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

ORDER PO-2328

Appeal PA-030113-1

Ministry of the Attorney General

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BACKGROUND:

On June 9, 2000, the Province of Ontario, as represented by the Attorney General and Minister Responsible for Native Affairs, entered into an agreement titled "Casino Rama Revenue Agreement" (the Agreement). The other parties to the agreement are the Ontario Lottery and Gaming Corporation (OLGC), Ontario First Nations Limited Partnership (OFN) and Mnjikaning First Nation Limited Partnership (MFN).

Article 4 of the Agreement, headed "First Nations Reporting" contains a number of provisions, including requirements for MFN and various organizations receiving revenue under the terms of the Agreement to provide annual audited financial statements to OFN, and for OFN to in turn report to the Province. The OFN report must include a consolidation of various individual reports, as well as audited financial statements for OFN itself. The Agreement contains scheduled forms to be used for these reporting exercises.

The Agreement also provides for the appointment of an accountant called the "Joint Appointee", agreed upon jointly by the Province and OFN, who is provided with the various reports and given authority to conduct investigations to determine whether the parties to the Agreement are living up to their contractual responsibilities, and to report on an annual basis to all signatories to the Agreement.

OFN and MFN are given authority under the Agreement to develop policies and procedures setting out expenses that can be charged by organizations against revenue generated under the terms of the Agreement, subject to approval by the Province.

NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "copies of all audits, reports, and related documents received by the Ministry from [OFN] as per [the Agreement]" and "any Ministry memos or reports, including audits, related to First Nations audits submitted as per [the Agreement]".

The Ministry identified 110 responsive records.

Pursuant to section 28 of the *Act*, the Ministry invited OFN and MFN, whose interests might be affected by the disclosure of the records, to provide input on whether they should be disclosed. Both objected to disclosure.

The Ministry then responded to the requester, denying access to all of the records pursuant to the following exemptions in the *Act*:

section 13(1)	-	advice or recommendations
sections 17(1)(a) and (c)	-	third party information
section 19	-	solicitor client privilege
section 21(1)	-	invasion of privacy

The requester, now the appellant, appealed the Ministry's decision.

During mediation, the Ministry provided the appellant and this office with an index identifying the specific exemption claimed for each record. The index also indicated that parts of certain records contained information that was not responsive to the request.

No issues were resolved during mediation, and the appeal was forwarded to the Adjudication Stage. I began my inquiry by sending a Notice of Inquiry to the Ministry, OFN and MFN. The Ministry and OFN submitted representations. I then sent the Notice to the appellant, together with a copy of the Ministry's representations in their entirety and the non-confidential portions of OFN's representations. The appellant in turn provided representations.

RECORDS:

The records at issue in this appeal are described in the index prepared by the Ministry and provided to the appellant during mediation.

There are a total of 110 records comprising 356 pages. They include correspondence, financial audits completed under the terms of the Agreement, fax cover sheets, briefing notes, meeting notes, handwritten and typed notes, agendas, and email messages. Some records are in draft format.

For each record, the index identifies the exemptions claimed by the Ministry and, where relevant, the portions the Ministry submits are not responsive to the appellant's request.

DISCUSSION:

RESPONSIVENESS

The Ministry takes the position that the following records or portions of records are not responsive to the request: Records 1, 3, 9, 10, 11, 12, 15, 16, 20, 21, 22, 27, 28, 29, 30, 32, 33, 37, 38, 39, 40, 41, 42, 44, 45, 46, 48, 59, 62, 65, 66, 80, 83, 84, 90 and 105.

The Ministry submits that information it identifies as non-responsive consists of meeting agenda items or proposed agenda items that do not deal with the "audits or related documents" concerning the Agreement; computer file path directors that identify the location of records in the Ministry's computer system but do not contain the requested information; and notes or other communications that do not contain any information about the audits or documents relating to the audits.

The appellant submits in her representations:

> I am prepared to accept the irrelevance of agenda items or proposed agenda items, computer file path directories and communications that do not contain

> information about the Casino Rama Revenue Agreement audits or related documents.

I have reviewed the portions of the records the Ministry describes as being non-responsive.

Some portions contain the computer-generated file references, which are clearly not covered by the appellant's request.

The other non-responsive portions of records consist of agendas, meeting notes, email messages and official minutes of various meetings of the Casino Rama Working Group of the Casino Rama Revenue Agreement Implementation Committee (the Casino Rama Committees) where a number of issues are discussed. The items and notations dealing with audits and related documents have been included within the scope of the request; and other portions that deal with topics relating to various aspects of the Agreement other than the audit reporting process, have been excluded.

Previous orders have established that in order to be responsive, a record must be "reasonably related" to the request [Order P-880]. In light of the wording of the appellant's request and her acceptance that information concerning aspects of the Agreement other than audits and related documents is not responsive, I find that the portions of the following records withheld by the Ministry as "non-responsive" fall outside the scope of the appellant's request: Records 1, 3, 9, 10, 11, 12, 15, 16, 20, 21, 22, 27, 28, 29, 30, 32, 33, 37, 38, 39, 40, 41, 42, 44, 45, 46, 48, 59, 62, 65, 66, 80, 83, 84, 90 and 105.

INVASION OF PRIVACY

The Ministry claims that the following records or portions of records qualify for exemption under the mandatory invasion of privacy exemption in section 21(1) of the *Act*: 9, 11, 16, 22, 27, 28, 32, 33, 39, 40, 41, 46 and 63.

In order to qualify for exemption under section 21(1), a record must contain "personal information". This term is defined in section 2(1) of the *Act* to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual [paragraph (h)].

The information identified by the Ministry consists of the names of individuals who are not Ministry employees. The Ministry submits that these names themselves are "personal information" and, in addition, that "the names in combination with other information in the document[s], provides information about the whereabouts and activities of identifiable individuals at particular dates and times", and therefore falls within the scope of paragraph (h) of the definition.

The appellant states that she is not interested in receiving information that qualifies as "personal information" as defined in section 2(1).

Previous decisions of this office have drawn a distinction between information relating to an individual in a *personal capacity* and information relating to an individual in *a professional or official government capacity*. As a general rule, information associated with a person in a professional or official government capacity will not be considered to be "about the individual" within the meaning of section 2(1) definition of "personal information" [Orders P-257, P-427, P-1412, P-1621].

In a reconsideration of Order P-1538, Adjudicator Donald Hale reviewed the history of this office's approach to this issue. He extensively examined the approaches taken by other jurisdictions and considered the effect of the decision of the Supreme Court of Canada in *Dagg* v. *Canada (Minister of Finance)*(1997), 148 D.L.R. (4th) 385. In applying the principles which he described in his reconsideration order, Adjudicator Hale reached the following conclusions:

> I find that the information associated with the names of the affected persons which is contained in the records at issue relates to them only in their capacities as officials with the organizations which employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them but, rather, relates to their employment or association with the organizations whose interests they are representing. This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not about these individuals and, therefore, does not qualify as their "personal information" within the meaning of the opening words of the definition.
>
> In order for an organization, public or private, to give voice to its views on a subject of interest to it, individuals must be given responsibility for speaking on its behalf. I find that the views which these individuals express take place in the context of their employment responsibilities and are not, accordingly, their personal opinions within the definition of personal information contained in section 2(1)(e) of the *Act*. Nor is the information "about" the individual, for the reasons described above. In my view, the individuals expressing the position of an organization, in the context of a public or private organization, act simply as a conduit between the intended recipient of the communication and the organization which they represent. The voice is that of the organization, expressed through its spokesperson, rather than that of the individual delivering the message.
>
> In the present situation, I find that the records do not contain the personal opinions of the affected persons. Rather, as evidenced by the contents of the records themselves, each of these individuals is giving voice to the views of the organization which he/she represents. In my view, it cannot be said that the affected persons are communicating their personal opinions on the subjects addressed in the records. Accordingly, I find that this information cannot properly be characterized as falling within the ambit of the term "personal opinions or views" within the meaning of section 2(1)(e).

I have reached the same conclusion as it relates to the portions of Records 9, 11, 16, 22, 27, 28, 32, 33, 39, 40, 41, 46 and 63 withheld by the Ministry under section 21(1).

The information the Ministry claims to be "personal information" in these records is the names of individuals who attended meetings of the various Casino Rama Committees as representatives of OFN, MFN and/or OLGC. In one instance (Record 16) the name of a lawyer who attended a meeting, and the law firm he represents, has also been withheld under section 21(1). Applying the approach outlined by Adjudicator Hale, it is clear from the context in which the names are listed in the various records that these individuals are attending the Casino Rama Committee meetings in their official capacities as representatives of the organizations to which they belong. There is no "personal capacity" dimension to the names in this context and, in my view, no basis for distinguishing the names of Ministry officials attending these meetings, which the Ministry has agreed to disclose, and the names of officials representing other parties, which the Ministry purports to withhold as representing an invasion of their privacy.

Order PO-2225 is also helpful in this context. In that order, I considered the definition of "personal information" and the distinction between information about an individual acting in a business capacity as opposed to a personal capacity. I posed two questions that help to illuminate this distinction:

> Based on the principles expressed in these [previously referenced] orders, the first question to ask in a case such as this is: "*in what context do the names of the individuals appear*"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?
>
> ….
>
> The analysis does not end here. I must go on to ask: "*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

In the current appeal, the context in which the names appear is not inherently personal, but is one that relates exclusively to the official responsibilities of these individuals as representatives of the other parties to the Agreement. Similar to the business context present in Order PO-2225, the professional or representative context in which the individuals' names appear here removes them from the personal sphere. In addition, there is nothing about the names themselves that, if disclosed, would reveal something of a personal nature about the various attendees.

As far as the name of the lawyer in Record 16 is concerned, it is listed along with the name of the private sector law firm with which he is associated. Clearly, there is no personal context for this individual's name and professional association.

For all of these reasons, I find that the names of the various individuals withheld from Records 9, 11, 16, 22, 27, 28, 32, 33, 39, 40, 41, 46 and 63 do not qualify as "personal information" as that term is defined in section 2(1) of the *Act*. Because only "personal information" can qualify for exemption under section 21(1), I find that this exemption claim has no application in the circumstances of this appeal.

SOLICITOR-CLIENT PRIVILEGE

The Ministry takes the position that section 19 applies to the responsive portions of Records 1, 3 (pages 4-11), 4, 12, 14, 15, 17, 19, 23, 24, 30, 31, 35, 36, 42, 43, 49-56, 58-66, 70, 71, 72 (pages 2-4), 75, 76, 77, 79, 80, 81, 85, 87, 89, 90, and 94-110.

General principles

Section 19 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 contains two branches as described below. The Ministry must establish that one or the other (or both) branches apply.

Branch 1: common law privileges

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

Common law litigation privilege has not been raised by the Ministry and has no application in the circumstances of this appeal.

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue,* [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

The Ministry relies on the common law solicitor-client communication privilege component of Branch 1 for all identified records, with the exception of Records 1, 3 (pages 4-11) and 17 (pages 1-14). The Ministry takes the position that:

> Records 4, 12, 14, 15, 30, 31, 36, 42, 43, 51, 52, 54, 56, 61-66, 70, 71, 72 (page 4), 76, 79, 81, 90 [page 3 is a fax transmittal page attaching pages 1-2], and 94-110 consist of correspondence subject to common law solicitor-client privilege because they contains communications between a lawyer and client and are exchanged for the purpose of seeking or giving confidential legal advice.
>
> Records 17 (pages 5-50), 19, 23, 24, 53 and 87 are draft legal opinions or legal documents and related attachments which were provided for the purpose of giving advice or seeking instructions.
>
> Records 35, 55, 58, 59, 72 (pages 2-3), 77 and 89 consist of draft correspondence "expressly and/or implicitly" containing or seeking legal advice.
>
> Records 49, 50, 75 and 84 [should be 85] are notes made by counsel for the purpose of formulating or communicating legal advice, or seeking instructions.

The appellant makes no submissions on the application of the solicitor-client privilege to the records at issue in this appeal.

On the basis of the Ministry's representations and my review of the records identified by the Ministry as qualifying under Branch 1 solicitor-client communication privilege, I make the following findings:

- Record 4 is a letter from the Director of the Policy and Agency Partnerships Branch of the Ministry of Tourism, Culture and Recreation (MTR) to a private sector law firm asking for a legal opinion on the interpretation of an aspect of Article 4 of the Agreement. The letter outlines the context in which the legal

issue arose, includes specific items that are to be addressed in the opinion, and refers the lawyer to internal legal counsel for any required clarifications. I find that this record falls squarely within the parameters of common law solicitor-client communication privilege: it is a written communication between a client and a solicitor made for the purpose of obtaining professional legal advice. The record is marked "solicitor-client privilege" evidencing a clear intention that the contents should be treated confidentially. I find that Record 4 qualifies for exemption under Branch 1 of section 19.

- Records 12, 14, 15, 30, 31, 36, 42, 43, 51, 52, 54, 56, 61-66, 70, 71, 72 (page 4), 76, 79, 81, 87, 90, and 94-107, 108 (page 1), 109 and 110 are all internal email messages and email chains exchanged between legal counsel, program staff and staff of the Office of the Deputy Attorney General on the topic of the requested legal opinion comprising Record 4 and issues stemming from it. Although not marked as "confidential", given the subject matter and the context in which these records were created, it is reasonable to assume that the communications reflected in them were intended to be treated confidentially. In my view, these records are either direct communications between solicitor and client seeking or conveying legal advice or are accurately characterized as part of the "continuum of communications" between solicitor and client described in *Balabel*. Although pages 1-2 of Record 90 are authored by a lawyer representing one of the other parties to the Agreement, it is clear from the content of page 3 of this record that it was communicated to MTR's legal counsel during the continuum of discussions on the subject matter of Record 4. Therefore, for the reasons outlined, I find that Records 14, 15, 30, 31, 36, 42, 43, 51, 52, 54, 56, 61-66, 70, 71, 72 (page 4), 76, 79, 81, 87, 90, and 94-97, 108 (page 1), 109 and 110 all qualify for exemption under the common law solicitor-client communication privilege component of Branch 1 of section 19.

- Records 19, 23, and 24 and pages 5-50 of Record 17 are all draft copies of the legal opinion prepared by the private sector law firm in response to the request that comprises Record 4. Each draft contains handwritten notes apparently made by MTR legal counsel and other client staff. These records are, in effect, draft versions of the other half of the solicitor-client communication equation initiated by Record 4, and they also qualify for common law solicitor-client communication privilege. The main body of these records consists of written communications between a solicitor and a client made for the purpose of providing professional legal advice; and the handwritten notes constitute feedback provided to the solicitor by the clients. As with Record 4, it is reasonable to conclude that communications of this nature were intended to be treated confidentially. Pages 1-4 of Record 17 are all fax cover sheets transmitting the marked-up copy of the draft opinion from MTR legal counsel to outside legal counsel and to internal program area officials. The notations on these cover sheets make it clear that they are part of the "continuum of communications" outlined in *Balabal*. Therefore, I find that Record 19, 23 and 24, and all of Record 17 qualify for exemption under Branch 1 of section 19. It

should be noted that the final version of the legal opinion has not been identified as a responsive record in this appeal. Although this would normally raise issues concerning the adequacy of the Ministry's search for responsive records, it is clear that any such record would clearly fall within the scope of common law solicitor-client communication privilege and, in my view, there is no useful purpose in pursuing the search issue in these circumstances.

- Records 35, 55, 58, 59 and 72 (pages 2-3), 77 and 89 all consist of draft letters prepared for the Deputy Attorney General (and in one case his Executive Assistant) to send to one of the other parties to the Agreement, concerning issues stemming from the request for the legal opinion comprising Record 4. Based on the content of the draft letters, it is reasonable to conclude that they were prepared by legal counsel. In my view, these records all qualify for common law solicitor-client communications privilege. They were drafted and communicated by staff to the Deputy Attorney General for the purpose of providing legal advice on issues under discussion within the government at that time. I accept that draft documents of this nature are prepared with an expectation that the contents would remain confidential until finalized. Therefore, I find that Records 35, 55, 58, 59 and 72 (pages 2-3), 77 and 89 qualify for exemption under Branch 1 of section 19.

- Records 49, 50, 53, 75, 85 and 108 (pages 2-7), consist of handwritten or typewritten notes prepared by legal counsel in the context of discussing and researching issues stemming from the request for the legal opinion comprising Record 4. I find that these records constitute counsel's working papers directly related to seeking, formulating or giving legal advice as described in *Susan Hoisery*, and therefore Records 49, 50, 53, 75, 85 and 108 (pages 2-7) qualify for exemption under the common law solicitor-client communications component of section 19 of the *Act*.

The Ministry's representations do not deal with Records 60 and 80, although section 19 is identified on the index as applying to these two records. Having reviewed them, I find that Records 60 and 80 are similar in nature to Records 58 and 51 respectively, and qualify for exemption under section 19 for the same reasons as these other records.

Branch 2: statutory privilege

Branch 2 is a statutory solicitor-client privilege that is available in the context of Crown counsel giving legal advice or conducting litigation. This branch encompasses the same two types of privilege as derived from the common law. The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

The Ministry takes the position that Branch 2 applies to Records 1, 3 (pages 4-11) and 17 (pages 1-3). I have already determined that pages 1-3 of Record 17 qualify for exemption under Branch 1, so I will not consider these records under Branch 2.

In its representations, the Ministry simply states that disclosing the proposed agenda item identified in the responsive portion of Record 1 and the fax cover sheets for Record 3 would reveal communications prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

I do not accept the Ministry's position.

I have no basis for concluding that Crown counsel was the author of Record 1, and it is clear from other records in this appeal that the recipients of the Casino Rama Committee agendas included all parties to the Agreement, including representatives outside the government. I am also not persuaded that disclosing the one-line reference to the topic included on this agenda and presumably known outside the confines of a restricted solicitor-client relationship could reasonably be considered confidential, nor would it appear that the listed agenda item could be used in "giving legal advice or in contemplation of or for use in litigation", certainly not based on the evidence and argument provided by the Ministry in its representations.

As far as the Record 3 fax cover sheets are concerned, although six of them are addressed to employees of the government, the other two were sent to outsiders representing other parties to the Agreement. In these circumstances, it is not reasonable to conclude that the communications were intended to be treated confidentially, nor am I persuaded, based on the brief representations provided by the Ministry, that the communication could reasonably be expected to be used in "giving legal advice or in contemplation of or for use in litigation". Therefore, I find that the responsive portions of Record 1 and pages 4-11 of Record 3 do not qualify for exemption under Branch 2 of section 19. No other exemption has been claimed for Record 1, so the responsive portion should be provided to the appellant. The Ministry has also withheld pages 4-11 of Record 3 under section 17(1), and I will include these pages in my discussion of that exemption claim.

ADVICE TO GOVERNMENT

The Ministry claims section 13(1) of the Act as one basis for denying access to portions of the following records: 10, 11, 13, 17, 19, 22, 23, 35, 41, 48, 58, 59, 60, 77, 89 and 94.

I have already determined that Records 17, 19, 23, 35, 58, 59, 60, 77, 89 and 94 qualify for exemption under section 19, so I will restrict my discussion of section 13(1) to the portions of Records 10, 11, 13, 22, 41 and 48 identified by the Ministry.

Section 13(1) reads:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the

decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance)* v. *Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-1894, PO-1993].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Information and Privacy Commissioner),* [2004] O.J. No. 163 (Div. Ct.), leave to appeal granted Doc M30914, June 30, 2004, C.A.)].

The appellant does not address the application of section 13(1) in her representations.

The only portions of Records 10, 11, 22 and 41 withheld by the Ministry under section 13(1) consist of headings of agendas and minutes of meetings of the Casino Rama Committees, and the only representations provided by the Ministry for this information is a statement that the headings "would reveal that advice and recommendations were being formulated or given in respect of [the Agreement]". Clearly, this is not sufficient to establish the requirements of section 13(1). The information itself may have been in draft form at the time the records were created, and I accept that the actual substance of the agendas and minutes may have been amended before they were produced as final documents. However, the information at issue in Records 10, 11, 22 and 41 is strictly factual information identifying the name of the Committee and the date, time and place of the meeting in question. No advice is contained in these portions of the records, nor would disclosing them permit one to accurately infer any advice or recommendations. The portions of Records 10, 11, 22 and 41 at issue here clearly do not qualify for exemption under section 13(1) under any definition of the term "advice or recommendations" and should be disclosed.

The withheld portion of Record 13 consists of a brief handwritten notation on a fax cover sheet. The author of the note is not identified. The content of the note does not contain advice or recommendations, nor would disclosing it reveal any information that would qualify for exemption under section 13(1). It is in the nature of a direction to staff to take specific action and, as such, is similar in nature to information found to fall outside the scope of section 13(1) in Order P-363. Accordingly, the handwritten notation on page 1 of Record 13 does not qualify for exemption under section 13(1) and should be disclosed.

Record 48 is a draft letter from the Deputy Attorney General to one of the parties to the agreement. Unlike Records 35, 55, 58, 59 and 72 (pages 2-3), 77 and 89, which also fit this

general description, the Ministry has not claimed section 19 for Record 48, and it is clear from its content that it does not contain the type of information that could qualify for solicitor-client privilege under that section of the *Act*. I also find that it does not qualify for exemption under section 13(1). The record simply acknowledges receipt of correspondence from the other party and identifies a change in administrative arrangements for issues relating to the Agreement. In my view, the fact that the letter is in draft, which is the only potential rationale for the section 13(1) exemption claim, is not sufficient to bring it within the scope of "advice or recommendations", and clearly not on the basis of the arguments put forward by the Ministry in its representations [Order PO-1690]. Record 48 is also included among the records withheld under section 17(1), and I will include it in my discussion of this other exemption claim.

THIRD PARTY INFORMATION

The following records have been withheld in whole or in part by the Ministry under sections 17(1)(a) and (c) of the *Act*: Records 2, 3, 5-11, 13, 16, 18, 20-22, 25-29, 32-34, 37-41, 44-48, 57, 67-69, 72 (page 1), 73, 74, 78, 82-84, 86, 88 and 91-93.

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For a record to qualify for exemption under sections 17(1)(a) or (c), the Ministry and the affected party resisting disclosure (in this case OFN) 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 Ministry 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 subsection 17(1) will occur.

[Orders 36, P-373, M-29 and M-37]

For the purposes of the section 17(1) discussion, I have divided these records into 7 groups, as follows:

Group 1: Audited financial statements and transmittal documents for OFN and MFN for the years ending March 31, 2001 and 2002 and related supplementary financial information: Records 2, 5, 26, 82 and 86.

Group 2: Other reports and transmittal documents submitted by OFN pursuant to the Agreement: Records 7, 13, 18, 25, 34, 73, 88 and 92.

Group 3: Communications from OFN to MFN regarding reporting obligations under the Agreement: Records 47, 68, 69 and 93.

Group 4: Correspondence from the Deputy Attorney General or the MTR legal counsel to OFN regarding issues relating to the administration of the Agreement: Records 3 (pages 1-3), 57, 67 and 78.

Group 5: Correspondence from OFN to the Deputy Attorney General or MTR officials regarding issues relating to the administration of the Agreement: Records 6, 72 (page 1) and 74.

Group 6: Portions of agendas, minutes, handwritten notes relating to the topic relating to audit reporting requirements under the Agreement at various meetings of the Casino Rama Committees: Records 8-11, 16, 20-22, 27-29, 32, 33, 37-41, 44-46, 83 and 84.

Group 7: The remaining records, which consist of the 8 fax cover sheets (Record 3, pages 4-11); a draft letter from the Deputy Attorney General to OFN (Record 48); and a letter from a native organization to the Ontario Native Affairs Secretariat concerning the administration of the Agreement (Record 91).

Part 1: Type of Information

The Ministry submits that the records for which they claim section 17(1) contain financial information. OFN agrees, and also submits that they contain commercial information.

The terms "commercial information" and "financial information" have been defined in previous orders of this office as follows:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

Representations

The representations provided by the Ministry and OFN are both brief.

The Ministry's consist of the following:

> The records requested are audits and reports in relation to a revenue agreement. By their very nature, they contain financial information as the records relate to the use and distribution of money, which falls within the meaning of the term 'financial information' as set out in Orders P-47, P-87, P-113, P-228, P-295 and P-394.

OFN's representations state:

> The Records contain information that relates to the business operations and financial position of [OFN] and its First Nations partners and related entities. Disclosure of the Records would therefore reveal commercial and financial information. In Orders P-1496 and P-1587 it was recognized that financial statements contain the types of commercial and financial information identified in the first part of the s. 17 test.

The appellant makes no specific comment on the type of information contained in the records.

Analysis and findings

I accept that an audit report, by its very nature, would include "financial information" for the purposes of part 1 of the section 17(1) test. I also accept that information that makes reference to specific data relating to an audit report, such as "cost accounting methods, pricing practices, profit and loss data, overhead and operating costs" would also meet the definition of "financial information" as outlined above. However, not all information contained in a record that relates to the Agreement and its administration falls within the scope of "financial information" simply on the basis that it deals with the same subject matter as the audit reports. To qualify as "financial information" the information itself must be financial in nature.

I do not accept OFN's position that the records contain "commercial information". Although I accept that Casino Rama operates as a commercial enterprise, that is not sufficient to bring all records that relate to the administration of a revenue sharing agreement among various organizations that are not involved in the actual operations of the casino within the scope of "commercial information" for the purposes of part 1 of section 17(1). As the definition makes clear, to qualify as "commercial" the information in a record must "relate solely to the buying, selling or exchange of merchandise or services". The appellant is interested in being provided with access to audit reports and related information. These audit reports are prepared and provided to the Ministry in accordance with the terms of the revenue sharing Agreement in which the Province of Ontario has a clear interest. No merchandise or service is exchanged in this context, nor, in my view, can it reasonably be argued that an audit report of this nature, which is prepared for the purpose of ensuring accountability for the provision of funds, somehow transforms into "commercial information" simply because it stems from a business venture.

Therefore, I find that unless the records withheld under section 17(1) contain or would reveal "financial information", they do not satisfy part 1 of the test and do not qualify for exemption for that reason.

I will now apply this finding to the various groups of records:

Group 1: Record 2 (page 1), Record 5 (pages 1-2), Record 26 (pages 1-2), Record 82 (page 1) and Record 86 (pages 1-3) all consist of cover letters and other administrative records. Although they make general reference to various audits, none of these pages contain or would reveal any financial information from the audits. Accordingly, they do not meet the definition of "financial information" and do not qualify for exemption under section 17(1). The remaining portions of the various Group 1 records consist of the actual audits themselves or related financial statements. I find that they contain "financial information", thereby satisfying the requirements of part 1 of the test.

Group 2: Record 7 (pages 1-2), Record 13 (pages 1-2), Record 18 (page 1), Record 25 (page 1), Record 34 (page 1), Record 73 (page 1), Record 88 (pages 1-2) and Record 92 (page 1) all consist of cover letters and other administrative records. Although they make general reference to various audits, none of these pages contain or would reveal any financial information from the audits. Accordingly, they do not meet the definition of "financial information" and do not qualify for exemption under section 17(1). The remaining portions of the various Group 2 records consist of reports made to the Ministry in the form of schedules included in the Agreement. Each report contains "financial information" thereby satisfying the requirements of part 1 of the test.

Group 3: All Group 3 records consist of letters dealing with administrative issues involving the Agreement. None of them contain nor would they reveal "financial information" and therefore do not qualify for exemption under section 17(1).

Group 4: The various Group 4 records are correspondence (and in one instance a fax cover sheet) sent by the government to OFN on issues relating to compliance with or administration of the Agreement. Although in some cases the issues stem from information distilled from audit reports, none of the Group 4 records themselves contain "financial information", nor, in my view, would any actual "financial information" contained in the audits be revealed through the disclosure of the various Group 4 records. The fact that some of these records refer to issues that have financial implications is not sufficient to bring this information within the scope of the definition of "financial information". Accordingly, the Group 4 records do not satisfy part 1 of the test and therefore do not qualify for exemption under section 17(1).

Group 5: The Group 5 records all deal with the same subject matter as a number of the Group 4 records. Although the date references do not match precisely, it would appear from their content that the Group 5 records respond to Records 3 and 67 (page 3). For the same reasons outlined above for the Group 4 records, I find that none of the Group 5

records contain or reveal "financial information", and therefore they do not satisfy part 1 of the test and do not qualify for exemption under section 17(1).

Group 6: I have already determined that significant portions of the various Group 6 records are not responsive to the appellant's request. As far as the responsive portions are concerned, some of them consist of agendas of meetings of the various Casino Rama Committees. The portions withheld under section 17(1) include the agenda headings and the 1-line description of the topic dealing with financial reporting under the Agreement. I find that the mere reference to the topic and date and location of the committee meetings is not "financial information" and this information does not qualify for exemption under section 17(1). The remaining Group 6 records (with the exception of Record 8) consist of typed and handwritten notes of meetings of the various Casino Rama Committees made by various attendees. None of these records contain "financial information" and, although they deal with the topic of audit reporting, I find that disclosing them would not reveal any "financial information" contained in the audit reports. Record 8 is a briefing note that deals with one of the issues raised in the Group 4 records. With the exception of one line that makes specific reference to a financial figure derived from documents provided under the terms of the Agreement, I find that the remaining responsive portions of these records do not contain nor would they reveal "financial information". Accordingly, with the exception of one line on Record 8, I find that none of the Group 6 records meets the requirements of part 1 of the test and therefore they do not qualify for exemption under section 17(1).

Group 7: Clearly, none of the fax cover sheets comprising Record 3 (pages 4-11) contain "financial information", nor does the draft letter prepared for the Deputy Attorney General to send to OFN (Record 48), which deals with purely administrative matters. As far as Record 91 is concerned, it makes reference to the same issue raised in the various Group 4 records and, for the same reasons as these other related records, I find that it does not contain nor would it reveal "financial information" contained in the audit reports. I find that none of the Group 7 records satisfies part 1 of the test and therefore they do not qualify for exemption under section 17(1).

In summary, I find that the only records that meet the requirements of part 1 of the section 17(1) test are:

Group 1: Record 2 (pages 3-17), Record 5 (pages 3-15, Record 26 (pages 3 and 4), Record 82 (pages 2-11) and Record 86 (pages 4-13)

Group 2: Record 7 ((pages 3 and 4), Record 13 (pages 3-5), Record 18 (pages 2 and 3), Record 25 (pages 2 and 3), Record 34 (pages 2 and 3), Record 73 (pages 2 and 3), Record 88 (pages 3 and 4) and Record 92 (pages 2 and 3).

Group 3: none

Group 4: none

Group 5: none

Group 6: Record 8 (page 1), in part

Group 7: none

All other records do not qualify for exemption under section 17(1)(a) or (c) and since they are not otherwise exempt, they should be disclosed.

Part 2: Supplied in Confidence

The "supplied" component of part two reflects the purpose of the section 17(1) exemption, namely protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by an affected party, or where its disclosure would reveal or permit the drawing of accurate inference with respect to information supplied by an affected party [Order PO-2020, PO-2043].

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure (in this case, the Ministry and OFN) must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

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

- Communicated to the Ministry on the basis that it was confidential and that it was to be kept confidential
- Treated consistently in a manner that indicated a concern for its protection from disclosure by OFN prior to being communicated to the Ministry
- Not otherwise disclosed or available from sources to which the public has access
- Prepared for a purpose that would not entail disclosure [Order PO-2043]

The Ministry and OFN both submit that records provided by OFN to the province pursuant to the reporting requirements in Article 4 of the Agreement were "supplied". I concur, and find that all of the information contained in records that meet part 1 of the test was "supplied" for the purposes of part 2.

Both parties also rely on Article 12.1 of the Agreement, and specifically clauses 12.1.2 and 12.1.4, as an express indication that the information was supplied "in confidence". These clauses read, in part:

> 12.1.2 … except as may be required by applicable law, all … confidential information provided by any party hereto pursuant to or in connection with this Agreement shall be kept confidential by the parties and shall only be made available to such of a party's employees, advisors and consultants as are required to have access to the same in order for the recipient party to adequately use such information in accordance with this Agreement.
>
> 12.1.3 Without limitation, [the parties to the Agreement] agree that the reports under Article 4 shall, except as may be required by applicable law, be kept confidential by them and not be used by OLGC or the Province for any purposes other than in accordance with this Agreement.

Again, I concur with the Ministry and OFN. Although Article 12 specifically recognizes that disclosure obligations may exist by law, which would include disclosure under the *Act*, as far as the "in confidence" component of part 2 is concerned, I find that the information contained in those records that meet the requirements of part 1 was supplied to the province with the express and reasonably held expectation that it would be treated confidentially, pursuant to Article 12 of the Agreement.

Therefore, I find that part 2 of the section 17(1)(a) and (c) test has been established for all of the Group 1, 2 and 7 records that satisfied the requirements of part 1.

Part 3: Harms

General principles

To meet this part of the test, the City and/or the affected party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to the speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board)* v. *Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

Representations

The Ministry largely defers to OFN on the harms component of section 17(1), stating:

> Any harms resulting from the disclosure of these records would be to [OFN] or its members. The Ministry defers to the submissions of [OFN] with respect to the harms that would occur if the information were disclosed. Since the Ministry itself is not involved in the operation of the casinos, it does not have evidence of the potential harms that may reasonably be expected to result from the disclosure of the responsive records. The Disclosure section of the Agreement is for the benefit not only of the Province, but of all parties to the Agreement.

OFN points to the wording of Article 12.1.2 which makes reference to the types of harm outlined in section 17(1)(a) and (c), and takes the position that the existence of this wording represents an acknowledgement by the province that disclosing information provided under Article 4 of the Agreement would result in these harms.

OFN also submits:

> The Records contain detailed information about [OFN and MNF]'s assets, revenue and expenses. [OFN] has a direct financial interest in Casino Rama and currently receives 65% of the net revenues of Casino Rama. The direct partnership interest of First Nations in the Casino has been confirmed by the Supreme Court of Canada (*Lovelace*) and the Ontario Superior Court (*MFN v. HMQO*).
>
> Disclosure of the Records would reveal the annual net revenues of Casino Rama and would thereby allow a competitor to assess the financial condition and profitability of Casino Rama. The gaming industry is highly competitive, and should a competitor gain access to the financial and commercial information contained in the Records, Casino Rama's ability to maintain and enhance its share of the gaming marketplace would be compromised. This would cause significant harm to [OFN] and its First Nation partners, many of which are among the poorest communities in Canada. Significant harm would also be caused to the other parties directly interested in the Casino, including the operator, [named company], contractors, employees and the Ontario Gaming and Lottery Corporation. Also there would be undue gain to Casino Rama's competitors.
>
> Moreover, disclosure of information concerning the amount of [OFN's] revenue and expenses would interfere with negotiations between those First Nations and their suppliers. Such interference would also cause undue loss to the [OFN] and undue gain to the suppliers.
>
> In Order P-1360 the Information and Privacy Commissioner recognized that disclosure of financial statements and similar documents can reasonably be expected to cause the types of harm specified in s. 17(1)(a) and (c). In that case,

> the disclosure could have prejudiced negotiations with labour unions and suppliers. In Order P-1496, where a request was made for disclosure of financial statement, the Information and Privacy Commissioner concluded that:
>
> > With respect to the financial statements and statements of account, I find that they contain a great deal of information regarding the internal structure of the affected party and its financial activities, the disclosure of which could reasonably be expected to prejudice significantly its competitive position. Therefore, I am satisfied that the harm in section 17(1)(a) applies to these records.
>
> The conclusion of the Information and Privacy Commissioner in Order P-1496 applies with equal force to the disclosure of the Records: disclosure would prejudice significantly the competitive position of Casino Rama and cause harm to [OFN] and its partners of the type specified in section 17(1)(a) of [the *Act*].

The appellant argues generally that the mandatory exemptions under section 17(1)(a) and (c) of the *Act* have no application in the circumstances of this appeal. She submits:

> I do not accept that releasing audits showing how Casino Rama profits were spent in native communities would in any way jeopardize the competitive position of Casino Rama. Please sever any data in such fiscal reports that would somehow put trade secrets at risk. As for confidentiality, it seems a former provincial government struck a deal with [OFN] that forever shields from the general public an accounting of hundreds of millions of dollars in profits from a taxpayer-supported casino. I respectfully submit that an arbiter should rule on the fairness of this. In Saskatchewan, the provincial auditor general has access to fiscal reports filed by the Saskatchewan Indian Gaming Authority, and informs the legislature of related findings. Those findings have historically included tax accounting for gambling-related profits and questionable management of funds meant to help native communities in the province. Former Ontario Auditor General Erik Peters said in an interview with The Canadian Press on March 27, 2003 that the office has no direct access to Rama fiscal reports. In short, the same type of public accounting does not appeal to exist.
>
> …
>
> … First Nations have received in excess of $700 million in related funds since Rama profits began to flow. I respectfully submit that an arbiter should examine whether band members and the general public should have easy access to related band audits and the yearly comprehensive fiscal reports (on how Rama money was disbursed to each First Nation) which are filed to the province by [OFN].

As noted earlier, although MNF was provided with a Notice of Inquiry and an opportunity to participate in this inquiry, it declined to do so.

Analysis and findings

I should state at the outset that some of the considerations raised by the appellant in her representations do not fall within the scope of my authority. My responsibilities are restricted to an assessment of the argument and evidence put forward by the parties in the context of the records at issue in this appeal and to determine whether the Ministry and/or OFN have discharged their onus of establishing the requirements of the section 17(1)(a) and (c) exemption claims.

Having carefully reviewed all representations, the records, and the terms of the Agreement, I am not persuaded that disclosing the audit reports and related information concerning OFN and MFN that was supplied to the province under the terms of the Agreement could reasonably be expected to result in any of the harms outlined in section 17(1)(a) or (c). I have reached this conclusion for a number of reasons.

It is clear from the wording of the Agreement that the confidentiality provisions in Article 12 (as well as Article 2) are not intended to assure absolute confidentiality. First of all, the confidentiality provisions use the phrase "except as may be required by applicable law" which, in my view, is a clear recognition that confidentiality expectations are subject to overriding legislative rights, including a right of access under the *Act*. Further, although clause 12.1.2 describes the type of information provided by the OFN and MNF under the Agreement and the anticipated harm using the same language found in section 17(1) of the *Act*, the clause contains permissive rather than mandatory language (i.e. *may* rather than *shall*). In my view, this further supports my conclusion that the specific information itself must be tested under section 17(1)(a) and (c), and that the confidentiality provisions in the Agreement, although helpful, are by no means determinative of the harms issue.

It is also important to recognize that the audits and related information at issue here come into the custody and control of the Ministry under the terms of a revenue sharing agreement. Based on the evidence and argument provided to me in this appeal, I do not accept OFN's position that disclosing the audit reports would "reveal the annual net revenues of Casino Rama and would thereby allow a competitor to assess the financial condition and profitability of Casino Rama". Even if I were to accept that Casino Rama operates in a competitive environment, which has clearly not been established by the submissions put forward by the parties in this appeal, the information at issue here bears no direct relationship to the operations of Casino Rama. According to OFN, Casino Rama is operated by a large publicly traded company in the United States and no "financial information" at issue in this appeal belongs to that corporate body.

I also find that the two orders referred to by the OFN in its representations are distinguishable on their facts. Order P-1360 involved a request for access to financial statements relating to a named health centre. The adjudicator in that case accepted the affected party's section 17(1)(a) harms arguments based on negotiations with labour unions and vendors that were ongoing at the time of the request. No similar considerations are relevant here. As far as Order P-1496 is concerned, the records at issue in that case were financial statements provided by an affected party to the Ministry of the Environment in the context of obtaining a grant. In upholding the section 17(1)(a) and (c) exemption claims, the adjudicator found that some records contained

"considerable information which reflects the results of a significant amount of research and development on the part of the affected party" and that the financial statements contained "a great deal of information regarding the internal structure of the affected party and its financial activities". In my view, the information at issue in this appeal, which was supplied for audit purposes only and has no competitive context, is distinct and different considerations apply.

Finally, I am not persuaded that the information at issue in this appeal is the type of information intended to be protected under section 17(1) of the *Act*. The purposes of section 17(1) exemption were articulated 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) as follows:

> . . . The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information (p. 313).

Adopting the policy rationale outlined by the Williams Commission, this office has determined that section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. It is recognized that one of the central purposes of the *Act* is to shed light on the operations of government, but orders have recognized that section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

In my view, the audit reports and related documents that are at issue in this appeal do not fit within this policy framework. The OFN and MFN, as representatives of various First Nations receiving funds under the Agreement are not themselves engaged in competitive commercial activity. Different considerations might apply to records more directly related to the operations of Casino Rama, but those are not the type of records at issue here.

MFN has provided no evidence or argument concerning any harm it might experience through disclosure of its audit reports. In my view, this itself is a strong indication that the harms identified in section 17(1) are not present as they relate to MFN in the circumstances of this appeal. As far as information relating to OFN is concerned, in my view, OFN has not provided the level of "detailed and convincing" evidence necessary to establish a reasonable expectation of prejudice to any competitive position that might exist, any significant interference with contractual or other negotiations in which it is involved, or any undue loss or gain to any person or organization. Accordingly, I find that the requirements of part 3 of the section 17(1)(a) and (c) test have not been established for any of the records that meet the requirements of parts 1 and 2.

In summary, I find that none of the records qualify for exemption under section 17(1)(a) or (c) of the *Act*.

ORDER:

1. I find that the portions of the following records identified by the Ministry as "non-responsive" fall outside the scope of the appellant's request and should not be disclosed: Records 1, 3, 9, 10, 11, 12, 15, 16, 20, 21, 22, 27, 28, 29, 30, 32, 33, 37, 38, 39, 40, 41, 42, 44, 45, 46, 48, 59, 62, 65, 66, 80, 83, 84, 90 and 105.

2. I uphold the Ministry's decision to deny access to the following records: Records 4, 12, 14, 15, 17, 19, 23, 24, 30, 31, 35, 36, 42, 43, 49-56, 58-66, 70, 71, 72 (pages 2-4), 75-77, 79-81, 85, 87, 89, 90, and 94-110

3. I find that the responsive portion of the following records do not qualify for exemption and I order the Ministry to disclose them to the appellant by **November 5, 2004** but not before **October 29, 2004**: Records 1, 2, 3, 5-11, 13, 16, 18, 20-22, 25-29, 32-34, 37-41, 44-48, 57, 67-69, 72 (page 1), 73, 74, 78, 82-84, 86, 88 and 91-93.

4. In order to verify compliance with Provision 3, I reserve the right to require the Ministry to provide me with copies of the records that are disclosed to the appellant.

Original signed by: September 30, 2004
Tom Mitchinson
Assistant Commissioner