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

ORDER PO-2383

Appeal PA-040087-2

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* (*Act*) stated as follows:

> Can you provide me with all information and research OLGC has collected with regards to the self-exclusion program available at Ontario Gaming Venues for problem gamblers? Examples of such information may include but is not limited to:
>
> (1) number of people that have signed up for the self-exclusion program
>
> (2) current research OLGC has conducted on the effectiveness or ineffectiveness of the self-exclusion program
>
> (3) current policies on how the Ontario Gaming Facilities in co-operation with the OLGC currently enforce the self-exclusion program
>
> (4) any research conducted by OLGC on problem gambling that makes reference to the self-exclusion program

OLGC advised the requester that no records exist with respect to part 2 of the request.

With respect to part 3 of the request, OLGC provided access to the following three documents:

- Self Exclusion Policy/Procedures
- Memorandum to Heads of Security, Charity Casinos, Racetrack Slot Facility
- Standard letter in reinstatement process

OLGC also provided partial access to two documents identified as Record A (Final Report) and Record B (Appendices to the Final Report) in response to part 4 of the request. Portions of Record A and B were withheld pursuant to the exemption in section 13(1) (advice and recommendations) of the *Act*.

Finally, OLGC indicated that it had provided notice to certain third parties, and would provide a supplementary decision letter once these consultations had been completed.

The requester (now the appellant) appealed OLGC's decision with respect to parts 2 and 4 of his request.

OLGC subsequently issued its supplementary decision letter, granting access to additional portions of Record B, but denying access to the remainder pursuant to section 13(1) and 17(1) (third party information).
After having an opportunity to review the additional information provided by OLGC, the appellant advised that he was not interested in seeking access to third party information related to jurisdictions outside of Ontario. Accordingly, the number of affected parties was reduced from approximately twenty-five to seven. The appellant, in turn, submitted that there is a compelling public interest to disclose the remaining portions of the records (section 23).

During mediation four of the seven affected parties provided their written consent to the release of information affecting their interests.

Also during the mediation, the appellant raised the issue of whether OLGC had conducted an adequate search for all responsive records. He identified the following types of additional records:

- additional records related to the self-exclusion program, such as memorandums, electronic and hard copy correspondence;
- memorandums, electronic and hard copy correspondence on the OLGC's policies related to the detection, removal and prevention of re-entry of enrolled persons;
- training manuals and directives provided to staff; and
- documentation related to the type of technology used to detect enrolled persons

OLGC conducted a further search and located two records that were created after the date of the request. OLGC issued a further decision letter to the appellant providing him with:

- partial access to the additional records, access to the remainder denied pursuant to section 21 (invasion of privacy) of the *Act*;
- access to the portions of the records previously denied pursuant to section 13(1) of the *Act* that was determined to contain factual information;
- general information regarding the self-enforcement program; and
- access to the portions of the Record B containing third party information where consents had been obtained.

The appellant took no exception to the portions of records withheld under section 21(1) but, confirmed that he still seeks access to the remaining portions Records A and B withheld under sections 13(1) and 17(1), and continues to feel that OLGC has not made adequate searches for all records.

Mediation did not succeed in resolving the remaining issues, and the appeal was transferred to the adjudication stage. The inquiry was originally commenced by Assistant Commissioner Tom Mitchinson. On his retirement, I assumed responsibility for the appeal.

Assistant Commissioner Mitchinson initiated his inquiry by sending a Notice of Inquiry inviting representations from OLGC as well as the 3 remaining affected parties with an interest in these records. He received representations from OLGC. One of the affected parties responded by stating that the record in question is not responsive to the request. The other two affected parties chose not to send in any representations. He then sent a Notice of Inquiry to the appellant, together with a copy of the representations submitted by OLGC. The appellant, in turn, submitted representations as well as a video taped television program on problem gaming.

RECORDS:

The following are the records remaining at issue and the exemptions claimed for them:

Record A (Final Report) - pages 5 to 13 - section 13(1).

Record B (Appendices to final report) - pages 12-19, 30-32, 34-37 and 59-67 - sections 13(1) and 17(1).

The reasonableness of OLGC's search for records responsive to the appellant's request also remains an issue in this appeal.

In addition, the appellant raised the issue of whether a compelling public interest exists to support the disclosure of the records pursuant to section 23.

DISCUSSION:

RESPONSIVENESS

OLGC takes the position that two paragraphs on page 36 of Record B are not responsive to the appellant's request. These two paragraphs relate to the Alcohol and Gaming Commission of Ontario (AGCO). OLGC takes this position based on representations from the AGCO. The AGCO submitted that, since the appellant's request was for research conducted by OLGC on problem gambling that makes reference to the self-exclusion program of OLGC, and the two paragraphs in question do not refer to that program, this portion of the record is non-responsive to the request.

Previous orders have established that in order to be responsive, a record must be "reasonably related" to the request [Order P-880]. After reviewing the content of the two paragraphs in question, I do not accept the position taken by OLGC. The paragraphs are part of the appendix to a comprehensive report entitled "Responsible Gaming, Problem Gambling Consultation". The appendix contains a review of programs addressing problem gambling, both within Ontario and in other jurisdictions. I find that information on the activities of the AGCO dealing with their activities in the gaming industry is reasonably related to the topic of problem gambling and self-exclusion programs. Clearly the consultant preparing this report concluded that the activities of the AGCO were of sufficient interest to these topics that these paragraphs were included in the report. I therefore conclude that the two paragraphs on page 36 of Record B relating to the AGCO are responsive to the appellant's request.

ADVICE TO GOVERNMENT

General principles

Section 13(1) states:

> 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-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.)].

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.)]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

> [Orders P-434, PO-1993, PO-2115, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.), PO-2028, 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 (Court of Appeal Doc. M30913, June 30, 2004)]

Assistant Commissioner Mitchinson reviewed the meaning of the word "advice" for the purpose of section 13(1) in Order P0-2028. In that order, a provincial Ministry took the position that "advice" should be broadly defined to include "information, notification, cautions, or views where these relate to a government decision-making process". He did not agree, and stated:

> … [the institution's position] flies in the face of a long line of jurisprudence from this office defining the term "advice and recommendations" that has been endorsed by the courts; conflicts with the purpose and legislative history of the section; is not supported by the ordinary meaning of the word; and is inconsistent with other case law.
>
> A great deal of information is frequently provided and shared in the context of various decision-making processes throughout government. The key to interpreting and applying the word "advice" in section 13(1) is to consider the specific circumstances and to determine what information reveals actual advice. It is only advice, not other kinds of information such as factual, background, analytical or evaluative material, which could reasonably be expected to inhibit the free flow of expertise and professional assistance within the deliberative process of government.

OLGC representations state their position on section 13(1):

> The records were prepared by a consultant who was retained by OLGC for the specific purpose of investigating best practices of responsible gaming across North America to report on how OLGC could improve its responsible gaming program. The consultant's recommendations and advice are included in the records.

> The recommended course of action includes the implementation of specific identified policies, procedures and processes with respect to responsible gaming and problem gambling including but not limited to self-inclusion.
>
> The records were prepared by a consultant who was retained by OLGC for the specific purpose of investigating best practices of responsible gaming across North America and to report on how OLGC could improve its responsible gaming program. The consultant's recommendations and advice are included in the reports.

In his representations, the appellant states:

> After reviewing the records from OLGC the only severed records in "Record B" that appear to be advice is in the section called "Themes & Recommendations." In addition, one would think if the author of the report had advice it would be in the recommendations section. Therefore, 13(1) only applies to portions of "Themes & Recommendations" section that you deem to be advice to government.

I have carefully reviewed the records and have concluded that OLGC has been overly broad in its application of the section 13 exemption. I agree that the consultant's recommendations and advice are included in the report. In some instances, parts of the report that represent recommendations and advice are clearly marked as such, for example, page 13 of Record A which is headed, "Recommendations and Next Steps". In other instances, the consultant's advice and recommendations to OLGC are interspersed in the narrative of the report. I have carefully reviewed Records A and B with a view to identifying those passages that reveal actual advice and recommendations or that would permit one to accurately infer the advice or recommendations given by the consultant. The sections of Records A and B that I have concluded meet the test for advice and recommendations set out in section 13(1) are marked in yellow on a copy that I am providing to OLGC.

In my review of the records, I have not accepted OLGC's application of section 13 where, in my view, the information conveyed by the consultant is factual, background or analytical in nature. These can be broken down into a number of broad categories:

- I have noted, in several instances, that OLGC has claimed the section 13 exemption for portions of both records that simply represent an analysis by the consultant of the current status of responsible gaming programs in Ontario, and his view of their weaknesses and deficiencies. For example, section 13(1) was applied, in my view inappropriately, to portions of page 9 of Record A under the heading, "OLGC – Consultant's Observations". Those sections, in part, detail the feedback received by the consultant from "industry peers" and cannot be construed as advice or recommendations.

- Similarly, Record B contains a number of passages where the consultant outlines his view of the current state of Ontario's self-exclusion programs. Because this analysis may point out deficiencies in the current system but this, in itself, does not transform these comments into advice and recommendations.

- In some cases, OLGC has applied the section 13(1) exemption to a short phrase within a paragraph that otherwise has been disclosed. These phrases appear to be nothing more than background or evaluative material. In the absence of a persuasive argument as to why these particular phrases represent advice or recommendations, I find they are not exempt under section 13(1).

- Section 13(1) has been applied to paragraphs that are a straightforward summary of current programs in place in Ontario, both at the provincial and the local casino level (Record B, pages 30 to 32). In my view, this cannot be considered advice or recommendations and as such, section 13(1) does not apply to these sections.

- Pages 59 and 60 of Record B consists of a summary of the task that the OLGC had requested the consultant to undertake, as well as a summary of the steps taken by the consultant, and the deliverables for the project. In my view, it contains no information that can properly be characterized as advice or recommendations.

- Pages 61, 62 and 63 of Record B consist of the questionnaire used by the consultant when gathering information from representatives of the gaming and lottery industry, and related industries. It contains no substantive information, and in any event, cannot be considered to contain or reveal advice and recommendations.

Consistent with Assistant Commissioner Mitchinson's reasoning in Order PO-2028, I have concluded that these sections of the records do not reveal or suggest a course of action that will ultimately be accepted or rejected by the institution and as a result, I find that section 13(1) does not apply.

THIRD PARTY INFORMATION

Following mediation, the portions Record B to which OLGC applied the exemption at section 17(1) were reduced in number. Several affected parties agreed to the release of information relating to them, and the appellant indicated that he was no longer interested in information relating to other jurisdictions. The following is therefore still at issue:

Page 35 – in a passage related to Casino Niagara, two references naming another casino have been exempted.

Page 36 – a series of references to OLGC have been exempted

Page 36 – two paragraphs outlining the regulatory role of the Alcohol and Gaming Commission of Ontario have been exempted.

Page 37 – two references have been exempted; the first is a two word description of self-exclusion programs provided by the Ontario Problem Gambling Research Centre and the second is a comment on community partnerships also provided by the Centre.

Section 17(1): the exemption

Section 17(1) states, in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

Section 17(1) 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 section 17(1) to apply, OLGC and/or the affected parties 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 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 paragraph (a), (b), and/or (c) of section 17(1) will occur.

Part 1: type of information

In its representations, OLGC identifies the information in the records to be commercial information. Commercial information with respect to section 17(1) has been discussed in prior orders:

> *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 simply states, "The record reveals commercial information that relates to the selling of gaming services".

The appellant does not agree. In his representations he states:

> OLGC claims that the information relates to selling gaming services. There are severed portions on page 35, 36 and 37 about policy, staff training and self-exclusion. What does that have to do with selling gaming services? I do not see any connection whatsoever.

Having reviewed the portions to which OLGC has applied the section 17 exemption, I agree with the appellant. While it can be said that casinos are involved in a commercial activity, the information to which the section 17 exemption has been applied relates to programs designed to address problem gambling. The Section 17 exemption has been applied, for example, to the two paragraph description of the regulatory activities of the Alcohol and Gaming Commission of Ontario found at page 36 of Record B. These two paragraphs contain no information of a commercial nature. Likewise, the references to OLGC, also found at page 36 of Record B deal with problem gambling programs, including the self-exclusion program. This is clearly not a commercial activity, although it is tangentially related to the commercial activity of gaming. I have therefore concluded that the records do not reveal information that is commercial information, nor does it reveal information that is a trade secret or scientific, technical, financial or labour relations information and therefore part 1 of the test has not been met.

Because all three parts of the section 17 test must be met, my finding that part 1 of the test has not been met is sufficient to dispose of the exemptions. I will nevertheless consider the other two parts of the test under section 17.

Part 2: supplied in confidence

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of 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].

OLGC states:

> The severed records which contain information supplied by third parties were prepared by a consultant who was retained by OLGC for the specific purpose of investigating best practices of responsible gaming across North America and to report on how OLGC could improve its responsible gaming program.

I agree with OLGC that the records are not a negotiated document and were supplied directly to them.

In confidence

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure 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 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 person prior to being communicated to OLGC
- 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]

On this test, OLGC states:

> There was an explicit understanding that the information supplied by the third parties was supplied in confidence. Certain third parties reiterated that understanding and specifically requested the OLGC not disclose the information when OLGC made its third party enquiries as a result of the initial request for information.

The appellant does not agree. He questions OLGC's statement:

> I ask that you review OLGC's claim that all third parties had an explicit understanding that the information supplied would be in confidence. There are no comments.

I have carefully reviewed the records and the representations of the parties. I find that each page of the record, including the cover, says "confidential" in the bottom corner. However, this is the only indication that third parties may have had an expectation of confidentiality when providing information to the consultant, beyond OLGC's statement that this was the case. No representations were received from the third parties indicating that information was provided only on the basis that it would remain confidential. On reading the material for which the section 17 exemption has been claimed, it is not readily apparent that a third party would consider the information provided so sensitive that confidentiality would be a necessary part of providing it. As to the fact that all pages of the report are marked "confidential", I find nothing in the representations of the parties, nor in the content of the report, to indicate that this was anything but a pro forma and routine practice on the part of the consultant. Therefore, I cannot find, on reasonable and objective grounds, that the third parties had a reasonable expectation of confidentiality at the time of providing the information to the consultant.

Therefore, I find that the "supplied in confidence" component of part two has not been met.

Part 3: harms

General principles

To meet this part of the test, OLGC and/or the affected parties 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].

Section 17(1)(a): prejudice to competitive position

OLGC stated the following in its representations regarding the impact of disclosure of the records in question:

> Disclosure of the records could interfere significantly with the relationship between OLGC and the third parties and jeopardize the free flow of information from these parties.

While the submissions from OLGC are hardly detailed, it is not unreasonable to assume that gaming in this Province is a focussed niche business. If a player in this market were not able to continue to have a good faith relationship with OLGC, continuing in the market could prove difficult. However, neither the OLGC, nor the affected parties, have provided any evidence that the relationship between OLGC and gaming institutions will suffer through the disclosure of the records. There is also no evidence to establish a reasonable expectation of competitive harm through their disclosure. As already noted, the information at issue relates to the provision of programs for problem gamblers, not to the business of gaming itself. Disclosure of the information cannot be expected to impact on the principal business of the parties involved. There is certainly nothing in the information itself that, if disclosed, could be expected to harm the competitive position of any of the parties.

Therefore, I find that the harms component of section 17(1)(a) has not been established.

Section 17(1)(b): similar information no longer supplied

OLGC states its concerns for future information no longer being supplied:

> It is in the public interest to ensure that OLGC is able to request and receive on a confidential basis, the various views from individuals and entities in the responsible gaming industry including other gaming jurisdictions. This ensures the OLGC meets its commitment to offer the most responsible gaming practices possible to the citizens of Ontario.

Again, I am not persuaded that disclosing the specific information that is at issue in this portion of the appeal could reasonably be expected to result in similar information no longer being supplied to OLGC. The assertion by OLGC that industry stakeholders such as the affected parties will no longer cooperate with them is not credible, given their role as the regulator of the gaming industry in Ontario. There is no evidence that provincial casinos and lottery and gaming outlets are in a position to refuse to co-operate with OLGC.

Therefore, I find that the harms component of section 17(1)(b) has not been established.

Section 17(1)(c): undue loss or gain

OLGC states:

> The third party information constitutes commercial, financial, and labour relations information. Disclosure will harm the third party's competitive position and the ability to undertake the development of programs to support social responsibility objectives, specifically, but not limited to, procurement through such processes as requests for proposals.

For the same reasons outlined in my discussion of the section 17(1)(a) harms, I agree that while disclosure of the information may not be welcomed by the affected party, I have not been provided with the detailed and convincing evidence required to establish a reasonable expectation that the affected parties would suffer undue loss should these portions of the records be disclosed.

In summary, I find the evidence of harm provided by the parties resisting disclosure in this appeal is speculative and does not meet the "detailed and convincing" evidentiary standard established by the Court of Appeal in *Ontario (Workers' Compensation Board)*. Therefore, part three of the 3-part test for exemption under section 17(1)(a), (b) and/or (c) has not been established. I find that the portions of the records which were exempted by section 17 do not in fact qualify for that exemption and should be disclosed.

PUBLIC INTEREST OVERRIDE

It is now not necessary to deal with the section 17 exemptions under this section and therefore I will only look at the section 13 exempted records.

Section 23 states:

> An exemption from disclosure of a record under sections **13**, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

Compelling public interest

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in

some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

A public interest is not automatically established where the requester is a member of the media [Orders M-773, M-1074].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4196 (Div. Ct.)].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

Is there a compelling public interest (part 1 of the test)?

In support of his position that a compelling public interest exists for disclosure of the records, the appellant submitted:

> It is abundantly clear that information related to problem gambling and responsible gambling initiatives such as the self-exclusion ought to be public information. These issues are making national news, people are losing their lives from suicide, OLGC admits 4% of the population has a gambling problem, and politicians are making public comments and statements on responsible gambling policy in the news. The public has a right to know what the government and OLGC are doing, what policies they have and what recommendations experts have made. How else can we hold the government accountable (good or bad) for actions and decisions with regard to problem gambling if that information is withheld? Isn't that the fundamental principle of Freedom of Information?

OLGC states:

> In order to invoke this override, there must be a compelling public interest that clearly outweighs the purpose of the exemption. It must be a public interest and not merely private or personal interest. The information must serve the purpose of informing the citizenry about the activities of government, adding in some way the information the public has available to effectively express opinion or to make political choices.

While the appellant's representations may demonstrate a "strong interest or attention" in problem gambling in this province, the appellant has not convinced me that there is a "rousing strong interest or attention" in disclosing the specific portions of the record which provide advice to OLGC on how to deal with this issue, as required in order to satisfy the requirements of the first part of the section 23 test. In fact, the purpose of the record itself indicates that OLGC is aware of the problem and is looking for possible answers. There must be a compelling public interest *in disclosure of the specific information protected by the exemption claim*, not simply in the subject matter of the record. I am unable to conclude that a compelling public interest exists in this appeal.

Accordingly, I find that section 23 has no application in the circumstances of this appeal.

REASONABLE SEARCH

Introduction

In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether the institution has conducted a reasonable search for the records as required by section 24 of the Act. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the institution will be upheld. If I am not satisfied, further searches may be ordered.

A number of previous orders have identified the requirements in reasonable search appeals (see Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, acting-Adjudicator Mumtaz Jiwan made the following statement with respect to the requirements of reasonable search appeals:

> … the Act does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with acting-Adjudicator Jiwan's statement. Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The Act does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

The appellant states:

> I find it surprising that the government of Ontario (according to OLGC's most recent annual report) spent $29 million dollars on prevention, treatment, research and education for problem gambling. Yet, there are no records of anyone communicating internally at OLGC. Surely, there must be internal e-mail, memos, faxes, etc. discussing some of the programs available. I still feel that there wasn't an adequate search done by OLGC.

OLGC states:

> The records search was conducted by the coordinator of OLGC's self-exclusion program at corporate office. The coordinator searched files associated with social responsibility, problem gambling and self-exclusion and reviewed each record to determine if each was responsive to the request. The coordinator also reviewed electronic files on self-exclusion and problem gambling to ensure if any such records were not also in hard copy format and could apply to the request.
>
> The records responsive to the request were provided in full or severed.
>
> OLGC's Manager of Responsible Gaming conducted a search of that office's problem gambling and self-exclusion files to determine if the records in those files were responsive to the request. Those records deemed responsive were the same as those found by the coordinator of the self-exclusion program. There were no further electronic or hard copy records deemed responsive to the request.
>
> The Director of Compliance, Investigation and Best Practices was also contacted in response to the request for documents regarding enforcement and detection. The information obtained was provided in a second letter to the requester as requested by the mediator during mediation.

Based on the information provided by OLGC, I am satisfied that OLGC's search for records responsive to the request was reasonable in the circumstances. OLGC conducted a further search at the request of the mediator during the mediation phase of this appeal and no additional records were uncovered. That search was focused on e-mails and correspondence and still no further documents were found.

I accept the evidence provided by OLGC concerning its search for responsive records. In my view this evidence, particularly the multiple searches as well as senior staff involvement, is persuasive. Although the appellant questions some of the information, and also identifies the reasons why, in his view, additional records may exist, on balance I am not convinced that this information is sufficient to support a finding that the OLGC's search for the records was not reasonable in the circumstances of this appeal. Accordingly, I find that the OLGC's search for records was reasonable.

ORDER:

1. I uphold the decision of OLGC to exempt those portions of pages 5, 6, 7, 8, 9, 12 and 13 of Record A (Final Report) as well as the portions of pages 13, 14, 17, 18, 19 64, 65 and 66 of Record B (Appendices to final report) which are marked in yellow in the attached enclosure and which were exempted by Section 13(1) of *the Act*. I order OLGC to disclose all other passages that were severed from Records A and B pursuant to section 13(1).

2. I order OLGC to disclose the severed portions of pages 35, 36 and 37 of Record B which were exempted by section 17(1) to the appellant by May 20, 2005.

3. I find that OLGC has adequately discharged its responsibilities under section 24 of the Act to conduct a reasonable search for all responsive records.

4. In order to verify compliance, I reserve the right to require OLGC to provide me with a copy of the records disclosed to the appellant pursuant to Provision 2, upon request.

Original Signed by: April 15, 2005
Brian Beamish
Assistant Commissioner