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

ORDER PO-2526

Appeal PA-050118-1

Ontario Lottery and Gaming Corporation

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NATURE OF THE APPEAL:

The Ontario Lottery and Gaming Corporation (OLGC) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of all the "Site Holder Agreement(s)" between the Ontario Lottery Corporation (OLC) and a named racetrack. In particular, the requester asked for information in any responsive record relating to the following:

1. Inability to access the premises.

2. Performance targets and benchmarks agreed upon.

3. Any conditions that would cause the OLGC to suspend or terminate the payments of slots revenues to the Site Holder.

OLGC identified a Prescribed Lottery Scheme Site Holder Facilities Agreement (the agreement) as being responsive to the request, and relying on sections 17(1)(a) and (c) (third party information) and 18(1)(a), (c) and (d) (valuable government information), denied access to it in full.

The requester (now the appellant) appealed the decision.

Mediation did not resolve the appeal and it was moved to the adjudication stage.

A Notice of Inquiry was sent to the OLGC and a party whose interests may be affected by disclosure of the agreement (the affected party), initially. They both provided representations in response. The affected party asked that all of its representations be withheld due to confidentiality concerns. After considering the affected party's request and determining that most of its representations could be shared, I sent a Notice of Inquiry along with the complete representations of the OLGC and the non-confidential representations of the affected party to the appellant. The appellant provided representations in response. As the appellant's representations raised issues to which I determined that the OLGC and the affected party should be given an opportunity to reply, I sent the appellant's representations (with personal identifiers removed) to the OLGC and the affected party, inviting their reply representations. Only the OLGC filed representations in reply.

RECORD

The record at issue is a Prescribed Lottery Scheme Site Holder Facilities Agreement between the affected party and the OLC.

DISCUSSION:

THIRD PARTY INFORMATION

The OLGC and the affected party claim the application of the mandatory exemptions in sections 17(1)(a) and (c) of the *Act*, which 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,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization; or
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

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, PO-2371, PO-2384, MO-1706].

For section 17(1) to apply, the institution and/or the affected 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) and/or (c) of section 17(1) will occur.

Part 1: Type of Information

The OLGC claims that the records contain "commercial information". The affected party submits that the agreement also contains "financial information".

Analysis

Previous orders have defined "commercial information" and "financial information" as follows:

> *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].

Based on the representations of the parties and my review of the records, I am satisfied that the agreement contains "financial" and/or "commercial" information that falls within the scope of the definitions cited above.

Because information in the agreement qualifies as "financial" and/or "commercial", I find that the requirements of Part 1 of the section 17(1) test have been met. The application of section 18(1) will be addressed later in this decision.

Part 2: supplied in confidence

In order to satisfy Part 2 of the test, the OLGC and/or the affected party must establish that the information was "supplied" to the institution "in confidence", either implicitly or explicitly.

Supplied

The requirement that information be supplied to an institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706]. Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by a third party, even where the contract substantially reflects terms proposed by a third party and where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706, PO-2371]. Except in unusual circumstances, agreed upon essential terms of a contract are considered to be the product of a negotiation process and therefore are not considered to be "supplied" [Orders MO-1706, PO-2371 and PO-2384].

This approach has recently been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)* [2005] O.J. No. 2851 (Reasons on costs at [2005] O.J. No. 4153) (Div. Ct.)); motion for leave to appeal dismissed, Doc. M32858 (C.A.).

In Order PO-2384, I wrote with respect to 17(1) of the *Act*:

> If the terms of a contract are developed through a process of negotiation, a long line of orders from this office has held that this generally means that those terms have not been "supplied" for the purposes of this part of the test. As explained by Adjudicator DeVries in Order MO-1735, Adjudicator Morrow in Order MO-1706 identified that, except in unusual circumstances, agreed upon terms of a contract are not qualitatively different, whether they are the product of a lengthy exchange of offers and counter-offers or preceded by little or no negotiation. In either case, except in unusual circumstances, they are considered to be the product of a negotiation process and therefore not "supplied".
>
> As discussed in Order PO-2371, one of the factors to consider in deciding whether information is supplied is whether the information can be considered relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of section 17(1). Another example may be a third party producing its financial statements to the institution. It is also important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it. The intention of section 17(1) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed.

The OLGC and the affected party provided me with very little assistance regarding whether the withheld information was subject to negotiation. The appellant's representations do not specifically address this part of the section 17(1) test, but he does state that he is not interested in any "site plans and floor plans" set out in the agreement. As he is no longer seeking access to that information (which is referred to in Schedules B and F of the agreement) I will remove that information from the scope of the appeal. I will now consider the remaining information in the balance of the agreement.

Analysis

Based on the authorities reproduced above, and my review of the representations and the records, I conclude that all of the remaining information in the balance of the agreement, except for the information in Schedule A and the first paragraph of Schedule E, consists of mutually generated

agreed upon essential terms that I consider to be the product of a negotiation process. Therefore, in the circumstances of this appeal, I do not consider that information to have been "supplied" by the affected party for the purposes of part 2 of the section 17(1) test.

Since all three parts of the test must be met before the section 17(1) exemption applies this is sufficient to dispose of the application of section 17(1) to all of the remaining information in the balance of the record, except for the information in Schedule A and the first paragraph of Schedule E, which I will deal with in the following section.

In Confidence

In order to satisfy the "in confidence" component of Part 2, the parties resisting disclosure, in this case the OLGC and the affected party, must establish that the supplier of the information in Schedule A and the first paragraph of Schedule E, 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-2043].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected party prior to being communicated to the institution;
- not otherwise disclosed or available from sources to which the public has access;
- prepared for a purpose that would not entail disclosure [PO-2043].

The information contained in Schedule A and the first paragraph of Schedule E is available to the public through a title search.

Accordingly, I am not satisfied that the information contained in Schedule A and the first paragraph of Schedule E was supplied by the affected party in confidence, either explicitly or implicitly within the meaning of section 17(1). I find, therefore, that OLGC and the affected party have not satisfied the requirements of part 2 of the test for information contained in Schedule A and the first paragraph of Schedule E.

As all three parts of the test under section 17(1) must be met, I find that section 17(1) does not apply to the remaining information in the balance of the agreement.

I will now consider whether this information qualifies for exemption under sections 18(1)(a), (c) or (d).

VALUABLE GOVERNMENT INFORMATION

The OLGC claims that the exemptions in sections 18(1)(a), (c) and (d) apply to the remaining portions of the balance of the agreement which, as discussed above, I have found contains "financial" and "commercial" information.

Sections 18(1)(a), (c) and (d) read:

> 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.

Broadly speaking, section 18 is designed 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.

Sections 18(1)(c) and (d) take into consideration the consequences that would result to an institution if a record was released [Order MO-1474]. For sections 18(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 [See *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner*) (1998), 41 O.R. (3d) 464, (C.A.)]. This contrasts with section 18(1)(a), which is concerned with the **type** of the information, rather than the consequences of disclosure (see Orders MO-1199-F, MO-1564).

The OLGC submits that the information in the agreement belongs to it. The OLGC submits that if disclosed, the information could be used by its competitors, as well as other site-holders and stakeholders in the horse racing industry when dealing with the OLGC. In particular, the OLGC submits that with this information, these competitor's and stakeholders could "attempt to manipulate the circumstances that could deprive the OLGC of the full benefit of the site-holder agreement including the full revenue stream". The OLGC submits that the information has monetary value because its disclosure "could impact the business and financial dealings between the OLGC and other site-holders or potential new site-holders".

The appellant submits that the licensing and control of the gaming industry in Ontario resides wholly in the OLGC and disagrees with its assertions.

Section 18(1)(a)

In order for a record to qualify for exemption under section 18(1)(a) of the *Act*, it must be established 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].

Part 1: Type of information

The definition of "commercial" and "financial" information in section 18(1) mirrors the way the terms are defined for the purposes of a section 17(1) analysis. As noted above, I found that information in the agreement also meets the definition of "commercial" and/or "financial" information under section 18(1).

Part 2: Belongs to the OLGC

In Order PO-1763 [upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)* (April 25, 2001), Toronto Doc. 207/2000 (Ont. Div. Ct.)], Senior Adjudicator David Goodis reviewed the phrase "belongs to" as it appears in section 18(1)(a) of the *Act*. After reviewing a number of previous orders, he summarized the status of the relevant previous orders as follows:

> The Assistant Commissioner [Tom Mitchinson] has thus determined that the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right to simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. 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, trade mark, 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. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, there is a quality of confidence about the information, in the sense that it is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others. (See, for example, *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.), and the cases discussed therein).

Analysis

Based upon my review of the records and representations, I have concluded that the withheld information does not "belong to" the OLGC. I find that I have not been provided with sufficient evidence to demonstrate that the mutually generated agreed upon terms which formed part of a negotiation process constitute the intellectual property of the OLGC or are a trade secret of the OLGC. Nor have I been provided with evidence to indicate that the OLGC expended money, skill or effort to develop the information. Therefore, I find that the information sought to be withheld does not "belong to" the OLGC within the meaning of section 18(1)(a) of the *Act*. Part 2 of the test under that section has not, therefore, been met.

As all three parts of the test must be met, this is sufficient for me to find that section 18(1)(a) does not apply.

Section 18(1)(c)

Citing Orders P-1190 and PO-1639, the OLGC submits that there is a reasonable expectation that disclosure of the agreement would prejudice the OLGC in its competitive marketplace, and adversely affect its ability to protect its legitimate economic interests. Specifically, the OLGC submits that it operates in a highly competitive gaming market, and as set out in Order P-1026, this office has recognized that the disclosure of certain information by the OLGC would prejudice its economic interests and harm its competitive position.

The OLGC further submits that disclosure of the agreement could reasonably have an effect on future negotiations or business dealings with other site-holders or potential new site-holders by placing them in a "preferable position and allow such site-holders to use the information to the disadvantage of the OLGC".

The appellant submits that the licensing process for the gaming industry in Ontario is under the exclusive control of the OLGC. Hence, there is no competitor that can prejudice the OLGC's

interests. The appellant also asserts that only race track operators can enter into negotiations with the OLGC, and each site-holder agreement is site-specific.

In reply, the OLGC submits that disclosure of the agreement could impact the "negotiations conducted between OLGC and the racetrack in question or other racetracks" and that it "would be at a commercial disadvantage in its negotiations with each of the other racetracks".

Analysis

I find that the OLGC has failed to provide me with sufficiently detailed evidence to establish that disclosure could reasonably be expected to result in the harm contemplated by the section 18(1)(c) exemption.

In Order P-1026, the section 18(1)(c) exemption was claimed for draft agreements prepared in the course of the negotiations for an Interim Operating Agreement for a casino. The institution in that appeal claimed that disclosure of the draft agreements would provide a complete picture of the positions and strategies it adopted during the course of the negotiation and would negatively affect its current negotiations relating to establishing a permanent casino. In the representations filed in that appeal the institution provided a number of examples of positions it initially took which changed significantly during the negotiation process. The institution in that appeal also referred to three categories of casino negotiations that were ongoing or to take place to demonstrate the harm which would flow from disclosure. In upholding the application of the exemption, Adjudicator Anita Fineberg found that, based on her review of the records and submissions, disclosure of the requested records could reasonably be expected to result in the institution "being hampered in its ability to negotiate the best deal possible for the province in its continuing negotiations for the permanent casino" and other casinos.

The facts are very different in the appeal before me. In this case, the appellant does not seek any drafts, but rather the final agreement. Furthermore, unlike in Order P-1026 (or for that matter Orders P-1190 or PO-1639) the OLGC gives no particular submissions on how it will suffer harm or identify any specific negotiation that may be affected adversely by disclosure of the agreement. In my view, Order P-1026 is therefore distinguishable because of these differing circumstances.

I find that the evidence and submissions tendered by the OLGC in support of its argument that the agreement is exempt under section 18(1)(c) are speculative at best, and, unlike in Orders P-1026, P-1190 or PO-1639, do not describe in sufficient detail how the disclosure of the information contained in the agreement could reasonably be expected to result in the harm envisioned by section 18(1)(c). The generalized statements made by the OLGC in support of its position do not satisfy the "detailed and convincing" evidentiary standard accepted by the Court of Appeal in *Ontario* (*Workers' Compensation Board*), cited above.

Accordingly, I find that the agreement does not qualify for exemption under section 18(1)(c).

Section 18(1)(d)

The harm addressed by section 18(1)(d) is similar, but broader, than section 18(1)(c), and this exemption is intended to protect the broader economic interests of Ontarians [Order P-1398 upheld on judicial review [1999], 118 O.A.C. 108 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.)].

The OLGC's representations on section 18(1)(d) consist of the following:

> OLGC's revenues to government represent a significant portion of the Government of Ontario's non-tax revenue. OLGC's gaming facilities operate in a competitive marketplace specifically those that operate near the US border. Disclosure of the site holder agreement that OLGC and the affected party maintain to be a confidential internal document could be injurious to the financial interests of the government. The site holder agreements and related internal documents are essential to the operations of the slot facilities at racetrack and for future development. According to the OLGC's audited 2003-2004 Financial Statements, OLGC slot operations earned $946,185 million in net revenue. This money was allocated by government to the Ontario Trillium Foundation, an agency of the Ministry of Culture, for charities and not-for-profit organizations, and to the Ministry of Health and Long-Term care for operations of hospitals as well as problem gambling and related programs.
>
> The disclosure of the record requested could reasonable have an effect on future negotiations or business dealings with other site-holders or potential new site-holders by placing such site-holders in a preferable position and allow such site-holders to use the information to the disadvantage of the OLGC. Disclosure could prejudice financial negotiations/relationships with site holders as not all sites have the same financial arrangements with OLGC.
>
> Disclosure of the site-holder agreements could negatively impact the provincial gaming revenues and the programs funded by those revenues.
>
> Accordingly, disclosure of the site-holder agreements could reasonably be expected to be injurious to the financial interests of the Government of Ontario and the ability of the Government of Ontario to manage the economy of Ontario. The requested information therefore falls within section 18(1)(d).

Again, the OLGC's representations are not persuasive. The OLGC has failed to provide the appropriate foundation to establish a reasonable expectation of harm to the "financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario". These are serious concerns warranting careful consideration, which are simply not established by the assertions made by the OLGC that are speculative at best. Again, the generalized statements made by the OLGC in support of its position do not satisfy the "detailed and convincing" evidentiary standard accepted by the Court of Appeal in *Ontario (Workers' Compensation Board)*, cited above.

Accordingly, I find that the records do not qualify for exemption under section 18(1)(d).

ORDER:

1. I order OLGC to disclose to the appellant the agreement, with the exception of schedules B and F, by sending him a copy by **December 22, 2006**, but not before **December 18, 2006**.

2. In order to verify compliance with provision 1 of this order, I reserve the right to require OLGC to provide me with a copy of the information disclosed to the appellant.

Signed by: November 17, 2006
Steven Faughnan
Adjudicator