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

ORDER PO-2941

Appeal PA09-112

Ontario Lottery and Gaming Corporation

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NATURE OF THE APPEAL:

The appellant submitted a request to the Ontario Lottery and Gaming Corporation (the OLGC) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to lottery retailers in a particular city. Specifically, the appellant sought:

> The information that I am requesting access to is financial information for all active retailer locations, both online and offline, in the city of [named city] for the year 2008 specified as follows:
>
> - Amount of sales, in dollars, that each location generated from the off-line portion of the lottery business (scratch tickets);
>
> - Amount of sales, in dollars, that each location generated from the on-line portion of the lottery business;
>
> - Dollar amounts redeemed from both off-line and on-line prizes awarded at each location;
>
> - The amount of commissions or compensation paid to each location from OLGC, in dollars, for the sales cash redemptions, and activations of both off-line and on-line products.

The OLGC located the responsive record and denied access to it, pursuant to sections 18(1)(a) (valuable government information) and 18(1)(c) and (d) (economic and other interests) of the *Act*.

The appellant appealed the decision of the OLGC to this office.

During mediation, the appellant confirmed that in a previous request he sought access to the same type of information about two specific retailers rather than all retailers in the identified city. The appellant indicated that the OLGC disclosed the information responsive to that request to him. The appellant is of the view that the information in this appeal is the same as that which was previously disclosed. Accordingly, the appellant takes the position that the responsive information should be disclosed.

As further mediation was not possible, the file was transferred to the adjudication stage of the appeal process for an inquiry.

The adjudicator previously assigned to this appeal began her inquiry by sending a Notice of Inquiry to the OLGC, initially. The OLGC responded with representations.

She then sought representations from the appellant, and sent him a copy of the Notice of Inquiry, along with a copy of the non-confidential portions of the OLGC's representations. The appellant also submitted representations in response.

The file was subsequently transferred to me to complete the adjudication process.

RECORD:

The record at issue is a two-page document entitled "[Named city] Sales and Commission Information for the Period: January 1, 2008 to December 31, 2008."

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

The OLGC has claimed the application of sections 18(1)(a), (c) and (d) to the information contained in the Record. These exemptions 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;

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

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

Sections 18(1)(c) and (d) take into consideration the consequences that would result to an institution if a record was released [Order MO-1474]. This contrasts with section 18(1)(a), which is concerned with the type of information, rather than the consequences of disclosure (see Orders MO-1199-F and MO-1564). I will begin my discussion with section 18(1)(a).

Section 18(1)(a)

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 one

The OLGC submits that the record contains both financial and commercial information. These two terms, which are found in both sections 17(1) and 18(1)(a), have been defined in previous orders as:

> ***Commercial Information***
>
> Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises. [Order P-493]
>
> ***Financial Information***
>
> The term refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs. [Orders P-47, P-87, P-113, P-228, P-295 and P-394]

The OLGC states that the record contains information about consumer transactions in the form of money paid by ticket purchasers to retailers and commissions paid to retailers by the OLGC, as well as prizes paid by the OLGC, and submits that this falls within the meaning of financial information.

In addition, the OLGC argues that the sale of lottery tickets is a commercial activity and that the record contains information about these transactions.

The appellant does not specifically address this part of the section 18(1)(a) test.

Based on my review of the record and the OLGC's submissions, I find that the record contains information that would qualify as financial and/or commercial as it relates to money and its use and distribution, as well as the buying, selling and exchange of merchandise or services. Accordingly, the first part of the test has been met.

Part two

The OLGC submits that the information in the record "belongs to" the OLGC "in the sense that the law would protect it from misappropriation by another party." Referring to the concept of a "quality of confidence" discussed in Order PO-1763, the OLGC cites a number of court decisions that discuss this concept, and points out that the quality of confidence threshold is not high.

In taking the position that the record is "confidential in quality," the OLGC notes that it has invested in an accounting system for compiling the information and has licensed software which allows it to use the information. The OLGC states further that only key members of its sales team can access the database through the use of unique usernames and passwords, and that members of its staff are bound by the OLGC's "Code of Business Conduct," which specifies that customer and financial information is confidential. The OLGC indicates that it uses the information in making sales and marketing decisions and otherwise limits the use and disclosure of the information. Finally, the OLGC submits that the information would have value to its competitors and that, in order for competitors or a market research company to reproduce the information, it would have to survey over 10,000 OLGC retailers.

Referring to previous orders of this office and decisions of the courts, the OLGC notes that similar types of information have been held to have a "quality of confidence." (see: for example, Order P-797).

The OLGC notes further that the information in the record was "not collected for the purpose of fulfilling a specific legislative requirement that is tied to an administrative, planning, governance-related or otherwise public purpose." (see: Order PO-2308). Rather, the OLGC submits, the information was "collected under the general grant of power given to the [OLGC] under the *Ontario Lottery and Gaming Corporation Act, 1999* and in furtherance of its mandate to 'develop, undertake, organize, conduct and manage lottery schemes,'" which the OLGC submits is a commercial mandate.

The OLGC acknowledges the previous disclosure of similar information, relating to two specific retailers, to the appellant. Noting that its sales information database contains approximately 160 gigabytes of sales data relating to over 10,000 retailers, the OLGC states that it "relinquished its confidentiality interest in the four pages of information disclosed to the requester, but did not relinquish its confidentiality interest in any other information." The OLGC submits that the disclosure made to the appellant was "exceptional."

In support of this position, the OLGC attached an affidavit sworn by a Customer Service Representative (the Representative) for the OLGC. In her affidavit, the Representative referred to a telephone conversation she had with a retailer who had complained that his commission and sales information had been disclosed to a third party (the appellant). She confirmed that she "explained to him that the [OLGC] only provides this information to contract holders." She indicates that the retailer faxed a copy of the information to her and that she forwarded the letter to her supervisor. The OLGC notes that the Representative explained the OLGC's general practice without knowing that an exception had been made.

The OLGC also provided an affidavit, sworn by the Director of Customer and Channel Management for the OLGC (the Director), which confirmed the OLGC's submissions in greater detail.

The appellant's representations focus on two previous disclosures made by the OLGC.

First, he refers to his previous request for information relating to two specific retailers, which resulted in an appeal that ultimately proceeded to the representations stage before the OLGC decided to disclose the information to him. He notes that the OLGC's representations in the previous appeal were very similar to those submitted in the current appeal, and cannot understand why there should be a distinction made between the two situations.

The appellant then asserts that the OLGC has disclosed the information at issue to a third party. The appellant objects to the OLGC's submission that the disclosure to him was "exceptional." In explaining his position, the appellant describes his own personal involvement with the OLGC and a named petroleum company gas bar and convenience store chain. The appellant attached to his submissions his retail lease agreement with the petroleum company and his retailer contract with the OLGC. The appellant also refers to a privacy complaint he made to the Commissioner's office on the grounds that the OLGC sent quarterly business reports to the petroleum company which "broke down sales by [OLGC] products for all [petroleum company] retailer locations and indicated the retailer's commission on those sales." The appellant provided a sample copy of the report that was sent to the petroleum company and notes that the report "was site specific and as such, they were easily able to view all of the retailers' financial information individually." The appellant submits that this is not a "one-off" disclosure, but is rather, a routine disclosure of "retailers' lottery information to third parties *notwithstanding* the private and confidential nature of it." [emphasis in the original]

The appellant submits that the OLGC is giving "mixed signals." He enclosed a copy of an audio recording of a meeting he had with the Director and two other OLGC employees following his privacy complaint. The appellant states that during that meeting, the Director stated that "the OLGC could do whatever it wanted with my lottery information because it was theirs, they 'owned' it." He submits that this statement contradicts the statements he made in his affidavits relating to the OLGC's *Code of Business Conduct and Conflict of Interest* "which has a confidentiality and disclosure rule which specifically indicates that customer lists, customer information and financial information is **confidential**." [emphasis in the original]

The appellant concludes:

> Aside from the information that I received from [OLGC] in my previous request to access, there are over 100 [named petroleum] branded outlets in Ontario and many of these have lottery terminals that [OLGC] has generated sales reports for third party [named petroleum company] on numerous occasions. They also generate these reports for other oil companies [named], all without exercising its discretion under section 18(1), without any concern for their purported adherence to their 'Code of Business Conduct and Conflict of Interest' and without concern for the economic 'harm that would flow from disclosure because the [OLGC]

> develops and maintains an expectation amongst its retailers that it will keep their lottery sales information confidential." Clearly, and has been admitted by [OLGC], granting access to the information that I have requested is a regular business practice…

Analysis and Findings

In Order PO-1763, after reviewing Orders P-1281 and P-1114, Senior Adjudicator David Goodis made the following observations about the phrase "**belongs to**":

> The Assistant Commissioner has thus determined that the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business to business mailing lists (Order P-636), customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, there is a quality of confidence about the information, in the sense that it is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others. [See, for example, *Lac Minerals Ltd.* v. *International Corona Resources Ltd.* (1989), 61 D.L.R. 4th 14 (S.C.C.), and the cases discussed therein].
>
> [Order PO-1763, upheld on judicial review, *Ontario Lottery and Gaming Corporation* v. *Ontario (Information and Privacy Commissioner)*, ([2001] O.J. No. 2552 (Div. Ct.))]

In Order PO-2308, former Assistant Commissioner Tom Mitchinson considered whether client lists created by the Ontario Clean Water Agency "belonged to" that institution. He found:

> The record at issue in this appeal is a detailed client list that has been prepared and continually updated by OCWA staff for purposes of the agency's own business administration and not for the purpose of fulfilling a legislative requirement. I accept that in order to prepare this record OCWA has expended money and effort to gather the information and has an interest in protecting this information from disclosure to its competitors. Accordingly, I find that the OCWA has a proprietary interest in the information contained in the record and the second requirement of section 18(1)(a) has been established.

In circumstances where "lists" of information relating to alcohol sales were communicated to a contracting party, former Assistant Commissioner Irwin Glasberg found in Order P-797:

> … As indicated previously, these records list the types of alcoholic beverages which the consulate ordered from the Board and which the Board subsequently delivered to the consulate. Given the reciprocal nature of this transaction, I find that the information in the records belongs to both the Board and the consulate.
>
> Several orders issued by the Commissioner's office have considered scenarios where a government organization and a third party have a joint proprietary interest in information (Orders P-219 and P-561). These orders state that a finding of this nature is not inconsistent with the conclusion that the information belongs to the government organization for the purposes of the *Act*.

In Order P-636, former Adjudicator Holly Big Canoe determined that a list of addresses of lottery outlets "was created by the [OLGC] as a result of its contractual relations with its retailers." Noting that the OLGC was the "only source for this list," the adjudicator found that it was the "property" of the OLGC.

In my view, the type of information at issue in Order P-636 is similar in nature to the current appeal. The record at issue in this appeal is a list prepared by the OLGC that breaks down the sales and commissions relating to the retailers with whom it has entered into contractual relations. After considering the approaches taken in previous orders to similar types of information and/or contractual relationships, I am satisfied that the information in the record "belongs to" the OLGC. In my view, there is an inherent monetary value in the information to the OLGC resulting from the expenditure of money or the application of skill and effort to develop the information.

As well, I am satisfied that it is consistently treated in a confidential manner by the OLGC, despite the appellant's submissions that it has disclosed the information to outside parties. As I indicated above, the appellant provided a copy of the privacy complaint report relating to his privacy complaint. The nature of the appellant's privacy complaint was described in the reasons of the Commissioner's office dismissing his complaint:

> Prior to August 2, 2007, you had a lease agreement with [the named petroleum company] as a "commission agent" and you operated a [named] retail outlet. [The named petroleum company] paid you commissions for the sale of consigned products such as gasoline and cigarettes. In 2001 you entered into a 'Retailer Contract' with the [OLGC]. In June 2003 you received clearance for an online lottery terminal. It is your understanding that during this process [the named petroleum company] did not inquire about receiving compensation from you for the sale of lottery tickets.
>
> …

> In October 2005 you found out that the [OLGC] was sending reports to [the named petroleum company], which disclosed the commission paid to you by the [OLGC] for the sale of lottery products. In response, [the named petroleum company] reduced the amount of commission paid to you for the sale of consigned products. As a result, [the named petroleum company] became the main beneficiary of your lottery business.

According to the privacy report, once the appellant complained to the OLGC about this disclosure, it stopped sending the reports to the petroleum company. A number of consequences flowed from this complaint, which are not relevant to the issue before me. Without commenting on any legal ramifications from the OLGC's actions and the contractual terms relating to the appellant's business, I find that the comments made by former Assistant Commissioner Glasberg in Order P-797 are relevant to the sharing of financial information between the OLGC and a party that it deems to have an interest in that information.

Moreover, it appears from the appellant's representations that the OLGC has consistently maintained in its communications with the appellant that it owns the information at issue, and can, therefore, disclose it as it sees fit. Despite an exceptional disclosure to the appellant, which appears to be inconsistent with its own policies about maintaining the confidentiality of such information, I am satisfied that the OLGC has otherwise guarded the information from disclosures that are not related to its business or other contractual interests.

As a result, I am satisfied that the information contained in the record "belongs to" the OLGC, and the second requirement of section 18(1)(a) has been established.

Part three

For the third part of the section 18(1)(a) test to be satisfied, the OLGC must establish that the information contained in the records has monetary value or potential monetary value. The OLGC states that detailed information about the lottery sales of all OLGC retailers in Ontario is valuable information about a market. The OLGC notes that this type of information is sold by market researchers and "may be exploited by the OLGC and other companies who sell to retailers."

The affidavit sworn by the Director explains how the sales data contained in the record can be used by the OLGC and others in assessing the market and why it would be of interest to others as a marketing tool.

The appellant does not specifically address this part of the section 18(1)(a) test.

Analysis and Findings

In Order P-219, (then) Assistant Commissioner Tom Wright found that the third part of the section 18(1)(a) test did not apply to certain financial information for the following reasons:

The institution goes on to argue as follows:

> In addition, as a result of the high profile of the SkyDome and its business affairs in the community, and the historical interest of the media in publishing information regarding Stadco's commercial affairs, it is likely that the information can be sold to the media for publication and thereby has potential monetary value.

In my view, the use of the term "monetary value" in subsection 18(1)(a) requires that the information itself have an intrinsic value. As I see it the purpose of subsection 18(1)(a) is to permit an institution to refuse to disclose a record which contains information where circumstances are such that disclosure would deprive the institution of the monetary value of the information. In this case I am not satisfied that the information itself has monetary value. As well, the institution has no intention of publishing or disseminating the requested information in a way that would result in some form of monetary payment to the institution. Accordingly, subsection 18(1)(a) does not apply.

However, in Order PO-2308, former Assistant Commissioner Mitchinson noted the following:

> In Order P-636, Adjudicator Big Canoe found that a list of lottery retailers had monetary value as contemplated in part three of the section 18(1)(a) test because the institution provided evidence that the list had a market value that could exceed several thousand dollars.
>
> The OCWA has identified a market for the client name and contact information found in the record and identified that records containing similar information are commercially available for a fee. **Although the OCWA does not argue that its client list has been sold to others, or that it has the intention of pursuing potential purchasers or disseminating the requested information in a way that would generate income, I accept that the client name and contact information has potential commercial value that may be exploited** if made available to OCWA's competitors. Therefore, I find that the client names and contact information contained in the record have potential monetary value as contemplated by part three of the section 18(1)(a) test. The internally generated client number and service type indicator are appropriately considered as part of the customer profile developed by OCWA and, in my view, should be treated in the same manner as the client names and contact information for the purposes of section 18(1)(a). Accordingly, I find that the third requirement of the section 18(1)(a) test has been established for all portions of the record under consideration here. [my emphasis]

Former Adjudicator Big Canoe's findings in Order P-636, referred to in Order PO-2308, state:

> In its representations, the OLC contends that a list of the addresses of lottery retailers is a valuable asset in relation to the sales of lottery tickets or other retail

> products. The OLC submits that an accurate, single-source, business to business mailing list is a very saleable asset with potential monetary value. Corroborating evidence from a supplier of mailing lists was included with the OLC's representations, which support the corporation's position that the list has a market value which could exceed several thousand dollars.

I have considered the rationale for the approaches taken to the third part of the section 18(1)(a) test in previous decisions of this office in arriving at my decision in this case. Having reviewed the record at issue in the current appeal, and the OLGC's submissions, I find that the information contained in it has a current "monetary value" to the OLGC, as well as a high potential monetary value that may be exploited by either the OLGC or other marketers if it were made publicly available. The information contained in the record would permit the OLGC to determine the sales opportunity and trends at particular retailers. I am satisfied that this information has significant commercial value to the OLGC and other sellers to that retail market. Accordingly, I find that the OLGC has met all three parts of the test and section 18(1)(a) of the *Act* applies to the record.

Because section 18(1)(a) is a discretionary exemption, I have also reviewed the OLGC's representations regarding its decision to exercise discretion in favour of claiming this exemption, and I find nothing improper in the circumstances of this appeal.

Having found that section 18(1)(a) applies to exempt the record from disclosure, it is not necessary for me to consider the other exemptions claimed by the OLGC.

ORDER:

I uphold the OLGC's decision.

Original signed by: December 23, 2010
Laurel Cropley
Adjudicator