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

ORDER PO-2382

Appeal PA-040205-1

Ontario Lottery and Gaming Corporation

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NATURE OF THE APPEAL:

The 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 the 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.

The 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.

During mediation, the OLGC conducted a subsequent search for records in their accounts payable, records management and procurement departments. Instead of issuing a revised decision letter, the OLGC agreed to participate in a mediation conducted by telephone to advise the appellant of its search efforts. At the telephone mediation the OLGC advised the appellant that thirty-three pages of records (as more particularly described in the Records section below) had been located. The OLGC maintained its reliance on the above-noted exemptions to deny access to all the responsive records.

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

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

RECORDS

The records at issue relate to the provision of print, display and television advertising services. They consist of invoices, purchase orders, cheques, an internal email and estimates of the cost of providing the services or goods relating to the services. The estimates have a signature line indicating approval by the client at the bottom. The estimates are all signed. The balance of the documentation relates to the billing and processing of payment for the services and goods provided based on the estimates.

Although the appellant did not raise reasonable search as an issue, as there is a reference to a contractual agreement dated July 1, 1995 in the records, at the adjudication stage I asked the OLGC to conduct a search for the document. OLGC did so and was unable to locate it.

The records that the OLGC located total thirty-three pages.

DISCUSSION:

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 the 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

The 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].

The OLGC submits that the records consist primarily of pricing information pertaining to the sale of goods and services as well as the terms of delivery and payment, 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, the OLGC must establish that the information was "supplied" "in confidence", either implicitly or explicitly.

Supplied

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).

The OLGC submits that the affected party provided the estimates and invoices, which include the pricing for the products and services. It submits that this information is also included in the

purchase orders and cheques it generated. It submits that the OLGC Procurement maintains the confidentiality of vendor information, including pricing information, and the information 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 noted previously, the estimates for the cost of providing the services have a signature line indicating approval by the client at the bottom. They are all signed. In my opinion, they essentially represent a series of discrete contractual arrangements that appear to have been generated under the auspices of a base contractual agreement (the document that the OLGC was unable to locate). The purchase orders and cheques relate to the processing of payment for the services and goods provided. Except for the document which is an OLGC internal administrative email (which by its nature does not meet the definition of "supplied" by the affected party) these OLGC internal documents reveal or permit the drawing of accurate inferences with respect to the information in the estimates. In my opinion, however, the estimates, purchase orders and cheques, and the information that is contained in them, were created in a process that is discussed in Order MO-1706 and more recently in order PO-2371 that falls outside the definition of "supplied" because the information in these records is, in my view, mutually generated.

Based on the representations filed, my review of the records that were provided, and the authorities set out above, I find that the information in the records discussed above was mutually generated by the parties, rather than "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 the estimates, purchase orders, cheques and internal email.

In Confidence

Because of my conclusion set out below that the invoices that were supplied to the OLGC were not supplied "in confidence", it is not necessary for me to consider whether these records can also be considered part of the process of mutually generated contractual terms, notwithstanding they may have been supplied in accordance with the terms of a main contract.

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

The OLGC submits that it takes certain steps to preserve the confidentiality of the information that it receives. Although under no obligation to file representations on this issue, the affected party would have been in the best position to advise me as to the expectation of confidentiality it held or the manner in which it communicated its invoices to the OLGC. Based on the representations filed by the OLGC, and in the absence of any representations on the issue from the affected party, there being no indication on the invoices or, for that matter, 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 the 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, I find that no information in the records was supplied "in confidence" as that term is used in section 17(1), and in particular that this portion of Part 2 of the test has not been satisfied with respect to the invoices.

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 the OLGC filed representations on this issue.

The OLGC takes the position that disclosure of the records would reveal pricing and is likely to cause underbidding for similar goods and services. The 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 from providing detailed pricing estimates to the OLGC and that if it was not able to obtain detailed pricing for products and services then it would prejudice the OLGC's economic interests. Finally, the OLGC states that disclosure of the pricing could prejudice the "competitive positioning" of the affected party and the economic interests of the OLGC, resulting in undue loss to both of them. The OLGC also says that the 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 the OLGC. They say that it is reasonably likely that a vendor could use the information to the disadvantage of the OLGC.

Finding

As noted earlier, section 17(1) protects the informational assets of affected parties rather than institutions. As a result, prejudice to the OLGC's economic interests or using the information to the disadvantage of the OLGC, 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 the 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 the 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 accepted by the Court of Appeal in *Ontario (Workers' Compensation Board)*, cited above.

As a result, while I can accept that the information could possibly be of interest to another company operating in the same competitive marketplace, in my view, it has not been established that disclosing the type of information at issue here could 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 the 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.

I find therefore that the OLGC has not satisfied the requirements of Parts 2 and 3 of the test under section 17(1) with respect to any of the records at issue in this appeal.

ECONOMIC OR OTHER INTERESTS

The 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).

The 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 by indicating what pricing OLGC was willing to pay for certain goods and services. 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 the OLGC has failed to provide sufficient evidence to establish that disclosure could reasonably be expected to result in the harm contemplated by the section 18(1)(c) exemption.

The evidence and submissions tendered by the OLGC in support of its argument that the records are exempt under this section are speculative at best, and do not describe in sufficient detail how the disclosure of the information contained in these records, which relates to the years 1998 and 1999, could reasonably be expected to result in the harm envisioned by section 18(1)(c). The generalized statements made by the 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.)].

The 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, the OLGC's representations are not persuasive. The 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 the OLGC regarding information relating to the years 1998 and 1999 and are speculative at best. The generalized statements made by the 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)(d).

ORDER:

1. I order OLGC to disclose the records to the appellant by sending a copy to the appellant by **May 19, 2005** but not earlier than **May 16, 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:

April 14, 2005

Steven Faughnan
Adjudicator