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

ORDER PO-1745

Appeal PA-990047-1

Ontario Casino Corporation

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND:

The Ontario Casino Corporation (OCC) is an agency of the government of Ontario, established under the Ontario Casino Corporation Act, 1993. The OCC manages Ontario's three commercial casinos, Casino Niagara, Casino Rama and Casino Windsor. The casinos are operated by three different companies pursuant to agreements with the OCC. The information at issue in this appeal was provided to the OCC by the casinos pursuant to these agreements.

NATURE OF THE APPEAL:

The OCC received a request for access to information under the Freedom of Information and Protection of Privacy Act (the Act). The requester sought records containing "... the average percentage payout of the various categories of slot machines in the Ontario casinos." The requester further stated:

> ... I am not looking for individual statistics, but rather a generalization such as: quarter slot average is ??% - 50 cent slot average is ??% - $1.00 slot average is ??%.
>
> I understand from talking to [the OCC Freedom of Information and Protection of Privacy Co-ordinator] that these figures are not now available. It seems to me that the general figures that I am asking for are not figures that would reveal any deep secrets of the gaming business in Ontario, as these types of figures are readily available in the U.S.
>
> I am hoping to obtain the above information, in a friendly manner, and in the spirit in which I am asking. The information I seek, is so that I can become a more aware consumer of the gambling entertainment that your corporation offers.

The OCC responded to the requester by stating that it "does not have records which respond to your request for percentage payouts of the various slot machines." The OCC also stated:

> However, I can advise you that, by regulation, Ontario commercial casino slot payouts must be 85% or higher. That is, a minimum of 85% of the money wagered by patrons at slot machines in Ontario casinos is paid back to patrons in the form of winnings. The casinos cannot "win" more than 15%.

The requester then wrote to the OCC, explaining that he did not accept the OCC's response.

The OCC replied by stating that it "... does not have the records which respond to your request. Although we are able to calculate average percentages, we do not release such information to the public, other than the 85% to 100% range previously given to you, as this is confidential business information."

The requester (now the appellant) appealed the OCC's decision to this office. With his letter of appeal, the appellant enclosed excerpts from two magazines, Strictly Slots (December 1998) and Casino Players

(October 1998) which he indicated contain information similar to that requested relating to casinos in many states of the United States and the province of Quebec.
The OCC later wrote to the requester stating:

> The [OCC] would rely upon sections 18(1)(a) and (c) of the Act, and likely also section 17(1), as the basis for refusing to provide access to the record, if it existed, since the information constitutes financial or commercial information which, if disclosed, could harm or prejudice OCC's economic or financial interests.

During the mediation stage of the appeal, the OCC reiterated that it does not have records which identify the average payout percentages of the various categories of slot machines, as requested by the appellant. The OCC explained, however, that it does have records for a particular time period, which show the daily average hold percentage (i.e., the amount not paid out) per slot averaged on a monthly or fiscal year-to-date basis, and broken down by denomination/class of slot machine. Specifically, the time period for which this information exists, according to the OCC, is April 1998 to February 1999. The OCC also explained that the records for April, May, July, August, October and November 1998, as well as January and February 1999, consist of monthly averages, while the records for June, September and December 1998 consist of fiscal year-to-date averages. Both the appellant and the OCC agreed that the records as described above are the records responsive to the appellant's request.

Also during the mediation stage of the appeal the OCC clarified that it was relying on paragraphs (a) and (c) of section 17(1) of the Act, and paragraphs (a) and (c) of section 18(1) of the Act, to deny access to the records.

Finally, during mediation, the appellant raised the possible application of the "public interest override" in section 23 of the Act.

I sent a Notice of Inquiry setting out the issues in the appeal to the appellant, the OCC and the operators of the three casinos to which the records relate (the casinos). The casinos submitted a single, joint set of representations.

THE RECORDS:

The records at issue in this appeal consist of 11 pages, dated monthly from April 1998 to February 1999 inclusive. The first seven pages are entitled "Average Analysis Per Slot Per Day." The last four pages are entitled "Summary of Slots." Each page is an excerpt from monthly or quarterly OCC internal reports.

Each page of the record contains three major columns of information. The information which is responsive to the appellant's request appears in the third major column on each page, which is entitled "Individual Average Hold Percentage Per Slot Per Day." The parties have agreed that the first two major columns on each page of the record are not at issue in this appeal. The third column is further broken down into categories for each of the casinos as well as categories for each type of slot machine (e.g., $1, $5). Each of

the figures reveals the average percentage of money that the slot machines of a given type at a given casino "held back" during the given month. In effect, the information at issue would reveal the amount that the casino "won" based on each category.

DISCUSSION:

ECONOMIC INTERESTS OF ONTARIO

Introduction

The OCC claims that the record is exempt under sections 18(1)(a) and (c) of the Act. Those sections 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.

In order 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].

Section 18(1)(c) provides institutions with a discretionary exemption which can be claimed where disclosure of information could reasonably be expected to prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the government's ability to protect its legitimate economic interests (Order P-441).

Representations

With respect to section 18(1)(c), the OCC submits:

Section 18 is intended to protect certain interests, economic and otherwise, of the institution or the Government of Ontario, and it considers the consequences which could reasonably be expected to result from disclosure of a record.

In order to claim an exemption under subsection 18(1)(a) or (c), it is unnecessary to prove actual harm. The harms must only be present or reasonably foreseeable. (Order P-394; Re: Workers Compensation Board and Assistant Information and Privacy Commissioner, (1995) 125 D.L.R. (4th) 171 at 181, [1998] O.J. No. 3485 (C.A.)).

. . . . .

Disclosure of these records and the financial or commercial information contained therein would be prejudicial or harmful to OCC's economic and financial interests and its competitive position since this information would provide its competitors with highly sensitive financial or commercial information indicating the percentage payout from slot machines at the Casinos. The disclosure of this information would provide OCC's competitors with an advantage in determining how to compete against OCC. For example, OCC's competitors could deliberately increase their payout percentages to attract customers that otherwise would visit one of Ontario's casinos and thereby reduce Ontario's market share and revenue. The release of this information will, therefore, prejudice OCC's competitive position.

Further, the disclosure of this information to the public may result in direct competition between Ontario's Casinos which would result in lower revenues to OCC and the Government. Unlike the U.S. marketplace, Canada has deliberately chosen not to adopt a free market system for casinos. Most gaming is prohibited under the Criminal Code and, subject to certain exemptions, permitted gaming must be conducted and managed pursuant to provincial legislation. Ontario has established a single gaming marketplace, and the Government has carefully identified and chosen locations of the Casinos to protect against market saturation and cannibalization. To date, there is very limited competition among Casinos in Ontario. While both Casino Rama and Casino Niagara draw patrons from the greater Toronto area, marketing and other initiatives of the Casinos are designed to minimize the competition that otherwise occurs in U.S. markets.

The three commercial casinos in Ontario do not have access to confidential financial information about each other, and they have explicitly confirmed that they do not want such information, including slot payout percentages, shared among them or released publicly because this may result in a "slot percentage war". As describe earlier, Casino Windsor does not know the average payout at Casino Rama, or vice versa. If this information is released publicly, the Casinos may be compelled to compete directly against each other resulting in lower revenues to OCC and the Government. Thus, OCC's economic and financial interests are prejudiced by the release of this information.

The casinos submit that section 18 applies generally, but make no specific representations on this issue.

The appellant submits:

> The ... information does not "reasonably prejudice the economic interests" of the OCC. Does [the OCC] really foresee, that by revealing the "hold" percentage that there will be a mass exodus of Slot players to Atlantic City, Pennsylvania, [Las] Vegas, or some other far flung casino because the machines in Ontario pay a few percentage points less, and therefore deprive the OCC out of reasonable economic gains, and also damage the "competitive" position of the OCC? The OCC is a MONOPOLY here in Ontario, and as such should welcome the opportunity, to provide openly, fair information to the public that [the OCC] wants to frequent [its] places of business. In seeking to keep this information "Secret" he is fostering the idea that there may be something to hide, that there may be some "Funny business". OCC should take care to foster [its] image in [a] forthright and open manner, as exhibited by most of the U.S. and other Canadian casinos now do.

Analysis

The OCC submits that in order to establish the application of the section 18(1)(c) exemption, "it is unnecessary to prove actual harm. The harms must only be present or reasonably foreseeable." In support of this argument, the OCC cites Order P-394 and decisions of the Divisional Court and the Court of Appeal for Ontario on judicial review of Order P-373 [Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)].

The "reasonably foreseeable" test is one derived from tort law, which the Federal Court of Appeal has rejected in applying similarly worded harms test exemptions under the federal Access to Information Act [see Canada Packers Inc. v. Canada (Minister of Agriculture) (1989), 53 D.L.R. (4th) 246 at 253-255]. This test has not been applied by this office under section 18 since 1994. The appropriate test is that articulated by the Court of Appeal in the 1998 judgment in Ontario (Workers' Compensation Board). In order to establish that the harms under section 18(1)(c) "could reasonably be expected to" result from disclosure, the OCC must provide "detailed and convincing" evidence to establish a reasonable expectation of probable harm, in this case, prejudice to the OCC's economic interests or competitive position [Div. Ct. at 40; C.A. at 476; see also Ontario (Minister of Labour) v. Ontario (Big Canoe), [1999] O.J. No. 4560 (C.A.), p. 5].

The OCC's representations consist mainly of assertions of fact coupled with argument, which, in my view, fall short of providing the kind of "detailed and convincing" evidence required to establish the application of section 18(1)(c). For example, the OCC submits that Ontario, in contrast to other jurisdictions, has established a "single gaming marketplace ... to protect against market saturation and cannibalization." Presumably, as part of this overall strategy, a deliberate decision was made not to publish the kind of data at issue in this case. It would be reasonable to expect that this decision would have been based on studies, surveys, empirical evidence or similar material from other jurisdictions and/or this province, demonstrating

the kinds of adverse impacts which disclosure could be expected to have on revenues or profitability. The absence of this kind of evidence is particularly troublesome given the long-standing experience and relatively vigorous level of competition which occurs in the gaming industry in many parts of the United States, where information of the sort requested is routinely available to the public.

Notwithstanding my reluctance to find a reasonable expectation of the harm alleged on the basis of the evidence before me, I am prepared to infer that such harm could reasonably be expected to result based on my independent analysis of the facts and circumstances. In this connection, I refer to the judgment of the Federal Court, Trial Division in Canada (Information Commissioner) v. Canada (Prime Minister), [1993]1 F.C. 427 at 478-479:

> While no general rules as to the sufficiency of evidence in a s. 14 [harm to federal-provincial affairs] case can be laid down, what the Court is looking for is support for the honestly held but perhaps subjective opinions of the Government witnesses based on general references to the record. Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged.

In short 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.

The information at issue, the "hold percentages", describes the pricing practices and/or strategies of the casinos for specific types of slot machines at specific locations. This information reveals how patrons, as an overall group, are "charged" on a monthly basis for the use of the machines, expressed as a percentage of amount wagered rather than as a dollar figure. Disclosure of this information could well increase competition by setting off a price or "winnings" war among casinos within Ontario, as well as between Ontario casinos and those in border states such as Michigan and New York. It is reasonable to expect that, in response to disclosure, one or more of the Ontario casinos would lower their hold percentages in order to attract patrons, to prevent losing business to neighbouring competitors in Ontario or in border states which may already have lower hold percentages, or which may lower them in order to gain a competitive advantage. In either eventuality, this increased competition from disclosure could reasonably be expected to produce lower revenues or profits for Ontario casinos, which in turn would prejudice the economic interests of the OCC. While I have not been presented with detailed and convincing evidence to demonstrate the degree of likelihood of increased competition of the sort described (which would have made this decision much easier), I am prepared in the circumstances to accept that this kind of competition

among casinos serving a common market is, on balance, more likely than not to occur, with resulting prejudicial consequences to the economic interests of the OCC.

While I accept the appellant's submission that it is difficult to imagine a "mass exodus" of slot machine players to Las Vegas, Atlantic City or Pennsylvania, this argument overlooks the fact that the casinos, to varying degrees, are in competition both with each other and with casinos in other jurisdictions much closer than the locations to which the appellant refers. Further, although the gaming system in Ontario is designed to minimize competition, this does not mean that the casinos do not compete with each other for patrons at all. I note that two of the three casinos in Ontario are located roughly equidistant from Toronto, Ontario's largest population centre and each is susceptible to having its patrons drawn away by the perceived benefits of the other venues.

My finding is consistent with a recent decision of the British Columbia Information and Privacy Commissioner involving similar information. In Order No. 285-1998, a requester sought access to the "gross revenue" from slot machines at a specific casino during a specific time period. The British Columbia Lottery Corporation denied access to the information requested on the basis of the equivalent exemption to section 18(1)(c) of the Act, but disclosed that "the province-wide net win per slot machine for the [relevant time period] was about $300. During this period there were 1,071 slot machines operating at 7 sites." On appeal, the B.C. Commissioner upheld the denial of access.

The information at issue in the B.C. case is similar to that at issue in this appeal, in the sense that disclosure would reveal information which is not already known and which could be useful to competitors in developing their own pricing strategies for slot machines to the detriment of the casinos and ultimately the government.

I find that the record is exempt under section 18(1)(c) of the Act. Because of the manner in which I have disposed of the issues in this appeal, it is not necessary for me to make a finding under section 18(1)(a) or 17(1) of the Act.

As indicated above, where a party resisting disclosure fails to provide detailed and convincing evidence, the claim for exemption will not always be defeated where harm can be inferred from other circumstances. However, in my view, it would only be in exceptional circumstances that the determination of whether an exemption applies would be made on the basis of anything other than the records at issue and the evidence provided by such party in discharging its onus.

PUBLIC INTEREST IN DISCLOSURE

Section 23 of the Act reads:

> An exemption from disclosure of a record under sections 13, 15, 17, **18**, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption [emphasis added].

In order for the section 23 "public interest override" to apply, two requirements must be met: there must be a compelling public interest in disclosure; and this compelling public interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner) (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)].

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption [Order P-1398, cited above].

The appellant submits:

> In most jurisdictions where casinos exist there is great demand by the governmental jurisdictions to see that statistical information is reported regularly on all games conducted within these casinos. Further, all of this statistical information is freely available to the press or public for [its] scrutiny. The gaming industry itself seems most eager to assure the public that they are not being "had" beyond the extent of normal odds that every gambler knows exists.
>
> Recently in the Financial Post section of the National Post (Tuesday May 4, 1999) on page C8, almost the entire page was devoted to the subject of the information that I have requested. They have also penned the term "percentage payout" rather than the OCC version of "hold" ... [The Chairman] of the Nevada Gaming Commission, is quoted "Part of maintaining the integrity and public confidence in gaming is to let people know what you're doing." "When people don't know, they tend to fill in the blanks with negative thoughts." Professor Igor Kusyszyn, an acknowledged gambling expert who taught courses in gambling at York University for many years says, "In every gambling jurisdiction in North America, casinos must divulge the payback on slot machines, in all denominations, and these figures are published."
>
> There is much more to this article. I'm confident that this report is a fine example of public interest.
>
> Since frequenting our Ontario and other Casinos over the past 2 years I have taken a great deal of interest and been well entertained by them. I now subscribe to Casino Player magazine to become a more informed user of this form of recreation. Over the past year I have read many articles that preach the importance of disclosure by the gaming industry. Because of the vast sums involved it is one of the ways to ensure "trust" of the public. By [its] very nature gambling will always be subject to "cheating" from one side or the other,

> but we all know intellectually that the odds always favour the "house", but no one organization because of [its] monopoly should be allowed to keep [its] "edge" a secret.

The OCC submits:

> ... [T]here is no compelling public interest which clearly outweighs the purpose of the exemptions in this case ... [M]uch of the information was supplied to OCC by third parties with an expectation that the information would be kept confidential. It is in the public interest that OCC be able to receive financial and commercial information from third parties in confidence and that this confidence be maintained.
>
> Since the information is produced after the fact and is presented as "averages", the information is not useful for the purposes of informing patrons on where to play in the future. To make the information truly useful to the patron, the Casinos would have to advertise their payout percentages daily in advance. The information would also have to be broken down by denomination of machine, type of game and individual machine. No casino in any jurisdiction does that. It would result in high advertising costs, and would result in a loss of revenue due to the "lowest price" war which would result from such tactics.
>
> ... [R]eleasing slot payout information to the public would arm its competitors to compete against the Casinos, and may lead to payout percentage wars among the Casinos themselves, resulting in lower revenues. Although OCC may accept lower revenues if it furthers other policy objectives, such as job creation, local economic development, tourism development or revenue generation, in this case, the release of slot payout percentage information would not result in any benefits which would compensate for the lower revenues that may result.
>
> The fact that some U.S. and Canadian casinos may voluntarily choose to disclose this information is not a compelling reason to require OCC to disclose this information. In the U.S., casinos are operated by private sector companies and compete in an open marketplace. As described earlier, competition in the casino market in Ontario is managed by OCC. In Canada, Ontario is the only Canadian gaming jurisdiction with casinos in Canada/U.S. border communities. As a result, Ontario's casinos would be more adversely affected by disclosure of this information than casinos in other Canadian jurisdictions.
>
> Further, New Jersey and Nevada gaming legislation require that this type of information be provided to the state gaming commissions, and this information is released by the commissions for a fee, not by the private companies which run the casinos. When developing its casino legislation, the Government of Ontario would have had knowledge of Nevada and New Jersey laws and regulations, and did not consider it necessary to impose these disclosure requirements on OCC or the Casinos in Ontario.

> In any event, the disclosure of this information is not necessary to protect casino patrons in Ontario since:
>
> (a) OCC has publicly stated that its payouts must be between 85-100%, and these rates are competitive with other jurisdictions; and
>
> (b) both OCC and the Alcohol and Gaming Commission of Ontario ("AGCO") regularly monitor and conduct spot-checks to ensure that the payouts are as reported by the casino operator.
>
> Ontario's casino legislation provides for both the regulation and management of the business by the Government through AGCO and OCC respectively. Therefore, there is even more protection for the casino patron than would be available under a purely private sector model such as that found in the U.S.

The casinos' submissions support the OCC's position on section 23.

In British Columbia Information and Privacy Commissioner Order 285-1998, referred to above, the Commissioner states:

> The applicant has asked for access to information on "the gross revenue from 275 slot machines" operated by the third party at the Stockmen's Hotel Casino. The Lottery Corporation provided the applicant with the province-wide "revenue after prizes"(RAP) per slot machine for the period of his request. The Lottery Corporation says that it uses the RAP as its equivalent of gross revenue and has therefore assumed, reasonably in my view, that what the applicant is seeking is the RAP for the 275 slot machines in question . . . As an aside, it is my view that by disclosing the province-wide RAP for the period in question the Lottery Corporation has gone a considerable way towards meeting the goals of accountability and transparency of public bodies as contemplated by the Act.

He later rejects the argument that the "public interest override" in the B.C. legislation should apply to compel disclosure.

In my view, the B.C. Commissioner's comments are relevant here. The OCC has gone a considerable way towards meeting the goals of accountability and transparency of government institutions by disclosing that the minimum payout percentage for its slot machines is 85%.

I do not accept the submissions of the OCC and the casinos that the information in the records would not be useful to patrons in determining whether and how to play various slot machines. Indeed, this argument diminishes the force of the OCC's submissions under section 18(1)(c) on the impact of disclosure of this information on competition. The information, although generalized and based on past experience, would

allow individuals to identify pricing trends and strategies, and thereby enhance the development of their own playing strategies. However, I am not persuaded that the enhanced ability of some members of the public to become "smarter" players amounts to a "compelling public interest". As a result, I find that section 23 does not apply to override the application of the section 18(1)(c) exemption.

ORDER:

I uphold the OCC's decision to deny access to the record under section 18(1)(c) of the Act.

Original signed by: January 25, 2000
David Goodis
Senior Adjudicator