Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3637

Appeal PA13-510

Alcohol and Gaming Commission of Ontario

July 25, 2016

Summary: The appellant seeks access from the AGCO for an electronic copy of all corrective action reports (CARs) issued to gaming sites since January 1, 2007. The AGCO denied the appellant access to the responsive records, in full, claiming the application of the discretionary exemptions in sections 13(1) (advice or recommendations), 14(1)(c), (i) and (2)(a) (law enforcement) and the mandatory exemptions in sections 17(1) (third party commercial information) and 21(1) (personal privacy) of the *Act*. The appellant appealed the AGCO's decision and claimed the application of the public interest override in section 23 to the records. In this order, the adjudicator finds that the records are exempt from disclosure under section 14(2)(a) and upholds the AGCO's decision to withhold them, in full.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 14(2)(a)

Orders and Investigation Reports Considered: M-544, P-136, PO-1959, PO-3034, PO-3341

OVERVIEW:

[1] The appellant made a request to the Alcohol and Gaming Commission of Ontario (the AGCO) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to an electronic copy of all corrective action reports (CARs) issued to gaming sites since January 1, 2007.

[2] After locating responsive records, the AGCO issued a decision denying the

appellant access to them, in full. The AGCO advised the appellant that it withheld the responsive records under the discretionary exemptions in sections 13(1) (advice or recommendations), 14(1)(c) (reveal investigative techniques and procedures), (i) (security) and (2)(a) (law enforcement report) and the mandatory exemptions in sections 17(1) (third party commercial information) and 21(1) (personal privacy) of the *Act*. The AGCO also identified some information as not responsive to the appellant's request.

[3] The appellant appealed the AGCO's decision. In her appeal, the appellant raised the possible application of the public interest override in section 23 of the *Act* to the records.

[4] During mediation, the AGCO prepared an index of records and it was shared with the appellant. After reviewing the AGCO's index, the appellant confirmed that she pursues access to all of the records with the exception of the information withheld under the personal privacy exemption in section 21(1).

[5] Mediation did not resolve the appeal and the file was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. This office originally sent a Notice of Inquiry to the AGCO, inviting it to make submissions on the issues in this appeal. In that Notice of Inquiry, the adjudicator originally assigned to this appeal advised the parties that she would consider the application of the sections 13(1) and 14 exemptions before determining whether to seek the affected parties' representations on the application of the section 17(1) third party commercial information exemption. The AGCO submitted representations.

[6] The adjudicator then invited the appellant to submit representations in response to the Notice of Inquiry and the non-confidential portions of the AGCO's representations, which were shared with the appellant in accordance with *Practice Direction Number 7* of the IPC's *Code of Procedure*. The appellant submitted representations. The adjudicator then sought and received reply representations from the AGCO.

[7] The appeal was transferred to me. In the discussion that follows, I uphold the AGCO's decision to withhold the records under section 14(2)(a) of the *Act*.

RECORDS:

[8] In its index of records, the AGCO describes the records at issue as follows:

Record Numbers	Description	Exemption(s) claimed
1-30	Electronic Gaming Reports and attachments	13(1), 14(1)(c), 14(1)(i), 14(2)(a), 17(1) and 21(1) Some information also withheld as not responsive
31-92	Electronic Gaming Reports and attachments	13(1), 14(1)(c), 14(1)(i), 14(2)(a), 17(1) and 21(1)

93-525	Audit and Gaming Branch Reports	13(1), 14(1)(c), 14(1)(i), 14(2)(a), 17(1) and 21(1) Some information also withheld as not responsive
526	Gaming Monitoring System Printout	14(2)(a) and 21(1)

Based on my review of the records, I find that there are 32 distinct CARs at issue in this appeal. The CARs are numbered in the records as follows: 1-13, 14-30, 31-49, 50-63, 64-66, 67-92, 93-114, 115-124, 125-161, 162-176, 177-194, 195-202, 203-210, 211-224, 225-242, 243-266, 267-291, 292-302, 303-323, 324-347, 348-369, 370-379, 380-382, 383-402, 403-405, 406-426, 427-439, 440-445, 446-461, 462-478, 479-525 and 526.

ISSUES:

A. Does the discretionary exemption at section 14(2)(a) apply to the records?

B. Did the AGCO exercise its discretion under section 14(2)(a)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the discretionary exemption at section 14(2)(a) apply to the records?

[9] While the AGCO argues that sections 14(1)(c), (i) and (2)(a) apply to exempt the records from disclosure, due to my finding below, I will only consider the application of section 14(2)(a). Section 14(2)(a) states:

> (2) A head may refuse to disclose a record,
>
> > (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

[10] Section 14(4) of the *Act* provides an exception to section 14(2)(a). It reads as follows:

> Despite clause (2)(a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency where that agency is authorized to enforce and regulate compliance with a particular statute of Ontario.

[11] The term *law enforcement* is used in several parts of section 14 and is defined in section 2(1) as follows:

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b)

The term *law enforcement* has covered the following situations:

- a municipality's investigation into a possible violation of a municipal by-law that could lead to court proceedings[1]
- a police investigation into a possible violation of the *Criminal Code*[2]
- a children's aid society investigation under the *Child and Family Services Act* which could lead to court proceedings[3]
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997*[4]

This office has stated that *law enforcement* does not apply to the following situations:

- an internal investigation by the institution under the *Training Schools Act* where the institution lacked the authority to enforce or regulate compliance with any law[5]
- a Coroner's investigation or inquest under the *Coroner's Act*, which lacked the power to impose sanctions.[6]

[12] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[7]

Section 14(2)(a): Law enforcement report

[13] In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the institution must satisfy each part of the following three-part test:

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[1] Orders M-16 and MO-1245.
[2] Orders M202 and PO-2085.
[3] Order MO-1416.
[4] Order MO-1337-I.
[5] Order P-351, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.).
[6] Order P-1117.
[7] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

1. the record must be a report; and

2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.[8]

[14] The word *report* means "a formal statement or account of the results of the collation and consideration of information." Generally, results would not include mere observations or recordings of fact.[9] The title of a document does not determine whether it is a report, although it may be relevant to the issue.[10]

[15] As background, the AGCO states that it is a regulatory agency established pursuant to the *Alcohol and Gaming Regulation and Public Protection Act, 1996* and is tasked with administrating the *Gaming Control Act, 1992* (the *Gaming Control Act*) and other legislation. The AGCO states that its Board provides advice to the Attorney General on matters that fall within the AGCO's mandate.

[16] The AGCO states that within the AGCO there is a Bureau of the Ontario Provincial Police (OPP) which is comprised of OPP officers and AGCO civilian staff. The AGCO states that OPP officers carry out investigations of applicants and registrants and manage the inspection of licenced premises by civilian staff. The AGCO states that gaming is prohibited by the *Criminal Code of Canada* (the *Criminal Code*) as an indictable offence, subject to an exemption from the general prohibition against gambling which allows provincial governments to conduct and manage gambling. The Registrar of Alcohol and Gaming (the Registrar) is responsible for ensuring that gaming registrants are compliant with the *Criminal Code*, *Gaming Control Act* and *Liquor Licence Act*. The AGCO also asserts that the IPC recognizes the AGCO as a law enforcement institution.[11]

[17] The AGCO submits that a gaming license is permitted pursuant to the *Criminal Code* and *Gaming Control Act* in certain circumstances and not granted automatically. Further, the AGCO states that "a gaming investigation report is not a routine report".

[18] The AGCO submits that Records 1-525 consist of AGCO gaming enforcement or compliance reports each of which followed from various investigations into registrants' breaches of the *Gaming Control Act*. The AGCO submits that these investigations are *law enforcement matters* for the purposes of meeting the section 14 exemption because the OPP is an organization with an "undisputed law enforcement mandate". The AGCO submits that these reports contain the AGCO inspector's review, analysis, findings, conclusions and recommendations. With respect to Record 526, which is slightly different from the other records, the AGCO submits that this record is an AGCO

[8] Orders P-200 and P-324.
[9] Orders P-200, MO-1238 and MO-1337-I.
[10] Order MO-1337-I.
[11] See Orders PO-2796, PO-1889, P-1587 and P-1399.

gaming compliance monitoring system print-out detailing an AGCO inspection and OPP investigation of a breach by a registrant and the remedial actions taken by the registrant and subsequent consideration of the information by the AGCO. Given these circumstances, its role as a law enforcement institution and the records, the AGCO submits that all 526 records fall within the law enforcement report exemption in section 14(2)(a) of the *Act*.

[19] The appellant does not dispute that these records are law enforcement reports.

[20] I have reviewed the records at issue and considered the representations of the parties. In my view, the records clearly fall within the scope of the section 14(2)(a) exemption. Each CAR, which I identified in the Records portion above, constitutes a law enforcement report within the meaning of section 14(2)(a). Based on my review of the CARs, I find that they are related to an investigation or inspection conducted by the AGCO, which is an agency which has the function of enforcing and regulating compliance with a law, namely the *Gaming Control Act*. Further, I am satisfied that these reports were prepared in the course of law enforcement, inspections or investigations and constitute a formal statement or account of the results of the collation and consideration of information. Based on my review of the records, I find that the results do not include mere recordings of fact or observations.[12] Therefore, I find that the records at issue in this appeal consist of law enforcement reports within the meaning of section 14(2)(a) of the *Act*.

[21] I note that some of the CARs include various appendices as attachments to the reports. These appendices are directly referenced in the reports and appear to have been attached to the reports by the inspectors who authored them. Previous orders of this office have considered whether attachments to a report, or other documents contained in an investigation file, can be considered part of the report for the purpose of section 14(2)(a).

[22] In Order PO-1959, Assistant Commissioner Sherry Liang considered whether records contained in a Special Investigations Unit (SIU) file can collectively be considered a *law enforcement report* within the meaning of section 14(2)(a). Assistant Commissioner Liang stated:

> Essentially, the ministry's submission is that all of the records must be considered together for the purposes of the application of section 14(2)(a). I am unable to accept this submission, and I find that section 14(2)(a) requires consideration of whether *each* record at issue falls within that exemption. The ministry has enclosed copies of two prior orders of this office in support of its position. In Order P-1315, it appears that a group of records described as the SIU's final investigative report, and which included witness statements, expert reports, summaries of forensic testing and other evidence gathered in the course of the police investigation into an accident, was considered as one record and found as

[12] Orders 200 and P-324.

> a whole to constitute a 'report' for the purposes of section 14(2)(a). A similar approach was applied in order P-1418. More recently, however, in Order PO-1819, section 14(2)(a) was applied to each record which formed part of the SIU investigation file.
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> On my reading of these orders, it is clear that even in Order P-1315, there were a large number of records in the SIU investigation file which were considered separately by the adjudicator for the purposes of section 14(2)(a). Some of these records, such as interview notes, a motor vehicle accident report and vehicle examination and damage report, are similar to those before me which the ministry asserts form part of an overall SIU 'investigation brief.'
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> Order P-1418 is less easily reconciled with Order PO-1819, and with the approach I have taken in this order. I am satisfied that, if there is any inconsistency between the approaches in some of the orders in this area, the analysis in PO-1819 is more in keeping with the intent of this section in the *Act*. Although I find that Records 2 (the Report of the Director) meets the requirements of section 14(2)(a), it does not follow that all material which may have been gathered together, placed before and considered by the Director before arriving at his conclusions is also exempt, without further analysis. In this respect, I agree with the appellant that section 14(2)(a) does not provide a 'blanket exemption' covering all records which the Ministry views as constituting part of the SIU's 'investigative brief.'

This analysis was adopted in Order PO-3169, in which Adjudicator Catherine Corban considered the application of section 14(2)(a) to records that formed part of the SIU investigative brief for an incident.

[23] In light of the analysis set out in Order PO-1959 by Assistant Commissioner Liang, I have examined the records and considered whether each report and accompanying attachment would be exempt under section 14(2)(a). Generally, the attachments to the reports consist of discrete documents such as employment or witness statements, log book entries for equipment or surveillance, transaction reports from gaming centres and email correspondence relating to the incident under investigation.

[24] Based on my review of these records, I find that they are not analogous to the SIU investigation files considered by Assistant Commissioner Liang in Order PO-1959 and Adjudicator Corban in Order PO-3169. The SIU investigation files before the adjudicators in Orders PO-1959 and PO-3169 were voluminous and included a number of discrete documents that were produced independently. Rather, in the case before me, while most of the CARs consist of a covering report with a number of appendices, I find that these records are analogous to discrete SIU reports that were found to be *law enforcement reports*. The attachments or appendices to the covering reports in each record is explicitly referred to, summarized and relied on by the investigator in collating

and analyzing the information. To be more specific, I find that the following CARs are discrete law enforcement reports within the meaning of section 14(2)(a): 1-13, 14-30, 31-49, 50-63, 64-66, 67-92, 93-114, 115-124, 125-161, 162-176, 177-194, 195-202, 203-210, 211-224, 225-242, 243-266, 267-291, 292-302, 303-323, 324-347, 348-369, 370-379, 380-382, 383-402, 403-405, 406-426, 427-439, 440-445, 446-461, 462-478, 479-525 and 526.

[25] I find support for my finding in Adjudicator Laurel Cropley's comments in Order M-544 regarding attachments to a report:

> While it is possible that a "report" can include appendices or attachments as an **integral part** of the document, I am not satisfied that Record 3 was obtained by the Police or used in any way as part of their investigation or in the course of law enforcement general. Although indirectly related to information recorded in the Sudden Death Report, I find that the record is not integral to the formal accounting of the results of the collation and consideration of information. I find, therefore, that it is not a part of the Sudden Death Report as a unique and distinctive record, and section 8(2)(a) [the municipal equivalent to section 14(2)(a) of the *Act*] does not apply to it. [Emphasis added]

A similar approach was followed in Order PO-3341, where Adjudicator Steven Faughnan considered the application of section 14(2)(a) to a record as follows:

> I also am not satisfied that the one-page document can be integrated into the Case Coordinator's Analysis in such a way that it assumes the nature of a report under section 14(2)(a). There is no reference to this one-page document in the Case Coordination Analysis Form that the OIPRD provided to this office in the course of adjudication. Rather, it appears to me to be a stand-alone document. Accordingly, I find that part 1 of the test under section 14(2)(a) has not been met.

[26] Based on my review of the attachments to the reports, I find that they, unlike those considered in Orders M-544 and PO-3341, form an *integral part* of the documents at issue. The attachments are referred to and relied upon by the investigator who prepared the final reports. The reports refer explicitly to and rely on the appendices and the appendices form part of the formal accounting of the conclusions and findings of the investigators after the collation and consideration of the information contained in the attachments. Therefore, I find that the reports, including the attachments or appendices, are *law enforcement reports* within the meaning of section 14(2)(a).

[27] I will now consider whether the records at issue fall within the exception at section 14(4) of the *Act*.

Section 14(4): Routine inspection report

[28] The section 14(4) exception to the exemption in section 14(2)(a) of the *Act* is

designed to ensure public scrutiny of material relating to routine inspections and other similar enforcement mechanisms in such areas as health and safety legislation, fair trade practice laws, environmental protection schemes and many of the other regulatory schemes administered by the government.[13]

[29] Generally, *complaint driven* inspections are not *routine inspections*.[14]

[30] In her representations, the appellant submits that she seeks access to corrective action reports (CARs) issued to Ontario gaming sites since January 1, 2007. The appellant states that CARs are issued by the AGCO's Audit and Gaming Compliance Branch as part of routine gaming-related inspections. The appellant refers to the AGCO's 2012-2013 annual report which states that the "Audit and Compliance Branch conducts compliance inspections and audits at casinos and slot machine facilities, both scheduled and ad hoc, to ensure compliance with the [*Gaming Control Act*], [*Liquor Licence Act*], Rules of Play, approved policies, terms of conditions or registrations, and anti-money laundering and terrorist financing measures."[15] The existence of discretion to inspect or not to inspect is an important but not necessarily determinative factor in deciding whether an inspection is *routine*.[16]

[31] The appellant submits that it is "clear" that these inspections and the CARs that are issued as a result fall under section 14(4) of the *Act*, which requires a head to "disclose a record that is a report prepared in the course of routine inspections by an agency where that agency is authorized to enforce and regulate compliance with a particular statute of Ontario." The appellant refers to Order PO-3034, in which the adjudicator noted that section 14(4) "is designed to ensure public scrutiny of material relating to routine inspections and other similar enforcement mechanisms" in areas such as health and safety legislation, fair trade practice laws and other regulatory schemes administered by the government. The appellant submits that the responsive records are part of routine inspections and are not complaint-driven reports.

[32] In response to the appellant's representations, the AGCO provides some additional background to the CARs. The AGCO states that gaming sites are required to prepare and file an Internal Control Manual (ICM) approved by the AGCO, which sets out the internal controls, including financial, operation and security controls unique to that particular gaming site. The AGCO states that each registrant is required to self-report if they become aware of a breach of a provision set out in their ICM. The AGCO adds that the ICM customized for each registrant forms, in part, a unique approach that the AGCO employs in formulating a plan for the monitoring of that specific gaming site, over and above investigations which may arise from complaints or specific incidents, whether self-disclosed by the registrant or otherwise.

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[13] Order PO-1988.
[14] Orders P-136 and PO-1988.
[15] Alcohol and Gaming Commission of Ontario, "Annual Report 2012/2013" (Ontario: AGCO, 2013). Online Available at: http://www.agco.on.ca/pdfs/en/ann_rpt/2012_13Annual.pdf
[16] Orders P-480, P-1120 and PO-1988.

[33] The AGCO submits that the CARs are not issued to Ontario gaming sites and are not generated as part of routine gaming-related inspections. Rather, the AGCO submits that the CARs are law enforcement documents and are reports prepared in the course of law enforcement investigations. The AGCO submits that the records are confidential AGCO internal reports, "virtually all of which arise from complaints or are triggered by specific incidents which are either self-reported by the registrant, as required, or uncovered by an AGCO investigation which followed a review by the AGCO into the registrant's records or activities." Further, as a result of each gaming site's customized ICM, the AGCO submits that each investigation or inspection employs a "unique approach to choosing the controls to review and therefore attendance by an AGCO inspector at a gaming site cannot be considered a routine inspection." The AGCO submits that the CAR forms the basis for potential disciplinary action by the AGCO, including monetary penalties, suspension of the gaming site's registration/license and or other sanctions. The AGCO asserts that these reports do not arise from a routine inspection.

[34] Finally, the AGCO submits that Order PO-3034 is distinguishable from the circumstances of this appeal. In Order PO-3034, Adjudicator Steven Faughnan found that a review of an applicant during the renewal of an existing registration constituted a routine report when the investigation was not conducted pursuant to a complaint or a specific concern. The AGCO asserts that the CARs at issue in this appeal were generated when an investigation is carried out pursuant to a complaint and/or a specific concern. As well, the AGCO submits that the CARs are customized, unique investigations or inspections of a specific gaming site and were not prepared as a result of routine inspections.

[35] I have reviewed the CARs at issue and agree with the AGCO that these records are not routine inspection reports. In Order P-136, former Commissioner Sidney B. Linden explained that:

> … it is the nature of the inspection itself which should be considered in deciding whether it falls within the scope of subsection 14(4). As far as "complaint driven" inspections (such as the one that generated the records at issue in this appeal) are concerned, the components of these types of investigations would vary depending on the nature of the information supplied by the complainant, and, in my view, they could not be said to be "routine".

[36] This analysis was adopted in later orders of this office, including Orders PO-1988 and PO-3034. I adopt this analysis for the purposes of this appeal. Based on my review of the records at issue in this appeal, I find that they were clearly created in response to a specific incident or complaint that was logged by the gaming site. None of the investigations or inspections that were subject to the CARs were conducted as a part of a routine inspection or renewal process as considered by Adjudicator Faughnan in Order PO-3034. Rather, each investigation that was the subject of the CARs was initiated in response to a specific incident. As a result, I find that the CARs at issue in this appeal

were not prepared in the course of routine inspections by the AGCO.

[37] Accordingly, I find that section 14(4) does not apply in the circumstances of this appeal and the records are, therefore, exempt from disclosure under section 14(2)(a) of the *Act*, subject to my consideration of whether the AGCO properly exercised its discretion to apply that exemption.

Issue B: Did the AGCO exercise its discretion under section 14(2)(a)? If so, should this office uphold the exercise of discretion?

[38] After deciding that records or portions thereof fall within the scope of a discretionary exemption, an institution is obliged to consider whether it would be appropriate to release the records, regardless of the fact that they qualify for exemption. Section 14(2)(a) is a discretionary exemption, which means that the AGCO could choose to disclose the information, despite the fact that it may be withheld under the *Act*.

[39] In applying the exemption, the AGCO was required to exercise its discretion. On appeal, the Commissioner may determine whether the AGCO failed to do so. In addition, the Commissioner may find that the AGCO erred in exercising its discretion where it did so in bad faith or for an improper purpose; where it took into account irrelevant considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to the AGCO for an exercise of discretion based on proper considerations.[17] According to section 54(2) of the *Act*, however, I may not substitute my own discretion for that of the AGCO.

[40] As I upheld the AGCO's decision to apply section 14 to the records, I must review its exercise of discretion under that exemption.

[41] The AGCO submits that it properly exercised its discretion in withholding the records subject to the section 14(2)(a) exemption. The appellant did not make representations on the AGCO's exercise of discretion.

[42] Based on the AGCO's representations on the application of section 14(2)(a) and my review of the records, I am satisfied that the AGCO considered relevant factors in exercising its discretion and did not take into account irrelevant considerations. I am satisfied that the AGCO exercised its discretion properly and in good faith and I will not interfere with it on appeal. Therefore, I uphold AGCO's decision to exempt the records under section 14(2)(a) of the *Act*.

[43] Due to this finding, I do not need to consider whether the other exemptions claimed by the AGCO, namely sections 13, 14(1)(c) and (i) and 17(1), also apply to the records. Furthermore, I do not need to consider whether the AGCO properly withheld certain portions of the records as not responsive to the appellant's request. Finally, while the appellant raised the possible application of the public interest override in

[17] Order MO-1573.

section 23 of the *Act* to the records, section 23 of the *Act* does not apply to records that are exempt under section 14(2)(a). Therefore, I do not need to consider whether the public interest override applies to the records

[44] I dismiss the appellant's appeal.

ORDER:

I uphold the AGCO's decision to apply section 14(2)(a) of the *Act* to the records and dismiss the appeal.

Original Signed by: July 25, 2016

Justine Wai
Adjudicator