

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3031

Appeal PA10-336

Ontario Lottery and Gaming Corporation

December 29, 2011

Summary: The appellant sought access to records related to the OLG's entry into the provision of online gaming services. The OLG denied access to portions of the responsive records pursuant to the discretionary exemptions in sections 13(1), 18 and 19. On appeal to this office, the OLG issued a revised decision disclosing more information to the appellant. The OLG also withdrew its claim of section 13(1) and added a claim to the mandatory exemption in section 17(1) to deny access to information provided by the Atlantic Lottery Corporation. While the exemptions in sections 18(1)(a) and 19 apply to some of the withheld information, the OLG is ordered to disclose the non-exempt portions of records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 17(1), 18(1)(a), (c), (d) and (g), and 19.

Orders and Investigation Reports Considered: PO-2789.

Cases Considered: *Balabel v. Air India*, [1988] 2 W.L.R. 1036 (Eng. C.A.).

OVERVIEW:

[1] This order addresses the decision of the Ontario Lottery and Gaming Corporation (the OLG) to deny access under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to portions of the records identified as responsive to the following request for:

All briefing notes (final versions only or, if no final versions are available, then the latest drafts), with attachments, created regarding online gambling, including the [OLGC's] expansion into online gaming. Please limit the date range from January 1, 2009 to August 9, 2010.

[2] The OLGC's initial access decision relied on sections 13(1) (advice or recommendations), 18(1) (valuable government information) and 19 (solicitor-client privilege) of the *Act* to deny access to the withheld information. Upon appeal to this office, and through the mediation process, the OLGC issued a new decision disclosing additional information. When no further mediation proved possible, the appeal was transferred to the adjudication stage of the process, where it was assigned to me to conduct an inquiry.

[3] On receipt of the Notice of Inquiry that I sent outlining the issues to the OLGC and seeking representations, the OLGC issued a further revised decision letter to the appellant, disclosing several additional portions of the record. In the OLGC's representations, the exemption claim under section 13(1) was withdrawn, but a claim for exemption under section 17(1) (third party information) was added to deny access to a portion of page 16 of the record. The OLGC argued that the information was supplied by the Atlantic Lottery Corporation (ALC), but did not submit representations in support of the exemption claim. Concluding that the ALC may be an affected party (i.e., an organization whose interests may be affected by the outcome of this appeal), I decided to seek the ALC's representations on the possible application of section 17(1) of the *Act*. I received representations from the ALC in response. I subsequently sought and obtained representations from the appellant as well.

[4] In this order, I find that portions of the record are exempt under sections 18(1)(a) and 19, but that section 17(1) and the other section 18(1) exemptions do not apply. I order the OLGC to disclose the non-exempt portions to the appellant.

RECORDS:

[5] Remaining at issue in this appeal are portions of two records: "New Media – OLG and the Internet," dated August 27, 2009 (2 pages) and "Interactive Digital Media Play," dated July 2009 (9 pages).¹

ISSUES:

A. Does the mandatory exemption for third party information in section 17(1) apply?

¹ The first two pages of this record consist of a briefing note prepared by the OLGC's Director of Strategic Support and Lottery Integration for Internet Gaming for the OLGC Board of Directors. The second part is a nine-page "White Paper" prepared by the same individual prior to his preparation of the briefing note.

- B. Does the discretionary exemption for economic and other interests in section 18(1)(a), (c), (d) or (g) apply?
- C. Does the discretionary exemption for solicitor-client privileged information in section 19 apply?
- D. Should the OLGC's exercise of discretion under sections 18 and 19 be upheld?

DISCUSSION:

A. Does the mandatory exemption for third party information in section 17(1) apply?

[6] The OLGC withheld a portion of page 16 under sections 17(1)(a) and (c). However, as stated previously, the OLGC did not provide representations respecting this exemption claim, instead deferring to the Atlantic Lottery Corporation (ALC). When provided the opportunity, the ALC provided representations in support of the application of sections 17(1)(a), (b) and (c) of the *Act*.

[7] Section 17(1) of the *Act* is a mandatory exemption that applies to exempt the information of a third party if certain requirements are met. The ALC's representations suggest that sections 17(1)(a), (b) and (c) all apply to the information on page 16. The relevant parts 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; . . .

[8] Section 17(1) of the *Act* recognizes that in the course of carrying out public responsibilities, government bodies receive information about the activities of private businesses. The exemption is designed to protect the confidential "informational assets"

of businesses or other organizations that provide information to government institutions.²

[9] Although one of the central purposes of the *Act* is to shed light on the operations of government through the release of information to the public, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.³

[10] For section 17(1) to apply, the ALC must provide evidence to 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) and/or (c) of section 17(1) will occur.

[11] The ALC submits that the information at issue on page 16 qualifies as a trade secret or commercial information for the purpose of part 1 of section 17(1). These particular types of information have been described in a number of past orders as follows:

Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known,
and

² *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal refused (November 7, 2005), Doc. M32858 (C.A.).

³ Orders PO-1805, PO-2018, PO-2371, PO-2384 and MO-1706.

- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy (Order PO-2010).

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises (Order PO-2010). The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information (Order P-1621).

[12] I adopt these definitions for the purposes of this appeal.

[13] According to the ALC, the three sentences in the OLG record that are withheld represent a summary created by the OLG drawn from a report prepared by the ALC,

[which] consists of proprietary information representing significant hours of research, meetings and analysis, the monetary value of which is extremely hard to quantify.

[14] The remainder of the ALC's representations on the subject of the type of information contained in the portion of page 16 were not shared with the appellant, based on the confidentiality criteria of this office or because I did not consider them relevant. However, for the sake of explaining my reasons in a more fulsome manner, I note that the ALC claims that the report (from which the OLG summarized information at page 16) formed the basis of a specific ALC business strategy.

[15] The ALC also offered submissions under the heading for "type of information" that refer to the harms it alleges would result from disclosure of the information at issue, but these more properly relate to the third part of the test for exemption under section 17(1).

[16] The appellant's representations take issue mainly with the persuasiveness of ALC's submission that it would suffer prejudice or harm with disclosure of the withheld information on page 16, or that the OLG would no longer receive such information, as required by part three of the test for exemption under any of sections 17(1)(a), (b) or (c) of the *Act*.

Analysis and findings

[17] The ALC's claim, supported by the OLG but without representations, is that the portion of page 16 at issue contains trade secret or commercial information for the purpose of part one of the section 17(1) test. However, based on the evidence provided

to me in this appeal and my review of the withheld information on page 16, I find that the ALC has failed to establish that the information fits into any of the categories of information protected by section 17(1).

[18] To begin, I note that the three sentences that have been withheld under section 17(1) are actually, on the ALC's own evidence, a summary of information provided (verbally) by the ALC to the OLG. In my view, this categorically distinguishes the information at issue from information that actually forms part of the originating ALC report itself or the resulting business strategy adopted by the ALC in response to the report.

[19] With regard to the definition of "trade secret" established by past orders of this office, it is clear from my review of the severed information on page 16 that the three sentences do not include, or amount to, "a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism," as the introductory part of the "trade secret" definition has been interpreted by past orders of this office. The sentences themselves contain no strategy, let alone a formula, program, or some other "proprietary" product as claimed by the ALC. I specifically reject the ALC's submission that the information ought to be characterized as "proprietary" and find that it is not in the nature of a trade secret that the courts would protect from misappropriation.⁴

[20] Based on my finding that the information at issue does not fit within even the introductory wording of the definition of "trade secret," it is not necessary for me to consider whether the summary meets the four additional criteria of the definition. Therefore, I find that the information at issue on page 16 does not constitute a "trade secret" for the purposes of section 17(1) of the *Act*.

[21] In addition, I conclude that the withheld portion of page 16 does not constitute "commercial information" within the definition of that term in section 17(1). It is not connected to the "buying, selling or exchange of goods or services," because it does not, for example, derive directly from any record describing an arrangement or

⁴ The term "proprietary" is more often addressed in the context of section 18(1)(a), which is intended to protect information that has inherent monetary value and "belongs to" an institution. See Orders PO-1763, PO-2632, and PO-2990. As described in these orders,

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.

This concept will be discussed further under Issue B (Section 18(1) of the *Act*) below.

agreement between the ALC and another party for buying, selling or exchanging goods or services. While it may plausibly have been argued that a document containing the ALC's business strategy qualifies as "commercial information" for its relation to the selling of online gaming services, the same cannot be said for brief, summarized information about the research that led to it, as is actually at issue in this appeal.

[22] In my view, to include the OLGC-prepared summary of some of the conclusions from a report that is not at issue in this appeal upon which an ALC business strategy may be based would inappropriately expand the definitions of "trade secret" or "commercial" information under part one of the section 17(1) test. I find, therefore, that the three withheld sentences from page 16 of the record at issue do not contain the ALC's "informational assets" or constitute information of the type that would qualify for exemption under section 17(1) of the *Act*.

[23] In the circumstances of this appeal, I do not propose to review the second part of the test for exemption under section 17(1). However, even if I were to find that the second requirement – supplied in confidence – was satisfied, I conclude that the third part of the test for exemption is not met. Neither the ALC nor the OLGC has provided me with sufficiently detailed and convincing evidence that the harms contemplated by sections 17(1)(a), (b) or (c) could reasonably be expected to result from the disclosure of the withheld portion of page 16.

[24] The ALC refers in its representations to harms that would result from disclosure of "the proprietary information," "the record in question" or "the ALC record," while acknowledging that "the record does not include the complete ALC report." It is worth repeating that the information at issue is limited to OLGC's brief, three sentence summary of research conveyed to it verbally by the ALC, not information of sufficient detail or character to qualify it as "trade secret" or "commercial" information. In this context, I am not satisfied that disclosure of this information could reasonably be expected to result in significant prejudice to the ALC's competitive position, undue loss to the ALC, or the OLGC no longer receiving such information in the future. I find, therefore, that part three of the sections 17(1)(a), (b) and (c) exemption claims has not been established.

[25] Since all three parts of the test must be established, and parts one and three are both not present in the context of this appeal, I find that the portion withheld from page 16 of the record does not qualify for exemption under sections 17(1) of the *Act*. As no other exemptions are claimed with respect to it, I will order it disclosed to the appellant.

B. Does the discretionary exemption for economic and other interests in sections 18(1)(a), (c), (d) or (g) apply?

OLGC relies on four different parts of section 18(1) of the *Act* to deny access to portions of pages 7, 8, 14, 15 and 17.⁵ In its representations, the OLGC refers to sections 18(1)(a), (c) and (d) in denying access to “financial projections generated for OLGC by [its consultants].” The OLGC relies on sections 18(1)(c), (d) and (g) to withhold “specific strategies and plans related to OLG[C]’s entry into the online gaming market.”

[26] The relevant parts of section 18(1) state:

A head may refuse to disclose a record that contains,

- (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
- (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
- (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

[27] The purpose of section 18 is to protect certain economic interests of institutions. The rationale for including a “valuable government information” exemption in the *Act* was explained in the Williams Commission Report⁶ as follows:

⁵ Although the OLGC’s initial decision and certain pages also list the section 18(1)(e) exemption, the OLGC appears to have abandoned its claim to it. The OLGC provided no representations in support of the application of section 18(1)(e) and, consequently, I have not reviewed it in this order.

⁶ 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).

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 . . .

[28] Along with its written representations, the OLGC provided affidavit evidence from its Director of Strategic Support and Lottery Integration for Internet Gaming. This individual provides general evidence respecting OLGC's markets and its competition from unregulated internet gaming providers, known as "grey market operators," as well as more specific evidence on the information at issue under section 18.

Section 18(1)(a)

[29] The OLGC submits that the financial projections on pages 7 and 14 are exempt under section 18(1)(a) because they are OLGC's valuable financial and commercial information. In particular reference to the three requirements for exemption under section 18(1)(a), OLGC submits:

- the information qualifies as "financial information" because it is about "money and its use and distribution," relating as it does to money that consumers are expected to pay to OLGC and its competitors for "various potential product offerings" in the context of the online gaming market;
- the information also qualifies as "commercial information" because OLGC will launch an online gaming platform in which it will provide a commercial service through which "consumers will make wagers for the chance to win prizes and OLG[C] will derive profit;"
- the information "belongs to" the OLGC in the sense that the law would protect it from misappropriation by another party and in the sense that this office has previously interpreted that term because it relates to existing or potential markets for products and services;⁷
- the information is not known outside the OLGC, it has commercial value to OLGC as confidential information; and OLGC retained and paid a consultant to generate the projections; and
- finally, the consultant's projections are themselves valuable as they are in the nature of "information sold by market researchers and [have] monetary value" that can be leveraged by OLGC or its current and potential competitors in the online gaming market. The OLGC retained the consultant to generate these projections so that it could carefully plan its entry into, and investment in, the

⁷ This section of the OLGC's representations also contains a lengthy discussion of the "belongs to" requirement of section 18(1)(a) with reference to common law consideration of the concept of "quality of confidence" in the context of civil litigation. For the purpose of my analysis in this order, I do not set these submissions out in any detail although I have reviewed them.

online gaming market. For this reason, the financial projection information has intrinsic value to OLG. ⁸

Analysis and findings

[30] For me to uphold the OLG's claim of section 18(1)(a), I must be satisfied by the evidence 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.

[31] For the reasons that follow, I find that the "financial projection" information found in the withheld portion of page 7 and page 14, in its entirety, is exempt under section 18(1)(a) of the *Act*.

[32] To begin, I am satisfied that the information on pages 7 and 14 fits within the definition of "financial information" as that term has been interpreted in past orders. It contains specific figures and data related to current and future potential revenues. I find, therefore, that the first requirement under section 18(1)(a) is met (Order PO-2010).

[33] I am also satisfied that the withheld information "belongs to" the OLG. The financial projections and associated information were developed by a consulting firm on behalf of the OLG. In my view, this is a situation where there is an inherent monetary value to the OLG in the information. I accept the evidence of the OLG that the information has been treated confidentially, and that it maintains its value to the OLG by not being generally known.⁹ In the circumstances, I accept the OLG's evidence that the withheld information on pages 7 and 14 merits protection from misappropriation by another party. Accordingly, I find that the second requirement for exemption under section 18(1)(a) is met.

[34] Finally, I am satisfied that the withheld information on pages 7 and 14 has inherent monetary value for the OLG for planning and investment purposes. In my view, this value goes beyond the mere cost to the OLG of having the projections developed and produced by its consultants. I therefore find that the third requirement of section 18(1)(a) is met.

⁸ Throughout this portion of the representations, the OLG refers to specific parts of the affidavit evidence of its Director of Strategic Support and Lottery Integration for Internet Gaming.

⁹ 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.). See also Orders PO-1805, PO-2226 and PO-2632.

[35] Since all three requirements of section 18(1)(a) are met, I find that the withheld portion of page 7 and page 14, in its entirety, are exempt.

Sections 18(1)(c), (d) and (g)

[36] The other category of information the OLGC seeks to withhold under section 18(1) is what it refers to as "specific strategies, plans and targets." The withheld information appears on pages 8, 15 and 17 of the record.

[37] For sections 18(1)(c), (d), or (g) to apply, the OLGC must demonstrate that disclosure of the information "could reasonably be expected to" lead to the specified result. To meet this test, the OLGC must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.¹⁰ This "harms" requirement contrasts with section 18(1)(a), which is concerned with the type of the information, rather than the consequences of disclosure.¹¹

[38] In its affidavit evidence, the OLGC's director describes the importance of maintaining the confidentiality of the planning and development process in advancing the interests of the OLGC as it ventures into the internet gaming market. To that end, the OLGC refers to the request for information (RFI) issued in November 2010, through which information was gathered to develop the business and operating model for the provision of online gaming services.

[39] The OLGC's arguments on the harms that could result from disclosure rely, in part, on its position as an employer of Ontarians and contributor of substantial funds to support Ontario's "health care, physical fitness, sport, recreation and cultural activities." In asserting the application of sections 18(1)(c) and (d), in particular, the OLGC submits that its competitive interest and the government's broader economic interests "are one and the same."

[40] Further, the OLGC argues that the withheld information in this category is also exempt under section 18(1)(g) because its disclosure would reveal "proposed plans, policies or projects."

[41] The OLGC refers to the more specific evidence contained in the affidavit evidence of its director regarding the harm that could be expected with disclosure of the withheld portions of pages 8, 15 and 17, which it characterizes as the "potential strategy for entering the online gaming market." According to the OLGC,

¹⁰ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

¹¹ Orders MO-1199-F and MO-1564.

Disclosure of specific strategies and plans related to OLG[C]'s entry into the online gaming market could reasonably be expected to be injurious to OLG[C] and the province's economic and financial interest and could reasonably be expected to cause "loss to a person."

[42] The OLGC submits that disclosure of this information would permit its competitors "to better prepare for OLGC's entry into the online gaming market." The OLGC notes that while it has made public its general intentions with respect to this new market direction, it has deliberately kept detailed information about its strategies and plans confidential.

Disclosure of the specific strategy that is described in the redacted text on pages 8, 15 and 17 would "tip OLG[C]'s hand" to its grey market competitors. The strategy is specific, non-obvious and unknown to the public.

[43] Further, the OLGC argues that disclosure of the "specific strategy"

could reasonably be expected to result in a less effective launch because it would help OLG[C]'s grey market competitors respond. More generally, it will lessen OLG[C]'s ability to deliberate about potential strategies in a manner that will support the best possible launch. OLG[C] ought to have a "zone of privacy" for deliberating about its market launch . . .

[44] The OLGC argues that its interest in engaging in effective planning for market entry within a confidential zone is "real and significant," particularly in the context of the heightened scrutiny around commercial initiatives such as online gaming.

[45] OLGC's arguments under sections 18(1)(c), (d) and/or (g) also focus on the potential for compromise of future RFP processes with disclosure of this information.¹²

[46] The remainder of OLGC's submissions in this section address the exemption of assumed pricing rates under sections 18(1)(c), (d) and (g). As I have already found that this type of information on pages 7 and 14 is exempt, it is unnecessary to outline these submissions further.

[47] The appellant submits that the OLGC has not provided sufficiently detailed and convincing evidence to establish a reasonable expectation of harm with the disclosure of all of the information withheld under section 18(1). The appellant disputes the OLGC's claim that the information ought to be withheld because its disclosure could

¹² Paragraph 18 of the OLGC's affidavit evidence relating to compromise to future RFP processes was withheld from the appellant, pursuant to this office's sharing criteria; however, reference to future RFP processes is also found in non-confidential portions of the affidavit, such as paragraph 11, which were shared.

possibly benefit so-called "grey market" operators of online gambling websites. The appellant submits that:

As the OLG[C] has a legal monopoly over online gambling within the jurisdiction of Ontario, I disagree that OLG[C]'s concerns about competition from websites illegal in Canada but still operating in foreign jurisdictions are a valid interpretation of the wording of section 18(1).

Analysis and findings

[48] For the reasons that follow, the OLGC's submissions on sections 18(1)(c), (d) and (g) regarding the particular information withheld from pages 8, 15 and 17 have not persuaded me that there is a reasonable expectation of harm as a result of its disclosure.

[49] In my view, the main difficulty facing the OLGC in meeting the "detailed and convincing" standard under these section 18(1) exemptions is that what the OLGC has chosen to characterize as "specific strategies and plans" for OLGC's entry into the online gaming market are not, in fact, very specific at all. Indeed, allusions to the general strategy referred to in these withheld portions of the records respecting OLGC's approach to operating in the online gaming market are suggested by, or implicit in, other disclosed parts of the records. Other information from these sections that has been withheld is not even directly related to business strategy or plans, but rather a more general sense of the imperative behind the move. In this context, I find that the OLGC has failed to establish an evidentiary link between the disclosure of the specific information at issue and a reasonable expectation of the harms that sections 18(1)(c), (d) or (g) is intended to protect against. I will now address each of the exemptions individually.

[50] 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). In rejecting the OLGC's arguments on the application of section 18(1)(c) to the particular information that has been withheld under it, I find that insufficient evidence has been tendered to persuade me that the approach described only generally in the withheld portions could reasonably be expected to be exploited by "grey market" competition and thus harm the OLGC's competitive position or its economic interests. I agree with the appellant that the OLGC's position as a state-sanctioned gaming provider puts it in a different, and unique, position and that this is a relevant consideration in reviewing the claim of prejudice to its competitive interests.

[51] For similar reasons, I am also not persuaded that disclosure of the information on pages 8, 15 and 17 could reasonably be expected to be injurious to the financial interests of the provincial government or its ability to manage the economy. In its representations, the OLGc refers to the economic benefits, programs and services provided to Ontarians through the funds generated by OLGc's management and operation of gaming in the province. On this point, I rely on comments I made in Order PO-2789 (at page 37) on the subject:

It cannot be disputed that lotteries are "big business" in Ontario, and that they generate a great deal of revenue for the provincial government that is, in turn, used to fund a variety of programs for the benefit of citizens of the province. As noted previously, in order to establish a reasonable expectation of economic and financial harm to that revenue stream under sections 18(1)(c) or 18(1)(d), **the OLGc was required to provide "detailed and convincing" evidence to establish a clear connection between disclosure of the specific information at issue with the forecasted harm** [my emphasis].

[52] I remain in agreement with the requirement I articulated in Order PO-2789 that a nexus between the information and the harm upon its disclosure must be established. Accordingly, I find that section 18(1)(d) does not apply to the information for which it is claimed.

[53] Next, for me to uphold the application of section 18(1)(g) to the withheld information on pages 8, 15 and 17, I must be satisfied by the evidence that the information reveals "proposed plans, policies or projects" of the OLGc and that disclosure of the information could reasonably be expected to result in either the premature disclosure of a pending policy decision, or undue financial benefit or loss to a person.¹³ Previous orders of this office have established that the application of section 18(1)(g) requires there to be an existing policy decision by the institution (Order P-726). Arguing for the application of section 18(1)(g) in this appeal, the OLGc has merely stated that the exemption applies to the withheld information because its disclosure would reveal "proposed plans, policies or projects" and that its disclosure would result in "loss to a person." I reject these arguments because they are not accompanied by evidence of, or a connection to, any specific policy decision by the OLGc. In this context, I find that section 18(1)(g) does not apply.

[54] In sum, while I have found that sections 18(1)(c), (d) and (g) do not apply to the information withheld on pages 8, 15 and 17, I uphold the OLGc's exemption claim under section 18(1)(a) to the financial information on pages 7 and 14, subject to my review of the OLGc's exercise of discretion, below.

¹³ 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.).

C. Does the discretionary exemption for solicitor-client privileged information in section 19 apply?

[55] The OLGC has withheld portions of pages 7 and 13 pursuant to branch 1 of the discretionary exemption in section 19, which exists to protect solicitor-client privilege at common law.¹⁴

[56] Branch 1 of section 19 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.¹⁵

[57] 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.¹⁶ The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.¹⁷

[58] 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.¹⁸

[59] According to the affidavit evidence of the OLGC’s director, the information withheld from pages 7 and 13 under section 19 contains legal advice he obtained from OLGC’s senior legal counsel and a lawyer from an outside law firm. OLGC submits that:

[the director] conveys legal advice obtained by the corporation to the OLG[C] board of directors. His statements – revealing of legal advice obtained by OLG[C] itself – are unquestionably within the “continuum of communications” protected by solicitor-client privilege. [The director] also received this legal advice on behalf of the corporation in confidence and conveyed it to the board in confidence.

¹⁴ The OLGC withheld two portions of page 7: one under section 18(1)(a), which I have found exempt, above, and the other under section 19.

¹⁵ Order PO-2538-R; *Blank v. Canada (Minister of Justice)*, [2006] S.C.J. No. 39.

¹⁶ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

¹⁷ Orders PO-2441, MO-2166 and MO-1925.

¹⁸ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

[60] The appellant indicates in his representations that he does not question the applicability of section 19 to the passages in question. I will, however, proceed with a finding on the exemption.

Analysis and findings

[61] Based on the OLGC's representations and my review of the withheld information on pages 7 and 13, I am satisfied that these portions contain information that is properly subject to the solicitor-client privilege exemption. I find that this information forms part of the "continuum of communications between a solicitor and client."

[62] In my view, these portions of the records also contain content that is contemplated by a later part of the passage from *Balabel* (cited above), where the English Court of Appeal stated:

. . . legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.¹⁹

[63] Specifically, based on my review of the records, I find that the withheld portions of pages 7 and 13 represent a confidential communication between a solicitor, either employed by the OLGC or on retainer with the OLGC, and a client, namely the OLGC director or its board. Further, these communications pertain to the legal issues surrounding online gaming, possible legal requirements, and potential options available to the OLGC. I am satisfied that the portions of the records for which section 19 is claimed are directly related to the seeking, formulating or giving of legal advice.

[64] Accordingly, I find that the information withheld from the specified portions of pages 7 and 13 is exempt from disclosure under the solicitor-client communication privilege component of section 19, subject to my review of the OLGC's exercise of discretion.

D. Should the OLGC's exercise of discretion under section 19 be upheld?

[65] After deciding that a record or part thereof falls within the scope of a discretionary exemption, the head of an institution is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. An institution must exercise its discretion in this regard.

[66] In this appeal, I have upheld the OLGC's decision to withhold part of page 7 and all of page 14 under section 18(1)(a) and certain portions of pages 7 and 13 under section 19. I must therefore review the OLGC's exercise of discretion with respect to

¹⁹ *Balabel* (see footnote 18), cited in Order P-1409.

these exemptions because it was permitted to disclose information, despite the fact that it could withhold it.

[67] On appeal, the Commissioner (or her delegate) may determine whether the institution failed to do so. In addition, the Commissioner may find that the institution erred in exercising its discretion where: it does so in bad faith or for an improper purpose; it takes into account irrelevant considerations; or it fails to take into account relevant considerations. In such a 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)).

[68] With respect to its exercise of discretion in withholding the information under sections 18 and 19, the OLGC submits that it considered:

- The principle that information should be available to the public subject to limited and specific exemptions;
- The wording of the section 18 exemption and the meaning attributed to it by this office, including protecting the OLGC's "significant commercial interest;"
- Whether disclosure would increase public confidence in the operation of the OLGC;
- OLGC's interest in entering the online gaming market in a manner that will derive the greatest possible benefit to the province;
- The significance of the information in light of the timing of the request;
- OLGC's need to ensure the confidence of its employees and officers in being able to seek the legal advice of internal and external counsel and not have this legal advice about "a critical business initiative" disclosed; and
- The importance of protecting the solicitor-client privilege interest over the requester's interest in access to this particular information.

[69] In his brief representations on the subject of the exercise of discretion, the appellant submits that the OLGC did not adequately consider the purposes of the *Act* in rendering its access decision, namely that information ought to be publicly available and that exemptions should be limited and specific.

[70] On balance, I am satisfied that the OLGC considered relevant factors and properly exercised its discretion in withholding the information that I have found to qualify for exemption under section 18(1)(a) and branch 1 of section 19. Therefore, with due consideration of the overall circumstances of the appeal, including the information the appellant will receive as a consequence of my other findings in this order and the fact that the OLGC re-exercised its discretion on two occasions to disclose more information to the appellant, I will not interfere with its exercise of discretion.

[71] Accordingly, I uphold the OLGC's decision not to disclose the information on pages 7, 13 and 14 that has been withheld under sections 18(1)(a) and 19.

ORDER:

1. I uphold OLGC's decision to deny access to the information on pages 7, 13 and 14 that I have found exempt under sections 18(1)(a) and 19 of the *Act*.
2. I order OLGC to disclose the remaining non-exempt portions of the records at pages 8 and 15-17 by sending the records to the appellant no later than **February 2, 2012** but not before **January 27, 2012**.
3. In order to verify compliance with this order, I reserve the right to require a copy of the information disclosed by OLGC pursuant to order provision 2.

Original signed by: _____
Daphne Loukidelis
Adjudicator

_____ December 29, 2011