Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3116

Appeal PA11-496

Ontario Lottery and Gaming Corporation

October 5, 2012

Summary: The requester made an access request to the Ontario Lottery and Gaming Corporation for operating agreements entered into with a named company since 2000. The institution identified an interim and permanent operating agreement, and issued a decision letter, granting access to both records in their entirety. The company filed a third party appeal to this office, objecting to the disclosure of the records in their entirety, and claiming the application of the mandatory exemption in section 17(1) (third party information) of the *Act*. In this order, the adjudicator finds that some of the information in the records is exempt under section 17(1) and orders the institution to disclose the remaining information to the requester.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 17(1), *Access to Information Act* R.S.C. 1985, c. A-1, section 20.(1).

Orders Considered: MO-1706, PO-2371 and PO-2435.

Cases Considered: *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41. O.R. (3d) 464 (C.A.) and *Merck Frost Canada Ltd. v. Canada (Health)* 2012 SCC 3 (SCC).

OVERVIEW:

[1] This order disposes of the sole issue raised as a result of an access decision of the Ontario Lottery and Gaming Corporation (the OLGC) in response to a request under

the *Freedom of Information and Protection of Privacy Act* (the *Act*) for operating agreements between the OLGC and a named company from 2000 to the present.

[2] The OLGC located two responsive records and, following third party notification of the company, issued a decision letter granting access to the responsive records in their entirety.

[3] The third party (now the appellant) filed an appeal of the OLGC's decision to this office, claiming the application of the mandatory exemption in section 17(1) (third party information) to both records.

[4] As mediation was not successful, the appeal was moved to the adjudication stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the appellant and the requester. The OLGC advised that it would not be submitting representations. Representations were shared in accordance with the IPC's *Practice Direction 7*. Portions of the appellant's representations were withheld, as they would reveal the substance of the records claimed to be exempt, or in order to protect "confidential" information. I have considered the appellant's representations in full, but will not be referring to them in their entirety in this order.

[5] For the reasons that follow, I uphold the OLGC's decision in part and order it to disclose the records to the requester, subject to those portions I have found exempt under section 17(1).

RECORDS:

[6] The records at issue consist of an interim operating agreement and a permanent operating agreement.

DISCUSSION:

[7] In 1995, the provincial government announced that Niagara Falls would become the third community in Ontario to host a commercial casino. In 1996, the predecessor to the OLGC issued a request for proposals for the Niagara Falls casino project, and in 1998 announced that the appellant's proposal had been selected as the preferred proposal. Negotiations ensued, and the appellant and the OLGC entered into the interim operating agreement. Four years later, further negotiations resulted in the appellant and the OLGC entering into the permanent operating agreement. The appellant is a privately-held company owned, in part, by an entity connected to a hotel corporation.

[8] The permanent operating agreement formed the basis for a previous access request and decision, which was also appealed to this office by the appellant. In Order

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

[9] The sole issue to be decided in this appeal is whether the mandatory exemption at section 17(1) applies to the records, which consist of an interim operating agreement and a permanent operating agreement.

[10] The appellant has claimed the application of the mandatory exemption in sections 17(1)(a) and 17(1)(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;
>
> ...
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

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

[12] 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;

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[1] *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*).
[2] Orders PO-1805, PO-2018, PO-2184, MO-1706.

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

Part 1: type of information

[13] The appellant submits that the records contain trade secrets, as well as commercial, financial and labour relations information. The types of information listed in section 17(1) have been discussed in prior orders:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
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> (i) is, or may be used in a trade or business;
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> (ii) is not generally known in that trade or business;
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> (iii) has economic value from not being generally known; and
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> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[3]
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> *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]

[3] Order PO-2010.
[4] *Ibid*.
[5] Order P-1621.
[6] See note 3.

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;[7] and

- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees.[8]

[14] The appellant submits that the records contain:

- commercial information, as they contain terms that relate solely to the selling of casino operating services to the OLGC;

- financial information, as they describe the fees to be paid to the operator, as well as the formula for calculating fees, which clearly relates to money;

- trade secrets of another service provider in Schedule 3. The schedule contains a list of services that are not generally known, which have economic value from not being generally known, and are the subject of efforts that are reasonable under the circumstances to maintain their secrecy. These trade secrets have been developed over many years in the hotel operating business, are the products of special expertise and are guarded to maintain their secrecy;[9] and

- labour relations information, as they contain information that relates to the collective relationship between the employer and employees of the casino complex.

[15] I have reviewed the records and the appellant's representations. The requester's representations do not address this issue. I find that the records contain commercial, financial and labour relations information, as they contain information relating to:

- the buying, selling or exchange of services;

- money and its use or distribution which refers to specific data; and

- the management of the relationship between the OLGC, the employer and the employees of the casino complex.

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[7] Order P-1540.
[8] Order P-653.
[9] The appellant provided a letter from the other service provider in which it submits that Schedule 3 contains trade secrets and is its proprietary information.

[16] With respect to whether Schedule 3 of the permanent operating agreement contains trade secrets, it is not necessary to make a determination on that issue, given that it contains commercial, financial and/or labour relations information.

[17] Consequently, as the information in the records qualifies as commercial, financial and/or labour relations, I find that the requirements of part 1 of the section 17(1) test have been met with respect to this information.

Part 2: supplied in confidence

[18] In order to satisfy part 2 of the test, the appellant must establish that the information contained in the records was "supplied" to the OLGC "in confidence," either implicitly or explicitly.

Supplied

[19] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[10]

[20] 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.[11]

[21] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional Court in *Boeing*.[12]

[22] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products.[13]

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[10] Order MO-1706.
[11] Orders PO-2020, PO-2043.
[12] See note 1. See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.) (*John Doe*).
[13] Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *John Doe* (cited in note 11).

[23] The appellant submits that the permanent operating agreement should not be disclosed because it would reveal or permit the drawing of accurate inferences with respect to underlying confidential, non-negotiated information supplied by it to the OLGC. The appellant provided examples from the agreement of terms that were supplied by it to the OLGC as a result of the "accurate inferences" rule.

[24] For example, the appellant submits that the negative covenants in the record would allow an accurate inference to be drawn that an entity currently owns a certain percentage of the appellant. This information, the appellant argues, is confidential, was not negotiated with the OLGC and was supplied to the OLGC in the context of the confidential bid process.

[25] In addition, the appellant submits that the operator fee information was supplied to the OLGC, as it sets out the operator fee to be paid to the appellant for its performance of services. Disclosure of the fee formula, the appellant states, would reveal or permit accurate inferences with respect to price/cost structure information that was supplied by it to the OLGC in its bid. The appellant also states:

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

[26] Similarly, the appellant argues that disclosure of the additional operator service fees would reveal the price/cost structure that was set out in its reply to the Request for Proposals for the reasons above.

[27] The appellant also submits that the disclosure of the representations and warranties would reveal or permit accurate inferences with respect to information that was supplied to the OLGC, including details of the appellant's corporate organization and share structure. This information, the appellant argues, is non-negotiated and, similar to a company's operating philosophy, is immutable.

[28] Further, the appellant argues that the list of services in Schedule 3 of the operating agreement is the proprietary information of the service provider, and these services are akin to a "sample of the products" of a business.

[29] The appellant then states that the above examples of the "accurate inferences" rule is not exhaustive, and that the operating agreement consists of highly interrelated terms linked by reference and subject. The appellant states:

> It would be difficult or impossible to disclose only certain terms without revealing information that was supplied. As a result, the entire Operating Agreement should remain confidential.

[30] The appellant further submits that the arguments made against the disclosure of the operating agreement apply equally to the interim operating agreement as the information contained in it is the same or similar to the operating agreement, was supplied in confidence, and its disclosure can reasonably be expected to harm the appellant.

[31] Lastly, the appellant provided a letter from legal counsel who states that he acted for the appellant from the beginning of the bid process and also throughout the negotiations, drafting and delivering of the various agreements between the parties. Legal counsel submits that disclosure of the records would reveal much of the information that had been supplied by the appellant in the course of the confidential bid process and ensuing discussions between the parties.

[32] I have reviewed both records carefully and I find that some, but not all of the information contained in them meets the "inferred disclosure" or "immutability" test and was, consequently, "supplied" by the appellant to the OLGC for the purposes of section 17(1). In particular, I find that the following portions of the permanent operating agreement were supplied by the appellant to the OLGC:

- Article 1, definition (fffff), portions of definition (xx), (yy), (zz), (aaa), (bbb), (ccc), (ddd), (ttt), (uuu), (vvv) and (gggg);
- Portions of Article 1.4;
- Portions of Article 3.3, 3.10, 3.11 and 3.13;
- Portions of Article 6.1, 6.2, 6.3, 6.4, 6.5 and 6.6;
- Article 7.1(b) and (c);
- Portions of Article 8.1 and 8.2;
- Portions of Article 9.1;
- Portions of Article 12.1(b);
- Schedule 3; and
- Portions of Schedule 4.

[33] With respect to the interim operating agreement, I find that the following portions were supplied by the appellant to the OLGC:

- Portions of the Table of Contents 3.11, 6.2, 6.3 and 6.5;
- Article 1, definition (au), (bd), (bx), (ci), (cj), (ck), (cl), (cw), (cx), (cy), portions of (as), (cx), (at), (av), (cu), (bf), (bn), (bo) and (ca);
- Portions of Article 1.4;
- Portions of Article 3.11, 3.12 and 3.14;
- Portions of Article 6.2, 6.3, 6.4, 6.5 and 6.6;
- Article 7.1(b) and (c);
- Portions of Article 8.1 and 8.2;
- Portions of Article 9.1;
- Portions of Article 12.1;
- Portions of Article 15.15;
- Schedule 3; and
- Portions of Schedule 4 and all of its permitted contracts.

[34] In my view, the above portions of the records meet the "inferred disclosure" and/or the "immutability" criteria of part 2 of the section 17(1) test. In Order PO-2371, Adjudicator Steven Faughnan dealt with an attachment to a contract described as a "Design Intent Drawing Sample" that had been provided by an affected party. Adjudicator Faughnan found that the attachment had been "supplied" within the meaning of section 17(1). In his analysis, Adjudicator Faughnan referred to an exception to the general principle that information in a negotiated contract will not be found to have been "supplied" where the information is relatively "immutable" or not susceptible to change.[14]

[35] As well, the above order and Order MO-1706 discuss several situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply, including the "inferred disclosure" exception. 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".

[36] Based on the submissions of the appellant and my review of the records, I have concluded that the information listed above either represents underlying non-negotiated information, or information that is not susceptible to change. For example, two documents within the interim operating agreement consist of contracts between the appellant and a third party. Other portions refer to the underlying and fixed structure of the appellant that is not subject to change by the OLGC. Consequently, I find that this information was "supplied" to the OLGC within the meaning of section 17(1).

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[14] See *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848 (S.C.).

[37] However, with respect to the remaining information in the records, I do not accept the appellant's argument that the interim and permanent operating agreements, in their entirety, meet the "inferred disclosure" or the "immutability" exceptions. In my view, the remaining information was not supplied by the appellant to the OLGC. Rather, it sets out agreed upon contractual terms that govern the relationship between the OLGC and the appellant in regard to the implementation of the appellant's (then) proposed project.

[38] In Order PO-2435, Assistant Commissioner Brian Beamish discussed the immutability of contractual information. In that appeal, the third party was a consultant and Assistant Commissioner Beamish noted that the acceptance or rejection of a consultant's bid in response to a request for proposals by an institution is a form of negotiation. He also noted that the proposal of terms by the third party and subsequent transfer of those terms into a full contract, which also added a number of significant further terms, and which was then read and signed by both parties indicated that the contents of the contract were subject to negotiation. I adopt the approach taken by Assistant Commissioner Beamish for purposes of this appeal.

[39] The appellant has provided no evidence that there was an absence of negotiations between it and the OLGC and has, in fact, provided evidence that discussions and negotiations did take place between the two parties.

[40] Further, I do not accept the appellant's argument that because the price/cost structure contained in its reply to the OLGC's Request for Proposals was not "directly incorporated" into the interim and permanent operating agreements, it was not made a part of a negotiated agreement. The records at issue in this appeal are the actual contracts that were entered into between the OLGC and the appellant, and reflect the terms and conditions that were negotiated between the two parties, including the fees to be paid to the appellant.

[41] Consequently, I find that the remaining information in the records consists of mutually generated, agreed-upon terms that I find to be the product of a negotiation process and that it was not "supplied" by the appellant for the purposes of part 2 of the section 17(1) test. As no other exemptions have been claimed and no other mandatory exemptions apply, I will order the OLGC to disclose to the requester those portions of the records I have found were not supplied to the OLGC.

[42] I will now determine whether the information I have found to have been supplied to the OLGC by the appellant was done so in confidence.

In confidence

[43] In order to satisfy the "in confidence" component of part two, the party resisting disclosure, in this case, the appellant, must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[15]

[44] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;
- not otherwise disclosed or available from sources to which the public has access; and
- prepared for a purpose that would not entail disclosure.[16]

[45] The appellant submits that there are confidentiality terms in the agreements that give rise to a reasonable and objective expectation of confidentiality at the time the information was supplied, as the terms stipulate that all information supplied by either party shall be kept confidential and not be released.

[46] The appellant also submits that it had a reasonable expectation of privacy at the time the information was supplied, based on the sensitivity of the information contained in the records.

[47] In addition, the appellant states that its reasonable expectation of privacy has continued to the present, given its consistent treatment of the information in the records "in a manner that indicates a concern for its protection from disclosure." In particular, the appellant states that:

- it is a privately-held company, which does not publicly disclose information in relation to its corporate organization or share structure as set out in article 7.1;

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[15] Order PO-2020.
[16] Orders PO-2043, PO-2371, PO-2497.

- it does not disclose the details of services and has carefully maintained the secrecy of Schedule 3;

- when the permanent operating agreement was ordered disclosed in Order PO-2620, it was prepared to challenge this decision on application for judicial review; and

- the information in the records has not been otherwise made available from sources to which the public has access.

[48] Legal counsel who acted for the appellant during the bid process submits that it would be customary to expect that the discussions and negotiations, and the information supplied in the course of the discussions and negotiations would be treated by the parties as confidential. In addition, he states, both the interim and the permanent operating agreements contain explicit confidentiality clauses.

[49] The requester submits that the appellant has failed to demonstrate that any of the withheld information is exceptional and beyond what are well-known, accepted operating policies, procedures and practices within the gaming industry in North America. The requester states:

> The [a]ppellant has provided no indication and no demonstration, in their initial representations, that any of the withheld information, and the two remaining records at issue, are not of a nature that is otherwise fundamental, common knowledge to those who are skilled and experienced in the operation of the gaming industry. . .

[50] Having reviewed the considerations provided by the appellant, I find that they weigh in favour of a finding a reasonable basis for the expectation of confidentiality for the limited amount of information that I have found to have been supplied by the appellant to the OLGC. I reach this conclusion based on the submissions provided by the appellant, the sensitive, financial nature of the information, and the fact that this information was generated by the appellant separate from any negotiations with the OLGC. Accordingly, I find that this information was "supplied in confidence" for the purposes of part 2 of the test under section 17(1).

Part 3: harms

[51] To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[17]

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[17] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.) (*WCB*).

[52] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.[18]

[53] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1).[19]

[54] Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[20]

[55] The appellant submits that although the Notice of Inquiry[21] sent to it states that it must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm" under section 17(1) of the Act, this test has been "supplanted" by the Supreme Court of Canada's decision in *Merck Frosst Canada Ltd. v. Canada (Health).*[22]

[56] The appellant states that in *Merck*, the Court held that it is an error of law to require proof of an "immediate" and "clear" harm under the third party harms based exemption in the federal *Access to Information Act*.[23] The appellant states:

> The language considered by the Supreme Court, "reasonable expectation of harm," is similar to the language in ss. 17(1)(a) and (c) of the *Act* (which relates to reasonable expectation of harm in the form of prejudice to competitive position or undue loss). Indeed, on its face the language of the *ATIA* is more stringent than that in s. 17(1) of the Act, given the word "probable." However, in *Merck*, Justice Cromwell questioned whether the word "probable" added anything to the applicable test, and made it clear that proof of harm on a balance of probabilities was not required (see para. 196).
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> In terms of the test to apply in determining a party's reasonable expectation of harm, the Court in *Merck* held that the exemption that protects third parties from economic harm under the *ATIA* requires something "considerably above a mere possibility" and "somewhat less" than a likelihood of harm (see para. 201). The IPC should apply this test,

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[18] Order PO-2020.
[19] Order PO-2435.
[20] *Ibid*.
[21] The Notice of Inquiry sets out the issues in the appeal.
[22] 2012 SCC 3 (*Merck*).
[23] R.S.C. 1985, c. A-1 (*ATIA*).

> as opposed to the "detailed and convincing evidence" test, in reviewing [the appellant's] submissions on harms of disclosure.
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> [emphasis added]

[57] The appellant then goes on to state that, in the alternative, the IPC should apply the "detailed and convincing evidence" test that is currently in use.

[58] The third party information exemption in section 20.(1) the *ATIA* states:

> Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains
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> (a) trade secrets of a third party;
>
> (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
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> (b.1) information that is supplied in confidence to a government institution by a third party for the preparation, maintenance, testing or implementation by the government institution of emergency management plans within the meaning of section 2 of the Emergency Management Act and that concerns the vulnerability of the third party's buildings or other structures, its networks or systems, including its computer or communications networks or systems, or the methods used to protect any of those buildings, structures, networks or systems;
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> (c) information the disclosure of which would reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
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> (d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

[59] In *Merck*, the Supreme Court of Canada engaged in a thorough examination of the elements of the third party information exemption in the *ATIA.* It may be that there are aspects of this decision that will inform this office's application of section 17(1). With respect to the particular argument made by the appellant here, I do not find anything in *Merck* which necessitates a departure from the requirement that a party provide "detailed and convincing" evidence of harm in order to satisfy its burden of proof. As the Ontario Court of Appeal stated in the *WCB* decision, the phrase "detailed

and convincing" is about the quality of the evidence required to satisfy the onus of establishing a reasonable expectation of harm:

> . . . the use of the words "detailed and convincing" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed.[24]

[60] Further, for the reasons below, I am satisfied that the appellant has provided "detailed and convincing" evidence establishing a reasonable expectation of harm.

[61] Turning to the appellant's representations on the harms, the appellant submits that disclosure of the records would prejudice significantly its competitive position. The appellant states that competition for the casino business in southern Ontario is intense, including casinos in Ontario and across the border in Niagara Falls, New York, Salamanca, NY and Buffalo, NY, as each casino attempts to attract Canadian customers.

[62] The appellant submits that its competitive position would be prejudiced in the following ways, should the records be disclosed:

- Operators of other casinos will have a "snapshot" of the manner in which the appellant is contractually required to operate the casino complex, including specific details of the contract and also the complete picture of the appellant's obligations and limitations;

- Competitors will be able to use the information in the records to their advantage in order to better compete with the appellant and capture an increased market share;

- The OLGC publishes the combined revenues of its three commercial casinos. By combining the OLGC's information with the operator and additional operator services fee formulas in the records, a competitor would be able to deduce with some accuracy the range of actual fees that the appellant receives;

- The appellant would have to make concessions to service providers that other casino operators would not have to make if its fee information was disclosed;

[24] See note 17 at para. 26.

- Competitors would have a great advantage the next time that they are competing with it on a bid review for a new casino or a competitive bid opportunity for an existing casino, as the records reveal a great deal the about appellant;

- Competitors would know with precision the concessions that the appellant had been willing to make when negotiating the casino complex and would likely be willing to make again. Competitors would know with precision the fees formula that the appellant was willing to accept and would likely be willing to accept again. With this information, competitors could easily undercut the appellant in their bids for future opportunities; and

- Competitors would have an early advantage if there is a future competitive bidding bid process for the casino complex. The OLGC has acknowledged the highly confidential nature of a casino operating agreement in the recent procurement process for Casino Rama. In that process, the OLGC waited until there was a shortlist of pre-qualified proponents before providing them with the current Casino Rama operating agreement, which also entailed proponents agreeing to extensive confidentiality requirements. If potential proponents had the operating agreement at the start of such a process, there would be a serious advantage to the competitors of the current operator in terms of being selected for the shortlist, which would increase the competition for the current operator and in this scenario, the appellant.

[63] In support of its position, the appellant notes that past orders of this office have upheld the application of section 17(1) where the information in the records would enable a competitor to gain an advantage on a third party by adjusting its bid and underbidding in future bidding contracts.[25] In addition, the appellant submits that a reasonable expectation of prejudice to competitive position has been found in cases where information relating to unit pricing was contained in the records.[26] In this appeal, the appellant argues, the fees formula is analogous to unit pricing.

[64] The appellant further submits that the disclosure of the records will result in undue loss to it and undue gain to others, in the form of lost profit to the appellant. The appellant states that if casino operations costs increase and if it loses future bids, its profits will decrease. The appellant states:

> This type of loss as a result of disclosure would not be minimal. This would be significant, unwarranted, and undue loss to [the appellant]. Conversely, disclosure would benefit [the appellant's] competitors and

[25] Orders P-408, M-288 and M-511.
[26] Orders P-610 and M-250.

> parties that negotiate agreements with [the appellant], resulting in undue gain to them.

[65] Lastly, the appellant argues that disclosure of the records would interfere significantly with its contractual or other negotiations, as the appellant is a privately-held company and the records contain corporate structure and financial information.

[66] The appellant provided an affidavit from its Vice President of Casino Operations, in support of its representations, which reiterates the above information.

[67] The appellant provided further detailed representations on part 3 of the section 17(1) test, which met the confidentiality criteria set out in this office's *Practice Direction 7*, and accordingly, are not set out in this order, but were taken into consideration.

[68] The requester's representations did not address the issue of harms.

[69] As previously stated, my analysis regarding part 3 of the section 17(1) test is limited to those portions of the records that I have found to have been "supplied in confidence" to the OLGC and not the portions of the records that are mutually agreed upon terms as a result of negotiations.

[70] I am sufficiently persuaded by the appellant's arguments that disclosure of the information that I have found was supplied in confidence could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the affected party, resulting in undue loss to the appellant and gain to other competitors. The appellant's representatives, including the confidential portions, contain sufficiently detailed evidence of harm.

[71] In sum, portions of the records are exempt under section 17(1) of the *Act*. I uphold the OLGC's decision, in part and order it to disclose the records to the requester, with the exempt portions withheld.

ORDER:

1. I order the OLGC to disclose the records to the requester by **November 12, 2012** but not before **November 5, 2012**. The information I have found to be exempt under section 17(1) is to be severed from the records. I have included a copy of the records and highlighted the portions that are not to be disclosed to the requester.

2. In order to verify compliance with order provision 1, I reserve the right to require that the OLGC provide me with a copy of the records sent to the requester.

Original signed by: October 5, 2012
Cathy Hamilton
Adjudicator