Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3578

Appeal PA13-494

Ministry of Finance

February 24, 2016

Summary: The appellant submitted a request to the Ministry of Finance for financial records relating to horse racetrack operations in Ontario. The records relate 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 its initial representations, the ministry claimed that section 65(6)3 (employment or labour relations exclusion) applies to exclude the records from the application of the *Act* and that the mandatory exemption at section 12(1) (cabinet records) applies to some information.

In this order, the adjudicator determines that: (1) the records are responsive to the request; (2) section 65(6)3 does not apply; (3) portions of the records are exempt under sections 13(1) and 17(1)(a); (4) information about treasury board approvals in one group of records is exempt under section 12(1); (5) sections 18(1)(c), (d) and (e) do not apply; and (6) 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 1(a)(i), 10(1) and (2), 12(1), 13(1), 13(2)(a), 17(1)(a) and (c), 18(1)(c), (d) and (e), 23, 24 and 65(6)3; *Public Sector Salary Disclosure Act*.

Orders and Investigation Reports Considered: M-1108, MO-1450, P-24, P-472, P-711, P-880, P-1463, P-1587, PO-1816, PO-2556, PO-2569, PO-3154 and PO-3480.

Cases Considered: *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507; *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner),* [2002] O.J. No. 4769, 166 O.A.C. 183, 118 A.C.W.S. (3d) 605 (C.A.); *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.); *John Doe v. Ontario (Finance)*, 2014 SCC 36; *343901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254; *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322; *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.
>
> . . .[2]
>
> 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

[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.

> 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 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*

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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.

> *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]
>
> *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

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[7] *Ibid.*, at p. 1.
[8] *Ibid.*, at p. 25.
[9] *Ibid.*, at p. 26.
[10] Final Report, p. 14.
[11] *Ibid.*, at pp. 27 and 28.

> 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 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
>
> 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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[12] "Building a Sustainable Future Together," p. 2
[13] This report is referenced at footnote 1. See pp. 8-9 and 45-57.
[14] *Modernization Plan Report* at p. 5.
[15] *Ibid.*, at p. 14.
[16] *Ibid.*, at pp. 45-57.

> • the racetrack owners' share of the funds over the life of SARP amounted to over $2 billion;
>
> • 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;
>
> • 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 exercise did not achieve its objective of informing the OLG about operators' use of SARP monies they received;
>
> • there were allegations that one racetrack operator, one of the affected parties 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 an 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 [that affected party's] executives and related issues."[18] The AGCO investigation is ongoing.

[12] Some of 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. As part of the due diligence exercise, the race tracks were required to complete a spreadsheet containing detailed financial data for four fiscal years, and to provide it to the consultant.

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 reports and financial records prepared by a consulting firm (the consultant) on horse racing

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

track operations in Ontario.

[14] Specifically, the requester asked for the following information:

> … the results of audits conducted by a third party [the consultant] of Ontario horse racing track finances on behalf of the Ministry of Finance in 2012 and 2013.

[15] In the request, the appellant also stated as follows:

> I am a member of the media. It is my position that this audit information is of great public interest because $180 million taxpayer funding was given to provincial horse racing tracks based on the findings of [the consultant]. It is my position that the public has a right to know what financial data the ministry received before approving public taxpayer subsidies to horse racing businesses.
>
> I am also requesting any and all reports, briefing notes, spread sheets and memos from the ministry's Revenue Agencies Oversight Division based on the audit results and/or based on the oversight division's research leading up to the auditing of the horse tracks' financial statements.
>
> …

[16] After notifying affected parties (including the consultant) of the request under section 28 of the *Act* and considering the representations they provided in response, the ministry denied access to the responsive records in their entirety, pursuant to sections 13(1) (advice and recommendations), 17(1) (third party information), 18(1) (economic and other interests) and 21(1) (invasion of privacy) of the *Act.*

[17] In particular, the ministry's decision letter advised the appellant as follows:

> Disclosure of the responsive records would reveal advice and recommendations provided to the Ministry from a consultant. . . . For this reason, the records are being withheld in their entirety pursuant to section 13(1) of the *Act*.
>
> Section 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 racetracks, including undue loss.
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> Disclosure of the records could also impact the economic and other interests of Ontario protected by sections 18(1)(c), 18(1)(d), and 18(1)(e) of the *Act*.

> Finally, section 21(1), a mandatory exemption, has been applied to deny access to portions of the records containing personal information of identifiable individuals.

[18] The ministry attached an index of the records to its decision letter, which was provided to the appellant and subsequently to this office. The index lists each record and the exemptions claimed for it.

[19] The appellant filed an appeal of the ministry's decision.

[20] During mediation of the appeal, the appellant indicated that she is pursuing access to what she refers to as the audit information because the appellant believes there is a public interest in the disclosure of the records. The appellant maintained that the taxpayers have the right to know the basis on which transition funding was allocated to racetrack operators. The ministry clarified that it retained the services of the consultant to complete a financial due diligence review of the racetracks' operations, rather than an audit, and provided additional information to the appellant on the nature of the consultant's mandate.

[21] The ministry continued to maintain the exemption claims set out in its access decision and no further mediation was possible. Accordingly, this appeal was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[22] The affected parties consist of Ontario horse racetrack operators (the "affected parties") who were subject to the financial review and named in the records at issue. This office also decided to invite the consultant to make representations. Although it is not clear that the consultant has an interest covered by section 17(1), it had been notified by the ministry and had provided representations during the ministry's processing of the request.

[23] One of the affected parties provided representations to the ministry at the time of the request and again during the inquiry stage of this appeal to the effect that the records are not responsive to the request because they relate to a "financial review" rather than an audit.

[24] This office began the inquiry by inviting representations from the ministry, the racetracks and the consultant. This office then invited the appellant to provide representations, and subsequently invited reply and sur-reply representations. During this process, representations were shared in accordance with section 7 of this office's *Code of Procedure*, and *Practice Direction 7*. In addition to representations, several parties provided affidavit evidence, which I have considered in reaching the determinations in this order.

[25] The ministry's initial representations claim the mandatory exemption at section 12(1) of the *Act* (cabinet records) for a small amount of information in one group of

records. The ministry's initial representations also claim that the records are excluded from the scope of the *Act* under section 65(6)3 (labour relations and employment-related records). Neither of these provisions were raised in the ministry's original decision letter. I will address both of these issues in this order.

[26] In this appeal, consideration of section 21(1) was deferred pending the outcome of the other exemptions. This order applies the section 17(1) exemption to the information for which the ministry also claimed section 21(1), and accordingly, it will not be necessary to solicit representations or rule on section 21(1).

RECORDS:

[27] There are 41 records at issue, totalling 348 pages. The records include reports, charts of proposed funding, letters of intent, term sheets, and funding worksheets. Two of these records are also at issue in Appeal PA13-356. That appeal is the subject of Order PO-3577, issued concurrently with this order.

ISSUES:

A. Are the records responsive to the request?

B. Does section 65(6)3 apply to exclude the records from the *Act*?

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

D. Does the mandatory exemption at section 12(1) of the *Act* apply?

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

F. Do the exemptions at sections 18(1)(c), (d) and (e) of the *Act* apply?

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

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

DISCUSSION:

Issue A. Are the records responsive to the request?

[28] One of the affected parties submits that the records are not responsive to the request because the request refers to an audit, but no audit was done. This affected party alleges that interpreting the request to encompass the results of the due diligence exercise conducted by the consultant (an accounting firm that performs, among other

things, audits) amounts to expanding its terms.

[29] This affected party made these same arguments to the ministry in its representations in response to the ministry's section 28 notice inviting affected parties to comment on whether the records should be disclosed. At that point the affected party stated that it would be "improper" to disclose the records as a response to a request for the results of an audit because they merely represent the results of a "financial review."

[30] In making these arguments, this affected party advocates a narrow interpretation of the request that is, in my view, completely at odds with the spirit and terms of the *Act*, and out of step with previous jurisprudence on this subject. For the reasons that follow, I reject this argument and find that the records are responsive to the request.

[31] One of the purposes of the *Act*[19] is "to provide a right of access to information under the control of institutions in accordance with the principles that . . . information should be available to the public." [Emphasis added.]

[32] The right of access is enshrined in section 10(1), which states:

> Subject to subsection 69(2),[20] *every person has a right of access to a record or part of a record* in the custody or control of an institution unless . . . [the record is exempt from disclosure or the request is frivolous or vexatious]. [Emphasis added.]

[33] The access procedure is set out in section 24 of the *Act*, which states, in part, as follows:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) *provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record*; and
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> (c) at the time of making the request, pay the fee prescribed by the regulations for that purpose.
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> . . .

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[19] Section 1(a)(i).
[20] Section 69(2) relates to records in the custody or under the control of a hospital, and does not apply in this appeal.

> (2) *If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request* so as to comply with subsection (1). [Emphases added.]

[34] In Order P-880, Adjudicator Anita Fineberg explained the approach to the issue of "responsiveness" or "relevance" of a record to a request. She stated:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a
>
> request. *While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request*.
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> *In my view, an approach of this nature will in no way limit the scope of requests as counsel fears. In fact, I agree with his position that the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request.* If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the Act to assist the requester in reformulating it. As stated in Order 38, an institution may
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> in no way unilaterally limit the scope of its search for records. It must outline the limits of the search to the appellant. [Emphases added.]

[35] To summarize, one of the purposes of the *Act* is that "information should be available to the public." Every person has a right of access to a record unless it is exempt from disclosure. In order to exercise the right of access, a person must submit a request that provides sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record. If the request does not describe the record in sufficient detail, the ministry has a duty to offer assistance to the requester in reformulating the request. In order to be responsive, a record must be "reasonably related" to the request. And, significantly, the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request.

[36] In this case, the ministry identified records relating to a "financial review" as being responsive to a request that referred to an "audit." In my view, it is clear that a

liberal approach to the interpretation of this request, or indeed any reasonable interpretation of it, would find the records at issue to be responsive. The ministry did not clarify the request under section 24(2), and there was no need for it to do so, as the responsiveness of the records is not in doubt.

Issue B. Does section 65(6)3 apply to exclude the records from the *Act*?

[37] In its initial representations, the ministry claims that section 65(3)3 applies to exclude the records from the application of the *Act*. This claim was not included in the ministry's access decision. However, if section 65(3)3 applies, the records are not accessible under the *Act*, and this is therefore a preliminary issue that must be addressed before other issues, such as the potential application of exemptions, can be considered.

[38] Section 65(6)3 states:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[39] If section 65(6)3 applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

[40] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[21]

[41] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[22]

[42] If section 65(6)3 applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[23]

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[21] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

[22] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.

[23] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

[43] The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[24]

[44] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.[25]

Analysis

[45] The records at issue have no connection to the employees or workforce of an institution, or to individuals who are remunerated by the Ontario government. In that situation, it is clear that section 65(6)3 does not apply.

[46] In *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*[26] ("*Solicitor General*"), the Ontario Court of Appeal stated that section 65(6)3:

> . . . deals with records relating to a miscellaneous category of events "about labour relations or employment-related matters in which the institution has an interest". Having regard to the purpose for which the section was enacted [footnote omitted], and the wording of the subsection as a whole, the words, "in which the institution has an interest" in subclause 3 *operate simply to restrict the categories of excluded records to those relating to the institution's own workforce* where the focus has shifted from "employment of a person" to "employment-related matters". . . . [Emphasis added.]

[47] In *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*[27] ("*Minister of Health*"), the Court of Appeal considered whether the work of the Physician Services Committee, in the context of its role in negotiating the remuneration of physicians by the Ontario government, would fall within the meaning of the term, "labour relations." In concluding that it did, the Court discussed the meaning of the phrase, "labour relations," stating that:

> . . . its ordinary meaning can extend to relations and conditions of work beyond those relating to collective bargaining. Nor is there any reason to restrict the meaning of "labour relations" to employer/employee

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[24] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).
[25] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above at footnote 23.
[26] Cited above at footnote 23.
[27] [2002] O.J. No. 4769; 166 O.A.C. 183; 118 A.C.W.S. (3d) 605 (C.A.).

> relationships; to do so would render the phrase "employment-related matters" redundant.
>
> The relationship between the government and physicians, and the work of the Physician Services Committee in discharging its mandate on their behalf, including provisions for the remuneration of physicians, falls within the phrase, "labour relations", and the meetings, consultations and communications that take place in the discharge of that mandate fell within that phrase as it appears in s. 65(6)3.

[48] Physicians are not directly employed by the government, but they are remunerated by it. Therefore, the Court of Appeal's decision in *Minister of Health* takes a slightly more expansive view of the type of relationship that would be encompassed by section 65(6)3 than the reference in *Solicitor General* to "the institution's own workforce." Nevertheless, it addresses a situation in which the workforce in question was paid by the Ontario government. I therefore conclude that this decision does not stand for the proposition that section 65(6)3 applies to labour relations and employment matters where the employer is a private sector entity, as the racetracks are in this case, and the institution is not acting in any employment-related or labour relations capacity.

[49] This view is reinforced by the analysis in *Ontario (Ministry of Correctional Services) v. Goodis*[28], a later decision in which the Divisional Court stated that:

> . . . the type of records excluded from the *Act* by section 65(6) are *documents related to matters in which the institution is acting as an employer,* and terms and conditions of employment or human resources questions are at issue. [Emphasis added.]

[50] The ministry is not acting in any employment-related or labour relations capacity in the circumstances of this appeal. I find that section 65(6)3 does not apply.

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

Introduction

[51] In its decision letter, the ministry claimed section 13(1) for all the records at issue. As outlined below, it changed its position on what is covered by this exemption more than once during the inquiry.

[52] Section 13(1) states:

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[28] Cited above at footnote 24.

> 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.

[53] 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;
>
> (c) a report by a valuator, whether or not the valuator is an officer of the institution;
>
> . . .
>
> (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;
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> (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;
>
> (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.

[54] 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.[29]

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

[56] "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.

[57] 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.[30]

[58] In *John Doe v. Ontario (Finance)*[31] ("*John Doe*"), the Supreme Court of Canada ruled that "advice" has a broader meaning than "recommendations". The Court agreed with the Federal Court of Appeal's view[32] 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.[33]

[59] The Court found that "policy options" are exempt under section 13(1). It defined this term as follows:[34]

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[29] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[30] 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.
[31] See citation at footnote 29.
[32] in *343901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254 ("*Telezone*") at para. 50.
[33] at para. 24.
[34] at paras. 26 and 27.

> 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.
>
> 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.

[60] The Court stated further:[35]

> 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 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).

[61] 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;

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[35] at para. 47.

- 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.

[62] In making these points, the Court stated: [36]

> 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.

Representations

Ministry's initial representations

[63] In its initial representations, prior to making submissions on each of the claimed exemptions, the ministry included a section entitled, "Records, description and outline of argument for each group." The summary at the beginning of this section, and the description of each group, makes it clear that the ministry claims, at this point in its representations, that all of the records are subject to this exemption.

[64] In particular, this portion of the ministry's representations states that "[s]ection 13(1) applies to all the material in Records 1-13." This submission is contradicted by its submissions on the exemption itself, where it identifies portions of this same group of records as "factual material" falling within the section 13(2)(a) exception to the exemption, as outlined below.

[65] In its representations specifically aimed at section 13(1), the ministry also submits that the consultant is a "consultant retained by the ministry" within the

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[36] at para. 51.

meaning of section 13(1), and that portions of the records for which this exemption is claimed consist of the consultant's detailed recommendations to Ontario. The ministry submits further that "all the records are prepared as internal interim advice to senior civil servants or advice from the Ministry of Finance to the Ministry of Agriculture and Food. . . ."

[66] In addition, the ministry states that the reports were prepared for the benefit of Ontario, and were not prepared only to benefit the racetracks.

[67] The ministry refers to the Supreme Court of Canada's decision in *John Doe* (extensively quoted above) and its conclusion that "advice" has a broader meaning than "recommendations."

[68] The ministry submits that there is overwhelming circumstantial evidence that all the records, including charts, worksheets and the consultant's reports (but not including the letters of intent and term sheets [records 18-30]) formed part of the deliberative process that led to a decision by the ministry about transitional funding.

[69] As well, the ministry submits that the records prepared by the consultant 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.

[70] The ministry also refers to the purpose of the exemption being to protect the deliberative process relating to the development of government policy. It states further that:

> In this case, the deliberative process involved considering the balance between:
>
> a. Insisting on cutbacks to racetracks while preserving their sustainability and self-sufficiency; and
>
> b. Ensuring a continuing incentive for the industry to continue to offer live horse racing where it was a viable business offering and serve as landlord to OLG slots facilities from which Ontario derives significant revenue (unlike Ontario built casinos, for example).

[71] 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 indicates that it 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. As already

noted, this contradicts an earlier statement in these same representations[37] where the ministry claims section 13(1) for "all parts" of records 1-13.

[72] The ministry goes on to submit that the section 13(3) exception does not apply because the records have never been publicly cited by the ministry. As well, the ministry submits that the section 13(2)(b) exception does not apply.

[73] With its representations, the ministry provided an affidavit sworn by the director of the ministry's Gaming Policy Branch.

[74] The affidavit states:

> The key purpose of all the Records that are the subject [of] this appeal, including the financial due diligence review of the racetracks, was to assist and advise the Province in determining the level of transition funding each racetrack would receive and to assist the Province in negotiating transition funding with the racetracks.

[75] I turn now to the ministry's representations concerning particular records.

Records 1-13

[76] These records are the consultant's reports on the racetrack operators prepared as part of the "due diligence" process in relation to transitional funding.

[77] The ministry states that it ". . . claims this exemption for advice of various kinds . . ." and goes on to use records 12 and 13 as an example of this. The ministry refers to specific portions of these record and argues that they contain:

- simple recommendations in sentence or point form;
- options and analysis of options;
- specific recommendations; and
- follow-up recommended key changes and next steps.

[78] The affidavit of the Director of the Gaming Policy Branch states that record 13 contains recommendations for labour relations and operational restructuring in relation to the affected party referred to in that record.

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[37] found at page 4 of the ministry's representations under the heading, "Records, description and outline of argument for each group."

Records 14-17

[79] These records consist of "internal and interim [ministry] charts on proposed funding for up to eighteen racetracks for years 1 and 2." The ministry states that funding amounts for years 1 and 2 were considered as different options, based on a number of variables, and that it claims section 13(1) for these records in their entirety. It describes them as "draft option papers" and states that they are advice prepared for the Ministry of Agriculture and Food.

Records 18-30

[80] These records consist of letters of intent that the ministry sent to the various racetracks, and term sheets that were enclosed with these letters, setting out terms and conditions for transitional funding. The ministry states that it ". . . claims s. 13 for the letters of intent and the term sheets as advice to [the Ontario Ministry of Agriculture and Food] on which racetracks were willing to take on accountability and transparency and other obligations mentioned." The ministry submits further that because the proposed payment amounts are not "final" or "historic," they are not "factual material" within the meaning of section 13(2)(a).

Records 31-41

[81] Records 31-41 are draft worksheets for each racetrack, and the ministry submits that they were prepared as summary advice for determining transitional funding and for advising the government in that regard. According to the ministry, these records consist entirely of confidential projections of financial numbers of the racetracks for the following year, and are not current or past numbers, so they are not "factual material."

Affected parties' initial representations

[82] Although section 13(1) exists to protect the ministry's interests, a number of the affected parties provided representations that either expressly or implicitly support its application.

[83] Two racetrack operators (whom I will refer to as "affected party 1" and "affected party 2" in this order) provided submissions to the effect that section 13(1) applies to the records pertaining to them. Both of them also argue that the section 13(2)(a) exception to the exemption for factual material does not apply.

[84] With respect to the issue of what constitutes "factual material" under section 13(2)(a), affected party 1 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).[38]

[85] Affected party 1 argues further 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.

[86] Affected party 2 makes essentially the same argument.

Appellant's initial representations

[87] The appellant's arguments are mainly focused on the application of the section 23 public interest override, as reflected below in my consideration of that section.

[88] With respect to section 13(1), the appellant submits that the "factual material" exception found in section 13(2)(a) applies. The appellant states:

> We believe that the information contained in these documents at issue constitutes "factual material" in that they are a series of findings and facts based on a detailed review of the financial information by [the consultant] and perhaps others. These are facts related to the financial situation at these tracks. . . .

[89] The appellant also argues that ". . . this information can be likened to a 'performance or efficiency report' which is releasable under the Act." This is an apparent reference to the exception to the section 13(1) exemption set out in section 13(2)(f), which describes this category of information as "a report or study on the performance or efficiency *of an institution*. . . ." [Emphasis added.] I conclude, however, that because the racetracks are not "an institution" or part of one, section 13(2)(f) does not apply.

Reply Representations

[90] In its reply representations, the ministry reverses the statement in its initial representations to the effect that the section 13(2)(a) "factual material" exception applies to the "current information and financial numbers." The ministry now takes the position that this exception does not apply.

[91] In particular, the ministry submits:

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

> . . . The "factual material" mentioned in subsection (2)(a) of s. 13 of the Act refers to source material, *not a selection of facts for an advisory purpose*. Otherwise, the word "material" is superfluous.[39] . . .
>
> "Factual material" could refer to independently sourced materials, such as library materials, media reports, financial statements, source materials provided to [the consultant] by the racetracks, all of which are distinct from what is factual in the advice.
>
> . . .
>
> The Ministry submits that *the pieces of racetracks' current financial information in the* [consultant's]*due diligence reports and other records at issue is not "factual material", although it is factual.*
>
> When the purpose is to analyze the facts or present a particular view of the facts, the presentation of facts is part of the advice. Similar to the facts portion of a lawyer's legal opinion, the source material for those facts is not privileged, but the lawyer's description of facts in the legal opinion is factual and within the zone of confidentiality. The choice of what facts an advisor is to present involves an exercise of judgment; it is exempt "advice". The presentation of facts by a consultant is exempt advice. Had the financial statements of the companies been in our files, these would be factual materials, as they are source materials. Yet, these were not in our records. *The facts in the* [consultant's] *records are items selected by* [the consultant] *for recommended change or advice.*
>
> [Emphases added.]

[92] Affected party 1 reiterates essentially this same position in its reply representations. Affected party 1 states:

> The information is not "factual material" as that term is used in section 13(2)(a). For the reasons set out by the Ministry, "factual material" refers to source material and not a selection of facts for an advisory purpose. [The consultant] was not an independent third party who weighed evidence and arrived at factual findings. They were consultants retained to exercise their judgment and provide expert advice after considering various factors as instructed by the Ministry, their client.

[93] In support of this view, affected party 1 cites *Provincial Health Services Authority*

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[39] The ministry goes on to add arguments about the principle of statutory interpretation known as the presumption against tautology.

v. British Columbia (Information and Privacy Commissioner),[40] which contains an interpretation of a similar provision in British Columbia's *Freedom of Information and Protection of Privacy Act*.[41] That case dealt with a request for executive summaries of all reports by the Provincial Health Services Authority (PHSA)'s internal audit department for a particular year.

[94] In particular, the Court dealt with an "overarching submission" by PHSA that ". . . the entirety of the factual information in the Disputed Records constitutes background and factual analysis integral to the expert opinions offered therein and, as such, forms part of the "advice" provided to the Board for the purposes of s. 13(1)."[42] In assessing this issue, the Court stated:

> The *Canadian Oxford English Dictionary* defines "material" in part as "the matter from which a thing is or can be made". Accordingly, whatever constitutes the "material" exists *prior* to its use in service of a particular purpose or goal. Applying this definition to the term "factual material" in s. 13(2)(a) . . . I conclude that s. 13(2)(a) does not apply to factual information compiled from source material by experts, using their expertise, for the specific purpose of aiding the deliberative process.
>
> It is important to recognize that source materials accessed by the experts or background facts not necessary to the expert's "advice" or the deliberative process at hand would constitute "factual material" under section 13(2)(a) and accordingly would not be protected from disclosure. However, if the factual information is compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body or if the expert's advice can be inferred from the work product it falls under s. 13(1) and not under s. 13(2)(a). As I held earlier, these compilations do not exist separately and independently from the opinions and advice in the reports. Rather, the compilation of factual information and weighing the significance of matters of fact is an integral component of the expert's advice and informs the decision-making process. . . .[43] [Italicized emphases are original. Underlined emphases are added.]

[95] Affected party 2 has also provided reply representations concerning two of the

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[40] 2013 BCSC 2322.

[41] Section 13(1) of British Columbia's *Freedom of Information and Protection of Privacy Act* states: "The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister." Section 13(2)(a) of the same statute states: "The head of a public body must not refuse to disclose under subsection (1)" "(a) any factual material, . . ."

[42] *Ibid.*, at para. 65.

[43] *Ibid.* at paras. 93-94.

exceptions under section 13(2):

> The appellant submits that the information contained in the records at issue "constitutes 'factual material' in that they are a series of findings and facts based on a detailed review of the financial information by [the consultant]." On its face, this statement does not meet the test. As submitted previously . . . , factual material must constitute "a coherent body of facts separate and distinct from the advice and recommendations contained in the record." Any factual information included in the records affecting [affected party 2] is inextricably linked and interwoven with advice and recommendations . . . and does not constitute a coherent body of facts separate and distinct from the recommendations.
>
> . . .
>
> The appellant has presented no justification whatsoever for the analogy to a "performance or efficiency report" under the Act. Further, the exception under section 13(2) of the Act relates only to "a report or study on the performance or efficiency of an institution." The legislature has explicitly chosen not to include performance or efficiency reports regarding third parties under the section 13(2) exception.[44]
>
> In fact, by analogizing the records to a performance or efficiency report, the appellant highlights the fact that the records are not subject to the factual material exception, since a performance or efficiency report under the Act is mutually exclusive with factual material. Previous decisions have held that a "report" as defined under the Act would not include "mere observations or recordings of fact" [Order 200]. These inconsistencies merely serve to reinforce that the appellant's submissions are mere speculation unsupported by evidence.

[96] The other affected parties who provided reply representations continue to object to disclosure.

Sur-reply representations

[97] The appellant's sur-reply representations do not specifically address section 13.

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[44] This argument is based on section 13(2)(f), which I found not to apply, above. It is included here because the affected party relates it to the "factual material" exception in section 13(2)(a).

Analysis

[98] The ministry initially claimed section 13(1) for the records in their entirety. As already described, in one portion of its initial representations, it took a different approach, applying the "factual material" exception in section 13(2)(a) to what it describes as "current information and financial numbers," which would therefore *not* be exempt under section 13(1). In its reply representations, the ministry again changes course, contradicting its submissions about the "current information and financial numbers." As outlined in detail above, the ministry now says that the records do not contain "factual material" within the meaning of section 13(2)(a).

[99] While it would have been preferable for the ministry to take a consistent position throughout this inquiry, I do not find that there is any procedural unfairness or other basis for finding that the ministry is not entitled to change its position. In that regard, I note in particular that the appellant was provided with the ministry's reply representations and invited to provide sur-reply representations in response.

[100] The ministry's representations also state that "where subsection 13(1) sidebars appear in the records, the advice of [the consultant] . . . consists of detailed recommendations to Ontario. . . ." Unfortunately, the records provided to this office by the ministry contain no such sidebars, other than indications that entire records are claimed to be exempt under this section.

[101] Accordingly, I will consider all of the records at issue, in their entirety, in my determinations under section 13(1).

Records 1-13

[102] These records consist of the consultant's reports concerning the racetracks. Two of the records, namely records 12 and 13, are also at issue in Appeal PA13-356, which is the subject of Order PO-3577, issued concurrently with this order.

[103] As the ministry notes, records 1-13 contain specific recommendations, and I find that these portions of the records qualify for exemption under section 13(1). The recommendations refer to future action and cannot be considered to be "factual material" within the meaning of section 13(2)(a). Nor do any other exceptions to the exemption, which are listed in section 13(2), apply to this information. In addition, where the records set out options with respect to proposed changes, I find that they qualify as "policy options" within the meaning of *John Doe*, and as they also refer to future action, they are not subject to the exception to the exemption found in section 13(2)(a).

[104] 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*:[45]

> In *Telezone*,[46] 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*. . . . They cannot be characterized as merely informing the Minister of matters that are largely factual in nature. [Emphases added.]

[105] Accordingly, these portions of the records also qualify as advice and are exempt under section 13(1), in accordance with the Supreme Court's determination in *John Doe*. These portions of the records do not constitute "factual material" under section 13(2)(a).

[106] As well, page 12-6 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 12-6 therefore meets the requirements for exemption under section 13(1). Again, they do not constitute "factual material" under section 13(2)(a).

[107] Further on the question of factual material under section 13(2)(a), as noted above, the ministry argues that this ". . . could refer to independently sourced materials, such as library materials, media reports, financial statements, source materials provided to [the consultant] by the racetracks, all of which are distinct from what is factual in the advice."

[108] In a similar vein, and also outlined in detail above, affected party 1 relies on the decision of the British Columbia Supreme Court in *Provincial Health Services Authority*[47] in support of the view that "factual material" means source material and does not apply to factual portions of a record ". . . that have been compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process. . . ."

[109] With respect, I am not persuaded by these characterizations of "factual material"

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[45] Cited above at footnote 29. See para. 31 of the decision.
[46] Cited above at footnote 32.
[47] cited above at footnote 40.

as referring to source material only, and excluding factual material compiled by experts that is incorporated in a document that also contains advice or recommendations. In *John Doe*, the Supreme Court considered the exceptions in section 13(2) as informing the scope of the exemption, since the kind of information mentioned in section 13(2) would otherwise constitute "advice or recommendations" and fall under the exemption.[48] This strongly suggests that "factual material" as used in section 13(2)(a) encompasses information selected by experts for inclusion in a document that also contains advice and/or recommendations.

[110] By contrast, source materials of the kind referred to by the ministry would seldom meet the threshold to be "advice or recommendations," and it would therefore be unnecessary, in most cases, to exclude these documents from the scope of section 13(1). This would render section 13(2)(a) largely redundant, and it is therefore an unacceptable interpretation of the provision. In any event, I am not bound to follow decisions of the British Columbia Supreme Court (such as *Provincial Health Services Authority*[49]), and I also note that in that decision, the Court declined to follow Ontario authorities "given the difference in wording of the Ontario statute."[50]

[111] Accordingly, I find that factual information found in the records that is severable without reducing it to meaningless snippets[51] of information would constitute "factual material" within the meaning of section 13(2)(a). Based on my examination of the records, this information is not "interwoven" and would be meaningful if disclosed on its own. In the context of these records, this information would be the current or past "financial numbers," a category of information that was identified as factual information by the ministry in its initial representations. Information of this nature is not exempt under section 13(1).

Records 14-17

[112] These records are internal and interim ministry charts on proposed funding for up to eighteen racetracks for years 1 and 2. The ministry states that "[f]unding amounts for each of Year 1 and Year 2 were considered as different options on different charts. . . ." Having reviewed the records, I conclude that the focus of these charts is to set out possible funding options, with accompanying evaluative aids. I find that, for the most part, they qualify as advice or recommendations, and as they are proposals for the future, they do not fall under the section 13(2)(a) "factual material" exception from the exemption.

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[48] See paras. 29-35.
[49] cited above at footnote 40.
[50] See paras. 83 and 85. See also footnote 41 for the different wording of the advice and recommendations exemption in B.C.'s *Freedom of Information and Protection of Privacy Act*.
[51] See *Ontario (Ministry of Finance) v. Glasberg)*, [1997] O.J. 1465 (Div. Ct.) at paras. 24, 27 and 28; and *Canada (Information Commissioner) v. Canada (Solicitor-General)*, [1988] 3 F.C. 551 at 558.

[113] However, some of these charts show the historical amounts of SARP revenue received by each racetrack. For the reasons set out above with respect to "current or past financial numbers" in records 1-13, I find that the historical SARP revenues received by each racetrack are "factual material" and because the section 13(2)(a) exception applies, they are not exempt under section 13(1).[52]

[114] Because the rest of the information in these records qualifies as "advice" or "recommendations," it is exempt under section 13(1).

Records 18-30

[115] Records 18-30 are Letters of Intent and Term Sheets. These records relate to the arrangements between the ministry and a number of racetracks about transitional funding. Although the ministry claims that these records, in their entirety, are exempt under section 13(1), its representations also contain the following, apparently contradictory, statement about this group of records:

> . . . the circumstantial evidence in this case is overwhelming that all the records, *except the Letters of Intent and Term Sheets*, formed part of the deliberative process that led to a decision by the [ministry] on transitional funding amounts and terms. . . .

[116] As already noted, the ministry submits that these records represent advice concerning which racetracks should receive transitional funding, and the proposed amounts, which the ministry says are not "factual material" under section 13(2)(a) because they represent proposed figures. The ministry also indicates that these records include "some recommended [consultant] advice."

[117] I accept that identifying information concerning these racetracks, and the proposed payments and other proposed terms they contain, are exempt under section 13(1) because they reflect recommendations about the terms that would accompany transitional funding. This is not factual material, as it represents proposals for the future.

[118] Accordingly, I find that identifying information concerning these racetracks, and the proposed payments and other terms found in these records, is exempt under section 13(1).

[119] The remainder of records 18-30 does not reveal advice or recommendations and I find that it is not exempt under section 13(1).

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[52] I also note that the ministry indicates, in its representations, that this information is already public.

Records 31-41

[120] These records consist of internally developed transitional funding worksheets for individual racetracks, which the ministry indicates are "confidential projections of financial numbers of the racetrack for the next year." Based on my review, I conclude that these records are projected financial results, incorporating certain assumptions about the proposed business model for each racetrack, and showing the impact of proposed transitional funding amounts. As such, I find them to consist of specific recommendations and/or policy options. Because they are projections rather than a description of past or current circumstances, they are not "factual material" under the section 13(2)(a) exception. Accordingly, I find these records exempt under section 13(1).

Conclusions under section 13(1)

[121] I find that the following information is exempt under section 13(1):

- In records 1-13: recommendations for future action; options with respect to proposed changes; advice as to "how to view a matter;" the parameters for making a decision; and assumptions that underlie, and therefore form part of, the advice that appears elsewhere in the record;
- In records 14-17: all information except historical amounts of SARP revenue;
- In records 18-30: identifying information of the racetracks and proposed funding amounts and other proposed terms; and
- Records 31-41 in their entirety.

[122] Pages that are exempt under section 13(1), in whole or in part, are identified in Appendix A to this order.

Issue D. Does the mandatory exemption at section 12(1) of the *Act* apply?

[123] The ministry raised this mandatory exemption for the first time in its initial representations. The ministry claims that the exemption applies to a small amount of information in records 14-17. Although it was not addressed in the Notice of Inquiry, the ministry's representations were provided to the appellant, who was given an opportunity to reply to them. Accordingly, I conclude that there is no procedural unfairness in considering whether this exemption applies to the information for which the ministry relies on it.

[124] In particular, the ministry claims that information about treasury board approvals on seven pages of records 14-17 is exempt under this section. I have already found this information exempt under section 13(1). However, because of the public interest

override argument under section 23 of the *Act*, to be addressed later in this order, and in view of the fact that section 12 is not listed in section 23 as an exemption that can be overridden to satisfy a public interest in disclosure, I will proceed to determine whether it applies.

[125] Section 12(1) states:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,
>
> (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
>
> (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
>
> (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;
>
> (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
>
> (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and
>
> (f) draft legislation or regulations.

[126] The use of the term "including" in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of an Executive Council (Cabinet) or its committees, and not just the types of records enumerated in the various subparagraphs of section 12(1), qualifies for exemption under section 12(1).[53]

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[53] Orders P-22, P-1570 and PO-2320.

[127] A record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations.[54]

[128] In order to meet the requirements of the introductory wording of section 12(1), the institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations.[55]

[129] The ministry describes the information as "interim approval amounts discussed and approved at Treasury Board," and submits that, although these particular records were not presented to Treasury Board, the information allows reasonable inferences to be drawn as to what was discussed by the board. The ministry has provided an affidavit affirming that:

- Treasury Board is a committee of cabinet;
- the information in question consists of interim amounts approved by the board; and
- the final amounts of transitional funding have been disclosed by the Ministry of Agriculture and Food.

[130] The appellant did not address section 12 in her representations.

[131] In the marked up records provided to this office, the ministry also claims that an additional line of information would permit the drawing of an accurate inference as to what Treasury Board approved.

[132] I accept the ministry's submissions regarding section 12, and I find that disclosure of the information identified by the ministry as subject to section 12(1) would reveal the substance of deliberations of Treasury Board, which is a cabinet committee. This information therefore meets the requirements of the introductory wording of section 12(1). The exceptions to the exemption found in section 12(2) do not apply.[56] Accordingly, the exemption in section 12(1) applies to the information for which the ministry claims it.

[133] The ministry's identification of which portions of records 14-17 set out information subject to this exemption is inconsistent, and because this is a mandatory

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[54] Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.
[55] Order PO-2320.
[56] Section 12(2) provides exceptions to the exemption where: "(a) the record is more than twenty years old; or (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given."

exemption, I also find that it applies to a small amount of information not identified by the ministry, to which it is clear that the exemption does apply.[57]

[134] Pages that contain information that is exempt under section 12 (1) are identified in Appendix A to this order.

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

Section 17(1): the exemption

[135] The representations of the ministry and affected parties address the grounds for exemption set out under sections 17(1)(a), (b) 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;
> >
> > (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency; . . .

[136] Under section 17(3), the ministry has discretion to disclose upon the consent of an affected person. This section states:

> A head may disclose a record described in subsection (1) or (2) if the person to whom the information relates consents to the disclosure.

[137] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[58] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[59]

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[57] This additional information appears on pages 14-3, 15-1, 15-3, 16-1, 17-1 and 17-3.
[58] *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.*).
[59] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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

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

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

[140] The ministry's initial access decision in response to the request claims that records 1-13 (financial reviews) and 31-41 (worksheets), in their entirety, are exempt under this provision. In its representations, the ministry also claims that this exemption applies to parts of records 24-30 (term sheets), notwithstanding that the index of records it provided to the appellant with its decision letter, and provided to this office, does not refer to this exemption in relation to these records.

[141] The consultant submits that information about the racetracks should not be disclosed.

[142] Affected party 1 objects to disclosure of all information in the financial reviews and some information in the Letter of Intent and Term Sheet pertaining to it. Two other affected parties adopt this party's representations.

[143] Affected party 2 claims that the financial review (found in records 1-13) and worksheet (found in records 31-41) pertaining to it are exempt under section 17(1), and that some information in other records may also attract the application of this exemption.

[144] Other affected parties take the following positions:

- one affected party objects to disclosure of some information in the two records pertaining to it, but would not object if the documents are withheld in their entirety based on the ministry's claims;

- another affected party objects to the disclosure of the two records concerning it; and

- an additional affected party objects to disclosure of information about it that was identified in its representations to the ministry at the request stage.

[145] One affected party consents to the full release of information about it, and another affected party provided a consent form in which it agreed to the partial release of information about it, but verbally communicated to this office that it consents to its information being disclosed in full. As already noted, section 17(3) confers discretion on the ministry to disclose in the event that a party consents to its information being released. At the request stage, I note that one affected party consented to disclosure in its representations to the ministry[60], but the ministry nevertheless denied access to information of all racetracks, including the one who consented, under section 17(1). From this, I infer that the ministry has opted to exercise its discretion under section 17(3) by not disclosing information even where there is consent.

[146] Under the circumstances, and given the mandatory nature of section 17(1), I will consider the possible application of section 17(1) to all of the records at issue. I will consider the impact of the consents by the two affected parties, below.

[147] Parts of the records have already been found exempt under sections 12(1) and 13(1). I include them in my consideration of section 17(1) in order to facilitate consideration of the public interest override, below.

Part 1: type of information

[148] 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.[61]

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[60] This party has now changed its position, and in its representations in this inquiry, it objects to disclosure.
[61] Order PO-2010.

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.[62]

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 prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[63]

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.[64] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[65]

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.[66]

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.[67]

Representations

[149] The ministry submits that records 1-13 and 31-41 contain financial information. It also submits that records 1-13 contain commercial information, and that record 13 contains labour relations information. Oddly, this portion of the ministry's representations does not address records 24-30, notwithstanding the ministry's claim elsewhere in its representations to the effect that these records are exempt under

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[62] Order PO-2010.
[63] Order PO-2010.
[64] Order PO-2010.
[65] Order P-1621.
[66] Order PO-2010.
[67] Order MO-2164.

section 17(1), and despite the inclusion of these records in the heading that leads off this portion of the ministry's representations.

[150] Affected party 1 submits that the records contain information about its financial affairs and operational practices with respect to the restructuring of its operating model. Affected party 1 also submits that this is commercial, financial and labour relations information, and cites several examples that I am not able to include here as this would provide too much detail about the contents of the records.

[151] Another affected party submits that "the information being requested is clearly financial and commercial." Other affected parties describe the information as "financial." Another affected party claims that the information is both "commercial" and "financial."

[152] The appellant did not address this issue in her representations.

[153] At reply, one affected party reiterates that the records contain financial information. The other reply representations do not address this point, and neither do the appellant's sur-reply representations.

Analysis

Records 1-13

[154] These records are the reports prepared by the consultant concerning individual racetracks. The entire focus of the records is the business and operations of the affected party, and other racetracks, 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.

Records 14-17

[155] Records 14-17 consist of charts setting out proposed funding. Based on my review, I find that they consist of financial information.

Records 18-30

[156] These records are letters of intent and terms sheets which were enclosed with the letters. They outline possible terms for transfer payment agreements. Based on my review of them, I am satisfied that they are commercial information, and they also contain financial information.

Records 32-41

[157] Records 32-41 are transitional funding worksheets. Based on my review, I find that they consist of financial information.

Summary

[158] I find that all of the records consist of financial and/or commercial information, meeting part 1 of the test under section 17(1).

Part 2: supplied in confidence

Supplied

[159] 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.[68]

[160] 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.[69]

[161] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.[70]

Representations

[162] The ministry submits:

> Most racetrack financial and commercial information in [records 1-13] was **supplied by the racetracks** to the Ministry through [the consultant], but other information like models, proposed numbers and other changes, for each racetrack were **supplied directly by** [the consultant] to the Ministry giving a snapshot of the racetrack's financials in the future, assuming the advice was taken and the target numbers were vigorously pursued. [Emphases in original.]

[163] The ministry cites *SNC-Lavalin Inc. v. Canada (Minister of Public Works)*,[71] where the court dealt with the third party information exemption at section 20(1)(b) of the federal *Access to Information Act*, which the ministry summarizes as follows:

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[68] Order MO-1706.
[69] Orders PO-2020 and PO-2043.
[70] This approach was approved by the Divisional Court in *Boeing Co.,* cited above at footnote 58, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).
[71] [1994] F.C.J. No. 1059, 79 F.T.R. 113 at para. 35.

> Although the information was not directly "supplied" to the government by the third party, the court held that the "supplied" element of section 20(1)(b) was established. A "supplier" could be an intermediary consultant hired on by the government to collect the third party information and present it to the government in a relevant way.

[164] The ministry also states that the facts of this case present an exact analogy to the facts in *SNC-Lavalin*. The ministry submits that the due diligence review reports produced by the consultant (records 1-13), two identified lines of each term sheet (records 24-30) and all the numbers in the worksheets (records 31-41) contain and are based on private financial and commercial information of the racetracks directly provided to the consultant, which the consultant passed on to the ministry. Based on *SNC-Lavalin*, the ministry submits that all this information was "supplied" to it.

[165] In a similar vein, affected party 1 also submits that although the direct supplier of the information to the ministry was the consultant, the information that affected party 1 supplied to the consultant qualifies as having been "supplied" by affected party 1 within the meaning of section 17(1). In this regard, the affected party relies on the similar situation in *SNC-Lavalin Inc. v. Canada (Minister of Public Works)*, referred to above, to support its submission that the information is "supplied" even though it has flowed to the ministry through an intermediary, namely the consultant.

[166] Affected party 2 argues that the consultant collected the information as agent for the Ontario government. Other affected parties also take the position that they "provided" or "supplied" the information to the ministry through the consultant. A number of affected parties also submit that disclosure would permit the drawing of accurate inferences about what was supplied.

[167] The appellant's representations do not touch on whether the information was "supplied."

Analysis

Records 1-13

[168] Records 1-13, which are reports by the consultant to the ministry, were clearly "supplied" to the ministry by a third party, namely the consultant.

[169] Even in that circumstance, the interests of the affected parties (the racetrack operators) 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 harm to the person who actually supplied the information. In other words, although the consultant supplied the information to the ministry, sections 17(1)(a) and/or (c) may

apply where disclosure could reasonably be expected to harm the affected parties. Section 17(1)(b) is similarly unaffected by the issue of who supplied the information, and whether that person would be the one who would suffer harm, because it refers to the public interest rather than harm to any particular group.

[170] 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, or to find that the consultant was an agent for the ministry, in order to find that the information in these records that originated with the affected parties was "supplied" to the ministry within the meaning of section 17(1). In addition, information that is the product of the consultant's analysis meets the "supplied" test.

[171] Having reviewed the evidence and argument on this issue, I therefore find that records 1-13 were "supplied" to the ministry within the meaning of section 17(1).

Records 14-17

[172] The ministry describes these records as "internal and interim [ministry] Charts on Proposed Funding for up to eighteen racetracks for Years 1 and 2. . . ." It is clear that the charts were not supplied to the ministry, but were, instead, generated internally. The ministry does not claim section 17(1) for these records, nor does its description of the records provide evidence that the information contained in them meets the definition of "supplied" under section 17(1). Based on my review of the evidence and the records at issue, it does not appear that any of the information in these records was provided to the ministry by the racetracks or by the consultant.

[173] In determining whether the information in these records was "supplied" to the ministry, I looked for a correlation between information provided by the consultant in records 1-13 and the contents of these records. There is some correlation between the number of race days in records 1-13 and the number shown in these records, and in the amount to be paid by OLG to each race track in order to lease space for OLG's slot machines at the track.

[174] Under the circumstances, however, I conclude that where there is a correlation between the information in records 1-13 and the figures set out in records 14-17, the information in the latter records was either the result of a decision by the ministry, or the result of negotiations or discussions. In either of these contexts, this information was not "supplied" to the ministry. Specifically with regard to the OLG revenues, this information presumably arises from a lease agreement or some other form of negotiated agreement, and the rule that information in a contract is not "supplied" therefore applies to it.

[175] The only information in records 14-17 that does not consist of proposals for the future is the "SARP" column that appears on some pages. SARP revenues were paid out by OLG. The ministry also advises that these payment amounts are public information.

As the amounts of SARP revenues originated with OLG, I conclude that it does not meet the "supplied" requirement.

[176] Under the circumstances, and based on the evidence provided, I am not satisfied that any information in these records meets the "supplied" requirement. Because all three parts of the test must be met to qualify for exemption, I find that records 14-17 are not exempt under section 17(1).

Records 18-30

[177] The ministry's index indicates that it does not claim section 17(1) for these records, which consist of letters of intent to a number of racetracks, and term sheets that were enclosed with the letters.

[178] However, as I have already noted, the ministry's initial representations claim that some information in the term sheets is exempt under section 17(1). The ministry describes this information as "the couple of lines of marked racetrack numbers in the Term Sheets (two lines each in Records 24-30)." Similar to the non-existent "sidebarring" referred to in relation to section 13(1), the records provided by the ministry are not marked in this way, and offer no indication of which information is supposedly exempt. In the final sentence of its "supplied" representations, the ministry submits that the consultant's reports (records 1-13) and worksheets (records 31-41) satisfy this component of the test, and fails to mention records 24-30 at all.

[179] The ministry says that the letters of intent ". . . contemplate the final transfer payment agreement which will be binding with final terms." It states further that "[t]he term sheets contained approximations of future revenue information, expense information, transformation information of private companies, and some recommended [consultant] advice." Again, the ministry does not indicate what information in these records is "recommended [consultant] advice."

[180] It might be suggested that the letters of intent and term sheets are contracts, and therefore their contents would not normally be seen as having been "supplied" within the meaning of section 17(1). However, the letters do not represent final agreements, making it difficult to determine whether records 18-30 can accurately be described as "contracts," and whether they should be found not to meet the "supplied" requirement on that basis. Fortunately, in this case, the issue of "supplied" can be determined without deciding this point.

[181] As with records 14-17, I looked for a correlation between information provided by the consultant in records 1-13 and the contents of these records. There is some overlap of information with respect to the number of race days, and in the amount to be paid by OLG to each racetrack in order to lease space for OLG's slot machines at the track.

[182] However, for the reasons cited above with respect to records 14-17, I conclude

that where there is a correlation between information in records 1-13 and records 18-30, the figures set out in the latter were either the result of a decision by the ministry, or the result of negotiations or discussions. In either case, this information was not "supplied" to the ministry.

[183] It is clear that the letters of intent and term sheets themselves were generated by the ministry, and were not supplied to it. Based on my review of the evidence and the records at issue, I am not satisfied that any information in these records that meets the criteria in part 1 of the test under section 17(1) was "supplied" to the ministry by the racetracks or by the consultant within the meaning of section 17(1). Accordingly, I find that it does not meet part 2 of the test under section 17(1). Because all three parts of the test must be met to qualify for exemption, I find that records 18-30 are not exempt under section 17(1).

Records 31-41

[184] These records are worksheets containing projected income and expense figures, as well as proposed funding models, for a number of racetracks. I accept the ministry's position that this information was provided to it by the consultant, who had received some of the information from the racetracks while generating other information as part of its advice to the ministry. I therefore find that the contents of these records, in their entirety, were "supplied" to the ministry within the meaning of section 17(1).

In confidence

[185] 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.[72]

[186] 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

[72] Order PO-2020.

- prepared for a purpose that would not entail disclosure.[73]

[187] With respect to the requirement for a reasonable expectation of confidentiality, the ministry and a number of the affected parties rely on confidentiality agreements that the affected parties entered into with the consultant in relation to "confidential information" they were to provide as part of the due diligence exercise.

[188] The affected parties also make the following points about confidentiality:

- prior to providing financial information to the consultant, assurances were given that it would remain confidential;
- the information was expressly provided on a confidential basis;
- the reports provided to the ministry by the consultant were marked "privileged and confidential" on every page; and
- this information was kept confidential by the racetracks, including internally within their own businesses.

[189] I am satisfied that, with respect to the information supplied by the affected parties to the consultant, the agreements provide explicit evidence of an expectation of confidentiality when the information was provided. I note, however, that the agreements bind the affected parties and the consultant. The ministry is not a party. I also note that the confidentiality agreement between affected party 1 and the consultant expired in November 2014. Nevertheless, the confidentiality agreements, including the one signed by affected party 1, provide evidence of an intention to keep the information supplied by the affected parties to the consultant confidential.

[190] 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 parties.

[191] 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. The consultant also indicates that it took care not to disclose a racetrack's information to the other racetracks.

[192] I conclude that the affected parties had a reasonable expectation of

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[73] 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.

confidentiality with respect to their financial and commercial information. 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.

Conclusions re part 2 of the test

[193] To summarize, I have found that the following parts of the records that met part 1 of the test were "supplied in confidence" to the ministry, meeting part 2:

- all of the financial and commercial information in records 1-13;
- records 31-41 in their entirety.

[194] As all parts of the section 17(1) test must be met for the exemption to apply, I find that the remaining records are not exempt under this section. I will now consider whether any of the information that meets part 1 and 2 of the test also meets part 3.

Part 3: harms

[195] The parties 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), (b) 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.[74]

[196] 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.*[75]

Representations

The ministry

[197] In its initial representations, the ministry indicates that it ". . . primarily relies on the arguments and representations made by the racetracks . . . to illustrate the harm to racetracks under section 17(1)(a)(b)(c) of [the *Act*].

[198] With respect to the harm identified in section 17(1)(a) (prejudice to competitive

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[74] *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.
[75] Order PO-2435.

position and significant interference with contractual or other negotiations), the ministry's initial representations state:

> . . . that disclosure would make business practices and finance available to competitors in both the horse racing industry and any related entertainment industry. Racetracks will lose some of their competitive edge and may have to lay off staff. A reasonable apprehension of competitive harm to the racetracks of complete transparency is evidenced by the fact that two of the racetracks rejected millions of dollars of government subsidy to avoid even a minor level of transparency demanded in the transfer payment agreements. Specifically, the government requires that the transfer payment amounts be published and any salaries over $100,000 be published. Initially a third racetrack rejected transparency at that level but has since changed its mind.

[199] With respect to section 17(1)(b) (similar information no longer being provided), the ministry submits:

> This evidence of reasonable anticipation of harm and loss clearly links to harm (b) of s. 17(1)(b) which provides as follows: [it would]
>
> > Result in similar information no longer being supplied to the institution where it is in the public interest that similar information continues to be so supplied.

[200] Under section 17(1)(c) (undue loss or gain to any person), the ministry submits that:

> . . . the racetracks were reasonably concerned about undue loss to themselves if their complete financials were disclosed in the newspaper in the style of news making[.] The loss would be based on reputational damage imposed by the press on racetracks. As well, the industry is very labour intensive and rural communities who rely on racetracks for both full time and part time employment would suffer losses. Similarly suppliers of horses (breeders) horse bedding (straw and hay), feed (oats, grains and manufactured feed), boarding and veterinary services would suffer losses paralleling losses to racetracks.

[201] In my opinion, these submissions are extremely general and do not refer to harm that is "well beyond the merely possible or speculative." However, as noted, the ministry "primarily relies" on the arguments and representations of the affected parties.

[202] The ministry did not address section 17(1) in its reply representations.

Affected Party 1

[203] In its initial representations, affected party 1[76] submits that disclosing the information in the records would cause prejudice to its position in the marketplace. This 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.

[204] Affected party 1 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 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."

[205] Affected party 1 also submits that ". . . a competitor with knowledge of the information in [the records] has a complete road map to understanding [the affected party]'s business to the detriment of [the affected party]'s ability to compete in future RFPs."

[206] Affected party 1 cites Order PO-3154[77] in support of its assertion that "[t]his type of information, which covers a wide variety of topics ranging from financial to strategic, 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." Affected party 1 also argues that any prejudice to its competitive position will create an undue loss for it, and a disproportionate gain for its competitors by giving them information for use in future RFPs.

[207] Affected party 1 also submits that disclosure of the information in the records would affect negotiations between it and its employees and potential outsourcing

[76] whose representations were adopted by two other affected parties.
[77] at paras. 76-77.

suppliers.

[208] Affected party 1 also 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 and gain an unfair advantage." Affected party 1 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.

[209] Affected party 1 cites Order PO-1816 in support of this argument. Order PO-1816 dealt with proposals for public funding, including proposed restructuring plans, 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 parties' business models.

Affected Party 2

[210] In its initial representations, affected party 2 submits that it was:

> . . . shocked by the extent of disclosure required by the Government, and extremely concerned, as most of the information was highly confidential and had never been disclosed outside the organization. Indeed, much of the information was not even shared within the organization, except on a need-to-know basis under strict confidentiality requirements. Employees of [affected party 2] would never be privy to the vast majority of this information, nor would suppliers or other organizations with which [affected party 2] does business. [Affected party 2] was extremely nervous about providing this detailed financial and operational information to the Government.

[211] Affected party 2 also submits that "[t]he information in the records is misleading and will be misunderstood."

Section 17(1)(a)

[212] Under section 17(1)(a), affected party 2 submits:

> • it operates in a very sensitive environment with potential competitors seeking to replace it or take market share from it;
>
> • knowledge of the contents of the records would confer a significant unfair advantage on competitors;

> • the information in the records is capable of commercial application by existing or potential competitors and could be used by them to copy or compete unfairly;
>
> • disclosure could interfere significantly in future contractual negotiations because competitors could demand similar terms; and
>
> • disclosure could reasonably be expected to interfere with negotiations with suppliers and employees.

[213] Affected party 2 sets out a review of the records, and in some cases, argues that the information could damage its reputation. It suggests ways in which some information could be used to calculate other financial information about it. It also suggests ways in which the information could be used by competitors. As well, it indicates that some of the information is inaccurate. I am not providing much detail about these submissions because significant parts of them were kept confidential during the exchange of representations.

[214] Affected party 2 submits that "fundable fixed expenses" must not be disclosed because "other numbers can be backed out" and "the level of fundable fixed expenses is highly-competitive information that other racetracks could use to their own benefit and to [affected party 2's] prejudice."

[215] In a similar vein, affected party 2 also asserts that:

> disclosure of the percentage of overall expenses in the Gross column and in the Analysis column [of a page in the consultant's report] would allow a competitor to draw inferences about [affected party 2]'s overall business and cost structure, its financial picture and its budget. *A competitor could use this highly-confidential data to emphasize different cost structures to bolster their own proposals or marketing by comparison* to [affected party 2]. [Emphasis added.]

[216] Affected party 2 also submits that information in a record created by a public servant would be exempt to the extent that reveals information of the requisite kind. It cites Order MO-1450, and states that in it, ". . . the IPC upheld a decision refusing disclosure of a consultant's financial review – a record very similar to the records in this appeal." Affected party 2 goes on to argue that "[t]he review and analysis in that case, like here, would have disclosed information on actual and anticipated revenues, costs, prices and rent."

[217] Affected party 2 also cites Order PO-2556 for the proposition that "the IPC refused to disclose a report by a consultant to the [Ontario Lottery and Gaming Corporation] that provided revenue impacts of certain policy and legislative changes on the basis that it included detailed financial information obtained from casino operations." I note, however, that the record that was described in that manner (record

5 in Order PO-2556) was found to be exempt under sections 18(1)(a), (c) and (d), and the possible application of section 17(1) to it was not considered.

[218] In addition, affected party 2 cites Order P-1463, in which it says the IPC ". . . upheld the institution's decision not to disclose information that revealed budgets, expenses, salaries, fees paid, revenues etc." because "[d]isclosure of the records would allow the Company's competitors to estimate with relative accuracy the budget levels and funding sources of the company."

[219] Affected party 2 cites three further orders in support of its contention that section 17(1)(a) applies.

[220] In Order P-472, detailed revenue and expense projections were found to be exempt under this section.

[221] In Order P-711, budget information pertaining to 11 sections of an ambulance service provider was withheld under sections 17(1)(a) and (c).

[222] In Order M-1108, the appellant sought information about a study of impaired driving in Sudbury, and in particular the names of the 10 licensed establishments who were found to have served impaired drivers who indicated that they had their last drink in a licensed establishment. The record was found exempt under section 10(1)(a) of the *Municipal Freedom of Information and Protection of Privacy Act* (the equivalent of section 17(1)(a) of the *Act*). The order indicates that the affected parties objected to disclosure "on a variety of bases." They argued that the manner of collection would lead to inaccuracies, and some affected parties also indicated that they had changed their serving habits. The record was found exempt under section 10(1)(a).

[223] Affected party 2 cites Order M-1108 as the basis for an argument that ". . . the IPC has recognized that compilations of inaccurate information (like many of the figures and conclusions here) can cause significant prejudice to affected parties." Affected party 2's allegations that information in the records is inaccurate are focused on projected figures rather than historical data.

Section 17(1)(b)

[224] Under section 17(1)(b), affected party 2's argument is underpinned by its statement, referred to above, that it had significant concerns about providing what it describes as detailed, confidential financial data "to the Government." It states that this information was provided "for the sole purpose of [the consultant] informing the Government's consideration of transitional funding. It argues that disclosure would "cast a sharp chill on future co-operation" and that it "would not have disclosed this highly-confidential information if it perceived a risk of disclosure."

[225] In this regard, it must be observed that the transitional funding program to which affected party 2 refers is, as I have already outlined, part of a $500 million

investment by Ontario in the horse racing industry over a 5-year period. In 2013-14 alone, the amount paid out by Ontario to the industry totalled over $50 million.[78] Failure to provide the requested information would, presumably, result in racetracks who take that approach receiving zero dollars in transitional funding. The evidence before me shows that information was provided by fourteen racetracks, while only two did not participate. The most significant consequences for failing to provide the requested information would be suffered by the racetracks, and the funding is a significant incentive to provide information to the consultant.

[226] Section 17(1)(b) only applies ". . . where it is in the public interest that similar information continue to be so supplied." [Emphasis added.] With respect to this requirement, affected party 2 submits that "[i]t is in the public interest, and the Government's interest, to foster relationships of trust and to have confidential communications with [affected party 2] and others to build the Government's knowledge base to inform important decisions." But as I have already noted, failure to provide the requested information simply means that a racetrack would not receive transitional funding. Providing the information is an essential condition in order to receive the funding. It is therefore in the racetracks' interest, rather than the public's, to provide this information.

[227] It might be argued (although it has not been) that there is a public interest in slot machines continuing to be available at racetracks because of the significant revenues they generate (approximately $1.8 billion in 2012-2013, according to the ministry). However, it has not been suggested or demonstrated that continuing to have slot machines at racetracks is contingent on the provision of transitional funding or, in turn, on the continued provision of financial information by the racetracks which, as noted, is required to receive the transitional funding. In that regard, I also note that after the cancellation of SARP, OLG proposed to begin paying rent to racetracks for the space occupied by its slot machines. Moreover, if slot machines are moved out of racetracks, I have not been presented with evidence or argument to suggest that they would generate lower revenues. Under the circumstances, therefore, affected party 2's arguments do not link the public's financial interest in the continued presence of slot machines at racetracks to the continued supply of the information found in the records.

Section 17(1)(c)

[228] Under section 17(1)(c), affected party 2 submits that disclosure "could reasonably be expected to cause material loss to [it]," and "relies on its submissions in respect of section 17(1)(a)," arguing that "the prejudice and interference with negotiations can reasonably be expected to cause obvious undue losses and/or gains to others."

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[78] See the chart showing the payments to individual racetracks for 2013-14 at http://www.omafra.gov.on.ca/english/about/transition/transitionfunding.html

[229] In this part of its representations, affected party 2 refers to "other racetracks vying for transition funds," and other situations involving competitors that were withheld during the exchange of representations for confidentiality reasons.

Other affected parties

[230] In their initial representations, the other affected parties submit as follows:

- the information should remain confidential as it represents confidential business information regarding the affected party's operations and competitive position;
- disclosure may interfere with contractual rights and negotiations between a racetrack and the OLG through disclosure of lease payment information;
- disclosure "would, without question," impact the future supply of this or similar information to the ministry, and would lead a racetrack to alter its business practices to better protect informational assets, and could well result in no owner being prepared to supply confidential information needed to make proper decisions;
- disclosure of OLG lease payment information could result in undue loss or gain;
- disclosure of salary information would harm employee relations;
- the information was provided in confidence, is in draft form, and is subject to disclaimers to the effect that it (1) has not been completely verified through due diligence; and (2) is based on assumptions; and (3) changes in the assumptions could change the data;
- disclosure of the information could easily prejudice the position of some or all of the racetrack owners;
- disclosure of the financial details of a private family business would cause prejudice to the business; and
- disclosure would have a negative impact on ongoing and future business.

[231] The reply representations of the other affected parties do not add any significant arguments to those summarized above.

The appellant

[232] In her initial representations, the appellant submits:

> The respondents have made vague references to anticipated harm they say would flow from the release of these documents. In our opinion, there would be no harm and they have not met the test required here. They

> have suggested that release of these audit [sic] documents would interfere with their ongoing business. That it would somehow hurt their competitive position. Frankly, we do not see how that could happen. People go to the track to watch horses and gamble on the outcome of the race. They go to slots to have a chance of winning. The past financials of any gambling house will not [affect] which Ontario residents go to which gambling house. . . .

[233] The appellant also suggests that the racetracks not wanting ". . . to lose their competitive edge in the gaming industry or amongst themselves" is "not a valid concern."

[234] The appellant does not specifically address section 17(1) in her sur-reply representations.

Analysis

[235] In assessing whether or not disclsoure could reasonably be expected to significantly prejudice the affected parties' competitive position or interfere significantly with their 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."[79] The panel also indicated that "[w]ithout slots or a new revenue stream, the horse racing industry in Ontario will cease to exist."[80] In addition, the number of players in the Ontario horse racing industry is limited.

[236] These objectively observed circumstances provide evidence that supports affected party 1'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 and obtaining an appropriate share of transitional funding.

[237] At this point, it will be helpful to review and categorize the types of information found in the records that have met the requirements of parts 1 and 2 of the section 17(1) test.

[238] Records 1-13 consist of the consultant's reports. They contain the following types of information:

- title and subtitle pages;
- agenda;

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[79] Interim Report, p. 1.
[80] *Ibid.,* p. 27.

- 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 parties;
- description of alternative scenarios relating to racetracks in Ontario;
- analytical data; and
- proposed changes/options for change, and projected impacts.

[239] Records 31-41 set out projected financial performance figures in relation to each racetrack.

[240] The affected parties have provided extensive representations concerning the impact of disclosure. Having reviewed the records in detail, I conclude that the affected parties' 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.

[241] Given the detailed representations of the affected parties, and bearing in mind the difficulty of predicting future events with precision,[81] I accept that disclosure of these parts of the records could reasonably be expected to significantly prejudice the competitive position of the affected parties and interfere with their ongoing negotiations within the meaning of section 17(1)(a). 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), subject to my comments, below, about affected parties who consented to the disclosure of information about them. The exempt information consists of significant portions of records 1-13 and all of records 31-41.

[242] Having reached this conclusion, it is not necessary for me to consider whether this information is also exempt under section 17(1)(c).

[243] 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[82]:

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[81] Order MO-3179 at para. 62.
[82] at para. 76.

> 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.

[244] 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 disclosure of the following information in records 1-13 is not exempt under sections 17(1)(a) and (c): title and subtitle pages, except portions that reveal proposed changes; agendas; information concerning the status of the consultant's reviews; description of methodology and assumptions; 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.

[245] For the reasons outlined, above, in my review of the submissions of affected party 2 in relation to section 17(1)(b), I am not satisfied that this harm is made out. This conclusion is reinforced by the fact that, as discussed above, I have concluded that the reasonable expectation of harm, in the event that this information were no longer supplied, relates to the interests of the racetracks, as opposed to the public interest referred to in section 17(1)(b).

[246] As already noted, two of the affected parties have consented to the disclosure of information about them. On this basis, because the affected parties are in the best position to assess possible harm, I find that section 17(1) does not apply to information that is subject to this consent. One of these affected parties consented in full to disclosure of information about it. The other affected party completed a consent form that indicates "partial" consent, and the extent of its consent must therefore be determined. In addition, some of the information about these two affected parties is exempt under section 13(1), and will therefore not be disclosed. I will address this issue later in this order, as I must also decide whether section 18(1)(c), (d) or (e) applies to this information.

[247] To summarize, I find that significant portions of records 1-13, and records 31-41, in their entirety, are exempt under section 17(1)(a).

[248] Pages that are exempt, in whole or in part, under section 17(1)(a) are identified in Appendix A to this order.

Issue F. Do the exemptions at sections 18(1)(c), (d) and (e) of the *Act* apply?

[249] The ministry's original decision letter refers specifically to sections 18(1)(c), (d) and (e), and these three exemptions are cited for every record in the index that accompanied the decision letter. In the index that the ministry provided to this office during this appeal, the ministry does not refer to section 18(1)(c). This omission is repeated in the ministry's representations, which refer only to sections 18(1)(d) and (e).

[250] In addition, the revised index indicates that:

- records 1-13 are exempt under sections 18(1)(d) and (e) and;
- records 14-17 and 24-41 are exempt under section 18(1)(e).

[251] The only records for which sections 18(1)(d) and (e) are not claimed in the ministry's representations are the letters of intent (records 18-23) and this is consistent with the revised index.

[252] Affected party 1 purports to rely on sections 18(1)(c) and (d). These exemptions exist to protect the ministry's interests, rather than those of affected parties, and I could infer, based on the revised index and the ministry's representations, that the ministry has withdrawn its reliance on section 18(1)(c). If that were the case, I would need to consider whether an affected party can raise a discretionary exemption not claimed by the ministry. However, the ministry has never expressly stated that it no longer relies on section 18(1)(c), nor that it has reduced the scope of its claim under sections 18(1)(d) and (e) to cover only some of the records at issue.

[253] Parts of the records are exempt under sections 12(1), 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.

[254] Accordingly, I will consider whether sections 18(1)(c), (d) and/or (e) apply to any of the records.

[255] These sections 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) and (d)

[256] 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.

[257] Relying on *Canada Packers Inc. v. Canada (Minister of Agriculture)*,[83] 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*).

[258] 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 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)*,[84] which also addressed section 20 of the *ATIA*.

[259] More recently, in Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)[85] ("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,[86] and also found that it requires a "reasonable expectation of probable harm."[87] 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."

[260] 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

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[83] [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.
[84] 2012 SCC 3.
[85] 2014 SCC 31.
[86] the law enforcement exemptions at sections 14(1)(e) and 14(1)(l) of the *Act*.
[87] at paras. 53-54.

> 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". . . .

[261] This is the standard of proof that I applied under section 17(1), above,[88] and I will also apply it here.

[262] 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)*,[89] 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."[90] I note that this case proceeded to the Court of Appeal[91], which elaborated on the standard of proof required under section 18 without endorsing this particular articulation of it.[92] Moreover, and significantly, the Supreme Court of Canada has been very clear that the standard of proof articulated in *Community Safety 4and Correctional Services v. IPC*,[93] 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.[94]

[263] 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

[264] Section 18(1)(d) is intended to protect the broader economic interests of

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[88] 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."
[89] 2004 CanLII 11768, [2004] O.J. No. 224 (ONSC).
[90] at para. 23.
[91] [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.).
[92] See paras. 33-41.
[93] cited above at footnote 85.
[94] The ministry also made this argument in relation to the standard of proof under section 17(1). For the reasons given here, my analysis under section 17(1) applied the standard referred to in footnote 88.

Ontarians.[95]

[265] The ministry submits that any financial loss to the affected parties will inevitably lead to material financial harm to the government because of the affected party's contribution to OLG gaming revenues. The ministry states:

> If the Adjudicator agrees that racetracks are harmed under s. 17(1)(a) or racetracks are prejudiced due to the disclosure of Records 1-13 any financial loss for racetracks as landlords to OLG slot facilities, enable the generation of OLG slots revenues which contribute significant revenues to Ontario that were primarily used for health care in 2012-2013 [sic].

[266] This submission, which I have quoted verbatim, is difficult to understand. However, I infer that the intent is to explain the subtitle under which this comment appears: "As Racetracks Lose, Ontario Loses."

[267] Section 17(1) exists to protect the interests of affected parties, and it is not a foregone conclusion that any reasonably foreseeable economic harm to the affected parties in this case could, without more, be reasonably expected to also trigger the harms addressed in section 18(1)(d).

[268] The ministry refers to "significant revenues from slot facilities," but does not explain how the overall bottom line of the affected parties could reasonably be expected to affect the amount of money they are 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 parties could drive up their costs and leave revenues unaffected. I find that the representations on this point are speculative, and the evidence is not "considerably above" or "well beyond" a mere possibility of harm.

[269] The ministry also submits that racetracks 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 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).

[270] Affected party 1 adopts and relies on the ministry's arguments, and adds that

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[95] 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.

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 and suggests that pricing received by the ministry would be "tainted" by the disclosure of information in the records about affected party 1.

[271] Although these arguments of affected party 1 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.

[272] Affected party 1 also submits:

- any losses it suffers will result in financial harm to the ministry;
- information in the records will provide a competitive advantage to cross-border competitors that has the potential to divert revenue from its operations, and this will result in lower revenues for the ministry;
- the OLG's modernization plan will deliver over $1 billion in additional net profit to the province by 2017-18;
- the interests of affected party 1 and the ministry will be harmed by disclosure because of increased competition in future RFPs.

[273] I am not persuaded by these arguments. As already noted, it is unclear why a decreased bottom line for affected party 1 automatically decreases gaming proceeds paid to the OLG. The decreased bottom line could be caused by increased costs rather than decreased gaming revenues. Moreover, if revenues are lower because customers go elsewhere in the province, the flow of revenue to the OLG would not decrease.

[274] As far as cross-border competition is concerned, affected party 1 cites decreased revenues in facilities close to the border from $800 million in 2001 to $100 million in 2011. It is not apparent that this decrease was caused by disclosure of financial details of the Ontario gaming operators, and I am not satisfied that a reasonable expectation of section 18(1)(d) harm is established on the basis of this argument. Cross-border competitors are free to attempt to divert business from affected party 1 whether or not they receive the records at issue.

[275] The relevance of the modernization plan and its expected profits to the impact of disclosure of the records is not clear, and I reject this as a basis for concluding that disclosure could reasonably be expected to injure the financial interests of the government or its ability to manage the economy. Nor is it apparent why increased

competition in future RFPs could reasonably be expected to cause these harms.

[276] Affected party 1 cites Order PO-2569 in support of an argument that disclosure of the records would reveal "the total amount of transfer payments and revenue improvement requirements agreed upon by [it] and the ministry. . . ." Order PO-2569 applied sections 18(1)(c) and (d) to correspondence from the ministry to Bombardier setting out the amount of money the ministry was willing to contribute to Bombardier if Ontario were to be selected as the site for construction of the company's C Series aircraft. The adjudicator found that this would be "prejudicial to the economic interests or competitive position of the Ministry" and "injurious to the financial interest of Ontario" because "it would demonstrate to other private sector industries seeking financial contribution 'how far Ontario is prepared to go in order to attract business to Ontario.'"

[277] Order PO-2569 is distinguishable and not persuasive in the circumstances of this appeal. The transitional funding that Ontario is providing to racetracks is not for the purpose of attracting an industry to locate in the province. Rather, its intention is to support the horse racing industry after the cancellation of SARP. Even more importantly, as described in the "Overview" section, above, Ontario has disclosed the total amount of transitional funding it will pay, and has even disclosed the amount paid to each racetrack for 2013-14.[96]

[278] Based on the above analysis, I conclude that, with respect to section 18(1)(d), the ministry and affected parties 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.

[279] Accordingly, I 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

[280] 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.[97]

[281] The economic harms addressed in section 18(1)(c) are arguably narrower than

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[96] See http://www.omafra.gov.on.ca/english/about/transition/transitionfunding.html.
[97] Orders P-1190 and MO-2233.

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.

[282] 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."

[283] As noted, the ministry did not make representations concerning the application of this section. I have addressed affected party 1'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).

[284] 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.

[285] 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

[286] 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.[98]

[287] The ministry submits:

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[98] Order PO-2064.

> The positions and criteria and terms which are apparent in all the Records except the Letters of Intent would prejudice future negotiations by revealing the spread between the negotiating position and the final published transitional funding. Conclusions about the funding criteria evident in the Worksheets, the [consultant]'s Reports, the Charts and the Term sheets for competing racetracks would prejudice the secrecy necessary in the negotiating arena. The need to treat certain racetracks differently from others could seem an unfair advantage to some.

[288] The ministry's representations misapprehend the way in which section 18(1)(e) applies. This exemption does not require proof that future negotiations will be prejudiced; rather, it requires proof that actual information in the records is intended to be applied to current or future negotiations. The ministry has failed to do this. The specific information in the records relates to negotiations that occurred in the past. Accordingly, requirement 3 under this exemption, which stipulates that negotiations must be carried on currently, or will be carried on in the future, has not been met.

[289] In any event, the ministry's argument on this point alleges that the information it identifies in the records would prejudice future negotiations, but offers no explanation of why this is the case. I have been provided with no evidence or argument to suggest that the "spread" between negotiating positions and final funding amounts would automatically be repeated for future years, or that it would have any application to other racetracks. Moreover, the spread between the negotiating position and the final amount of funding received by each racetrack is already known to that racetrack.

[290] The affected parties did not provide representations concerning section 18(1)(e).

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

EXERCISE OF DISCRETION

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

General principles

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

[293] 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.

[294] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[99] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations

[295] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[100]

- 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.

[296] The ministry states that the exemption was applied in furtherance of its purpose, which, according to the ministry, is "the importance of ensuring government's decision-making process without intrusion."

[297] The ministry submits that it applied section 13(1) ". . . based on a true belief that the disclosure of the Records would interfere with a decision-making process of the government."

[298] The ministry submits further that 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.

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[99] Order MO-1573.
[100] Orders P-344 and MO-1573.

[299] The ministry submits that 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.

[300] 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.

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

[302] Despite the fact that the ministry describes the purpose of section 13(1) somewhat differently from the Supreme Court of Canada in *John Doe,*[101] 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*.

[303] 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.

[304] 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?

[305] The appellant claims that the public interest override in section 23 applies. I have found that sections 13(1) and 17(1)(a) apply to parts of the records. These exemptions may be overridden by section 23.

[306] I have also found that section 12 applies to a small amount of information in records 14-17. Section 12 is not listed as an exemption that can be overridden by section 23, and the information that is subject to section 12 will, accordingly, not be disclosed.

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[101] *John Doe*, cited at footnote 29, above, describes the purpose of the exemption as follows: " 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."

[307] 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.]

[308] 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 exemptions.

[309] 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.[102]

[310] 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.[103] 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.[104]

[311] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[105]

[312] Any public interest in *non*-disclosure that may exist also must be considered.[106] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[107]

[313] 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.

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[102] Order P-244.
[103] Orders P-984 and PO-2607.
[104] Orders P-984 and PO-2556.
[105] Order P-984.
[106] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[107] Orders PO-2072-F, PO-2098-R and PO-3197.

Representations

Ministry's initial representations

[314] 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.

[315] This submission ignores the fact that the records are entirely concerned with 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.

[316] 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.

[317] 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.[108] 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 prepared the records at issue was engaged ". . . to study how best to distribute the transitional funding."[109]

[318] 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.[110] Rather, the relevant issue being assessed here is the *public* interest in the information.

[319] 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

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[108] Pages 45-57 of the *Report*.
[109] See page 54 of the *Report*.
[110] That type of interest could be relevant in balancing an identified compelling public interest against the purpose of the exemption.

appellant does not rely on the Auditor General being interested in the records as the basis of her public interest argument.

[320] 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.

[321] The ministry submits that the fact that the appellant is a journalist does not automatically establish a public interest in disclosure.[111] Nor, however, does it mean that the fact that the appellant is a journalist who has already published stories in the media about the racing industry and the cancellation of SARP, is irrelevant to this determination. It simply means that the involvement of a journalist does not automatically create a public interest in disclosure.

[322] The ministry cites Order P-1587[112] 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 locations.

[323] 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.

[324] 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,

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[111] citing Orders M-773 and M-1074.

[112] incorrectly referenced by the ministry as Order P-1557 (a fee waiver order dealing with a different institution).

> 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.

[325] 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).

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

[327] 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*.

[328] 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*[113] 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.

[329] 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.

[330] 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.

[331] The ministry also states that it is in the public interest "not to upset large revenue streams by undressing companies who generate them."

Affected Parties' Initial Representations

[332] Affected party 1 adopts the ministry's representations on this point. To the extent that the affected party 1 repeats the ministry's arguments, which are already set out in considerable detail above, I will not repeat them here.

[333] Affected party 1 submits that the appellant does not provide detailed or convincing evidence that the request meets the high standard of a "compelling public interest" that clearly outweighs the purpose of the exemptions, and adds that the appellant's "assertions" regarding the public interest "lack specificity."

[334] Affected party 1 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

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[113] cited above at footnote 29.

requested records before providing representations. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant.[114]

[335] Affected party 1 also submits that there is a considerable amount of information available about the basis on which transition funding was allocated, such as the Auditor General's *Modernization Plan Report*, which refers to funding conditions such as controlling salaries and operating costs. Affected party 1 also says that public scrutiny of the government's activities regarding the allocation of transitional funding can be accomplished without the disclosure of the records.

[336] In a similar vein, affected party 1 submits that non-disclosure of the specific information in the records does not impair the ability of the public to express opinions or make a political choice with respect to transitional funding provided to racetracks.

[337] Affected party 1 refers to the public interest in non-disclosure, and submits that the effective operation of government, which has a public interest component, and which requires the protection of advice and third party information, must be balanced against the value of open government. It also argues that there is a public interest in the consultant's due diligence being conducted in a zone of confidentiality, and failing to do so would "render confidentiality protections meaningless." Affected party 1 says that "[p]reserving the integrity of the due diligence process outweighs any public interest in disclosure of the Records."

[338] On the question of whether any public interest in disclosure outweighs the purpose of the section 13(1) exemption, affected party 1 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*.[115] Affected party 1 submits that disclosure is contrary to that purpose, and that the public interest in disclosure does not outweigh that purpose.

[339] With respect to whether disclosure outweighs the purpose of section 17(1), affected party 1 identifies that purpose as protecting the "informational assets" it provided to the ministry in the course of the ministry carrying out its public responsibilities. Affected party 1 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.

[340] Affected party 2 also provided representations on this issue. To the extent that they essentially repeat arguments already summarized, above, I will not describe them here.

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[114] Order P-244.
[115] cited above at footnote 29.

[341] In addition to its arguments similar to those I have already described, affected party 2 submits that:

- the appellant must demonstrate that the information requested would respond to specific government issues that are the subject of public debate, rather than a general interest in an agency's decision-making process; and

- the public interest in situations where the override has been applied (economic impact of Quebec separation;[116] the integrity of the criminal justice system;[117] public safety and the operation of nuclear power facilities;[118] the safe operation of petrochemical facilities;[119] and the province's ability to prepare for a nuclear emergency[120]) cannot reasonably be compared to the alleged public interest in this appeal.

Appellant's initial representations

[342] The appellant submits:

> We believe the information contained in these records constitutes public information and that there is a compelling interest to release it. Upon its release we commit to reviewing it and to publishing stories that are newsworthy regarding the records.

[343] The appellant goes on to provide the following further submissions:

- the government has created a regulatory system that allows legalized gambling, including horse racing and slot machines, and as a result, activities that would otherwise be illegal are allowed;

- the racetrack operators and the province reap financial benefits from this arrangement;

- it is the appellant's view that the consultant's review "turned up some serious problems in how money had previously been spent" in that "[e]xecutive salaries were far too high" and "[t]here were other expenses that were egregious";

- the racetracks and the government are concerned about a public outcry if the information is disclosed;

- if money was misspent, the public deserves to know; and

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[116] Order P-1398.
[117] Order P-1779.
[118] Order P-1190.
[119] Order P-1175.
[120] Order P-901.

- the records refer to proposed cost reductions and these are key to the request, and the fact that some records refer to compensation and salaries is helpful.

Reply Representations

[344] The ministry's reply representations state that "[p]ublic interest in the records has been fully discussed by the Ministry in its original representations and won't be repeated in this reply."

[345] Affected party 1 disputes the appellant's submission that the information in the records is "public information." According to affected party 1, this means that the appellant is sidestepping the balancing of interests contemplated by section 23. I do not agree. In my opinion, the appellant's assertion is rhetorical, and her intention is to suggest that the information *should be* public.

[346] Affected party 1 also asserts that the appellant's interest is focused on it and the other racetracks, and not on an institution that is subject to the *Act*, and therefore does not shed light on government operations. I have already addressed this argument. The records relate to the "due diligence" process and the allocation of $500 million in government funding. These are significant government activities.

[347] Affected party 1 states further that there is a significant amount of information available to provide citizens with a meaningful understanding of the activities of government. It refers to the Panel's interim report (addressed in the "Overview" section, above) and the detailed information it contains about the amounts earned by racetracks under SARP.

[348] In addition, affected party 1 characterizes the appellant's arguments about executive salaries being "far too high" as being made "without the context of any appropriate benchmark," and "simply atmosphere." In this regard, I note that, as mentioned above, 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 [affected party 1's] executives and related issues."

[349] Affected party 2 refers to parts of its own earlier representations, and also essentially repeats some of affected party 1's reply representations, already outlined above. I will not set out these submissions here.

[350] In addition, affected party 2 refers to the fact that the appellant supports her allegation of a "public" interest by citing only one article – written by her. It also states that there is no evidence of a "current" public interest. In this regard, it is important to note that in some instances, records may contain information in which there is a public interest regardless of whether it has already been the subject of public discussion. This could occur, for example, where the contents of a record touch upon a matter of great public importance that is not publicly known. Such a subject could still "rouse strong

interest or attention," but would have to be publicly disclosed in order to do so. The number of news articles that have, or have not, been written about the matter is not the only measure of this aspect of section 23.

Appellant's sur-reply representations

[351] In sur-reply, the appellant states that the $4 billion in SARP funds has been referred to by a former Minister of Finance as a "government subsidy." She also refers to the Panel's interim report and its view that "[SARP] . . . is public money belonging to the people of Ontario" which was spent by race track operators "unimpeded by accountability requirements." She says that the consultant "conducted financial reviews on Ontario horse race track operations books from years when slots money was still funding the sport."

[352] In her view, "[m]erely posting the lump sum awards [of transitional funding] each track received is not financial disclosure, as the affected parties contend." She characterizes that argument as "an attempt to deflect proper transparency with a tiny nugget of information."

[353] She states that "the public interest should also override confidentiality agreements." Specifically:

> In this case, confidentiality agreements were made to protect a desperate set of horse track racing operators who urgently needed taxpayer handouts to survive. This situation tramples the public's right to examine information regarding how taxpayer money was gifted to struggling businesses.
>
> . . . [The appellant's newspaper's] wide audience would benefit from overdue financial transparency regarding Ontario race track operators who believe they are entitled to cloak their long-time use of public funds in secrecy.
>
> . . .
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> As to not providing "benchmarks" regarding salary disclosures, the affected parties ought to have known that information was not available. There was widespread secrecy surrounding race track operator salaries, compensation packages and in some cases, profit sharing, since 1998.

[354] To the extent that her remarks can be taken as a general assertion that all public subsidies or other support for industry automatically requires the disclosure of information that could damage the recipient's competitive position or other commercial interests protected by section 17 of the *Act*, they are inconsistent with the scheme of section 23. Where a compelling public interest is established, it must be balanced against the purpose of exemptions named in section 23 that would otherwise apply.

Analysis

[355] 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.[121]

[356] 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.

[357] 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.

[358] 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 in the use of SARP money or the cancellation of the program.

[359] The existence of another public process or forum for addressing the public interest can be significant in assessing whether section 23 applies.[122] 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.

[360] 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

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

recommended transitional funding.

[361] 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."[123]

[362] As well, the allegation that affected party 1 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.

[363] 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.

[364] 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. With respect to the public interest in transparency regarding the use of transition funding by racetracks, I find that it 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.

[365] 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.

[366] 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 parties' commercial and financial information (their "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 parties' 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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[123] *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.

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

THE EFFECT OF CONSENT BY TWO AFFECTED PARTIES

[368] As noted above, two of the affected parties have consented to the disclosure of information about them in the records. One of these parties consented to disclosure in full. The other indicated verbally that it consents to full disclosure, but its consent form states that it consents to "partial release" without specifying which information should, its view, continue to be withheld.

[369] These consents can only affect the application of section 17(1). Information that is exempt under other sections of the *Act* is not affected by these consents.

[370] In the order provisions that follow, I will order the ministry to disclose the information in the records pertaining to the affected party who consented in full, subject to the severance of information about that party that is exempt under provisions other than section 17(1). With respect to the other affected party, whose consent form refers to "partial" disclosure, I will order the ministry to contact that party and invite it to clarify its position. If that party consents to disclosure of the information about it, then such information, excluding what is otherwise exempt, should also be disclosed.

ORDER:

1. I uphold the ministry's decision to apply the exemption in section 13(1) to portions of records 1-13, 14-17 and 18-30 as indicated in Appendix A to this order. I also uphold the ministry's decision to apply the exemption in section 13(1) to records 31-41 in their entirety.

2. I uphold the ministry's decision to apply the exemption in section 12(1) to portions of records 14-17 as indicated in Appendix A to this order.

3. I uphold the ministry's decision to apply the exemption in section 17(1)(a) to portions of records 1-13 as indicated in Appendix A to this order, and to records 31-41 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 rule on that exemption claim.

5. I order the ministry to contact the relevant affected party and determine whether or not it contents to disclosure of the information that is highlighted in orange on the copies of pages 7-6, 7-7, 7-8 and 7-14 that are being provided to the ministry with this order, within twenty-one days after the date of this order. But for the consent, this information would be exempt under section 17(1) but not under any other exemption that has been claimed for it. This information pertains to the party whose consent form indicated consent to "partial" disclosure although it had provided verbal consent to full disclosure during mediation. To the extent that this affected party consents, this information is to be disclosed with the other information disclosed under Order Provision 6, below. The same information pertaining to the other affected party who consented to full disclosure is not highlighted, and will be ordered disclosed.

6. I order the ministry to disclose all non-exempt information in the records to the appellant no later than **April 1, 2016** and no earlier than **March 29, 2016.** The pages to be disclosed in full are indicated by a "D" notation in the fifth column of Appendix A, and pages to be disclosed in part are indicated by a "P" in that same column. I am providing highlighted copies of all pages with a "P" notation to the ministry with this order. On those pages, the information highlighted in yellow is not to be disclosed.

Original Signed by: February 24, 2016

John Higgins
Adjudicator

APPENDIX A

ORDER PO-3578

APPEAL PA13-494

INDEX OF RECORDS WITH FINDINGS

Page Number(s)	s. 12(1)	s. 13(1)	s. 17(1)(a)	Disclose in full (D), Disclose in Part (P) or withhold in full (W)
1-1 to 1-5				D

Page Number(s)	s. 12(1)	s. 13(1)	s. 17(1)(a)	Disclose in full (D), Disclose in Part (P) or withhold in full (W)
1-6		Part	All	W
1-7 and 1-8			All	W
1-9				D
1-10 and 1-11		All	All	W
1-12				D
1-13		Part	Part	P
1-14				D
2-1				D
2-2		Part	Part	P
2-3 to 2-5				D
2-6		Part	All	W
2-7 and 2-8			All	W
2-9				D
2-10 to 2-13		All	All	W
2-14		Part	All	W
2-15		All	All	W
2-16				D
2-17		Part	Part	P
2-18				D
3-1				D

Page Number(s)	s. 12(1)	s. 13(1)	s. 17(1)(a)	Disclose in full (D), Disclose in Part (P) or withhold in full (W)
3-2		Part		P
3-3 to 3-5				D
3-6		Part	Part	P
3-7 and 3-8			Part	P
3-9				D
3-10 to 3-13		All		W
3-14 and 3-15		Part		P
3-16		All		W
3-17				D
3-18		Part		P
3-19				D
4-1				D
4-2		Part	Part	P
4-3 to 4-5				D
4-6		Part	All	W
4-7 and 4-8			All	W
4-9				D
4-10 to 4-15		Part	All	W
4-16		All	All	W
4-17		Part	All	W

Page Number(s)	s. 12(1)	s. 13(1)	s. 17(1)(a)	Disclose in full (D), Disclose in Part (P) or withhold in full (W)
4-18		All	All	W
4-19				D
4-20		Part	Part	P
4-21				D
5-1				D
5-2		Part	Part	P
5-3 to 5-5				D
5-6		Part	All	W
5-7 and 5-8			All	W
5-9				D
5-10 to 5-13		All	All	W
5-14		Part	All	W
5-15 and 5-16		All	All	W
5-17				D
5-18		Part	Part	P
5-19				D
6-1				D
6-2		Part	Part	P
6-3 to 6-5				D
6-6		Part	All	W

Page Number(s)	s. 12(1)	s. 13(1)	s. 17(1)(a)	Disclose in full (D), Disclose in Part (P) or withhold in full (W)
6-7 and 6-8			All	W
6-9				D
6-10 to 6-15		All	All	W
6-16				D
6-17		Part	Part	P
6-18				D
7-1				D
7-2		Part		P
7-3 to 7-5				D
7-6		Part	Part	P (Ask affected party whether it consents to disclose portions with orange highlighting.)
7-7 and 7-8			Part	P (Ask affected party whether it consents to disclose portions with orange highlighting.)
7-9				D

Page Number(s)	s. 12(1)	s. 13(1)	s. 17(1)(a)	Disclose in full (D), Disclose in Part (P) or withhold in full (W)
7-10 to 7-13		All		W
7-14		Part		P (Ask affected party whether it consents to disclose portions with orange highlighting.)
7-15 and 7-16		All		W
7-17				D
7-18		Part		P
7-19				D
8-1				D
8-2		Part	Part	P
8-3 to 8-5				D
8-6		Part	All	W
8-7 and 8-8			All	W
8-9				D
8-10 to 8-13		All	All	W
8-14 and 8-15		Part	All	W
8-16		All	All	W
8-17				D

Page Number(s)	s. 12(1)	s. 13(1)	s. 17(1)(a)	Disclose in full (D), Disclose in Part (P) or withhold in full (W)
8-18		Part	Part	P
8-19				D
9-1				D
9-2		Part	Part	P
9-3 to 9-5				D
9-6		Part	All	W
9-7 and 9-8			All	W
9-9				D
9-10 to 9-13		All	All	W
9-14 and 9-15		Part	All	W
9-16		All	All	W
9-17				D
9-18		Part	Part	P
9-19				D
10-1				D
10-2		Part	Part	P
10-3 to 10-5				D
10-6		Part	All	W
10-7 and 10-8			All	W
10-9				D

Page Number(s)	s. 12(1)	s. 13(1)	s. 17(1)(a)	Disclose in full (D), Disclose in Part (P) or withhold in full (W)
10-10 to 10-13		All	All	W
10-14		Part	All	W
10-15		All	All	W
10-16				D
10-17		Part	Part	P
10-18				D
11-1				D
11-2		Part	Part	P
11-3 to 11-5				D
11-6		Part	All	W
11-7 and 11-8			All	W
11-9				D
11-10 to 11-13		All	All	W
11-14 and 11-15		Part	All	W
11-16		All	All	W
11-17				D
11-18		Part	Part	P
11-19				D
12-1 to 12-5				D
12-6		All	All	W

Page Number(s)	s. 12(1)	s. 13(1)	s. 17(1)(a)	Disclose in full (D), Disclose in Part (P) or withhold in full (W)
12-7			All	W
12-8				D
12-9			All	W
12-10 and 12-11		Part	All	W
12-12 to 12-16		All	All	W
12-17				D
12-18		All	All	W
12-19 and 12-20		Part	All	W
12-20		All	All	W
12-22				D
12-23 to 12-27		All	All	W
12-28				D
13-1		Part	Part	P
13-2				D
13-3 and 13-4			All	W
13-5				D
13-6 and 13-7			All	W
13-8 and 13-9		All	All	W
13-10				D

Page Number(s)	s. 12(1)	s. 13(1)	s. 17(1)(a)	Disclose in full (D), Disclose in Part (P) or withhold in full (W)
13-11			All	W
13-12 and 13-13		Part	All	W
13-14		All	All	W
13-15		Part	All	W
13-16		All	All	W
13-17		Part	All	W
13-18		All	All	W
13-19		Part	All	W
13-20		All	All	W
13-21		Part	All	W
13-22		All	All	W
13-23		Part	All	W
13-24		All	All	W
13-25		Part	All	W
13-26		All	All	W
13-27		Part	All	W
13-28		All	All	W
13-29				D
13-30		Part	All	W
13-31				D

Page Number(s)	s. 12(1)	s. 13(1)	s. 17(1)(a)	Disclose in full (D), Disclose in Part (P) or withhold in full (W)
13-32 to 13-35		Part	All	W
13-36				D
14-1		All		W
14-2 and 14-3	Part	Part		P
14-4		All		W
15-1	Part	Part		P
15-2		Part		P
15-3	Part	All		W
16-1	Part	Part		P
16-2		Part		P
16-3	Part	All		W
17-1	Part	Part		P
17-2		Part		P
17-3	Part	All		W
18-1 to 23-2		Part		P
24-1 and 24-2		Part		P
24-3 to 24-6		All		W
25-1 and 25-2		Part		P
25-3 to 25-7		All		W
26-1 and 26-2		Part		P

Page Number(s)	s. 12(1)	s. 13(1)	s. 17(1)(a)	Disclose in full (D), Disclose in Part (P) or withhold in full (W)
26-3 to 26-7		All		W
27-1 and 27-2		Part		P
27-3 to 27-6		All		W
28-1 and 28-2		Part		P
28-3 to 28-6		All		W
29-1 and 29-2		Part		P
29-3 to 29-7		All		W
30-1 and 30-2		Part		P
30-3 to 30-6		All		W
31-1 to 41-1		All	All	W