Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4175

Appeal PA19-00357

Ontario Lottery and Gaming Corporation (OLG)

August 11, 2021

Summary: The requester sought access from the Ontario Lottery and Gaming Corporation (OLG) under the *Freedom of Information and Protection of Privacy Act* to a copy of an operating agreement for two casinos. The OLG granted access to the operating agreement and four sections of another agreement that amended the operating agreement. The operator of the casinos, the party to these agreements with the OLG, appealed the OLG's access decision, claiming that the mandatory third party information exemption in section 17(1) applies to the records.

In this order, the adjudicator dismisses the appellant's appeal. She upholds the OLG's decision that the records are not exempt under section 17(1) and orders them disclosed to the requester.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1) and 52(1)(b).

Orders Considered: Orders PO-2384, PO-2620, PO-3116, and PO-3669.

Cases Considered: *Danyluk v. Ainsworth Technologies Inc.* 2001 SCC 44; *British Columbia* (*Workers' Compensation Board*) *v. Figliola*, 2011 SCC 52.

OVERVIEW:

[1] During the 2015-2016 fiscal year, the Ontario Lottery and Gaming Corporation (the OLG)[1] exercised an option to not extend the Niagara Permanent Casino Operating Agreement (the operating agreement) with a third party, the company that was operating Casino Niagara and Niagara Fallsview Casino Resort (the casinos) prior to June 10, 2019. The option not to extend the operating agreement resulted in a one-time operator non-extension cost to the OLG of more than $140 million.

[1] Also referred to as the OLGC.

[2] After the OLG announced it had selected another operator for the casinos, a media requester submitted an access request to the OLG, under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*), for a copy of the operating agreement between the OLG and the third party.

[3] After notifying the third party, the OLG issued a decision to the requester denying access to the record in its entirety under the mandatory exemption in section 17(1) (third party information) of the *Act*.

[4] The requester appealed that decision to the Information and Privacy Commissioner of Ontario (the IPC) and Appeal PA19-00066 was opened. During mediation, the OLG identified an additional responsive record, the Transition and Disentanglement Agreement (TDA) that contained four sections[2] amending the operating agreement. The OLG conducted third party notification again and subsequently issued a supplementary decision to the requester also denying access to this record in its entirety under section 17(1) of the *Act*.

[5] The OLG subsequently sent a revised decision to the requester and the third party advising of its decision to grant full access to the responsive information, consisting of the operating agreement in its entirety and the four sections of the TDA. Appeal PA19- 00066 was accordingly closed.

[6] The third party, now the appellant, appealed the OLG's revised decision to disclose both records in full to the requester to the IPC, which opened this appeal, Appeal PA19-00357 and appointed a mediator to explore the possibility of resolution.

[7] Mediation did not resolve the issues in this appeal and it proceeded to adjudication, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry.

[8] I sought the representations of the appellant initially, which were sent to the requester and the OLG, except for the confidential portions, which were withheld pursuant to the criteria for withholding representations in *Practice Direction 7*.[3] Only the requester provided representations in response to the appellant's representations. I then sought and received reply representations from the appellant.

[9] In this order, I dismiss the appellant's appeal. I uphold the OLG's decision that the records are not exempt under section 17(1) and order them disclosed to the requester.

RECORDS:

[10] At issue are two records:

- The Niagara Permanent Casino Operating Agreement (the operating agreement), dated as of July 19, 2002. The entire agreement is at issue. This agreement has

[2] Sections 6.1, 6.2, 7.1 and 7.2.

[3] Although the appellant's initial and reply representations contain confidential information, which was not shared with the requester, and which will not be referred to in this order, I have considered the entirety of the appellant's representations in making my decision in this order.

been already adjudicated upon in Order PO-2620[4] and Order PO-3116,[5] a fact that I address below.

- Sections 6.1, 6.2, 7.1 and 7.2 of the Transition and Disentanglement Agreement (the TDA). These four sections of the TDA amend the operating agreement.

[11] In this appeal, as well in the appeals that resulted in Orders PO-2620 and PO- 3116, the appellant provided representations objecting to disclosure of the operating agreement. Each of these three appeals involved different requesters. The institution in all three appeals was the OLG.

[12] In Order PO-2620, the adjudicator found that the operating agreement was not supplied to the OLG and ordered it disclosed.

[13] In Order PO-3116, the adjudicator ordered OLG to disclose the operating agreement, except for certain portions she found to have been "supplied", and ultimately, to have met all three parts of the test under section 17(1).

[14] Neither order was enforced, as the appellant filed applications for judicial review of the decisions. Before the judicial review applications could be heard, the requester in both appeals withdrew their access requests and the IPC agreed that Order PO-2620 and Order PO-3116 would not be enforced. As such, the appellant abandoned its judicial review applications.

DISCUSSION:

Preliminary Issue: The significance of the IPC's previous findings on the operating agreement

[15] The operating agreement at issue in this appeal is the same agreement considered in Order PO-2620[6] and in Order PO-3116. It is the Niagara Falls Permanent Casino Operating Agreement, dated as of July 19, 2002.

[16] In Order PO-2620, the adjudicator found that the operating agreement was not supplied to the OLG and ordered it disclosed.[7]

[17] In Order PO-3116, the only mention of Order PO-2620 is the following:

> In Order PO-2620, the adjudicator ordered the OLGC to disclose the operating agreement, in its entirety. After the order was issued, the appellant commenced an application for judicial review, but abandoned its application when the underlying request was withdrawn by the original requester. The appellant submits that Order PO-2620 was wrongly decided...

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[4] Order PO-2620, *Ontario* (*Lottery and Gaming Corporation*) (*Re*), 2007 CanLII 51692 (ON IPC).
[5] Order PO-3116, *Ontario* (*Lottery and Gaming Corporation*) (*Re*), 2012 CanLII 60534 (ON IPC).
[6] Identified as Record 3 in Order PO-2620.
[7] Portions of the adjudicator's findings supporting this decision in Order PO-2620 have been quoted by the requester in her representations, below.

> [W]hen the permanent operating agreement was ordered disclosed in Order PO-2620, [the appellant] was prepared to challenge this decision on application for judicial review.

[18] In Order PO-3116, the adjudicator found that only certain portions of the operating agreement met the supplied test under part 2, and ordered disclosure of the remaining information.

[19] In reaching this conclusion, the adjudicator stated:

> Based on the submissions of the appellant and my review of the records, I have concluded that the information listed above either represents underlying non-negotiated information, or information that is not susceptible to change… Other portions refer to the underlying and fixed structure of the appellant that is not subject to change by the OLGC. Consequently, I find that this information was "supplied" to the OLGC within the meaning of section 17(1).

[20] The adjudicator in Order PO-3116 ultimately determined that the information she found supplied met all three parts of the test under section 17(1), and ordered this information withheld.

[21] As I noted above, in this appeal, as well in the appeals that resulted in Orders PO-2620 and PO-3116, the appellant has objected to disclosure of the operating agreement. Each of these three appeals involved different requesters. The institution in all three appeals was the OLG.

[22] In this case, issue estoppel does not apply with respect to the appeal by the appellant objecting to disclosure of the operating agreement. *Danyluk v. Ainsworth Technologies Inc.*[8] sets out a two-step analysis for the application of issue estoppel.

1. First, the decision maker must determine whether the moving party established the three conditions to the operation of issue estoppel. These conditions are:

    1. that the same question has been decided,

    2. that the judicial decision which is said to create the estoppel was final; and,

    3. that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

2. Once these three conditions are met, the decision maker must determine "whether, as a matter of discretion, issue estoppel ought to be applied." The Supreme Court confirmed that these rules should not be applied "mechanically". Rather, "the underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case."

[23] The parties to this appeal are not the same parties as in Order PO-2620 or Order

[8] 2001 SCC 44 (*Danyluk*).

PO-3116, as the requester in this appeal and those two appeals are three different requesters; therefore, the requirements for the application of issue estoppel are not met.

[24] In circumstances where the requirements of issue estoppel are not met, the rules against collateral attack and the doctrine of abuse of process may apply so as to prevent a party from re-litigating an issue that was previously decided.[9] Abuse of process is one of a number of doctrines or techniques that have been developed under the common law[10] to prevent abuse of the decision-making process by parties at proceedings before both administrative tribunals and the courts.[11] This doctrine prevents the re-litigation of issues where the precise criteria for issue estoppel do not apply.

[25] These principles are also reflected in section 52(1)(b) of the *Act*, which provides an adjudicator, as a delegated decision-maker of the Commissioner, with the discretion to decide whether to conduct an inquiry to review a head's access decision in an appeal that has not been resolved during the mediation stage of the appeal process.[12] One of the grounds for not conducting an inquiry is that the IPC has previously issued a decision with respect to the same record.[13]

[26] In the appeal that led to Order PO-3116, the appellant sought to litigate again an issue that had already been decided in Order PO-2620, namely the application of section 17(1) to the operating agreement. However, it does not appear that the issues of collateral attack and/or abuse process were raised in Order PO-3116.

[27] No one has raised the issues of collateral attack and/or abuse of process before me in this appeal, either. Nevertheless, I have considered whether there is a basis for me to decline to conduct an inquiry regarding the operating agreement under section 52(1)(b) in this appeal, as the record has already been adjudicated upon (though not disclosed to date).

[28] However, since none of the parties raised the issue, and, as my ultimate conclusion on the disclosure of the operating agreement is the same as in the original order dealing with that record, Order PO-2620,[14] I will not comment further on the issues of collateral attack or abuse of process.

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[9] See *British Columbia* (*Workers' Compensation Board*) *v. Figliola*, 2011 SCC 52.

[10] Orders M-618 (aff'd *Riley v. Ontario* (*Information and Privacy Commissioner*) (March 23, 1999), Toronto Doc. 59/98 (Ont. Div. Ct.)), PO-2490 and PO-3184.

[11] *Danyluk v. Ainsworth Technologies Inc.,* 2001 SCC 44. Other such doctrines include issue estoppel, the rule against collateral attack, and *res judicata.*

[12] Section 52(1)(b) of *FIPPA* states:

> The Commissioner may conduct an inquiry to review the head's decision if, the Commissioner has authorized a mediator to conduct an investigation under section 51 but no settlement has been effected.

[13] See Order MO-2778.

[14] In making this finding regarding disclosure of the operating agreement, I have taken note that the appellant applied for judicial review of Orders PO-2620 and PO-3116, but was able to abandon its applications when the underlying requests were withdrawn and the IPC agreed that the orders would not be enforced. In the absence of a court order on the merits of these judicial review applications, I find that the appellant's aborted judicial review applications are not relevant to the determination I am making in this order.

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

[29] In this appeal, the appellant claims that both records are exempt under section 17(1), which 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,
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> > (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
> >
> > (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[30] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[15] 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.[16]

[31] For section 17(1) to apply, the institution and/or the third party (in this appeal, the appellant) 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), (c) and/or (d) of section 17(1) will occur.

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[15] *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.*).
[16] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Part 1: type of information

[32] The appellant submits that the operating agreement contains commercial information because it contains terms that relate solely to the selling of casino operating services by it to the OLG.

[33] The appellant submits that, in addition to containing commercial information, some parts of the operating agreement contain financial information, including terms relating to operator fees. For example, it states that Article 4, which describes the fees to be paid to the operator, contains a formula for calculating fees.

[34] The appellant submits that the four sections of the TDA at issue contain confidential commercial and financial information relating to the operating agreement.

[35] As well, the appellant submits that the list of services it has agreed to provide to the OLG in Schedule 3 of the operating agreement constitutes trade secrets that are proprietary information. It states that this information has been developed by it over many years in the hotel operating business. It describes these services in Schedule 3 as products of its special expertise, which have been guarded to maintain their secrecy.

[36] Finally, the appellant submits that the operating agreement contains labour relations information that relates to the collective relationship between the employer and employees of the casinos.

[37] The requester takes no position on part 1 of the test under section 17(1). As stated, the OLG did not provide representations.

Analysis/Findings

[38] The types of information referred to by the appellant and listed in section 17(1) have been discussed in prior orders, as follows:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
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> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
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> (iii) has economic value from not being generally known, and
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> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[17]
>
> *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

[17] Order PO-2010.

application to both large and small enterprises.[18] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[19]

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.[20]

Labour relations means relations and conditions of work, including collective bargaining, and is not restricted to employee/employer relationships. Labour relations information has been found to include:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute[21]

- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees,[22]

but not to include:

- names, duties and qualifications of individual employees[23]

- an analysis of the performance of two employees on a project[24]

- an account of an alleged incident at a child care centre[25]

- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation.[26]

[39] Having reviewed the records at issue, I agree with the appellant, and I find that the records contain these types of information, except for trade secrets.

[40] In particular, the records contain commercial information as they concern the selling of the appellant's services to the OLG to operate the casinos. They contain pricing related information about these services, which constitutes financial information.

[41] As well, the operating agreement contains labour relations information as it includes employees' conditions of work.

[42] Therefore, both records contain commercial and financial information. As well, the

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[18] Order PO-2010.
[19] Order P-1621.
[20] Order PO-2010.
[21] Order P-1540.
[22] Order P-653.
[23] Order MO-2164.
[24] Order MO-1215.
[25] Order P-121.
[26] Order P-373, upheld in *Ontario* (*Workers' Compensation Board*) *v. Ontario* (*Assistant Information and Privacy Commissioner*) (1998), 41 O.R. (3d) 464 (C.A.).

operating agreement contains labour relations information. Accordingly, I find that part 1 of the test under section 17(1) has been met for both records.

[43] I do not accept the appellant's submission that the operating agreement also contains trade secrets. The appellant submits that the list of services it provides in Schedule 3 are trade secrets. I do not accept that this list of services, being services that the appellant, as the casino operator, agrees to provide the OLG with, upon the request of the OLG, is information that is not generally known in that trade or business. Based on my review of Schedule 3, I find that these services are services that would be generally known in the large hotel operating business.

Part 2: supplied in confidence

Supplied

[44] 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.[27]

[45] 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.[28]

[46] 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.[29]

[47] 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.[30] 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, underlying fixed costs and product samples or designs.[31]

Representations of the appellant

[48] The appellant submits that the entire operating agreement should not be disclosed because it would reveal or permit the drawing of accurate inferences with respect to underlying confidential, non-negotiated information supplied by it to OLG. The appellant provides examples of terms of the operating agreement where the inferred disclosure exception applies, as follows:

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[27] Order MO-1706.
[28] Orders PO-2020 and PO-2043.
[29] 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*).
[30] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[31] *Miller Transit*, above at para. 34.

i. Article 3.13(e)(ii) and 3.13(g), part of Negative Covenants of Operator;

ii. Article 4.2, Operator Fee, and related definitions in Article 1.1(vv) and (xxx);

iii. Article 4.3, Additional Operator Services Fees, and related definitions in Article 1.1(aa) and (bb);

iv. Article 7.1, Representations and Warranties of the Operator; and

v. Schedule 3, List of Services.

[49] The appellant submits that disclosure of:

Article 3.13(e)(ii) - would allow an accurate inference to be drawn that a specific entity currently owns at least a certain percentage of the appellant. It submits that information with respect to the appellant's shareholders is confidential, was not negotiated with OLG, and was supplied to OLG in the context of the confidential bid process and the ensuing negotiations.

Article 3.13(g) - would reveal confidential, non-negotiated information supplied to OLG in the course of confidential negotiations.

Article 4.2 - would reveal or permit accurate inferences to be drawn with respect to the operator fee to be paid to the appellant in consideration for its performance of services. It submits that disclosure of this fee formula would reveal or permit accurate inferences with respect to the appellant's price/cost structure contained in the appellant's reply to the OLG's Request for Proposals [RFP]. It relies on past orders that pricing information contained in bids or proposals constitutes information that was supplied to the institution (Orders P-610, M-250, 166 and P-367). It states:

> The price/cost structure supplied by [the appellant] in its reply to the Request for Proposals was not directly incorporated into the Operating Agreement. As a result, the case at hand can be distinguished from the situation in orders like Order PO- 2384, where Adjudicator Faughnan found that a tender bid incorporated by reference as a schedule to the agreement between the Ministry of Natural Resources and the affected third party was not supplied within the meaning of section 17(1). Incorporating the bid as part of a negotiated agreement had made it "negotiated information", since it signified that the other party had agreed to it. Here, however, nothing has been incorporated and therefore made a part of a negotiated agreement.

Article 4.3 - would reveal or permit accurate inferences to be drawn with respect to the price/cost structure in its reply to the Request for Proposals and would reveal confidential, non-negotiated information supplied by the appellant to OLG.

Article 7.1- contains details of the appellant's corporate organization and share structure, which constitutes the informational assets of a privately-held

> company, supplied to OLG by [the appellant] in its confidential reply to the Request for Proposals and the ensuing negotiations.
>
> Schedule 3 - the services are akin to "a sample of the products" of a business and are immutable (Order PO-2435). The appellant relies on Order MO-1706, in which the adjudicator used the example of "a contractual term [that] incorporates a company's 'secret formula' for manufacturing a product, amounting to a trade secret" (page 11) to demonstrate the type of information that, even though it may be found in a contractual term, would be considered to be supplied by the third party.

[50] The appellant states that the above list of terms in the operating agreement that should not be disclosed because of the "accurate inferences" rule is not exhaustive. It submits that the operating agreement consists of highly interrelated terms that are linked by reference and subject. It submits that it would be difficult or impossible to disclose only certain terms without revealing information that was supplied. As a result, it submits, the entire operating agreement should remain confidential. It states that this is also true of the four TDA sections at issue.

[51] The appellant also makes submissions on Order PO-2620 that, as previously mentioned, also considered the application of section 17(1) to the operating agreement. It submits that the finding in Order PO-2620 that the operating agreement was not supplied and should be disclosed was wrong and should not be relied upon.

[52] In the appellant's view, Order PO-2620 was wrongly decided for the following reasons:

i. The adjudicator wrongly decided that as a negotiated agreement, information contained in the operating agreement cannot have been "supplied" to OLG by the appellant. This interpretation of section 17(1) is incorrect and/or unreasonable and is contrary to the plain meaning of the *Act* and the purpose of section 17(1);

ii. Even if the test articulated by the adjudicator for the meaning of "supplied" is correct and/or reasonable, she erred in rejecting the appellant's submission that pricing and other information contained in bids or proposals, such as its reply to OLG's Request for Proposals, constitutes information that was supplied to the institution, and in failing to distinguish between this case and cases where such information was then incorporated directly into the contract;

iii. Even if the test articulated by the adjudicator for the meaning of "supplied" is correct and/or reasonable, she erred in deciding that the terms of the operating agreement do not fall into the "inferred disclosure" or "immutability" exceptions. Disclosure of the operating agreement would reveal information about the appellant, its owners, and its business that was not negotiated and was not susceptible of change; and

iv. The adjudicator erred in failing to decide whether the operating agreement contained trade secrets and labour relations information. Such a determination - especially with respect to trade secrets – would have been relevant to the

applicability of the "inferred disclosure" and "immutability" exceptions to the operating agreement.

[53] I discovered when writing this order that the operating agreement had been the subject of yet another IPC order, in addition to Order PO-2620. Order PO-3116 addressed the operating agreement and involved yet a different requester. The appellant was a party to that appeal and again opposed disclosure of the operating agreement. As stated above, in Order PO-3116, the adjudicator[32] ordered the OLG to disclose the operating agreement, except for certain portions she found to have been "supplied", and ultimately, to have met all three parts of the test under section 17(1).

[54] I then asked the appellant to provide representations on Order PO-3116. I asked it, in particular, to address in its representations whether the findings in Order PO-3116 should or should not apply to the operating agreement in the circumstances of this appeal.

[55] In response, the appellant argued that Order PO-3116 should not be followed for the same reasons that it had submitted for Order PO-2620. The appellant also stated that, as was the case for Order PO-2620, it had applied for judicial review of Order PO- 3116, but again abandoned this second judicial review application when the underlying request was withdrawn and the IPC agreed that the order would not be enforced.

Representations of the requester

[56] The requester states that the records were not supplied, as they are negotiated contracts between the OLG and the appellant. She quotes from Order PO-2620, as follows:

> …I conclude that all of the information contained in the operating agreement consists of mutually generated, agreed-upon, essential terms that I find to be the product of a negotiation process. I do not accept the third party's[33] arguments that any portion of the agreement can be viewed as anything other than agreed-upon terms in what appears to be a detailed and carefully negotiated contract between the OLGC and the third party. Consistent with the rationale cited above, I find that the constituent terms of the operating agreement do not fall into the "inferred disclosure" or "immutability" exceptions for the same reasons expressed in Order PO- 2435. Therefore, in the circumstances of this appeal, I do not consider that information to have been "supplied" by the third party for the purposes of part 2 of the section 17(1) test.

[57] The requester also quotes from Order PO-2384, which was also quoted from in Order PO-2620, as follows:

> If the terms of a contract are developed through a process of negotiation, a long line of orders from this office has held that this generally means that those terms have not been "supplied" for the purposes of this part of the test. As explained by Adjudicator DeVries in Order MO-1735, Adjudicator Morrow in Order MO-1706 identified that, except in unusual circumstances,

[32] The adjudicator in Order PO-3116 is a different adjudicator than that in Order PO-2620.
[33] The third party in Order PO-2620 is the appellant in this appeal.

> agreed upon terms of a contract are not qualitatively different, whether they are the product of a lengthy exchange of offers and counter-offers or preceded by little or no negotiation. In either case, except in unusual circumstances, they are considered to be the product of a negotiation process and therefore not "supplied".

Reply representations of the appellant

[58] In reply, the appellant relies on its representations it originally made challenging Order PO-2620. It further states:

> Even if it is accepted that information is not exempt under section 17(1) simply by virtue of being part of a negotiated agreement - a test not found in section 17(1) or otherwise in *FIPPA* - this disregards the "accurate inferences" and "immutability rules" that have been established in other IPC decisions.[34]

[59] The appellant submits that the adjudicator in Order PO-2620 erred in deciding that the terms of the operating agreement do not fall into the "inferred disclosure" or "immutability" exceptions, for the reasons set out in its original submissions. It further submits that disclosure of the operating agreement would reveal information about the appellant, its owners, and their business that was not negotiated and was not susceptible of change.

Analysis/Findings re supplied

The operating agreement

[60] I have carefully reviewed both records and, in particular, the terms of the operating agreement referred to by the appellant, as well as the parties' representations.

[61] With respect to the operating agreement, other than the share structure of the appellant in Article 7.1(b), I agree with the findings in Order PO-2620 that the operating agreement in this appeal contains mutually generated, agreed-upon, essential terms of a contract that are the product of a negotiation process.

[62] Specifically, I agree with the adjudicator in Order PO-2620 that the operating agreement appears to be a detailed and carefully negotiated contract between the OLG and the appellant. Consistent with the rationale cited above in Order PO-2620, I find that, other than the appellant's share structure in section 7.1(b), the constituent terms of the operating agreement do not fall into the "inferred disclosure" or "immutability" exceptions.

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[34] The appellant refers to Order PO-2384, where it was recognized that information about a third party revealed through contractual terms could be exempt: "[f]or example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of section 17(1). Another example the appellant relies on is in the case of *Imperial Oil Limited v. Alberta* (*Information and Privacy Commissioner*), 2014 ABCA 231 (CanLII), where the court held in the alternative that four technical letters appended to an agreement were exempted from disclosure because they were technical information obtained by Imperial Oil from consultants that were provided in confidence and not negotiated by the parties (at para. 84).

[63] I find that the terms of the operating agreement, other than the share structure in section 7.1(b), have been mutually generated, rather than supplied by the appellant. I find that disclosure of the operating agreement, other than the share structure information in section 7.1(b), would not permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the appellant to the OLG. Nor would this disclosure reveal information that is not susceptible to negotiation.

[64] For example, Articles 3.13(e)(ii), 3.13(g) , 4.2 and 4.3 of the operating agreement contain phrases such as "at least", "falling below", "a minimum", or a specific percentage, which requires a certain threshold to be maintained or reached by the appellant. I find that these terms would have been negotiated with the appellant. The appellant has submitted that this information reveals the actual value of its assets, but I disagree. It just reveals a threshold that should be reached or maintained under the terms of the contract, but does not reveal the actual value of the appellant's assets.

[65] Article 7.1(b) of the operating agreement contains the percentage and number of shares in the appellant company held by various entities. I agree with the appellant that the inferred disclosure exception applies to this information, as disclosure would permit accurate inferences to be made with respect to underlying, non-negotiated, confidential information about the appellant's share structure supplied by the appellant to the OLG.

[66] I find, however, that the remainder of Article 7 does not contain information that is immutable or subject to the inferred disclosure exception because is it information that the OLG and the appellant are relying on from each other in the fulfilment of the contract. As such, I find the remainder of Article 7 to be negotiated, not supplied, information.

[67] I reject the appellant's argument that information in the operating agreement derived from its reply to the Request for Proposals (the RFP) which was incorporated into the operating agreement, fits within the immutability or inferred disclosure exceptions. This information is part of the negotiated contract. I agree with the following findings in Order PO-2384:

> … [O]ne of the factors to consider in deciding whether information is supplied is whether the information can be considered relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of section 17(1). Another example may be a third party producing its financial statements to the institution. It is also important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it. The intention of section 17(1) is to protect information of the third party that is

> not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed [Emphasis added].[35]

[68] The appellant appears to be trying to distinguish between information incorporated directly from its reply to the RFP into the operating agreement and information from its reply to the RFP that was indirectly included in the operating agreement. I do not agree with the appellant that there is any reasonable or supportable distinction to be made between these two situations. I agree with the reasoning in the past orders noted above, that in either case, its presence in the contract signifies that the other party agreed to it.

[69] I find, in particular, that the fees and pricing information in the operating agreement is information that was agreed upon by the parties, despite the fact that it may have been derived from the pricing/cost information in the appellant's reply to the RFP. Given my conclusion that the fees and pricing information in the operating agreement was agreed to by the parties, I find that particular information is also not supplied.

[70] I found above that the operating agreement contains labour relations information in the form of provisions related to the conditions of work at the casinos operated by the appellant. However, I find that the conditions of work is information that would have been negotiated between the OLG and the appellant and is not information that has been supplied.

[71] Therefore, I find that, other than the appellant's share structure in Article 7.1(b), the information in the operating agreement was not supplied to the OLG by the appellant. As part 2 of the test for exemption under section 17(1) has not been met for the remaining parts of the operating agreement, I will order them disclosed. I will consider whether Article 7.1(b) meets the "in confidence" aspect of part 2 of the test below. First, I turn to the provisions of the TDA at issue.

The TDA

[72] The other information at issue in this appeal is sections 6.1, 6.2, 7.1 and 7.2 of the TDA. The appellant did not make representations specific to each of these amending provisions.

[73] I have reviewed each of the sections at issue in the TDA, an agreement between the appellant and the OLG. I find that they represent terms that were clearly agreed upon between the parties concerning the amendment and extension of the operating agreement. In fact, of the four sections, three of them (sections 6.1, 7.1 and 7.2) state that "the parties agree" and section 6.2 is a continuation of section 6.1.

[74] The appellant has not provided any submissions to support, and I cannot ascertain from my review of these four sections of the TDA, that this information is either immutable or subject to the inferred disclosure exception. On a plain reading of these sections, this information appears to be agreed upon terms between the OLG and the appellant as to how the operating agreement is to be amended.

[75] I find that the information in the four sections at issue in the TDA was not supplied

[35] See also Order PO-3830.

by the appellant to the OLG. Therefore, I find that the information at issue in the TDA does not meet part 2 of the test for exemption under section 17(1) and I will order this information disclosed to the requester.

Conclusion

[76] In conclusion, I have found that only the share structure of the appellant in Article 7.1(b) of the operating agreement meets the supplied test in part 2 of the test under section 17(1). I will now consider whether the share structure of the appellant in Article 7.1(b) of the operating agreement was supplied by the appellant to the OLG with a reasonable expectation of confidence.

In confidence

[77] I will now consider whether the information that I have found to be supplied, the share structure of the appellant in Article 7.1(b) of the operating agreement, was supplied in confidence as required for part 2 of the test under section 17(1).

[78] The appellant submits that the information was supplied to the OLG under an explicit expectation of confidentiality. It refers to Article 15.1 of the operating agreement, which reads, in part, as follows:

> ...the Parties acknowledge and agree that information provided by any Party hereto to the other Party hereto pursuant to or in connection with this Agreement...may comprise trade secrets or scientific, technical, commercial, financial or labour relations information, supplied in confidence...

[79] The appellant submits that Article 15.1 also provides that all information supplied by either party shall be kept confidential and shall not be released, as follows:

> ...except as may be required by Applicable Law, all such information provided by any Party hereto pursuant to or in connection with this Agreement shall be kept confidential by the Parties and shall only be made available to such of a Party's employees, advisors, consultants and institutional lenders as are required to have access to the same in order for the recipient Party to adequately use such information for the purposes for which it was furnished and who shall be similarly bound to these provisions...

[80] The appellant states that while Article 15.1 recognizes disclosure obligations may exist by law, that this does not negate the explicit expectation of confidentiality articulated by the parties.[36]

[81] Alternatively, the appellant submits, the information in the operating agreement was implicitly provided in confidence because the operating agreement contains the appellant's sensitive and proprietary commercial and financial information.

[82] The appellant also relies on a letter from its solicitor written to the adjudicator who decided Order PO-3116. This solicitor was involved in the RFP process that resulted in the operating agreement. This letter details the solicitor's opinion that the negotiations and

[36] The appellant relies on Order PO-2328.

discussions that resulted from this process are confidential.

[83] The appellant states that, even setting aside the explicit assurances of confidentiality in Article 15.1 of the operating agreement, it clearly had a reasonable expectation, based on the sensitivity of the information in question, that it would be kept confidential. It states:

> Furthermore, this reasonable expectation of confidentiality has continued through to the present time. This is evidenced by all the circumstances, including [the appellant's] consistent treatment of the confidential information in the operating agreement in a manner that indicates a concern for its protection from disclosure...
>
> [The appellant] is a privately held company. It does not publicly disclose information in relation to its corporate organization [or] share structure, such as that which would be revealed if Article 7.1 was disclosed…

[84] The requester takes no position on the "in confidence" portion of part 2 of the test under section 17(1).

Analysis/Findings re in confidence

[85] In order to satisfy the "in confidence" component of part 2, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[37]

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.[38]

[87] Based on my review of the appellant's representations and the share structure of the appellant in Article 7.1(b) of the operating agreement, I find that this information was supplied in confidence to the OLG.

[88] The information about the appellant's share structure in the operating agreement is information about a privately held company that I accept has not been publicly disclosed. I

[37] Order PO-2020.
[38] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

find that this information was supplied by the appellant to the OLG with a reasonable expectation of confidentiality, both explicit (as set out in Article 15.1 of the operating agreement) and implicit (in the manner the parties to the operating agreement treated this information).

[89] Therefore, I find that part 2 of the test under section 17(1) has been met for the share structure of the appellant found in Article 7.1(b) of the operating agreement.

Part 3: harms

[90] In order to meet part 3 of the test under section 17(1), there must be detailed evidence to establish a risk of harm from disclosure of the information at issue that is well beyond the merely possible or speculative.[39]

[91] I will now consider whether part 3 of the test under section 17(1) has been met for the share structure of the appellant found in Article 7.1(b) of the operating agreement.

Representations

[92] Other than the applicable legal test and principles for part 3, which were also set out in the Notice of Inquiry sent to the parties to seek their representations, the appellant's representations on part 3 were withheld from the requester in their entirety, as they satisfied the confidentiality criteria in IPC *Practice Direction 7*. I have, however, reviewed them and considered them in coming to my conclusions.

[93] The requester argues that the harms under part 3 of the test under section 17(1) are not made out because the contract between the OLG and appellant ended on June 10, 2019 and she highlights the fact that during mediation of this appeal, the OLG ultimately granted full access to the records.

Analysis/Findings re part 3

[94] Parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.[40]

[95] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[41] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by

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[39] *Accenture Inc. v. Ontario* (*Information and Privacy Commissioner*), 2016 ONSC 1616, *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C.R. 23.
[40] *Accenture Inc. v. Ontario* (*Information and Privacy Commissioner*), 2016 ONSC 1616, *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C.R. 23.
[41] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), cited above.

repeating the description of harms in the *Act.*[42]

[96] In applying section 17(1) to government contracts, the need for public accountability in the expenditure of public funds is an important reason behind the need for detailed evidence to support the harms outlined in section 17(1).[43]

[97] At issue under part 3 of the test is the share structure of the appellant in Article 7.1(b) as of the date of the operating agreement in July 2002. The appellant has not provided representations on part 3 that are specific to this information, only providing more general representations that disclosure of the information in the operating agreement could reasonably be expected to result in the harms in sections 17(1)(a) to (c).

[98] In particular, under section 17(1)(a), the appellant submits that disclosure of the records could reasonably be expected to prejudice significantly its competitive position.

[99] Under section 17(1)(b), the appellant states that disclosure would create a disincentive for entities considering contracting with government to offer government their best price or terms.

[100] Under section 17(1)(c), the appellant submits generally that disclosure of the records could reasonably be expected to cause undue loss to it and undue gain to the appellant's competitors.

[101] I find that disclosure of the appellant's share structure information in Article 7.1(b), that it supplied to the OLG in 2002, could not reasonably expected to:

- significantly prejudice the competitive position of the appellant under section 17(1)(a),
- 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 under section 17(1)(b), or
- result in undue loss to the appellant and undue gain to the appellant's competitors.

[102] As I stated, at issue is the appellant's share structure in the 2002 operating agreement. Share structures may change over time. The appellant has not been the operator of the casinos since June 2019. I have not been provided with evidence by the appellant as to how disclosure of its share structure in 2002, when it was the operator of the casinos, could now, almost two decades later, reasonably be expected to result in the harms set out in section 17(1).

[103] I find that part 3 of the test for exemption under section 17(1) has not been met for the information that I found met part 2 of the test, the share structure of the appellant in Article 7.1(b) of the operating agreement. Therefore, I find that this information is not exempt under section 17(1). As this is the only information that remains at issue, I am dismissing the appellant's appeal and I will order both the operating agreement and sections 6.1, 6.2, 7.1 and 7.2 of the TDA to be disclosed to the requester.

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[42] Order PO-2435.
[43] Order PO-2435.

ORDER:

I order the OLG to disclose the operating agreement and sections 6.1, 6.2, 7.1 and 7.2 of the Transition and Disentanglement Agreement to the requester **by September 15, 2021** and **not before September 10, 2021**.

Original Signed by: August 11, 2021

Diane Smith
Adjudicator