



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER PO-2796**

## **Appeal PA08-168**

### **Alcohol and Gaming Commission**



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/Téloc: 416-325-9188  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

The Alcohol and Gaming Commission of Ontario (the AGCO) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of the following records:

1. “plan to investigate”, dated March 18, 2005, by [name], AGCO
2. “report of investigation”, dated May 4, 2005, by [name], AGCO

...any other AGCO document which mentions [the requester] or relates to the [date] Casino [name] incident.

The AGCO located the responsive records and granted partial access to them. Access to the remaining information in the records was denied pursuant to sections 13(1) (advice to government), 14 (law enforcement), 17(2) (information on a tax return), 19 (solicitor-client privilege) and 21(1) (personal privacy) of the *Act*.

The requester (now the appellant) appealed the decision to deny him access to Records 28, 43, 44, 76, 97 and 98.

During the course of mediation, the appellant advised the mediator that he would no longer be seeking access to Record 98, therefore, section 17(2) of the *Act* is no longer at issue in this appeal.

The mediator sought the consent of an individual whose personal information may be contained in one record, Record 43, the interview report. This individual agreed to the release of this record. After being advised of this, the AGCO disclosed Record 43 to the appellant. Therefore, section 21(1) of the *Act* is no longer at issue in this appeal. In addition, during mediation, the AGCO disclosed portions of Records 28, 76 and 97 to the appellant.

As mediation did not resolve all of the issues in this appeal, the file was transferred to me to conduct an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal to the AGCO, seeking its representations initially. As the records appeared to contain the personal information of the appellant, section 49(a) (right of access to one’s own personal information) was added as an issue. I received representations from the AGCO, a complete copy of which was sent to the appellant, along with a Notice of Inquiry seeking the appellant’s representations. I received representations from the appellant. I provided a copy of the appellant’s representations to the AGCO and sought and received reply representations from it.

## **RECORDS:**

The records at issue are described in the following chart:

<b>Record #</b>	<b>Description of Record</b>	<b>Exemption(s) Claimed</b>	<b>Released ?</b>
28	Memorandum the AGCO's Senior Manager of the Strategic Services and Projects Section (the Senior Manager) to the Registrar	13(1)	partial
44	E-mail and Report from the Director of Audit and Gaming Compliance (the Director) to the Registrar	13(1); 14(2)(a)	no
76	Memorandum from Senior Strategic Analyst to the Senior Manager	13(1)	partial
97	E-mail from Senior Manager to the Registrar	13(1)	partial

## **DISCUSSION:**

### **PERSONAL INFORMATION**

I will first determine whether the records contain "personal information" as defined in section 2(1) and, if so, to whom it relates.

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" 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 and 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 and PO-2225].

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). These amendments apply only to appeals involving requests that were received by institutions after that date. Section 2(3) modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity". Section 2(4) further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as "personal information" for the purposes of the definition in section 2(1).

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.)].

Both the AGCO and the appellant agree that the records contain the personal information of the appellant. Upon my review of the records, I find that they contain the personal information of the appellant, in particular his name which appears with other personal information about him in accordance with paragraph (h) of the definition of personal information in section 2(1).

## **RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION**

I will now determine whether the discretionary exemption at section 49(a) in conjunction with the sections 13(1) and 14(2)(a) exemptions apply to the information at issue.

Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

Under section 49(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 12, **13, 14**, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

## **LAW ENFORCEMENT**

I will first determine whether the discretionary exemption at sections 49(a) in conjunction with 14(2)(a) applies to Record 44. This section reads:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

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

"law enforcement" means,

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

The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law [Orders M-16, MO-1245]
- a police investigation into a possible violation of the *Criminal Code* [Orders M-202 and PO-2085]

- a children's aid society investigation under the *Child and Family Services Act* [Order MO-1416]
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997* [Order MO-1337-I]

The term "law enforcement" has been found *not* to apply in the following circumstances:

- an internal investigation to ensure the proper administration of an institution-operated facility [Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.)]
- a Coroner's investigation under the *Coroner's Act* [Order P-1117]
- a Fire Marshal's investigation into the cause of a fire under the *Fire Protection and Prevention Act, 1997* [Order PO-1833]

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

It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238 and MO-1337-I].

The title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Order MO-1337-I].

The AGCO submits that:

The *Criminal Code of Canada (Code)* creates the framework for the regulation of gambling in Canada. Under the *Code* gambling is illegal unless it is permitted by a specific exemption. Commercial casinos fall under the exemption of s. 207(l)(a) of the *Code*, which permits the government of a province to conduct and manage games of chance.

The government of Ontario enacted the *Gaming Control Act, 1992 (GCA)* and the regulations made under it for the purpose of regulating the gaming industry. The

*GCA* imposes registration requirements on individuals who work in gaming facilities as well as those persons who provide goods and services to gaming facilities.

The *GCA* and the regulations made under it also set out a scheme for the regulation of gaming premises, including the approval of floor plans, surveillance plans and security plans to ensure that gaming is conducted with honesty and integrity and in a manner that is socially and financially responsible.

The administration of the *GCA* is assigned to the AGCO pursuant to the *Alcohol and Gaming Regulation and Public Protection Act, 1996 (AGRPPA)*. The office of Registrar of Alcohol and Gaming (the Registrar) is created by section 6(1) of *AGRPPA* for the purposes of exercising authority under the *GCA* and the *Liquor Licence Act*.

The Registrar is primarily responsible for administering the *GCA*, subject to the right to appeal certain decisions of the Registrar to the Board of the AGCO.

Within the AGCO there is a Bureau of the Ontario Provincial Police (OPP). It is staffed by OPP officers and civilian staff of the AGCO. OPP officers carry out inspections and investigations for regulatory purposes, including investigations into the background of applicants for registration under the *GCA*...

The majority of Record 44 consists of a report from the Director to the Registrar with respect to the “[appellant’s name] Surveillance Report” (report)...

The report portion of Record 44 is headed “Memorandum”. It is addressed to the Registrar from the Director. It contains a summary of allegations made by the appellant with respect to the video surveillance of an incident involving the appellant at Casino [name].

The report goes on to provide an analysis of the relevant regulatory framework, the role of certain casino staff in responding to the incident, the preparation of a dub tape, a discussion of the role of AGCO inspectors in overseeing the surveillance room of the casino and a conclusion in respect of each of the allegations made by the appellant...

Regulation 385/99 made under the *GCA* requires that casinos seek the approval of the Registrar for items such as floor plans and surveillance plans. Changes to these plans and procedures require approval by the Registrar. Failure to follow the approved plans and procedures could result in the imposition of sanctions against the casino.

Section 19 of Regulation 385/99 [of the *GCA*] requires casino operators to prepare a surveillance plan that includes certain specified elements and have it approved by the Registrar. Amendments to the surveillance plan must also be approved by the Registrar.

As part of the formal approval and oversight process, inspections and enforcement staff gather information on behalf of the Registrar to ensure that casino operators follow regulatory requirements including those with respect to surveillance plans.

The appellant made a series of allegations that touched on regulatory requirements of the casino and that reflect on certain casino staff members who are registered under the *GCA*. Consequently, the report, which encompassed investigative actions, was a necessary and integral part of the AGCO's law enforcement mandate...

Pursuant to the *GCA*, investigators and inspectors are required to determine compliance with the legislation and the terms of registration. Investigators are mandated to examine anything relevant to their investigations...

The appellant submits that:

In this instance my January 2005 request for an investigation regarded only the operational and performance aspects of a surveillance system which is required by regulation to meet minimum standards. The very system AGCO approved and monitors, including its OPP detachment assigned to monitor casino operators (the OPP did also perform surveillance at that time)...

[There is no] criminal charge pending that requires investigation; the January 2005 request makes no allegation of criminal misconduct - it asks only for an investigation into a casino surveillance-system's operation and performance standards as revealed by the surveillance record in question....

[R]ecord 44 is prepared by and the investigation was conducted by an AGCO staff member and not OPP, the actual "law-enforcement" arm of the AGCO - i.e. policing.

Additionally, I note the *Gaming Control Act* makes no provision for required AGCO investigation into any complaint or request to investigate made by a member of the public. Its authority to investigate any casino operational system is entirely self-directed and discretionary.

In reply, the AGCO submits that:

[T]he casino is not operated by the AGCO and as such, the investigation conducted is not an internal investigation. The commercial casinos in this province are operated by a commercial operator under contract with the government of Ontario. The AGCO's role is not to operate or administer the gaming facility but rather to enforce and ensure legal compliance with the applicable provisions of the *GCA* in that context...

The appellant suggests that because Record 44 was not prepared by a member of a police force, it does not fall under the exemption of section 14(2) of [the *Act*]. A review of section 14(2)(a) indicates that it does not, by its wording, require that the report be prepared by a police officer...

The appellant suggests that the *GCA* does not require investigations into complaints, consequently, the AGCO's authority to investigate is "self-directed and discretionary". [T]he administration of the *GCA* was assigned to the AGCO by the *Alcohol and Gaming Regulation and Public Protection Act, 1996*. This encompasses the responsibility to ensure that regulatory requirements and standards are being followed and to take enforcement action, as required. It would be impossible for the AGCO to administer the legislation effectively without the ability to investigate and enforce.

### **Analysis/Findings**

In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the AGCO must satisfy each part of the following three-part test:

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

(Order 200 and Order P-324)

Record 44 is an e-mail and a memorandum from the Director of Audit and Gaming Compliance to the Registrar.

The AGCO does not claim that the e-mail portion of this record is a report. Based upon my review of this record, I find that the e-mail portion of this record is not a report and therefore, this e-mail does not qualify for exemption under sections 49(a) in conjunction with 14(2)(a). I

will consider below whether the e-mail qualifies for exemption under sections 49(a) in conjunction with 13(1).

The appellant does not dispute that the memorandum portion of Record 44, is a report. Upon my review of the memorandum, I find that it is a report, as it is “a formal statement or account of the results of the collation and consideration of information” [Orders P-200, MO-1238 and MO-1337-I]. Therefore, part 1 of the test has been met.

I also find that the memorandum was prepared in the course of an investigation. This memorandum was created in response to the appellant’s request for the Registrar of the AGCO to conduct an investigation for the purpose of determining whether a named casino is in compliance with the *GCA* and regulations pertaining to the casino’s surveillance plan and related matters involving an incident on a specific date. Therefore, part 2 of the test has been met.

The third part of the test requires that the memorandum must have been prepared by an agency which has the function of enforcing and regulating compliance with a law. The AGCO has been found to be an agency that has the function of enforcing and regulating compliance with a law, specifically the *GCA*. In Order PO-2253, former Assistant Commissioner Tom Mitchinson found that:

Consistent with previous orders involving the AGCO and its predecessor, the Gaming Control Commission, I find that the AGCO performs the functions of a “law enforcement” institution. Investigations undertaken in compliance with the *GCA* could lead to proceedings in a court (with respect to *Criminal Code* or *Provincial Offences Act* prosecutions) or a tribunal (the Board of the AGCO) where a penalty or sanction could be imposed (Order PO-1892-F).

In Order P-1399, former Inquiry Officer Anita Fineberg also found that the predecessor of the AGCO, the Gaming Control Commission (the GCC), conducted investigations to collect information to fulfill its statutory mandate. She determined that its investigations may qualify as law enforcement investigations and that the GCC, the predecessor of the AGCO, was an agency which has the function of enforcing and regulating compliance with a law, the *GCA*.

In particular, the following statutory provisions support the AGCO’s claim that it is an agency which has the function of enforcing and regulating compliance with a law.

Section 3(1) of the *AGRPPA* provides that the AGCO is responsible for the administration of the *GCA* and its regulations.

Section 14(1) of the *AGRPPA* reads:

The board of [AGCO] may establish, subject to the approval of the Minister, a schedule of monetary penalties that may be imposed with respect to

contraventions of those Acts and regulations administered by the Commission that are prescribed by the regulations

Regulation 282/07 under the *AGRPPA* prescribes the monetary penalties under the *GCA* regulations.

Section 31(1) of the *GCA* provides that:

The Registrar may appoint any person to be an investigator for the purpose of determining whether there is compliance with this Act, the regulations, the terms of a licence or the terms of a registration

As referred to above, section 19(1) of Regulation 385/99 under the *GCA* requires that:

An operator shall not provide gaming premises unless,

- (a) the operator has submitted to the Registrar a surveillance plan (including diagrams, where appropriate) for the surveillance of activities related to the playing of games of chance at the premises; and
- (b) the Registrar has approved the surveillance plan as meeting or exceeding the minimum standards established by the Registrar for security.

Furthermore, section 19 of this regulation requires that:

(5) An operator shall ensure that its operations are conducted in accordance with the policies and procedures relating to the surveillance plan approved by the Registrar.

(6) If there is a failure of surveillance capability in the premises, the operator shall ensure that no games of chance are conducted, managed or operated until the use of the surveillance is restored.

In this particular case, the AGCO was authorized to conduct the investigation requested by the appellant into whether the named casino was conducting its operations in accordance with the policies and procedures relating to the approved surveillance plan.

Therefore, I find that memorandum portion of Record 44 was prepared by the AGCO, was prepared by an agency that has the function of enforcing and regulating compliance with a law. Accordingly, part 3 of the test has been met. As all three parts of the test have been met, sections 49(a) in conjunction with section 14(2)(a) applies to the memorandum portion of Record 44.

The exception to section 14(2)(a) in section 14(4)(a), applies to “a report prepared in the course of routine inspections by an agency”, does not apply to the memorandum portion of Record 44. This memorandum was not prepared as a result of a routine inspection of the casino or the surveillance system, but was prepared in response to allegations made by the appellant [Orders P-136 and PO-1988]. As a result, the memorandum does not fall into the s. 14(4) exception to the section 14(2)(a) exemption.

### **ADVICE TO GOVERNMENT**

I will now determine whether sections 49(a) in conjunction with 13(1) applies to the records, except for the memorandum portion of Record 44, which I have found subject to the law enforcement exemption in section 14(2)(a).

Section 13(1) states:

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

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

“Advice” and “recommendations” have a similar meaning. In order to qualify as “advice or recommendations”, the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff’d [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways:

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

[Orders PO-2028, PO-2084]

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, 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]

The AGCO submits that all of the records contain advice that was given to its Registrar. It submits that the staff members in each record offered their advice and recommendations to the Registrar, the official authorized to make decisions, in respect of how the appellant's complaints would be addressed.

### **Record 28**

This record is a memorandum, dated February 14, 2005, from the Senior Manager to the Registrar. The appellant submits that this memorandum predates the issue for which the Registrar would have required advice or recommendations and as such could not contain such information. In reply, the AGCO submits that:

The appellant's representations with respect to Record 28 set out the details of his January 2005 request to investigate and suggest that, by his understanding of the time line, a decision by the Registrar in February of 2005 about an investigation that was conducted in April of 2005 would have been premature. ...[A]dvice given in February could easily affect the course of an investigation that is undertaken in April.

From the records that have been released, it is clear that the appellant's complaints were brought to the Registrar's attention soon after his letter was received by the AGCO and that staff members provided advice on how the complaints should be addressed at various times...

The AGCO claims that section 13(1) applies to two portions of this record, a typewritten portion and a handwritten portion.

I agree with the AGCO that the severed typewritten portion of Record 28 indicates advice given to the Registrar in February of 2005 following receipt of the appellant's January 2005 letter.

Although the appellant suggests that by including the sentence: "Please let me know how you would like to proceed" at the end of Record 28 suggests that what came before it was factual, background or analytical information, the use of that phrase is completely consistent with a memorandum in which a staff member provides advice and is asking the decision-maker whether he wishes to take the advice or to proceed in another manner. The information severed from the record suggests a course of action that will ultimately be accepted or rejected by the Registrar. Therefore, I find that section 13(1) applies to this information.

However, I find that the severed portion of the Registrar's handwritten note on Record 28 does not suggest a course of action that will ultimately be accepted or rejected by the person being advised. As no other exemption has been claimed for this portion of Record 28, I will order it disclosed.

#### **Record 44 (e-mail)**

At issue is an e-mail from the Director to the Registrar enclosing the memorandum that I have found subject to the law enforcement exemption above. Neither party provided direct representations on this e-mail. Based upon my review of this record, I find that it does not contain information that suggests a course of action that will ultimately be accepted or rejected by the Registrar. I find that this e-mail is not exempt by reason of section 49(a) in conjunction with section 13(1). As no other exemptions have been claimed for this e-mail, I will order it disclosed.

#### **Record 76**

This record is a memorandum from the Senior Strategic Analyst to the Senior Manager of Strategic Services. The AGCO submits that this record:

...shows that the Senior Strategic Analyst considered the appellant's complaints and came to certain conclusions with respect to the validity of the complaints and other steps that could be taken by the Registrar.

The appellant submits that:

... any information provided within the memo is factual and analytical material used as the basis to discuss both my request to investigate (and the material contained within that request), and/or the application of the provisions and regulations of the *Gaming Control Act* as they pertain to the investigation request.

Based upon my review of this record, I find that it contains advice or recommendations. I will now consider whether any of the exceptions to section 13(1) in section 13(2) apply to this record. The appellant submits that certain exceptions in section 13(2) apply, as follows:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

- (a) factual material;
- (f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;
- (l) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,
  - (i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person ...

***Section 13(2)(a)- factual material***

In reply, the AGCO submits that this record does not contain factual information but rather the advice of a staff member with respect to matters that are germane to the complaint. It provided the following information regarding each severance:

The first section of the memorandum is titled "Conclusion" and begins with the advice on what steps should be taken before undertaking a formal investigation...

The sentence severed from page 2 of Record 76 indicates that, based on the analysis of the Senior Strategic Analyst, certain provisions of the regulations made under the [GCA] should be reviewed...

The portions severed from pages 3, 4 and 5 of Record 76 contain the staff member's analysis of certain elements of the appellant's complaint ...that led to the staff recommendations.

***Section 13(2)(f) - performance or efficiency report of the institution***

The AGCO submits that this section does not apply as this record is a memorandum prepared by an AGCO staff member with respect to his analysis of the surveillance of a specific incident and his advice on how to proceed with respect to the appellant's complaint.

***Section 13(2)(l) - reasons for a final decision, order or ruling***

The AGCO submits that this section does not apply as the information at issue is not reasons for a final decision, order or ruling but consists of recommendations and opinions on the next steps that should be taken, a review of the regulations and an assessment of the appellant's allegations.

***Analysis/Findings***

Based on my review of the withheld information contained in Record 76, I find that only certain portions contain "advice or recommendations" which, as stated above, is information that suggests a course of action that will ultimately be accepted or rejected by the person being advised. I agree with the AGCO that the severance on page 1 of Record 76 contains advice on what steps should be taken before undertaking a formal investigation and, therefore, is subject to section 49(a) in conjunction with section 13(1). Furthermore, the severances on pages 3 and at the bottom part of pages 4 and 5 reveal information which, if disclosed, would permit one to accurately infer the advice or recommendations given on page 1 of this record.

In my view, none of this information falls within the exceptions in section 13(2), in particular those raised by the appellant. Concerning section 13(2)(a), it is not factual material, as it is not a coherent body of facts separate and distinct from the advice and recommendations contained in the record [Order 24].

Concerning section 13(2)(f), this record is not a report or study on the performance or efficiency of the named casino. It is not a formal statement or account of the results of the collation and consideration of information [Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)].

Concerning section 13(2)(l), this record also does not contain the reasons for a final decision, order or ruling of the AGCO, but the Senior Strategic Analyst's consideration of the appellant's complaint along with recommendations for steps that could be taken by the Registrar in response to this complaint.

However, based upon my review of this record, I find that the remaining withheld information in it does not contain "advice or recommendations". These severances, which are on page 2 and at the top of pages 4 and 5, contain a summary of the appellant's allegations. Furthermore, I find that the severance at the bottom of page 5 does not contain advice or recommendations. As no other exemptions have been claimed for this information, I will order it disclosed.

**Record 97**

This record consists of two e-mails in an e-mail chain between the Senior Manager of the Strategic Services and Projects Section to the Registrar. The AGCO states that the severed portion of the initial e-mail sets out the issue and the Senior Manager's advice with respect to

how it should be handled. The second e-mail is the response from the Registrar and has been released to the appellant.

The appellant submits that as this e-mail concerns his request that AGCO locate surveillance cameras on a floor plan of a specific area in the named casino, it comes within the exceptions in sections 13(2)(a) and 13(2)(l).

Based upon my review of the information at issue in this record, I find that it contains advice or recommendations and is, therefore, subject to section 49(a) in conjunction with section 13(1). For the same reasons as stated above for the information at issue in Record 76, I find that the information in Record 97 does not come within the exceptions in section 13(2), in particular the two exceptions raised by the appellant. This record does not contain factual material nor does it contain the reasons for a final decision, order or ruling.

### **EXERCISE OF DISCRETION**

I will now determine whether the AGCO exercised its discretion under section 49(a) concerning the information I found qualifies for exemption under sections 14(2)(a) or 13(1):

- the typewritten severance in the Memorandum of the Senior Manager of the Strategic Services and Projects Section to the Registrar (Record 28);
- the Memorandum from the Director of Audit and Gaming Compliance to the Registrar (part of Record 44);
- the Memorandum from the Senior Strategic Analyst to the Senior Manager of Strategic Services (Record 76, except for the severances at page 2, at the top of pages 4 and 5 and the bottom of page 5); and,
- the e-mail from Senior Manager of the Strategic Services and Projects Section to the Registrar (Record 97).

The section 49(a) 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

The AGCO submits that:

In this case, the head considered the fact that surveillance is one of the most sensitive areas of casino regulation and enforcement. There are strict limits on

who can have access to the surveillance room. In fact, most casino staff members and all visitors to the casino are barred from the surveillance room and surveillance staff members are not permitted to be represented by the same bargaining agent as other casino staff. Any issues respecting how surveillance is conducted and whether it is carried out in accordance with the surveillance plan approved by the Registrar are taken extremely seriously. For that reason, it was necessary for the Registrar to obtain a report from the Director in response to the appellant's allegations...

The head also considered the fact that the appellant had brought a civil claim against the casino, certain casino staff members as well as a member of the AGCO OPP bureau, for whose actions the AGCO is responsible. The litigation is ongoing.

In arriving at the conclusion that the report [the memorandum portion of Record 44] should not be released, the head considered the purposes of [the *Act*]. While it is desirable to make information available to the public, there are certain cases where the processes and procedures employed by public facilities should not be made public. Due to its nature, the information in the report is considered highly sensitive by the AGCO. This type of information has never been disclosed to anyone outside the AGCO or a police service.

The role of the Registrar is to ensure that proper approvals are in place and to examine whether there has been any breach of the regulatory scheme. That has been done in this case through the painstaking examination of the appellant's complaints. It is not necessary to disclose the entire report to the public to ensure that the Registrar has properly discharged his legal responsibilities.

The appellant representations on this issue focus on the AGCO's refusal to disclose the report issued as a result of the appellant's complaint, the memorandum portion of Record 44. He submits that:

To satisfy the rightful public interest in governmental transparency and accountability and to merit its trust in regulatory compliance by self-monitoring government agencies, I respectfully submit that AGCO Record 44 should be released.

The investigation request concerned performance and operational aspects of the surveillance record, all of which can be related to the minimum casino surveillance operational and performance standards as required by regulation. The gambling public has a sophisticated knowledge of surveillance technology and its usage to monitor play and in Facial Recognition Technology. Among the general public there is a growing awareness of surveillance technology and its application in crime prevention and monitoring persons. The standards for the

surveillance processes and procedures employed in the surveillance record under consideration are already in the public domain via those minimum requirements listed in [GCA Regulation 197/95]...

[The public] knows how surveillance is to be conducted and its applicable regulatory controls - but it does not know whether the surveillance being conducted complies with regulation. The release of an AGCO review into surveillance incident regulatory compliance could allay public concern about the reliability of surveillance conducted by self-regulating governmental authorities and the adequacy of the measures in place to ensure authenticity and dissuade misuse.

In this instance the AGCO discretionary refusal to release an internal review of a surveillance incident conducted by the very surveillance system it approved and monitors presents an optic of the self-serving rejection of public scrutiny. A declaration of compliance at the highest rank, the Registrar, followed by a refusal to release supporting documentation smacks of bad faith...

The AGCO is to independently regulate [the named casino], not assist its defence in civil actions.

AGCO authority is granted in part to approve and monitor regulatory compliance of a relatively small and closely knit group of government-owned, privately-operated gambling facilities. The guardianship of public trust is not served well when that authority is investigated for possibly providing confidential information to initiate and assist one of its charges evade accountability in a civil lawsuit...

The same lack of fairness and impartiality is evident again in the AGCO refusal decision to release Record 44; which it claims was prepared after "painstaking examination" into my request for investigation, and thus permitted the single statement answer from the AGCO Registrar:"... no evidence of any violation of the *Gaming Control Act*" ...[W]hat regulatory mechanisms were examined and how, and what results would permit the AGCO Registrar apparent pronouncement of compliance?...

Though AGCO states it is responsible for [its OPP] officer's actions, it is not actually a party to the civil suit, neither vicariously or otherwise; moreover, it is an irrelevant consideration. If AGCO was a party to that action then it would be compelled to disclose Record 44 under the civil rules of disclosure...

However the statement does indicate a bias motive to discretionarily withhold Record 44 for an improper purpose and to potentially benefit one of its charges. The withholding of information is contrary to the purpose and spirit of the civil action, a truth-finding process...

Given the circumstances in this matter I submit there is value in releasing Record 44 to establish an understanding of the basis on which the AGCO Registrar “properly discharged his legal responsibilities” by his declaration that the surveillance record under consideration complied with the provisions of [GCA Regulation 197/95].

In its reply, concerning its exercise of discretion not to release Record 44, the AGCO submits that:

...the AGCO is not the operator of Ontario’s casinos, but rather an independent agency responsible for the administration and enforcement of the GCA.

The AGCO is an independent regulatory body that operates at arm’s length from government. It is the AGCO’s responsibility to ensure that certain regulatory requirements are met and that there is appropriate oversight of regulated entities. In the case of the appellant’s complaint, the system worked as intended: the appellant made a complaint to the regulator, the AGCO communicated with the appellant to ensure a complete understanding of the appellant’s concerns, the AGCO investigated and advised the appellant of its findings...

The appellant has asserted that the “gambling public has a sophisticated knowledge of surveillance technology”, however, that is not a substantiated fact. In any event, this assertion does not contradict the fact that the surveillance room and surveillance plans are sensitive matters related to casino security and protection of the overall public interest, which is a fundamental element of the AGCO’s mandate.

The appellant has raised no evidence of impropriety on the part of the AGCO...While the appellant may sincerely believe that the AGCO is not an independent regulator, that is not the case, either in fact or in law.

It is respectfully submitted that the appellant’s concern with ensuring an independent review of complaints such his is well-addressed through the current regulatory structure, which neither provides for nor warrants disclosure of confidential investigations and advice.

### **Analysis/Findings**

I find that the AGCO exercised its discretion in a proper manner taking into account relevant considerations and not taking into account irrelevant considerations. The information that I have not ordered disclosed concerns advice or recommendations (from Records 28, 76 and 97) or a report prepared in the course of an investigation by an agency which has the function of enforcing and regulating compliance with a law (the memorandum portion of Record 44).

The appellant sought an investigation of the named casino's "operational and performance aspects of a surveillance system". As stated above, the records were created in response to his request for this investigation. These records, in particular the memorandum portion of Record 44,

...provide an analysis of the relevant regulatory framework, the role of certain casino staff in responding to the incident, the preparation of a dub tape, a discussion of the role of AGCO inspectors in overseeing the surveillance room of the casino and a conclusion in respect of each of the allegations made by the appellant.

Based upon my review of the information at issue in the records, these records consist of more than an internal review of a surveillance incident as claimed by the appellant.

This information at issue in the records concerns a sensitive subject, namely the surveillance system in a named casino which is related to both the security system in that casino, as well as the protection of the public who frequent that casino. While there may be a public interest in disclosure of this information, the significant and sensitive nature of this information outweighs both the public's interest in disclosure as well as the appellant's need to receive this information for his own private interest to assist him in his court action.

In conclusion, I find that the typewritten severance in Record 28, the severances at pages 1, 3 and the bottom of page 4 and a portion of the severance at the bottom of page 5 of Record 76 and the severance in Record 97 are exempt from disclosure by reason of section 49(a) in conjunction with section 13(1). Furthermore, I find that the memorandum portion of Record 44 is exempt from disclosure by reason of section 49(a) in conjunction with section 14(2)(a).

## **ORDER:**

1. I order the AGCO to disclose to the appellant the handwritten severance in Record 28; the e-mail portion of Record 44; and the information at page 2, at the top of pages 4 and 5 and at the bottom of page 5 of Record 76 by **July 30, 2009 but not before July 24, 2009**. For ease of reference, I have highlighted the portions of these records that should be disclosed to the appellant in the copy of these records that accompany this order sent to the AGCO.
2. I uphold the AGCO's decision to withhold access to the remaining information at issue in the records.

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

Original signed by: \_\_\_\_\_

Diane Smith  
Adjudicator

\_\_\_\_\_ June 25, 2009