



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-1958

Appeal PA-000066-1

Alcohol and Gaming Commission



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NATURE OF THE APPEAL:

The Alcohol and Gaming Commission of Ontario (the AGCO) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information contained in the liquor license application file of an affected party. The requester, now the appellant, and the affected party are involved in a legal dispute.

The AGCO issued a decision letter advising the appellant that access cannot be provided to the records requested because they do not exist. The AGCO then contacted the appellant and clarified his request, confirming that he is seeking access to “all records, starting from January 1999, relating to the application and licensing decision regarding liquor license [number] for [named establishment and address].” Based on the clarified request the AGCO located six responsive records which were disclosed to the appellant in their entirety.

Shortly after, the AGCO issued a second decision letter advising the appellant that an additional 61 records had been located, and that partial access was being granted. Together with this decision letter, the AGCO provided an index of all responsive records indicating that it was relying on the exemptions at sections 21 (invasion of privacy) and 14 (law enforcement) to deny access to information. It also advised that the request for certain records may affect the interests of an affected party and, in accordance with section 28, the AGCO sent the affected party notification soliciting its views on the disclosure of records 1 to 6.

In turn, legal counsel for the affected party provided submissions to the AGCO objecting to disclosure of records 1 to 6 on the basis that they contain information which would reveal commercial and/or financial information and, if released, would result in competitive harm. The AGCO issued a third decision letter advising the appellant that it is denying access to records 1 to 6 on the basis of the exemption at section 17(1) (third party information).

The appellant appealed the AGCO’s decision to deny access to records 1 to 6 only.

Mediation was not successful and a Report of the Mediator was issued. The AGCO subsequently reconsidered its position on the application of section 17 and decided to grant partial access to records 1 to 6. It notified the affected party of this decision and invited a response if it had “any concerns about the release of the records”. Considerable efforts were made by this office and the AGCO to determine whether the affected party objected to the AGCO’s decision to grant partial access. However, the affected party gave no indication either way. As a result, the AGCO did not disclose the severed records, and this appeal was moved to adjudication.

I sent a Notice of Inquiry to the AGCO and to the affected party, initially, inviting representations on the issues raised by this appeal. On receipt of the Notice, the affected party advised that it was prepared to consent to partial access to records 1, 2, 4, 5 and 6, and full access to record 3. The AGCO issued a final decision letter and disclosed the records, in part, to the appellant in accordance with the affected party’s consent. After receiving and reviewing the severed records, the appellant notified this office that he was not satisfied with the information disclosed and indicated his intention to pursue this appeal.

The AGCO advised that it was not returning a response to the Notice. The affected party returned submissions, a summary of which was shared with the appellant. A Notice was also sent to a secondary affected party, but no representations were returned. The appellant advised that he was submitting a response, but none was received.

RECORDS:

The severed portions of records 1, 2, 4, 5 and 6 only are at issue in this appeal. These records consist of correspondence from the affected party's legal counsel to the AGCO with respect to his client's application for an additional liquor license.

DISCUSSION:

THIRD PARTY INFORMATION

Introduction

As indicated earlier, representations were received from the affected party only. In addition to responding to the Notice, the affected party provided extensive background information on the events giving rise to this appeal and a detailed history of the litigation in which it is involved.

The AGCO and the affected party both take the position that section 17(1) is applicable to the information severed from records 1, 2, 4, 5 and 6. This section reads, in part:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

Section 17(1) exists in recognition of the fact that in the course of carrying out public responsibilities, governmental agencies often find themselves in possession of information about the activities of private businesses. In Order PO-1805, Senior Adjudicator David Goodis discussed the purposes of 17(1), stating that this provision was

designed to "protect the 'informational assets' of businesses or other organizations which provide information to government institutions."

In order for a record to qualify for exemption under section 17(1)(a), (b) or (c) of the *Act*, each part of the following three-part test must be satisfied:

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) or (c) of section 17(1) will occur [Orders 36, M-29, M-37, P-373].

Part 1: Type of information

All the records at issue are correspondence prepared by the affected party's legal counsel, to the AGCO, with respect to a licensing application. Record 1 is in response to the AGCO's request for further information in relation to a letter of complaint. Records 2, 4, 5 and 6 are in response to the AGCO's request for further information concerning the affected party's licensing application. In addition to dollar figures, they contain extracts of two leases, between the affected party and the secondary affected party, and between the affected party and the appellant.

Previous decisions of this office have defined the terms "commercial" and "financial information" as follows:

Commercial information

Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order P-493].

Financial information

The term refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs [Orders P-47, P-87, P-113, P-228, P-295 and P-394].

Based on the foregoing and my review of the records, I accept that the information severed from records 1, 2, 4 5 and 6 includes details of the transaction involving the affected party's lease, and is thus commercial and/or financial information. The information refers to rent payable, rentable

area, and marketing and other leasing information, all of which constitutes commercial and/or financial information within the meaning of the *Act*. (see, for instance, Order P-356). The requirements of the first part of the test are therefore met.

Part 2: Supplied in Confidence

The second part of the test has two elements. First, the information must have been **supplied** to the AGCO and secondly, it must have supplied **in confidence**, either implicitly or explicitly.

Supplied

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 the third party*. As stated in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report), which provided the foundation of this *Act*:

. . . [T]he [proposed] exemption is restricted to information "obtained from a person" in accordance with the provisions of the U.S. Act and the Australian Minority Report Bill, so as to indicate clearly that **the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself**. The fact that the commercial information derives from a non-governmental source is a clear and objective standard signalling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. **It is the original source of the information that is the critical consideration:** thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind (pp. 312-315) [emphasis added].

The affected party makes a broad assertion that the information was "supplied" to the AGCO. As stated earlier, each of the letters was prepared by the affected party's legal counsel with respect to the affected party's licensing application, and is addressed to the AGCO Licensing Officer. From my review of these records, it is clear that the severed information was "supplied" by the affected party to the AGCO.

In Confidence

In order to establish that the information severed from records 1, 2, 4, 5 and 6 was "supplied in confidence", either explicitly or implicitly, the affected party must demonstrate that an expectation of confidentiality existed at the time the records were submitted (Order M-169), and that this expectation was based on reasonable and objective grounds.

Although the records are not marked “Confidential”, and the correspondence was either faxed to the AGCO or delivered by hand, the affected party explains in its representations that the information was supplied in confidence, implicitly or explicitly. The affected party describes its difficulties in dealing with the appellant and of the appellant’s actions to damage, or interfere with the affected party’s relationship with the secondary affected party. The affected party makes this point in record 1, in which it advised the AGCO that the appellant’s actions were intended to delay the opening of the affected party’s business. The representations go on to state that the letters were provided to the AGCO while the affected party was engaged in litigation with the appellant, over the lease. On this point, records 2 and 6 refer to that litigation and the file contains evidence in the form of a Court Order.

I have considered the circumstances surrounding the affected party’s licensing application and based on the nature of the records, it is reasonable to expect that the AGCO would understand that they contain the kind of information that is to be treated somewhat confidentially. I accept that, at the time the letters were submitted to the AGCO, the affected party had a reasonably-held belief that the records would be treated with a degree of confidentiality. The second requirement for the section 17(1) exemption claim has been established.

Part 3: Harms

To discharge the burden of proof under the third part of the test, the party resisting disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed (Order P-373).

The words "could reasonably be expected to" appear in the preamble of section 10(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, including section 17(1), in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "**detailed and convincing**" evidence to establish a "reasonable expectation of probable harm" (see Order P-373, two court decisions on judicial review of that order in Ontario (*Workers Compensation Board*) v. *Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), as well as Orders PO-1745 and PO-1747).

Section 17(1)(a) – interference with negotiations

The affected party makes a general statement that disclosure of the severed information would “give rise to reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17 (1) will occur.” The response which follows, however, appears to focus on section 17(1)(a) under which the affected party presents two arguments. One argument focuses on its relationship with the secondary affected party and the negotiations involving the lease. The other concerns the financial impact, on the affected party, of the appellant’s ongoing litigation.

In responding to the AGCO's initial notification, the affected party stated:

The information contained in the records sought to be disclosed would "reveal" information supplied by this office on behalf of [affected party], to the AGCO, within the meaning of section 17(1) of the *Freedom of Information and Protection of Privacy Act* (FOIPPA) and its disclosure would permit the drawing by competitors of [affected party] of accurate inferences with respect to information actually supplied to the AGCO and with respect to the business operations of [affected party] and the leasing, pricing and marketing strategies of [affected party].

In Order MO-1450, Adjudicator Sherry Liang considered the application of the municipal equivalent of section 17(1). In reviewing, among other records, documents that contained the terms of a lease of a particular property, and the Offer to Lease between two third parties, Adjudicator Liang found that information contained in those documents, such as "minimum annual, percentage rent and construction allowance", may be used to gain a competitive advantage.

I agree with this reasoning and find it applicable for the purposes of this appeal. I accept that the severed information relates to the leasing arrangements between the affected party and the secondary affected party. Disclosure of this information would reveal certain terms of the lease, including rental fee, rental area, and matters related to the physical construct of the named establishment.

Before concluding, there are two severed items that are extracted from leasing agreements to which the appellant is a party: point 1 of record 1 and point 4 of record 2 (at page 2). As a party to these agreements, the appellant clearly has knowledge of, and access to, this information. I am not satisfied that any harm could "reasonably be expected" to result from their disclosure, and they should therefore be disclosed to the appellant. With the exception of these two items, I accept that disclosure of the severed information could reasonably be expected to significantly interfere with the affected party's contractual negotiations with the secondary affected party.

In conclusion, I find that the requirements for the application of section 17(1) have been met and the balance of the information severed from records 1, 2, 4, 5 and 6 qualify for exemption from disclosure under the *Act*.

ORDER:

1. I order the AGCO to disclose the items identified as point 1 of record 1, and point 4 of record 2 (at page 2), which I have highlighted on the copies of these records attached to this Order, by **November 16, 2001**, but not earlier than **November 9, 2001**.
2. I uphold the AGCO's decision to deny access to the balance of the information severed from records 1, 2, 4, 5 and 6.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the AGCO to provide me with a copy of the records which it provided to the appellant.

Original Signed By: _____

Dora Nipp
Adjudicator

_____ October 12, 2001