



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

ORDER PO-2199

Appeal PA-020160-1

Ontario Lottery and Gaming Corporation



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NATURE OF THE APPEAL:

The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ontario Lottery and Gaming Corporation (OLGC) for access to:

. . . all research and discussion documents, including studies, reports and memos, regarding the development, establishment and expected success of the “Big Ticket Lottery”.

In response, the OLGC stated:

We have completed a search for records responsive to your request. Please find enclosed a copy of a Power Point presentation by OLGC to the major charities regarding the introduction of BIG TICKET LOTTERY and a copy of the letter inviting major charities to our meeting.

In response to your request for research studies regarding the establishment and expected success of BIG TICKET LOTTERY, OLGC denies access to the relevant records on the basis of section 18(1)(a), (c), (d) of the *Act* because they contain commercial information that belongs to OLGC and has monetary value or potential monetary value; information where disclosure could reasonably be expected to prejudice the economic interests of OLGC or the competitive position of OLGC and information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario.

The appellant appealed the OLGC’s decision to this office. In its letter of appeal, the appellant stated:

The OLGC is a Crown agency created by the Ontario government to, among other things, operate the province’s lotteries. It operates on government-authorized proceeds of lotteries and gaming, and thus should be accountable to taxpayers. The same logic dictates that the OLGC’s commercial property is essentially the property of the people of Ontario. And its mandate is protected by the government, so there would seem to be no chance of any competitor using this information against the OLGC.

We have not requested, nor would we expect to receive, any personal or confidential information that is protected by the *Act*. Section 18 is a discretionary exemption, and appears to have no direct relevance to this request. Rather, it is apparently being wielded in a general refusal to release background information about OLGC operations, specifically the Big Ticket Lottery.

We believe the information we have requested is the domain of the people of Ontario, and is not exempted by the *Act* . . .

The appeal was not resolved in mediation so the matter was streamed to the adjudication stage of the process. I sent a Notice of Inquiry setting out the issues in the appeal to the OLG, which provided representations in response. I then sent the Notice of Inquiry, together with a copy of the OLG's representations, to the appellant, who in turn provided representations.

RECORDS:

The records at issue in this appeal are described as follows:

Record Number	Description
1(a) – 1(g)	Memos concerning research on high price point tickets
2(a) – 2(c)	Memos concerning research on high price point tickets
3(a) – 3(b)	Memos concerning Big Ticket Lottery research
4	Letter to the OLG dated March 24, 2001 re: higher price point lottery research proposal (revised)
5	Higher Price Point Lottery: Phase 1 -Discussion Outline
6	Higher Price Point Lottery Research Study – Phase 1 – Research
7	Higher Price Point Lottery: Phase 2 – Research Study
8	\$25 Regional Game Proposal
9	Quantitative Research May 2001

DISCUSSION:

ECONOMIC INTERESTS OF ONTARIO

Introduction

The OLG claims that sections 18(1)(a), (c) and (d) apply to the information at issue. 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;
- (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

I will first consider the application of section 18(1)(c) to the records.

Section 18(1)(c): prejudice to economic interests or competitive position

General principles

For this exemption to apply, the Ministry must demonstrate that disclosure of the records “could reasonably be expected to” lead to the specified result. To meet this test, the Ministry must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Representations

The OLGC begins its representations by setting out an overview of its functions and the business environment in which it operates:

As a Crown corporation, OLGC is responsible for province-wide lottery games; charity and aboriginal casinos; slots facilities at racetracks; and commercial casinos. The development and marketing of new lottery games for sale to the public are key components to OLGC’s competitive strategy in the gaming marketplace. The OLGC works closely with the private sector, including major corporate retail partners, in delivering products and services. Its partnerships with independent business retailers and major corporate accounts are a key component of its competitive strategy.

The OLGC also provides an affidavit sworn by its vice-president of lottery marketing, in support of the following submissions regarding section 18(1)(a) which, in my view, are also relevant in the context of section 18(1)(c):

The OLGC commissioned the market research information contained within the market research studies and related internal documents described above. OLGC treats this information as strictly confidential. All market research conducted by or for OLGC builds upon previous research conducted by or for OLGC.

Accordingly, disclosing the market research studies and internal documents would not only disclose OLGC's marketing strategy for OLGC's BIG TICKET LOTTERY game and future OLGC high price lottery games, but also provide insight into how OLGC designs, builds and markets its other lottery products. Accordingly, all of the information contained in the market research studies and the related internal documents constitute a trade secret as well as the proprietary commercial and technical information of OLGC. This information could be used by OLGC's competitors to develop new and/or better games for their organizations.

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The information was not available publicly and has not been released into the public domain. OLGC paid approximately \$64,681.50 to outside consultants to conduct the research for OLGC. There has been an expenditure of money and the application of skill and effort to develop the information. As such, the information belongs to OLGC.

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The research documents contain valuable information on how OLGC conducts and manages its games. This information would be of substantial value to persons who offer consulting services to such entities in the Province of Ontario or to persons who are interested in doing so in the future.

The OLGC then makes specific submissions on section 18(1)(c):

An important consideration regarding the applicability of section 18(1)(c) is whether the disclosure of the information would provide competitors with valuable information and place them in a preferable position. Relevant factors include the nature of the market facing the institution (such as the degree of competitiveness), the potential effect of disclosure on future negotiations or business dealings and whether it is reasonably likely a competitor would use the information to the disadvantage of the institution. In Order P-1190 (upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), the Commissioner stated:

In my view, the purpose of section 18(1)(c) is to protect the ability of institutions such as Hydro to earn money in the market-place. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.

In this case the marketing of lottery games by the OLGC gives rise to a reasonable expectation that the disclosure of this information would prejudice the

OLGC in its competitive market place and adversely affect its ability to protect its legitimate economic interests. Specifically, OLGC operates in a highly competitive market for gaming and lottery activities. The Commissioner has recognized that the disclosure of certain information by the OLGC would prejudice its economic interests and harm its competitive position.

In addition, the OLGC in general has no comparable access to information on its competitors who are private sector companies and not subject to the *Act*. Disclosure of this information would provide OLGC's competitors with an unfair advantage as they do not have to release similar information. OLGC relies on its market research to enable it to maintain its business on a competitive basis as well as to develop new gaming opportunities. The gaming industry is a marketing-driven industry and disclosure of the information would harm OLGC's position in its competitive industry.

As a result, the disclosure of the market research studies and related internal documents could reasonably be expected to prejudice the economic interests and the competitive position of OLGC . . .

I asked the OLGC to comment on the applicability of Order P-941 of Adjudicator Anita Fineberg, which I believed might be relevant here. In that case, the requester sought access to "three market research studies prepared for the OLC [a predecessor corporation to the OLGC]." regarding the "Sport Select" lottery. Adjudicator Fineberg found the studies exempt under section 18(1)(c) for the following reasons:

The OLC has explained that one of its business activities is that of developing and marketing new lottery games for sale to the public. The OLC retains external consultants in order to identify the type of lottery games which will appeal to the public, what demographic groups will purchase certain lottery games, and what marketing and promotional activities will enhance the sale of these games. The records at issue in this appeal consist of three such market research studies, prepared by an external consultant. The OLC submits that the market research it commissions allows it to develop unique sales and marketing strategies for its various lottery products.

The OLC further states that the market in which it offers its various lottery games is becoming increasingly competitive. It has identified such activities as break-open tickets offered by various charities, casino gambling and the operation of bingo games and other gaming activities for charities as providing competition. Moreover, the OLC notes that there are also potential private sector competitors looking for entry into the gaming market, gaming via INTERNET being one example.

In his representations, counsel for the OLC states that the market research studies commissioned by the OLC would be of substantial value to persons or entities operating such other gaming activities or to individuals who offer consulting services to such entities. These other entities could use the market analysis data contained in the records to create and market other gaming activities which directly compete with the lottery products of the OLC. While it is true that the OLC holds a monopoly on operating provincial lotteries, based on the information provided in the affidavit of the Acting Vice-President of Marketing of the OLC, I am satisfied that the activities described above compete with the OLC for the same consumer dollar. Accordingly, I find that disclosure of the information contained in the market research studies could reasonably be expected to prejudice the competitive position of the OLC and therefore qualifies for exemption under section 18(1)(c) of the *Act*.

The OLGC comments on Order P-041 as follows:

Order P-941 is applicable to the circumstances of this appeal. The records at issue in Order P-941 were . . . copies of three market research studies prepared by the OLGC . . . Similar to the Sport Select [lottery] research, the Big Ticket Lottery research identifies the development and marketing strategy for this game. In both cases, OLGC retained external consultants in order to identify the type of lottery game that appeals to the public, what demographic groups would purchase the game and what marketing and promotional activities will enhance the sale of these games. The IPC recognized in Order P-941 that the disclosure of certain information by OLGC would prejudice its economic interest and harm its competitive position. As such the IPC upheld OLGC's decision to deny access . . .

The appellant makes no specific submissions on the application of section 18(1)(a), (c) or (d). Instead, the appellant's submissions focus on the public interest in disclosure. I will address these arguments below.

Findings

In my view, the OLGC has provided sufficiently detailed and convincing evidence to establish a reasonable expectation that disclosure of the records would prejudice its economic interests and/or competitive position. Similar to the findings in Order P-941, I accept the premise that the OLGC operates in a competitive environment, in the sense that it competes with a variety of organizations for "the same consumer dollar." Although it appears that the Big Ticket lottery is no longer in existence, I am satisfied that the records reveal the OLGC's unique marketing strategies for similar "high priced" lotteries and, as well, provide insight into how the OLGC designs, builds and markets its lottery products in general. In the circumstances, I accept that the OLGC's competitors would find this information useful, to the financial detriment of the OLGC. Again, this finding is similar to that of Adjudicator Fineberg in Order P-941 with regard to records of a similar nature.

Accordingly, I find that the records are exempt under section 18(1)(c) of the *Act*.

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 [1999] S.C.C.A. No. 134 (note)].

In deciding whether or not there is a compelling public interest in disclosure, any public interest in *non*-disclosure must be considered [*Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.)].

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that 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 that 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:

OLGC officials must find it difficult to objectively judge whether there is an “overriding public interest” in disclosing the requested information. After all, OLGC exists to run and market gambling activities. It was created by the Ontario government for the express purpose of operating lotteries, casinos, racetrack slot machines, etc. They then channel much of the profit back into Ontario communities and charities.

Billions of dollars are wagered through OLGC activities each year, resulting in a huge revenue source for the government. In its 1999-2000 annual report the OLGC reported revenues of \$4.7 billion, of which \$1.6 billion went into provincial coffers. By 2001 gaming in general generated \$2.2 billion for the province.

In these circumstances, one man's prize is another's addiction. While the profits may seem a windfall for many communities or charities, gambling also affects Ontario taxpayers in other ways.

In December 2001, the Ontario Problem Gambling Research Centre (<http://www.gamblingresearch.org/>) published a research study that found:

- more than one third of a million Ontarians – 340,000 people – experience moderate to severe gambling problems;
- rates for moderate or severe problems are higher among several groups, including unemployed people;
- low-income people are among those most vulnerable to develop problems if they gamble; and
- many gamblers suffer income loss or are forced into debt; as severity of the habit increases, so does the likelihood of severe family problems, health problems, stress and depression

Note: the study also found that there is a real need for a better understanding of trends in gambling behaviour, as well as the underlying causes of gambling problems. It concluded there is a need for prevention programming providing valid information on the real odds of winning.

The potential perils of gambling are not in dispute. In fact, Ontario government policy calls for 2% of gross revenue from slots at the province's charity casinos and racetracks to be spent on a "Problem Gambling Strategy". Part of that strategy is to fund the same Ontario Problem Gambling Research Centre which produced the report cited above.

As well, the OLGCA itself is mandated to provide some level of assistance to people suffering addiction and other gambling problems. For instance, its Web site (<http://www.olgca.ca/>) includes a toll-free phone number for the . . . Ontario Problem Gambling Helpline, and flashes cautionary phrases such as "It's just a game. Play responsibly."

But neither the OLGCA or the province has been very effective at communicating the availability of assistance programs. That December 2001 report by the Ontario Problem Gambling Research Centre found that:

- most problem gamblers are unaware of toll-free help lines; and

- about half of problem gamblers remain unaware of any counselling services available to them.

Against this backdrop of an unfulfilled duty to inform and protect Ontarians from gambling problems, we requested the documents pertaining to the now-defunct Big Ticket Lottery.

We question the OLG's ability to credibly claim there is no "overriding public interest" in revealing these documents because doing so would be "injurious to the financial interests of the government of Ontario."

In its submissions for this inquiry, the OLG seeks to seal its publicly-funded files behind Section 18(1). The OLG says it paid consultants thousands of dollars for research to produce marketing plans and other strategies for building and selling gambling products. The OLG says this information is proprietary, because it was paid for with "their" money.

The OLG derives its massive revenues from the same Ontario public that is vulnerable to the casualty of problem gambling. The Ontario public not only has an interest in knowing how legal gambling is targeted at them, it has a right to know.

The majority of the appellant's representations on this issue are focussed on establishing that people in Ontario suffer from gambling problems. This undoubtedly is true. However, the appellant does not make a convincing case as far as explaining how disclosure of *these particular records* would serve the public interest in addressing these problems. How would knowledge of confidential marketing strategies lead to an alleviation of this problem? Who would take such steps? The appellant does not put me in a position where I may draw a connection between disclosure of the information and the public interest in addressing problem gambling.

In addition, it is clear to me that there is a strong public interest in *non*-disclosure of this information. As I found above, should the records be disclosed, the OLG could reasonably be expected to suffer competitive and economic harm. Thus, money that may have gone to the OLG and, in turn, funded charitable causes, may be directed towards other entities. In this respect there is a public interest in the information remaining confidential.

Accordingly, I find that the appellant has not established that there is a compelling public interest in disclosure of the records and, therefore, section 23 does not apply to override the application of section 18(1)(c).

ORDER:

I uphold the OLG's decision to deny access to the records.

Original signed by: _____
David Goodis
Senior Adjudicator

_____ October 24, 2003