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

ORDER PO-2556

Appeal PA-050102-2

Ministry of Finance

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NATURE OF THE APPEAL:

The Ministry of Finance (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to proposed new province-wide tobacco control legislation. Specifically, the requester asked for:

> All opinions, reports or recommendations prepared since Jan. 2003 and provided to government ministers, deputy ministers, assistant deputy ministers or their officials or political staff regarding:
>
> - The negative impact of any and all of the proposed measures - and any measures that were considered - on government revenues (retail sales tax, revenue from casinos, bars, pubs or other establishments), whether from the sale of tobacco products or from businesses and government-owned enterprises, such as casinos, in terms of reduced business resulting from the loss of customers who smoke
> - The level of tobacco tax increases, fees, licenses or similar initiatives required against smokers or other consumers or businesses to compensate for these losses in government revenues, or to otherwise enhance government revenues
> - Any other measures that could be taken to mitigate losses resulting from any or all of the proposed actions in the legislation
> - Possible costs resulting from potential liability for compensation to those businesses negatively affected by the legislation
> - The impact of increased black-market tobacco sales and related criminal activity on the economy, government revenues and law enforcement costs.

The Ministry located a number of responsive records and granted partial access to them. Access to the remaining records, or parts of records, was denied on the basis that the undisclosed information was exempt from disclosure under the exemptions in sections 12(1)(b), (c), (d) and/or (e) (Cabinet records), 13(1) (advice to government), 14(1)(a), (c) and (g) (law enforcement), 15(a) and (b) (relations with other governments), 17(1)(a), (b) and/or (c) (third party information), 17(2) (tax information), 18(1)(a), (c), (d) and/or (g) (economic and other interests of Ontario) and 19 (solicitor-client privilege) of the *Act*.

The Ministry notified several affected parties under section 28(1) of the *Act* on the basis that these parties may have an interest in the disclosure of one of the records, a briefing note. One of these affected parties argued that a portion of the briefing note contained information which belonged to it, and objected to the disclosure of this record to the appellant on the basis that it was exempt under section 17(1).

Also in its decision letter, the Ministry noted that the final fee for processing the request was calculated at a lower amount than what had originally been estimated. Based on the amount that was paid as a deposit by the requester, the Ministry agreed to refund the difference to her.

The requester (now the appellant) appealed the decision.

During mediation, the appellant raised the possible application of the compelling public interest provision in section 23 of the *Act* to the records. As further mediation was not possible, the appeal was moved to the adjudication stage of the process. I sought and received the representations of the Ministry and the affected party, initially.

Subsequently, the Ministry granted additional disclosure to portions of Record 32 and renumbered the Index of Records, creating a new document entitled Revised Summary of Exemptions. I then provided the appellant with a Notice of Inquiry setting out the facts and issues in the appeal. I also provided the appellant with a copy of the Revised Summary of Exemptions in which the Ministry set out its exemption claims for each of the records at issue. I shared only portions of the Ministry's submissions and none of the representations of the affected party, as they contain confidential information whose disclosure would reveal the substance of the records. The appellant also provided me with representations in response to the Notice of Inquiry.

RECORDS:

The records remaining at issue, in whole or in part, originated in the following Ministry Branch, Division and Units and consist of documents relating to the Ministry's strategy on tobacco control issues:

- Industrial and Financial Policy Branch - 3 records
- Fiscal and Financial Policy Division - 2 records
- Special Investigations Unit - 37 records (238 pages)
- Program Unit - 18 records

DISCUSSION:

CABINET RECORDS

The Ministry takes the position that many of the records qualify under the mandatory exemptions in sections 12(1)(b), (c), (d) and/or (e), as well as the introductory wording to the section. These exemptions state:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,
>
> (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

(c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

(d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy;

Representations of the parties

The Ministry has made extensive submissions on the application of these exemptions to the records, the majority of which contain information whose disclosure would reveal the contents of those records. As a result, I am unable to describe in detail the submissions made by the Ministry in support of its arguments. With respect to the application of the introductory wording to the section 12(1) exemption to the records, the Ministry submits that:

> . . . [the disclosure of] any record which would reveal the substance of deliberations of Cabinet . . . qualifies for exemption whether or not the record falls within one of the enumerated categories in the various subparagraphs of section 12(1).
>
> Where disclosure of a record would reveal the substance of deliberations of Cabinet, or permit the drawing of accurate inferences with respect to these deliberations, the mandatory exemption in section 12(1) of the *Act* applies and access to the record must be denied, whether or not the record has been placed before Cabinet. Numerous orders have also established that it is possible for records that have never been placed before an Executive Council or its Committees to qualify for exemption under the introductory wording of section 12(1) of the *Act*. For example, reports that had been reviewed by Ministers and were incorporated into submissions made at Cabinet Committees and to Cabinet would permit the drawing of accurate inferences regarding the substance of deliberations of the Executive Council or its Committees. The reports were therefore exempt.

The Ministry provided me with detailed submissions on the application of the section 12(1) exemptions claimed in a 43-paragraph Schedule to its submissions that was not shared with the appellant. It adds that the information contained in the records relates to the formulation and implementation of its proposed tobacco control legislation which it refers to as its "Tobacco Strategy". This was part of an inter-ministerial undertaking involving various staff from the Ministry, Management Board Secretariat, Cabinet Office, the Ministry of Public Infrastructure and Renewal and the Ministry of Health and Long Term Care (the MOHLTC). The working group was comprised of representatives of these agencies who met and considered various options and discussion papers relating to the Government's strategy regarding tobacco use in Ontario.

The Ministry was identified as the "primary member" of the working group and was represented by staff from its Office of the Budget and Taxation and Special Investigations Branch. It assumed the role of advising on taxation and enforcement matters relating to this initiative.

With respect to the application of section 12(1) to the records, the appellant submits that:

> . . . the deliberations of the Executive Council on this issue has past [sic] and the outcome of those deliberations made public. Legislation has been brought forward and passed. Further, it is important to differentiate between a cabinet document that is in all Minister's cabinet binders, or a briefing note in the binder from staff. Having worked in many Minister's office's, I know that sometimes it is difficult to brief the Minister on various issues and notes are sometimes sent to Cabinet for the Minister to review. It is important that those notes are identified and made separate from the other cabinet notes.

Findings with respect to section 12(1)

I will now make my findings on the application of section 12(1) on the various categories of records, based on my review of the records and the representations of the parties.

The Industrial and Financial Policy Branch records (Records 1, 2 [which is identical in substance to Record 18] and 3)

Record 1 is a slide which was intended to form part of a presentation made by the MOHLTC to a Cabinet committee, the Health and Social Services Policy (HSSP), on June 21, 2004. This document was not, however, included as part of the MOHLTC submission to the HSSP or to the full Cabinet on June 23, 2004 (referred to as Record 14 in this appeal). The Ministry argues that regardless of the fact that Record 1 never found its way into the submission to Cabinet or its HSSP committee, it contains similar information to that in Records 2 (and 18) and 3, a draft and the final version of a briefing note for the Minister. It argues that the information included in each of these records included information whose disclosure would reveal the substance of the deliberations of the HSSP and the full Cabinet, thereby qualifying for exemption under the introductory wording to section 12(1).

In my view, Records 1, 2 (which are duplicated at Records 18 and 37) and 3 qualify for exemption under the introductory wording to section 12(1) as their disclosure would reveal the substance of the deliberations of the HSSP on June 21, 2004 and the full Cabinet on June 23, 2004. I find that the records that contain information relating to the tobacco taxation issue that were before Cabinet and one of its committees, the HSSP. While the specific issues addressed in these records was ultimately not put before the HSSP and full Cabinet, those surrounding the entire issue of tobacco taxation were under consideration at those meetings. As a result, this information qualifies for exemption under the introductory wording to section 12(1).

Tax Revenue Division records (Records 11 and 14)

Record 11 is part of a slide presentation made to the Health and Social Services Policy Committee by the MOHLTC, briefing the members of the committee on the contents of a submission to the Priorities and Planning Board (the P & P), a committee of Cabinet, on April 22, 2004. I agree with the Ministry's submission that the disclosure of the contents of this record would reveal the substance of the P & P's deliberations with respect to the subject matter of the record. Accordingly, I find that Record 11 is exempt from disclosure under the introductory wording to section 12(1).

The undisclosed portion at the bottom of the page in Record 14 refers to a particular subject that will be discussed at a "Tobacco Strategy Meeting". The Ministry claims that the excerpt "includes a reference to the request from Cabinet Office" with respect to a particular issue. I can locate no such reference in the portion of Record 14 that is subject to the section 12(1) claim. As a result, I find that this section has no application to the undisclosed information at the bottom of Record 14.

Special Investigations Branch (also described as the Special Investigations Unit) records

The Ministry claimed the application of the exemptions in sections 12(1)(b), (c) and (d) to Record 8, a two-page email message. The Ministry has not, however, provided me with any submissions with respect to how these exemptions might apply, and it is not readily apparent on the face of the record that it does so. As a result, I find that Record 8 does not qualify for exemption under sections 12(1)(b), (c) or (d).

The Ministry submits that Record 9 was submitted by its Tax Revenue Division to a sub-committee of Management Board of Cabinet in July 2004 and that it contains recommendations for action to be taken by the sub-committee. I have reviewed the contents of Record 9 and agree that it qualifies for exemption under section 12(1)(b).

Record 10 is a draft version of Record 11, a submission made by the MOHLTC to the Priorities and Planning Board of Cabinet on April 22, 2004. I find that it is exempt under the introductory wording to section 12(1) as its disclosure would reveal the substance of the deliberations of that committee.

Records 12 and 13 formed part of the MOHLTC's submission to Management Board of Cabinet on September 30, 2004. I find that because they each contain specific recommendations and seek the approval of this particular committee of Cabinet, both Records 12 and 13 qualify for exemption under section 12(1)(b).

Record 15, which is duplicated at Record 37, is a 20-page slide presentation made by the MOHLTC to the Health and Social Services Policy Committee of Cabinet on June 21, 2004. I find that the complete document falls within the ambit of the exemption in section 12(1)(b).

Record 16, which is duplicated at Records 38 and 40, is an incomplete version of a document drafted for discussion purposes with the input of staff from the Ministry, MOHLTC, the Ministry of Economic Development and Trade and the Ministry of Agriculture and Food. The Ministry has applied the mandatory exemption in section 12(1)(b) to this document. The Ministry acknowledges that although the information in this record was to have been provided to the Health and Social Services Policy Committee of Cabinet, this was never actually done. However, the fact remains that the information was specifically prepared for a Cabinet committee and, regardless of the fact that the document was never actually put before the committee, it qualifies for exemption under section 12(1)(b).

Record 17 is a Cabinet submission dated June 21, 2004. Clearly, this document qualifies for exemption under section 12(1)(b).

Record 19 is a 23-page paper prepared by the MOHLTC entitled Analysis document and dated June 15, 2004. Appended to this paper are a number of additional documents (Records 20 to 30). The Ministry indicates that Record 19 and its appendices (Records 20 to 30) were submitted as supporting documentation to the MOHLTC's presentation to the Health and Social Services Policy Committee of Cabinet. Based on my review of this document and its appendices, I find that they contain the supporting information upon which the actual submission to Cabinet was based. Accordingly, in my view, the disclosure of these documents would reveal the substance of the deliberations of either the full Cabinet or one of its committees, in this case the HSSP.

Record 31 is a series of slides prepared for a meeting of the Inter-Ministerial Working Group held on November 15, 2004 to discuss the communications strategy for the initiatives under discussion. The Ministry argues that the contents of this document were approved in the document submitted to the HSSP as Record 19, specifically page 21. The Ministry submits that it is, as a result, exempt from disclosure under the introductory wording to section 12(1). I have reviewed Record 31 and find that its disclosure would reveal the substance of deliberations of the HSSP with respect to the communications strategy to be employed in this initiative. Record 31 is, accordingly, exempt from disclosure under the introductory wording to section 12(1).

The Ministry submits that Record 32, which is duplicated at Record 33, consists of an Issue Note prepared by Ministry of Health and Long-Term Care staff to brief their Minister on the status of the Tobacco Strategy implementation. Portions of this document (pages 1 and 2) were disclosed to the appellant. It argues that the undisclosed portions contain information that was contained in Record 19, the submission to the HSSP, and in other Cabinet submissions and that this information qualifies for exemption under the introductory wording to section 12(1). I have

reviewed the contents of this document and agree that its disclosure would reveal the substance of the deliberations of Cabinet, or one of its committees, in this case the HSSP. As a result, I find that Records 32 and 33 are exempt from disclosure under the introductory wording to section 12(1).

Tax Revenue Division records (Records 34, 36, 39, 43 and 44)

Record 34 consists of the undisclosed portions of a hand-written note taken by the Executive Assistant to the Assistant Deputy Minister (the ADM) of the Tax Revenue Division at a meeting held on November 18, 2004, which was a briefing of the ADM by the Director of the Ministry's Special Investigations Branch. The briefing was intended to update the ADM on the progress of the Inter-ministerial Working Group at its meeting on November 15th, 2004. The Ministry argues that the severed information is "a record of the specific enforcement measures that were discussed during the meeting." It adds that because these items formed part of the potential recommendations for inclusion in the Tobacco Strategy, "their disclosure would reveal the deliberations of Cabinet". I cannot agree with this conclusion, based on my review of the record and the Ministry's submissions. I find that the Ministry has not provided me with the necessary evidentiary link between the contents of this severed record and the actual deliberations of Cabinet or one of its committees on the initiatives discussed in the document. As a result, I find that the severed information in Record 34 does not qualify for exemption under the introductory wording to section 12(1).

Record 36 is a chain of emails passing between Ministry officials and representatives of the Inter-ministerial Committee. Portions of these emails have been disclosed to the appellant. Among other exemptions claimed, the Ministry argues that two portions of Record 36 contain information that is subject to exemption under section 12(1). I do not agree. Rather, I find that the Ministry has not provided sufficient evidence to demonstrate that the severed portions actually contain information whose disclosure would reveal the substance of the deliberations of Cabinet or one of its committees.

Record 39 is an email to which is attached a slide program which was presented to Cabinet's HSSP on June 21, 2004. The email includes a discussion of one of the items addressed in the slide presentation. I find that both the email and the slide presentation qualify for exemption under the introductory wording of section 12(1).

Records 43 and 44 are a four-page fact sheet and an email containing a correction of certain information therein. The Ministry submits that these records were prepared in order to update "the Minister's staff for their meeting with the Premier", thereby qualifying for exemption under section 12(1). In my view, the Ministry has failed to establish the application of the exemption in section 12(1), including the introductory wording, based on its submissions and my review of the contents of these documents. I will address the application of other exemptions claimed for Records 43 and 44 below.

ADVICE OR RECOMMENDATIONS

The Ministry has claimed the application of section 13(1) to Records 2, 3, 4, 6, 7, 12, 13, 32, 34 and 35. In my discussion of the application of section 12(1) to the records, I found that Records 2, 3, 12, 13 and 32 are exempt under that section. I will, accordingly, address the possible application of section 13(1) only to Records 4, 6, 7, 34 and 35. Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563]

Record 4

Record 4 is a Ministry Issue Note which addresses a number of concerns surrounding the impact of a province-wide smoking ban on provincial gaming revenue. The Ministry submits that Record 4:

> . . . provides a detailed explanation of the impact of the ban on specific sectors in the economy and its consequences on the province's finances. The redacted portion provides information to the Minister of Finance to assist in the Ministry's deliberations concerning the Tobacco Strategy on whether to recommend the reversal of the smoking ban or the implementation of alternative strategies to mitigate any forecasted decline in gaming revenues. The inability to fully inform the Minister of all relevant information would prevent a proper and thorough consideration of the matter by the Minister.

I have carefully reviewed the undisclosed portions of Record 4 and conclude that they do not include any information which could reasonably be described as representing "advice or recommendations" within the meaning of section 13(1). Rather, Record 4 simply sets out a number of potential problem areas and forecasts certain outcomes should the proposed course of action be undertaken. I cannot agree that this information represents a suggested "course of action that will ultimately be accepted or rejected by the person being advised". As a result, I find that the undisclosed portions of Record 4 do not qualify for exemption under section 13(1).

Record 5

Record 5 is a lengthy and detailed document entitled "Draft Smoking Ban Impact Analysis" which was prepared by consultants retained by the Ontario Lottery and Gaming Corporation (the OLGC) to examine the ramifications for the gaming industry in Ontario of a smoking ban. The Ministry has also applied the exemptions in sections 15(b), 17(1)(a) and (c) and 18(1)(a), (c) and (d) to this document.

The Ministry takes the position that because Record 5 "includes an impact analysis, conclusions and recommendations to the OLGC for mitigating the impact of the proposed smoking ban", it is exempt from disclosure under section 13(1).

I have carefully examined the 101 pages that comprise Record 5 and conclude that it does not contain "advice or recommendations" within the meaning of section 13(1). I find that the document provides extremely detailed financial information obtained by the consultants and a very detailed analysis of that information which resulted in certain projections and predictions being set forth by the consultants. In my view, however, this information cannot be characterized as either advice or recommendations made to an institution under section 13(1). I will address the application of the other exemptions claimed for this document below.

Record 6

The Ministry has disclosed the contents of Record 6, with the exception of paragraphs 4 and 5, which consist of part of an email exchange between two Ministry staff. I have reviewed the undisclosed portions of Record 6 and find that they contain information that qualifies as "advice or recommendations" for the purposes of section 13(1). The information suggests a specific course of action to be either accepted or rejected by the recipient of the communication. For this reason, I uphold the Ministry's decision with respect to Record 6.

Record 7

Record 7 is an Issue Note prepared by Ministry staff to provide the Minister with "information related to potential queries as to why the Government has not raised tobacco taxes to the national average." The Ministry goes on to submit that this record, or at least some unascertained parts of it, is exempt under section 13(1) as it "includes background information advising the Minister on the matter and on issues that the Minister would be required to act upon", and includes "staff comments advising the Minister with respect to the specific aspects of smuggling".

As was the case with Record 4, based on my review of the contents of Record 7, I am unable to agree that it contains information that qualifies as "advice or recommendations" for the purposes of section 13(1). I do not agree that the record contains a suggested course of action on a particular matter, as is required in order for the exemption in section 13(1) to apply.

Record 34

Record 34 consists of the undisclosed portions of a hand-written note taken by the Executive Assistant to the Assistant Deputy Minister (the ADM) of the Tax Revenue Division at a meeting held on November 18, 2004, which was a briefing of the ADM by the Director of the Ministry's Special Investigations Branch. The briefing was intended to update the ADM on the progress of the Inter-ministerial Working Group at its meeting on November 15th, 2004. The Ministry argues that the severed information represents a record of the specific enforcement measures that were discussed during the meeting and require further approval from affected Ministries. It goes on to add that "[T]he note is a point form summary of the measures being proposed to the ADM-TRD for which approval is required in order to proceed."

I have reviewed the contents of the undisclosed portions of Record 34 and conclude that they do not contain information that qualifies as "advice or recommendations" within the meaning of section 13(1). Several questions are posed in the notes, and answers are provided, but it does not include specific recommendations as to a course of action to be undertaken by the recipient of the communication. For this reason, I find that section 13(1) has no application to Record 34.

Record 35

Similarly, the undisclosed portions of Record 35 do not contain or suggest a course of action that will ultimately be accepted or rejected by the person being advised, as is required for section 13(1) to apply to information. I will address the application of the other exemptions claimed under sections 14 and 18 to this record below.

By way of conclusion, I find that the exemption in section 13(1) applies only to paragraphs 4 and 5 of Record 6, but not to Records 4, 5, 7, 34 and 35.

LAW ENFORCEMENT

The Ministry has claimed the application of the discretionary law enforcement exemptions in sections 14(1)(a), (b), (c) or (g) to Records 6, 8, 9, 35, 43 and 44. In my discussion of section

12(1)(c) above, I found that Record 9 is exempt under that section. It is not, therefore, necessary for me to address the possible application of the law enforcement exemptions claimed for this document as well.

General principles

Sections 14(1)(a), (b), (c) and (g) state:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b)

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Except in the case of section 14(1)(e), where section 14 uses the words "could reasonably be expected to", 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 [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers'*

Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 (C.A.)].

Sections 14(1)(a) and (b): law enforcement matter or investigation

The law enforcement matter or investigation in question must relate to a specific, ongoing matter or investigation. The exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters or investigations [Orders PO-2085, MO-1578].

Under both sections 14(1)(a) and (b), the institution holding the records need not be the institution conducting the law enforcement matter for the exemption to apply [Order PO-2085].

Section 14(1)(g): law enforcement intelligence information

The term "intelligence information" means:

> Information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law. It is distinct from information compiled and identifiable as part of the investigation of a specific occurrence [Orders M-202, MO-1261, MO-1583].

Record 6

In its representations, the Ministry is claiming for the first time the application of section 14(1)(l) to the undisclosed portions of Record 6. This exemption was not claimed in either its original decision letters to the appellant or during the mediation stage of this appeal. In support of its arguments, the Ministry submits that the severed portions of Record 6 refer to certain specific enforcement measures that were recommended for implementation by its Motor Fuels and Tobacco Tax Branch as part of the overall Tobacco Strategy. It argues that the disclosure of the severed portions of one paragraph in Record 6 would reveal "evasion activities that are difficult to detect" which would, if disclosed, "facilitate and promote further unlawful activity."

In my view, the Ministry's arguments in favour of the application of section 14(1)(l) cannot be supported by the evidence which it has tendered. I find that the Ministry has failed to provide me with the type of detailed and convincing evidence required to make the necessary link between the disclosure of the information in Record 6 and the harm alleged under section 14(1)(l). As a result, I find that this exemption has no application to the undisclosed information in Record 6.

Record 8

Record 8 is a lengthy email from the Director of its Special Investigations Branch to the Assistant Deputy Minister, Tax Revenue Division outlining the results of a meeting held with officials from the Ministry of Health and Long Term Care. The subject of that meeting was

potential enforcement activities to be undertaken as part of the overall Tobacco Strategy. The record sets out in some detail the nature of those enforcement activities.

The Ministry claims the application of the exemption in section 14(1)(c) to Record 8 on the basis that its disclosure could reasonably be expected to reveal investigative techniques and procedures that will likely be brought into play as part of the Ministry's enforcement efforts. Based on my reading of the contents of Record 8, I accept the Ministry's arguments and find that this document qualifies for exemption under section 14(1)(c). Because of the nature of the information in this document, I am unable to elaborate further on its contents in this order.

Record 35

Record 35 is a two-page chain of emails sent between various Ministry of Finance staff. The Ministry submits that a portion of paragraph 3 of page one of these email exchanges "discusses enforcement measures related to the ongoing investigation for the detection and prohibition of counterfeit and smuggling activities", thereby qualifying for exemption under sections 14(1)(a) and (g). Because I have found below that this particular segment of Record 35 qualifies for exemption under section 18(1)(g), it is not necessary for me to also consider whether it is exempt under sections 14(1)(a) or (g).

Record 43

Record 43 is a four-page Fact Sheet dated June 8, 2004 which reviews in some detail a particular issue relating to the Government of Ontario's recovery of tobacco and retail sales taxes lost as a result of cigarette smuggling in the early 1990's. The record also sets out certain details of a criminal investigation undertaken by the RCMP against an identified company and the steps being taken by the Government of Ontario to participate in that prosecution. In my view, the disclosure of Record 43could reasonably be expected to interfere with a law enforcement matter within the meaning of section 14(1)(a). As a result, Record 43 is exempt from disclosure under that section.

Record 44

The undisclosed portion of Record 44 refers directly to certain information from Record 43 which I have found to be exempt under section 14(1)(a). For the same reasons, I find that this severance is also exempt under that section.

RELATIONS WITH OTHER GOVERNMENTS

The Ministry claims the application of sections 15(a) and (b) to Record 5 and to certain portions of Record 7. These sections state:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> (b) reveal information received in confidence from another government or its agencies by an institution; or
>
> and shall not disclose any such record without the prior approval of the Executive Council.

Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. Section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships. Similarly, the purpose of section 15(b) is to allow the Ontario government to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern [Order PO-1927-I; see also Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

For this exemption 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.)].

Record 5

Record 5 is a lengthy report received by the Ministry from the Ontario Lottery and Gaming Corporation (the OLGC) entitled "Smoking Ban Impact Analysis". The report was prepared by consultants retained by the OLGC, an agency of the Government of Ontario, and includes very detailed information respecting the revenue impacts anticipated for the calendar year 2005 as a result of the proposed smoking ban on Ontario gaming sites. The report also includes detailed financial information obtained by the consultants from other casino operations located in other jurisdictions, including elsewhere in Canada, the United States and Australia.

In my view, section 15(a) was intended to protect intergovernmental contacts and the relationships that develop between the Government of Ontario, and its agencies, and those outside that sphere. In the case of Record 5, much of the information in the record relates to casino activities outside of Ontario. The information was not, however, supplied to the Government of Ontario as such. Rather, it was provided by other jurisdictions to the consultants retained by the OLGC. In my view, section 15(a) is not applicable to a record whose origin was within the Government of Ontario. I will address the possible application of sections 17(1) and 18(1)(d) to this document below.

Record 7

The Ministry appears to be claiming the application of sections 15(a) and (b) for a small portion of page 6 of Record 7. This excerpt relates to certain actions taken by the Government of British Columbia, including the enactment of an increase in its tobacco tax, which would have been widely known within that province, along with certain information that was contained in "press reports" there. In my view, owing to the wide knowledge of the activities of the Government of British Columbia which are reported in the severed portion of the record, I cannot agree that it was provided to the Government of Ontario in confidence. In my view, any confidentiality in the information to which the Ministry is applying section 15 was lost at the time the Government of British Columbia made this information publicly known. I find that section 15 has no application to the withheld information on page 6 of Record 7.

SOLICITOR-CLIENT PRIVILEGE

The Ministry has claimed the application of the solicitor-client privilege exemption in section 19 to portions of Records 41 and 42. At the time the request was made, section 19 stated as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 was recently amended (S.O. 2005, c. 28, Sched. F, s. 4). However, the amendments are not retroactive, and the original version (reproduced above) applies in this appeal. Section 19 contains two branches as described below. The institution must establish that one or the other (or both) branches apply. In this case, the Ministry submits that a portion of Records 41 and 42 represent a request made to Ministry counsel by a Ministry staff person for legal advice on a legal issue pertaining to the possible disclosure of information contained in another record, thereby qualifying for exemption under branch 1 of section 19.

Branch 1: common law privilege

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 457 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551]. Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Based on my review of the severed information from Records 41 and 42 and my understanding of the circumstances surrounding their creation, I agree that they represent a confidential communication from a client to her solicitor seeking legal advice pertaining to a legal issue. As a result, I find that those portions of Records 41 and 42 to which the Ministry has applied section 19 are properly exempt under branch 1 of that exemption.

ECONOMIC AND OTHER INTERESTS

The Ministry has applied the discretionary exemption in section 18(1)(g) to portions of Records 35, 36, 41 and 42 and sections 18(1)(a), (c), (d) and (g) to Record 5, in its entirety. These 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;
>
> (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

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 of 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(b), (c), (d) or (g) 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.)].

The undisclosed portions of Records 35, 36, 41 and 42

The Ministry has claimed the application of section 18(1)(g) to certain undisclosed portions of Records 35, 36, 41 and 42. In order for section 18(1)(g) to apply, the institution must show that:

1. the record contains information including proposed plans, policies or projects of an institution; and

2. disclosure of the record could reasonably be expected to result in:

   (i) premature disclosure of a pending policy decision, or
   (ii) undue financial benefit or loss to a person.

[Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)]

For this section to apply, there must exist a policy decision that the institution has already made [Order P-726].

With respect to the undisclosed portions of Records 35 and 36, the Ministry submits that the undisclosed information refers to certain proposals to be undertaken by it to counteract counterfeit tobacco products "which ha[s] received policy approval but were not yet in place". The Ministry's representations respecting the application of section 18(1)(g) to the undisclosed portions of Records 41 and 42 were made confidentially and I am unable to reproduce them in this decision.

Based on my review of the information contained in these records, the context in which they were created and the representations of the Ministry, I am satisfied that the disclosure of this information could reasonably be expected to result in the premature disclosure of a pending policy decision respecting the treatment and taxation of tobacco products by the Government of Ontario. As a result, I find that the undisclosed portions of Records 35, 36, 41 and 42 contain information that is exempt from disclosure under section 18(1)(g).

Record 5

As noted above, the Ministry has claimed the application of sections 18(1)(a), (c), (d) and (g) to Record 5, a lengthy and detailed study of the potential impact a smoking ban may have on Ontario gaming that was prepared by a consulting firm for the OLGC.

In support of its claim respecting the application of sections 18(1)(a) and (c), the Ministry submits that Record 5 contains financial and commercial information specific to several identified casino facilities in Ontario which operate in a highly competitive environment. It argues that disclosing site specific information would be injurious to the financial interests of the OLGC and the Government of Ontario. It also submits that the disclosure of this information would adversely affect the OLGC's ability to protect its economic interests and harm its competitive position with respect to casino facilities in other neighbouring jurisdictions. The Ministry goes on to suggest that its competitors in the gaming industry would obtain a better understanding of the impact of a smoking ban should the information in the records be disclosed and that they would aim their promotional material and advertising towards attracting the smoking customer, to the detriment of the Ontario gaming industry.

The Ministry also argues that OLGC revenues represent a significant potion of the Government of Ontario's non-tax revenues and that the disclosure of the information in Record 5 could "be injurious to the Ministry in its management of the province's finances and economy", thereby qualifying for exemption under section 18(1)(d). Finally, the Ministry submits that Record 5 provides advice on specific mitigation techniques to reduce the impact of a potential smoking ban and that the record was prepared "in contemplation and for the purposes of seeking the Government's approval of the mitigation techniques". As a consequence, the Ministry suggests that Record 5 is properly exempt under section 18(1)(g).

I have carefully reviewed the contents of Record 5 and the submissions made by the Ministry on the application of the section 18(1) exemptions, and conclude that the Ministry has provided me with the kind of detailed and convincing evidence required to make a finding that it is properly exempt under sections 18(1)(a), (c) and (d). The record itself is an extremely detailed study of the impact of smoking bans or partial bans on the gaming industry in a number of jurisdictions around the world. The information is then extrapolated to the circumstances present in Ontario, with its mix of casinos, slot machine facilities at race tracks and charity casinos, and certain conclusions are reached.

Record 5 also provides the Ministry with very explicit information about the possible steps it might take to address the amelioration of a smoking ban in order to continue to maximize its revenues from this source. In my view, the disclosure of information of this sort would reveal commercial information about OLGC-owned facilities that has actual, measurable monetary value. As a result, I find that section 18(1)(a) properly applies to this information. I also am of the view that, owing to the nature of the extremely detailed information contained in Record 5, its disclosure to those in other jurisdictions who compete with Ontario in the gaming industry could reasonably be expected to result in harm to the economic interests or competitive position of the OLGC, and, therefore, the Government of Ontario. I accept the Ministry's arguments that competitors could reasonably be expected to make use of the information in Record 5 to

strategically aim their advertising and marketing efforts at those who may wish to continue to gamble in a smoking atmosphere. As a result, I find that this information in Record 5 also qualifies for exemption under section 18(1)(c) and (d).

In conclusion, I find that the undisclosed portions of Records 35, 36, 41 and 42 are exempt under section 18(1)(g) while Record 5, in its entirety, qualifies for exemption under sections 18(1)(a), (c) and (d).

THIRD PARTY INFORMATION

The Ministry claims the application of the mandatory third party exemption in section 17(1) to all of Record 5 and a portion of page 4 of Record 7. I have found above that Record 5 is exempt under sections 18(1)(a), (c) and (d) and I need not, accordingly, consider whether this record also qualifies for exemption under section 17(1). The mandatory exemption in section 17(1) states:

> 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,
>
> (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; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

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), (c) and/or (d) of section 17(1) will occur.

The Ministry indicates that it will "defer" to the representations filed on behalf of the affected party with respect to the undisclosed information on page 4 of Record 7. The appellant has also not addressed the application of this exemption to the information at issue, indicating her satisfaction with my review in order to "verify the Ministry's exemption claim".

The third party, however, has provided extensive and detailed submissions on the application of the exemption to the one-third of a page that has been withheld by the Ministry. The third party represents the authors of an academic "econometric" study, the result of which are quoted in this portion of the record, relating to certain issues surrounding the taxation of tobacco.

Part 1: type of information

The third party argues that the undisclosed information in page 4 of Record 7 includes scientific, commercial and financial information within the meaning of section 17(1). These types of information have been discussed in prior orders:

> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

I have reviewed the contents of the undisclosed information on page 4 of Record 7 and find that they include information which may properly be characterized as commercial and scientific in nature. The information describes a number of conclusions made by experts in the field of economics as a result of a study which they conducted into issues surrounding the taxation of tobacco products. In my view, this information meets the requirements of part one of the test under section 17(1).

Part 2: supplied in confidence

The affected party submits that the information at issue on page 4 of Record 7 was provided to the Ministry with a reasonably-held expectation that it would be treated confidentially. It argues that the information was provided to the Ministry "in the context of efforts to cooperate with the government on issues relating to the affordability of tobacco products in Ontario, the impact of taxation relating to same, including the potential revenue realized by Ontario on other governments from tobacco taxation." It submits that the information was provided in the form of the presentation to the Ministry of a study by its authors, who are economists with a University, retained by a tobacco company. The affected party provided me with further details as to the circumstances surrounding this presentation and the inherent confidentiality surrounding the study and the presentation to the Ministry.

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

Based on the affected party's submissions with respect to the circumstances surrounding the presentation of its study to the Ministry, I am satisfied that the undisclosed information in page 4 of Record 7, which summarizes some aspects of the study, was provided to the Ministry with a reasonably-held expectation that it would be treated confidentially. As a result, I find that the second part of the test under section 17(1) has been met with respect to this information.

Part 3: harms

To meet this part of the test, the institution and/or the affected party 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.)].

The affected party submits that the disclosure of the information that was included in the study and presented to the Ministry could reasonably be expected to result in harm to its competitive position within the meaning of section 17(1)(a). It argues that its competitors in the tobacco industry could make use of the information in the record to seriously undermine the affected party's market position by taking advantage of the conclusions described therein to increase their own market position.

Based on the submissions of the affected party with respect to the possible impact of the disclosure of the conclusions set forth in page 4 of Record 7, I find that it has provided me with sufficiently detailed and convincing evidence to establish a reasonable expectation that harm to its competitive position may result from the disclosure of this portion of Record 7. As all three parts of the test under section 17(1) have been satisfied, I find that the undisclosed information on page 4 of Record 7 is exempt under that exemption.

PUBLIC INTEREST IN DISCLOSURE

The appellant submits that there exists a public interest in the disclosure of the information in the records, as contemplated by section 23 of the *Act*, which reads:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Section 23 does not apply to records exempt under sections 12, 14, 14.1, 14.2, 16, 19 or 22. I have found above that Records 1, 2, 3, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19 to 30, 31, 32, 33, 37, 38, 39, 40, 41, 42, 43 and 44 qualify for exemption under sections 12(1), 14(1) or 19. As a result, the "public interest override" provision in section 23 cannot apply to these records. I will, however, consider the possible application of this provision to Records 5, 7, 35 and 36, which I found to be exempt under sections 17(1) and 18(1).

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

Compelling public interest

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564]. The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

Purpose of the exemption

The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

Representations of the appellant

In support of her arguments in favour of the application of section 16 in the circumstances of this appeal, the appellant submits that:

> . . . it is the job of the government to serve the people. The *Smoke Free Ontario Act* in which we requested related records, has been shown in numerous cases to hurt small businesses in various communities, as well as hurt the charitable organizations in many communities, specifically in the border communities as a whole. If the local businesses and/or charitable organizations were given the information with respect to the real effects of the Smoking Ban, they would have been able to plan accordingly. To rephrase, if these documents were released and used to inform the citizenry about the activities and impacts of the government, local business and charitable organizations would have been able to plan accordingly and possibly protect against loss of business rather than being forced to operate in the dark and suffer losses. I point this out because of FOI documents obtained by [the organization which the appellant represents] from the Ministry of Economic Development and Trade which clearly show that border communities and gaming facilities will suffer a 500 million dollar loss as a result of the smoking ban.

Findings

Again, I must reiterate that the "public interest override provision in section 23 can only apply to those records which I found to be exempt under sections 17(1) and 18(1), namely Records 5, 7, 35 and 36. It must also be noted that the appellant received substantial access to Records 7, 35 and 36; only discreet portions of those records are subject to the exemptions claimed.

Examining the contents of the undisclosed portions of Records 7, 35 and 36, I find that there does not exist the requisite degree of "public interest" in the disclosure of this information to render it "compelling" that it be disclosed. The information that has been severed does not address an inherently "public" interest whose disclosure would serve to inform or enlighten people about the activities of their government or its agencies. I find that the interest in the disclosure of this information is not sufficiently compelling to meet the threshold test under section 23.

With respect to Record 5, I am not satisfied based on my review of this document that there exists a "compelling" public interest in the disclosure of this information as well. The record consists of a very detailed and thorough study of the possible ramifications of the implementation of a smoking ban on the gaming industry in Ontario. It addresses these questions by examining the experience of other jurisdictions and projects these findings into the context of the Ontario gaming industry. In my view, Record 5 does not address the possible ramifications of a smoking ban on "small businesses and charitable organizations", as the appellant is seeking. Rather, Record 5 is focused on the gaming industry in Ontario.

In my view, there does not exist a sufficiently compelling interest in the disclosure of the information contained in Record 5 to warrant the application of the provisions of section 23. I conclude that this provision has no application in the present appeal.

ORDER:

1. I order the Ministry to disclose to the appellant Records 4, 14 and 34 by providing her with copies by no later than **April 5, 2007**.

2. I uphold the Ministry's decision to deny access to the remaining records, and parts of records.

3. In order to verify compliance with Order Provision 1, I reserve the right to require the Ministry to provide me with a copy of the records that are disclosed to the appellant.

Original Signed by: March 15, 2007
Donald Hale
Adjudicator