Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4122

Appeal PA18-00609

Ontario Cannabis Retail Corporation

March 19, 2021

Summary: The appellant submitted a request under the *Act* to the OCRC for any contracts, work orders, or architectural plans/concepts for a specific proposed Ontario Cannabis Store in Guelph. The OCRC denied access to the records, in full, on the basis of the mandatory exemption in section 17(1) (third party information) and the discretionary exemption in section 18(1) (economic and other interests). The appellant appealed and at the conclusion of the mediation, the remaining information at issue was certain information withheld in one record, the Lease.

In this order, the adjudicator finds that neither the section 17(1) nor the section 18(1) exemptions apply to the information at issue and she orders the OCRC to disclose it.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F31, sections 17(1) and 18(1).

Orders Considered: Orders PO-2720, PO-3579 and PO-2405.

OVERVIEW:

[1] When cannabis was legalized for recreational use in Canada, the Ontario government initially decided to establish a separate Crown corporation, the Ontario Cannabis Retail Corporation (OCRC), to operate an online store as well as several physical retail stores to sell recreational cannabis.[1] At some point later, the Ontario government

[1] This background is drawn from the OCRC and LCBO's representations.

decided that the OCRC would only operate an online store and that it would license private companies to operate physical retail stores (referred to below as "retail stores" or "physical retail stores," as distinct from online stores). By the time that the latter decision was made, the OCRC had already entered into leases to operate retail stores under the name, Ontario Cannabis Store. As will be explained in more detail below, the Liquor Control Board of Ontario (LCBO) assisted the OCRC with its leasing program for a short time. Due to the government's decision, the OCRC never operated any Ontario Cannabis Stores and the leases it entered into for such purposes were terminated.

[2] The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the OCRC for any contracts, work orders, or architectural plans/concepts for a specific proposed Ontario Cannabis Store in Guelph.

[3] The OCRC issued an access decision to the appellant denying him access to the records, in full. The OCRC withheld the records under the mandatory exemption in section 17(1) (third party information) and the discretionary exemption in section 18(1) (economic and other interests).

[4] The appellant appealed the OCRC's decision.

[5] During mediation, the OCRC notified a number of affected third parties of the request, seeking their representations regarding the potential disclosure of the responsive records. After reviewing the affected parties' representations, the OCRC issued a revised access decision granting the appellant partial access to the records. The OCRC continued to withhold portions of the records from disclosure under sections 17(1) and 18(1) of the *Act*.[2]

[6] The appellant continued to seek access to the remaining withheld information in one record, the Offer to Lease (referred to below as the "Lease").[3] Although most of the Lease was disclosed, the following information was withheld: the minimum rent portion, the operating costs portion, the realty taxes portion, and the early termination clause.

[7] The appeal transferred to the adjudication stage of the appeal process and an IPC adjudicator commenced an inquiry that involved inviting and receiving representations from the appellant, the OCRC and the lessor as an affected party (referred to as the third party in this order).

[8] The OCRC's representations relied on and included submissions made by the LCBO and the LCBO was added as a second affected party. Representations were shared amongst the parties in accordance with this office's *Code of Procedure* and *Practice Direction 7.*

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[2] The IPC mediator also negotiated full resolutions to third party appeals that were filed in relation to the request.

[3] Identified in the index as Record 3.

[9] In this order, I find that neither the section 17(1) nor the section 18(1) exemptions apply to the withheld information and I order the OCRC to disclose it to him.

RECORDS:

[10] The information remaining at issue consists of the following withheld portions of the Lease:

- Minimum rent information (page 4)
- Operating costs information (page 5)
- Realty taxes information (page 7)
- Early termination clause (page 13)

ISSUES:

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

B. Does the discretionary exemption for economic and other interests at sections 18(1)(b) or (c) apply to the withheld information?

DISCUSSION:

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

[11] The OCRC asserts that the harm-based exemption at section 17(1) applies and it defers to the representations of the third party to specify those harms. The third party argues that sections 17(1) (a), (b) and (c) apply to parts of the withheld information (i.e., minimum rent, operating costs and realty taxes).

[12] Section 17(1) is a mandatory exemption that states,

> 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; or

[13] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[4] 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.[5]

[14] For section 17(1) to apply, the OCRC 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;

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), or (c) of section 17(1) will occur.

Part 1 – The withheld information is commercial or financial information

[15] The third party submits that the minimum rent, operating costs and realty taxes reveal financial information.

[16] The following definition of financial information is established and relied upon in several prior orders of this office dealing with section 17(1).

> *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.[6]

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[4] *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.*).

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

[6] Order PO-2010.

[17] The information at issue consists of agreed costs and formulas for different lease conditions. Based on my review of the information, considering the plain and ordinary meaning of financial information and the definition established by this office in prior orders, I agree with the affected party that the minimum rent, the operating costs and the realty taxes are financial information. Although it was not specifically argued, I find from my review of the record that the termination clause information also qualifies as financial information.

Part 2 – The commercial and financial information was not supplied by the third party

[18] To establish part two of the test, the third party must demonstrate that it supplied the financial information and that it did so in confidence. I find that the third party has not established that it *supplied the information* at issue and what follows are my reasons. Because of this finding, it was not necessary for me to address whether the information was supplied *in confidence* as also asserted by the third party.

[19] The requirement that the financial information was "supplied" to the OCRC by the third party reflects the purpose in section 17(1) to protect the informational assets of third parties.[7] 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.[8]

[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, are 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.[9]

[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.[10] The immutability exception arises where the contract contains information supplied by the third party and the information is not susceptible to

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[7] Order MO-1706.

[8] Orders PO-2020 and PO-2043.

[9] 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*).

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

negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.[11]

[22] The third party argues that it provided the financial information to the OCRC. For reasons stated in its confidential representations, it argues that the "immutability exception" applies.

[23] The appellant made representations under the heading of section 17(1); however, those arguments are more relevant to the section 18(1) issues and I will therefore consider them in the next section of this order.[12]

Analysis and finding

[24] The information at issue is contained in a contract, the Lease. Consistent with prior orders of this office, I find that the information was mutually generated and not "supplied" by either party.

[25] It is also my view that the withheld (financial) information does not fall within the immutability exception. There is nothing inherent about the information at issue that makes it *not susceptible* to negotiation.[13] Generally speaking, the fact that one party to a contract has a "bottom line" or what it perceives to be a non-negotiable position about a contractual term, does not make the term immutable or incapable of being negotiated. The immutability exception applies to certain types of information that, regardless of the bargaining power or positions of the parties, is not capable of being negotiated. For instance, it could apply to information contained within a lease that consisted of specific financial information about the financial health of one of the parties, such as the identity of its debt holders, its guarantors, or its historic financial statements, etc. No similar type of information is at issue in this appeal and I find that the third party has not established that the information at issue was supplied within the meaning of section 17(1).

[26] Having concluded that the second part of the section 17(1) test has not been met, it is not necessary for me to consider the third part of the test and I therefore find that section 17(1) does not apply to the information at issue. I will now consider the OCRC's alternative argument that the discretionary exemption for economic interests in section 18(1) of the *Act* applies.

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[11] *Miller Transit*, cited above at para. 34.

[12] The appellant also made argument about a particular footnote in the OCRC's public financial statements that he interpreted to disclose "discounts" to lease payments. The OCRC clarified that the discounts mentioned in the financial statements refer to an accounting principle and do not reveal information at issue in the appeal. I will therefore not discuss this argument further.

[13] *Miller Transit*, cited above.

Issue B: Does the discretionary exemption for economic and other interests at sections 18(1) (c) or (d) apply to the withheld information?

[27] The OCRC, supported by the third party and the LCBO, relies on sections 18(1)(c) and (d) of the *Act* to withhold the information at issue.[14] I must decide, therefore, if either section applies. These sections state:

> A head may refuse to disclose a records 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.

[28] 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*.[15]

[29] 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.[16] Section 18(1)(d) is intended to protect the broader economic interests of Ontarians.[17]

[30] For sections 18(1) (c) or (d) to apply, the institution must provide detailed 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

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[14] The OCRC made brief representations that section 18(1)(e) also applied but deferred to the LCBO to make this claim. The LCBO did not make this claim and I will therefore not consider this section.

[15] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy, 1980* (The Williams Commission Report), Toronto: Queen's Printer, 1980.

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

[17] 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.

in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[18]

[31] The failure to provide detailed evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances.[19]

[32] IPC adjudicators have held that 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 interests.[20]

Representations

The role of the LCBO

[33] As will be seen, a main component of the OCRC's position in this appeal is that disclosure will cause both the OCRC and the LCBO the harms set out in sections 18(1)(c) and (d). The OCRC and the LCBO explain that the LCBO negotiated the Lease on the OCRC's behalf. The LCBO provided the following additional context.

[34] While the LCBO is also an institution under the *Act,* the LCBO submits that as it relates to the Lease, "for all intents and purposes, the LCBO was the [OCRC]." Before the OCRC was established as a Crown corporation, the LCBO was responsible for identifying and establishing leasing arrangements for Ontario Cannabis Store locations to be eventually operated by the OCRC. The LCBO provided these supports and services pursuant to a shared services agreement permitted by legislation in force at the time.[21]

[35] The LCBO says that it drew on its own retail leasing expertise and experience to provide the services and supports to the OCRC. It says that it has a vast portfolio of leases for beverage alcohol stores in Ontario. It explains that it is constantly and continually negotiating leases, lease extensions or other lease modifications.

[36] The LCBO explains the shared services agreement between it and the OCRC contains a confidentiality provision governing the exchange of information between them. The LCBO says that disclosure of the Lease is governed by the confidentiality provisions in the shared services agreement.

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[18] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and PrivacyCommissioner)*, 2014 SCC 31 ("*Ontario (Community Safety and Correctional Services)*") at paras. 52-4.

[19] Order MO-2363.

[20] See Orders MO-2363 and PO-2758.

[21] *Liquor Control Act,* R.S.O. 1990, c. L.18, sections 3(1), (o), (p) and (q); and, *Ontario Cannabis Retail Corporation Act, 2017,* S.O. 2017, c. 26, Sched. 2.

[37] It elaborates that the LCBO relied on its template leasing provisions to enter into the lease at issue in this appeal on behalf of the OCRC. It explains that its template was developed based on years of conducting negotiations and managing its own leasing program, which it says is a specialized area of expertise as it operates government retail stores to sell a regulated substance.

[38] The LCBO says that its expectation was that the information about its template lease agreement would be treated as confidential and that even after the OCRC came into existence the information would remain confidential. The LCBO describes steps that it took to maintain confidentiality of its activities undertaken pursuant to the shared services agreement.

[39] Referring to media reports, the LCBO submits that it is widely known that the LCBO was involved in arranging leases for Ontario Cannabis Store locations. The LCBO makes further representations about the harms it will experience if the withheld information is disclosed, which I summarize following the summary of OCRC's representations.

OCRC Representations

[40] The OCRC refers to the above-described purposes of sections 18(1)(c) and (d) and explains that it is an operational enterprise generating revenue for the province of Ontario. It argues that disclosure of the withheld information could reasonably be expected to prejudice both its own economic interests and competitive position as well as cause harm to Ontario's financial interests.

Harm to OCRC's ability to maintain confidential information, eroding trust in the marketplace

[41] The OCRC argues that disclosure of the information would undermine its ability to keep commercially valuable information confidential and therefore would erode the confidence of third parties with whom it enters into contracts. It submits that it is not standard commercial practice for contracting parties to disclose key business terms under a lease.

[42] It says that it is required to compete with and work along side private sector recreational cannabis retailers and that its ability to operate and compete in this industry would be hindered if commercially valuable information contained in its key contracts is disclosed, particularly where its status as a government entity can be used to leverage favourable business terms.

[43] It explains that Ontario has budgeted for certain revenue streams from the newly-sanctioned cannabis industry, consisting of taxation and profits from the OCRC. It says that the OCRC's ability to maximize its profits – and contribute to the revenue streams budgeted for by the provincial government – is tied to its ability to negotiate favourable contracts and maintain a competitive advantage during negotiations.

[44] Further, it says that the OCRC is "likely to negotiate" favourable contracts if its negotiating parties trust that it will respect the confidential nature of sensitive business information. It acknowledges that its counterparties ought to know that they are negotiating with a public entity but it argues that the fact that it operates in a commercial context should be taken into account.

[45] The OCRC emphasizes that it has only withheld portions of the lease that contain commercially sensitive information.

Harm to future OCRC negotiations for retail space

[46] The OCRC says that disclosure could reasonably be expected to cause harm to its economic interests and competitive position by negatively affecting future retail space negotiations.

[47] It points to Order PO-2720 where the adjudicator upheld the institution's application of the section 18(1)(c) exemption to information in a conditional lease agreement. It argues that because the Lease was conditional on the OCRC being legally permitted to operate cannabis retail stores, the present appeal is analogous and I should follow the reasoning of the adjudicator in that order. It says that although the OCRC is not currently permitted to operate recreational cannabis retail stores, disclosure of the negotiated lease terms would prejudice its ability to do so if it were required to negotiate new lease agreements in the future.

[48] The OCRC acknowledges that the lease at issue in Order PO-2720 was one where the institution was a landlord, unlike the present situation; however, it argues that the underlying principle remains applicable.

[49] The OCRC also refers to Order PO-3579, in which the adjudicator upheld the Ontario Lottery and Gaming Corporation's (OLGC) decision to withhold information in a lease agreement. It submits that the arguments made by the OLGC are analogous to those made by the OCRC in the present appeal on the basis that the information at issue was the result of negotiations and a balancing of interests between the OCRC and the lessor. It says that disclosure could reasonably be expected to adversely prejudice future lease negotiations, "should the [OCRC] be required to operate retail stores in the future."

[50] Lastly, the OCRC makes a separate point that disclosure of the withheld information would harm private recreational cannabis retailers. The OCRC says that it views private cannabis retailers as partners and that disclosure of the withheld information could compromise the ability of those retailers to negotiate favourable lease agreements. The OCRC does not elaborate on precisely how the information at issue could impact on these negotiations; however, it says that this risk of harm is acute for those retailers seeking to locate their store in geographic proximity to the property at issue in the Lease.

LCBO Representations

The LCBO and Ontario's economic interests are at stake

[51] Like the OCRC, the LCBO submits that it has economic interests at stake, as it operates as a commercial enterprise selling beverage alcohol in Ontario and earning revenue for the provincial government. It refers to Order PO-2405, as an example of an order of this office that recognized that the LCBO has economic interests that are capable of being impacted by the harms in section 18(1).

[52] It says that it has an economic interest in increasing profitability of its alcohol beverage retail stores and continuing to fulfil the social responsibility aspect of its mandate and that it has taken "consistent steps" to do so for decades. It submits that it remits billions of dollars to the municipal, provincial and federal governments and has an interest in expanding its profitability to increase these contributions.

[53] It says that it has a further economic interest in negotiating competitive leasing arrangements, explaining that it takes into account a wide variety of factors including supporting local communities. It says that its leasing practices and approaches have been developed over many years.

[54] It submits that it has a further economic interest in negotiating leases that are competitive in an increasingly competitive liquor sales market in Ontario, which has expanded in recent years. Its ability to negotiate competitive leases impacts its remittances to the province of Ontario.

[55] The LCBO says that all of the above economic interests are shared with the government of Ontario. It explains that the LCBO is one of the government's largest revenue sources and that the Province draws from these remittances to support key public programs.

[56] It says, also, that it is the agency through which the government regulates importation, distribution and sale of beverage alcohol in Ontario, which it does by implementing various social responsibility measures. Therefore, it says that Ontario has an interest in the profitability of the LCBO's stores and its efforts to keep operating costs down and that this requires maintaining confidentiality of its leasing practices.

Harm to LCBO's competitive position

[57] The LCBO says that it competes in the liquor retailing industry for customers and market share in the alcoholic beverage market, but also for prime retail space. As noted above, the LCBO relies on Order PO-2405 for the proposition that it has a competitive position for the purpose of section 18(1)(c). It says that this principle has been found in other prior IPC orders involving similar institutions, such as Order P-941 involving the Ontario Lottery Corporation (as it was then called).

[58] It also points to Order PO-2720 (also referred to by the OCRC), for the proposition that disclosure of leasing terms could harm economic interests of the Government of Ontario. It offers the following evidence to support its position that it would be prejudiced if the withheld information is disclosed.

[59] It submits that disclosure will impede its ability to negotiate favourable lease terms, thus negatively impacting its ability to control operating costs, thus negatively impacting is profitability and therefore establishing a reasonable expectation of injury to the government of Ontario's ability to manage the provincial economy. In support, the LCBO states its most recent contributions made to revenues of the government of Ontario. It does not quantify the impact that disclosure may have on these contributions going forward.

[60] The LCBO also submits that if the information at issue is disclosed – and, as I understand it, therefore available to counterparties negotiating with the LCBO – the LCBO would be prejudiced by "adding a further level of complexity that does not exist." It says that the prejudice is significant and points to the total value of its province-wide leasing payments. It does not quantify the impact that disclosure of the information at issue may have on its leasing costs.

[61] The LCBO argues that disclosure of the rent and operating costs would compromise its future ability to negotiate favourable terms because – as I understand the argument – the terms negotiated in the Lease would be known. The LCBO submits that it has successfully maintained the confidentiality of its standard leasing terms. The LCBO's confidential representations include information about the number of leases it negotiates on an annual, province-wide basis. It does not provide any information particular to the geographic market relevant to the Lease.

[62] Lastly, the LCBO provides confidential representations describing how its lease negotiations compare to other potential tenants'. It says that disclosure of the terms in the Lease would be without context and could prejudice the bargaining position of the LCBO. It submits that the risk of harm is great at the present time because of the expanding market for the sale of beverage alcohol in Ontario (e.g. in grocery stores). It says that the withheld information would be of value to other market participants.

Third party representations

[63] The third party argues that disclosure could reasonably be expected to prejudice the OCRC's economic interest and competitive position. It submits that if the information is publicly known, the public could use it to deduce "the product or service costs." The party says that with this information, the public could then refuse to purchase from the OCRC if they deduce that the OCRC has priced its products too high.

Appellant's representations (with OCRC and LCBO sur-reply, as applicable)

[64] The appellant disputes that disclosure could result in any of the harms stated in section 18(1). His arguments focus mainly on the arguments made by the OCRC.

[65] Regarding any contractual expectation of confidentiality, the appellant points to a clause in the Lease that indicates that it permits "release" of information if it is in accordance with the *Act.* In reply on this point, the OCRC says that reference to the *Act* in the lease means that it may rely on the section 18(1) exemption.

[66] The appellant submits that the OCRC has already disclosed the total amounts that it paid in leases in its 2018-2019 financial statements and that therefore, part of the information at issue has already been disclosed. In reply on this point, the OCRC says that the information at issue is more detailed than the aggregate information disclosed in the financial statements.

[67] The appellant refers to Orders MO-2363 and PO-2758 in support of the proposition that "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 positon, or financial interests." In reply on this point, the OCRC submits that the harms that will be caused are: undermining the market's confidence in the OCRC as a commercial partner and compromising the ability of third private retailers to negotiate favourable leases.

[68] The appellant argues that because the OCRC is the sole wholesaler of recreational cannabis, there is no competitive position to consider as contemplated by section 18(1)(c). In reply, the OCRC says that the appellant's argument overlooks one of the broader purposes of the OCRC, which is to compete for and displace the illegal cannabis market. On this point, both the OCRC and the LCBO point to Order P-941, referred to and described above. The LCBO also refers to Order PO-2405 (referred to above).

[69] Lastly, the appellant argues that because the OCRC is, in fact, not permitted to operate retail stores, there is no possible impact on its financial interests or that of the government of Ontario.

[70] In reply, the OCRC reiterates that disclosure of the withheld information could harm its private retail partners – those entities permitted to establish retail cannabis stores. It elaborates that the OCRC and Ontario have an interest in cannabis retail store operators negotiating favourable lease terms to improve profit margins and displace the illegal cannabis market. The OCRC refers to a C.D. Howe Institute study indicating that the illegal cannabis market results in *national* annual losses of $700 Million.[22]

[71] In further reply, the OCRC submits that disclosure of the withheld information could reasonably be expected to cause the stated harms because it will impact OCRC's retail store partners and therefore impact on the strength and success of the entire legal recreational cannabis supply chain. It says that the displacement of the illegal cannabis market has other harm reduction goals and that any harms to its economic or competitive

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[22] Anindya Sen and Rosalie Wyonch, *Cannabis Countdown: Estimating the Size of Illegal Markets and Lost Tax Revenue Post Legalization* (Toronto: CD Howe Institute, 2019).

position would also negatively impact these harm reduction goals, therefore injuring the financial interests of Ontario by "hindering its ability to convert the illegal marketplace which directly affects policing and health care costs."

Analysis and findings

[72] Sections 18(1)(c) and (d) are harms-based exemptions under which the institution bears the onus of demonstrating a reasonable expectation of harm with disclosure. To meet this burden, the institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm.[23] However, it need not prove on a balance of probabilities that the harm will occur.

[73] In this appeal the OCRC says that section 18(1)(c) and (d) apply to its own operations and to that of the LCBO. I accept that for all intents and purposes in relation to the Lease, the LCBO was acting as the OCRC and I therefore find it relevant to consider the arguments advanced by the LCBO in this appeal.

[74] For the reasons that follow, I am unable to conclude that the section 18(1) exemption applies.

Insufficient evidence of harm to OCRC or the Ontario government

[75] To start, I accept that the OCRC is capable of having economic interests and a competitive position within the meaning of section 18(1)(c). I also accept that because of the role that the OCRC plays in the Ontario government's overall recreational cannabis program, including the revenues that it is budgeted to provide to the government, it is possible that matters involving the OCRC could involve information the disclosure of which could reasonably be expected to be injurious to the financial interests of the government of Ontario (section 18(1)(d)).

[76] However, the OCRC has not provided sufficient evidence to demonstrate that disclosure of the withheld information may reasonably be expected to prejudice its economic interests or its competitive position or be injurious to the financial interests of the government of Ontario.

[77] The OCRC says that it its economic interests and competitive position will be harmed by disclosure because it will erode trust and confidence that it has in the market place to keep information confidential. In my assessment, this is a speculative concern lacking of any particulars to illustrate the impact that the alleged erosion of trust may have, such as which aspects of its business, and the value of the impact.

[78] The OCRC also says that disclosure will harm its ability in the future to negotiate leases for retail stores. This possibility would require a change to the statutory framework

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[23] *Ontario (Community Safety and Correctional Services)*, cited above.

for recreational cannabis sales in Ontario. As mentioned above, the government has decided that OCRC is to operate only an online store. I have no evidence before me to indicate that a change to this framework is a possibility. Without further evidence, I conclude that any risk of harm related to the OCRC engaging in future retail store lease negotiations is speculative and insufficient to establish the harms in section 18(1)(c) or (d).

[79] The OCRC also submits that disclosure will have an impact on private recreational cannabis retail operators. I have no evidence before me about how, specifically, disclosure could impact any particular retail store operator. In my view, such a contingent interest is insufficient to establish the harm in section 18(1) (c) as it relates to the OCRC. However, the potential harm to the Government of Ontario required further consideration.

[80] I accept the submissions made by the OCRC that the Government of Ontario has an interest in the success of the OCRC which has as a main goal the displacement of the illicit recreational cannabis industry. The success of the Ontario government's program, much of which is carried out by the OCRC, depends on a viable and healthy private sector recreational cannabis retail sector. It is conceivable that disclosure of certain information could reasonably be expected to be injurious to the financial interests of the Government of Ontario.

[81] However, I am unable to conclude that the information at issue here is that kind of information. The withheld information consists of the key terms of a single lease for what was to be a government-run, recreational cannabis store in a particular geographic area of Ontario that never operated and is no longer permitted to operate. It is not apparent to me, nor was I aided by the OCRC's representations, how these key terms could be of any relevance to a negotiation between a private recreational cannabis retailer and a landlord. The legislative framework in place at the time that the Lease was negotiated has completely transformed.

[82] I have considered Order PO-2720, which OCRC argues is analogous to the present appeal because it deals with a lease that that was conditional and not yet in place. In my view, the circumstances in Order PO-2720 are not analogous. Unlike the present appeal, the condition at issue in Order PO-2720 remained in play and its fulfillment could possibly have been impacted by disclosure of the information at issue. In the present appeal, the Lease was conditional on legislation permitting retail sales of cannabis by the OCRC. The Lease has already been terminated on the basis of that condition and the Lease will not be further impacted by disclosure of the withheld information.

[83] OCRC also relies on Order PO-3579, in which the adjudicator upheld the OLGC's decision to withhold information in a lease agreement. The circumstances in Order PO-3579 are more analogous to the present appeal, but ultimately not persuasive. The lease at issue in Order PO-3579 was between the OLGC and a private race track for space at the race track for gaming activities at the track. There was evidence before the adjudicator that a small number of similar agreements were under negotiation with other race track owners. Further, there was evidence that these types of lease agreements were relatively new. Taking all of this evidence into account, the adjudicator was persuaded that

disclosure could reasonably be expected to prejudice the OLGC's economic interests or competitive position.

[84] In my view, the circumstance in the present appeal are different because the evidence is that the OCRC is no longer in the business of leasing retail space for cannabis sales. There is no potential for disruption of any new or emerging business of the OCRC.

[85] I find that the OCRC has not established that disclosure could reasonably be expected to prejudice its own economic interests or its competitive advantage, or to be injurious to the financial interests of the government of Ontario or the ability of the government to manage the Ontario economy.

Insufficient evidence of harm to the LCBO or the Ontario government

[86] As noted above, I accept that for all intents and purposes in relation to the Lease, the LCBO was acting as the OCRC and I therefore find it relevant to consider the arguments advanced by the LCBO in this appeal.

[87] Like the OCRC, the LCBO is capable of having economic interests and a competitive position within the meaning of section 18(1)(c).[24] I also accept that because of the LCBO's broader mandate and the revenues it delivers to the government of Ontario, it is possible that matters involving the OCRC could involve information the disclosure of which could reasonably be expected to be injurious to the financial interests of the government of Ontario (section 18(1)(d)).

[88] To find that that either section 18(1)(c) or (d) apply, however, I must have detailed evidence that disclosure of the information before me could reasonably be expected to cause the stated harms.

[89] The LCBO says that it competes in the retail industry for customers and market share in the alcoholic beverage market, but also for prime retail space. Although it assisted the OCRC in the context of the recreational cannabis market, it asserts that the section 18(1)(c) and (d) harms will be experienced by the LCBO in the retail alcoholic beverage market. Its concern is that disclosure will impede its ability to negotiate favourable lease terms for LCBO-run, alcoholic beverage stores. Further, the LCBO says that it will be required to deal with an added level of complexity in the negotiating process that would arise if the withheld information is publicly known.

[90] Although the LCBO provided aggregate information about the value of revenues it provides to the province, the number of leases that it negotiates on an annual basis and the value of the lease payments it makes, it has not provided any particular information to identify or explain how disclosure of the withheld information could impact any of those

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[24] Order PO-2405.

indicators. Without more specific information, it is my view that the evidence offered by the LCBO is speculative.

[91] I contrast the level of detailed provided in this appeal with that provided in the appeal leading to Order PO-3579, involving the OLGC. In that appeal, also involving a lease, there were a finite number of lease arrangements under negotiation and the program for which the leases were being negotiated was new. As is illuminated in the LCBO's representations, leasing for LCBO alcoholic beverage retail stores has been ongoing for decades and there are a vast number of leases at various stages of negotiation at any given time.

[92] I also observe that there are a number of features of the Lease that arguably make it distinguishable from the LCBO's regular leases, such as the location, the legal framework under which it was negotiated (i.e. a recently-legalized recreational cannabis market), and the requirements of retail recreational cannabis stores. The LCBO argues that if the withheld information was public it could be useful to its counterparties to negotiate more favourable terms because the terms would be without context. It is not clear why the LCBO could not address or provide the necessary context should the situation arise.

[93] In summary, I am not persuaded by the argument or the evidence that disclosure can reasonably be expected to impact the LCBO's competitive position or its economic interests. I am also not persuaded that disclosure could reasonably be expected to impact on the alcoholic beverage retail market in general to such a degree that it could be injurious to the financial interests of the government of Ontario or impact the ability of the government to manage Ontario's economy.

ORDER:

1. By **April 26, 2021** but not before **April 21, 2021** I order OCRC to disclose the remaining information at issue, as described in the Records section of this order, to the appellant.

2. In order to verify compliance with order provision 1, I reserve the right to require the OCRC to provide the IPC with a copy the records sent to the appellant.

3. The timelines in this order may be extended if the OCRC is unable to comply in light of the current COVID-19 pandemic. I remain seized of the appeal to address any timeline-related issues if the parties are unable to resolve them.

Original Signed by: March 19, 2021

Valerie Jepson
Adjudicator