I reviewed the records to determine whether they establish any of the section 17(1) harms based on their content. They do not. My review of the information in records 68, 165-189 and 219 supports my conclusion that disclosure could not reasonably be expected to result in any of the section 17(1)(a), (b) or (c) harms. Accordingly, I find that section 17(1) does not apply to records 68, 165-189 and 219.

ORDER:

I order the AGCO to disclose records 68, 165-189 and 219, in their entirety, to the appellant by **August 2, 2019**, but not before **July 30, 2019**, and to copy me on its disclosure correspondence.

Original Signed by
Stella Ball
Adjudicator

June 27, 2019