



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER P-1587

Appeal P-9700156

Gaming Control Commission



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BACKGROUND:

The Gaming Control Act, 1992 (the GCA) establishes a regime and structure for the registration and regulation of the suppliers of goods and services to those organizations which have been licensed to operate lottery schemes. This legislation creates the Gaming Control Commission (the GCC) and the statutory positions of Registrar and Director who have the legal authority to carry out investigations to ensure compliance with the GCA and its regulations. These investigations are usually carried out by investigators employed by the GCC on behalf of the Registrar or the Director. Pursuant to section 31 of the GCA, the Director appoints investigators to determine if there has been compliance with the GCA, its regulations, terms of a licence or terms of registration.

“Due diligence” investigations are conducted on behalf of the Registrar with respect to applicants for registration under the GCA. Section 9(1) of the GCA provides that:

The Registrar may make such inquiries and conduct such investigations into the character, financial history and competence of an applicant for registration or renewal of registration, a registrant or persons interested in the applicant or registrant, as are necessary to determine whether the applicant meets the requirements of this Act and the regulations.

The Registrar has the authority to refuse a registration, or to suspend or revoke a registration. Where the applicant or registrant is a corporation or partnership, the Registrar’s inquiries or investigation may include a complete investigation of the officers, directors or partners and key employees. As part of any investigation into a corporation that has applied for a renewal of its licence, the investigator will also investigate the corporation’s compliance with the law during the registration period, including compliance with any prior terms or conditions of registration agreed upon between the registrant and the GCC. The investigator may also conduct an investigation in other jurisdictions or seek relevant information or material that is available in other jurisdictions.

NATURE OF THE APPEAL:

The Gaming Control Commission (the GCC) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all records relating to the GCC’s decision concerning a named individual (the affected person). In particular, the requester sought access to: (1) the GCC’s reasons for requesting the affected person, a former shareholder and director of certain named companies, to divest himself of all his interests in these companies, and (2) all records that may relate to any of the companies’ other directors and/or shareholders in connection with this matter.

The GCC issued a decision, refusing to confirm or deny the existence of responsive records pursuant to section 14(3) of the Act due to an ongoing investigation (section 14(1)). The requester, now the appellant, appealed the decision to deny access.

The appellant, who is represented by counsel, is a newspaper reporter interested in the issues surrounding charity casinos in Ontario.

As a result of mediation, the GCC issued a second decision letter withdrawing its reliance on section 14(3) of the Act. In this second decision letter, the GCC denied access to the responsive records, in their entirety, on the basis of the following exemptions:

- law enforcement - sections 14(1)(a), (b), (c), (d) and (g), and sections 14(2)(a) and (c)
- relations with other governments - section 15(b)
- third party information - sections 17(1)(a), (b) and (c)
- tax return information - section 17(2)
- solicitor-client privilege - section 19
- invasion of privacy - section 21(1)

During mediation, the appellant advised that he was not seeking access to certain information which may qualify as personal information such as home telephone numbers, home addresses, bank account information and tax return information. The appellant also advised that he is not seeking access to information relating to ongoing police investigations.

This office provided a Notice of Inquiry to the appellant, the GCC, the affected person and two companies whose interests may be affected by disclosure of the records. The Notice of Inquiry also invited the parties to comment on the application of section 23 of the Act (the “public interest override”), which had been raised by the appellant. Representations were received from all parties. In their representations, the two companies explained that there is a third related company and their submissions are made on behalf of all three related companies.

RESPONSIVE RECORDS

The GCC advised that the records responsive to the request are contained in nine bankers boxes which cover a total of six cubic feet.

As I have indicated above, there are three related companies, which I will refer to as Company A, Company B and Company C. In this order, I will refer to Company A, Company B or Company C individually and, where necessary, I will refer to all three companies collectively as the Company. The GCC explains that Company A is one of a number of subsidiary, affiliated and associated corporations and partnerships that are registered under the GCA. The officers and directors of Company A are the shareholders of Company A, Company B and Company C. These individuals are also the officers and directors of Companies B and C. Through Company C, these individuals have interests in other corporations and partnerships that operate approximately 45 bingo halls, most of which operate under a trade name. Most of the halls are owned and operated by Company A, Company B or through operating companies that are registered and controlled by Company C. The GCC states that these corporations have a common management structure built around Company C as the “parent corporation”.

The GCC explains that Company A has applied for renewal of its registration under the GCA and a due diligence investigation for the purpose of assisting the Registrar with her decision is ongoing. In arriving at his/her decision, the Registrar will consider the results of investigations into the applicant company, all related companies, their directors, shareholders and key employees. The Registrar will also consider whether the applicant company and the related

companies have complied with the conditions imposed on the previous registration. The GCC states that records in the nine boxes contain information about Company A, Company B and Company C and other related companies, which information is related to that sought by the appellant. The GCC submits that the nine boxes of records constitute the records responsive to the request.

Given that the responsive records are voluminous, I will consider the application of the exemptions raised by the GCC by examining a representative sample of the records in the nine boxes. In this regard, the GCC has provided this office with 234 records which are listed in the index prepared by the GCC. The GCC has also provided this office with an affidavit attesting to the fact that the 234 records provided to this office are a representative sample of the records responsive to the request.

During mediation, the GCC provided this office with a copy of a draft Notice of Proposed Order to Revoke Registration as a sample record for its claim under section 19 (solicitor-client privilege) of the Act. My findings on the records within each category will apply equally to similar records which were not provided to me but which are responsive to the request.

Having reviewed the records, I note that there is a numbering error on the index prepared by the GCC. The GCC has undertaken to provide a revised index of records to all the parties to this appeal. The record numbers referred to in this order reflect the numbers on the revised Index of Records.

SCOPE OF THE REQUEST

As I have previously noted, the appellant is not seeking access to home telephone numbers, home addresses, bank account information, tax return information and information related to ongoing police investigations. Having reviewed the records, I note that Records 12, 78, 112, 132, 138, 144 and 149 consist of corporate tax returns for various years. Since the appellant is not seeking access to tax returns, these records are no longer at issue in this appeal. Accordingly, I will not consider the application of section 17(2) of the Act to the records.

The GCC submits that the severing of the home telephone numbers, and home addresses would not be sufficient to remove the remaining information from the scope of personal information. The GCC points out the appellant is familiar with the names of the individuals referred to in the records and therefore, even with the removal of some information, an informed appellant would be able to know the identity of the individuals referred to in the records. I will therefore, review each record to see if it contains personal information and whether the records relate to ongoing police investigations.

FRIVOLOUS AND VEXATIOUS

In its representations, the affected person submits that the request by the appellant is frivolous and vexatious. Section 10(1) of the Act reads as follows:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

- (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or
- (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

In my view, a plain reading of the above section dictates that the exception may only be raised by the head of the institution if he/she is “of the opinion on reasonable grounds that the request for access is frivolous or vexatious”. The GCC has not indicated that it considers the request to be frivolous or vexatious. Therefore, I will not consider this submission any further.

PUBLICLY AVAILABLE RECORDS

In reviewing the records, I note that they include records filed and registered by the Company with the Ministry of Commercial and Consumer Affairs. As these records consist of corporate registrations, certified articles of amendment, amalgamation and incorporation, they are available to the public and should be disclosed to the appellant. In addition, Record 224 is a Notice of a Zoning By-law, which is also a public document, and should be disclosed to the appellant.

Accordingly, I order the GCC to disclose Records 5, 6, 14-16, 18, 19, 21, 23, 108-110, 126, 130, 137, 149, 176, 201 and 224 to the appellant.

The records remaining at issue include Certificates of Registrations and Conditional Registrations which the GCC has withheld under section 17(1). The Company has indicated that these Certificates are required to be publicly posted in the place of business. The Company considers these records to be “public documents” and indicates that they have no objection to their disclosure. On this basis, I order the GCC to disclose Records 181, 184, 197 and 233 to the appellant.

CATEGORIES OF RECORDS

For ease of reference, I have grouped the records following and expanding upon the general outlines suggested by the GCC and the Company in their representations and I have placed each record in the most appropriate category. Where there are two types of records attached together and referenced under one number, I have entered the record under both categories.

1. Applications for Registration Part I: Record Numbers 4, 76, 95, 125, 128, 134, 146, 178, 185, 187, 189, 196, 199 and 230.
2. Applications for Registration Part II: Record Numbers 13, 17, 20, 22, 101, 102, 103, 112a, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 154, 155, 156, 157, 157, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217 and 218.
3. Applications for Registration Part III: Record Numbers 24, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56 and 57.

4. Financial Statements and Corporation Organization charts: Record Numbers 7, 9, 11, 77, 100, 106, 111, 129, 132, 135, 138, 144, 147, 172, 177, 200 and 202.
5. Lists of Officers and Directors of subsidiary and affiliated companies, Shareholders and Key Employees and Hall Managers: Record Numbers 10, 29, 45, 97, 104, 107, 124, 130, 136, 148, 172, 173, 174, 175, 204, 205 and 206.
6. Terms of Registrations and Declarations of Renewals: Record Numbers 60, 66, 71, 75, 84 and 91.
7. Lists of Halls, including an Agreement of Purchase and Sale: Record Numbers 8, 79, 105, 203 and 222.
8. Correspondence including memoranda, GCC worksheets, investigation report, investigation take sheets and facsimile transmissions: Record Numbers 1, 2, 3, 25, 26, 58, 59, 61, 62, 63, 64, 65, 67, 68, 69, 70, 72, 73, 74, 76, 80, 81, 82, 83, 85, 86, 87, 88, 89, 90, 92, 93, 94, 95, 96, 98, 99, 140, 141, 142, 143, 151, 152, 153, 179, 179a, 180, 182, 183, 186, 187, 188, 190, 191, 192, 193, 194, 195, 198, 219, 220, 221, 223, 225, 226, 227, 228, 229, 231, 232 and 234.
9. Draft Notice of Proposed Order to Revoke Registration

The GCC has claimed that due to the nature of the records and the context in which they were compiled, most of the exemptions claimed will apply to the records, in whole or in part. I will first consider the mandatory exemption provided by section 21(1) of the Act.

DISCUSSION:

PERSONAL INFORMATION AND INVASION OF PRIVACY

Section 2(1) of the Act defines “personal information” to mean, in part, recorded information about an identifiable individual.

Previous orders of the Commissioner have held that information about an employee does not constitute that individual’s personal information where the information relates to the individual’s employment responsibilities or position. The information in some of the records relates to the employees of the GCC in their employment capacity. This applies equally to information about some of the employees of the applicant corporations. I find that the names and positions of these individuals where they appear in the records, do not constitute the personal information of these individuals.

Where however, the information involves an evaluation of the employee’s performance or an investigation into his or her conduct, these references are considered to be the individual’s personal information. In the circumstances of this appeal, I find that most of the information about the employees of the applicant corporations appears in the context of an investigation into “the character, financial history and competence” of the applicants and by implication, their

employees. Accordingly, this information necessarily constitutes the personal information of these individuals.

Having reviewed the records, I am in agreement with the GCC that deleting the residential addresses and telephone numbers from the records would not remove all of the remaining information from the scope of personal information. Because the appellant has indicated that he is not seeking access to the residential addresses and telephone numbers appearing in the records, this information is not at issue.

I find that the following records contain personal information:

1. Applications for Registration Part I contain the names, dates of birth, and sex of directors and officers of the corporations. Some of the applications also contain names of key employees, identity of the corporations' creditors and its long-term debt. The record also contains the residential addresses and telephone numbers of key employees and directors and shareholders which qualifies as the personal information of these individuals but is not at issue. I find that the dates of birth and sex of the directors, shareholders and key employees constitute the personal information of these individuals. I find that the remaining information in the applications for Registration Part I does not qualify as personal information. The GCC has claimed section 17(1) for this category of record and I will consider its application below.
2. Application for Registration Part II - Enterprise Disclosure Form - the residential phone number of an employee of the applicant which appears on this form qualifies as the personal information of that individual but is not at issue. I will consider the application of section 17 to the remaining parts of the record.
3. Application for Registration Part III - Personal Disclosure Form contains names, addresses, social insurance numbers, dates of birth, driver's licence numbers and photographs of all officers, directors, partners and shareholders of the applicant company and its parent company as well as its key employees. The record also contains a detailed employment history, criminal history, bankruptcy and garnishee information together with the fingerprints of some of these individuals. All of the information in this record qualifies as personal information.
4. Lists of Officers and directors of subsidiary and affiliated companies, shareholders, key employees and Hall Managers (Key Employees and Officers list) contain the names, dates of birth, positions and residential addresses of these individuals and constitute their personal information. The residential addresses of these individuals are not at issue.
5. Terms of Registration and Declaration of Renewals - the Terms of Registration contains personal information where the terms imposed by the GCC reflect on the individual shareholders or directors of the applicant company. This qualifies as the personal information of these individuals. The Declarations of Renewal contain no personal information. I will consider these records under sections 14 and 17 to these records.

6. Financial Statements and Corporate Organization charts - contains complete financial statements of the applicant company, lists of subsidiaries and affiliated corporations in Canada and charts showing the business relationship between the applicant and related companies. These records do not contain personal information. I will consider this category of records under section 17(1) of the Act.
7. Lists of locations contains no personal information.
8. Correspondence including memoranda, GCC worksheets, investigation report and facsimile transmissions - I find that some of the correspondence and memoranda was created within the context of complaints against employees of the applicant corporations. As I have indicated previously, this information constitutes the personal information of the individual to whom it relates. I will consider the remaining records under sections 14 and 17 of the Act.
9. Draft Notice of Proposed Order to Revoke Registration which I will consider under section 19.

INVASION OF PRIVACY

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits disclosure of this information unless one of the exceptions listed in the section applies. The only exception which might apply in the circumstances of this appeal is section 21(1)(f). In order for this exception to apply, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

Section 21(2), (3) and (4) provide guidance in determining whether the disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 21(3) applies to the personal information contained in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to it.

If none of the presumptions in section 21(3) apply, the GCC must consider the application of the factors listed in section 21(2) of the Act, as well as all other circumstances which are relevant in the circumstances of the case.

The GCC submits that the presumptions in sections 21(3)(d), (f) and (g) apply as the records contain information about an individual's employment and educational history, personal finances, income, assets, liabilities, bank balances and financial history. The GCC submits that the records also contain personal recommendations, character references and personnel evaluations.

The GCC has also raised the factors in section 21(2)(e) (pecuniary or other harm), 21(2)(f) (highly sensitive), 21(2)(h) (supplied in confidence) and 21(2)(i) (unfair damage to reputation) as being relevant to the non-disclosure of the personal information in the records. The GCC submits that the personal information was collected in the course of the due diligence investigation and was provided in confidence by the individuals to whom it relates.

The affected person and the Company both concur with the GCC with respect to the exemptions listed above and, in addition, raise the application of sections 21(2)(g) (unlikely to be accurate or reliable), 21(3)(b) (investigation into a possible violation of law), and 21(3)(e) (tax return information). The affected person states that the records contain financial, educational, and employment information pertaining to his personal and business life and should not be disclosed. The Company points out that the information in the Applications for Registration was provided to the GCC under the authority of the GSA for the limited and express purposes associated with the evaluation of the application, that the personal information is highly sensitive and was provided in confidence.

I have carefully considered the records together with the representations of the parties and I find as follows:

1. I find that some of the personal information in Application for Registration Parts I, II and III qualifies as employment and educational history and describes the finances, income, assets and liabilities of the individuals referred to therein. Accordingly, I find that the presumptions in sections 21(3)(d) and (f) apply. I find that none of this information falls under section 21(4). I will consider the application of section 23 below.
2. I find that the remaining personal information in the Applications and the personal information in the Key Employees and Officers lists is highly sensitive and was supplied in confidence to the GCC by the individual to whom it relates. In my view, both the nature of the information in the records and the context within which it was gathered or provided supports the application of sections 21(2)(f) and (h). I find that the personal information in some of the correspondence also falls within these two categories. Both these factors weigh in favour of non-disclosure. I have considered the other factors under section 21(2) together with the relevant circumstances and find no factors that weigh in favour of disclosure of this information. Therefore, I find that this information is exempt under section 21(1) of the Act. None of the factors in section 21(4) apply to the records and I will include the exempt information in my discussion on public interest below.

LAW ENFORCEMENT

The GCC claims that the records are exempt under sections 14(1)(a), (b), (c), (d), (g) and 14(2)(a). I will consider the application of these exemptions to the Investigation report, the GCC worksheets and computer updates, the Terms of Registration and Declarations of Renewal, and the remaining correspondence.

These sections of the Act state:

- 14(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
 - (a) interfere with a law enforcement matter;
 - (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law

enforcement proceeding is likely to result;

- (c) reveal investigative techniques and proceedings currently in use or likely to be used in law enforcement;
- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
- (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

14(2) A head may refuse to disclose a record,

- (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

For a record to qualify for exemption under section 14(2)(a) of the Act, the GCC must satisfy each part of the following three-part test:

1. the record must be a report; **and**
2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Order 200]

In order for a record to qualify for exemption under section 14(1)(a), (b), (c), (d) or (g) or 14(2)(a), the record must relate to a “law enforcement” matter, which is defined in section 2(1) of the Act as follows:

“law enforcement” means,

- (a) policing,
- (b) investigations or inspections which lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b).

The GCC submits that it has a law enforcement mandate as defined in paragraph (b) and that the records relate to this mandate. The GCC states that Company A has applied for renewal of its registration. As part of the due diligence investigation, the Registrar is currently reviewing Company A's compliance with its Terms of Registration. The GCC states that the due diligence investigation into Company A and its affiliated business entities and their officers, directors and key personnel is currently underway and will result in an investigation report to the Registrar. The Registrar's decision is based on information and material provided by the applicant and that was obtained as part of the due diligence investigation from other individuals and under an information sharing agreement with other law enforcement agencies and government bodies in other jurisdictions. This includes intelligence information, results of previous investigation checks into past conduct and financial responsibility. The due diligence investigation will also include an examination of the business entity's structure and its compliance with any terms of registrations that were consented to by the applicant corporation.

The GCC acknowledges that there are different levels of due diligence investigations, depending upon the perceived risk to the integrity of the business and the need to protect the public interest. The GCC submits that Company A and its affiliated and associated business entities are "major players" in the charitable gaming industry and consequently, the number of officers, directors and employees that were subject to a due diligence investigation was significant. The GCC submits that the results of the current investigation could lead to a Notice of Proposed Order to Refuse Registration under the GCA. This could result in appeal proceedings before the Commercial Registration Appeal Tribunal (CRAT).

In Order P-1399, former Inquiry Officer Anita Fineberg considered a similar appeal resulting from the GCC's decision to deny access to GCC application files and commented that the nature of the investigations carried out to date and the potential for denial of the licence could lead to proceedings in which a penalty or sanction is imposed. She noted that, pursuant to section 17 of the GCA, when a person is refused registration or is refused renewal of a licence, he or she cannot apply to the Registrar for registration until at least two years have passed since the refusal or revocation. The Inquiry Officer concluded that the matters related to investigations conducted for GCC applications were "law enforcement" matters for the purposes of sections 14(1) and (2) of the Act.

I agree with the reasoning and conclusion of Inquiry Officer Fineberg and find that they are equally applicable in the circumstances of this appeal. Therefore, I find that the records relate to a "law enforcement" matter, within the meaning of section 14 of the Act.

I will first consider whether the investigation report (Record 85) qualifies for exemption under section 14(2)(a). In Order 221, former Commissioner Tom Wright made the following comments about part one of the test:

The word "report" is not defined in the Act. However, it is my view that in order to satisfy the first part of the test, i.e. to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact.

I agree with this approach and will apply it to determine whether Record 85 is properly exempt under section 14(2)(a). I find that this record, consisting of 55 pages, contains a background summary on the application and request for the due diligence investigation, identifies the sources of the various checks and statements from numerous witnesses together with an analysis of the results. In my view, the record qualifies as a report as it contains both a detailed account of the results of the investigation and an analysis of the facts. Part one of the test has been met.

In Order P-1399, former Inquiry Officer Anita Fineberg also found that the GCC has the mandate to ensure that applicants for registration satisfy the requirements of the GCA and that “due diligence” investigations, such as the one currently underway, are used by the GCC to collect information to fulfill its statutory mandate. She determined that “due diligence” investigations conducted by the GCC qualified as law enforcement investigations and that the GCC was an agency which has the function of enforcing and regulating compliance with a law, the GCA. I agree with this approach and adopt it for the purposes of this appeal.

Based on the foregoing, I find that Record 85 satisfies all parts of the three-part test, qualifies as a law enforcement report and is exempt under section 14(2)(a) of the Act.

I will now consider whether any of the other exemptions in section 14(1) apply to the other records. The GCC submits that section 14(1)(b) applies as the records were collected as part of its current “due diligence” investigation and that the Registrar’s decision on the renewal of the registration for Company A has not yet been made. The GCC submits that disclosure of these records would interfere with its ongoing investigation, the results of which could lead to a hearing before CRAT.

The purpose of the section 14(1)(b) exemption is to provide the GCC with the discretion to preclude access to records in circumstances where the disclosure would interfere with an **ongoing** law enforcement matter or investigation. I am satisfied that the due diligence investigation is ongoing and that the Registrar’s decision, which has yet to be made, could lead to an appeal hearing before CRAT. Accordingly, I find, based on the evidence of the GCC, that disclosure of the GCC worksheets and computer updates, the Terms of Registration and the Declarations of Renewal, and the remaining correspondence, prior to the completion of the investigation and the Registrar’s decision, could reasonably be expected to result in the harm outlined in section 14(1)(b) of the Act.

I will now consider the financial statements, corporate organization charts and membership and shareholders lists, lists of locations and the remaining parts of the Application for Registration Part I under section 17(1).

THIRD PARTY INFORMATION

For a record to qualify for exemption under section 17(1)(a), (b) or (c), the GCC and/or the Company 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 (a), (b) or (c) of section 17(1) will occur.

[Order 36]

All three parts of the test must be satisfied in order for the exemption to apply.

The harms listed under sections 17(1)(a), (b) and (c) are as follows:

- (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.

TYPE OF INFORMATION

The GCC submits that the information in the records concerns the business operations of the Company and contains information that relates to the financial position of these and other related entities. The Company states that the records contain detailed financial information and sketch out the intra-corporate relationships between subsidiary and affiliated companies. Having reviewed the records, I am satisfied that they contain financial and commercial information which satisfies the first part of the test.

SUPPLIED IN CONFIDENCE

In order for this part of the section 17(1) test to be met, the information must have been supplied to the GCC in confidence, either implicitly or explicitly. It must be demonstrated that there was a reasonable expectation of confidentiality on the part of the supplier at the time that information was provided and this expectation must have an objective basis. The information will also be considered to have been supplied if its disclosure will permit the drawing of accurate inferences with respect to the information actually supplied to the institution.

Both the GCC and the Company submit that the information in the records was supplied in confidence. The GCC submits that the information is supplied with the express understanding that it will be held in confidence. The GCC explains that due to the nature of the information, the expectation of confidentiality was reasonable and had an objective basis.

The Company points out that the application forms explicitly state that collection of the information is authorized under the GCA only for the purpose of determining the eligibility for registration or renewal of registration. Disclosure of the information by the GCC is limited to the Company and individuals or entities related to it, law enforcement agencies and jurisdictions which are party to an information sharing agreement with the GCC. The Company submits that it is on this express understanding that it provided the information to the GCC.

The Company states that the information is supplied to the GCC in order to obtain the necessary licences and includes both financial and commercial information including statements of income and changes in financial position. The information also includes information which is integral to the strategic commercial position of the company in the market place. The Company submits that given the nature and extent of the information supplied to the GCC, it had a reasonable expectation that the information would be held in confidence.

Based on the evidence of the parties, I am satisfied that the information was supplied to the GCC by the Company in confidence, both explicitly and implicitly. Part two of the test has been met.

HARMS

With respect to section 17(1)(b), the GCC submits that it is essential for the integrity of its operation that the confidentiality of the information supplied be maintained. The GCC points out that the information is key to effective and efficient conduct of its due diligence investigations. The GCC states that the co-operation of the applicants is essential in order to obtain all the information without having to resort to considerable expense and delay. The GCC also states that “[t]he supply of this information is in the public interest as it relates directly to the information that the Registrar needs to make a decision on eligibility for registration”.

The Company states that the information supplied to the GCC is extremely extensive and covers every facet of its business operations. The Company points out that the information would not continue to be supplied in the same extent and detail if there was any possibility of disclosure.

The Company claims that section 17(1)(a) also applies as disclosure of the records could reasonably be expected to prejudice its competitive position in a significant manner. The Company states that the gaming business industry is highly competitive and disclosure of the information in the records would reveal not only its financial position but also its business strategy.

I accept the submissions of the GCC and the Company that disclosure of the records could reasonably be expected to result in the harms outlined in sections 17(1)(a) and (b) of the Act. All three parts of the test have been satisfied and I find that the financial statements, corporate organizational charts and membership and shareholders’ lists, lists of locations and the remaining parts of the Application for Registration Part I are exempt under section 17(1).

SOLICITOR-CLIENT PRIVILEGE

The GCC submits that the Draft Notice of Revocation of Registration is exempt under section 19

of the Act.

Section 19 consists of two branches, which provide the GCC with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1), and
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the GCC must provide evidence that the record satisfies either of two tests:

1. (a) there is a written or oral communication, **and**
(b) the communication must be of a confidential nature, **and**
(c) the communication must be between a client (or his agent) and a legal advisor, **and**
(d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

In order for a record to qualify for exemption under Branch 2, two criteria must be satisfied:

1. the record must have been prepared by or for counsel employed or retained by the GCC; **and**
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

The GCC is relying on both branches of the section 19 exemption to withhold access to the record. I will first consider the record under Branch 1.

The GCC submits that the draft notice was prepared by legal counsel for the purpose of providing legal advice to the Registrar. The GCC states that the draft notice is marked "Confidential" and contains confidential advice.

I have carefully reviewed the record. I note that the draft notice is extremely detailed and contains the reasons that the Registrar would be relying upon for the revocation, if it was to be issued in final form. I find that the draft notice represents confidential written communication between a legal advisor and his/her client and that it is directly related to formulating and giving legal advice. Accordingly, I find that the record is exempt under section 19 of the Act.

COMPELLING PUBLIC INTEREST

The appellant claims that a compelling public interest exists in the disclosure of the information in the records.

Section 23 of the Act states:

An exemption from disclosure of a record under sections 13, 15, **17**, 18, 20 and **21** does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. (emphasis added)

Section 23 does not apply to records found to be exempt under sections 14 and 19. I will therefore only consider the application of section 23 to those records that I have found to be exempt under sections 17 and 21 of the Act.

The Act is silent as to who bears the burden of proof in respect of section 23. The burden of proof in law generally is that a person who asserts a position must establish it. However, where the application of section 23 to a record has been raised by an appellant, it is my view that the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the requested record before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by an appellant (Order P-1190). In addition, the nature of the information in the records may also play a role in the determination of whether there is a compelling public interest in the disclosure of the information.

The appellant states that in 1996, the GCC made a decision to require the affected person to divest himself of all his interest in Company C and that this decision was reported by a television network. The appellant has enclosed a copy of a transcript from a telecast of a W5 program on the CTV television network which contains a reference to this decision. The appellant argues that as a result of this report, part of the information has been brought into the public domain.

The appellant has also provided a copy of a submission made by Company C to the Committee on Bill 75, The Alcohol, Gaming and Charity Funding Public Interest Act. The appellant states "[c]learly, the issue of gambling is a matter of public regulation and public interest and ... that the handling by the Ontario Gaming Commission of what is described in the W5 story of [the affected party] being the largest bingo hall operator in Ontario is a matter of compelling public interest."

The appellant advises that Company C has commenced legal proceedings against both the appellant and his/her employer.

The Company states that a public interest does not exist in the disclosure of information gathered as part of a GCC investigation. The Company confirms that it is involved in a lawsuit with the appellant. The Company submits that the only interest in disclosure is on the part of the appellant for the purposes of the ongoing action. It argues that the only public interest in disclosure of the records has been created by the press and that the “public interest override” was not intended for this purpose. The Company goes on to state that “[t]he consequences of the release of personal information can have a severely prejudicial impact on a person, especially in the hands of the press”. The Company submits that “the public interest lies in ensuring that the GCC maintains the confidence of the government agencies with which it works and from which it gets its information, and the applicants themselves, who rely on the GCC’s promise of confidentiality when making personal and private disclosures.”

The affected person submits that disclosure of the records would cause unfair and immeasurable harm to his family. He submits that there is no evidence of a compelling public interest as evidenced by “a public demand for the disclosure of the [r]ecords”.

The GCC submits that no public interest exists in disclosure of the records and notes that a request does not constitute a public interest merely because the request comes from a media outlet. The GCC submits that section 23 requires evidence of a “public interest” and that the appellant’s interest in disclosure is a private interest.

I have carefully considered the representations of the appellant, the affected person, the Company and the GCC. I have also considered the nature of the information in the records and the context and circumstances in which they were created.

I agree that coverage by a national television network and reference to the Registrar’s decision by it may indicate interest on the part of its viewers and may even generate more interest in a topical issue. I also agree that casinos and charity gambling have become “big business” in Ontario and that there are sensitive issues surrounding the establishment of gaming casinos. I am in agreement that it should be strictly regulated both from a business perspective and from a public policy perspective to protect the public interest. I believe that the regulating structures and the Registrar’s office established by the GCA is the correct forum for these issues. I do not agree that the regulation of this industry should be conducted in the public domain.

In my view, any consideration of “public interest” must necessarily consider the context in which the records were created. In the subject case, the records relate to an ongoing due diligence investigation conducted by the GCC for the purpose of reviewing an application for renewal of registration and to assist the Registrar with her decision. In the circumstances, I find that the only public interest that exists lies in protecting the integrity of the Registrar’s process and allowing the due process established under the GCA to be completed. I find that this public interest outweighs any public interest which may exist in the disclosure of the records.

I have found these records fall within the exemptions provided by sections 17 and 21 of the Act. I have carefully considered the position put forward by the appellant and I have also considered

all the circumstances surrounding the appeal. I find that a "compelling public interest" in the disclosure of the records, sufficient to outweigh the purposes of the exemptions, does not exist.

ORDER:

1. I order the GCC to disclose Records 5, 6, 14-16, 18, 19, 21, 23, 108-110, 126, 130, 137, 149, 176, 181, 184, 197, 201, 224 and 233 to the appellant by sending a copy to him by **July 24, 1998** but not earlier than **July 20, 1998**.
2. I order the GCC to disclose to the appellant all records similar to those listed in Provision 1, which were not provided to me and which are responsive to the request, by sending a copy to him by **July 24, 1998** but not earlier than **July 20, 1998**.
3. I uphold the decision of the GCC to deny access to the remaining records, which includes the representative sample and those records which were not provided to me and which are responsive to the request.
4. In order to verify compliance with this order, I reserve the right to require the GCC to provide me with a copy of the records which are disclosed to the appellant pursuant to Provisions 1 and 2.

Original signed by: _____ June 19, 1998
Mumtaz Jiwan
Adjudicator
(formerly Inquiry Officer)