Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3042

Appeal PA11-11

Ontario Lottery and Gaming Corporation

January 24, 2012

Summary: The appellant made a request to the OLGC for any profit estimate and any revenue estimate for the Ontario government relating to OLGC's entry into online gaming. The OLGC denied access to the responsive records on the basis of the discretionary exemptions at sections 13(1)(advice or recommendation) and 18(1) (economic and other interests) of the *Act*. The OLGC also identified that portions of the records were not responsive to the appellant's request. On appeal, the OLGC withdrew its claim of section 13(1) and this inquiry determined that section 18(1) did not apply to certain projected revenue and profit estimate information. This information was ordered disclosed to the appellant.

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

Orders and Investigation Reports Considered: P-941

OVERVIEW:

[1] The appellant made a request to the Ontario Lottery and Gaming Corporation (OLGC) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> From January 1, 2010 to the present: any estimate of profit for OLG as well as any estimate of revenue to the Ontario Government from online gaming.

[2] The OLGC located responsive records and denied access to them pursuant to the discretionary exemptions at sections 13(1) (advice or recommendation) and 18(1) (economic and other interests) of the *Act*.

[3] During the course of mediation, the OLGC confirmed that it was no longer relying on section 13(1) to withhold the information. Instead, the OLGC advised that it would continue to rely on section 18(1) to withhold the responsive records. The OLGC also clarified that some information in the records was withheld as it was not responsive to the request. The appellant advised the mediator that he wished to pursue access to all of the records, including any portions of the records identified by the OLGC as not responsive.

[4] As mediation did not resolve the appeal, the file was moved to the adjudication stage of the appeals procedure where an adjudicator conducts an inquiry under the *Act*. During my inquiry I sought and received representations from the OLGC and the appellant. Representations were shared in accordance with *Practice Direction 7* and the IPC's *Code of Procedure*.

[5] In this decision, I order the OLGC to disclose the projected revenue and profit estimate information in the records.

RECORDS:

[6] The records at issue are set out in the following OLGC index which was also provided to the appellant. These records are a collection of MS PowerPoint slides that the OLGC has used internally.

Page	Subject / Title	Disclosure	Exemption claimed
1	From Internet Gaming: Overview of the OLG's Current State	Withheld	18(1)(a), (c), (d), (g)
2	From Internet Business Model Brainstorm	Withheld	18(1)(a), (c), (d), (g),
3	From Initiative Summary to Board	Withheld	18(1)(a), (c), (d), (g), N/R
4, 5	Internet Gaming: Financials for Minister	Withheld	18(1)(a), (c), (d), (g)
6, 7	From Profit Growth Opportunities Draft Discussion Document	Withheld	18(1)(a), (c), (d), (g), N/R

ISSUES:

A. What records are responsive to the appellant's request?

B. Does the discretionary exemption in section 18(1) apply to the records?

DISCUSSION:

A. What records are responsive to the appellant's request?

[7] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[8] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134 and P-880].

[9] To be considered responsive to the request, records must "reasonably relate" to the request [Orders P-880 and PO-2661].

[10] The OLGC submits that the information on pages 3, 6 and 7 are not responsive because the appellant's request was for financial projection information relating to OLGC's entry into the online gaming market and the information on these portions of the pages do not relate to the appellant's request. The OLGC states:

- Information under the heading "Execution: How will OLGC pursue the opportunity?" on page 3. This information falls outside the scope of the request because it is not financial projection information.

- First three rows of the table on page 6. This is information about potential market strategies (with financial projection information) for three markets *other than the online gaming market*. This information falls outside of the scope of the request because it does not relate to the online gaming market.

- Information under "Implementation timelines" and "Stakeholder impacts" headings on page 7. This information falls outside the scope of the request because it is not financial projection information.

[11] The appellant submits that his request was for basic information related to the OLGC's expected profit from online gaming and Ontario government revenue. He submits that he did not seek a line-by-line breakdown of revenue and expenses, specific plans or tactics, or specific financial modeling methodology and assumptions. The appellant submits that he would have even been satisfied with the requested information reproduced in table form.

[12] In its reply representations, the OLGC submits that the appellant's representations on this issue attempt to change and narrow his request. The OLGC states:

> The requester specifically asked for "any" estimate of profit for OLGC and "any" estimate of revenue to the province and did not specify that he wanted "bottom-line", "global" or "aggregate" information. The OLGC responded properly by treating all profit estimates as responsive, including profit estimates for (a) various years and (b) various product types.
>
> The information in the records under appeal corresponds very closely with what the requester has asked for. Pages 1, 2, 4, 5 and 6 include profit estimate information in tabular form along with the basis for the calculated estimate. Pages 3 and 7 include statements about estimated profit and closely related contextual information that goes to the statements' meaning.
>
> Having specifically asked for "any" information, the requester can not now narrow his request in response to OLGC's economic harm argument. As a matter of jurisdiction, both the requester and the IPC are bound to deal only with the request.

[13] I will first address the issue of whether the information identified on pages 3, 6 and 7 of the record is not responsive to the appellant's request. As stated above, the appellant's request was for any profit estimate for the OLGC and revenue for the province from online gaming for a specified period. The identified "not responsive" information in the record includes the following:

- Page 3 – OLGC strategies for implementing the on-line gaming
- Page 6 – initiatives to be undertaken in on-line gaming
- Page 7 – implementation timelines and stakeholder impacts

[14] Based on my review of this information and the parties' representations, I find that this information does not reasonably relate to the appellant's request. Accordingly, I uphold the ministry's decision that this information is not responsive and need not be included as part of the records at issue in this appeal.

[15] I will now address the OLGC's position that the appellant cannot narrow the scope of his request after receiving and reviewing the OLGC's submissions on the application of the section 18(1) exemption. The OLGC submits that I am bound to deal only with the appellant's request, which I assume means his request as it stood at the request stage.

[16] The OLGC submits that because the appellant did not specify that he wanted "bottom-line", "global" or "aggregate" information then he should be required to accept all of the information that has been found by the OLGC to be responsive. It points out that the appellant used the word "any" estimate or revenue in his request.

[17] In my view, the appellant's clarification of his request in his representations does not reflect a narrowing or change in the scope of his request. Instead, the appellant has clarified that his request does not include information relating to the line-by-line breakdown of revenue and expenses, specific plans or tactics, specific financial modeling methodology and assumptions. The appellant's request clearly does not ask for this information. The OLGC submits that the appellant's request infers that he is, "…interested in profit to OLGC and the flow-through "revenue to the province". I find the appellant's request does not imply that he is interested in that type of information. In my view, the appellant's use of the word "any" is to ensure that he captures any record that may contain this information as he, unlike the OLGC, is unaware of the possible responsive records. He has simply asked for information relating to the OLGC's expected profit and the Ontario government's expected revenue from online gaming. Further, there is nothing in this office's process or the *Act* that precludes the appellant from clarifying his request or prevents me from considering the application of the exemptions to the appellant's clarified request.

[18] I suggest to the OLGC that if it had provided more detailed information in its decision letter to the appellant at the request stage, the appellant could have provided clarification at that time as to the nature of his request. In particular, section 24(2) of the *Act* requires that the institution assist the appellant in clarifying the request, if the appellant's request does not sufficiently describe the record sought.

[19] In summary, I find that the information identified by the OLGC on pages 3, 6 and 7 is not responsive and I uphold the OLGC's decision with respect to this information. Further, as the appellant has indicated that he is only interested in information related to OLGC's expected profit from online gaming and Ontario government revenue, I will only be considering access to this information. The OLGC's reply representations contained a copy of the records at issue with this information highlighted for the purposes of its discussion. I will consider the application of the exemptions to this responsive information only.

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

[20] The OLGC claims that the information at issue is exempt under sections 18(1)(a), (c), (d) and (g) which 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;

[21] The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's

Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

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

[22] For sections 18(1)(c), (d) and (g) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

[23] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 18 [Orders MO-1947 and MO-2363].

[24] Parties should not assume that harms under section 18 are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order MO-2363].

Section 18(1)(a)

[25] I will first consider whether section 18(1)(a) applies to the information. For section 18(1)(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information,

2. belongs to the Government of Ontario or an institution, and

3. has monetary value or potential monetary value.

Part 1 – Type of information

[26] The OLGC submits that the profit and revenue estimate information in the records is financial and commercial information for the purposes of section 18(1)(a). The OLGC submits that the financial projections are about money that is expected to be paid by consumers of its online gaming products to the OLGC and thus it relates to money, and its use and distribution. The OLGC submits that the financial projections are commercial information as it will be providing a commercial service in that

consumers will make wagers for a chance to win and the OLGC will derive a profit from this activity. As such, it relates to the buying and selling of services and merchandise.

[27] Past orders of this office have defined financial and commercial information as follows:

> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].
>
> *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].

[28] I find that the profit and revenue estimate information is both financial and commercial information for the purposes of section 18(1)(a) as the information relates to OLGC's and the province's estimated profit and revenue from online gaming.

Part 2 – belongs to

[29] 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.

[30] Examples of the latter type of information may include trade secrets, business-to-business mailing lists [Order P-636], customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others [Order PO-1763, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.). See also Orders PO-1805, PO-2226 and PO-2632.]

[31] The OLGC submits that the information at issue would be recognized by this office as belonging to it because the information has the "quality of confidence" required by law. The OLGC submitted that the following factors establish that quality of confidence:

- The information is not known outside of the OLGC.
- The information has value to the OLGC as confidential information.
- OLGC paid a third party consulting firm to provide the information.
- OLGC used the information from the third party and another consulting group to develop the information at issue.

[32] Based on the OLGC's representations, I find that the aggregate information "belongs to" it. I accept OLGC's position that the information is not known outside the institution and relates to information that it developed partly through the retention of a third party consulting group. I further accept the OLGC's position that the aggregate financial projection information has value to the OLGC as confidential information because it relates to its mandate to develop lottery schemes and in particular to develop its online gaming system.

Part 3 – monetary value

[33] To have "monetary value", the information itself must have an intrinsic value. The purpose of this section is to permit an institution to refuse to disclose a record where disclosure would deprive the institution of the monetary value of the information [Orders M-654 and PO-2226].

[34] The fact that there has been a cost to the institution to create the record does not mean that it has monetary value for the purposes of this section [Orders P-1281 and PO-2166]. In addition, the fact that the information has been kept confidential does not, on its own, establish this exemption [Order PO-2724].

[35] The OLGC submitted an affidavit from its Director of Strategic Support and Lottery Integration for Internet Gaming (the affiant). The OLGC submits that the projection information is about "a market" and is the type of information that is sold by market researchers. It argues that this type of information has monetary value to both it and its competitors. The OLGC submits the following:

> [The affiant] swears to the value of the information at paragraphs 10, 22 and 24 of his affidavit. OLGC paid Deloitte to generate the information upon which it could carefully plan its means of entering the online gaming market – i.e., use the projections to determine how to best invest in sales

> and marketing efforts. It could be used by OLGC's competitors for the exact same purposes. Mr. Kyle swears, "[The projections] could be used by our competitors to increase their marketing spending significantly in advance of OLG entering the market and make it increasingly difficult for OLG to achieve its goal.

[36] The affiant, in the paragraphs referred to above, affirms the following:

- The OLGC has kept this information confidential as it is entering into an existing market dominated by grey-market competition.
- The OLGC values the information as it allows them to plan how much to invest in the online gaming market and for each product.
- There is no "off the shelf" market research product for online gaming and OLGC engaged Deloitte and Boston Consulting Group to develop the projections.

[37] On the specific issue of whether the revenue and profit estimate information has value, the OLGC submits that:

> Insight about the online gaming market can be derived by OLGC and others looking to exploit the online gaming market from aggregate and detailed information alike.

[38] The appellant submits that the government has already publicly speculated on the potential profit and market size and provides a quote from the Toronto Star as evidence that information sought is not kept confidential by the OLGC and does not have intrinsic value.

[39] While, based on the evidence tendered by the OLGC, I accept that the OLGC keeps this information confidential; I am unable to find that it derives its value from not otherwise being known. The information in the profit and revenue estimate projections is about profit projections which are specific to the OLGC and relate to the unique way in which it operates in the Ontario gaming market. It is not apparent to me what, if any, monetary value could be derived from OLGC's competitors from this information. In my view, even if this information is disclosed to the "grey market" competitors, these organizations or individuals would still have to act in order to derive value from this information i.e. choosing to invest in certain activities to off-set or limit the OLGC's market share. I am not satisfied that based on the OLGC's representations, that its competitors would derive a monetary value from the information in the same way that OLGC derives value from it due to its specific nature and the unique position of the OLGC. I find that the information in and of itself does not have intrinsic value and I find that section 18(1)(a) does not apply.

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

[40] 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 [Orders P-1190 and MO-2233].

[41] This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758].

[42] Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario," section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians [Order P-1398 upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233].

[43] The OLGC submits that sections 18(1)(c) and (d) apply to the financial projection information that relates to its entry into the online market. In support of its position that section 18(1)(c) applies, the OLGC cites Order P-941 where Adjudicator Anita Fineberg found that three market research studies prepared for OLGC by external consultants to support the development of sales and marketing strategies were exempt from disclosure under section 18(1)(c). The OLGC submits that "theory for exemption" in this case is similar to that in P-941. The OLGC also evidences the information set out in the affidavit referred to above. I have summarized portions of the affidavit above. Further, the affiant submits the following would be disclosed to OLGC's competitors if the records were disclosed:

- Information about projected market potential by year, both overall and by product line. Market potential is indicated by the following data: total market size, OLGC market share, OLGC sales, net win, after pricing revenue cannibalization rate and net profit to the province.

- Information about online gaming planning assumptions. Assumptions are revealed by the following data: prizing revenue rates; infrastructure costs and revenue costs.

[44] The OLGC submits that it should be permitted to engage in effective marketing planning by recording and analyzing assumptions that cannot be made public. Further, the OLGC submits that this harm is real and significant given "the scrutiny that it typically faces in launching and marketing critical commercial initiative such as online gaming." Finally, the OLGC submits that the grey market competitors will use the information to develop an optimal response to OLGC's market entry. Regarding disclosure over the aggregate profit estimate information, the OLGC submits that this information would reveal profit *over-time* [OLGC's emphasis].

[45] I have reviewed Order P-941 where the issue before Adjudicator Fineberg was whether disclosure of three market research studies relating to the development of new lottery gaming products could reasonably be expected to prejudice the economic interests of the OLGC and its competitive interest. In finding that the records were exempt under section 18(1)(c), the Adjudicator relied on the affidavit of the acting vice-president of the institution and was satisfied that there was a reasonable expectation of harm to the OLGC's competitive position based on this evidence.

[46] In the present appeal, I am not satisfied that the OLGC has provided the detailed and convincing evidence necessary to establish that disclosure of the records at issue could reasonably be expected to either prejudice its economic interests or its competitive position [section 18(1)(c)] or be injurious to the financial interests of Ontario or its ability to manage the economy in Ontario [section 18(1)(d)].

[47] The OLGC submits that it intends to capture a portion of the estimated $400 million Ontarians spend on internet gaming providers by entering the online gaming market. In doing so, the OLGC submits that it will be competing directly against grey market operators that have created reputable brand names and online gaming sites which currently compete against OLGC's current gaming offerings. The OLGC further submits that it competes against other businesses (theatres, movie rental, sporting event and live theatre offerings) for "entertainment" spending. The OLGC submits that disclosure of the information at issue in the financial projections will permit its competitors to use this information to plan their investment strategies without having to retain third party consulting groups for information to compete against the OLGC. I note, however, that the OLGC did not provide evidence that would address the following:

- How would organizations such as theatres, movie theatres and sporting event operators use the information of the online gaming market and OLGC's projected profit estimates to compete against it?

- How would OLGC's competitors use the forecasted profit over-time information to prejudice the OLGC's competitive or economic interests?

- How would the grey market competitors use the information to compete against the OLGC?

[48] I find the OLGC's representations on the application of these exemptions to be vague and speculative at best and do not address in any substantive way the prejudice that would be suffered by the OLGC or the province of Ontario should disclosure occur. While I appreciate that OLGC will be competing against existing organizations already operating in the online gaming market, I conclude that it has not provided detailed and convincing evidence that disclosure of the information at issue could reasonably be expected to result in the harms set out in section 18(1)(c) and (d). The possible threat that competitors could potentially use this information to change or alter their business practices does not establish the harms in section 18(1)(c) and (d). Accordingly, I find that the information at issue is not exempt under section 18(1)(c) and (d).

Section 18(1)(g)

[49] In order for section 18(1)(g) to apply, the OLGC must show that:

1. the record contains information including proposed plans, policies or projects of an institution; and

2. disclosure of the record could reasonably be expected to result in:

   (i) premature disclosure of a pending policy decision, or
   (ii) undue financial benefit or loss to a person.

[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.)]

[50] For this section to apply, there must exist a policy decision that the institution has already made [Order P-726].

[51] The OLGC makes the same argument against disclosure for the application of section 18(1)(g) that it did above. The OLGC submits that disclosure of the aggregate profit estimate information would reveal "forecasted profit *over-time*" and thus its competitors would be able to pre-empt the OLGC entry into the online gaming market. The OLGC also refers to the evidence in the affidavit referred to above.

[52] Based on my review of the aggregate profit estimate information and the OLGC's representations, I am not satisfied that the aggregate profit estimate information contains information relating to the proposed plans, policies or projects of the OLGC and that disclosure of this information could reasonably be expected to result in either premature disclosure of a pending policy decision or result in undue financial benefit or loss to a person. I made this finding in light of the fact that the OLGC has made it

known that it would be entering the online gaming market and has speculated on its potential profit. Further, the OLGC did not provide detailed and convincing evidence that disclosing the information at issue would result in either harm in section 18(1)(g). Accordingly, I find that section 18(1)(g) does not apply.

ORDER:

1. I order the OLGC to disclose the information to the appellant by providing him a copy of this information by **February 24, 2012**. For clarity, I have highlighted the information **to be disclosed** on the copy of the record which is enclosed with the OLGC's copy of the order.

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

Original Signed by: January 24, 2012
Stephanie Haly
Adjudicator