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

INTERIM
ORDER PO-2651-I

Appeal PA06-213

Ontario Lottery and Gaming Corporation

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

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 information relating to the 1996/1997 proposal made by a named corporation, the affected party in this appeal, regarding the Niagara Falls Casino/Gateway Project (the Project). In particular, the requester sought the following information:

a. all information given by the affected party to government representatives (including OLGC);

b. all information developed within the government (including OLGC) in considering the affected party's proposal; and

c. all information and communications to the affected party from government representatives (including OLGC).

The OLGC located responsive records (Batch 1 records) consisting of:

- the affected party's proposal submitted in March 1997 to the OLGC; and,
- responses to follow-up questions posed during the selection process in 1996-1998.

The OLGC denied access to these records pursuant to the mandatory third party exemptions in sections 17(1)(a) and (c), and the discretionary exemptions in sections 18(1)(a), (c) and (d) (economic and other interests) of the *Act*. The OLGC also advised the requester that it had not been able to locate all of the records that may be responsive to the request, as it anticipates that those records may no longer be in existence, due to the passage of time and the operation of its records retention schedules. Finally, the OLGC indicated that it could not respond on the government's behalf regarding the request.

The requester (now the appellant) appealed the OLGC's decision to deny access to the responsive records.

During mediation the affected party advised the mediator that it objected to the disclosure of any records relating to this appeal. Also during mediation the OLGC located additional records and issued a supplementary decision denying access to these additional records (Batch 2 records) pursuant to the discretionary exemptions in sections 13(1) (advice or recommendations), 17(1)(a), (b) and (c) and 18(1)(a), (c), (d) and (e) of the *Act*. The OLGC confirmed that it does not have any additional records responsive to the request, and the appellant did not take issue with this. Accordingly, the existence of additional records is no longer an issue in this appeal.

As further mediation was not successful the file was transferred to me to conduct the inquiry. I sent a Notice of Inquiry, setting out the facts and the issues in this appeal, to the OLGC and the affected party, initially, seeking their representations. I received representations from both the OLGC and the affected party. The representations on behalf of the affected party were provided by a company which is the successor in interest to the original proponent in the records, as the original proponent corporation is no longer in operation.

In its representations the OLGC raised the application of the discretionary exemption in section 19 (solicitor-client privilege) of the *Act* for the first time. Therefore, the late raising of this exemption, as well as the application of this exemption, were added to the issues in this appeal.

Before seeking representations from the appellant I sent a Supplementary Notice of Inquiry to the OLGC and the affected party seeking its representations on the late raising of the exemption in section 19, as well on any personal information contained in the records. I only received a letter in response from the OLGC declining to make representations, other than stating that the OLGC records do not contain personal information. I sent a complete copy of the OLGC and the affected party's representations to the appellant, along with a Notice of Inquiry, seeking his representations. I received the appellant's representations in response.

RECORDS:

The records or portions of records at issue are described in the following index:

Index of Records

Batch 1

TR-6-1:	Section I – Identification of Proponents
TR-6-2:	Section II – Casino Complex
TR-6-3:	Section III – Tourist Attractors
TR-6-4:	Section IV – Executive Summary and Table of Contents
TR-6-5:	Appendix 1 – Graphic Design Drawings
TR-6-6:	Appendix 2 – The affected party's Gaming Licenses
TR-6-7:	Appendix 3, Book 1 of 2 – Financial Information Exhibits A and B – Form 10-K Exhibits C and D – Form 10-Q Exhibit E – Prior Bankruptcy Filings (1 page) Exhibit F – Significant Litigation (2 pages) Exhibits G and H – Unaudited Financial Statements
TR-6-8:	Appendix 3, Book 2 of 2 – Financial Information Exhibits I through N – Unaudited Financial Statements Exhibits O through S – Balance Sheets

TR-6-9: Appendix 4 – The affected party's Security Plan
Exhibit A – Underage Gaming Policy
Exhibit B – Security Plan

TR-6-10 Appendix 5 – Ancillary Information

TR-6-11 2 Videos (3D video presentation and corporate video)

TR-6-12 Financial Statements

TR-6-13 Financial Statements

TR-6-14 Financial Statements

TR-6-15 Financial Statements

TR-6-16QA Responses to Presentation Follow-up Questions from Ontario Casino Corporation (OCC) Selection Committee

TR-6-17QA Economic Impact Analysis

TR-6-18QA Responses to Presentation Follow-up Questions

TR-6-19QA Responses to Additional Questions

Batch 2:

1. Documents prepared for June 26/27, 1997 Selection Committee meeting setting out analysis of proposals by evaluation/analysis teams

2. Documents prepared for July 1997 Selection Committee meetings with proponents including agenda, names of persons attending the presentations for each proponent, power point presentations presented to the Selection Committee on June 26/27, 1997, based on evaluation/analysis teams' June 1997 "draft reports"

3. Document entitled Supplemental Report to Selection Committee from one of the evaluation/analysis teams

4. September 24, 1997 letter from the affected party to OCC, with attachment

5. OCC document entitled "Materials for Meeting with Proponents October 1997"

6. Documents prepared for October 28/29, 1997 meetings with proponents. Includes agenda, summary information regarding each proponent, proponents' responses to follow-up questions

7. November 10, 1997 letter from the affected party to OCC

8. December 5, 1997 letter from the affected party to OCC, with attachment

9. December 8, 1997 letter from the affected party to OCC, with attachment

10. February 6, 1998 letter from the affected party to OCC, with attachment

11. February 10, 1998 letter from the affected party to OCC, with attachment

12. February 18, 1998 letter from OCC to the affected party, with attachment

The OLGC claimed sections 17(1) and 18(1) for all of the records in Batch 1 and for portions of the records in Batch 2. It also claimed the exemptions in sections 13(1) and 19 for portions of the records in Batch 2.

DISCUSSION:

BACKGROUND

As the records in this appeal date back at least 10 years, it is useful to provide certain background information. The OLGC states in its representations that:

> The legislative authority of the OLGC is set out in the *Ontario Lottery and Gaming Corporation Act, 1999*. Classified as an Operational Enterprise Agency, OLGC has a single shareholder, the Government of Ontario... OLGC is the successor in interest to both the Ontario Lottery Corporation and the OCC...

According to a February 18, 1998, OCC press release:

> The OCC issued a Request for Proposals [RFP] for the Niagara Falls Casino/Gateway Project on September 12, 1996. The RFP called for proposals for a full-service casino complex and tourist development. The private sector was provided with maximum flexibility in proposing the size and scope of the casino complex and the type of tourist attractor(s) to be developed.
>
> The deadline for proposals was March 13, 1997. Four companies submitted proposals to bid on the project: [names of proponents, including affected party]. An independent Selection Committee reviewed the proposals to select the one that best met the selection criteria. The Committee's decision was based on the merits

> of the proposals, the advice of experts in the casino industry, an evaluation of the bidders' ability to develop and finance the project, and their management experience and depth.
>
> Of the four companies that submitted proposals, the Preferred Proponent [the company that submitted the winning proposal] was considered to have most closely met the selection criteria for the project, thus allowing it to begin negotiations with the OCC on the relevant business and operating agreements. The deadline for agreement on key issues is 60 days. Following the successful outcome of these negotiations, the Preferred Proponent will assume responsibility for operating the interim Casino [Niagara, which had originally opened in December 1996].

In November 1998, the winning proponent took over the everyday operations of the interim Casino Niagara pending the building of the Niagara Fallsview Casino Resort (the Project), which began in October of 2001. In April 2003, the Ontario Government announced that Casino Niagara would remain in operation after the opening of the Project, which opened in June 2004.

THIRD PARTY INFORMATION

The OLGC claimed in its decision letters the application of the mandatory exemptions at sections 17(1)(a) and (c) to all of the records, along with the application of section 17(1)(b) to the Batch 2 records. However, it only provided representations on the application of sections 17(1)(a) and (c) to certain portions of the Batch 2 records. The relevant portions of section 17(1) 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;
>
> (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;

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.

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].

Part 1: type of information

The OLGC submits that the records contain the commercial and financial information of the affected party. These types of information have been discussed in prior orders, 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].

Although the affected party and the appellant provided representations in this appeal, each of their representations were approximately four paragraphs in length and did not directly address the application of the exemptions set out in the Notice of Inquiry.

Based on my review of the records at issue, I find that they contain commercial information, that is, information related to the affected party's bid to provide services regarding the project [Order MO-2197]. The records also contain the affected party's financial information filed in support of the bid [Order PO-2010]. Therefore, part 1 of the test has been met.

Part 2: supplied in confidence

Supplied

The requirement that it be shown that the information was "supplied" to the 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 the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706].

In confidence

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].

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 person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

The OLGC submits that:

> In accordance with normal procurement practice, this information has been consistently treated by the parties as confidential.

The affected party submits that:

> …all material provided to the OLGC was provided in confidence with the understanding that such information would not be provided to any third party...

The appellant submits that:

> Whatever confidentiality the [affected party] information may have had during the bid process has long since been lost. [The affected party] was not even the winning bidder. And the information is now long stale-dated.

Based on my review of the records, the parties' submissions and the RFP, I accept that the information at issue was supplied with a reasonable expectation of confidentiality to the predecessor of the OLGC, the OCC, by the affected party as part of the response to the RFP for the Project. In particular, the RFP contained the following clauses that reflect the parties' expectation of confidentiality:

- Any information received by the proponent relating to the project, gained through the RFP process or otherwise, is to be treated in strict confidence.

- Proponents and participants must not disclose any details pertaining to their proposal and the selection process in whole or in part to anyone not specifically involved in their proposal, unless written consent is obtained from the [OCC] prior to such disclosure…

- Financial information submitted in accordance with the RFP will be treated by the [OCC] as confidential…

- The OCC is required under the *Freedom of Information and Protection of Privacy Act* to protect the confidentiality of [the personal information] in its possession and control, and to use the information only for the purposes for which it is collected or for consistent purposes.

Therefore, I find that part 2 of the test has been met.

Part 3: harms

To meet this part of the test, the institution and/or the third 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 OLGC did not provide representations on part 3 of the test.

The affected party submits that:

> The requested materials would provide confidential and proprietary information to an individual solely for the purpose of advancing that individual's competitive position in litigation. There is no public interest in providing such information to the party and will increase the likelihood of undue loss to [the affected party].

The appellant did not provide direct representations on this issue, but did state that due to the age of the information at issue the competitive bidding process or the management of the affected party or the OLGC could not possibly be affected in any way by disclosure.

Analysis/Findings re: Sections 17(1)(a) and (c)

The affected party did not provide me with details of the litigation referred to in its representations nor any information as to how disclosure of the records would advance the appellant's position in this litigation. Therefore, the affected party's submissions do not persuade me that disclosure of the records would prejudice significantly their competitive position or interfere significantly with the contractual or other negotiations of the affected party.

It is not enough to provide generalized statements of possible harm, which is all that the affected party has provided. Its submissions lack the requisite degree of specificity in describing the anticipated harms it alleges will flow from the disclosure of the information.

Moreover, I agree with the analysis of Senior Adjudicator John Higgins in Order PO-2490 concerning the application of sections 17(1)(a) and (c) to records that are the subject of litigation. In that Order, he stated:

> In my opinion, the reference to "competitive position" in section 17(1)(a) of the *Act* was not intended to include a litigant's competitive position in civil litigation. As noted above, previous orders of this office have found that section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions, and the Divisional Court endorsed this view in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.). In my view, this is aimed at protecting such assets in the competitive context of the marketplace, rather than before the courts…
>
> In addition, it is in my view a curious and unsustainable argument to suggest that the outcome of a lawsuit before the civil courts could produce an "undue" loss or

> gain. The whole purpose of litigation, and the unswerving ambition of the Canadian judiciary, is to produce results that are fair and just. In my view, this argument cannot be upheld. Section 17(1)(c) cannot possibly include "undue gain or loss" in the context of litigation.

The affected party did not provide any other submissions relating to the harms in sections 17(1)(a) and (c). The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

I find that this is not an exceptional case where harm can be inferred from other than the records at issue and the evidence provided by the affected party [Orders PO-1745, PO-2020]. I accept the appellant's position that due to the age of the records, the information at issue would be of little value to the affected party's competitors. Disclosure of the information would not significantly prejudice the affected party's competitive position or result in undue loss or gain. Disclosure of the information would also not interfere significantly with the contractual or other negotiations of a person, group of persons or organization. Therefore, paragraphs (a) and (c) of section 17(1) do not apply to the information at issue.

I find that "detailed and convincing" evidence has not been provided that disclosure of the information at issue would prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization, nor that disclosure of the information would result in undue loss or gain to any person, group, committee or financial institution or agency. Therefore, I find that paragraphs (a) and (c) of section 17(1) do not apply to the information in the records.

Analysis/Findings re: Sections 17(1)(b)

The OLGC claimed the exemption in paragraph (b) of section 17(1) in its supplementary decision letter but made no representations on this issue. Nor did the affected party provide representations on this section.

In the absence of representations from the OLGC and the affected party, I find that I do not have "detailed and convincing" evidence to establish that release of the undisclosed information in the records would result in similar information no longer being supplied to the OLGC. Moreover, based on the type and age of the information, as discussed above, I find that section 17(1)(b) does not apply to information in the records.

Conclusion

Accordingly, I find that part 3 of the harms test with respect to sections 17(1)(a), (b) and (c) has not been met with regard to the undisclosed information in the records.

As none of the information in the records at issue has met all three parts of the test, as required under section 17(1), I find that this exemption does not apply.

ECONOMIC AND OTHER INTERESTS

The OLGC has claimed the discretionary exemptions at sections 18(1)(a), (c) and (d). 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;

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

In its representations, the OLGC's provided submissions with respect to the applicability of Section 18(1) only to the following portions of records in Batch 2:

Record 1

1. Page 4 of the Evaluation section
2. Pages 7, 9, 11, 12, 17, 18, 19, 22, 23 and 24 of the Summary of Analysis Findings section
3. Pages 3, 4, 18, 19, 24, 25, 30 and 33 of Appendix A
4. Pages 3, 5, 6 and 8 of Appendix B
5. Pages 6 and 7 of Appendix C
6. Page 3 of Appendix D
7. Appendix H
8. Appendix I
9. Pages 5, 6, 7, 8, 10, 11, 12, 21, 22, 23 and 27 of the record titled "White Paper Evaluation of Proponent Proposals Related to an assessment of Economic Development
10. Tables A1, A2, A3, A4, 4, 4A; 5, 5A, 6, 6A, 7 and 7A of Appendix A - Economic Impact Calculation of Casino and Attractor Components by Proponent
11. Pages 3, 4, 6, 8, 9, 11, 12, 15, 16, 19, 21, 22, 23, 24, the table on page 30, the table on page 34, the table on page 35, the table on page 43, the table on page 44, the table on page 52, the table on page 53 of the record titled "Niagara Falls Casino/Gateway Project White Paper Evaluation of Proponent Proposals Financial"
12. Pages 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 23, 26, 28, 29, 31, 32, 33, 34, 35, 36 and 38 of the record titled "White Paper Evaluation of Proponent Proposals Related to an Assessment of the Business Plan"
13. Pages 4, 5, 6, 7, 8, 11, 17, 20, 21, 22, 23 and 26 of the record titled "White Paper Evaluation of Proponent Proposals Related to an Assessment of Management Expertise"
14. Pages 3, 4, 6, 7, 9, 10, 15, 18, 19 and 23 of the record titled "White Paper evaluation of Proponent Proposals Related to an Assessment of Tourist Attractors"
15. All of the record titled "Report to Selection Committee from the Legal Team" June 24, 1997, prepared by a named law firm

Record 2

1. Tab 2
2. Tab 5
3. Pages 1 through to 8 of Tab 6
4. Tab 7
5. Tab 8
6. Tab 9
7. Tab 10
8. Record titled "Report to Selection Committee from Legal Team"

Record 3
All of record 3

Record 5
The information contained on page 12

Record 6
Tab 2 as listed in the Table of Contents

As the purpose of section 18(1) is to protect the ability of institutions to earn money in the marketplace, and as I only received representations in support of this exemption from the OLGC, I will only deal with the records in Batch 2 that the OLGC submits are subject to this exemption, which records are described as follows:

- Record 1 - is a draft evaluation paper containing documents prepared for the June 26 and 27, 1997 Selection Committee meetings setting out the factual information in, and evaluations of, the proposals submitted for the Project.

- Record 2 - contains documents prepared for the July 1997 Selection Committee meetings with proponents; the information at issue includes names of persons attending the presentations for the affected party and power point presentations concerning the affected party's proposal presented to the Selection Committee on June 26 and 27, 1997. The information in this record is based on the information in Record 1 of Batch 2.

- Record 3 - is a document entitled "Supplemental Report to Selection Committee" from one of the evaluation/analysis teams.

- Record 5 is a document entitled "Materials for Meeting with Proponents October 1997"; page 12 of this record contains an evaluation of certain information in the affected party's proposal.

- Record 6 - contains documents prepared for the October 28 and 29, 1997 meetings with proponents; tab 2 contains summary information regarding the affected party's proposal along with its responses to follow-up questions.

As stated above, the RFP for the Project was issued in September 1996, and the records were submitted to the OCC, the predecessor of the OLGC, in 1997. All of the information at issue in these five records, Records 1 to 3, 5 and 6, concerns the affected party's proposal. This information was utilized by the OCC Selection Committee to evaluate whether to accept the affected party's proposal to construct and operate the Project.

Section 18(1)(a): information that belongs to government

For section 18(1)(a) to apply, the OLGC must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information
2. belongs to the Government of Ontario or an institution, and
3. has monetary value or potential monetary value.

Part 1: type of information

Only the OLGC made direct representations on section 18(1)(a). The OLGC submits that:

> Each of the records contains the financial and commercial information of OLGC in its business relationship with a third party for the provision of services by that third party that are integral to the operation of OLGC's commercial business.

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 at issue meets the definition of commercial and/or financial information under section 18(1).

Part 2: belongs to

The term "belongs to" refers to "ownership" by an institution. It is more than the right 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, the information 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 [Order PO-1763, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.)].

The OLGC submits that:

> The financial and commercial information of OLGC and the analysis of OLGC of the information provided by the third party in each of the requested records is information that, in each case, belongs to OLGC as it is for the provision of services by the third party that are integral to OLGC's business…
>
> OLGC has a statutory duty, under the *Ontario Lottery and Gaming Corporation Act, 1999*, to carry out the commercial activity that resulted in the creation of the records. This commercial activity represents a core function of OLGC. The information was created, at the expense of OLGC and each party, pursuant to a competitive bid process and for no other purpose and does not purport to bind any other party. As such, no other party has any ownership interest in the information.

Analysis/Findings

In my view, none of the information at issue contained in the records has inherent monetary value to the OLGC. Any interest that might exist in these records in the traditional intellectual property sense or in law as required by section 18(1)(a) could only belong to the affected party, not the OLGC, as the information at issue reflects the details of the proposal provided by the affected party to the OLGC. Whether the disclosure of that information would result in harm to the affected party has been determined in my discussion on the application of the mandatory exemption at section 17(1) [Order MO-2103-I].

Accordingly, I do not accept that the information at issue "belongs" to the OLGC within the meaning of part 2 of the test for section 18(1)(a). As part 2 of the test has not been met, it is not necessary for me to consider whether part 3, the harms component applies, however, for the sake of completeness I will consider this part of the test under section 18(1)(a).

Part 3: monetary value

To have "monetary value", the information itself must have an intrinsic value. The purpose of this section is to permit an institution to refuse to disclose a record where disclosure would deprive the institution of the monetary value of the information [Order M-654].

The OLGC submits that:

> The information in the records is the confidential business information of OLGC and has monetary value. The records were created at the expense of OLGC and the third party, and the records contain financial and commercial data that would be valuable to a party that was interested in bidding on, marketing to or lobbying OLGC to pursue an operator relationship with OLGC in the future.

> The information is consistently treated by OLGC in a confidential manner and represents information concerning an activity that is integral to the operation of OLGC's commercial business. If disclosed, the information could be used by other parties to defeat or alter the business arrangements or purposes of OLGC and otherwise deprive OLGC of the full benefit of the business arrangements. As such, confidential business information of this nature has an intrinsic value.

Analysis/Findings

I do not accept that the OLGC's reasons for keeping the records at issue confidential result from a fear of misappropriation of the information by others. In particular, I am not satisfied that the information could be used by other parties to defeat or alter the business arrangements or purposes of OLGC and otherwise deprive OLGC of the full benefit of the business arrangements. The information is more than ten years old and concerns the analysis of a proposal that was not acceptable to the OLGC. The OLGC has not provided sufficient evidence for me to find that the information at issue has monetary value or potential monetary value to the OLGC. Accordingly, I find that the OLGC has failed to satisfy part 3 of the test. Therefore, section 18(1)(a) does not apply to this information.

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

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

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

The OLGC representations on the applicability of section 18(1)(c) in this appeal are general and do not address the specific records at issue. The OLGC submits that:

> In the event that the terms of the business arrangement with each operator [of the province's commercial casinos] or their competitors were disclosed, then OLGC's ability to enter into new business relationships in an efficient economic manner would be compromised at the time that the operator agreement was renegotiated or a new operator was to be selected through a competitive bid process…
>
> There are a limited number of potential proponents that could respond to a competitive bid process for the operation of a commercial casino in Ontario. It is

important that any bids received have competitive pricing. Disclosure of the requested records would severely inhibit the ability of OLGC to obtain competitive pricing…

In the alternative, all proponents could inform themselves of the strategic elements of the proposal and determine what elements were significant to OLGC, and then specifically ensure that their proposals focused on those targeted areas, regardless of whether or not that focus misrepresented the true ability of the proponent to provide the required service, to the detriment of the competitive bid process.

OLGC's financial position would be harmed if OLGC enters into a business arrangement with a proponent that is not truly capable of performing the required services. This would result in lost profits for OLGC…

With the benefit of the insights gained from reviewing the records at issue, [the existing operators of the other commercial casinos] may then put pressure on OLGC to renegotiate their operator agreements prior to the expiration of their agreements. Any such negotiations could include the compensation structures, but could also open the door to negotiations on other points that are currently to OLGC's benefit.

Further, the disclosure of the records requested could reasonably have an effect on future negotiations or business dealings with potential new landowners of premises for any new proposed commercial casino location by placing such potential new landowners in a preferable position in negotiating new business arrangements with OLGC, and would result in the reduced flexibility of OLGC to source the same services through open competition.

Disclosure of the severed portions of the records will also reduce OLGC's flexibility in negotiating commission rates that are favourable to OLGC, with other gaming stakeholders including municipalities, racetrack operators and the horse racing industry… The[se] stakeholders may not be willing to accept their current level of compensation based on their perception of the level of compensation provided to the operators of the commercial casinos as alluded to by the [affected party] proposal materials...

Casino Niagara was originally opened in December 1996 as an interim commercial casino while the permanent casino, being Fallsview Casino Resort, was being constructed. However, the popularity of Casino Niagara has resulted in that Casino remaining open even after the opening of Fallsview Casino Resort in June 2004. Public knowledge of the records at issue may cause stakeholders in the community, such as municipal government, business interests, and employees, to exert public pressure on OLGC in its decision as to whether or not to close or

> keep open Casino Niagara, regardless of what is in the best economic interests of the Province of Ontario. Such stakeholders may exert pressure upon OLGC to pursue particular aspects of the [affected party] proposal even though such proposal was earlier rejected by OLGC.
>
> Upon the expiration or early termination of an operator agreement, OLGC would initiate a competitive bid process to obtain a new operator for the particular commercial casino. Disclosure of the records at issue would result in certain potential proponents refusing to submit a bid in order to protect what they perceive to be their confidential business pricing. This would result in a loss of competition which could result in OLGC having to pay an increased amount for services.
>
> In alternative, such proponents may submit bids in excess of their standard pricing model so that competitors would not have the advantage of having the knowledge of the how low a price the proponent could accept. This would result in a loss of competition which could result in OLGC having to pay an increased amount for services. Value is maximized when competitive proposals are based on market information.

The OLGC provided an affidavit from its Director of Procurement containing general information concerning the bid process and concluding that disclosure of a proponent's bid proposal would result in:

> …a reduction in the competition responding to an OLGC competitive bid process or, in the alternative, the pricing obtained through such competitive bid process would not be competitive with the market rates for such services. As a result, OLGC would likely be forced to pay an amount for such services that was excessive and that would result in a reduction of profits to OLGC and a reduction in transfer payments to the Government of Ontario.

The affected party did not provide representations on this issue.

The appellant submits that:

> …it is clear that this (the Niagara Casino) competitive bidding process could not possibly be effected in any way by disclosure, since it occurred 11-12 years ago. Further, there is no evidence at all that disclosure of bids from long ago has, or would have, the slightest impact upon the future provision of bids to OLGC...
>
> The fact of the matter is that the information I have requested has no importance whatsoever for the ongoing confidentiality, competitive position or management of either the Ontario Government or [the affected party]. Whatever confidentiality the [the affected party] information may have had during the bid

> process has long since been lost. [The affected party] was not even the winning bidder. And the information is now long stale-dated.

Analysis/Findings

I find that the representations provided by the OLGC are speculative and general in nature and fail to demonstrate that disclosure of the records at issue in this appeal could reasonably be expected to prejudice the economic interests or the competitive position of the OLGC.

In this appeal, the records concern the analysis of an unsuccessful proposal for the Project. The final agreement for the construction and operation of the Project followed the submission of the proposals and was based, not on the affected party's proposal, but on the successful proponent's proposal. Therefore, the information at issue in the records is not part of the negotiated detailed business arrangements with the current operator of the Fallsview Casino Resort.

Although the OLGC may be required to either renegotiate an existing agreement with the current operator or select a new operator for a commercial casino through a competitive bid process, I find that the information at issue, being details of an unsuccessful bid in 1997, could not reasonably be expected to prejudice the OLGC's economic interests or competitive position.

The situation in this appeal differs from that in Order P-1026 where the request was for records that would allow the requester to determine how the interim operating agreement was negotiated for Casino Windsor. As stated by Inquiry Officer Anita Fineberg in that order:

> The operation of an interim casino facility until such time as the permanent casino complex could be established was one of the requirements to be met by the entity wishing to submit a proposal pursuant to the RFP. As the parties themselves acknowledge, the execution of the Interim Operating Agreement represents one step in the process of negotiating the overall agreements in respect of the permanent casino.

The records at issue concern an unsuccessful bid and therefore were not utilized in the contracting process for either an interim or permanent casino. Furthermore, the agreements that resulted from the successful bid have already been negotiated and formalized. In Order P-1026, the negotiation process was ongoing and disclosure of the records at issue in those appeals could reasonably be expected to prejudice the OLGC's economic interests or competitive position.

Based on the age of the records at issue, which are dated between 1997 and 1998, I find that disclosure of the records would not provide existing or proposed new operators with knowledge of the compensation and business structures of their competition to the prejudice of OLGC's ability to acquire truly competitive proposals.

Furthermore, I disagree with the OLGC that disclosure of the records at issue could reasonably be expected to prejudice its economic interests as proponents could inform themselves of the

strategic elements of the proposal in the records at issue and determine what elements were significant to the OLGC. Even if a proponent could determine from the records what was significant to the OCC in 1997 in approving a proposal, I find that disclosure of the information could not reasonably be expected to prejudice the OLGC's economic interests. The OLGC has not provided "detailed and convincing" evidence that the specific information that was significant to the OCC in 1997 is still significant, or that proponents would now provide false or misleading information as a result of disclosure of the information in the records to the detriment of the competitive bid process.

The severed portions of the records at issue concern the details of an unsuccessful proponent for the Project. As such, disclosure would not enable third party stakeholders who may be affected by the records, to use the information to seek compensation or other concessions from OLGC where it is not justified. Therefore, I find that disclosure would not reasonably be expected to prejudice OLGC's negotiating ability and leverage in other future negotiations.

I do not find any merit in the OLGC's contention that proponents in response to future RFPs would submit non-competitive bids in excess of their standard pricing model so that competitors would not have the advantage of having the knowledge of how low a price the proponent could accept. Proponents would risk the rejection of their bid by the OLGC if they bid in such an alleged manner.

I am not persuaded that disclosure of the records at issue would result in certain potential proponents refusing to submit a bid in order to protect what they perceive to be their confidential business pricing. The records at issue concern an unsuccessful bid in 1997 from a proponent whose corporate structure is no longer in existence. The records do not reveal the details of current business pricing or information.

Furthermore, the decisions concerning the implementation and operation of commercial casinos in Ontario are solely within the jurisdiction of the OLGC. The OLGC does not compete with other entities in the receipt of bids for these casinos. No other entity competes with the OLGC for these bids.

Therefore I find that section 18(1)(c) does not apply to the records at issue as the OLGC has not provided "detailed and convincing" evidence to establish a "reasonable expectation of harm" as a result of disclosure of these records.

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

Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians [Order P-1398 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 submits that:

> 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 and specifically those that operate near the US border. Disclosure of the severed portions of the records that OLGC and the third party maintain to be a confidential internal document could be injurious to the financial interests of the Government.
>
> The disclosure of the severed portions of the records requested could reasonably have an effect on future negotiations or business dealings with: (i) existing operators who do not have the same financial arrangements with OLGC, or (ii) with potential new operators who do not currently have an operator or lease agreement with OLGC, who would submit a bid pursuant to any competitive bid process initiated by OLGC and who would formulate bid and negotiation strategies based on, and otherwise target, the analysis of OLGC of the [affected party's] proposal.
>
> The exemptions relied upon seek to protect the economic interests of the Government of Ontario and maintain protection over privileged documents. The release of the severed portion of the record would seriously compromise the ability of OLGC to operate and conduct business in the best economic interest of the Government of Ontario.
>
> Disclosure of the severed records could negatively impact the provincial gaming revenues and the programs funded by those revenues.
>
> Accordingly, disclosure of the severed records 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.

Analysis/Findings

The OLGC made very similar submissions in Orders PO-2526 and PO-2620. One of the responsive records in Order PO-2620 was an actual casino operating agreement for the casino that is the subject of the records in this appeal. In Order PO-2620, Adjudicator Laurel Cropley relied on the findings of Adjudicator Steven Faughnan in Order PO-2526. In that order, Adjudicator Faughnan stated that:

> 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.

The adjudicators in both Orders PO-2526 and PO-2620 found that the OLGC had not provided the kind of "detailed and convincing" evidence to establish a "reasonable expectation of harm".

I agree with the findings in Orders PO-2526 and PO-2620 and find that they are similarly applicable to the records at issue in this appeal. I find that the OLGC's submissions raise speculative and generalized concerns. The records at issue in this appeal reflect the details of an unsuccessful proposal from 1997. The records do not contain the financial arrangements that current casino operators would be required to enter into with the OLGC. Furthermore, upon review of the records, I find that they do not reveal information that would reveal bid and negotiation strategies to potential new casino operators. Even if the records did reveal information that could assist future potential casino operators in their bid and negotiation strategies, based on the type and age of the information, I would not find that this information 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. Therefore, I find that section 18(1)(d) does not apply to the records.

ADVICE TO GOVERNMENT

I will now determine whether the discretionary exemption at section 13(1) applies to the records.

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.

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]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, cited above]

Although the OLGC claimed this discretionary exemption in its decision letter disclosing the Batch 2 records, it did not identify, either on the records or in its representations, which portions of the Batch 2 records it claims are subject to the section 13 exemption. Furthermore, both the OLGC and the appellant did not provide any representations on this issue. The affected party submits that the information it provided was to be utilized by the OLGC to advise and make recommendations relating to a government decision.

Analysis/Findings

Based on my review of the Batch 2 records, I do not find that they contain information that suggests a course of action that will ultimately be accepted or rejected by the OLGC. The records concern an unsuccessful bid proposal made by the affected party with respect to the

Niagara Falls Casino/Gateway Project. These records do not contain "advice or recommendation" nor could disclosure of the records reveal "advice or recommendations". Therefore, section 13(1) does not apply to the records.

LATE RAISING OF DISCRETIONARY EXEMPTION IN SECTION 19

The OLGC has raised the discretionary exemption in section 19 (solicitor-client privilege) more than 35-days after the Confirmation of Appeal was sent to the parties. I will now determine whether this new discretionary exemption claim should be considered in this inquiry.

The *Code of Procedure for appeals under the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act* (the *Code*) sets out basic procedural guidelines for parties involved in an appeal before this office. Section 11 of the *Code* (New Discretionary Exemption Claims) sets out the procedure for institutions wanting to raise new discretionary exemption claims. Section 11.01 is relevant to this issue and reads:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35 day period.

Section 19 is a discretionary exemption that falls within the scope of section 11 of the *Code*. In this case, the Confirmation of Appeal for this file is dated August 22, 2006. The OLGC was advised in the Confirmation of Appeal that it had until September 26, 2006 to raise any new discretionary exemptions. The section 19 exemption was raised by the OLGC for the first time in its submissions, well after this deadline. This raises an issue of the late raising of a discretionary exemption claim.

The OLGC submits that through error, it failed to claim section 19 of the *Act* to the following portions of records in Batch 2:

- Record 1- Part 15, report titled "Report to Selection Committee from the Legal Team" June 24, 1997, prepared by a named law firm

- Record 2 – Tab 11, report titled "Report to Selection Committee from Legal Team"

- Record 3 - Report titled "Supplemental Report to Selection Committee from the Legal Team, Comparative analysis of Proposals Incorporating Responses to Follow-Up Questions", dated August 14, 1997

It submits that:

> Nothing in this submission derogates from or otherwise prejudices the position of the appellant under this appeal because the appellant is required to make submissions regarding the applicability of the other discretionary exemptions, and the appellant will have an opportunity to review the submissions of OLGC concerning the applicability of the section 19 discretionary exemption, prior to providing the appellant's submissions in this appeal. Further, though the OLGC has not specifically claimed the privilege in a decision letter, OLGC has not waived the privilege. Accordingly, the full scope of the privilege is preserved for OLGC and there is no loss of the privilege as a result of the passage of time.

In response, the appellant submits that:

> [he] take[s] strong issue with any time periods being extended here. Frankly, the entire length of this process has, with respect, been unjustifiable. Access to information becomes a mockery if government institutions do not respond in a full, timely way.

Analysis/Findings

The purpose of this office's 35-day policy is to provide institutions with a window of opportunity to raise new discretionary exemptions, but only at a stage in the appeal where the integrity of the process would not be compromised and the interests of the requester would not be prejudiced. The 35-day policy is not inflexible, and the specific circumstances of each appeal must be considered in deciding whether to allow discretionary exemption claims made after the 35-day period (Orders P-658, PO-2113). The 35-day policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 110/95, leave to appeal refused [1996] O.J. No. 1838 (C.A.).

In Order PO-2113, Adjudicator Donald Hale set out the following principles that have been established in previous orders with respect to the appropriateness of an institution claiming additional discretionary exemptions after the expiration of the time period prescribed in the Confirmation of Appeal:

> In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby

> delaying the appeal. Finally, she pointed out that in many cases the value of information sought by appellants diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.
>
> The objective of the 35-day policy established by this Office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. The 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

In deciding whether the OLGC should be allowed to raise the section 19 exemption at the adjudication stage, I adopt the findings of Adjudicator Colin Bhattacharjee in Order MO-2222, where he stated:

> In considering whether the Township should be allowed to claim the section 12 [of the *Municipal Freedom of Information and Protection of Privacy Act*, the equivalent to section 19 of the *Act*] exemption at a late stage in this appeal, I have taken into account the importance that the courts have attached to the principle of solicitor-client privilege. For example, in the recent case of *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, Mr. Justice Fish of the Supreme Court of Canada stated the following:
>
> > … The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.
>
> In my view, given the importance that the courts have ascribed to the principle of solicitor-client privilege, the Township should, in the circumstances of this particular appeal, be given an opportunity to claim the section 12 exemption at the adjudication stage of the appeal process.

Furthermore, I accept the OLGC's representations that in the circumstances of this appeal the integrity of the appeals process has not been compromised and the appellant's interests have not

been prejudiced. The appellant has been provided with an opportunity to address the issue of the application of section 19 at the same time he provided representations on all of the other issues. I find that the OLGC should be permitted to raise the discretionary exemption in section 19.

SOLICITOR-CLIENT PRIVILEGE

When the request in this matter was filed, 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. The OLGC must establish that one or the other (or both) branches apply. Branch 1 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

The OLGC relies on the common law solicitor-client communication privilege in branch 1 of section 19 in its representations.

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].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

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.)].

The OLGC submits that:

> The records are written communications made directly between the external "Legal Team", being the law firm of [name], and the OLGC (then Ontario Casino Corporation) "Selection Committee", and therefore are direct communications between a solicitor and client.
>
> Further, the written communications were prepared on a confidential basis, as part of the confidential analysis of the proposals submitted pursuant to the competitive bid process. The records were prepared by the Legal Team for the purposes of identifying legal and contractual issues which it believed to be material to the project for the purposes of comparing the proposals and ultimately negotiating definitive agreements with the preferred proponent. The reports contain, amongst other things, a comparative analysis of each proponent's proposal on these issues. Each record is a written communication to OLGC prepared by lawyers retained by OLGC for the dominant purpose of the analysis of the legal aspects of each of the proposals and with an intention that it be confidential.

Neither the appellant nor the affected party provided representations on this issue.

Analysis/Findings

Based on my review of the records or portions of records at issue for which section 19 has been claimed, I find that they contain the details of direct communications of a confidential nature between the named law firm, who was acting as the solicitor in this case, and the client, the Selection Committee of the OCC, for the purpose of obtaining professional legal advice [Order MO-2124-I]. Accordingly, I find these records or portions of records are exempt under branch 1 of the solicitor-client communication privilege exemption in section 19.

I have not been provided with any evidence to support a finding that the privilege in these records has been waived or lost.

Subject to my discussion below of the exercise of the OLGC's discretion, I agree with the OLGC that Record 1(part 15), Record 2 (tab 15) and Record 3 in Batch 2 are exempt from disclosure.

EXERCISE OF DISCRETION

I will now determine whether the OLGC exercised its discretion under section 19, in a proper manner.

The section 19 exemption is discretionary and permits an institution to disclose information despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons

- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

Analysis/Findings

The OLGC did not provide me with representations concerning the exercise of its discretion. Therefore, I cannot determine if it exercised its discretion in a proper manner concerning the records for which it has claimed the applicability of section 19. Accordingly, I will order it to re-exercise its discretion and to provide me with its representations thereon.

PERSONAL INFORMATION

I will now determine whether the records contain "personal information" as defined in section 2(1) and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,

> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

None of the parties provided representations on whether the records contain personal information, however, as the personal privacy exemption in section 21(1) is a mandatory exemption, I will consider this issue. Based on my reviews of the records, I find that the following records in Batch 2 contain personal information:

- Record 9, page 2; and,
- certain information in Records 10 and 11.

The personal information consists of information relating to financial transactions in which identifiable individuals have been involved, under paragraph (b) of the definition of personal information in section 2(1). The records do not contain the personal information of the appellant.

PERSONAL PRIVACY

I will now determine whether the mandatory exemption at section 21(1) applies to the personal information at issue.

Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21.

In the circumstances, it appears that the only exception that could apply is paragraph (f), which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 21(1)(f).

From my review of the personal information at issue, I find that the presumption in section 21(3)(f) applies. This section reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.

As paragraph (f) of section 21(3) applies, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. Section 21(4) does not apply in this appeal and the appellant has not raised the application of section 23.

Once a presumed unjustified invasion of personal privacy is established under section 21(3), it cannot be rebutted by one or more factors or circumstances under section 21(2) [*John Doe*, cited

above]. Therefore, I find that the mandatory exemption in section 21(1) applies to page 2 of Record 9 and certain portions of Records 10 and 11 in Batch 2. Disclosure of this information would be an unjustified invasion of the personal privacy of the identifiable individuals in these records and I will order it not to be disclosed to the appellant.

ORDER:

1. I order the OLGC to disclose all of the responsive records to the appellant by **April 23, 2008** but not before **April 18, 2008** except for:

   - Record 1(part 15), Record 2 (tab 15) and Record 3 in Batch 2; and,

   - page 2 of Record 9 and the information that I have highlighted on Records 10 and 11 in Batch 2. For greater certainty, I have highlighted the portions which are not to be disclosed to the appellant on the copy of Records 10 and 11 sent to the OLGC along with this Order.

2. I order the OLGC to re-exercise its discretion with respect to the records for which I have found section 19 to apply, namely, Record 1(part 15), Record 2 (tab 15) and Record 3 in Batch 2. If the OLGC continues to withhold all or part of this information, I also order it to provide the appellant with an explanation of the basis for exercising its discretion to do so and to provide a copy of that explanation to me. The OLGC is required to send the results of its re-exercise of discretion, and its explanation to the appellant, with a copy to this office, no later than **April 11, 2008**. If the appellant wishes to respond to the OLGC's re-exercise of discretion, and/or its explanation for exercising its discretion to withhold information, the appellant must do so within 21 days of the date of the OLGC's correspondence by providing me with written representations.

3. I remain seized of this matter pending the resolution of the issue outlined in provision 2.

4. In order to verify compliance with this Order, I reserve the right to require the OLGC to provide me with a copy of the records disclosed to the appellant pursuant to provision 1, upon my request.

Original signed by: March 19, 2008
Diane Smith
Adjudicator