Information and Privacy Commissioner/Ontario
Commissaire à l'information et à la protection de la vie privée/Ontario

ORDER PO-2620

Appeal PA06-237

Ontario Lottery and Gaming Corporation

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NATURE OF THE APPEAL:

The Ontario Lottery and Gaming Corporation (the OLGC) received the following request under the *Freedom of information and Protection of Privacy Act* (the *Act*):

- Any and all information (including documents and other written or electronic documentation) relating to Casino Niagara and Fallsview Casino and their parent company Falls Management Company and their participation in Ontario's responsible gaming programme
- Any information concerning any disciplinary action or sanctions levied etc…against the Falls Management Company by the OLGC
- The Master Agreement between OLGC (formerly the Ontario Casino Corp.) and the landowner/landlord of the property for Casino Niagara (the former interim casino)

During the request stage, the requester clarified and amended the request as follows:

- Could we specifically get any amendments, side letters, agreement memoranda etc…regarding the lease between the OLGC and Maple Leaf Entertainment or related companies*
- Could we specifically get any amendments, side letters, agreement memoranda etc…regarding the license between the OLGC and Maple Leaf Entertainment or related companies*
- Could we get the operating agreement between Falls Management Corporation (FMC) and the OLGC?
- We are interested in receiving the dates as to when any and all of the above agreements expire, come up for (re) negotiation or open periods etc…
- A list of complimentary items/services provided to players by the OLGC and any agreement on complimentary items/services between the OLGC and FMC
- Any information concerning any disciplinary action or sanctions levied etc…against FMC by the OLGC, for example, if FMC has not lived up to obligations in the operating agreement such as building tourist attractions what if anything has the OLGC done?
- Is there site specific information on the responsible gaming programme for either Niagara casino (see WEG request)

* Related companies and signatories to the lease and license w/the OLGC (formerly the OCC):
- Maple Leaf Entertainment Inc.
- Canadian Niagara Hotels Inc.
- 1032514 Ontario Ltd.
- Greenberg International Inc.

In responding to the clarified/amended request, the OLGC applied the exemptions found in sections 17(1)(a) and (c) (third party information) and sections 18(1)(a), (c) and (d) (valuable government information/economic and other interests) of the *Act* to deny access to certain lease, license and operating agreements, in their entirety, with the exception of a 1994 Heads of Agreement between Ontario Casino Corporation and Windsor Casino Limited for the operation

of the (interim) Casino Windsor and a Summary of Certain Principle Terms of the Interim Casino Operating Agreement, to which access was granted in full.

With respect to expiry dates, the OLGC indicated that the lease agreement at Casino Niagara had been extended for an additional two years beginning December 9, 2006. The OLGC informed the requester that commercial casinos are managed by private corporations and a list of complimentary items/services provided to players, if it exists, is under the control of the casino. The OLGC indicated further that no records exist relating to any agreement on complimentary items/services between OLGC and FMC.

The OLGC informed the requester that to the best of its knowledge, the named companies are in good standing under their agreements with OLG. Finally, the OLGC provided the requester with information with respect to where at risk players may seek help and receive information.

The requester (now appellant) appealed the OLGC's decision on the basis that disclosure of the requested information was in the public interest. The appellant also indicated in its appeal letter that the lease and license agreements are publicly available.

During mediation, the appellant indicated that it was satisfied with the OLGC's response with respect to the information provided regarding resources for at risk players. The appellant confirmed that it was relying on the application of the "public interest override" provision in section 23 of the *Act*.

The mediator held a number of conversations with the OLGC and appellant and additional correspondence was exchanged which resulted in the appellant removing several items from the scope of the appeal. Also during mediation, the OLGC provided this office with copies of two agreements, in addition to the Operating Agreement initially sent. The appellant was not provided with access to these records.

As a result of mediation, the following remained at issue:

- Whether the mandatory exemption at section 17(1)(a) and (c) applies to two records extending the lease and license agreements relating to Casino Niagara and one casino Operating Agreement;

- Whether the discretionary exemption at sections 18(1)(a), (c) and (d) applies to the same three records;

- Whether the OLGC has custody or control of a list of complimentary items/services provided to players by the OLGC pursuant to section 10(1) of the *Act*, and if it is found that it does have custody and/or control, whether sections 17(1)(a) and (c) and/or 18(1)(a), (c) or (d) apply to it;

- Whether the OLGC conducted a reasonable search for an agreement on complimentary items/services between the OLGC and Falls Management Company pursuant to section 24(1) of the *Act*; and

- Whether there is a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 17 and 18 exemptions that have been applied to the two records extending the lease and license agreements relating to Casino Niagara and one casino Operating Agreement pursuant to section 23 of the *Act*.

Further mediation was not possible and the appeal was forwarded to the adjudication stage of the process. I decided to seek representations from the OLGC, initially. I also decided to seek submissions from the two companies that are parties to the agreements (the third parties).

Although the OLGC claims that it does not have custody or control of a list of complimentary items/services provided to players by the OLGC, it is apparent that the OLGC has turned its mind to the possible application of exemptions under the *Act* to such a record. In order to address all issues in a timely manner, the OLGC was asked to provide submissions on the application of sections 17 and 18 to this record, in the event that it is found to be within its custody and/or control.

The OLGC and both third parties submitted representations in response to the Notices that were sent to them. After reviewing these representations, I decided that I did not need to hear from the appellant on any of the issues, except the reasonableness of the search conducted by the OLGC. The OLGC consented to sharing its representations with the appellant. I sent a Notice of Inquiry to the appellant along with a copy of that portion of the OLGC's representations that addressed only the search issue. The appellant indicated that it was satisfied with the OLGC's explanation of the search that it conducted. The reasonableness of the OLGC's search for responsive records is, therefore, no longer at issue.

RECORDS:

The records identified as being at issue are two records extending the lease and license agreements relating to Casino Niagara (Records 1 and 2) and one casino Operating Agreement (Record 3). In addition, although the OLGC initially claimed that it does not have custody or control of a list of complimentary items/services provided to players by the OLGC, such a list, if it existed, was identified as a record at issue for the purposes of submissions regarding the possible application of sections 17 and 18 to it.

In its representations, the OLGC indicated that after the Notice of Inquiry was issued, it obtained from one of the third parties a list of complimentary items/services provided to patrons of Casino Niagara and Fallsview Casino Resort. The OLGC states further that it is prepared to disclose this record to the appellant and attached a copy of it to its representations.

Since this record has not yet been disclosed, I will include an order provision requiring the OLGC to disclose it to the appellant, without further discussion. As a result of these developments, custody and/or control and the application of sections 17 and 18 to this record are no longer issues in this appeal.

DISCUSSION:

THIRD PARTY INFORMATION

The OLGC and the third parties claim the application of the mandatory exemptions in sections 17(1)(a) and (c) of the *Act*, which state:

> 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; or
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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 [Orders PO-1805, PO-2018, PO-2184, PO-2371, PO-2384, MO-1706].

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

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

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

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

Part 1: Type of Information

The OLGC and the third parties claim that the records contain "commercial" and "financial" information within the meaning of section 17(1). One third party submits that the records also contain or reveal "trade secrets" and "labour relations information".

Analysis

Previous orders have defined the above-referenced types of information as follows:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *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 [Order PO-2010].
>
> *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
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].
>
> *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 [P-1540]
>
> - information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees [P-653],

but not to include:

- an analysis of the performance of two employees on a project [MO-1215]

- an account of an alleged incident at a child care centre [P-121]

- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation [P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]

Based on the representations of the parties and my review of the records, I am satisfied that the records contain "financial" and/or "commercial" information that falls within the scope of the definitions cited above. Because of this finding, it is not necessary to determine whether they also contain trade secrets and/or labour relations information.

Since information in the agreements qualifies as "financial" and/or "commercial", I find that the requirements of Part 1 of the section 17(1) test have been met. The application of section 18(1) will be addressed later in this decision.

Part 2: supplied in confidence

In order to satisfy Part 2 of the test, the OLGC and/or the third parties must establish that the information was "supplied" to the institution "in confidence", either implicitly or explicitly.

Supplied

The requirement that information be supplied to an institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706]. 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 [Orders PO-2020, PO-2043].

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 a third party, even where the contract substantially reflects terms proposed by a third party and where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706, PO-2371]. Except in unusual circumstances, agreed upon essential terms of a contract are considered to be the product of a negotiation process and therefore are not considered to be "supplied" [Orders MO-1706, PO-2371 and PO-2384].

This approach has recently been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)* [2005] O.J. No. 2851 (Reasons on costs at [2005] O.J. No. 4153) (Div. Ct.)); motion for leave to appeal dismissed, Doc. M32858 (C.A.).

Submissions and Analysis

The OLGC did not make submissions on this issue.

Records 1 and 2

One third party made the following submissions regarding the creation of the two records relating to the Casino Niagara Lease and License:

> These 2 documents clearly on their face note and reveal significant commercial and financial information, supplied in confidence to the OLGC by [the third party] **as a result of negotiations between the parties**…
>
> …**In the course of the negotiations leading up to the agreements underlying the letters**, the [third party] received the assurance, and the [third party] in reciprocation gave the assurance, that such matters would remain confidential between the OLGC and the [third party]… [my emphasis]

The third party with an interest in these two records has clearly acknowledged that they are the product of a negotiated process. It is apparent from my review of these two records as well that they consist of mutually generated, agreed-upon terms. Accordingly, I find that the information in Records 1 and 2 was not supplied by the third party for the purposes of part 2 of the section 17(1) test.

Record 3

The other third party made extensive representations on this issue. It takes the position 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. The third party cites several articles of the Operating Agreement which it argues would reveal this type of information, such as articles that pertain to Negative Covenants of Operator, Operator Fee, Representations and Warranties and List of Services. The third party has asked that much of its submissions regarding this issue not be shared, including the identification of the headings referred to above relating to the various articles cited. However, in order to properly address its arguments, I have decided that some of these submissions must be articulated in this order.

The third party provides numerous examples in explaining how, in its view, disclosure of specific details of the Operating Agreement could reasonably be expected to reveal confidential, non-negotiated information. With respect to the information under the heading "Negative

Covenants of Operator" for example, the third party notes that there is a provision that a participant will continue to own a certain percentage of shares "of the continuing or resulting entity". The third party submits that disclosure of the specific details enumerated in this clause would reveal that the participating entity owns at least that percentage. The third party submits that this information is confidential and was not the subject of negotiation.

With respect to the "Operator Fee" portion of the Operating Agreement, the third party notes that the Operating Agreement sets out the operator fee to be paid in consideration for its performance of services. The third party indicates that this fee is determined by way of a fee formula. The third party submits that disclosure of this information would reveal the price/cost structure proposed by it in its reply to the Request for Proposals (RFP). Relying on previous orders of this office (Orders P-610, M-250, 166 and P-367), the third party submits that pricing information contained in bids or proposals constitutes information that was supplied to the institution.

Also with respect to the Operator Fee, the third party submits that the price/cost structure supplied by it in its reply to the RFP was not directly incorporated into the Operating Agreement, which would distinguish this circumstance from the situations extant in the appeals which gave rise to decisions in orders like Order PO-2384.

The third party makes similar arguments for withholding the information under the heading "Additional Operator Service Fees". In addition to these arguments, the third party notes that certain portions of the Operating Agreement contain information that was created by it, and included in its reply to the RFP. The third party submits that all information contained in the reply to the RFP was confidential and non-negotiated.

The third party submits further that the information contained in the Operating Agreement's "Representations and Warranties of the Operator" section describes in detail its corporate organization and share structure. The third party argues that this information is confidential, non-negotiated and immutable (as defined in Order PO-2435). The third party claims that this information constitutes its informational assets that were supplied to the OLGC in its reply to the RFP.

The last example discussed by the third party in its representations pertains to a "List of Services" attached as Schedule 3 to the Operating Agreement. The third party submits that the services set out in this list are akin to a sample of the products of a business and are, therefore, to be considered immutable.

I do not find the third party's submissions on this issue to be persuasive. The previous decisions of this office cited by the third party (Orders P-610, M-250, 166 and P-367) all pertain to bid information contained in tender documents and are, therefore, distinguishable on their facts and the types of information at issue. I find that Adjudicator Steve Faughnan's analysis in Order PO-2384 pertaining to price-cost structure is highly relevant to the Operator Fee segment of Record 3 in the current appeal, as well as to the information contained under the other headings in the Operating Agreement. In Order PO-2384, the information at issue included a document entitled

"pricing sheet" [found at schedule VII of the Finalized Contract]. The Ministry in that case submitted that the identical page in the tender submission containing bid incentives was copied into the Finalized Contract. Commenting on the negotiation process in contract development, Adjudicator Faughnan stated:

> 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, 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".
>
> As discussed in Order PO-2371, one 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.
>
> As set out in the section of the Finalized Contract dated April 17, 2002 entitled "Background", the tender bid that was submitted by the affected party is wholly incorporated into the contract by reference…
>
> Based upon the reasoning in the authorities set out earlier, and my review of the representations and records, I am satisfied that the information contained in the Finalized Contract dated April 17, 2002 and extensions or renewals consist of agreed upon essential terms that I consider to be the product of a negotiation process. Therefore, in the circumstances of this appeal, I do not consider that any of the information in the agreement, including the tender that is incorporated by reference as schedule VII, or any of the information set out in the other schedules to have been "supplied" by the affected party for the purposes of this part of the test. [my emphasis]

In Order PO-2435, Assistant Commissioner Brian Beamish also discussed the immutability of information contained in a contract:

> Orders MO-1706 and PO-2371 discuss several situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply, which may be 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 affected party to the institution". The "immutability" exception applies to information that is immutable or not susceptible of change, such as the operating philosophy of a business, or a sample of its products.
>
> In its representations the Ministry describes the process which led to the SLAs' creation:
>
> > MBS issued an RFP for the provision of information technology services on behalf of Ministries and Schedule 1 Agencies. Successful proponents who responded to the RFP were selected, and were required to enter into a Vendor of Record (VOR) agreement with MBS, in accordance with the terms and conditions of the RFP. The VOR agreement provided that if a Ministry/Agency required the services of a particular Vendor, they would have to enter into an SLA with that Vendor. The form of the SLA was itself prescribed in the VOR.
>
> The Ministry's representations acknowledge that the SLAs are contracts but explain why they believe they still qualify as "supplied":
>
> > Although the Record 3 consists of contacts, the per diem information in the Appendices of each of these contracts was not a negotiated item. As described under the heading "Records at Issue", these agreements resulted from the issuance of a MBS RFP. Proposals submitted by potential vendors in response to government RFPs are not negotiated; a vendor's per diem rates in particular, as contained in their proposals, cannot be a negotiated item. The Ministry either accepts or rejects the proposal in its entirety.
>
> As in Order MO-1706, just because the SLAs may substantially reflect the terms of the RFP, it does not necessarily follow that they were "supplied" by the third parties within the meaning of section 17(1).

> The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP released by MBS, the Government is bound to accept that per diem. This is obviously not the case. **If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a VOR agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation.** In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry, or SSHA, to claim that the per diem amount was simply submitted and was not subject to negotiation.
>
> It is also important to note that the per diem does not represent a fixed underlying cost, but rather, it is the amount being charged by the contracting party for providing a particular individual's services.
>
> Further, upon close examination of each of these SLAs, **I find that in fact the proposal of terms by each third party and then the transfer of those terms into a full contract which adds a number of significant further terms and which was then read and signed by both parties, indicates that the contents of this contract were subject to negotiation. For this reason, I find that its constituent terms do not fall into the "inferred disclosure" or "immutability" exceptions.** [my emphasis]

I find the scenario described by Assistant Commissioner Beamish to be similar to the case before me. It is apparent from a review of the Operating Agreement that the calculation of the fees, the listing of services to be provided and the structural and fiscal integrity of the contracting party are essential terms of the agreement.

Based on the authorities reproduced above, my review of the third party's representations and the contents of the record, 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 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.

Since all three parts of the test must be met before the section 17(1) exemption applies, I find that section 17(1) does not apply to Records 1, 2 and 3.

I will now consider whether this information in the records qualifies for exemption under sections 18(1)(a), (c) or (d).

VALUABLE GOVERNMENT INFORMATION

The OLGC claims that the exemptions in sections 18(1)(a), (c) and (d) apply to the records at issue which, as discussed above, I have found contain "financial" and "commercial" information.

Sections 18(1)(a), (c) and (d) read:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
>
> (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.

Broadly speaking, section 18 is designed to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

Sections 18(1)(c) and (d) take into consideration the consequences that would result to an institution if a record was released [Order MO-1474]. For sections 18(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing"

evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [See *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner*) (1998), 41 O.R. (3d) 464, (C.A.)]. This contrasts with section 18(1)(a), which is concerned with the **type** of the information, rather than the consequences of disclosure (see Orders MO-1199-F, MO-1564).

Section 18(1)(a)

In order for a record to qualify for exemption under section 18(1)(a) of the *Act*, it must be established that the information contained in the record:

1. is a trade secret, or financial, commercial, scientific or technical information; **and**

2. belongs to the Government of Ontario or an institution; **and**

3. has monetary value or potential monetary value [Orders 87, P-581].

Part 1: type of information

The definition of "commercial" and "financial" information in section 18(1) mirrors the way the terms are defined for the purposes of a section 17(1) analysis. As noted above, I found that information in the agreement also meets the definition of "commercial" and/or "financial" information under section 18(1).

Part 2: belongs to the OLGC

The OLGC submits that the information in the agreements belongs to it as it relates to the provision of services by the third parties that are integral to the OLGC's business. The OLGC submits that it has a statutory duty to carry out the commercial activity that resulted in the creation of the records, and that this activity represents a core function. The OLGC submits further that the information contained in the records was created at the expense of the OLGC and the other contracting parties in order to set out in writing the business arrangement between them.

Analysis

In Order PO-1763 [upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)* (April 25, 2001), Toronto Doc. 207/2000 (Ont. Div. Ct.)], Senior Adjudicator David Goodis reviewed the phrase "belongs to" as it appears in section 18(1)(a) of the *Act.* After reviewing a number of previous orders, he summarized the status of the relevant previous orders as follows:

> The Assistant Commissioner [Tom Mitchinson] has thus determined that the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business to business mailing lists (Order P-636), customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, there is a quality of confidence about the information, in the sense that it is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others. (See, for example, *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.), and the cases discussed therein).

Based upon my review of the records and representations, I conclude that the information contained in the records does not "belong to" the OLGC. I find that I have not been provided with sufficient evidence to demonstrate that the mutually-generated, agreed-upon terms which formed part of a negotiation process constitute the intellectual property of the OLGC or are a trade secret of the OLGC. Other than a statement that the information was created at the expense of the OLGC and the other contracting parties, I have not been provided with evidence to indicate how the OLGC expended money, skill or effort to develop the information. Therefore, I find that the information sought to be withheld does not "belong to" the OLGC within the meaning of section 18(1)(a) of the *Act*. Part 2 of the test under that section has not, therefore, been met.

As all three parts of the test must be met, this is sufficient for me to find that section 18(1)(a) does not apply.

Section 18(1)(c)

Citing previous orders of this office (Orders P-1026, P-1190, PO-1639 and PO-2381), the OLGC submits that there is a reasonable expectation that disclosure of the agreement would prejudice the OLGC in its ability to protect its legitimate economic interests in the pursuit of its mandate. Specifically, the OLGC notes, as set out in Order P-1026, this office has recognized that the disclosure of certain information by the OLGC would prejudice its economic interests and harm its competitive position.

With respect to Record 3, the OLGC notes that the day-to-day operations of three of its four resort destination casinos are contracted to different unrelated entities, each with different compensation and term structures. The OLGC points out that each casino is in direct or indirect competition with each other. The OLGC indicates that upon expiration or termination of each agreement, it will either renegotiate the agreement or select a new operator through a competitive bid process.

The OLGC states that it has negotiated a detailed agreement with each of the current operators of its commercial casinos based on a number of specific variables that apply to each casino. The OLGC notes that these variables impact on the revenue and profit generating capacity of each casino, which impacts on the compensation scheme of each agreement. Since these variables may change over time, the OLGC indicates that it needs the flexibility to react to such changes and reflect them in the arrangements it has with the operators. The result of this is that each operator agreement has different term structures.

The OLGC submits that if the compensation scheme and term information of each operator agreement was disclosed, its ability to account for each of the variables in an efficient economic manner would be compromised on renegotiation or when a new operator was to be selected as the prospective contracting party would have knowledge of the terms that the OLGC would potentially be prepared to accept. The OLGC submits that disclosure of the requested records would severely inhibit its ability to obtain competitive pricing. Alternatively, if a new operator was sought through a competitive process, the OLGC speculates that all proponents could inform themselves of the strategic elements of the business arrangement and then target the level of compensation and term of contract accordingly.

The OLGC also expresses concern that its existing business relationships could be prejudiced if the current operators become aware of the arrangements made with other operators, as not all have the same arrangements.

Regarding Records 1 and 2, the OLGC notes that Casino Niagara was initially opened as an interim commercial casino and then remained open due to its popularity. The OLGC submits that disclosure of these records will enable the various stakeholders in the community to exert public pressure on the OLGC in its decision whether or not to close or keep open Casino Niagara, regardless of what is in the best economic interests of the Province of Ontario.

The OLGC also raises a concern that disclosure of these two records could reasonably affect future negotiations with potential new landowners of premises for any new proposed commercial casino location by placing them in a preferable position. Additionally, the OLGC submits that it would be financially disadvantaged in land lease and license negotiations as the amount of lease and license fees paid with respect to property reflects and directly impacts the market value of the property.

The OLGC does not explain in any further detail, however, how these interests could be affected by disclosure of the records at issue.

Finally, the OLGC submits that disclosure of the records at issue would provide other stakeholders, such as municipalities, racetrack operators, union representatives and employees of the landowner for the casino premises, with information that would enable them to exert pressure on the OLGC and or its current operators to renegotiate their contracts and/or to seek other concessions from the OLGC.

Analysis

I find that the OLGC has failed to provide me with sufficiently detailed evidence to establish that disclosure could reasonably be expected to result in the harm contemplated by the section 18(1)(c) exemption.

In Order P-1026, the section 18(1)(c) exemption was claimed for draft agreements prepared in the course of the negotiations for an Interim Operating Agreement for a casino. The institution in that appeal claimed that disclosure of the draft agreements would provide a complete picture of the positions and strategies it adopted during the course of the negotiation and would negatively affect its current negotiations relating to establishing a permanent casino. In the representations filed in that appeal the institution provided a number of examples of positions it initially took which changed significantly during the negotiation process. The institution in that appeal also referred to three categories of casino negotiations that were ongoing or to take place to demonstrate the harm which would flow from disclosure. In upholding the application of the exemption, Adjudicator Anita Fineberg found that, based on her review of the records and submissions, disclosure of the requested records could reasonably be expected to result in the institution "being hampered in its ability to negotiate the best deal possible for the province in its continuing negotiations for the permanent casino" and other casinos.

The facts are very different in the appeal before me. In this case, the appellant does not seek any drafts, but rather the final agreements. Furthermore, unlike in Order P-1026 (or for that matter Orders P-1190 or PO-1639) the agreements at issue in the current appeal have already been negotiated and formalized. In the cases cited by the OLGC, the negotiation process was on-going and susceptible to interference which led to a finding that disclosure could reasonably be expected to prejudice the OLGC's economic interests or competitive position. In my view, Orders P-1026, P-1190 and PO-1639 are distinguishable because of these differing circumstances.

I find that the evidence and submissions tendered by the OLGC in support of its argument that the agreements are exempt under section 18(1)(c) are speculative at best, and do not describe in sufficient detail how the disclosure of the information contained in the agreements could reasonably be expected to result in the harm envisioned by section 18(1)(c). In addition, the fact that the agreements are based on numerous variables, which are subject to change, in my view, undermines the OLGC's arguments that knowledge of the terms of one agreement could adversely affect its interests in negotiating another or renegotiating the same one. Furthermore, the generalized statements made by the OLGC in support of its position do not satisfy the

"detailed and convincing" evidentiary standard accepted by the Court of Appeal in *Ontario* (*Workers' Compensation Board*), cited above.

Accordingly, I find that Records 1, 2 and 3 do not qualify for exemption under section 18(1)(c).

Section 18(1)(d)

The harm addressed by section 18(1)(d) is similar, but broader, than section 18(1)(c), and this exemption is intended to protect the broader economic interests of Ontarians [Order P-1398 upheld on judicial review [1999], 118 O.A.C. 108 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.)].

The OLGC's representations on section 18(1)(d) consist of the following:

> [OLGC's] revenues to Government represent a significant portion of the Government of Ontario's non-tax revenue. [OLGC's] gaming facilities operate in a competitive marketplace and specifically those that operate near the US border. Disclosure of the severed portions of the records that [OLGC] and the third party maintain to be a confidential internal document could be injurious to the financial interests of the Government.
>
> The disclosure of the severed portions of the records requested could reasonably have an effect on future negotiations or business dealings with: (i) other landowners who might otherwise be inclined to bid lower than the current compensation, or (ii) with other existing operators who do not have the same financial arrangements with [OLGC], or (iii) with potential new operators who do not currently have an operator or lease agreement with [OLGC], who would submit a bid pursuant to any competitive bid process initiated by [OLGC] and who would formulate bid and negotiation strategies based on, and otherwise target, terms at least as favourable as currently exist with the current operator and landowner.
>
> The exemptions relied upon seek to protect the economic interests of the Government of Ontario and maintain protection over privileged documents. The release of the severed portion of the record would seriously compromise the ability of [OLGC] to operate and conduct business in the best economic interest of the Government of Ontario.
>
> Disclosure of the severed records could negatively impact the provincial gaming revenues and the programs funded by those revenues.
>
> Accordingly, disclosure of the severed records could reasonably be expected to be injurious to the financial interests of the Government of Ontario and the ability of

> the Government of Ontario to manage the economy of Ontario. The requested information therefore falls within section 18(1)(d).

The OLGC made very similar submissions in Order PO-2526 relating to a request for a Site Holder Facilities Agreement. In that Order, Adjudicator Steve Faughnan came to the following conclusion:

> Again, the OLGC's representations are not persuasive. The OLGC has failed to provide the appropriate foundation to establish a reasonable expectation of harm to the "financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario". These are serious concerns warranting careful consideration, which are simply not established by the assertions made by the OLGC that are speculative at best. Again, the generalized statements made by the OLGC in support of its position do not satisfy the "detailed and convincing" evidentiary standard accepted by the Court of Appeal in *Ontario (Workers' Compensation Board)*, cited above.

The OLGC's submissions under section 18(1)(d) generally encapsulate the arguments it made under section 18(1)(c). Similar to Adjudicator Faughnan's assessment, I find that they raise speculative and generalized concerns that fail to provide the kind of "detailed and convincing" evidence to establish a "reasonable expectation of harm". Accordingly, I find that the records do not qualify for exemption under section 18(1)(d).

Since neither section 17(1) nor 18 applies to the records, they must be disclosed to the appellant.

ORDER:

1. I order the OLGC to disclose to the appellant Records 1, 2 and 3, as well as the list of complimentary items/services provided to patrons of Casino Niagara and Fallsview Casino Resort by sending it a copy of these records by November 26, 2007 but not before November 21, 2007.

2. In order to verify compliance with provision 1 of this order, I reserve the right to require OLGC to provide me with a copy of the information disclosed to the appellant.

Original signed by: October 22, 2007
Laurel Cropley
Adjudicator