Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2468

Appeal PA-040283-1

Ontario Lottery and Gaming Corporation

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NATURE OF THE APPEAL:

The Ontario Lottery and Gaming Corporation (the OLGC) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for:

> Any financial information, statements, records of income/revenue, expense items as normally would appear as source document for the preparation of financial statements, [pertaining] to the Thunder Bay Charity Casino from its opening to the present date.
>
> Specifically, all the financial data that is gathered at the Thunder Bay Charity Casino that… is used internally (i.e. cost control, revenue performance) and externally by the Ontario Lottery and Gaming Corporation (OLGC) for the completion of the consolidated financial statements included in their Annual Report.
>
> Financial information that is not consolidated with the other operation of the OLGC and that it is comprehensive in a way that can give an in depth understanding of the financial performance of the Casino in Thunder Bay.

The requester subsequently narrowed his request for access to the following records:

> Thunder Bay Charity Casino's balance sheets, income statements and cash flow statements, from the opening of the Casino to the present date.

The OLGC operates five charity casinos in Ontario, including the Thunder Bay Charity Casino. In response to the request, the OLGC stated that it "… does not prepare individual site level statements of cash flow or individual site level balance sheets", but that it did prepare "unaudited financial reports for each individual site". The OLGC identified four documents of this nature as the responsive records and denied access to them under the discretionary exemptions at sections 18(1)(a) (valuable information) and 18(c) and (d) (economic and other interests) of the *Act*.

The appellant appealed the decision denying access to the responsive records. In his letter of appeal, he raised the possible application of the "public interest override" at section 23 of the *Act* as an issue.

During the course of mediation, the appellant stated that he was not satisfied with the explanation that the individual charity casinos do not prepare their own financial statements, and that he continues to believe that such records must exist. As a result, the issue of whether the OLGC conducted a reasonable search is also considered in this appeal.

As mediation did not resolve the appeal, it moved to the adjudication stage of the process.

I sent a Notice of Inquiry identifying the facts and issues in the appeal to the OLGC. The OLGC filed representations in response. I then sent a Notice of Inquiry, with a complete copy of the OLGC's representations, to the appellant. The appellant also provided me with representations.

RECORDS:

The records at issue and the exemptions claimed for them at the end of the mediation were:

- unaudited Thunder Bay Charity Casino Operational Reports for March 31, 2001, March 31, 2002, March 31, 2003 and March 31, 2004 – sections 18 (1)(a),(c) and (d).

DISCUSSION:

REASONABLE SEARCH

The Notice of Inquiry that I sent to the appellant advised that he "must provide a reasonable basis for concluding that such records exist". The appellant, however, did not make any representations on this issue. I have, however, considered the appellant's comments on this issue during mediation, as described above. I find that the appellant has not provided any reasonable basis for concluding that additional records beyond those identified by the OLGC are likely to exist. I accept the OLGC's statement, supported by a sworn affidavit from an experienced employee, that no site-specific audited financial statements, or site-specific balance sheets and statement of cash flows are prepared. Accordingly, I am satisfied that it made a reasonable effort to identify and locate responsive records. I am not persuaded that further searches could reasonably be expected to produce additional records in the manner requested.

I therefore dismiss the appeal with respect to the reasonable search issue.

VALUABLE GOVERNMENT INFORMATION/ECONOMIC AND OTHER INTERESTS

The OLGC claims that sections 18(1)(a), (c) and (d) apply to the information at issue. Those sections state:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For sections 18(1)(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Section 18(1)(a): valuable government information

In order for a record to qualify for exemption under section 18(1)(a) of the *Act*, the OLGC must establish that the information contained in the record:

1. is a trade secret, or financial, commercial, scientific or technical information; **and**

2. belongs to the Government of Ontario or an institution; **and**

3. has monetary value or potential monetary value [Orders 87, P-581].

The appellant makes very limited submissions with respect to the application of section 18(1)(a) to the records, stating that it does not apply because "…the information requested does not have monetary value … [or] information such as marketing studies or other information which the OLGC has paid someone else to supply." The OLGC submits that the tests are met under section 18(1)(a) for the reasons that follow.

Part 1: type of information

The OLGC submits:

> The operational reports contain financial data and information. OLGC treats this information as strictly confidential as these reports provide insight into OLGC's charity casinos' cost structure which would provide an advantage to competitors, including US based casinos. The operational reports also provide insight into surveillance and security costs which are to be kept confidential according to AGCO compliance policies.

Based on my review of the records, I find that the operational reports clearly contain financial data and information, including surveillance and security costs.

Part 2: belongs to

The OLGC submits:

> The information contained in the records is the proprietary information of OLGC. The information is not available publicly and has not been released in the public domain. There has been an expenditure of money and the application of skill and effort to develop the information. As such the information belongs to OLGC.

With respect to the second element, for information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trademark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business-to-business mailing lists [Order P-636], customer or supplier lists, price lists, or other types of confidential business information. [PO-1763, PO-1783, PO-2226, PO-2433]

I find that the records do not satisfy Part 2 of the test. In my view, the records do not contain the types of information contemplated in the discussion above. Further, I advised the OLGC in the Notice of Inquiry that, under section 53 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution. The passage as quoted above represents the extent of the OLGC's submissions on this part of the test under section 18(1)(a). Beyond making a bald statement that the information is "proprietary", the OLGC offers no basis for me to find that it has any recognized intellectual property interest in it, nor has it established any basis for concluding that there is a "substantial interest in protecting the information from misappropriation. In my view, this submission is overly broad and does not provide me with sufficient evidence to conclude that this part of the test has been met.

All three parts of the test must be met for section 18(1)(a) to apply, and the fact that Part 2 is not met is a sufficient basis to conclude that the section does not apply. For the sake of completeness, however, I will go on to consider Part 3.

Part 3: monetary value or potential monetary value

The OLGC submits:

> This information would be of substantial value to persons or entities operating other gaming activities in the nearby US market and those operating non gaming activities (such as food and beverage) in the local area and competing markets. This information would also be of value to those persons who offer consulting services to US competitors who are interested in opening gaming facilities in the future. In light of the foregoing the requested information therefore falls under section 18(1)(a).

I also find that the records do not satisfy Part 3 of the test. The OLGC has not provided me with sufficient evidence that explains how or why the records have monetary value or potential monetary value. The OLGC states that the information would be of value to US competitors, but does not indicate who these competitors might be and how they could benefit from the information in operational reports. Another possibility for satisfying this part of the test would be to provide evidence pointing to a market for this information should the OLGC choose to sell it, but again, no such evidence is provided. The submissions the OLGC does make on this point are broad and insufficiently supported by evidence.

I find that section 18(1)(a) does not apply.

Section 18(1)(c): prejudice to economic interests

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [Order PO-2014-I].

As noted previously, in order to establish a reasonable expectation of the harm section 18(1)(c) seeks to avoid, the OLGC must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.

The OLGC submits that releasing the records would result in the type of harm contemplated under this section, stating as follows:

> … the disclosure of this information would prejudice the OLGC in its competitive marketplace and adversely affect its ability to protect its ability to protect its legitimate economic interests. Specifically, the OLGC operates in a highly competitive market for gaming activities. The Commissioner has recognized that the disclosure of certain information by the OLGC would prejudice its economic interests and harm its competitive position [Order P-941].

In addition to Order P-941, the OLGC also refers me to Orders P-1026 and PO-1639.

In Order P-941, the records were market research studies and the submissions of the institution satisfied the Adjudicator that the market research studies could be used to "create and market other gaming activities which directly compete with the lottery products of the [institution]". In this case, I have not been provided with sufficient evidence to support a similar conclusion. I

have not been provided with submissions from the OLGC as to how disclosure of the information contained in the records, would "prejudice its economic interests and harm its competitive position". The OLGC's bald statement to this effect, supported only by the bare assertion that the gaming market is highly competitive, is not sufficient.

In Order P-1026, the records were characterized as "transaction outlines for the interim casino, drafts of the Pre-Opening and Interim Operating Agreement, various 'issues' lists and memoranda, other correspondence and memoranda to the OCC [Ontario Casino Corporation] … from its legal counsel" and other legal correspondence. In that appeal, the adjudicator concluded that, having reviewed the records and the submissions of the parties, disclosure of certain records "could reasonably be expected to result in the OCC being hampered in its ability to negotiate the best possible deal for the province in its continuing negotiations for the permanent casino in Windsor and other casinos…". On this basis, the adjudicator was satisfied that its "economic interests would be prejudiced", and for that reason, the section 18(1)(c) exemption applied. I have not been provided with any similarly persuasive evidence or argument from the OLGC as to how its economic interests would be prejudiced by disclosure of the records at issue in this case.

The OLGC also refers me to Order PO-1639. This case involved information about compensation for the omission of a planned element from the design of Casino Windsor. The evidence showed that the OCC had arrived at a financial settlement with an affected party to avoid potential litigation. The OCC was in the process of developing a third casino at that time and provided a number of different bases for concluding that its economic interests, in that particular context, could reasonably be expected to be prejudiced by the disclosure of detailed information about the settlement it had entered into. I note, in particular, the Adjudicator's finding that "the [OCC] has provided me with sufficient background information to put this appeal and the record in context". This stands in marked contrast to the submissions provided here, which are conclusory and do not offer detailed or convincing evidence to back up the OLGC's bald assertions of harm.

I find that section 18(1)(c) does not apply.

Section 18(1)(d): injury to financial interests

The OLGC also claims that the record is exempt from disclosure under section 18(1)(d). Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians [Order P-1398].

Again, as noted above, in order to establish a reasonable expectation of the harm section 18(1)(d) seeks to avoid, "detailed and convincing" evidence must be provided in support.

The OLGC's representations on this issue are as follows:

> OLGC's revenues to government represent a significant portion of the Government of Ontario's non-tax revenue. The gaming market in Canada and the US [is] populated by many organizations and is becoming increasingly

> competitive. The individual reports related to each of OLGC's gaming sites and related internal documents are essential for the successful operation of its charity casinos. Disclosing financial information and *related internal documents* would provide insight into how OLGC operates its individual gaming facilities…
>
> Disclosure of individual site financial information and the *related internal documents* could result in increased competition for the OLGC and therefore negatively impact the provincial gaming revenues and the programs funded by those revenues.
>
> Accordingly, disclosure of the financial internal documents could reasonably be expected to be injurious to the financial interests of the Government of Ontario. [emphases added]

While I acknowledge the OLGC's concerns, I have not been provided with persuasive, detailed and convincing evidence which explains how the release of the records at issue in this appeal could reasonably be expected to result in increased competition for the OLGC and thereby cause injury to the financial interests of Ontario when, as the appellant properly points out, the Government of Ontario has a "monopoly on casinos". Similarly, the OLGC does not explain how the insight provided by four one-page summary documents would "provide insight" into its operations, or how any insight that could be gained from reviewing the records could reasonably be expected to injure the financial interests of the Government of Ontario. Additionally, the records at issue here consist only of four one-page unaudited "operational reports"; there are no related internal documents as mentioned in the OLGC's representations.

Conclusion

Based on my findings that sections 18(1)(a), (c) and (d) do not apply to the records, I will order them disclosed. As such, it is not necessary for me to consider whether the "public interest override" at section 23 of the *Act* applies in the circumstances.

ORDER

1. I order the OLGC to disclose a copy of the Records by **June 2, 2006** but no earlier than **May 29, 2006**.

2. To verify compliance with this order, I reserve the right to require the OLGC to provide me with a copy of the records disclosed pursuant to provision 1.

Original Signed By
Beverley Caddigan
Adjudicator

April 28, 2006