Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4282

Appeal PA19-00175

The Ontario Lottery and Gaming Corporation

July 27, 2022

Summary: The Ontario Lottery and Gaming Corporation (OLGC) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the "pre-established guaranteed annual payment" – otherwise known as the "threshold amounts" – of the successful proposal for the GTA gaming bundle. The OLGC denied access to the responsive record based on the mandatory third party information exemption at section 17(1) and the discretionary exemption for economic and other interests of Ontario at section 18(1) of the *Act*. In this order, the adjudicator does not uphold the OLGC's decision. She finds that the sections 17(1) and 18(1) exemptions do not apply to the threshold amounts, and orders the OLGC to disclose them to the appellant.

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

Orders Considered: Orders MO-3058-F, PO-2435, PO-2774, and PO-2843.

OVERVIEW:

[1] This order determines whether certain information contained within a winning proposal to provide gaming services in the Greater Toronto Area (GTA) to the Ontario Lottery and Gaming Corporation (OLGC) should be disclosed under the *Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] The OLGC provides gaming entertainment (including casinos) in Ontario. It is in the process of completing its competitive procurement processes as part of the modernization of gaming facilities, in which it selects service providers to manage the day-to-day operations within gaming bundles. "Gaming bundles" refer to various regions in which casinos operate. When a service provider is awarded a gaming bundle by the OLGC, the terms of the agreement are reflected in a Casino Operating and Services Agreement (COSA) between them. The OLGC has entered into COSAs for the following gaming bundles: East, North, Southwest, Central, Ottawa Area, GTA, West GTA, and Niagara.

[3] Proposals and COSAs contain a service fee that the OLGC pays to the service provider, which is based on a model that includes fixed and variable fee components. Under this model, the OLGC is presumptively entitled to all gaming revenue. The OLGC will pay the service provider a fixed fee for operating costs and capital expenditures, and a variable fee based on a percentage of gaming revenue generated above the threshold. The "threshold amount" is the amount of gross gaming revenue that the OLGC is entitled to retain before paying the service provider the variable fee component. The bidding process allows service providers to offer a different threshold amount for each of the first 10 years of the COSA, based on anticipated changes in business performance and land development over the duration of the agreement. The threshold amounts are a key factor in the award of the contract for each bundle. A proposal that proposes a higher threshold amount is more favourable to the OLGC than a proposal that proposes a lower threshold amount.

[4] This appeal deals with the request for proposal (RFP) issued by the OLGC for the GTA bundle; the affected party in this appeal is the gaming service provider that submitted a proposal and was awarded the contract for the GTA bundle.

[5] A request was submitted to the OLGC under the *Act* for access to the following information:

> [The affected party] won the bidding process for the sale of the GTA Bundle from the OLGC. […] Can we please receive a copy of the proposal put forth by [the affected party] that won the GTA Bundle bid. Specifically can we receive a copy of the thresholds (pre-established guaranteed annual payment) set by [the affected party] in their proposal that won the bid.

[6] The OLGC notified the affected party of the request. Following consultations with the affected party, the OLGC issued a decision denying access to the responsive record under the mandatory third party information exemption at section 17(1) of the *Act*.

[7] The appellant appealed the OLGC's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution.

[8] During mediation, the appellant confirmed that it is only pursuing access to page 00917 of the proposal and raised the possible application of the public interest override at section 23 of the *Act*. The OLGC issued a revised decision claiming that sections 18(1)(c) and 18(1)(d) (economic and other interests of Ontario) apply to page 00917 of the proposal in addition to section 17(1).

[9] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage. I decided to commence an inquiry by inviting representations from the OLGC and the affected party, initially. I received representations from the OLGC and the affected party and shared their non-confidential representations with the appellant,[1] and invited representations from the appellant. The appellant submitted representations, which I shared with the OLGC and the affected party. I then invited and received reply representations from the OLGC and the affected party.

[10] In this order, I do not uphold the OLGC's decision to withhold the threshold amounts under sections 17(1) or 18(1) of the *Act*, and I order the OLGC to disclose this information to the appellant.

RECORD:

[11] The appellant seeks access only to the "pre-established guaranteed annual payment" – known as the "threshold amounts" – for each year covered by the proposal submitted by the affected party. There is no dispute that these same threshold amounts also appear in the COSA itself.

[12] The threshold amounts are contained on page 00917 of the proposal, "Appendix 3 – Variable Fee Threshold Form," (variable fee form).

ISSUES:

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

B. Does the discretionary exemption at section 18(1) (economic and other interests of Ontario) apply to the threshold amounts?

[1] Some portions were withheld in accordance with the confidentiality criteria in IPC Practice Direction 7 and section 7 of the IPC's *Code of Procedure*.

DISCUSSION:

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

[13] The OLGC and the affected party claim that the threshold amounts are exempt under section 17(1) and should be withheld on that basis. The OLGC argues that sections 17(1)(a), (b), and (c) apply, while the affected party argues that sections 17(1)(a) and (c) apply.

[14] Section 17(1) 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

[15] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[2] 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.[3]

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

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

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

---

[2] *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.*).
[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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.

Part 1: type of information

[17] The types of information listed in section 17(1) have been discussed in prior orders. Based on the OLGC and the affected party's representations, the relevant types of information in this appeal are:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[4] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[5]
>
> *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]

Representations of the OLGC

[18] The OLGC made representations about the variable fee form as a whole, although the appellant only seeks access to the threshold amounts contained in that form. Because the threshold amounts are contained in the variable fee form, I refer to and consider the OLGC's representations about the variable fee form below when they relate to the threshold amounts.

[19] The OLGC submits that the variable fee form, and therefore the threshold amounts, were submitted to the OLGC by the affected party in response to an RFP for the GTA bundle. The OLGC states that the threshold amounts are a key factor in assessing submitted proposals, and that the affected party won the GTA bundle based on the threshold amounts it proposed, along with other factors.

[20] The OLGC submits that the variable fee form contains financial and commercial information, and that the financial information relates to revenues, expenditures, and profit in relation to the GTA bundle. The OLGC further submits that the commercial information contained in the variable fee form relates to the exchange of services between it and the affected party.

---

[4] Order PO-2010.
[5] Order P-1621.
[6] Order PO-2010.

Representations of the affected party

[21] The affected party states that the variable fee form contains financial and commercial information because it summarizes the key financial and commercial terms of the proposal it made to the OLGC. The affected party submits that the threshold amounts reveal the business model used by it in operating and managing its business interests including the GTA bundle and other similar assets. The affected party further submits that the variable fee form also contains financial information under section 17(1) as the record reveals its pricing practices and operating costs.

Representations of the appellant

[22] The appellant submits that it is not requesting the revenue projections or capital expenditure projections, and that it is only requesting the threshold amounts. The appellant submits that the OLGC and the affected party are incorrectly defining what the information at issue is to obfuscate what is financially sensitive and therefore what should be kept confidential.

Analysis and findings

[23] Based on my review of the variable fee form and the representations of the parties, I find that the threshold amounts are commercial and financial information because they were a key component of the affected party's winning proposal to provide commercial services to the OLGC. Furthermore, they are the amount of gross gaming revenue that the OLGC is entitled to retain each year prior to paying the affected party a percentage of gaming revenue generated above the threshold. Therefore, I find that the threshold amounts are commercial and financial information within the meaning of section 17(1) of the *Act*.

[24] As part 1 of the three-part test under section 17(1) is met, I must now consider whether the affected party supplied the threshold amounts, in confidence, to the OLGC.

Part 2: supplied in confidence

Representations of the OLGC and the affected party

[25] The OLGC and the affected party submit that the IPC has consistently held that proposals submitted during the selection process by companies competing for government contracts are information supplied in confidence for the purposes of section 17(1). They argue that the threshold amounts were supplied in confidence by the affected party to the OLGC as part of the bidding process for the GTA bundle.

[26] The OLGC and the affected party submit that the variable fee form was supplied "in confidence" because the information was:

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

[27] The OLGC and the affected party submit that in addition to the list above, the variable fee form, which contains the threshold amounts, was submitted to the OLGC in an envelope marked "privileged and confidential."

[28] The OLGC states that it has not shared the RFP, or any part of the RFP, with third parties, and that it agreed to maintain in confidence the proposal for the threshold amounts and the calculations for them.

[29] The affected party states that it continued to protect the confidentiality of its financial and commercial information through the introduction of confidentiality terms in the COSA it entered into with the OLGC.

Representations of the appellant

[30] The appellant's representations do not specifically address the three-part test in section 17(1). However, the appellant argues that the section 17(1) exemption does not apply to the threshold amounts.

Analysis and findings

[31] The requirement that the information have been "supplied" to the institution by a third party reflects the purpose in section 17(1) of protecting the informational assets of third parties.[7]

[32] 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]

[33] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was

[7] Order MO-1706.
[8] Orders PO-2020 and PO-2043.

provided. This expectation must have an objective basis.[9]

[34] The appellant's request is for the threshold amounts from the successful RFP for the GTA bundle, and not the COSA between the OLGC and the affected party. There is no dispute that the threshold amounts at issue also appear in the COSA between the affected party and the OLGC. Previous IPC orders have found that, in general, contents of a negotiated contract are considered "mutually generated" and do not meet the "supplied" requirement for section 17(1) of the *Act*.

[35] However, the record at issue before me is the RFP, not the COSA. Where the record at issue is the RFP, the IPC's case law on the "supplied" test in relation to contracts is generally not applicable. In Order MO-3058-F, former Assistant Commissioner Sherry Liang stated that:

> I am aware that in some orders, adjudicators have found the contents of a winning proposal to have been "mutually generated" rather than "supplied", where the terms of the proposal were incorporated into the contract between a third party and an institution. In this appeal, it may well be that some of the terms proposed by the winning bidder were included in the town's contract with that party. But *the possible subsequent incorporation of those terms does not serve to transform the proposal, in its original form, from information "supplied" to the town into a "mutually generated" contract*. In the appeal before me, the appellant seeks access to the winning proposal, and that is the record at issue. (emphasis added).

[36] In this appeal, however, I note that the record at issue is not the entire RFP, and the situation here is not the "possible subsequent incorporation of the RFP terms into the contract." The information at issue in this appeal consists of solely the threshold amounts, which is specific information contained in the RFP, and the parties do not dispute that these same threshold amounts are in the COSA between the OLGC and the affected party.

[37] In these circumstances, it seems at least arguable to me that the threshold amounts should be treated as mutually generated rather than supplied. However, since I find that the harms are not established for the purposes of section 17(1) below, I do not need to make a finding on whether the threshold amounts were "supplied in confidence."

Part 3: harms

[38] 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

---

[9] Order PO-2020.

disclosure will in fact result in such harm.[10]

[39] 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.[11] 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 repeating the description of harms in the *Act.*[12]

Representations of the appellant

[40] I will first summarize the appellant's representations before turning to the other parties' arguments about the section 17(1) harms. The appellant submits that when the OLGC and the affected party describe the harms caused to them by disclosure, they are often referring to revenue projections and capital expenditures, and not to the threshold amounts. The appellant reiterates that it is only requesting disclosure of the threshold amounts, and argues that their disclosure would not result in prejudice to the competitive position of the OLGC or the affected party. The appellant also submits that none of the scenarios that the OLGC or the affected party argue could result from disclosure actually explain why or how the scenario could reasonably be expected to cause harm. The appellant argues, therefore, that the exemptions do not apply to the threshold amounts.

Representations of the OLGC and the affected party on sections 17(1)(a) and (c)

[41] The OLGC and the affected party submit that sections 17(1)(a) and (c) apply to the variable fee form, stating that its disclosure could reasonably be expected to significantly prejudice the affected party's competitive position or significantly interfere with contractual or other negotiations; or result in undue loss or gain to it.

[42] The OLGC and the affected party's representations outline the harms that the affected party could reasonably be expected to suffer if the entire variable fee form were disclosed. The OLGC also specifically referenced harms that could result from the disclosure of the revenue projections, capital expenditures, and business projections and forecasts contained in the variable fee form. As noted above, I will only refer to the arguments about the variable fee form if they are related to the threshold amounts.

[43] In support of its arguments, the affected party submitted an affidavit sworn by

---

[10] *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.
[11] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), cited above.
[12] Order PO-2435.

its General Counsel, Chief Privacy Officer, and Corporate Secretary (General Counsel). The affidavit reiterates the anticipated harms outlined in the affected party's arguments and does not expand on them. The affected party submits that the appellant challenges the evidence of harm adduced by the OLGC, but does not challenge the specific evidence of harm it adduced in the affidavit of its General Counsel. The affected party argues, therefore, that its affidavit should be accepted as establishing the stated harms.

[44] The OLGC submits that the threshold amounts are part of a "complex fixed and variable fee" calculation and they are proposed by bidders using the variable fee form. The OLGC submits that the model set out in the variable fee form is a wholistic one through which the threshold amounts are proposed.

[45] Viewing the arguments collectively, the OLGC and the affected party argue that disclosure of the threshold amounts could reasonably be expected to result in the harms in sections 17(1)(a) and (c), because disclosure could reasonably be expected to:

1. Reveal the affected party's proprietary pricing information, other information, and winning strategy,

2. Negatively impact the affected party's market value, and

3. Lead to demand for concessions.

[46] I will address each of these arguments, in turn.

(1) Disclosure could reveal the affected party's proprietary pricing information, other information, and winning strategy

[47] The OLGC submits that disclosure of the threshold amounts can be expected to impact the baseline expectations of other procuring entities in terms of the net revenues/revenue sharing split that the affected party is prepared to accept for a given casino property or bundle. The OLGC argues that this would affect the affected party's potential negotiations with other procuring entities.

[48] The OLGC and affected party submit that disclosure of the threshold amounts will reveal the "winning strategy" for one of the most valuable elements of the affected party's proposal – the proposed threshold amounts. They argue that this would significantly prejudice the affected party's ability to competitively negotiate and be successful in future bids, because competitors would use the data to tailor their proposals by choosing thresholds to undercut the affected party.

[49] The affected party submits that the threshold amounts are the equivalent of confidential pricing information, which competitors could exploit to tailor their fee proposals and threshold amounts to better compete with it, and negatively affect its ability to win future competitions for the operation of gaming assets in Ontario or

across Canada. The affected party submits that past IPC orders[13] have found that the requirements in section 17(1)(a) have been met where disclosure of the information would enable a competitor to use the information to gain an advantage in future bids; and where the information related to pricing or revenue distribution is included.

[50] The OLGC argues that disclosure would permit the accurate inferences of other information supplied within the bidding process, including the complex and proprietary financial modeling used by the affected party to derive the revenue/financial projections and capital expenditure figures.

[51] The affected party argues that even if the projected revenues and capital expenditures were severed from the variable fee form, disclosure of the remainder of the record, particularly the threshold amounts, could be used to infer its operations and reverse engineer its approach to creating its revenue projections. The affected party submits that this would prejudice its competitive position in relation to future procurements and contractual negotiations.

(2) Disclosure could negatively impact the affected party's market value

[52] The OLGC states that disclosure of the threshold amounts would reveal the future anticipated commitments and obligations of the affected party, which may influence how the financial status and prospects for the affected party are perceived in the public domain. The OLGC submits that disclosure of the threshold amounts can be expected to be particularly harmful for a publicly traded service provider, given the anticipated impact on share price and the trading market.

[53] The affected party submits that disclosure of the variable fee form could reasonably be expected to result in undue harm to it, its business partner, and their respective shareholders. The affected party states that it and its business partner are both publicly traded companies, and disclosure of the variable fee form in isolation could lead market analysts to draw incorrect or inaccurate conclusions about the partnership's current financial performance based on incomplete or partial information about one part of its business. The affected party states, for example, that market analysts could incorrectly conclude that it is failing to meet expectations, and these incomplete or partial analyses could lead to a sell-off, which could negatively impact the value of the affected party, its business partner, and their shareholders.

(3) Disclosure could lead to demand for concessions

[54] The OLGC submits that the affected party's suppliers and vendors in the GTA region could use the information contained in the variable fee form to seek financial or other concessions and tailor their supply and pricing practices accordingly.

[55] The affected party argues that disclosure would provide its competitors and

[13] Orders P-408, M-288, M-511, P-610, M-250.

suppliers with key information about its revenues, facilities, and commercial strategies as it relates to its casino and gaming operation, which those entities can use to seek greater financial or other concessions in negotiations with it.

Representations of the OLGC on section 17(1)(b)

[56] The OLGC argues that if the variable fee form were disclosed, the affected party may be unable to provide as favourable an offer in future procurements, which could 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."

Analysis and findings

[57] Based on my review of the evidence before me and the circumstances of this appeal, I find that part 3 of the three-part test for exemption under section 17(1) is not met. My reasons follow.

[58] The representations of the OLGC and the affected party focus largely on harms resulting from the disclosure of the variable fee form as a whole. As noted above, the appellant is only requesting the threshold amounts and not the other information, such as the projected revenues and capital expenditures found in the variable fee form. Accordingly, the arguments put forth by the OLGC and the affected party about the harms that could reasonably be expected to result from the disclosure of other portions of the variable fee form are only relevant to the appeal before me to the extent that they relate to the threshold amounts.

[59] Before turning to the specific arguments of the parties, I will address the affected party's argument that because the appellant did not challenge the evidence of harm it adduced in its affidavit, I should find that the harms have been established based on the unchallenged affidavit. Although the appellant did not specifically challenge the evidence outlined in the affected party's affidavit, as noted above, the affected party's affidavit reiterates its arguments without expanding on them. Furthermore, whether the appellant challenges the evidence or not, is not determinative of whether the affected party has established harms under part 3 of the three-part test in section 17(1). It is my responsibility as the decision-maker in this appeal to make that determination based on the totality of the evidence before me. Therefore, I reject the affected party's argument that I should accept its affidavit on the issue of harm as meeting the harms test simply because the appellant did not challenge it.

[60] To find that any of the section 17(1) harms could reasonably be expected to result from disclosure, I must be satisfied that there is a reasonable expectation of the specified harm. I can reach this conclusion either based on my review of the threshold amounts at issue, the circumstances of this appeal, including the record as a whole, and/or the representations made by the OLGC and the affected party.

[61] The OLGC and the affected party argue that sections 17(1)(a) and (c) apply to

the threshold amounts, stating that their disclosure could reasonably be expected to significantly prejudice the affected party's competitive position or significantly interfere with contractual or other negotiations; or result in undue loss or gain to it. The OLGC also argue that section 17(1)(b) applies because disclosure of the threshold amounts would lead to similar information no longer being supplied where it is in the public interest that it continue to be supplied.

[62] Viewed collectively, and as summarized above, the OLGC and the affected party argue that disclosure could reasonably be expected to result in the following, which I will discuss in turn below:

1. Reveal the affected party's proprietary pricing information, other information, and winning strategy,

2. Negatively impact the affected party's market value, and

3. Lead to demand for concessions from suppliers and vendors.

(1) Disclosure could reveal the affected party's proprietary pricing information, other information, and winning strategy

[63] The OLGC and the affected party argue that the threshold amounts are equivalent to pricing information and that their disclosure would reveal the affected party's confidential and proprietary pricing formula. They argue that this could reasonably be expected to significantly prejudice the affected party's ability to competitively negotiate and be successful in future bids, and that for this reason, the information is exempt under sections 17(1)(a) and (c). I do not accept their argument.

[64] The threshold amount is not the "price" that the OLGC pays in exchange for goods or services. The affected party offers its services to the OLGC – the running of the casinos/gaming properties in the GTA bundle – regardless of whether the threshold amount is reached, based on the COSA between them. The OLGC is entitled to retain the threshold amount of gross gaming revenue before sharing the gaming revenue above the threshold amount with the affected party. If the total gross gaming revenue from the GTA bundle does not meet the threshold amount for that year, the affected party does not receive this payment. Therefore, I do not find that the threshold amounts are pricing information, but rather, I find that they are a condition of payment. For this reason, I do not find the IPC orders provided by the parties about the harms resulting from disclosure of pricing information to be applicable in the appeal before me. Accordingly, I find that the affected party has not established that disclosure of the threshold amounts would reveal proprietary pricing information, and would give rise to a reasonable expectation that the harms specified in sections 17(1)(a) and (c) will occur on that basis.

[65] The OLGC and the affected party argue that disclosure of the threshold amounts would also disclose or allow the inference of the affected party's proprietary formula

and permit others to determine ("reverse engineer") the affected party's confidential information in the variable fee form. The parties argue that this would prejudice the affected party's competitive position in relation to future procurements and contractual negotiations, and lead to a reasonable expectation that the harms specified in sections 17(1)(a) and (c) will occur.

[66] Based on the representations of the parties and my review of the variable fee form, I cannot determine how this is possible. The threshold amounts are one line in what the OLGC has argued is part of a "complex fixed and variable fee" calculation and are calculated using the affected party's proprietary formula. It is not evident to me, and the OLGC and the affected party have not explained, how one line of the variable fee form, absent other information, could permit the reverse engineering to surmise the remainder of the information found in the variable fee form. Therefore, I do not accept the OLGC and the affected party's argument that disclosure of the threshold amounts could lead to the inference/reverse engineering of the affected party's other information.

[67] The OLGC argues that disclosure of the threshold amounts would impact baseline expectations of procuring entities in terms of revenue sharing the affected party is prepared to accept for the operation of a given gaming property or bundle. The OLGC and the affected party also argue that competitors could undercut the affected party by proposing more favourable threshold amounts in future procurements or re-procurements because disclosure of the threshold amounts would reveal the winning strategy of the affected party's proposal. I also do not accept these arguments.

[68] In its representations, the OLGC submits that the threshold amounts, while a "key factor" in the award of the GTA bundle, were not the only factor in the affected party's winning the GTA bundle. Moreover, each gaming bundle contains a different set of casinos/gaming properties for a specific region, so I am not convinced that the affected party proposing a certain threshold in a certain year for the GTA bundle could reasonably be expected to set up baseline expectations for its operation of other bundles/properties. As the OLGC explained, the bidding process allows service providers to offer a different threshold for each of the first 10 years of the COSA.

[69] The disclosure of the threshold amounts also would not reveal the affected party's entire proposal. The OLGC has argued that the proprietary and complex financial formula and model set out in the variable fee form, through which the threshold amounts are proposed, is a wholistic one. Even if I were to accept that competitors would copy the affected party's threshold amount in their proposal or undercut it, the rest of their proposal would have to support the threshold amount in each year in order to win the bid. Therefore, competitors of the affected party cannot simply copy or undercut the threshold amount in the affected party's winning proposal. Furthermore, given the complexity of the variable fee form calculation, it is unlikely that the affected party would provide the same threshold amounts in future procurements or re-procurements.

[70] Even if I accepted the OLGC and the affected party's argument that disclosure of the threshold amounts would result in a more competitive bidding process for the affected party in future competitions, past IPC orders have found that this alone does not establish the harms under section 17(1). In Order PO-2435, a request was made for consultants' contracts with the Ministry of Health and Long-Term Care. In that appeal, former Commissioner Brian Beamish evaluated the harms under section 17(1) argued by the ministry and stated:

> The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

[71] In Order PO-2774, Adjudicator Daphne Loukidelis followed former Commissioner Beamish's harms analysis in Order PO-2435, and stated that the section 17(1) exemption "was never intended to be wielded as a shield to protect third parties from competition in the market place, but rather, from a reasonable expectation of *significant* prejudice to the party's competitive position." (emphasis added). I agree with this analysis and adopt it in this appeal.

[72] The OLGC also submits that if the threshold amounts from the affected party's proposal were disclosed, the affected party may be unable to provide as favourable an offer in future procurements. The OLGC argues that this will 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" for the purposes of section 17(1)(b) of the *Act*. However, other than this argument, the OLGC has not elaborated on or provided detailed evidence to support this assertion. As noted above, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act.*[14]

[73] For the reasons above, I find that the OLGC and the affected party have not established that disclosure of the threshold amounts would reveal the affected party's proprietary pricing information, other information, and winning strategy, resulting in a reasonable expectation that one of the harms specified in paragraphs (a), (b), and (c) of section 17(1) will occur.

(2) Disclosure could negatively impact the affected party's market value

[74] The OLGC and the affected party argue that disclosure of the threshold amounts could reasonably be expected to negatively impact the market value of the affected party, its partner, and their shareholders. I understand them to be arguing here that for this reason disclosure would lead to a reasonable expectation that the harms specified in sections 17(1)(a) and (c) will occur.

[14] Order PO-2435.

[75] The affected party specifically submits that disclosure of the threshold amounts in isolation could lead market analysts to draw incorrect or inaccurate conclusions of the current financial performance of its partnership based on incomplete or partial information about one part of its business. The affected party further submits that the effect of these incomplete or partial analyses could lead to a sell-off that would negatively affect its value, the value of its business partner, and their shareholders.

[76] The OLGC states that disclosure of the threshold amounts would reveal the future anticipated commitments and obligations of the affected party, which may influence how the financial status and prospects for the affected party are perceived in the public domain. The OLGC argues that disclosure of the threshold amounts can be expected to be particularly harmful for a publicly traded service provider, given the anticipated impact on share price and the trading market.

[77] While the OLGC and the affected party have argued that disclosure of the threshold amounts would negatively impact the market value of the affected party and potentially its partner, they have provided little other evidence to support this assertion. I acknowledge that the affected party submitted an affidavit from its General Counsel with its representations. However, as I have noted above, his affidavit simply reiterates the arguments made by the affected party. In my view, the OLGC and the affected party's assertion about the negative impact on the affected party's market value is speculative. Even in the affected party's submission, the negative impact is contingent upon market analysts drawing "incorrect or inaccurate conclusions" and those conclusions leading to a "sell-off", before the affected party's market value is impacted. As noted above, parties resisting disclosure must show that the risk of harm is real and not just a possibility.[15]

[78] Based on their representations, I find that the OLGC and the affected party have not provided sufficient evidence to support a conclusion that the disclosure of the threshold amounts could negatively impact the market value of the affected party and its partner, and reasonably be expected to result in the harms set out in sections 17(1)(a) and (c) of the *Act*. I also find that these harms are not self-evident from my review of the threshold amounts in the context of the surrounding circumstances.

(3) Disclosure could lead to demand for concessions

[79] The OLGC and the affected party argue that disclosure of the threshold amounts would lead to suppliers and vendors using this information to seek financial or other concessions from the affected party, resulting in the harms in sections 17(1)(a) and (c) of the *Act*.

[80] I do not accept that disclosure of the threshold amounts could reasonably be expected to lead to demand for concessions from the affected party's suppliers and

[15] *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C.R. 23.

vendors. The OLGC and the affected party have not provided me with sufficient evidence to reasonably conclude that these vendors and suppliers would suddenly seek financial or other concessions from the affected party based on the threshold amounts. In my view, that assertion is hypothetical and speculative. Vendors and suppliers would already be aware of the affected party winning the GTA bundle and its COSA with the OLGC. The OLGC and the affected party have not sufficiently explained how the disclosure of the threshold amounts would change their pricing and behaviour, and the reason is not self- evident.

[81] Therefore, I find that the OLGC and the affected party have not provided a sufficient basis for me to find that disclosure of the threshold amounts could reasonably be expected to lead to demands for concessions from vendors and suppliers, and to the harms enumerated in sections 17(1)(a) and (c) of the *Act*.

Conclusion

[82] Based on the representations of the parties, I am not satisfied that disclosure of the threshold amounts could reasonably be expected to prejudice significantly the competitive position of, or interfere significantly with the negotiations of the affected party for the purposes of section 17(1)(a) of the *Act*. I am not satisfied that disclosure of the threshold amounts could reasonably be expected to result in undue loss to the affected party or undue gain to its competitors for the purposes of section 17(1)(c) of the *Act*. Furthermore, I am not satisfied that disclosure of the threshold amounts could reasonably be expected to result in similar information no longer being supplied to the OLGC for the purposes of section 17(1)(b). Finally, I find that the harms in section 17(1) are not self-evident from my review of the threshold amounts in the context of the surrounding circumstances.

[83] All parts of the three-part test must be met for the mandatory exemption at section 17(1) to apply. Since the OLGC and the affected party have not established that there is a reasonable expectation of harm resulting from the disclosure of the threshold amounts, the third part of the test has not been met. Accordingly, I find that section 17(1) does not apply to the threshold amounts at issue in this appeal. I will now consider the OLGC's alternative claim, that the threshold amounts are exempt under sections 18(1)(c) and/or 18(1)(d) of the *Act*.

Issue B: Does the discretionary exemption at section 18(1) (economic and other interests of Ontario) apply to the threshold amounts?

[84] The OLGC takes the position that the information at issue qualifies for exemption under sections 18(1)(c) and/or 18(1)(d) of the *Act*. Those sections provide that:

> A head may refuse to disclose a record that contains,

> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

[85] The purpose of section 18 is to protect certain economic and other interests of institutions. It also recognizes that an institution's own commercially valuable information should be protected to the same extent as that of non-governmental organizations.[16]

[86] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. It recognizes that institutions may have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse to disclose information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[17]

[87] The section 18(1)(d) exemption is intended to protect the broader economic interests of Ontarians.[18]

[88] 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.[19]

Representations of the OLGC

[89] The OLGC's representations outline the harms it says it could reasonably be expected to suffer if the entire variable fee form were disclosed. The OLGC also specifically references harms that could result from the disclosure of the forecasting, revenue, and expenditure/investment information contained in the variable fee form. Because the threshold amounts are contained in the variable fee form, I refer to and consider the OLGC's representations about the variable fee form below only to the extent that they relate to the threshold amounts.

[90] The OLGC submits that the section 18(1) exemption applies to the variable fee

---

[16] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.
[17] Orders P-1190 and MO-2233.
[18] 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.
[19] Orders MO-2363 and PO-2758.

form for the same reasons that it says that section 17(1) is applicable. The OLGC submits that competitive harm caused to the affected party, in the form of increased competition in the GTA region and harm to negotiations with third party suppliers and vendors, can reasonably be expected to also cause harm to the OLGC and the Province in the form of decreased revenues derived from the region. The OLGC further submits that disclosure of the variable fee form could compromise the procurement process as a whole, and lead to sub-optimal competition among service providers in the Province to the detriment of overall revenue generation.

[91] The OLGC argues that disclosure of the threshold amounts will cause financial, competitive, and future negotiating harm to the OLGC by negatively impacting the bidding process for gaming bundles that have not yet been procured, including Windsor. The OLGC states that thresholds that were accepted by the OLGC for other bundles, including the GTA Bundle, would be expected to inform the proponents' bids within Windsor's bidding process, and may result in offers of a lower threshold amount for the OLGC, and consequently less revenue for the OLGC and the Province.

[92] The OLGC states that the same will be true in a re-procurement context for any of the gaming bundles, and specifically, knowledge of the threshold amounts for other bundles and/or in prior contexts will influence the bids made with respect to the re-procured bundle. The OLGC submits that if it is known that one service provider, such as the affected party, offered to provide and ultimately agreed to pay lower threshold amounts to the OLGC, then bidders will be less likely to offer higher threshold amounts in other procurement contexts. The OLGC further submits that if the threshold amounts agreed to in one gaming region are released, this can be expected to generate requests for threshold relief if other service providers believe they have bid too high relative to competitors.

[93] The OLGC argues that any anticipated competitive and financial harm to the affected party because of disclosure of the threshold amounts can reasonably be expected to also result in harm to the OLGC. The OLGC further argues that disclosure will render service providers reluctant to make favourable bids to the OLGC in ongoing and future procurement processes, if such favourable bids will be revealed and impact on procurement processes that the service provider is engaged in within other jurisdictions.

[94] The OLGC states that past IPC orders have acknowledged that the economic and/or financial interests of the institution and Ontario can reasonably be expected to be prejudiced because of disclosure of pricing models and "value for money" conditions agreed upon between institutions and private parties.

[95] The OLGC relies on Order PO-3495, an order dealing with schedules to a pricing agreement, which contains the price, volume discount, and "value for money" terms, between the Ministry of Health and Long-Term Care (the ministry) and a drug manufacturer. The OLGC states that according to the ministry, prior disclosures resulted

in manufacturers becoming reluctant to enter into pricing negotiations. The OLGC submits that in order PO-3495, the adjudicator found that certain "value for money" terms agreed to by drug manufacturers were exempt under section 18(1) because disclosure would compromise the ministry's future negotiations and ability to obtain the lowest drug prices.

[96] The OLGC states that the circumstances in Order PO-3495 are similar to the present case because disclosure of the threshold amounts will prejudice the OLGC's ability to secure the best offers. The OLGC submits that if the threshold amounts were disclosed, the affected party's competitors could choose thresholds to undercut it and affect its ability to win future competitions. The OLGC submits that this could reasonably be expected to negatively affect the proposals made by the affected party and other service providers in re-procurements and future procurements, and prejudice the OLGC's ability to secure the best offers.

[97] The OLGC also relies on Order PO-3415 because it states that the adjudicator found that a "target pricing" contracting strategy developed by Ontario Power Generation (OPG) as a metric to evaluate target prices proposed by third parties was exempt under section 18(1)(c). The OLGC states that the adjudicator accepted that disclosure would reveal the OPG's target pricing strategy and impede its ability to obtain optimum results and pricing in future agreements, which would prejudice the economic and competitive interests of OPG and the government of Ontario.

[98] The OLGC states that Order PO-3415 is relevant because disclosure of the variable fee form similarly can reasonably be expected to prejudice the economic and competitive interests of OLGC by affecting future bids for bundles that have yet to be procured (Windsor), and in future re-procurements of gaming bundles. The OLGC submits that disclosure of the thresholds that were agreed to with one service provider can be expected to impact OLGC's current and future negotiations by setting expectations regarding threshold amounts, and may also encourage current service providers to seek re-negotiation or adjustments in the form of relief from agreed-upon thresholds.

Representations of the affected party

[99] The affected party's representations and reply do not directly address the section 18(1) exemption. However, some of its reply is related to the OLGC's arguments on the application of section 18(1) and I have considered its arguments in that context.

Representations of the appellant

[100] The appellant states that when the OLGC references the harms that could reasonably be expected to result from the disclosure of the variable fee form, it is often referring to revenue projections and capital expenditures and not to the threshold amounts. The appellant reiterates that it is only requesting disclosure of the threshold

amounts. The appellant submits that disclosure of the threshold amounts would not result in prejudice to the competitive position of the OLGC. The appellant states that none of the scenarios of harms that the OLGC argue could result from disclosure actually explain why or how the scenario could reasonably be expected to cause harm. The appellant argues, therefore, that the section 18(1) exemption does not apply to the threshold amounts.

[101] The appellant states that while the OLGC claims that the procurement for the gaming bundle for Windsor has not yet been initiated, there is no evidence to support that Windsor will ever be part of a procurement process. The appellant argues that since all eight bundles have now been awarded, it is not possible that disclosure of the threshold amounts could cause competitive harm, compromise the procurement process, or reduce revenues generated by the Province.

The OLGC's reply

[102] The OLGC submits that if only the threshold amounts in each year were disclosed, this would present an incomplete and misleading picture to the public of the financial benefit anticipated by the affected party's proposal. The OLGC submits, however, even absent this consideration, disclosure of the threshold amounts on their own would be harmful to release for the reasons set out in the OLGC's previous submissions, and reiterates the reasons for this:

- disclosure of the threshold amounts would set baseline expectations by other procuring entities, which will impact the affected party's potential negotiations and arrangements in other jurisdictions, and also impact the OLGC's ability to receive optimal bids from service providers in a re-procurement context;

- the negative impact on the bidding process for bundles that have not yet been procured or in re-procurement contexts, as disclosure of the threshold amount will inform service provider bids;

- requests for threshold relief by service providers who believe they have bid too high relative to competitors; and

- the impact on future investments by the service providers.

[103] The OLGC states that it does intend to carry out a procurement process for the Windsor gaming bundle and that disclosure of the threshold amounts and how they change over time can be expected to influence the bids received for the Windsor procurement. The OLGC submits that proponents of the Windsor procurement would be highly interested to know the threshold amounts that were proposed within successful bids on a year-to-year basis within already procured bundles.

[104] The OLGC argues that the threshold amounts are analogous to the ongoing procurement of optimal price for a government body, such as the Ontario Ministry of

Health and Long-Term Care's procurement of drugs under the publicly funded drug system in Order PO-3495. The OLGC reiterates that in Order PO-3495, the adjudicator held that the price at which drug companies agreed to offer drugs to the Province falls under section 18(1) of the *Act*, because its disclosure would compromise Ontario's ability to obtain the best price from drug companies.

Analysis and findings

[105] Based on the evidence before me, I find that the OLGC has failed to make the necessary evidentiary link between the disclosure of the threshold amounts for which sections 18(1)(c) and (d) have been claimed and a reasonable expectation of either of the harms envisioned by those exemptions.

[106] To begin, as with section 17(1), the representations of the OLGC on section 18(1) include harms resulting from the disclosure of the variable fee form as a whole. As noted above, the appellant is only seeking access to the threshold amounts and not the other information, such as the projected revenues and capital expenditures, found in the variable fee form. Accordingly, I have only considered potential harm arising from the disclosure of the threshold amounts and not the other portions of the variable fee form.

[107] The OLGC argues that sections 18(1)(c) and (d) apply to the threshold amounts because their disclosure could reasonably be expected to prejudice the economic interests of or the competitive position of the OLGC, and be injurious to the financial interest of the Government of Ontario. The essence of the OLGC's argument is that disclosure of the threshold amounts would negatively impact the bidding process for new gaming bundles and re-procurement of current bundles, and it would lead to requests for threshold relief by service providers who believe they have bid too high relative to competitors. The OLGC also argues that disclosure of the threshold amounts may affect future investments by the service providers.

1) Negatively impact the bidding process

[108] In Order PO-2843, former Commissioner Brian Beamish examined whether section 18(1)(c) applied to the financial terms of a contract between a university and a company for its parking fine debt collection services. The university argued that if certain terms of the agreement were released, it would be prejudiced in attempting to negotiate a new agreement with a competitor because a precedent of a "floor" or ceiling would be established for any prospective supplier in advance of negotiations. Former Commissioner Beamish did not accept the university's argument and stated that the university's position ignored the "reality of how a competitive marketplace functions." He also stated:

> In such a marketplace, the disclosure of the rates of an existing service provider would more likely lead to a competitor lowering its rates in order

> to secure a new agreement. The new lower cost would then be an economic benefit to the university.

[109] I agree with the former Commissioner's reasoning and adopt it in this appeal. I find that the OLGC's argument in this appeal fails to acknowledge the reality of the competitive bidding process. Following this logic, if a new service provider, who wanted to be awarded an OLGC gaming bundle, were aware of the threshold amounts, it may attempt to propose a higher threshold amount in order to secure the bundle. Additionally, if the current service provider is aware that competitors are aware of its threshold amounts, in the event of re-procurement, it will strive to provide the OLGC with the highest threshold amounts possible in order to win the bundle. In my view, disclosure of the threshold amounts would not be injurious to the Province's economic interests, and could possibly lead to benefiting the OLGC as well as the broader economic interests of Ontario.

[110] In Order PO-3495, an order relied on by the OLGC, the adjudicator held that the terms and price at which a specified drug company agreed to offer drugs to the Province is exempt under section 18(1) of the *Act*. The adjudicator held that disclosure "could reasonably be expected to discourage drug manufacturers in the future from negotiating large volume discounts and other favourable financial terms with Ontario, for fear of this information being used by their other public and private sector customers seeking to negotiate similar discounts with the drug manufacturers."

[111] The OLGC argues that Order PO-3495 is applicable to the case before me because the threshold amounts are analogous to the ongoing procurement of optimal drug pricing by the Province. I disagree with the OLGC and do not find that Order PO-3495 is applicable for two reasons. First, as I stated in section 17(1) above, I do not find that the threshold amounts are analogous to pricing information, but rather a condition of payment. The OLGC is entitled to retain the threshold amount of gross gaming revenue before sharing the gaming revenue above the threshold amount with the affected party. If the total gross gaming revenue from the GTA bundle does not meet the threshold amount for that year, the affected party does not receive this payment. Therefore, the threshold amounts are not the "price" that the OLGC pays for goods or services.

[112] Second, I find that Order PO-3495 is distinguishable from the case before me. In Order PO-3495, the specified drug company presumably sold the same drug to multiple customers, including to other public and private sector companies, so the pricing can be directly compared. The same is not true of a gaming bundle. Each gaming bundle contains a different set of casinos/gaming properties in a specific region, so I am not convinced that a service provider proposing a certain threshold in a certain year for a specific bundle will set up baseline expectations for its operation of other properties. Additionally, as the OLGC explained, the bidding process allows service providers to offer a different threshold for each of the first 10 years of the COSA, and the threshold amounts are calculated using the proprietary complex financial formula and model set

out in the variable fee form. Therefore, a comparison of threshold amounts between different bundles, absent the other information in the variable fee form, would not have the same impact as the drug pricing that was at issue in Order PO-3495.

[113] Furthermore, as noted above, other IPC orders have held that the fact that 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] Therefore, I am not convinced that disclosure of the threshold amounts would negatively impact the bidding process for new OLGC gaming bundles and re-procurement of current bundles.

2) Requests for threshold relief

[114] With respect to the OLGC's argument that disclosure of the threshold amounts would lead to requests for threshold relief by service providers who believe they have bid too high relative to competitors, I find that the OLGC has not provided sufficient evidence to support this assertion. The appeal before me deals with the disclosure of the threshold amounts for the GTA bundle. As the OLGC submits, each bundle is governed by a separate COSA between the OLGC and the service provider, which outlines the terms of their agreement. The OLGC has not provided me with the threshold amounts for the other bundles that have been procured, or detailed evidence to support its assertion that the winners of the other bundles would request threshold relief if the threshold amounts in this appeal were disclosed. Therefore, I am not convinced by the OLGC's argument that disclosure of the threshold amounts at issue in this appeal could lead to requests for threshold relief by other service providers. I also note that the OLGC has not provided any evidence that it would be obligated to entertain any request for threshold relief.

3) Future investments by service providers

[115] The OLGC elaborated on its submission that disclosure of the threshold amounts may affect future investments by the service providers in the confidential portion of its reply representations. While it has provided examples of how the threshold amounts could potentially affect future investments by the service providers and has argued that this is not "optimal", it has failed to provide sufficiently detailed evidence to demonstrate that the harm it argues could reasonably be expected to occur. I find that the OLGC's submission regarding this to be speculative and only amounts to a possibility of harm. I cannot comment further on this portion of the OLGC's argument without revealing the contents of its confidential representations.

Conclusion

[116] Overall, I find that the OLGC has failed to provide the detailed evidence required to show that disclosure of the threshold amounts could reasonably be expected to

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

prejudice its economic interests or competitive position, as contemplated by section 18(1)(c). Similarly, I find that it has failed to establish that disclosure of the threshold amounts could reasonably be expected to be injurious to the Government of Ontario's financial interests or its ability to manage the economy, as contemplated by section 18(1)(d). Therefore, I find that the threshold amounts do not qualify for exemption under either section 18(1)(c) or section 18(1)(d) of the *Act*.

ORDER:

1. I do not uphold the OLGC's decision to withhold the threshold amounts.

2. I order the OLGC to disclose the threshold amounts in the variable fee form to the appellant by **September 1, 2022** but not before **August 29, 2022**.

Original Signed by: July 27, 2022

Anna Truong
Adjudicator