Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3219

Appeal PA11-500-2

Ontario Lottery and Gaming Corporation

June 19, 2013

Summary: The appellant made a request for records between the Ontario Lottery and Gaming Corporation and five identified parties from April 2000 to the date of the request. The OLG sought clarification from the requester and the request was divided into four separate requests. This order addresses communications between the OLG and the five identified parties relating to the OLG's self-exclusion program. The OLG located responsive records and issued a decision letter, granting partial access to them. It denied access to portions of the records pursuant to sections 13(1) (advice or recommendations) and 18(1) (economic and other interests) of the *Act*. Portions of the records were also withheld as not responsive to the request. In its representations, the OLG advised that it was no longer relying on section 18(1) to deny access to portions of the records. In her representations, the appellant raised the issue of reasonable search and the possible application of the public interest override at section 23 of the *Act*.

In this order, the adjudicator finds that the OLG has properly severed portions of the records as not responsive and pursuant to section 13(1) of the *Act*. Additionally, the adjudicator finds that the OLG unilaterally narrowed the request and orders it to conduct a new search for responsive records. Finally, the adjudicator finds that the public interest override provision at section 23 does not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 13(1), 23, and 24.

Orders and Investigation Reports Considered: Order PO-2383.

OVERVIEW:

[1] A request was made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ontario Lottery and Gaming Corporation (OLG) for the following information:

> I wish to receive copies of all communications, correspondence, information, documents, contracts, agreements since April 2000 to the [date of the request], between the Ontario Lottery and Gaming (Corporations) and each of:
>
> 1. Ontario Ministry of Energy and Infrastructure
> 2. Ontario Ministry of Finance
> 3. [a named company]
> 4. [a named company]
> 5. [two named casinos][1]
>
> Responsive records may be redacted/severed as appropriate for protection of personal privacy…

[2] The OLG subsequently sought clarification of the request from the requester. Following discussions by way of email with her, the OLG advised that, for ease of reference, the request had been divided into four separate requests. This appeal relates to OLG request number A-2011-00147 which is for access to records regarding the exclusion of problem gamblers from all Ontario casinos. The OLG requested written confirmation from the requester that it had properly interpreted the request as follows:

> 2011-00147: We have interpreted this request to be for any communications from 2000 to the present between the OLG and the parties named in your initial request about OLG's self-exclusion program.

[3] The requester confirmed, by email, that the OLG's interpretation was correct and stated that she sought access to "all responsive records."

[4] The OLG located responsive records and issued a decision letter granting partial access to them, denying access to portions of them pursuant to sections 13(1) (advice or recommendations) and 18(1) (economic and other interests) of the *Act*.

[5] The requester, now the appellant, appealed the OLG's decision to this office.

[6] Pursuant to section 28(1), the OLG notified third parties that might have an interest in the disclosure of some of the information at issue, and subsequently issued a

[1] The named casinos are two resort casinos in the Niagara region.

revised decision letter to the appellant, advising that it had reconsidered its decision with respect to portions of the records at issue. The OLG granted further disclosure but continued to withhold some of the information, continuing to rely on sections 13(1) and 18(1) of the *Act*. In addition, the OLG severed some portions of the records on the basis that they are not responsive to the request.

[7] During mediation, the appellant advised that she wishes to pursue access to the records remaining at issue, in their entirety.

[8] As further mediation was not possible, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. Representations were received and shared in accordance with this office's *Code of Procedure* and *Practice Direction 7.*

[9] In its representations, the OLG advised that it is no longer relying on the exemption at section 18(1) of the *Act*. As a result, section 18(1) is no longer at issue in this appeal.

[10] In addition, the OLG provided this office with a copy of two further decision letters, issued to the appellant during the inquiry into this appeal, in which the OLG disclosed further information to the appellant.

[11] In her representations, the appellant indicated for the first time in the appeal, that she was of the view that additional records responsive to her request should exist. Additionally, the appellant raised the possible application of the public interest override at section 23 of the *Act.* As a result, the OLG was given an opportunity to reply to the appellant's representations on these issues. The OLG provided representations in reply, which were subsequently shared with the appellant. The appellant chose not to submit representations on sur-reply.

[12] For the reasons that follow, I find that the OLG has properly withheld portions of the responsive records from disclosure as non-responsive and pursuant to section 13(1) of the *Act*. Additionally, I find that the OLG has unilaterally narrowed the request and I have ordered it to conduct a new search for records responsive to the request as clarified during the processing period. Finally, I find that even if the appellant is entitled to raise the public interest override at the inquiry stage of the appeal process, a compelling public interest in the disclosure of the information at issue has not been established and the override does not apply.

RECORDS:

[13] The records that remain at issue in this appeal consist of portions of pages 8, 31, 32, and 33 of the records identified as responsive to the request.

ISSUES:

A. What is the scope of the request? What portions of the records are responsive to the request?

B. Is the appellant entitled to raise the issue of reasonable search during the inquiry stage of the appeal? If so, did the OLG conduct a reasonable search for responsive records?

C. Does the discretionary exemption at section 13(1) apply to the records?

D. Did the OLG exercise its discretion under section 13(1)? If so, should this office uphold the exercise of discretion?

E. Is the appellant entitled to raise the compelling public interest override during the inquiry stage of the appeal? If so, is there a compelling public interest in disclosure of the information at issue in the records that clearly outweighs the purpose of the section 13(1) exemption?

DISCUSSION:

Issue A: What is the scope of the request? What portions of the records are responsive to the request?

[14] Section 24 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).

[15] 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.[2]

[16] To be considered responsive to the request, records must "reasonably relate" to the request.[3]

Representations

[17] The OLG submits that this issue only relates to the severed portion on page 8 "which contains the communication by which record 8 was forwarded to OLG's freedom of information office for processing." It states that this information is "clearly non-responsive" to the request.

[18] The appellant does not specifically address the issue of the responsiveness of the severed portions of page 8. However, in her representations, the appellant make some general comments that speak to the scope of the request in general.

[19] The appellant notes that of the responsive records already disclosed to her, there are little or no communications relating to four of the five organizations specifically itemized in her request. She submits:

> The self-exclusion program is an everyday, essential, major component of the overall operational obligations of the OLG, in all Ontario casinos, and consequently, the OLG must be involved in all communications, including regular updates on the status of self-excluded persons, and all other updated conditions concerning the self-exclusion program, with their associated operational partners, and the Ontario Ministries that the OLG is obliged to report to.
>
> …
>
> It is clear from the [board mandate taken from page 4 of the OLG annual report 2009-1010], that in order for the OLG to be able to fulfill its mandate to "assess business risks" requires that the OLG must have full knowledge, among all other operational policies, procedures and performance of the security operations of resort casinos, including the policy, procedures and daily conduct of the self-exclusion program, and the OLG must be able to provide all required input "to review the adequacy and effectiveness of internal controls in managing risks."

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[2] Orders P-134 and P-880.

[3] Orders P-880 and PO-2661.

> All of this comes down to the all-encompassing mandate that the OLG must have all necessary oversight and input on all aspects of operations of resort casinos, in order "to ensure compliance with key policies, law and regulations."
>
> If the OLG did not have this oversight and input in all aspects of operations, they could not fulfill obligations to ensure compliance of these operations including the self-exclusion program.

[20] Later in her representations she submits that the OLG is now the landlord to the on-site operator of a named casino resort and that "the communication required to ensure that the OLG is properly informed at all times, of all these operational activities, must be voluminous and should greatly exceed only the 33 pages, as the OLG has presently disclosed." She argues that information from the OLG annual report 2009-2010 shows that there is very detailed, direct financial oversight and for the "OLG to claim that their responsibilities for financial oversight of the very valuable resort casinos is not matched by direct operational oversight and input, would be disingenuous."

[21] On reply, the OLG provided an affidavit sworn by the Senior Manager of Information, Access and Privacy Services, in which the OLG elaborates on how it interpreted the request. She states that given that the appellant initially filed a broad request for information and that, as a result, she sought clarification from the appellant for the specific purpose of narrowing the request. To her affidavit she attached the letter sent to the appellant which stated the following:

> Unfortunately, your request does not provide sufficient detail to enable us to identify specific responsive records. We are, however, prepared to assist you in reformulating your request. To this end we are providing the following questions to help identify the records you are seeking:
>
> 1. Contracts/agreements:
>
>   With respect for contracts between the named entities we have interpreted your request to be for any operating agreement between OLG and [named casino] management between 2000 to the present. Please confirm whether this is correct.
>
> 2. "communications, correspondence, information, documents";
>
>   - What is the nature and/or topic of these records?
>   - What specific issues do they address?
>   - What are the specific types of records?
>   - What departments and/or individuals at OLG would have created these records?

> Please provide as much detail as possible. If you are unsure of the answers to some of these questions, please provide us with more details about the information you are seeking (i.e., are you looking for information on a particular topic or issue?) to help us identify records that may be responsive.

[22] In response to this letter, the appellant confirmed that with respect to question 1 the OLG was correct that she seeks "any operating agreement between OLG and [named casino] management between 2000 to the present." With respect to question 2 she stated "regarding the nature, topics, specific issues" and then listed three separate topics, one of which was the "exclusion of problem gamblers from any, all Ontario casinos" and stated that she wanted all types and all formats of records since 2000 to the present.

[23] Subsequently, the OLG wrote to the appellant and stated:

> 2011-147: we have interpreted this request to be for any communications from 2000 to the present between OLG and the parties named in your initial request about OLG's self-exclusion program.

[24] The appellant confirmed that this was correct and reiterated that she wanted "all responsive records on this."

[25] In her affidavit, the Senior Manager states:

> When I wrote the clarification statement for request #147 [the request dealing with records relating to the topic of "the exclusion of problem gamblers from any and all Ontario casinos"] I was aware of OLG policies and procedures that governed the self-exclusion of individuals. I interpreted the request to be for records about these policies and procedures and about *the planning and administration of the self-exclusion program in general.* I felt this was a fair interpretation of the request, because the requester had used the words "regarding the nature, topics, specific issues." I did not contemplate a search for records about the exclusion of specific individuals, which would likely have produced a very different set of voluminous and sensitive records.

Analysis and findings

[26] In this appeal, there are two elements to my determination of the scope of the request. First, whether the information on page 8 of the records that the OLG has identified as not responsive, is indeed responsive to the request. Second, whether the OLG properly interpreted the general scope of the request in order to locate all of the responsive records.

[27] Dealing first with the specific information on page 8 of the records, I find that this information was properly severed by the OLG as it is not responsive to the request. As previously stated, following communications with the appellant, the OLG asked that the appellant confirm that it had properly interpreted the request to be for "any communications from 2000 to the present between the OLG and the parties named in your initial request about OLG's self-exclusion program." The appellant subsequently confirmed to the OLG that this interpretation was correct.

[28] As stated above, to be considered responsive to the request, records must "reasonably relate" to the request.[4] On my review of the severed information I am satisfied that it does not reasonably relate to the OLG's self-exclusion program. Accordingly, I uphold the OLG's decision to sever the top portion of page 8 as not responsive to the appellant's request.

[29] However, with respect to the OLG's interpretation of the general scope of the request for "any communications from 2000 to the present between the OLG and the parties named in your initial request about OLG's self-exclusion program," having carefully considered the OLG's representations and all of the circumstances of the appeal, I find that it interpreted the request too narrowly. It has been well established by this office that 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.[5]

[30] I acknowledge that the OLG made some significant attempts to clarify the request with the appellant, ensuring that it received the appellant's confirmation, in writing, that its interpretation of the request was correct. However, the appellant confirmed that she wanted "any communications from 2000 to the present between the OLG and the parties named in [her] initial request about OLG's self-exclusion program" and reiterated that she wanted "all responsive records on this." Despite the appellant's reiteration, the OLG then went on to unilaterally interpret the request more narrowly.

[31] As described by the Senior Manager of Information, Access and Privacy Services, searches were limited "to records about [self-exclusion] policies and procedures and about *the planning and administration of the self-exclusion program in general."* She states that she interpreted it in this manner as a result of the appellant's use of the terms "regarding the nature, topics, specific issues." However, in my view the appellant's use of these terms was not indicative of her desire to narrow the request as they were terms that were put to her in question 2 of the OLG's letter sent to her requesting that she provide more information about the records she was seeking.

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[4] *Ibid.*

[5] *Supra*, note 2.

[32] Although the Senior Manager provides the rationale behind her interpretation of the request in the manner that she did, I have not been provided with any evidence to suggest that this interpretation of the request, limiting records to policies and procedures regarding the planning and administration of the self-exclusion program, was communicated to the appellant. Moreover, at no point did the appellant indicate that she was only interested in only policies and procedures about the planning and administration of the self-exclusion program in general. In my view, given that this interpretation narrows the scope of the request significantly, and, in light of the appellant's specification that she sought "all responsive records on this" the onus was on the OLG to confirm with the appellant that this narrow interpretation of the request captured the records that she sought.

[33] Accordingly, I find that the OLG did not act in accordance with its obligations to the appellant under section 24(2) when it unilaterally narrowed the scope of the request. In my view, a request "all responsive records," "from 2000 to the present between the OLG and the parties named in [the appellant's] request about the OLG's self-exclusion program" is not limited solely "to records about [self-exclusion] policies and procedures and about the *planning and administration of the self-exclusion program in general."*

[34] As a result, I will order the OLG to conduct a new search for all records responsive to the clarified request for any communications from April 2000 to the present between the OLG and the parties named in the appellant's initial request, regarding the OLG's self-exclusion program. This search should not be limited to records about self-exclusion "policies and procedures and about the planning and administration of the self-exclusion program in general."

[35] I will also order the OLG to, following the search, issue a decision letter to the appellant regarding access to any additionally located records.

Issue B: Is the appellant entitled to raise the issue of reasonable search at the inquiry stage of the appeal? If so, did the OLG conduct a reasonable search for responsive records?

[36] In her representations, for the first time during the course of this appeal, the appellant raised the issue of reasonable search. She submits that additional records responsive to her request should exist and, therefore, that the OLG did not conduct a reasonable search.

[37] On reply, the OLG submits that the appellant should not be permitted to raise issue of reasonableness of the OLG's search as it is a new issue that was raised after mediation had concluded. It submits that it has been "deprived of the opportunity to discuss and deal with the now-raised challenges in mediation" and that I should decline to address the issue.

[38] As I have found that the OLG interpreted the scope of the request too narrowly and, and as a result will order them to conduct a new search for responsive records, it is not necessary for me to determine whether the appellant is entitled to raise the issue of reasonable search during the course of the inquiry, or, whether the OLG's search for responsive records was reasonable.

Issue C: Does the discretionary exemption at section 13(1) apply to the records?

[39] Section 13(1) states:

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

[40] The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.[6]

[41] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information.[7]

[42] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must reveal a course of action that will ultimately be accepted or rejected by its recipient.[8]

[43] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations;
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[9]

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[6] Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.).
[7] Order PO-2681.
[8] Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

[44] It is implicit in the various meanings of "advice" or "recommendations" considered in *Ministry of Transportation* and *Ministry of Northern Development and Mines*[10] that section 13(1) seeks to protect a decision-making process. If the document actually suggests the preferred course of action it may be accurately described as a recommendation. However, advice is also protected, and advice may be no more than material that permits the drawing of inferences with respect to a suggested course of action but does not recommend a specific course of action.[11]

[45] There is no requirement under section 13(1) that the OLG be able to demonstrate that the document went to the ultimate decision maker. What section 13(1) protects is the deliberative process.[12]

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

- factual or background information;
- analytical information;
- evaluative information;
- notifications or cautions;
- views;
- a supervisor's direction to staff on how to conduct an investigation.[13]

Representations

[47] The OLG submits that it severed information from two of the pages at issue where the information would reveal advice or recommendations made by a consultant organization that it retained to provide input on its self-exclusion program. It submits that the consultant's recommendations were summarized "for the purpose of evaluating progress against the recommendations" and that this purpose is self-evidence from the record, the majority of which has been disclosed to the appellant.

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[9] Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, *ibid*; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, *ibid.*

[10] *Ibid.*

[11] *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125 (C.A.).

[12] *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, *ibid*.

[13] Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, *supra,* note 13; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, *supra*, note 13.

[48] The OLG explains that the severances that it has made to these pages include actual recommendations made by the consultant, information from which recommendations made by the consultant could reasonably be inferred and, meaningless remainder or "disconnected snippet" of information. The OLG's severances to the pages at issue identify which of the three types of severances, each severance falls under.

[49] The OLG also submits that one of the pages at issue "contains a summary of recommendations made by the Responsible Gambling Council (the council) in a study of self-exclusion best practices that was funded by OLG and three other provincial lottery and gaming corporations." It submits that the recommendations are summarized in the records at issue and that the council was acting "as a consultant retained by an institution" in that it was paid money to conduct analysis and make recommendations. The OLG submits that it received the council's recommendations and deliberated upon them in a confidential process which led to the creation of some of the records at issue.

[50] The OLG acknowledges that the council's study has been made public but that the recommendations were made public in a "different context." It submits:

> OLG is entitled to incorporate the recommendations it paid the Council to create and that it expected to rely upon into its *confidential* "deliberative process" and deal with them in a zone of privacy that supports good decision-making. OLG still requires a zone of privacy notwithstanding the publication of the Council recommendations because its deliberation on the Council recommendations involves the kind of intellectual risk-taking that section 13 is meant to promote.

[51] The appellant does not make any specific representations on the possible application of the discretionary exemption at section 13(1) to the records.

Analysis and findings

[52] I have carefully reviewed the portions of the records at issue and conclude that the OLG has properly applied section 13(1) to exempt them from disclosure. I accept the OLG's submissions that the disclosure of the severed information would reveal the advice and recommendations of consultants retained by the OLG or, would permit one to accurately infer the advice or recommendations provided by them.

[53] The information at issue is contained on a chart entitled "Implementation Status of Expert Recommendations – April 2009." It consists of a list of recommendations made by consultants retained by the OLG to assist in its review of the self-exclusion program, as well as comments on the status of those recommendations. The chart also identifies, by checkmarks, whether the recommendation is "out of scope", "in progress," or "complete." Section 13 is a discretionary exemption and the OLG has exercised its

discretion to disclose the majority of the recommendations and the comments on their status as they appear on the chart. However, it has also exercised its discretion pursuant to section 13(1) to withhold 10 of those recommendations and some of the accompanying status commentary.

[54] My review of the severed information reveals that the recommendations are each distinct "suggested courses of action" made with respect to the self-exclusion program by the consultants retained by the OLG. Where the OLG has severed the accompanying commentary, I accept that the disclosure of this information would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations provided by the consultants. I accept that all of this information forms part of the advice and recommendations received from consultants during the deliberative process that the OLG engaged in when it embarked on the project of making changes to the existing self-exclusion program and that the decision makers within the OLG had the option of accepting or rejecting this advice.

[55] In my view, this information does not consist of factual, analytical or evaluative material. Rather, I find that it clearly reveals the advice and recommendations provided to the OLG by consultants that it retained to assist it in its deliberative process regarding changes to the self-exclusion program. Accordingly, I find that the portions of records that are at issue qualify for exemption under section 13(1) of the *Act*.

Issue D: Did the OLG exercise its discretion under section 13(1)? If so, should this office uphold its exercise of discretion?

[56] The section 13(1) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

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

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

[58] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[14] This office may not, however, substitute its own discretion for that of the institution.[15]

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[14] Order MO-1573.
[15] Section 54(2).

[59] Relevant considerations may include the purposes of the *Act*, including the principles that information should be available to the public, and exemptions from the right of access should be limited and specific.

[60] The OLG submits that in denying access to the portions of the responsive records under section 13(1), it considered the following factors:

- the purpose for which the records were created and the substance of the information at issue;
- the sensitivity of the advice and recommendations at issue, including considerations regarding the timing and subject matter of the advice and recommendations; and
- the purpose of section 13(1), including the risk that OLG officers and employees would be dissuaded from seeking advice and recommendations from similar organizations in the future.

[61] Additionally, the OLG submits that the fact that it exercised its discretion properly is evident in its treatment of the records. It submits that it made line-by-line decisions with respect to what was being severed as opposed to a blanket claim. It also submits that it re-exercised its discretion and issued a supplementary decision letter because, in light of timing related factors, it determined that it no longer needed to rely on section 13(1) for portions of the records.

[62] The appellant did not provide any representations on the issue of the OLG's exercise of discretion.

[63] Having considered the circumstances of this appeal and the OLG's representations, I am satisfied that it has properly exercised its discretion to withhold portions of the responsive record pursuant to section 13(1). I accept the OLG's submission that it issued a supplementary decision letter disclosing more information to the appellant once it determined that due to the passage of time it no longer needed to rely on section 13(1) for portions of the records. Also, as noted above, the OLG exercised its discretion *not* to apply section 13(1) to portions of the records to which that exemption might have applied, giving the appellant access to a significant portion of the responsive information. In my view, the OLG has exercised its discretion in good faith and has taken into account relevant considerations. I have no evidence before me to suggest that it has taken into account irrelevant considerations.

[64] Accordingly, I uphold the OLG's exercise of discretion to withhold portions of the responsive records pursuant to the exemption at section 13(1).

[65] I will now determine whether the compelling public interest override at section 23 of the *Act* has any application in the current appeal.

D. Is there a compelling public interest in disclosure of the information at issue in the record that clearly outweighs the purpose of the section 13(1) exemption?

[66] In her representations, the appellant raises for the first time the possible application of the compelling public interest override at section 23. She submits that there is a compelling public interest that clearly outweighs the purpose of the exemption at section 13(1) of the *Act*. The OLG argues that the appellant should not be permitted to raise the compelling public interest override at this stage in the appeal. Despite the OLG's position, and without making a determination as to whether the appellant is entitled to raise the public interest override at the representations stage of the appeal, in light of my finding on this issue I will address the possible application of section 23 to the information at issue.

Section 23: public interest override

[67] Section 23 states:

> An exemption from disclosure of a record under sections **13**, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

[68] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[69] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[16]

Compelling public interest

[70] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s

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[16] Order P-244.

central purpose of shedding light on the operations of government.[17] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[18]

[71] A public interest does not exist where the interests being advanced are essentially private in nature.[19] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[20]

[72] A public interest is not automatically established where the requester is a member of the media.[21]

[73] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[22]

[74] Any public interest in *non*-disclosure that may exist also must be considered.[23] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[24]

[75] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation;[25]
- the integrity of the criminal justice system has been called into question;[26]
- public safety issues relating to the operation of nuclear facilities have been raised;[27]

[17] Orders P-984, and PO-2607.
[18] Orders P-984, and PO-2556.
[19] Orders P-12, P-347, and P-1439.
[20] Order MO-1564.
[21] Orders M-773, and M-1074.
[22] Order P-984.
[23] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.).
[24] Orders PO-2072-F, PO-2098-R, and PO-3197.
[25] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).
[26] Order PO-1779.
[27] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, *supra* note 28, Order PO-1805.

- disclosure would shed light on the safe operation of petrochemical facilities[28] or the province's ability to prepare for a nuclear emergency;[29]

- the records contain information about contributions to municipal election campaigns.[30]

[76] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations;[31]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations;[32]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding;[33]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter;[34]

- the records do not respond to the applicable public interest raised by appellant.[35]

Purpose of the exemption

[77] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[78] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[36]

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[28] Order P-1175.
[29] Order P-901.
[30] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.
[31] Orders P-123/124, P-391, and M-539.
[32] Orders P-532, P-568, PO-2626, PO-2472, and PO-2614.
[33] Orders M-249, and M-317.
[34] Order P-613.
[35] Orders MO-1994, and PO-2607.
[36] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.).

Representations

[79] In support of her position that the public interest override should apply to the information that has been withheld the appellant submits that:

- there is a need for the public to be assured that the OLG is using the public funds allocated to the self-exclusion program in a reliable, directly effective, and cost effective [manner] for the best possible benefit of the public of Ontario and for the benefit of former casino patrons that are under self-exclusion; and

- the OLG has used public funds, in the amount of +$800 million … to purchase [a casino property in the Niagara region] … and therefore the OLG has a greater public accountability on these premises of the [Niagara casino] for their accountability in the proper performance of the self-exclusion program.

[80] Other than to submit that the appellant should not be permitted to raise the public interest override during the inquiry stage of the appeal, which I have addressed above, the OLG did not submit any representations in response to the appellant's submissions on the possible application of section 23.

Analysis and findings

[81] As noted above, two requirements must be met to establish that the public interest override in section 23 of the *Act* applies to the portions of the records to which section 13(1) has been found to apply:

- There must be a compelling public interest in the disclosure of the information; and

- this interest must clearly outweigh the purpose of the exemption.

[82] In Order PO-2383, the appellant in that appeal who sought access to information relating to the OLG's self-exclusion problem stated that, in light of issues regarding problem gambling that were making national news, "the public has a right to know what the government and the OLG are doing, what policies they have and what recommendations experts have made." He continued: "How else can we hold the government accountable (good or bad) for actions and decision with regard to problem gambling if that information is withheld?"

[83] In that order, Assistant Commissioner Brian Beamish found that the compelling public interest override did not apply, and stated:

> While the appellant's representations may demonstrate a "strong interest or attention" in problem gambling in this province, the appellant has not convinced me that there is a "rousing strong interest or attention" in disclosing the specific portions of the record which provide advice to OLGC on how to deal with this issue, as required in order to satisfy the requirements of the first part of the section 23 test. In fact, the purpose of the record itself indicates that OLGC is aware of the problem and is looking for possible answers. There must be a compelling public interest *in disclosure of the specific information protected by the exemption claim*, not simply in the subject matter of the record. I am unable to conclude that a compelling public interest exists in this appeal.

[84] Similarly, in the current appeal, I am not convinced that a compelling public interest has been established. While I accept that the public has an interest in the funds expended and the measures taken by the OLG to address problem gambling, and specifically, the self-exclusion program, there is no evidence before me to suggest that there is any inappropriate allocation of public funds with respect to this program or that the OLG is not taking appropriate steps to ensure its proper performance.

[85] As previously explained, the severed information consists of recommendations provided by consultants retained by the OLG with respect to a reevaluation of the self-exclusion program and, in my view, the appellant has not convinced me that there is a "strong interest or attention" in the disclosure of this particular information. As a result, I am not satisfied that any public interest in the disclosure of this specific information reaches the threshold of "compelling." Moreover, I also am not convinced that disclosure of this specific information would serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

[86] In my view, I have not been provided with sufficiently cogent evidence to conclude that there is a compelling public interest in the disclosure of the specific portions of the records at issue that have been withheld pursuant to section 13(1). As a compelling public interest in the disclosure of the information at issue has not been established, it is not necessary for me to determine whether part two of the test has been established, that is, that the interest clearly outweighs the purpose of the exemption.

[87] Accordingly, I find that the public interest override at section 23 does not apply in the circumstances of this appeal.

ORDER:

1. I order the OLG to conduct a new search for all records responsive to the clarified request for any communications from April 2000 to the present between the OLG and the parties named in the appellant's initial request, regarding the OLG's self-exclusion program. If additional records are located, I order the OLG to issue an access decision concerning those records in accordance with sections 26 and 27 of the *Act*, treating the date of this order as the date of the request.

2. I uphold the OLG's decision to withhold portions of the records as non-responsive and pursuant to the exemption at section 13(1) of the *Act*.

Original Signed By: June 19, 2013
Catherine Corban
Adjudicator