Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3577

Appeal PA13-356

Ministry of Finance

February 24, 2016

Summary: The appellant submitted a request to the Ministry of Finance for a consultant's report relating to a horse racetrack operator. The ministry located two reports, which were prepared during a due diligence exercise relating to transitional government funding provided to racetracks after the cancellation of the Slots at Racetracks Program (SARP) in 2013. SARP had provided racetrack owners with a share of slot machine revenues generated by machines installed at their facilities. The ministry denied access to the records under sections 13(1) (advice or recommendations), 17(1) (third party information), 18(1)(c), (d) and (e) (economic or other interests of government) and 21(1) (personal privacy). The appellant's arguments raised the possible application of section 23 (the public interest override). In this order, the adjudicator determines that: sections 13(1) and 17(1)(a) apply to portions of the records; sections 18(1)(c), (d) and (e) do not apply; and the public interest override in section 23 does not apply. Non-exempt information is ordered disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 10(1) and (2), 13(1), 13(2)(a), 17(1)(a) and (c), 18(1)(c), (d) and (e) and 23; *Public Sector Salary Disclosure Act*.

Orders and Investigation Reports Considered: M-430, P-24, P-1587, PO-1816, PO-3154 and PO-3480.

Cases Considered: *John Doe v. Ontario (Finance)*, 2014 SCC 36; *343901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254; *Ontario (Ministry of Finance) v. Glasberg*, [1997] O.J. 1465 (Div. Ct.); *SNC-Lavalin Inc. v. Canada (Minister of Public Works)*, [1994] F.C.J. No. 1059, 79 F.T.R. 113; *Canada Packers Inc. v. Canada (Minister of Agriculture)*, [1989] 1 F.C. 47,

53 D.L.R. (4th) 246 (C.A.); *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, 2004 CanLII 11768, [2004] O.J. No. 224 (ONSC), aff'd [2005] O.J. No. 4047 (C.A.).

OVERVIEW:

Background

[1] On March 12, 2012, the Ontario Lottery and Gaming Corporation (the OLG) officially announced the cancellation of the Slots at Racetracks Program (SARP), effective as of March 31, 2013.[1] Under SARP, the OLG paid racetracks a share of the revenues from slot machines that it operated on their premises. Provincial revenues from slot machines had been addressed in the 2012 report of the Commission on the Reform of Ontario's Public Services (the "Drummond Report"):

> Slot machines are directed to racetracks, where subsidies are provided to the horse racing and breeding industry and municipalities, rather than locations that would be more convenient and profitable; OLG would make much more money if slots were permitted elsewhere, as they should be.
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> . . .[2]
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> . . .
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> The horse racing industry is another area where subsidies to racetracks and horse people require a review and adjustment to realign with present-day economic and fiscal realities. Ontario has more racetracks than any other jurisdiction in the U.S. or Canada. In addition to revenues from wagering, since the late 1990s the industry has benefited from a provincial tax expenditure (a reduction to the provincial pari-mutuel tax) *and a percentage of the Ontario Lottery and Gaming Corporation's gross slot revenues that together are worth an estimated $400 million in 2011–12. Over the past 12 years, approximately $4 billion has flowed through 17 racetracks to support purses, racetrack capital improvement and operating costs.* Ontario's support is 10 times that of British Columbia, which has six racetracks, and 17 times that of Alberta, with five racetracks. Ontario's approach is unsustainable and it is time for the

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[1] Office of the Auditor General of Ontario, *Ontario Lottery and Gaming Corporation's Modernization Plan Special Report*, (the *Modernization Plan Report*), April 2014, at pp. 47 and 53.
[2] Drummond Report at p. 57.

> industry to rationalize its presence in the gaming marketplace.[3] [Emphasis added.]

[2] On June 7, 2012, the Government of Ontario announced a one-time transition fund of $50 million to help the horse racing industry transition from SARP to a more sustainable self-sufficient model. Specifically, transition funding was to be provided to individual racetracks.[4]

[3] Also in June 2012, the Government of Ontario retained the Horse Racing Industry Transition Panel (the panel) to make recommendations on how it could help the industry adjust to the cancellation of SARP. The panel submitted reports to the Minister of Agriculture, Food and Rural Affairs dated August 17, 2012 (the interim report) and October 15, 2012 (the final report). In its report of October 15, 2012, the panel recommended that transitional funding be provided in the amount of approximately $180 million over three years.[5]

[4] The panel's interim and final reports included the following statements:

> The panel believes it would be a mistake to reinstate SARP, as many stakeholders advocated. The program has provided far more money than was needed to stabilize the industry – its original purpose – and has done so without compelling the industry to invest in a better consumer experience. Slots revenue has enabled the industry to avoid facing up to the challenges of today's intensely competitive gaming and entertainment marketplace.[6]
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> . . . *any future investment of public dollars should be based on clear public interest principles including accountability, transparency, a renewed focus on the consumer and a business case showing that each public dollar invested is returned to government through tax revenues.*[7]
>
> The panel believes SARP's "no strings attached" approach is one reason the industry has come to think of slots revenue as "their money." In fact, in the panel's view, it is public money belonging to the people of Ontario and the government can redirect it to other purposes if it concludes this is in the public interest.[8]

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[3] *Ibid.*, at p. 316.
[4] As summarized at http://www.omafra.gov.on.ca/english/about/transition/transitionfunding.html
[5] Final Report, pp. 17-18. On March 31, 2014, the government announced that up to $500 million would be available – see *Modernization Plan Report*, April 2014, (referenced at footnote 1) at p. 48.
[6] Interim Report, p. 1.
[7] *Ibid.*, at p. 1.
[8] *Ibid.*, at p. 25.

> *Another problem with SARP has been the lack of transparency. This is not surprising given the absence of benchmarks or other conditions for obtaining funding. Tracks were not required to account for or report on how they spent the operator's share of SARP money, so they didn't.*[9]
>
> It is essential to avoid repeating the mistakes of SARP, which turned over funds to the industry with no strings attached. The panel believes that any new public funding for horse racing should be reviewed after three years. Monitoring should be ongoing to ensure the investment is meeting public-policy objectives and delivering no more funds than necessary to do so.[10] [Emphases added.]

[5] With respect to the ongoing viability of the horse racing industry in Ontario, the panel's interim report stated as follows:

> Without slots revenue or a new revenue stream, the horse racing industry in Ontario will cease to exist.
>
> Absent some other new revenue stream, no Ontario racetrack has a viable business plan to continue racing operations after March 31, 2013.[11]

[6] On October 1, 2013, the panel submitted a further report entitled, "Building a Sustainable Future Together: Ontario's Five-Year Horse Racing Partnership." In this report, the panel recommended that the government "invest up to $80 million per year for the next five years – a total of up to $400 million." The panel stated further:

> In all, the five-year government funding available to the industry from rents for Ontario Lottery and Gaming Corporation (OLGC) slot facilities, the Pari-Mutuel Tax Reduction (PMTR) and the new investment fund will exceed $1 billion. This long-term commitment will create a stable environment for private investment in the industry.[12]

[7] On October 11, 2013, the government announced that it was proceeding with the proposed partnership plan, including the investment of $400 million over 5 years, as the panel had recommended.

[8] The history of SARP and the reasons for its cancellation are extensively canvassed in the *Modernization Plan Report* issued by Ontario's Auditor General in April 2014.[13] The report addresses ". . . the seven-part motion by the Standing Committee on

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[9] *Ibid.*, at p. 26.
[10] Final Report, p. 14.
[11] Interim Report, pp. 27 and 28.
[12] "Building a Sustainable Future Together," p. 2
[13] This report is referenced at footnote 1. See pp. 8-9 and 45-57.

Public Accounts . . ."[14] which requested the Auditor General to review the OLG with respect to a number of specific issues, including the following:

> Whether the impact of cancelling the Slots At Racetracks Program on Ontario's horse racing industry was measured and whether certain communities have been impacted disproportionately as compared to other communities and if the Liberal government's decision to end the program will be offset by changes in the new modernization plan
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> Whether the province or the [OLG] properly consulted or consulted various industries, businesses and municipalities impacted by the cancellation of the Slots at Racetracks Program, and did the province or the [OLG] assess the economic impact on aid industries, businesses and municipalities and factor that into their decisions[15]

[9] The government's decision to cancel the slots at racetracks program is the subject of section 5.6 of the *Modernization Plan Report*, which occupies 13 pages at the end of the report.[16]

[10] Among other things, the *Modernization Plan Report* states:

> • racetrack owners were given 20% of slot machine revenues in compensation for the "free rent" given to the OLG for the slot facilities at the racetracks;
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> • half of the 20% had to be set aside for purses and other direct benefits for horse people;
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> • racetrack operators were not held accountable for their use of program funds;
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> • the racetrack owners' share of the funds over the life of SARP amounted to over $2 billion;
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> • horse people expected racetrack owners to use their revenue share to make the horse-racing experience better by improving their racetrack facilities and increasing race days; however they observed that this was not the case for certain racetrack operators;
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> • in July 2010, the Chair of the OLG wrote to all racetrack owners about the need for better information from the industry about how they used their SARP funding to improve horse racing in Ontario, but this reporting

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[14] *Modernization Plan Report* at p. 5.
[15] *Ibid.*, at p. 14.
[16] *Ibid.*, at pp. 45-57.

> exercise did not achieve its objective of informing the OLG about operators' use of SARP monies they received;
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> • there were allegations that one racetrack operator, namely the affected party in this appeal, may have been allocating its SARP funds to executive employees' and board members' salaries, bonuses and severances; and
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> • on March 31, 2014, the government announced that up to $500 million in funding would be available.[17]

[11] With respect to the allegations that the affected party's SARP funds may have been allocated to salaries, bonuses and severances, the Auditor General's *Modernization Plan Report* states that in April 2012, ". . . the OLG asked the [Alcohol and Gaming Commission of Ontario (AGCO)] to deal with the compensation scheme of [the affected party's] executives and related issues."[18] The AGCO investigation is ongoing.

[12] The records dealt with in this order were created by a consultant (the consultant) retained by the Ministry of Finance (the ministry) to make recommendations about providing transitional funding to horse racetracks. In some of their submissions, the parties refer to the process leading to the issuance of these reports as a "due diligence" exercise. The due diligence exercise relates to the decision as to whether to provide transitional funding, and if so, how much. The consultant produced two reports relating to the affected party, dated December 19, 2012 and January 7, 2013. The December 19, 2012 report relates to the affected party and other racetrack operators, and the January 7, 2013 report relates only to the affected party.

The request, the ministry's decision, and the appeal

[13] The appellant, who is a journalist, submitted a request to the ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a report by the consultant concerning an identified racetrack operator (the affected party).

[14] The ministry identified the reports of December 19, 2012 and January 7, 2013 as the responsive records. It then notified the consultant and the affected party of the request under section 28 of the *Act*. Both provided representations. The consultant indicated to the ministry that the records contain information that would be exempt under sections 17(1) and 21(1) "with respect to" the affected party, and that the consultant has been advised that the affected party would be "responding directly." The affected party also provided representations to the ministry.

[15] After receiving these responses, the ministry issued an access decision under section 28(7) and denied access in full to the records. The ministry claimed that the

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[17] at pp. 48-51.
[18] *Modernization Plan Report*, p. 52.

discretionary exemptions found in sections 13(1) (advice or recommendations) and 18(1)(c), (d) and (e) (economic and other interests) apply to the records in their entirety. It also claimed that the mandatory exemptions found in sections 17(1) (third party information) and 21(1) (personal privacy) apply to portions of the records.

[16] The appellant filed an appeal of the denial of access. The appeal proceeded to mediation, and the mediator had discussions with the appellant, the ministry and the affected party. The affected party did not consent to the release of the information in the records at issue. The appellant continues to seek access to the records and the appeal therefore could not be resolved at mediation.

[17] At the conclusion of mediation, the ministry agreed to provide this office with an index indicating which portions of the records it claims are exempt under the different sections the ministry relies on. The matter then proceeded to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[18] At the outset of adjudication, the ministry did not produce an index but instead provided a copy of the records in which the exemptions claimed for various portions are identified.

[19] To begin the inquiry, this office sent a Notice of Inquiry to the ministry and the affected party and invited them to provide representations concerning the issues in the appeal.

[20] The affected party responded to the Notice of Inquiry with a request that employees whose personal information may appear in the records not be notified of the appeal until after the exemptions in sections 13(1), 17(1) and 18(1)(c), (d) and (e) have been considered. Deferring the notification of these employees would, in effect, defer the consideration of whether the records contain personal information, and if so, whether that information would be exempt under section 21(1) of the *Act*. This office invited the appellant and the ministry to provide representations on whether or not to defer notification, and subsequently decided to grant the request to do so. Accordingly, this order deals only with sections 13(1), 17(1) and 18(1)(c), (d) and (e).

[21] Both the ministry and the affected party then provided representations on the issues, including claimed exemptions, which are being considered in this order.[19] Both also provided affidavit evidence, which I have considered in reaching the determinations in this order. The non-confidential portions of these representations were sent to the appellant with a second Notice of Inquiry. The appellant provided representations in response, in which she argued that there is a public interest in disclosure, raising the possible application of the "public interest override" in section 23 of the *Act*. The appellant was invited to provide supplementary representations on section 23, and did so. The appellant's representations were then provided to the

[19] The affected party also included representations on the section 21(1) exemption.

ministry and affected party for reply, and both these parties provided reply representations. The reply representations of the ministry and affected party were then given to the appellant, who responded with sur-reply representations.

[22] The consultant was also notified of this appeal, and adopts the representations it provided in Appeal PA13-494, which addresses the same records that are at issue in this order, as well as additional records that deal with other racetracks. Appeal PA13-494 is the subject of Order PO-3578, issued concurrently with this order.

[23] As noted above, consideration of section 21(1) has been deferred pending the outcome of the other exemptions. In this order, I have decided that the information for which the ministry claims section 21(1) is exempt under section 17(1), and accordingly, it will not be necessary to solicit representations or rule on section 21(1).

RECORDS:

[24] The records consist of two consultant's reports dated December 19, 2012 (record 1) and January 7, 2013 (record 2).

PRELIMINARY ISSUE:

Responsiveness of Records

[25] The appellant requested information about the affected party. Record 1 contains information about other racetracks. The portions of this record that contain information about other racetracks are not responsive to the request and are therefore not under consideration in this order. This information consists of: parts of pages 2, 9 and 10; and page 6 in its entirety.

[26] If these portions of record 1 were responsive, I would find that the substantive information they contain is exempt under section 17(1)(a) for exactly the reasons I have outlined below in finding that other parts of the records are exempt under this provision.

[27] Some other portions of record 1 may also be non-responsive but this information is intertwined with information about the affected party and is, in any event, determined in this order to be exempt under section 13 (1) and/or section 17(1).

ISSUES:

A. Does the discretionary exemption at section 13(1) of the *Act* apply?

B. Does the mandatory exemption at section 17(1) of the *Act* apply?

C. Do the exemptions at sections 18(1)(c), (d) and (e) apply?

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

E. Does the public interest override at section 23 of the *Act* apply?

DISCUSSION:

Issue A. Does the discretionary exemption at section 13(1) of the *Act* apply?

Introduction

[28] 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.

[29] Sections 13(2) and (3) set out mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13(1). These sections state, in part:

> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
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> (a) factual material;
>
> (b) a statistical survey;
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> (c) a report by a valuator, whether or not the valuator is an officer of the institution;
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> . . .
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> (f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;
>
> (g) a feasibility study or other technical study, including a cost estimate, relating to a government policy or project;
>
> (h) a report containing the results of field research undertaken before the formulation of a policy proposal;

> (i) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees;
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> (j) a report of an interdepartmental committee task force or similar body, or of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to the Executive Council or its committees;
>
> . . .
>
> (3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy.

[30] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[20]

[31] "Advice" and "recommendations" have distinct meanings.

[32] "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[33] 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.[21]

[34] In *John Doe v. Ontario (Finance)*[22] ("*John Doe*"), the Supreme Court of Canada

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[20] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[21] Orders PO-2084, PO-2028, 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.
[22] See citation at footnote 20.

ruled that "advice" has a broader meaning than "recommendations". The Court agreed with the Federal Court of Appeal's view[23] of the similar exemption in section 21(1)(a) of the federal *Access to Information Act*, to the effect that:

> . . . in exempting "advice and recommendations" from disclosure, the legislative intention must be that the term "advice" has a broader meaning that the term "recommendations." . . . Otherwise, it would be redundant.[24]

[35] The Court found that "policy options" are exempt under section 13(1). It defined this term as follows:[25]

> Policy options are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made. They would include matters such as the public servant's identification and consideration of alternative decisions that could be made. In other words, they constitute an evaluative analysis as opposed to objective information.
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> Records containing policy options can take many forms. They might include the full range of policy options for a given decision, comprising all conceivable alternatives, or may only list a subset of alternatives that in the public servant's opinion are most worthy of consideration. They can also include the advantages and disadvantages of each option, as do the Records here. But the list can also be less fulsome and still constitute policy options. For example, a public servant may prepare a list of all alternatives and await further instructions from the decision maker for which options should be considered in depth. Or, if the advantages and disadvantages of the policy options are either perceived as being obvious or have already been canvassed orally or in a prior draft, the policy options might appear without any additional explanation. As long as a list sets out alternative courses of action relating to a decision to be made, it will constitute policy options.

[36] The Court stated further:[26]

> The policy options in the Records in this case present both an express recommendation against some options and advice regarding all the options. Although only a small section of each Record recommends a preferred course of action for the decision maker to accept or reject, the remaining information in the Records sets forth considerations to take into

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[23] in *343901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254 ("*Telezone*") at para. 50.
[24] at para. 24.
[25] at paras. 26 and 27.
[26] at para. 47.

> account by the decision maker in making the decision. The information consists of the opinion of the author of the Record as to advantages and disadvantages of alternative effective dates of the amendments. It was prepared to serve as the basis for making a decision between the presented options. These constitute policy options and are part of the decision-making process. They are "advice" within the meaning of s. 13(1).

[37] The Court also explained that:

- the time of determination as to whether a record constitutes advice or recommendations is the time of its creation;
- draft records may be exempt under this section;
- the contents of the record need not have been communicated to anyone in order for the exemption to apply; and
- evidence of an intention to communicate is not required.

[38] In making these points, the Court stated: [27]

> Protection from disclosure would indeed be illusory if only a communicated document was protected and not prior drafts. It would also be illusory if drafts were only protected where there is evidence that they led to a final, communicated version. In order to achieve the purpose of the exemption, to provide for the full, free and frank participation of public servants or consultants in the deliberative process, the applicability of s. 13(1) must be ascertainable as of the time the public servant or consultant prepares the advice or recommendations. At that point, there will not have been communication. Accordingly, evidence of actual communication cannot be a requirement for the invocation of s. 13(1). Further, it is implicit in the job of policy development, whether by a public servant or any other person employed in the service of an institution or a consultant retained by the institution, that there is an intention to communicate any resulting advice or recommendations that may be produced. Accordingly, evidence of an intention to communicate is not required for s. 13(1) to apply as that intention is inherent to the job or retainer.

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[27] at para. 51.

Representations

Ministry's initial representations

[39] The ministry begins its representations on section 13(1) by analyzing the contents of each record. The ministry identifies specific parts of both records and argues that they contain:

- simple recommendations in sentence or point form;
- options and analysis of options; and
- other specific recommendations.

[40] I will refer to this portion of the ministry's representations in more detail below.

[41] The ministry also submits that the consultant is a "consultant retained by the ministry" within the meaning of section 13(1), and that all portions of the records for which this exemption is claimed consist of the consultant's detailed recommendations to Ontario.

[42] In addition, the ministry states that the reports were prepared for the benefit of Ontario, rather than being prepared only to benefit the affected party.

[43] The ministry also refers to a number of court decisions in its representations. I have reviewed and considered these submissions, but I will not repeat them here because, after the ministry made its initial submissions, the Supreme Court of Canada released its decision in *John Doe* (extensively quoted above) and specifically addressed section 13(1) of the *Act*. The ministry refers to this decision in its reply representations, as discussed below.

[44] As well, the ministry submits that the records are fundamentally advisory in nature, and submits further that where the exemption is claimed, if the information is not advice or a recommendation *per se*, it would permit the drawing of accurate inferences with respect to a suggested course of action.

[45] With respect to the exceptions to the exemption found in section 13(2), the ministry submits that the section 13(2)(a) exception for factual material applies to "current information and financial numbers" and does not claim section 13(1) for this material, although it claims other exemptions. The ministry also explains that it only claims section 13(1) for recommended or advised numbers.

[46] The ministry submits further that the other exceptions under section 13(2) do not apply. In particular, the ministry submits that sections 13(2)(f) and (i) do not apply

because the third party is not an "institution."[28]

[47] The ministry also submits that the section 13(3) exceptions do not apply because the records were created in 2012 and 2013 and have never been publicly cited by the ministry.

[48] With its representations, the ministry provided an affidavit sworn by the Assistant Deputy Minister (the ADM) of its Revenue Agencies Oversight Division, which includes the ministry's Gaming Policy Branch.

[49] The affidavit affirms that the ministry retained the consultant to provide recommendations on criteria for transitional funding for the horse racing industry in Ontario. With specific reference to section 13(1), the ADM states that he and other senior staff received the records, and that he instructed ministry personnel to treat them confidentially and not to disclose them externally.

Affected party's initial representations

[50] Although the affected party is not the intended recipient of the protection provided by section 13(1), it nevertheless provided submissions in support of the application of this exemption. With respect to the issue of what constitutes "factual information" under section 13(2)(a), the affected party identifies previous jurisprudence to the effect that:

> . . . "factual material" does not refer to occasional assertions of fact, but rather contemplates a body of facts separate and distinct from the advice and recommendations contained in the record. Further, where the factual information contained in the records is "interwoven" with the advice and recommendations, it cannot reasonably be considered a separate and distinct body of fact such that it does not meet the criteria of section 13(2).[29]

[51] The affected party argues that the factual material in the records is inextricably intertwined with the advice and recommendations and cannot be separated from them, and therefore the section 13(2)(a) exception does not apply.

[52] In this regard, the affected party's position differs from the approach taken by the ministry, which has indicated, as noted above, that portions of the records dealing with current information and financial numbers qualify as factual information under section 13(2)(a).

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[28] Section 2(1) of the *Act* defines "institution" to include the Assembly, a ministry of the Government of Ontario, a hospital, and any agency, board, commission, corporation or other body designated as an institution in the regulations. The Schedule to Regulation 460, made under the *Act*, sets out a list of designated institutions. This list does not include the affected party.

[29] Order P-24. See, in particular, page 7 of the order.

[53] In essence, the affected party is claiming that section 13(1) applies to portions of the records for which the ministry declines to apply it. This leads to the question of whether the affected party is entitled to do so. This office has previously taken the following approach to this issue:

> As a general rule, the responsibility rests with the head of an institution to determine which, if any, discretionary exemptions should apply to a particular record. The Commissioner's office, however, has an inherent obligation to uphold the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner or his delegate decides that it is necessary to consider the application of a discretionary exemption not originally raised by an institution during the course of an appeal. This result would occur, for example, where release of a record would seriously jeopardize the rights of a third party.[30]

[54] My analysis and conclusions concerning this issue are set out below.

Appellant's initial and supplementary representations

[55] The appellant relies on section 13(3), and in particular the aspect of that section that creates an exception to the application of section 13(1) "where the head has publicly cited the record as the basis for making a decision or formulating a policy."

[56] In support of this position, the appellant refers to an article in the Toronto Star[31], in which the Premier of Ontario stated: "Can I give you chapter and verse on everything that's happened in the past [regarding monies sent to track operators]? I can't." The Premier also stated: "I think there were some inequities in the system in terms of rates of salary, of wages."

[57] Even if the Premier qualified as the "head"[32] of the ministry, I am not satisfied that her comments, here quoted by the appellant, identify the reports as the basis for deciding to grant transitional funding to the affected party, or for any other decision or policy.

Ministry's reply [33] representations

[58] In its reply representations, the ministry refers to the Supreme Court of Canada's

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[30] Order M-430. See also Orders P-257, M-10 and P-1137.
[31] *Toronto Star* "Slot machine revenue vanishes," by Mary Ormsby, October 26, 2013 (with correction added October 29, 2013).
[32] "Head" is defined in section 2(1) of the *Act* as "in the case of a Ministry, the Minister of the Crown who presides over the ministry."
[33] The ministry and affected party refer to these representations of the ministry as "sur-reply" representations; they are in fact reply representations.

decision in *John Doe*[34], in which the Court dismissed an appeal from the Ontario Court of Appeal decision in the same case[35], which had overturned a decision of this office and adopted a broader definition of "advice." I have described the Supreme Court's decision in some detail, above. The ministry states that ". . . the [Supreme Court of Canada] confirms the Court of Appeal's view that all options raised are confidential advice under section 13(1), not just the recommended one."

[59] The ministry reiterates that the records also contain "current financial numbers," which it states are not exempt under section 13(1) because they are factual material within the meaning of section 13(2)(a). As addressed below, the ministry contends that this factual material is, nevertheless, exempt under section 17(1).

[60] With respect to section 13(3), the ministry also submits that the records were never publicly cited as the final basis for the new government policy of awarding transition funds to the affected party. The ministry describes the records as an "interim advisory document for the racetracks' affairs" and states that they "[do] not shed light on government policy or decisions."

Affected party's reply representations

[61] The affected party's reply representations are primarily directed at the issue of the "public interest override" (discussed below). However, the affected party states that it adopts the ministry's reply representations[36] and adds that disclosure would be "contrary to the purpose" of section 13.

Analysis

What material does the ministry claim is exempt under section 13(1)?

[62] Since the ministry received this access request, it has presented three different versions of what it considers exempt under section 13(1).

[63] The ministry's initial decision letter to the appellant was made under sections 26 and 29 of the *Act* which, together with section 28, specify the process for institutions to follow in handling access requests.[37] This initial decision was to exempt the records in their entirety under section 13(1), among other sections claimed.

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[34] Cited above at footnote 20, and extensively quoted above.
[35] 2012 ONCA 125.
[36] See footnote 33.
[37] Section 26 of the *Act* requires institutions to give written notice to a requester as to whether or not access is granted, and if access is to be given, to give the requester access to the record or part. Section 28 sets out a procedure for notifying affected parties, which was followed in this case. Section 29 sets out the requirements for a decision to deny access, which include a requirement to set out the provision of the *Act* under which access is denied, the reason that provision applies, the name of the person responsible for the decision, and the right of the requester to appeal the decision to this office.

[64] The marked-up copy of the records provided to this office by the ministry at the outset of adjudication identifies portions of the records that the ministry claims are exempt under section 13(1), and it therefore appears that the ministry has abandoned its reliance on this exemption for the portions not so identified. I note, however, that the severances made in these copies of the records are sometimes inconsistent in that information is claimed to be exempt on one page while exactly the same type of information is not claimed to be exempt on another page. When the records are viewed as a whole, therefore, the ministry's view of what is exempt under section 13(1) in the marked-up records does not stand up to logical scrutiny. I cannot provide a more detailed explanation without revealing the contents of the records.

[65] The ministry's representations, as summarized above, make specific reference to portions of the records and explain why, in the ministry's view, those portions are subject to section 13(1). In some instances, the ministry's representations appear to contradict the way the exemption is applied, and not applied, in the marked-up records.

[66] In the result, it is clear that the ministry has reduced its reliance on section 13(1) from its initial claim that the exemption applies to both records in their entirety. Under the circumstances, however, it is necessary to assess the application of the exemption in a logical and consistent manner. To do otherwise would result in an application of the exemption similar to the situation described by the Divisional Court in its decision in *Ontario (Ministry of Finance) v. Glasberg*[38], where the Court observed[39]:

> I find, however, on the record before this Court that the Commissioner's interpretation of the severance provision is patently unreasonable. It is impossible to discern the reasoning which led the Commissioner to decide what to delete and what to leave from the reasons given for the order *or from an examination of the records themselves*. . . . While it is apparent that an enormous amount of time and attention has been paid to the word-by-word review, that painstaking effort has, in my view, produced a result which is, on its face, impossible to understand, and the reasons offered shed no her [sic] light on the matter. [Emphasis added.]

[67] In assessing the application of the exemption, I have therefore considered the position taken by the ministry in both the marked-up records and in its representations, and reviewed the records in their entirety, in order to produce a logical and consistent determination of the extent to which section 13(1) applies.

Section 13(1): Advice and Recommendations

[68] The ministry submits that record 1 contains the following information that is exempt under this section:

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[38] [1997] O.J. 1465 (Div. Ct.).
[39] at para. 24.

- simple recommendations in sentence or point form: pages 18, 19, 20;
- options for restructuring listed on page 11 and analyses on pages 12-15 followed by a recommendation on page 18;
- options for restructuring on page 17; and
- analysis of the features to look at in order to compare options on pages 21-26.

[69] The ministry submits that record 2 contains the following information that is exempt under this section:

- specific recommendations on page 7, 8 and 11 (except status quo column on 11);
- recommendations in the charts on pages 12, 14, 16, 18, 20, 22, 24, 26 and 31-34
- follow-up recommended key changes; specific recommendations; and next steps in the charts on pages 13, 15, 17, 19, 21, 23, 25 and 27;
- specific recommendations in the chart on page 29.

[70] Most of the information identified by the ministry in these submissions as being exempt under section 13(1) consists of proposed changes to the affected party's business model and operations, including different options for how such changes might be effected. Some of it consists of specific recommendations. These portions of the records also include information on how the ministry "should view a matter" and "the parameters within which a decision should be made," which are included in "advice" by the Supreme Court of Canada in *John Doe*:[40]

> In *Telezone*,[41] Evans J.A. distinguished this type of objective information seen in s. 13(2) from a public servant's opinion pertaining to a decision that is to be made, which he concluded would fall within the scope of "advice" in the analogous federal exemption. At paragraph 63, he stated:
>
> > . . . a memorandum to the Minister stating that something needs to be decided, identifying the most salient aspects of an application, or *presenting a range of policy options on an issue*, implicitly contains the writer's view of what the Minister should do, *how the Minister should view a matter*, *or what are the parameters within which a decision should be made*. . . . [Emphases added.]

[40] Cited above at footnote 20. See para. 31 of the decision.
[41] Cited above at footnote 23.

[71] With the exception of record 1, page 21 (which is a title page containing no exempt information), all of the information identified by the ministry in its submissions, outlined above, consists of recommendations or falls under the description of "advice" in *John Doe*. Subject to the discussion of the exceptions to the exemption, below, I therefore find that this information meets the requirements for exemption under section 13(1).

[72] In addition, based on my review of the records, parts of pages 9 and 10 of record 1 contain policy options and/or recommendations. This information also qualifies for exemption under section 13(1).

[73] As well, page 5 of record 1 sets out information explaining the assumptions that underlie, and therefore form part of, the advice that appears elsewhere in the record. In the specific context of this record, given the way these assumptions are presented and described, I also find that they constitute "advice," and page 5 of record 1 therefore meets the requirements for exemption under section 13(1).

[74] I also find that the disclosure of a small amount of information on the cover page of record 2 would, if disclosed, permit the drawing of accurate inferences as to the nature of the actual advice or recommendations. For this reason, I find that it also qualifies for exemption under section 13(1).

[75] One of the records is marked "Draft: For Discussion Purposes Only." As noted earlier in this order, the Supreme Court's decision in *John Doe* indicates that the fact that a record is a draft does not prevent it from being exempt under section 13(1).

[76] To summarize, I find that the following information qualifies for exemption under section 13(1), subject to the analysis (below) of sections 13(2) and (3), the ministry's exercise of discretion, and the public interest override in section 23:

- in record 1: parts of pages 9, 10, 18 and 19; and pages 5, 11-15, 17, 20, 22-26 in their entirety; and
- in record 2: part of the cover page and parts of pages 11, 12, 14, 16, 18, 20, 22, 24, 26, 29 and 31-34; and pages 7, 8, 13, 15, 17, 19, 21, 23, 25 and 27 in their entirety.

Section 13(2)(a): Factual Material

[77] Section 13(2)(a) sets out an exception to the application of the section 13(1) exemption for "factual material."

[78] In its representations, the ministry explained that it has not applied section 13(1) to what it considers to be "factual material." Rather, the exemption is applied to portions of the records which, in the ministry's view, constitute advice or recommendations.

[79] As noted above, the ministry and the affected party take different positions concerning the "current financial numbers" in the records, which the ministry has decided not to exempt under section 13(1) because, in the ministry's view, this is "factual material" and would therefore fall under the exception to the exemption set out in section 13(2)(a). This raises the question of whether the affected party is entitled to argue that section 13(1) applies to the "current financial numbers," or other portions of the records that the ministry does not claim are exempt under this section.

[80] Clearly, if portions of the records qualify as "factual material," and are reasonably severable, section 13(2)(a) dictates that section 13(1) does not apply to them. If, on the other hand, information not exempted by the ministry under section 13(1) does *not* qualify as "factual material" within the meaning of section 13(2), the ministry has, in effect, exercised its discretion not to claim the exemption for that material. In the latter situation, I would have to consider whether this is one of the "rare cases" where the affected party is entitled to rely on this discretionary exemption where the ministry does not claim it.

[81] The information identified as "factual material" by the ministry appears in connection with proposed changes to the affected party's business model and operations, and projections of how those changes might affect or alter the figures identified as "factual material" in the future.

[82] As a matter of first impression, the information identified as "factual material" by the ministry, namely the "current financial numbers," does appear to fall under that category.

[83] However, as noted above, the affected party quotes from previous jurisprudence of this office, repeated here for ease of reference, which states that:

> "factual material" does not refer to occasional assertions of fact, but rather contemplates a body of facts separate and distinct from the advice and recommendations contained in the record. Further, where the factual information contained in the records is "interwoven" with the advice and recommendations, it cannot reasonably be considered a separate and distinct body of fact such that it does not meet the criteria of section 13(2).[42]

[84] On this basis, the affected party submits that the factual material in the records is too closely intertwined with advice to be reasonably severable.

[85] Section 10(2) of the *Act* also speaks to the question of severance. It provides that, if a record contains exempt information, ". . . the head shall disclose as much of the record as can reasonably be severed without disclosing information that falls under

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[42] Order P-24.

one of the exemptions."

[86] The manner in which severance is to be undertaken under the *Act* is addressed in detail in *Ontario (Ministry of Finance) v. Glasberg*.[43] The Divisional Court criticized the severance exercise undertaken in that case as not being "reasonable," and described the method of severance that it found unacceptable as a "literal and mechanical word-by-word approach."[44] The Court also adopted several decisions of the Federal Court as guidance on how to sever records. The Court stated:[45]

> I would, however, adopt as a helpful guide to the interpretation of s. 10(2) the following passage from the judgment of Jerome A.C.J. in *Canada (Information Commissioner) v. Canada (Solicitor General)*, [1988] 3 F.C. 551 at 558 interpreting the analogous provision in the Access to Information Act, S.C. 1980-81-82-83, c. 111, sch. I, s. 25:
>
> > One of the considerations which influences me is that these statutes do not, in my view, mandate a surgical process whereby disconnected phrases which do not, by themselves, contain exempt information are picked out of otherwise exempt material and released. There are two problems with this kind of procedure. First, the resulting document may be meaningless or misleading as the information it contains is taken totally out of context. Second, even if not technically exempt, the remaining information may provide clues to the content of the deleted portions. Especially when dealing with personal information, in my opinion, it is preferable to delete a[n] entire passage in order to protect the privacy of the individual rather than disclosing certain non-exempt portions or words.
>
> Indeed, Parliament seems to have intended that severance of exempt and non-exempt portions be attempted only when the result is a reasonable fulfilment of the purposes of these statutes. Section 25 of the Access to Information Act, which provides for severance, reads:
>
> > 25. Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of an institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains any such information or material. . . .

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[43] Cited above at footnote 38.
[44] at para. 24.
[45] at paras. 27 and 28.

> Disconnected snippets of releasable information taken from otherwise exempt passages are not, in my view, reasonably severable.
>
> Similarly, in *Montana Band of Indians v. Canada (Minister of Indian & Northern Affairs)* (1988), 51 D.L.R. (4th) 306 at 320, Jerome A.C.J. stated:
>
> > To attempt to comply with s. 25 would result in the release of a entirely blacked-out document with, at most, two or three lines showing. Without the context of the rest of the statement, such information would be worthless. The effort such severance would require on the part of the department is not proportionate to the quality of access it would provide.

[87] All of the "current financial numbers" are provided in the context of possible ways in which they could change. These possible changes are policy options and/or recommendations, which are clearly exempt under section 13(1) (as discussed above) and in my view, one could argue, as the affected party does, that the "current financial numbers" are therefore "interwoven" with advice or recommendations, and are not a "separate and distinct body of fact." This would mean they are not excluded from the application of the exemption under section 13(2)(a).

[88] But my review of the records makes it clear that if, hypothetically, this information were to be disclosed on its own, this would not amount to disclosure of mere "disconnected snippets" of information.

[89] On balance, therefore, I am satisfied that the information identified as factual by the ministry is, in fact, reasonably severable factual material within the meaning of the section 13(2)(a) exclusion, and I therefore find that the section 13(1) exemption does not apply to it.[46] I also find that section 13(2)(a) does not apply to any information that I found, above, to qualify for exemption under section 13(1).

[90] Even if I had not reached this conclusion, I am also satisfied that the ministry was entitled to exercise its discretion by not claiming section 13(1) even if it would otherwise apply. This is not one of the "rare cases"[47] where an affected party is entitled to rely on a discretionary exemption. The affected party's interests in this appeal are properly addressed under section 17(1), which the ministry has claimed for the "current financial numbers" and other information to which it has not applied section 13(1).

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[46] As regards the meaning of "factual material," see also the discussion of *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner*, 2013 BCSC 2322, in Order PO-3578, issued concurrently with this order.

[47] Orders M-430, P-257, M-10 and P-1137.

Sections 13(2)(b) through (l) and section 13(3): other exceptions to the exemption

[91] I have reviewed the remaining exceptions listed in section 13(2) and find that they do not apply. Specifically, sections 13(2)(f) and (i) do not apply because the affected party is not an institution under the *Act*. Nor does the evidence support the application of any of the other exceptions in section 13(2).

[92] I also find that the section 13(3) exception does not apply. The records are not more than twenty years old, and as explained above, I am not satisfied that they have been publicly cited by the head as the basis for making a decision or formulating a policy.

[93] In summary, therefore (subject to the analysis of the ministry's exercise of discretion and the consideration of the public interest override, both discussed below), I find that all of the information that qualified for exemption under section 13(1), as identified above prior to the consideration of sections 13(2) and 13(3), is in fact exempt under section 13(1).[48]

Issue B. Does the mandatory exemption at section 17(1) of the *Act* apply?

Section 17(1): the exemption

[94] The affected party and the ministry both submit that the records are exempt under sections 17(1)(a) and (c). These sections 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;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency; . . .

[95] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[49] Although one of the central purposes of the *Act* is to shed light on the operations of

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[48] In Record 1: parts of pages 9, 10, 18 and 19; and pages 5, 11-15, 17, 20 and 22-26 in their entirety. In Record 2: part of the cover page and parts of pages 11, 12, 14, 16, 18, 20, 22, 24, 26, 29 and 31-34; and pages 7, 8, 13, 15, 17, 19, 21, 23, 25 and 27 in their entirety.

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

government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[50]

[96] In this case, therefore, for section 17(1)(a) and/or (c) to apply, the ministry and/or the affected party must 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 ministry 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) and/or (c) of section 17(1) will occur.

What is the scope of the information claimed to be exempt under section 17(1)?

[97] As with section 13(1), this appeal presents several conflicting versions of what is claimed to be exempt under this section.

[98] The ministry's access decision to the appellant at the request stage indicates that "[s]ection 17(1) applies to portions of the records that would reveal commercial, financial and labour relations information supplied in confidence and where disclosure could reasonably be expected to result in significant prejudice to [the affected party], as well as undue loss." [Emphasis added.]

[99] Similarly, at the request stage, the affected party's representations to the ministry after being notified of the request under section 28(1) and (2) of the *Act* indicate that in the affected party's view, "most information" falls under this exemption, or the personal privacy exemption in section 21(1).

[100] The marked-up copies of the records provided by the ministry at the beginning of the adjudication stage indicate that, when that document was prepared, the ministry only relied on section 17(1) for parts of the records.

[101] However, in its representations, the ministry states that "Records 1 and 2 should be exempt in their entirety from disclosure on the basis of section 17(1) of FIPPA."

[102] The affected party also provided a marked-up copy of the records with its representations, claiming that almost all of the information in the records is exempt under either section 13(1) or 17(1). It has not consented to the disclosure of any part

[50] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

of the records under section 17(3).[51]

[103] Section 17(1) is a mandatory exemption. Under the circumstances, I will consider the records in their entirety, and determine whether they are exempt, in whole or in part, under this section.

[104] I have already exempted some information under section 13(1), but I am considering it again here for the sake of completeness, and in view of the need to assess the public interest override, in which the public interest may be weighed against the purposes of applicable exemptions.

Part 1: type of information

[105] The types of information listed in section 17(1) have been discussed in prior orders:

> *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
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[52]
>
> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.[53]
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information

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[51] Section 17(3) states that: "A head may disclose a record described in subsection (1) or (2) if the person to whom the information relates consents to the disclosure."
[52] Order PO-2010.
[53] Order PO-2010.

> prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[54]
>
> *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.[55] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[56]
>
> *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.[57]
>
> *Labour relations* means relations and conditions of work, including collective bargaining, and is not restricted to employee/employer relationships. It does not include the names, duties and qualifications of individual employees.[58]

[106] The affected party submits that the records contain information about its financial affairs and operational practices with respect to the restructuring of its operating model. The affected party submits that this is commercial, financial and labour relations information.

[107] The ministry adopts the affected party's representations on this issue. The ministry refers to the definitions above and submits that the records contain financial and commercial information.

[108] The appellant does not address this aspect of the test in her representations.

[109] I have reviewed the records in detail. The entire focus of the records is the business and operations of the affected party (and other racetracks[59]) as well as projected changes and their impact. I am satisfied that the contents of the records constitute financial and commercial information, meeting part 1 of the test.

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[54] Order PO-2010.
[55] Order PO-2010.
[56] Order P-1621.
[57] Order PO-2010.
[58] Order MO-2164.
[59] which I found to be non-responsive to the request, under the heading "Responsiveness of Records," above.

Part 2: supplied in confidence

Supplied

[110] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[60]

[111] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[61]

[112] The affected party submits that it "supplied" the information to the ministry in response to a due diligence review conducted by the ministry.

[113] Using slightly different language, both the affected party and the ministry submit that, although the direct supplier of the information to the ministry was the consultant, the information was supplied by the affected party to the consultant, and qualifies as having been "supplied" by the affected party within the meaning of section 17(1). In this regard, both the ministry and the affected party rely on the similar situation in *SNC-Lavalin Inc. v. Canada (Minister of Public Works)*,[62] where the court dealt with the third party information exemption at section 20(1)(b) of the federal *Access to Information Act*:

> The respondent submits that paragraph 20(1)(b) cannot apply to the evaluation report because it was not supplied to PWC by the applicant, a third party, but rather by a "fourth party", a consultant retained by PWC. That does not preclude the application of this provision, in my view, for "third party" is defined by the Act, s. 2, as including any party other than one that requests information or the government institution. The respondent's suggestion of a "fourth party" is merely another description for another third party under the Act. The Record was clearly provided by a third party, the consultant, even though that was not the applicant, who is also a third party.

[114] I have concluded that both records at issue were "supplied" to the ministry by a third party, namely the consultant. Even in that circumstance, the interests of the affected party are potentially protected under sections 17(1)(a) and (c) because of the reference in both these sections to a reasonable expectation of harm to either "a person, group of persons, or organization" [section 17(1)(a)] or to "any person, group, committee or financial institution or agency" [section 17(1)(c)]. The statutory language does not limit the exemption so as to apply only if there is a reasonable expectation of

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[60] Order MO-1706.
[61] Orders PO-2020 and PO-2043.
[62] [1994] F.C.J. No. 1059, 79 F.T.R. 113 at para. 35.

harm to the person who actually supplied the information. In other words, although the consultant supplied the information to the ministry, the exemption may apply where disclosure could reasonably be expected to harm the affected party.

[115] Although this conclusion is consistent with the analysis in *SNC-Lavalin Inc. v. Canada (Minister of Public Works)*, it is not necessary to rely on that decision in order to find that the information in the records that originated with the affected party was "supplied" to the ministry within the meaning of section 17(1). In addition, information that is the product of the consultant's analysis, even where it is an aggregation of information about a number of racetracks, [63] meets the "supplied" test.

[116] Having reviewed the evidence and argument on this issue, I therefore find that the "supplied" test is met.

In confidence

[117] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[64]

[118] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.[65]

[119] With respect to the requirement for a reasonable expectation of confidentiality, both the affected party and the ministry rely on a confidentiality agreement that the affected party entered into with the consultant in relation to "confidential information" that the affected party was to provide as part of the due diligence exercise. The affected party also submits that it was always the intention of the parties that the

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[63] For example, the information on page 8 of record 1. (This information is responsive because it includes information about the affected party.)
[64] Order PO-2020.
[65] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

information in the records would remain confidential.

[120] "Confidential information" is defined in the confidentiality agreement and I am satisfied that it includes the categories of information found in the records.

[121] The confidentiality agreement states that the affected party is not waiving its right to claim the protections of sections 17 and 21 of the *Act*. As noted by both the affected party and the ministry, the affected party also took the additional step of writing to the ministry and reiterating this point.

[122] The confidentiality agreement expired in November 2014. In order to meet this part of the test, the affected party and/or the ministry must demonstrate that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. I am satisfied that, with respect to the information supplied by the affected party to the consultant, the agreement and letter provide explicit evidence of an expectation of confidentiality when the information was provided. I note that the agreement binds the affected party and the consultant. The ministry is not a party. Nevertheless, the agreement provides evidence of an intention to keep the information supplied to the consultant confidential.

[123] In addition, I note that the information in the records that was produced or calculated by the consultant, which as noted above was also "supplied" to the ministry, deals with the same subject areas as the information provided to the consultant by the affected party.

[124] As well, the consultant submits that when financial data was requested from the racetracks, "it was implied that their private financial data would be held in strict confidence by [the consultant] and the Government." In other words, there was an implicit expectation of confidentiality with respect to financial information relating to the racetracks, including the affected party. The consultant also indicates that it took care not to disclose a racetrack's information to the other racetracks.

[125] The appellant submits:

> I don't think that organizations that receive government funding should be able to hide behind confidentiality agreements. The public interest should override any confidentiality accord. . . .

[126] This argument by the appellant relates more to the public interest override than to whether there was a reasonable expectation of confidentiality. I will address this issue later in this order.

[127] Based on the analysis set out above, I conclude that the affected party had a reasonable expectation of confidentiality with respect to its financial and commercial information within the due diligence process. Accordingly, I am satisfied that all the information I have found to meet part 1 of the test, and to meet the "supplied" test

under part 2, was supplied to the ministry "in confidence," and therefore it meets both requirements under part 2.

Part 3: harms

[128] The party resisting disclosure must demonstrate that disclosure could "reasonably be expected" to lead to one or more of the harms set out in sections 17(1)(a) or (c). In order to do so, the ministry and/or affected parties must demonstrate a risk of harm that is well beyond the merely possible or speculative although they need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[66]

[129] Parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act.*[67]

Representations

[130] The affected party submits that disclosing the information in the records would cause prejudice to its position in the marketplace. The affected party says that, specifically, disclosing the information would:

- prejudice its restructuring efforts;
- diminish its reputation;
- violate confidentiality agreements with terminated employees;
- prejudice its ongoing relationship with its current employees, thereby having a material effect on labour relations;
- harm its negotiating position in third party contracts;
- provide competitors with a competitive advantage they would not have had otherwise; and
- reveal sensitive financial and commercial information about its financial status.

[131] The affected party further submits that the racetrack industry is in a vulnerable state and is restructuring in order to maintain economic stability after the loss of slot

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[66] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at paras. 52-4 and *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at paras. 201 to 206. See also Order PO-3157. See also the discussion under section 18, below for a more detailed analysis of how this statement of the standard of proof derives from case law.
[67] Order PO-2435.

revenues, and that this increases the likelihood that its competitors will unfairly use the information to its disadvantage, thus causing "significant prejudice to its competitive position within the marketplace."

[132] The affected party also submits that disclosure would enable competitors to more fully understand its financial outlook and contingency planning, would disclose its process and strategy, and would provide a full template of its operation, including any strengths and weaknesses. In addition, the affected party asserts that a competitor with knowledge of the contents of the records has "a complete road map to understanding [the affected party]'s business," and that this would be "to the detriment of [the affected party]'s ability to compete" in an RFP process. The affected party directs this argument at prejudice to its competitive position [section 17(1)(a)] and undue loss [section 17(1)(c)].

[133] The affected party cites Order PO-3154[68] in support of its assertion that "it has been accepted that this type of information, which covers a wide variety of topics, would allow [its] competitors to gain insight into the business of [the affected party] and would provide a competitor with a competitive advantage that they would not have if the information were not revealed."

[134] The affected party also states:

> Increased competition in the marketplace . . . will create a loss of revenue for [the affected party] as competitors will be able to unfairly attract [the affected party]'s customers due to improved business strategies. Such a loss of revenue will disproportionately hinder [the affected party]'s ability to restructure and remain a viable business entity. At the same time, [the affected party]'s competitors will obtain a disproportionate gain by unfairly securing a greater customer base at [the affected party]'s expense.

[135] In addition, the affected party submits that disclosure could reasonably be expected to give its competitors an unfair advantage in negotiations regarding transition funding. According to the affected party, its competitors could use the information in the records to "target specific issues in their own submissions to the Ministry," thereby creating "an unfair and uneven 'playing field.'" The affected party seeks to underline this point by stating that "jobs are at stake," and that "[s]ecuring transition funding will be crucial to the racetracks' ability to maintain economic viability in the long term." The affected party is concerned that the use of these strategies by its competitors could negatively affect its share of transition funding, thereby hindering its plans and causing it undue loss, while also producing undue gain for its competitors.

[136] The affected party cites Order PO-1816 in support of this argument. Order PO-1816 dealt with proposals for public funding, including proposed restructuring plans,

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[68] at paras. 76-77.

budget projections and projected expenditures for salaries and benefits. Order PO-1816 states that "the relevant portions . . . are those which specifically address the proposed services to be provided. . . ." [Emphasis added.] In this case, a significant portion of the information also relates to proposed changes to the affected party's business model.

[137] The affected party also submits that disclosure "is likely to have a detrimental effect on" the negotiating climate between it and the OLG with respect to a lease agreement for a slots facility. In addition, it submits that disclosure could reasonably be expected to negatively affect negotiations between it and its employees and lead to attempted poaching of its employees by competitors.

[138] The ministry's representations state that it relies on the arguments and representations made by the affected party in relation to a reasonable expectation of harm under sections 17(1)(a) and (c).

[139] The appellant submits that the affected party provides "no evidence" to back up its assertions of prejudice to its competitive position, loss of revenue, or the unfair attraction of its customers by competitors, and describes the affected party's statements in this regard as "mere speculation."

[140] The appellant also points to the "sunshine list"[69] and the fact that it now mandates disclosure of the salaries of employees of the affected party who earn more than $100,000, and asks the apparently rhetorical question, "[h]as such publicity hurt the company's ability to compete?"

Analysis

[141] In assessing whether or not disclsoure could reasonably be expected to significantly prejudice the affected party's competitive position or interfere significantly with its contractual or other negotiations, the industry context is a relevant factor. As mentioned earlier in this order, Ontario's Horse Racing Industry Transition Panel refers to "today's intensely competitive gaming and entertainment marketplace."[70] The panel also indicated that "[w]ithout slots or a new revenue stream, the horse racing industry in Ontario will cease to exist."[71] In addition, the number of players in the Ontario horse racing industry is limited.

[142] These objectively observed circumstances provide evidence that supports the affected party's submissions, referred to above, that the horse racing industry is in a vulnerable state, and also supports the commercial importance of maintaining competitiveness in future RFPs, obtaining an appropriate share of transitional funding, and negotiating lease terms with the OLG on an ongoing basis.

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[69] This is a reference to the *Public Sector Salary Disclosure Act*.
[70] Interim Report, p. 1.
[71] *Ibid.,* p. 27.

[143] At this point, it will be helpful to review and categorize the types of information found in the records. As stated earlier, they relate to the due diligence review undertaken by the consultant. The records consist of two presentations by the consultant to the ministry in which the consultant's analysis and conclusions are presented. The responsive information in the records falls into the following categories:

- title and subtitle pages;
- agenda;
- information concerning the status of the consultant's reviews;
- description of the consultant's methodology and assumptions;
- financial model overview;
- current business and financial information of the affected party;
- description of alternative scenarios relating to racetracks in Ontario;
- analytical data; and
- proposed changes/options for change, and projected impacts.

[144] The affected party has provided extensive representations concerning the impact of disclosure. Having reviewed the records in detail, I conclude that the affected party's submissions relate most directly to several components in the records: current and historical business and financial information; description of alternative scenarios; analytical data; and proposed changes/options for change, and their projected impacts, where these appear in the records.

[145] Given the detailed representations of the affected party, and bearing in mind the difficulty of predicting future events with precision,[72] I accept that disclosure of these parts of the records could reasonably be expected to significantly prejudice the competitive position of the affected party and interfere with its ongoing negotiations within the meaning of section 17(1)(a). Disclosure of data that appears to aggregate information about the affected party with that of other racetracks could also reasonably be expected to prejudice the competitive position of the racetracks, including the affected party.

[146] Accordingly, as this information meets all three parts of the section 17(1) test, I find it to be exempt under section 17(1)(a). Having reached this conclusion, it is not necessary for me to consider whether this information is also exempt under section 17(1)(c).

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[72] Order MO-3179 at para. 62.

[147] This outcome is consistent with the conclusions reached by Adjudicator Stephen Faughnan in Order PO-3154, in which he addressed information found in a draft application under the *Companies Creditors Arrangement Act* (CCAA) on behalf of General Motors of Canada in the wake of the economic circumstances experienced by that company in 2009. Adjudicator Faughnan stated[73]:

> I am satisfied that the disclosure of a great deal of the information contained in the draft CCAA documentation and the discussion of this information set out in certain emails would reveal the process and strategy to be adopted in any CCAA proceeding, and provide a complete template of GMCL's operation, including any weaknesses and strengths. This information, which covers a wide variety of topics ranging from financial to strategic, is very specific, extensive and detailed, the collection of which would allow GMCL's competitors to gain an insight into the business of GMCL and would provide a competitor with a competitive advantage that they would not have if the information were not revealed.

[148] However, Adjudicator Faughnan did not apply the exemption to information in the records that did not meet the foregoing description. Similarly, in this appeal, I find that the following information is not exempt under sections 17(1)(a) and (c): title and subtitle pages, except for a portion of one cover page that reveals proposed changes; agenda; responsive information concerning the status of the consultant's reviews; description of methodology; and the financial model overview. I make this finding because these parts of the records do not contain financial or organizational information about the affected party that could reasonably be expected to cause the harms set out in sections 17(1)(a) and (c) if they are disclosed.

[149] To summarize, I find that the following information is exempt under section 17(1)(a):

- in record 1: parts of pages 9 and 10; and pages 5, 8, 11-15, 17-20, and 22-26 in their entirety; and
- in record 2: part of the cover page; and pages 2, 3, 5-8, 10-27, 29 and 31-34 in their entirety.

ECONOMIC AND OTHER INTERESTS

Issue C: Does the discretionary exemption at section 18(1)(c), (d) and (e) apply?

[150] The ministry's decision letter indicated that it relies on sections 18(1)(c), (d) and (e) to deny access to the records in their entirety. The marked-up copies of the records

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[73] at para. 76.

provided by the ministry at the outset of adjudication claim that sections 18(1)(d) and (e) apply to the records in their entirety. The ministry's representations address only section 18(1)(d), and accordingly, I will begin my analysis, below, with that section. As the ministry has not abandoned sections 18(1)(c) and (e), I will also consider them.

[151] Parts of the records are exempt under sections 13(1) and 17(1). However, in order to facilitate consideration of the public interest override, I will include the parts of the records I have previously found exempt in my consideration of this exemption.

[152] Sections 18(1)(c), (d) and (e) state:

> A head may refuse to disclose a record that contains,
>
> > (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;
> >
> > (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

Standard of proof under section 18(1)(c) or (d)

[153] In order to establish the application of sections 18(1) (c) or (d), the ministry must establish that harm could "reasonably be expected" to occur in the event of disclosure.

[154] Relying on *Canada Packers Inc. v. Canada (Minister of Agriculture)*,[74] the ministry submits that the standard of proof under sections 18(1)(c) and (d) requires "'detailed and convincing' evidence to establish a 'reasonable expectation of harm.'" The ministry goes on to state that "[e]vidence should demonstrate a probable harm." *Canada Packers* dealt with the third party information exemption at section 20 of the federal *Access to Information Act* (the *ATIA*).

[155] The ministry's submission is not a precise restatement of the language used in *Canada Packers*, where the Federal Court of Appeal simply stated that the phase "could

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[74] [1989] 1 F.C. 47, 53 D.L.R. (4th) 246 at 253-255 (C.A.). The ministry refers to this decision as a judgment of the Ontario Court of Appeal. In fact it is a judgment of the Federal Court of Appeal.

reasonably be expected to" requires "a reasonable expectation of probable harm." This exact formulation was affirmed by the Supreme Court of Canada in *Merck Frosst Canada Ltd. V. Canada (Health)*,[75] which also addressed section 20 of the *ATIA*.

[156] More recently, in Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)[76] ("Community Safety and Correctional Services v. IPC"), the Supreme Court of Canada addressed the meaning of the phrase "could reasonably be expected to" in two other exemptions under the Act,[77] and also found that it requires a "reasonable expectation of probable harm."[78] As well, the Court observed that "the 'reasonable expectation of probable harm' formulation . . . should be used wherever the 'could reasonably be expected to' language is used in access to information statutes."

[157] In order to meet that standard, the Court explained that:

> As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences". . . .

[158] This is the standard of proof that I applied under section 17(1)(a) and (c), above,[79] and I will also apply it here.

[159] In its argument about the meaning of "could reasonably be expected to," the ministry also refers to the Divisional Court's judgment in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*,[80] in which the Court held that in order to properly apply section 18, the Commissioner must ". . . review the assumptions underlying the Minister's prediction [of harm], and if reasonable, to uphold the prediction."[81] I note that this case proceeded to the Court of

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[75] 2012 SCC 3.
[76] 2014 SCC 31.
[77] the law enforcement exemptions at sections 14(1)(e) and 14(1)(l) of the *Act*.
[78] at paras. 53-54.
[79] Under section 17, I used a more compact formulation of the test: ". . . the ministry and/or affected parties must demonstrate a risk of harm that is well beyond the merely possible or speculative although they need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences."
[80] 2004 CanLII 11768, [2004] O.J. No. 224 (ONSC).
[81] at para. 23.

Appeal[82], which elaborated on the standard of proof required under section 18 without endorsing this particular articulation of it.[83] Moreover, and significantly, the Supreme Court of Canada has been very clear that the standard of proof articulated in *Community Safety and Correctional Services v. IPC*,[84] as set out in the preceding paragraph, should be applied "wherever the 'could reasonably be expected to' language is used in access to information statutes." This is therefore the standard that I will apply here.

[160] Above, with regard to section 17(1), I stated that in applying this exemption, one must also be "mindful of the difficulty of establishing a reasonable expectation of future harm." The same consideration applies here.

Section 18(1)(d): injury to financial interests

[161] Section 18(1)(d) is intended to protect the broader economic interests of Ontarians.[85]

[162] The ministry submits that any financial loss to the affected party will inevitably lead to material financial harm to the government because of the affected party's contribution to OLG gaming revenues. The ministry ties this argument to the affected party's position in relation to sections 17(1)(a) and (c). But section 17(1) exists to protect the interests of the affected party, and it is not a foregone conclusion that any reasonably foreseeable economic harm to the affected party could, without more, be reasonably expected to also trigger the harms addressed in section 18(1)(d).

[163] The ministry provides a dollar figure for the affected party's slot revenues that flow to OLG, but does not explain how the overall bottom line of the affected party could reasonably be expected to affect the amount of money it is required to remit to OLG in relation to gaming operations. The ministry appears to believe that this is self-evident, but I disagree. As an example, it is quite possible that competitive injury to the affected party could drive up its costs and leave revenues unaffected. I find that the representations on this point are speculative, and the evidence is therefore not "considerably above" or "well beyond" a mere possibility of harm.

[164] The ministry also submits that racetracks (including the affected party) voluntarily provided information to the consultant as part of the due diligence review process, with an expectation of confidentiality, and if the government fails to keep the

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[82] [2005] O.J. No. 4047, Tor. Docs. C42061 and C42071 (C.A.); affirming [2004] O.J. No. 224, 181 O.A.C. 171, Tor. Docs. 193/02 and 224/02 (Div. Ct.); application for leave to appeal dismissed, [2005] S.C.C.A. No. 563, File No. 31224 (S.C.C.)

[83] See paras. 33-41.

[84] Cited above at footnote 66.

[85] 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.

information confidential, they might refuse to provide this information in the future. The ministry further submits that this would interfere with its ability to conduct such reviews, and with its ability to regulate and assist the industry. I do not accept that the evidence and argument on this point establishes a sufficient link between disclosure of the records and the government's revenues or management of the economy to support the application of section 18(1)(d).

[165] The affected party adopts and relies on the ministry's arguments, and adds that disclosure may prejudice the ministry's economic interests by revealing cost structures at a time when the ministry is seeking transformational change. The affected party also refers to the need for the ministry to be assured that it is receiving competitive pricing.

[166] Although these arguments are expressly directed at section 18(1)(c), they may also relate to section 18(1)(d) and I am therefore considering them here. No evidence or further analysis is provided in these submissions to explain how they demonstrate a reasonable expectation of harm to the financial interests of the government or its ability to manage the economy. No specific examples of information in the records are given, nor any further explanation as to how release could raise concerns about pricing offered to the ministry by suppliers.

[167] In its reply representations, the affected party also refers to disclosure giving an advantage to U.S. racetracks attempting to enter the Ontario market by way of simulcast by obtaining a road map of the affected party's business and cost structure. This in turn would negatively impact the success of Ontario racetracks, leading to diminished revenues for the affected party and the government. Without more, I am at a loss to connect the "road map" of the affected party's operations and the hypothetical future decision of U.S. racetracks to begin simulcasting in Ontario, or to connect this development with the harms mentioned in section 18(1)(d).

[168] With respect to section 18(1)(d), I conclude that the ministry and affected party have not demonstrated a risk of harm that is well beyond or considerably above the merely possible, even bearing in mind the difficulty of establishing a reasonable expectation of future harm. I therefore conclude that they have failed to demonstrate that disclosure of the records could reasonably be expected to harm the financial interests of the government or its ability to manage the economy.

[169] The appellant's representations are largely directed at the public interest in disclosure, which I will address under the public interest override, below. However, she does make the following statements:

> I have read the submissions by the Ministry and [the affected party] as part of this appeal. What surprises me is the way the Ministry appears to align its interests with those of [the affected party]. The company argues that releasing the [records at issue] would diminish its reputation,

> prejudice its efforts to restructure its operations and violate a confidentiality agreement. . . .

[170] The appellant also states that the ministry and affected party "provide no evidence to back up their assertion."

[171] As will be apparent from my analysis of the positions taken by the affected party and the ministry, set out above, the alignment of interests referred to by the appellant is not sufficiently explained in the material before me to allow a conclusion that a reasonable expectation of economic harm to the affected party could also reasonably be expected to be injurious to the economic interests of the government, or its ability to manage the economy. Nor is any such connection evident from my review of the records themselves.

[172] I therefore find that section 18(1)(d) does not apply to any part of the records at issue.

Section 18(1)(c): prejudice to economic interests

[173] 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.[86]

[174] The economic harms addressed in section 18(1)(c) are arguably narrower than those in section 18(1)(d) because, while section 18(1)(d) speaks to the economic position of the Government of Ontario, section 18(1)(c) addresses the "economic interests" and "competitive position" of an institution. In this case, the institution is the ministry. On its website, the ministry describes its role as follows:

> The Ministry of Finance performs a variety of roles, all focused on supporting a strong economic, fiscal and investment climate for Ontario, while ensuring accountability with respect to the use of public funds.

[175] On this basis, it would be reasonable to conclude that the ministry's "economic interests" are aligned with those of the Government of Ontario, resulting in a similar scope as between this exemption and section 18(1)(d), with the added component of potential harm to the institution's competitive position. It is, however, significant that the ministry cannot be said to have a "competitive position" as regards the horse racing industry in Ontario. Nor does the ministry attempt to "earn money in the marketplace."

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

[176] As noted, the ministry did not make representations concerning the application of this section. I have addressed the affected party's representations on this section in my analysis of section 18(1)(d) and have nothing to add here. I have reviewed the evidence and argument presented, and I find that they do not support a reasonable expectation of the harms sought to be avoided under section 18(1)(c).

[177] I have also reviewed the records to determine whether they contain information that would support the application of section 18(1)(c), and I find that they do not.

[178] I find that section 18(1)(c) does not apply to any part of the records.

Section 18(1)(e): positions, plans, procedures, criteria or instructions

[179] In order for section 18(1)(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions,
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of the Government of Ontario or an institution.[87]

[180] Neither the ministry nor the affected party has provided representations concerning this section. I have reviewed the arguments and evidence provided to me, and the records at issue, and I see no evidence that the records contain positions, plans, procedures, criteria or instructions that are intended to be applied to current or future negotiations on behalf of the Government of Ontario.

[181] I find that section 18(1)(e) does not apply to any part of the records.

EXERCISE OF DISCRETION

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

General principles

[182] 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

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[87] Order PO-2064.

institution failed to do so.

[183] 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.

[184] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[88] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations

[185] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[89]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect.

[186] The ministry submits that:

> • the exemption was applied in furtherance of its purpose, which is "the importance of ensuring government's decision-making process without intrusion;"
>
> • it applied section 13(1) ". . . because it genuinely believes that the disclosure of the records would interfere with a decision-making process of the government;"

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[88] Order MO-1573.
[89] Orders P-344 and MO-1573.

> • it was seeking to correct a problem in an industry and to improve government revenues, and was seeking outside advice on how best to do it; and
>
> • in deciding to apply section 13(1), it considered that the purpose of the *Act* is access to government information subject to well-defined, limited and specific exemptions.
>
> The ministry does not view the request as compelling or sympathetic, and states that the requester does not need the information. Nor, in the ministry's submission, will disclosure increase public confidence in the ministry.

[187] The appellant did not address the ministry's exercise of discretion in her representations.

[188] It is evident from the ministry's representations that it considered relevant factors, namely the purpose of the section 13(1) exemption and the purposes of the *Act*. In the circumstances of this case, I do not consider the appellant's need for the information, which relates to her purpose in making the request, to be a relevant factor in the exercise of discretion. Nevertheless, on balance, I am satisfied that the ministry did not base its exercise of discretion on irrelevant factors. I conclude that the ministry's exemption claim under section 13(1) arises from its understanding of the exemption and its purpose in the overall legislative scheme of the *Act*, as applied to the records at issue.

[189] I therefore uphold the ministry's exercise of discretion to rely on section 13(1).

PUBLIC INTEREST OVERRIDE

Issue E: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13(1) and 17(1) exemptions?

[190] The appellant claims that the public interest override in section 23 applies, and that the records therefore must be disclosed. 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. [Emphases added.]

[191] 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.

[192] 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.[90]

[193] In considering whether there is a "public interest" in disclosure of a record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[91] 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.[92]

[194] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[93]

[195] Any public interest in *non*-disclosure that may exist also must be considered.[94] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[95]

[196] 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.

Representations

The appellant's initial representations[96]

[197] The appellant submits that there is a public interest in knowing how the affected party spent its share of the SARP money – which the appellant says was public money.

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[90] Order P-244.
[91] Orders P-984 and PO-2607.
[92] Orders P-984 and PO-2556.
[93] Order P-984.
[94] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[95] Orders PO-2072-F, PO-2098-R and PO-3197.
[96] As noted in the Overview section of this order, when the appellant provided her initial representations, she was invited to provide supplementary representations on the public interest override, and did so. Both her initial and supplementary representations were then shared with the ministry and affected party for reply. The appellant's initial and supplementary representations are both discussed under this heading.

She refers to the transitional funding announced for the horse racing industry after the cancellation of SARP, and submits further:

> Government-funded organizations must be accountable to the public. Without transparency, how can the public have any confidence in whether the government is a good custodian of taxpayers' money?

[198] The appellant further submits that there is a compelling public interest in disclosure that outweighs the purposes of the exemptions. She also suggests that the records would cast light on the decision to cancel SARP, which she submits was very controversial. She cites the Auditor General's *Modernization Plan Report*, which described the cancellation as "abrupt," and stated that it had a significant impact on the horse-racing sector.

[199] She also submits that:

> . . . the backlash against the government [for the cancellation of SARP] has largely taken place in an information vacuum: the former government never provided the public with an explanation as to why it cancelled the program. The [Auditor General]'s report did not tell the public about a study done by [the ministry], concluding that 3,500 to 5,800 jobs in the horse-racing sector would vanish from ending the funding program.

[200] She then states her view that "[t]he public interest in a policy decision that had sweeping implications for the sector far outweighs the affected party's financial interests," and that "[t]he government should be accountable to the public for the policy decisions it makes."

[201] The appellant provided a significant body of documentation in support of her position, including:

- a newspaper article about the investigation launched in April 2012 by the AGCO, which I mentioned in the overview section of this order, above;
- a summary of the transitional funding for 2013-14 showing a significant payout of public money to the affected party;
- a page from the Ontario Public Service website emphasizing the need to conduct government activities an "open, fair and transparent manner"; and
- a newspaper article about the lack of accountability for the use of racetrack's share of SARP income.

[202] The newspaper article referred to in the last bullet point, about lack of accountability, was entitled "Where did Ontario's slots-for-horses money go?" and appeared in the *Toronto Star* on October 26, 2013. The article includes the following

statements:

> Slot machine dollars earmarked for Ontario's struggling horse racing industry were misspent or unaccounted for due to lax oversight by the provincial government, a Star investigation has found.
>
> How much is at issue is not known, but it was fear of an ORNGE-style scandal that led then Finance Minister Dwight Duncan last year to abruptly cancel the long-running deal that funded horse racing in Ontario using publicly regulated gambling revenues. In all, $4.1 billion from slot machines flowed to the sport over 15 years.
>
> . . .
>
> How much money was misspent or overspent is not known. The question being asked by many people in the horse racing world is: Did all the money designated for growing the sport in Ontario end up in the correct place?
>
> One recent audit of a track operator . . . highlighted $45 million in cuts that had to be made over the next two years if the province was to keep funding [the track operator], according to a government document referencing needed reductions. Those cuts included $4.5 million in executive compensation and salary rollbacks.

[203] Three days later, on October 29, 2013, the *Toronto Star* published an editorial entitled, "Follow the money around the horse track," calling for disclosure of the very records that are at issue in this appeal. Although not mentioned by the appellant, this editorial is referenced in a document included in the ministry's Book of Evidence, supplied with its initial representations.[97] The editorial contained the following statements:

> It's getting curiouser and curiouser, the intrigue that swirls around the spending of money from Ontario's slot-machine industry.
>
> . . .
>
> As the Star's Mary Ormsby reports, some of that money can't be tracked because the Ontario government long ignored red flags about spending oversight in the horse racing industry. As well, the Ontario Lottery and Gaming Corp., which owned and operated the slot machines, failed to properly scrutinize the system. . . .

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[97] The document referencing the editorial is a Current Issues Sheet entitled, "Horse Racing Sustainability Plan."

> The good news is that the province has subjected racetrack operators . . . to an audit. Unfortunately, the finance ministry won't release the results. That's a serious mistake.
>
> The government should make the audits public as soon as possible. Their results would at least show where improvements are needed.
>
> . . . Beleaguered taxpayers have the right to know how their money is spent, especially when it has propped the industry up for years.
>
> As the Star story noted, worries that the money was going to high executive salaries or otherwise frittered away led to former finance minister Dwight Duncan's cancellation of slot machine funding to the horse racing industry in 2012. . . .

The ministry's reply representations[98]

[204] Responding to the appellant's arguments, the ministry submits that there is no compelling public interest in the records. The ministry submits that the records do not shed light on the operations of government, but rather provide options or models for the restructuring of the affected party without stating a governmental purpose.

[205] This submission ignores the fact that the consultant was retained to provide guidelines, and to conduct "due diligence," in the awarding of transitional funding with respect to the horse racing industry after the cancellation of SARP. As already noted, the currently authorized transitional funding, which is being paid by the government, amounts to $500 million for the industry as a whole. The processes of due diligence and allocation of this money are therefore significant government activities, and I disagree that this process is disconnected from government operations in the manner suggested by the ministry.

[206] The ministry also submits that the records do not shed light on the decision to cancel SARP, as this had already occurred prior to the creation of the records. The ministry submits further that the information in the records does not add to the public's information for the purpose of making political choices.

[207] The ministry also refers to the Auditor General's *Modernization Plan Report*, which devotes 13 pages to the cancellation of the Slots at Racetracks Program.[99] The ministry states that the report did not provide any detail of the analysis in the records at issue, although they were available to the Auditor General during the preparation of the report. As the ministry points out, the report identifies that the consultant who

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[98] As noted earlier, the ministry labelled its reply representations as sur-reply but they were actually reply representations.
[99] Pages 45-57 of the *Report*.

prepared the records at issue was engaged ". . . to study how best to distribute the transition funding."[100]

[208] The ministry characterizes the records as speaking "only about the individual racetrack's dollar allocations and models or options for changing those numbers." The ministry argues that this means the interest under consideration in section 23 is a private interest. I disagree. The question to be addressed under the public interest override, in assessing whether there is a "compelling public interest" in disclosure is not the nature of an affected party's interest, which will generally be private.[101] Rather, the relevant issue being assessed here is the *public* interest in the information.

[209] The ministry submits that the records "did not 'arouse strong interest or attention' from the Auditor General." However, this is not the only possible source of a public interest in disclosure, which may arise in many different ways. Moreover, the appellant does not rely on the Auditor General being interested in the records as the basis of her public interest argument.

[210] Under the heading, "wide public coverage," the ministry submits further that the public interest has been addressed by information that is already available, including the *Modernization Plan Report*, while also noting that the records themselves do not address the public interest in any way.

[211] The ministry submits that the fact that the appellant is a journalist does not automatically establish a public interest in disclosure.[102] Nor, however, does it mean that the fact that the appellant is a journalist who has already published several stories in the media about the racing industry, the cancellation of SARP and related issues, is irrelevant to this determination. It simply means that the involvement of a journalist does not automatically create a public interest in disclosure.

[212] The ministry cites Order P-1587[103] in support of its position that the public interest override does not apply. That order deals with a request by a member of the media to the Gaming Control Commission (GCC) for information resulting from a due diligence review. Some information was found exempt under sections 14 (law enforcement) and 19 (solicitor-client privilege), which are not subject to the public interest override. Order P-1587 considers whether the override applies to information that was found exempt under sections 17(1) (third party information) and 21(1) (personal privacy). The information in question consisted of financial statements, corporate organizational charts, membership and shareholders' lists, and lists of

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[100] at p. 54.
[101] That type of interest could be relevant in balancing an identified compelling public interest against the purpose of the exemption.
[102] citing Orders M-773 and M-1074.
[103] incorrectly referenced by the ministry as Order P-1557 (a fee waiver order dealing with a different institution).

locations.

[213] The appellant in Order P-1587 was in litigation with the GCC, and according to the submissions of the business that was the subject of the due diligence review, the appellant wanted the information for use in the lawsuit. There had been national media coverage of a decision by the GCC to request an affected party to divest himself of his shares in it. In rejecting the application of the public interest override, the adjudicator considered the fact that the GCC (predecessor of the AGCO) was charged with regulating the practices of the business, and was the proper forum for addressing the public interest. The adjudicator found that the only public interest present in that case was the protection of the integrity of the GCC's process.

[214] The ministry also submits that there is a public interest in non-disclosure, because disclosure:

> . . . could result in unfair competitive distress to companies who were acting legally within the structures agreed to and set up by the province, companies which were bringing in millions of dollars to the province under a program funding model. Furthermore, the government should be allowed to solve the problems as the regulator or overseer, and in this case without bringing all the confidential information of these companies into the news. The Auditor General has covered the public interest questions without any such intrusion.

[215] This argument could also be viewed as a submission to the effect that the public interest has already been addressed by the Auditor General's review (and, though not specifically mentioned here, by the AGCO's investigation).

[216] The ministry's reply representations also address whether any public interest in disclosure outweighs the purposes of the exemptions.

[217] With respect to section 17(1), the ministry submits that "it is counter to the public interest to interfere with the confidentiality of the financial information of regulated companies, as this exposure is harmful to their competitive interests and their future negotiations with the government." It also argues that avoiding reputational harm is important because of the contribution of racetracks to the consolidated revenue fund; that disclosure would lessen the affected party's competitive edge, which could impact profits and staff levels; that further government support may be needed as a consequence; and that these outcomes are not in the public interest. The ministry also points out that the amounts of transfer payments (an apparent reference to the transitional funding) is publicly available, and racetrack employees' salaries over $100,000 are now published under the *Public Sector Salary Disclosure Act*.

[218] With respect to whether any public interest outweighs the purpose of section 13(1), the ministry submits:

> • there is no public interest sufficiently compelling to override this exemption, which protects the advice of Ontario's consultants who help the ministry overseer to collect company information to set up a payment mechanism more favourable to Ontario by defining target financial numbers for each racetrack;
>
> • if there is a public interest, it is in protecting the ministry overseer in using the information for the purposes it was collected for "and not misuse this information by publishing details of target numbers in any newspaper";
>
> • the newspaper has no public mandate to do this work and should not be able to interfere;
>
> • *John Doe*[104] confirms the "high value" of the section 13(1) exemption and respect for government-decision making; and
>
> • the records at issue are not final nor were they cited as the basis for final decisions.

[219] I disagree with the ministry's statement about the public mandate of the appellant's newspaper. In that regard, I note that the Canadian Association of Journalists' *Principles of Ethical Journalism* states:

> Journalists have the duty and privilege to seek and report the truth, encourage civic debate to build our communities, and serve the public interest. We vigorously defend freedom of expression and freedom of the press as guaranteed under the Canadian Charter of Rights and Freedoms. We return society's trust by practising our craft responsibly and respecting our fellow-citizens' rights.

[220] Under the heading of "Independence," the same organization's *Ethics Guidelines* state:

> We serve democracy and the public interest by reporting the truth. This sometimes conflicts with various public and private interests, including those of sources, governments, advertisers and, on occasion, with our duty and obligation to an employer.

The affected party's reply representations

[221] The affected party adopts the ministry's representations on this point. To the extent that the affected party repeats the ministry's arguments, which are already set

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[104] Cited at footnote 20, above.

out in considerable detail above, I will not repeat them here.

[222] The affected party states that the appellant "asserts, without more" that her request meets the high standard of a compelling public interest, and that this is not sufficient to engage the public interest override. It characterizes the appellant's position as a "simple assertion." In my view, this is not an accurate description of the appellant's position, as outlined above. The appellant's initial representations provided more than a "simple assertion" of the public interest, and the appellant also included important background information in the attachments.

[223] The affected party states that the records contain non-public details of its financial, commercial and labour relations information, and are subject to the confidentiality agreement the affected party signed with the consultant (which, as noted previously, expired in November 2014).

[224] The affected party also states that there is an onus on the requester to "establish the basis for the application of the public interest override." This statement contradicts the long-held position of this office. As stated above, the onus under section 23 cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before providing representations. To find otherwise would be to impose an onus which could seldom, if ever, be met by an appellant.[105]

[225] The affected party refers to the appellant's interest in learning how racetracks spent their SARP money. The affected party states:

> Even if the [appellant] has the right under the Act to request how a private corporation allocates its portion of slots-at-racetrack-program funds, which [the affected party] denies, sufficient information is already publicly available and is provided for in [the affected party]'s annual Corporation Social Responsibility Report ("Report"). The Report provides detailed information regarding [the affected party]'s economic activity. It includes [the affected party]'s total annual payroll and benefits, payments to vendors and suppliers, racing industry contribution, annual debt payments, and payments to government and government agencies, as well as other expenditures. This financial information provides a framework of [the affected party]'s business adequate to address the [appellant]'s interest in information regarding [the affected party]'s spending. What the [appellant] wants is personal information of individuals or information that would allow the [appellant] to draw inferences about specific individuals. The [appellant] is not entitled to this information.

[226] With respect, and despite the affected party's denial that this is the case, I must

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[105] Order P-244.

point out that the appellant most certainly has the right to request access to the records at issue under the *Act*. This right is clearly given to her by section 10(1).[106] The question before me is whether the records, or any portion of them, are exempt from disclosure as claimed by the ministry and the affected party, and if so, whether the public interest override in section 23 applies.

[227] As well, I have reviewed the Social Responsibility Report referred to in this submission and would observe that it provides only a general view of the affected party's operations and does not contain nearly the level of detail found in the records at issue.

[228] The affected party also submits that the effective operation of government requires the protection of advice received, third party information, and the economic interests of Ontario, and that the due diligence review could only be conducted within a zone of confidentiality. The affected party says that ". . . preserving the integrity of the due diligence process outweighs any public interest in the disclosure of the [records]."

[229] On the question of whether any public interest in disclosure outweighs the purpose of the section 13(1) exemption, the affected party identifies that purpose as being "to provide the ability for public servants and consultants to provide, 'free, frank and full' advice during the process of government decision-making and policy-making," using the language of the Supreme Court in *John Doe*.[107] The affected party submits that disclosure is contrary to that purpose, and that the public interest in disclosure does not outweigh that purpose.

[230] With respect to whether disclosure outweighs the purpose of section 17(1), the affected party identifies that purpose as protecting the "informational assets" it provided to the ministry in the course of the ministry carrying out its public responsibilities. The affected party claims that the effective operation of the ministry is dependent on its co-operation, and that such co-operation is necessarily linked to the preservation of confidentiality. The affected party reiterates that disclosure could cause significant harm.

[231] The affected party also claims that, because of the "wide scope" of public disclosure related to SARP, disclosure of the records would not increase the capacity for public scrutiny related to the decision to cancel SARP, and that the public interest does not clearly outweigh the purpose of section 17(1).

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[106] Section 10(1) states: "Subject to section 69(2) [which relates to certain hospital records], *every person has a right of access to a record in the custody or control of an institution*" unless the record falls within an exemption, or the request is frivolous or vexatious. [Emphasis added.]
[107] cited at footnote 20, above.

The appellant's sur-reply representations

[232] The appellant submits that the public interest in the records is clear, and that the public is entitled to know how the affected party spent government funding. The appellant argues that without such information, it is impossible for the public to hold those who govern to account and to gauge how effectively government manages its own policies.

[233] The appellant states that public's interest in the horse racing industry, and in the affected party, is sufficiently widespread to be considered "compelling." In this instance, the appellant contends that the public was left in the dark about the government's controversial decision to cancel SARP. The appellant also submits that the records could shed light on why the government made this decision.

[234] The appellant also refers to the Auditor General's *Modernization Plan Report*, and in particular:

> • the public outcry over the "severe negative impact" of cancelling SARP for the horse-racing sector was considerable;[108]
>
> • the overview contained in the report of the problems associated with SARP, notably the lack of accountability and government direction on how track operators should spend the funding;[109]
>
> • the reiteration of media reports on allegations that the affected party used some of the "funding from the government program" – *i.e.* the racetrack operators' share of SARP revenues – to pay salaries and bonuses to its executives; [110] and
>
> • the launching of an investigation by the AGCO after a complaint about "certain governance and accountability issues." [111]

[235] On the question of whether or not the records shed light on the government's decision to cancel SARP, the appellant states:

> I don't know how [the consultant] would come up with a restructuring model without examining how the [SARP] worked and how racetrack operators, including [the affected party], used their share of the funding.

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[108] *Modernization Plan Report*, p. 54.
[109] an apparent reference to section 5.6 of the *Modernization Plan Report*, which appears at pp. 45-48.
[110] *Modernization Plan Report*, p. 52.
[111] *Modernization Plan Report*, p. 52.

Analysis

[236] Based on the representations and evidence provided by all parties, it is evident that there has been significant public discussion of recent issues pertaining to Ontario's horse racing industry. This discussion focuses on problems in the administration of SARP, and in particular the lack of accountability and transparency with respect to the allocation of the horse racing industry's share of the profits from it, and the need to ensure that any future public funding is based on clear public interest principles including transparency and accountability.[112]

[237] In addition, there has been considerable controversy surrounding the Ontario government's decision to cancel SARP and the decision, taken somewhat later, to provide an amount of transitional funding most recently announced to be $500 million over a five year period.

[238] It is evident that revenues from slot machines located at racetracks provide a very significant revenue stream to the province. Significant financial issues are at stake, given the massive amount of potential OLG revenue that was diverted under SARP, with the racetrack owners' share exceeding $2 billion, as well as the commitment to transitional funding of $500 million to be paid out of public money.

[239] In assessing whether or not there is a compelling public interest in disclosure, the contents of the records are crucial. In this case, the appellant's representations focus on the use of SARP money and the government's decision to cancel the program. But as the ministry points out, the records were created after that decision was made. I have reviewed the records in detail, and I cannot include extensive analysis of their contents, for obvious reasons. However, my review of them reveals that they do not address this policy decision in any way, nor do they shed any direct light on it. Nor do they contain any information about which revenue sources were used to fund particular types of expenses, including salaries or bonuses. This casts serious doubt on whether disclosure would address the public interest issues raised by the appellant.

[240] The existence of another public process or forum for addressing the public interest can be significant in assessing whether section 23 applies.[113] As already canvassed in this order, there have been a number of initiatives in which the cancellation of SARP and related issues have been, and in some cases continue to be, addressed. A summary of these initiatives follows.

[241] To begin with, the cancellation of SARP led to the establishment of the Horse Racing Industry Transition Panel (referred to in this order as the panel), which reviewed the circumstances of the racing industry, published a number of reports, and recommended transitional funding.

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[112] See Horse Racing Industry Transition Panel Interim Report, pages 1 and 26.
[113] Order PO-3480. See also Orders P-391 and M-539.

[242] In addition, after the cancellation of SARP, the Auditor General conducted an investigation into the OLG's Modernization Program. Following the investigation, the Auditor General issued the *Modernization Plan Report*, which has been extensively referenced earlier in this order. As already noted, 13 pages of the report are devoted to the "Cancellation of the Slots At Racetracks Program."[114]

[243] As well, the allegation that the affected party may have allocated SARP revenues to executive employees' and board members' salaries, bonuses and severances was referred to the AGCO by the OLG, and the ACGO's investigation is ongoing.

[244] In addition, I consider it significant that compensation paid to employees of the affected party is now subject to disclosure under the *Public Sector Salary Disclosure Act*, and this provides a significant measure of accountability with respect to the affected party's post-SARP expenditures on salaries, bonuses and severance payments, whatever their revenue source.

[245] The appellant has argued strongly in favour of a public interest in the disclosure of information about the cancellation of the SARP program and the use of SARP funds by racetracks. I conclude, however, that in the circumstances of this case, where the records do not specifically address these matters, and where two investigations by public authorities, one of which is ongoing, have been undertaken, the appellant has not established that there is a compelling public interest in disclosure of the particular records that are at issue in this appeal. Even if the public interest is expressed in broader terms, encompassing the public interest in transparency regarding the use of transition funding by racetracks, I would find that the public interest in disclosure does not rise to the level of "compelling" because of the application of the *Public Sector Salary Disclosure Act* to racetrack operators that receive transitional funding.

[246] This result is consistent with the outcome in Order P-1587, where a journalist requested information about a due diligence investigation conducted under the *Gaming Control Act*. The records included financial statements and corporate organizational charts. The public interest override was found not to apply despite national media coverage relating to the investigation.

[247] Moreover, in all of the circumstances of this appeal, even if the public interest in disclosure were considered to have met the "compelling" threshold, I would find that it does not outweigh the purpose of the exemptions, namely the protection of the affected party's commercial and financial information (its "informational assets") and the protection of the deliberative processes of the government. As already noted, the records do not explain the cancellation of SARP nor chart the affected party's use of SARP revenues or transitional funding, and other processes aimed at protecting the public interest have addressed these issues. One of these processes, the AGCO

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[114] *Modernization Plan Report* at pp. 45-57.

investigation, is ongoing. In these circumstances, I conclude that any public interest that may exist would not outweigh the purposes of the exemptions that apply.

[248] For all these reasons, I find that section 23 does not apply.

ORDER:

1. I uphold the ministry's decision to withhold the following parts of record 1, because I find that this information is not responsive to the request: parts of pages 2, 9 and 10; and page 6 in its entirety.

2. I uphold the ministry's decision to apply the exemption in section 13(1) to the following information:

    - in record 1: parts of pages 9, 10, 18 and 19; and pages 5, 11-15, 17, 20 and 22-26 in their entirety; and

    - in record 2: part of the cover page and parts of pages 11, 12, 14, 16, 18, 20, 22, 24, 26, 29 and 31-34; and pages 7, 8, 13, 15, 17, 19, 21, 23, 25 and 27 in their entirety.

3. I uphold the ministry's decision to apply the exemption in section 17(1) to the following information, some of which is also exempt under section 13(1):

    - in record 1: parts of pages 9 and 10; and pages 5, 8, 11-15, 17-20, and 22-26 in their entirety; and

    - in record 2: part of the cover page; and pages 2, 3, 5-8, 10-27, 29 and 31-34 in their entirety.

4. The information for which section 21(1) was claimed has been found exempt under section 17(1) and as a consequence, it is not necessary to consider whether section 21(1) applies.

5. The combined effect or order provisons 1, 2 and 3 above is that I uphold the ministry's decision to deny access to the following information:

    - in record 1: part of page 2; and pages 5, 6, 8-15, 17-20, and 22-26 in their entirety; and

    - in record 2: part of the cover page; and pages 2, 3, 5-8, 10-27, 29 and 31-34 in their entirety.

6. I order the ministry to disclose:

- in record 1: the cover page and pages 1, 3, 4, 7, 16, 21 and the last page, in their entirety, and part of page 2.

- In record 2: pages 1, 4, 9, 28, 30 and the last page, in their entirety, and part of the cover page.

7. For greater certainty, I am sending a copy of the parts of the records that are responsive and not exempt from disclosure to the ministry with this order, with exempt and non-responsive information highlighted. I order the ministry to disclose these pages, except for the highlighted portions, to the appellant no later than **April 1, 2016** and no earlier than **March 29, 2016**.

Original Signed by: February 24, 2016

John Higgins
Adjudicator