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

ORDER PO-2373

Appeal PA-040204-1

Ontario Lottery and Gaming Corporation

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NATURE OF THE APPEAL:

Ontario Lottery and Gaming Corporation (OLGC) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to dealings between OLGC and a named company (the affected party). The request read:

> I would like copies of records of any and all monies paid to [the affected party] and copies of any and all contracts, both tendered and untendered, given to [the affected party] between June 1, 1995 and the present date.

OLGC identified records responsive to the request and denied access to them in full, relying on the exemptions set out in sections 17(1)(a) (third party information) and 18(1)(c) and (d) (economic and other interests of Ontario) of the *Act*.

The requester (now the appellant) appealed the decision denying access to the records.

During mediation OLGC conducted a subsequent search for records in their accounts payable, records management and procurement departments. Instead of issuing a revised decision letter, OLGC agreed to participate in a mediation conducted by telephone to advise the appellant of its search efforts. At the telephone mediation OLGC advised the appellant that eleven pages of records (as more particularly described in the Records section below) had been located. OLGC also stated that based on its review of the computer print out which captured information relating to the total monies paid to the affected party, there was some possibility that not all of the corresponding purchase orders, purchase/cheque requisitions, invoices or correspondence had been located. Accordingly, the appellant raised the reasonableness of the search for records as an issue.

OLGC maintained its reliance on the above-noted exemptions to deny access to the responsive records.

Mediation did not resolve the appeal and the matter moved to the adjudication stage.

A Notice of Inquiry was sent to OLGC and the affected party, initially, setting out the issues and seeking representations. Only OLGC responded with representations. A Notice of Inquiry was then sent to the appellant along with a copy of OLGC's representations. The appellant did not provide representations in response.

RECORDS:

The records at issue relate to the provision of strategic communications and consulting services for a specific project. My review of the records indicates that they represent what would otherwise be contained in a contractual agreement, the renewal of that agreement or documents that flow from that agreement or its renewal.

The records that OLGC located total 11 pages and consist of the following:

Record 1 Correspondence from the affected party to OLGC dated September 12, 1997 setting out the scope of the agreement and the fees for the services provided.

Record 2 Undated invoice from the affected party to OLGC (2 copies)
Record 3 OLGC Purchase Requisition form dated December 18, 1997
Record 4 OLGC Cheque Requisition form dated December 18, 1997
Record 5 OLGC Cheque dated December 22, 1997 with covering letter of same date
Record 6 OLGC Purchase Order form dated April 2, 1998
Record 7 OLGC Purchase Requisition form dated April 2, 1998
Record 8 Undated invoice from affected party to OLGC
Record 9 Computer print-out

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

Where an appellant claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 of the *Act* [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (see Order M-909).

In support of its position OLGC filed the affidavits of four deponents detailing the efforts made to search for responsive records.

Finding

In the absence of any representations from the appellant or other evidence weighing in favour of the appellant on this issue, and based on my review of the four affidavits provided, I am satisfied that OLGC has taken all reasonable steps to locate the responsive records and I find that OLGC's search was reasonable in the circumstances of this appeal.

THIRD PARTY INFORMATION

General Principles

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].

Although OLGC only raised the application of section 17(1)(a) in its decision letter, the representations it filed address sections 17(1)(a), (b) and (c) of the *Act*. As these are mandatory exemptions, I will consider their application in the circumstances of this appeal.

Sections 17(1)(a), (b) and (c) of the *Act* read as follows:

> 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; or
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

For section 17(1)(a), (b) and/or (c) to apply, each part of the following three-part test must be established:

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 OLGC 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 paragraphs (a),(b) and/or (c) of section 17(1) will occur.

Part 1: Type of Information

OLGC takes the position that the records contain "commercial information". Previous orders have defined this term 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]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

OLGC submits that the records consist primarily of pricing information pertaining to the supply of services, and that this constitutes "commercial information". I concur and find that the information in the records meets the definition of "commercial information".

Therefore, the requirements of Part 1 of the section 17(1) test have been established.

Part 2: supplied in confidence

In order to satisfy Part 2 of the test, OLGC must establish that the information was "supplied" "in confidence", either implicitly or explicitly.

The requirement that information be "supplied" to an institution reflects the purpose in section 17(1) of protecting the informational assets of third parties (Order MO-1706).

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party (Orders PO-2020, PO-2043).

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation (Orders PO-2018, MO-1706).

OLGC submits that the cost to provide services was provided by the affected party and that this information received from the affected party is included in the documents generated by OLGC. In addition, it submits that OLGC Procurement maintains the confidentiality of vendor information including pricing information. OLGC submits that any vendor information submitted to OLGC would have been provided on that basis. Otherwise, it says, it maintains the confidentiality of third party commercial information in accordance with the *Act*.

Finding

As set out above, my review of the records indicates that they represent what would, in a more formal setting, otherwise be contained in a contractual agreement, the renewal of that agreement or documents that flow from that agreement or its renewal.

Record 1 sets out the provisions of the initial contractual agreement between the parties. Based on the representations filed, my review of the record, and the authorities set out above, I find the information in this record to have been mutually generated by the parties, rather than supplied by the affected party.

Records 3, 4, 5, 6, 7 and 9 are documents created internally by OLGC and reveal or permit the drawing of accurate inferences with respect to the information in Record 1. As noted above, however, this information was essentially mutually generated, and therefore I am satisfied that it was not "supplied" by the affected party.

As a result, I find that no information in these records was "supplied" as that term is used in section 17(1), and this portion of part 2 of the test has not been satisfied with respect to the information contained in Records 1, 3, 4, 5, 6, 7 and 9.

In Confidence

I will now consider whether the invoices from the affected party to OLGC identified as records 2 and 8, which were supplied by the affected party to OLGC, were so done "in confidence". 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 OLGC on the basis that it was confidential and that it was to be kept confidential;
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected party prior to being communicated to the OLGC;
- not otherwise disclosed or available from sources to which the public has access;
- prepared for a purpose that would not entail disclosure [PO-2043].

Finding

OLGC represents that it takes certain steps to preserve the confidentiality of the information that it receives. However, based on the representations filed by OLGC, in the absence of any representations on the issue from the affected party as to the expectation of confidentiality it held or the manner in which it communicated its invoices to OLGC, there being no indication on Records 2 and 8 (or any of the records under consideration in this appeal) that they were to be

treated as confidential, and in the absence of any other evidence weighing in favour of OLGC or the appellant on this issue, I am not satisfied that it has been established they were supplied "in confidence", either explicitly or implicitly. As a result, this portion of part 2 of the test has also not been satisfied with respect to the information contained in any of the records at issue.

Since all three parts must be satisfied for the section 17(1) exemption to apply, my findings on Part 2 are sufficient to dispose of the appeal. Nevertheless, I have decided to deal with the harms component of the test as well.

Part 3: Harms

To meet part 3 of the test, the party resisting disclosure, 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.)].

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].

While not obliged to make submissions, it would have been very useful to receive the affected party's representations on the issue of how the disclosure of the records could cause the harms as set out in section 17(1). Only OLGC filed representations on this issue.

OLGC takes the position that disclosure of the cost to provide the services and other information in the records is likely to cause underbidding for similar services. OLGC says that this could reasonably be expected to "prejudice the competitive position" of the affected party and interfere significantly with the contractual or other negotiations of the affected party. It further submits that the disclosure of pricing would result in vendors being deterred in providing detailed pricing estimates to OLGC and that if it was not able to obtain detailed pricing for products and services then it would prejudice OLGC's economic interests. Finally, OLGC states that disclosure of the pricing could prejudice the "competitive positioning" of the affected party and the economic interests of OLGC, resulting in undue loss to the affected party and OLGC.

Finding

As noted earlier, section 17(1) protects the informational assets of affected parties rather than institutions. As a result, prejudice to OLGC's economic interests, while possibly relevant under section 18 of the *Act*, is not a proper consideration under the section 17(1) analysis. That being said, even the relevant submissions regarding prejudice to the affected party are of an extremely general nature.

Having carefully reviewed the contents of the records at issue and considered OLGC's representations, I am not persuaded that disclosing this information could reasonably be expected to result in any of the harms outlined in sections 17(1)(a), (b) or (c) of the *Act*.

I find that OLGC has not provided the necessary detailed and convincing evidence to establish a reasonable expectation of any of the harms contemplated in sections 17(1)(a), (b) or (c), in accordance with the evidentiary standard set by the Court of Appeal in *Ontario (Workers' Compensation Board)*, cited above.

As a result, while I can accept that the information could possible be of interest to another company operating in the same competitive marketplace, in my view, disclosing the type of information at issue here could not reasonably be expected to "prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations" of the affected party, as required in order to establish the section 17(1)(a) harm; result in "similar information no longer being supplied" to OLGC or "result in undue loss or gain" to the affected party or a competitor, the harms identified in sections 17(1)(b) and 17(1)(c), respectively.

Accordingly, I find that the requirements of the part 3 harms component of sections 17(1)(a), (b) and (c) have not been satisfied.

ECONOMIC OR OTHER INTERESTS

OLGC also argues that the records qualify for exemption under sections 18(1)(c) and/or (d), which read:

> A head may refuse to disclose a record that contains,
>
> (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;

For sections 18(c) or (d) to apply, the institution must also demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution 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*), cited above).

Section 18(1)(c)

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

OLGC's submissions on section 18(1)(c) consist of the following:

> In this case there is a reasonable expectation that the disclosure of this information would prejudice the OLGC in its competitive marketplace and adversely affect its ability to protect its legitimate economic interests. Disclosure of the information would provide vendors with valuable information and place them in a preferable position with respect to future negotiations or business dealings with OLGC. It is reasonably likely that a vendor could use the information to the disadvantage of the OLGC.

Finding

I find that OLGC has failed to make the necessary evidentiary link between the disclosure of the records and the harm contemplated by the section 18(1)(c) exemption.

The evidence and submissions tendered by OLGC in support of its argument that the records are exempt under this section is speculative at best, and does not describe in sufficient detail how the disclosure of the information contained in these records could reasonably be expected to result in the harm envisioned by section 18(1)(c). The generalized statements made by OLGC in support of its position do not satisfy the "detailed and convincing" evidentiary standard accepted by the Court of Appeal in *Ontario* (*Workers' Compensation Board*), cited above.

Accordingly, I find that the records do not qualify for exemption under section 18(1)(c).

Section 18(1)(d)

The harm addressed by section 18(1)(d) is similar, but broader, than section 18(1)(c), and this exemption is intended to protect the broader economic interests of Ontarians [Order P-1398 upheld on judicial review [1999], 118 O.A.C. 108 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.)].

OLGC's representations on section 18(1)(d) consist of the following:

> OLGC's revenues to government represent a significant portion of the Government of Ontario's non-tax revenue.

> Disclosing the documents would provide insight into the cost of certain goods and services supplied to the corporation. According to the OLGC's audited 2003-2004 Financial Statements, OLGC earned more than $1.8 billion in net income from its lottery and gaming business. This money was allocated by government to the Ontario Trillium Foundation, an agency that distributes funding for charities and not-for-profit organizations, and to the Ministry of Health and Long-Term care for operations of hospitals as well as problem gambling and related programs.
>
> Disclosure of the records could negatively impact the provincial lottery and gaming revenues by impacting the cost of earning those revenues. Disclosure of the information would provide vendors with valuable information and place them in a preferable position with respect to future negotiations or business dealings with OLGC. It is reasonably likely that a vendor could use the information to the disadvantage of the OLGC.
>
> Accordingly, disclosure of the documents could reasonably be expected to be injurious to the financial interests of the Government of Ontario and the ability of the Government of Ontario to manage the economy of Ontario. The requested information therefore falls within section 18(1)(d).

Again, OLGC's representations are not persuasive. OLGC has failed to provide the appropriate foundation, to establish a reasonable expectation of harm to the "financial interests of the Government Ontario or the ability of the Government of Ontario to manage the economy of Ontario". These are serious concerns warranting careful consideration, which are simply not established by the assertions made by OLGC that are speculative at best. The generalized statements made by OLGC in support of its position do not satisfy the "detailed and convincing" evidentiary standard accepted by the Court of Appeal in *Ontario (Workers' Compensation Board)*, cited above.

I therefore find that OLGC has failed to make the necessary evidentiary link between the disclosure of the records and the harm contemplated by the section 18(1)(d) exemption.

Accordingly, I find that the records do not qualify for exemption under section 18(1)(d).

ORDER:

1. I order OLGC to disclose the records to the appellant by sending a copy to the appellant by **April 4, 2005** but not earlier than **March 28, 2005**.

2. In order to verify compliance with this order, I reserve the right to require OLGC to provide me with a copy of the records disclosed to the appellant in accordance with paragraph 1 above.

Original Signed By: February 28, 2005
Steven Faughnan
Adjudicator