Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3579

Appeal PA14-101

Ontario Lottery and Gaming Corporation

February 24, 2016

Summary: The appellant sought access to a lease agreement between a racetrack operator and the OLG. The OLG disclosed the vast majority of the agreement to the appellant but takes the position that portions of the agreement qualify for exemption under section 17(1) (third party information) or 18(1)(c) and (d) (economic and other interests). The adjudicator finds that the third party information exemption does not apply to the agreement as it cannot be said that the third party "supplied" the withheld information to the OLG for the purposes of section 17(1). However, these same portions of the agreement are found to qualify for exemption under sections 18(1)(c) and (d). As the adjudicator found that the public interest override under section 23 does not apply, the appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1), 18(c), 18(d), and 23.

BACKGROUND OF APPEAL:

[1] In 2012, the Province of Ontario announced that it was ending its funding of the Ontario Lottery and Gaming Corporation Slots At Racetracks program, effective March 31, 2013. Until March 31, 2013, the Ontario Lottery and Gaming Corporation operated slot facilities at Ontario racetracks under site holder agreements.

[2] In order for the OLG to continue to conduct and manage its slot machine

operations beyond the March 31, 2013 expiration of the program, it commenced negotiations with 14 racetracks to enter into lease agreements.[1]

OVERVIEW:

[3] The appellant submitted a request to the Ontario Lottery and Gaming Corporation (the OLG) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of a lease between the OLG and a company which owns a racetrack (the third party).

[4] The OLG located a copy of the lease and contacted the third party pursuant to the notification provisions under section 28(1) of the *Act*. The third party provided written submissions to the OLG objecting to the release of some of the information to the appellant.[2]

[5] After considering the third party's objections, the OLG issued a decision to the appellant granting partial access to the lease agreement. The OLG claimed that the withheld portions of the agreement were exempt under sections 17(1) (third party information) and 18(1) (economic and other interests) of the *Act*.

[6] The appellant appealed the OLG's decision to this office and a mediator was assigned to the appeal to explore settlement with the parties. The third party did not appeal the OLG's decision to this office.

[7] During mediation, the OLG issued a revised decision letter, notified the third party of its revised decision and subsequently disclosed additional records to the requester. Again, the third party did not appeal the OLG's decision. At the end of mediation, the appellant confirmed that he or she continues to seek access to the withheld information on pages 11, 12, 13, 14, 15, 49, 74 and 75 of the agreement.

[8] No further mediation was possible and the appeal was transferred to the adjudication stage of the appeals process in which an adjudicator conducts an inquiry under the *Act*. During the inquiry stage of this appeal, the OLG, third party and appellant provided representations to this office which were exchanged in accordance with this office's confidentiality criteria.

[9] In this order, I find that the withheld portions of the agreement qualify for

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[1] *OLG Annual Reports*, 2013-2014 and 2012-2013.

[2] During the request stage, the third party provided a highlighted copy of the record to the OLG proposing redactions to pages 1-5, 7, 9-19, 31, 34-44, 46-49, 52-54, 57-61, 65-66, 72-77, 81-83, and 85-88. The highlighted copy of the record provided by the third party identifies additional portions of the record than what was identified by the OLG. However, the third party did not appeal the OLG's access decisions to this office. As a result, the issue before me is only whether the remaining undisclosed portions of the agreement qualify for exemption under sections 17(1), 18(1)(c) and/or (d).

exemption under sections 18(1)(a) and (c).

RECORDS:

[10] The information at issue in this appeal is the withheld portions of a lease between the OLG and third party, dated April 1, 2013, located on pages 11, 12, 13 (entire page), 14, 15, 49, 74 and 75.

ISSUES:

A. Does the mandatory third party information exemption at section 17(1) apply to the withheld information?

B. Does the discretionary exemption at sections 18(1)(c) and (d) apply to the withheld information?

C. Did the OLG properly exercised its discretion under sections 18(1)(c) and (d)? If so, should this office uphold the exercise of discretion?

D. Does the public interest override at section 23 apply to the portions of the record found exempt?

DISCUSSION:

A. Does the mandatory third party information exemption at section 17(1) apply to the withheld information?

[11] The OLG and the third party take the position that the withheld information in the lease agreement qualifies for exemption under section 17(1). The third party's representations specify that section 17(1)(a) applies to the withheld information. The OLG did not make representations on this issue claiming that the third party was in a better position to do so.

[12] Section 17(1)(a) reads:

> 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 prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization.

[13] Section 17(1) is designed to protect the confidential "informational assets" of

businesses or other organizations that provide information to government institutions.[3] 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.[4]

[14] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b) and/or (c) of section 17(1) will occur.

Part 1: type of information

[15] The third party submits that the withheld information contains commercial and/or financial information. The third party states that the lease "contains confidential commercial and financial information about [its] business and operations in Ontario". The third party also submits that the withheld information contains specific payment information it is to receive from the OLG. The appellant does not dispute that the record contains financial and/or commercial information. Commercial and/or financial information has been discussed in prior orders, as follows:

> *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.[5] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[6]
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> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this

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[3] *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.*).
[4] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[5] Order PO-2010.
[6] Order P-1621.

> type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[7]

[16] Having regard to the third party's submissions, I am satisfied that the record contains "commercial information" and/or "financial information" within the meaning of that term defined by this office. In making my decision, I reviewed the lease agreement in question and note that it contains details about the contractual arrangement between the OLG and the third party regarding the amounts of monies the OLG is to pay the third party to lease its premise.

[17] Accordingly, I find that the first part of the three-part test has been met.

Part 2: supplied in confidence

Supplied

[18] 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.[8]

[19] 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.[9]

[20] 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.[10]

[21] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[11]The immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements,

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[7] Order PO-2010.
[8] Order MO-1706.
[9] Orders PO-2020 and PO-2043.
[10] This approach was approved by the Divisional Court in *Boeing Co., cited above, and in Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).
[11] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

underlying fixed costs and product samples or designs.[12]

Representations of the parties

[22] The third party submits that it directly supplied the commercial and financial information at issue to the OLG. The third party also submits that its representatives "negotiated the Lease in confidence with the OLG". In support of this position, the third party states:

> The financial information provided is not the type of information provided by [the third party] to other parties in the ordinary course. Furthermore, in our submission, the financial information and the terms of the Lease were intended to be, and was, prepared in confidence.

[23] The appellant's submissions did not specifically address this issue.

Decision and analysis

[24] As noted above, this office's approach to the "supplied" test and government contracts has been consistently upheld by the court. 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.[13]

[25] Adjudicator Catherine Corban's comments in Order MO-3175 summarize the desire of the courts to grant access to information contained in government contracts:

> … it is well established that the agreed-upon essential terms of a contract or agreement are considered to be the product of a negotiation process and not "supplied" even when "negotiation" amounts to acceptance of the terms proposed by the third party [See Orders PO-2384, PO-2497 (upheld in *CMPA)* and PO-3157]. In Order MO-1706, Adjudicator Bernard Morrow stated:
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> > …[T]he fact that a contract is preceded by little negotiation, or that the contract substantially reflects the terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1). The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion.

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[12] *Miller Transit*, above at para. 34.

[13] This approach was approved by the Divisional Court in *Boeing Co., cited above, and in Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).

> Also … the Divisional Court has affirmed this office's approach with respect to the application of section 10(1) to negotiated agreements and specifically confirmed in *Miller Transit* and *Aecon Construction* that the approach is consistent with the intent of the legislation, which recognizes that public access to information contained in government contracts is essential to government accountability for expenditures of public funds.

[26] For the purposes of this appeal, I adopt this office's approach to section 17(1) which has been repeatedly upheld by the Divisional Court, and find that the lease agreement at issue is a product of the negotiation process between the third party and the OLG.

[27] Finally, I considered whether either the "inferred disclosure" and "immutability" exceptions apply to the circumstances of this appeal. The third party did not provide specific representations on whether the "inferred" disclosure exception applies. Accordingly, there is no evidence before me suggesting that disclosure of the lease agreement would reveal, or permit the drawing of accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the appellant to the city.[14]

[28] The "immutability" exception applies to information that is immutable or is not susceptible of change. Examples are financial statements, underlying fixed costs and product samples or designs.[15] In my view, the commercial and/or financial information at issue in this appeal does not contain this type of information; nor did the third party's representations specifically address this issue.

[29] Accordingly, I find that the withheld information in this appeal does not fit the "inferred disclosure" or "immutability" exceptions. As a result, I find that the lease agreement reflects the end result of the third party's and OLG's negotiations and am satisfied that this record cannot be said to have been "supplied" to the OLG for the purposes of section 17(1).

[30] As all three parts of the section 17(1) test must be met, it is not necessary for me to also review the confidentiality requirement of the second part or the harms contemplated in the third part. I find that section 17(1) does not apply to the withheld information. However, I will go on to determine whether these portions of the lease agreement qualify for exemption under sections 18(1)(c) and (d) (economic and other interests).

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[14] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[15] *Miller Transit*, above at para. 34.

B. Does the discretionary exemption at sections 18(1)(c) and (d) apply to the withheld information?

[31] The OLG disclosed the vast majority of the lease agreement to the appellant. However, the OLG submits that "the withheld information is highly sensitive and exempt from the right of public access because it is directly relevant to ongoing negotiations". The OLG claim that the exemptions under sections 18(1)(c) and (d) apply. These sections read:

> 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; and
> >
> > (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.

[32] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.[16]

[33] For sections 18(1)(c) and (d) to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it 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.[17]

[34] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 18 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[18].

[35] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial

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[16] Toronto: Queen's Printer, 1980.
[17] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[18] Order MO-2363.

interests.[19]

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

[36] 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.[20]

[37] This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[21]

[38] Section 18(1)(d) is intended to protect the broader economic interests of Ontarians.[22]

Representations of the parties

[39] The OLG submits that disclosure could reasonably be expected to prejudice its economic interests or competitive position. The OLG also submits that disclosure could reasonably be expected to be injurious to the Province's financial interests.

[40] The OLG submits that with the end of the Slots At Racetrack program, it commenced a "new way of supporting gaming at Ontario racetracks", which included:

- OLG becoming the tenant at racetrack facilities under lease agreements with racetrack owners;
- OLG to select and manage gaming operators to operate the gaming facilities; and
- Gaming operators to assume the leases, and any liability for rent payable to the racetrack owner.

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[19] See Orders MO-2363 and PO-2758.
[20] Orders P-1190 and MO-2233.
[21] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.
[22] 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.

[41] With respect to the lease agreement at issue in this appeal, the OLG submits:

- It has a mandate to maximize profits, which publicly funds health care, education and amateur sports in the province in addition to employing approximately 17,000 people across the province;
- Negotiations are currently underway with the owners of other racetracks in Ontario; and
- The specific contractual term withheld from the appellant was the subject of negotiation between the OLG and the third party and is anticipated to arise again when the OLG negotiates lease agreements with other racetrack owners.

[42] The appellant's representations focus predominantly on the public interest in certain aspects of the lease. In this regard, the appellant submits that the he filed an access request to obtain information about "transfer clauses" in the lease agreement which would allow the owner/operator of an existing racetrack to move operations to another location in the province. The appellant also submits that "…the public should have the right to know where businesses as highly divisive as Casinos are going to be located". In support of his position, the appellant provided copies of several articles and press releases which discuss the possibility of the relocation of the third party's racetrack to a downtown gaming facility.

[43] Throughout his submissions, the appellant asks questions such as "why have relocation clauses been included in the OLG leases that allow operators to abandon racetracks at their whim?". The appellant states that a "casino being moved affects the quality of life [of] residents, affects taxes and affects the thousands of rural industries, farmers and individuals that rely on horse racing to make a living". Finally, the appellant submits that the third party's racetrack is a positive influence in the community and that his concerns about the lease terms relate solely to the location of the racetrack.

[44] The OLG takes the position that there is no express provision in the agreement for early termination and that the portions of the agreement which could impact a transfer have already been disclosed to the appellant. In support of this position, the OLG states:

> OLG has provided the [appellant] with information about the term of the lease….
>
> OLG is bound to this term, and any private operator who assumes the lease will be bound to this term, which imposes a significant financial disincentive to re-location. Despite statements attributed to [the] OLG in media statements appended to the [appellant's] submissions, this is the information in the lease agreement that has a direct bearing on the re-location of the [third party's] gaming facility.

Decision and analysis

[45] Having regard to the submissions of the parties, I am satisfied that disclosure of the withheld information could reasonably be expected to prejudice the OLG's economic interests or competitive position. I am also satisfied that disclosure of the withheld information could reasonably be expected to be injurious to the Government of Ontario's financial interests. In my view, disclosure of the withheld information could reasonably be expected to weaken the OLG's negotiating position in securing future lease agreements with other racetrack owners. At the time the OLG provided its reply representations, it advised that only 7 of the 14 lease agreements had been negotiated.

[46] In making my decision, I also carefully reviewed the contractual provisions on pages 11, 12, 13 (entire page), 14, 15, 49, 74 and 75 on the lease agreement and am satisfied that they relate to a contractual term which may or may not be included in the other lease agreements. In my view, disclosure of this contractual term could reasonably be expected to the lead to the harms contemplated in sections 18(1)(c) and (d).

[47] Accordingly, subject to my decision regarding the OLG's exercise of discretion, I find that the withheld information on pages 11, 12, 13 (entire page), 14, 15, 49, 74 and 75 qualifies for exemption under sections 18(1)(c) and (d).

C. Did the OLG properly exercised its discretion under sections 18(1)(c) and (d)? If so, should this office uphold the exercise of discretion?

[48] The section 18(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.

[49] 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.

[50] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[23] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[23] Order MO-1573.

[51] The appellant did not specifically address the issue of whether the OLG properly exercised its discretion under sections 18(1)(c) and (d). Having regard to the OLG's evidence, I am satisfied that the OLG properly exercised its discretion and in doing so took into account relevant considerations such as the sensitive nature of the information at issue along with the public's interest in the negotiated lease agreement. I am also satisfied that the OLG did not exercise its discretion in bad faith or for an improper purpose, not is there any evidence that they took into account irrelevant considerations.

[52] In making my decision, I note that the OLG considered that one of the purposes of the *Act* includes the principle that information should be available to the public. I also note that the vast majority of the lease agreement has been disclosed to the appellant, and the OLG only applied the exemption to discreet portions of the lease.

[53] Accordingly, I find that the OLG properly exercised its discretion to withhold certain provisions from the lease agreement I found exempt under sections 18(1)(c) and (d).

D. Does the public interest override at section 23 apply to the portions of the record found exempt?

[54] 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.

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

[56] 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.[24]

[57] Throughout his representations, the appellant maintains that there is a public interest in the disclosure of any "transfer clauses" in the agreement. The appellant submits that he filed an access request to obtain records which would shed light on "relocation specifics" hidden in the lease agreement.

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[24] Order P-244.

[58] The OLG submits that the public interest concerns identified by the appellant have no connection to the actual information at issue in this appeal.

[59] As previously stated, the OLG takes the position that the portions of the agreement which could potentially affect a transfer have already been disclosed to the appellant.

Decision and analysis

[60] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[25] 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.[26]

[61] A public interest does not exist where the interests being advanced are essentially private in nature.[27] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[28]

[62] A public interest is not automatically established where the requester is a member of the media.[29]

[63] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[30] Any public interest in *non*-disclosure that may exist also must be considered.[31] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[32]

[64] 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.

[65] In this order, I found that the exemption at sections 18(1)(c) and (d) apply to pages 11, 12, 13 (entire page), 14, 15, 49, 74 and 75 of the lease agreement. Having regard to the submissions of the parties, and the record itself, I agree with the OLG's

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[25] Orders P-984 and PO-2607.
[26] Orders P-984 and PO-2556.
[27] Orders P-12, P-347 and P-1439.
[28] Order MO-1564.
[29] Orders M-773 and M-1074.
[30] Order P-984.
[31] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[32] Orders PO-2072-F, PO-2098-R and PO-3197.

position that these portions of the agreement do not respond to the public interest considerations raised by the appellant.

[66] As I have found that the information at issue in this appeal does not address the public interest concerns of the appellant, I find that public interest override at section 23 does not apply in the circumstances of this appeal and dismiss this appeal.

ORDER:

The appeal is dismissed.

Original Signed by:	February 24, 2016
Jennifer James Adjudicator	