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

ORDER PO-2573

Appeal PA-050066-1

Ministry of Public Infrastructure Renewal

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NATURE OF THE APPEAL:

The Ministry of Public Infrastructure Renewal (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to proposed new province-wide tobacco control legislation. Specifically, the requester asked for:

> ...all opinions, reports, analyses and recommendations prepared since January 2003 and provided to government ministers, deputy ministers, assistant deputy ministers, or their officials or political staff regarding any potential negative impacts of the proposed legislation on economic activity in Ontario and any of its business communities or sectors, or any specific region or community within the province.

The Ministry located a number of responsive records and granted partial access to them upon payment of a fee. Access to the remaining records, or parts of records, was denied on the basis that the undisclosed information was not responsive to the request or was exempt from disclosure under the exemptions in sections 12(1) (Cabinet records), 13(1) (advice to government), 18(1) (economic and other interests of Ontario) and 19 (solicitor-client privilege) of the *Act*.

The requester (now the appellant) appealed the decision. In addition, the appellant took issue with the amount of the fee charged for access.

At mediation, the Ministry agreed to disclose the portion of page 13b that it had indicated to be non-responsive, and it was confirmed with the appellant that certain other portions of the records that it had identified as non-responsive were no longer at issue. It was also agreed that page 23d is no longer at issue because it was essentially the same as page 22c. In addition, the Ministry agreed to disclose some pages of the records that it had originally withheld and provided a revised Index of Records clarifying which parts of section 12(1) it was seeking to apply to some of the records remaining at issue. Also at mediation, the appellant agreed not to pursue the issue of the fee charged for access. The appellant, however, claimed that the release of the information is in the public interest. This gave rise to the possible application of the "public interest override" found at section 23 of the *Act*.

As no further issues could be resolved at mediation, the matter moved to the adjudication stage. However, prior to my sending a Notice of Inquiry, the Ministry advised that it was reconsidering its decision with respect to certain records, thereby further narrowing the issues in the appeal. Ultimately, the Ministry sent a supplementary decision letter to the appellant advising that it had decided to release further portions of the records remaining at issue and did so.

I sent a Notice of Inquiry setting out the facts and issues in the appeal to the Ministry, initially. The Ministry provided representations in response. In its representations, the Ministry advised that it had decided to grant the appellant further access to other portions of the records that it had withheld. Enclosed with the representations was a revised index setting out which records remained at issue, and the particular exemption the Ministry claimed was applicable. Subsequently, the Ministry sent a supplementary decision letter to the appellant enclosing copies of the additional portions of the records that were disclosed.

I then sent a Notice of Inquiry, along with a complete copy of the representations of the Ministry, to the appellant. The appellant provided representations in response to the Notice. As the appellant's representations raised issues to which I determined the Ministry should be given an

opportunity to reply, I sent a complete copy of the appellant's representations to the Ministry, inviting its reply submissions. The Ministry filed additional submissions by way of reply.

RECORDS:

As set out in the Index of Records that accompanied the Ministry's representations, all or parts of the following records remain at issue:

Record	Exemption(s) claimed
Record 1, in its entirety	Sections 12(1)(a),(b),(d),(e)
Record 2, in its entirety	Same
Record 3, in its entirety	Same
Record 4, in its entirety	Same
Record 5, in its entirety	Same
Record 6, pages 6, 6a and 6b (a copy of Record 1 is found at pages 6c to 6f)	Same
Record 10, page 10a	Same
Record 11, page 11a	Same
Record 12, page 12	Sections 18(1)(a),(c),(d),(g)
Record 13, page 13c	Sections 18(1)(a),(c),(d),(g)
Record 15, pages 15, 15a and 15b	Sections 18(1)(a),(c),(d),(g) and 19
Record 17, pages 17, 17a to 17c	Sections 13(1) and 18(1)(a),(c),(d) and (g)
Record 18, pages 18, 18k and 18m	Section 12(1)(a),(b),(d),(e)
Record 28, page 28a	Section 18(1)(a),(c),(d),(g)

CABINET RECORDS

The Ministry takes the position that Records 1, 2, 3, 4, 5, and 6 as well as the withheld portions of Records 10, 11, and 18 qualify for exemption under the mandatory exemptions in sections 12(1)(a), (b), (d) and/or (e), as well as the introductory wording to the section. These exemptions state:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,
>
> > (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
> >
> > (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

> (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy; and
>
> (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Counsel or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy.

The Introductory Wording in Section 12(1)

The use of the word "including" in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of the Executive Council (Cabinet) or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1) [Orders P-22, P-331 and PO-2320].

If disclosing a record that had never been placed before Cabinet or its committees would reveal the substance of the actual deliberations of Cabinet or its committees, or where its disclosure would permit the drawing of accurate inferences with respect to these deliberations, the record can be withheld [Orders P-226, P-293, P-331, P-361 and PO-2320].

Section 12(1)(b): Record Containing Policy Options or Recommendations

To qualify for exemption under section 12(1)(b), a record must contain policy options or recommendations, and the record must have been either submitted to Cabinet, or if not, then at least prepared for that purpose. [Orders 73, PO-2186-f]

Section 12(1)(d): Record Used for Consultation Amongst Ministers of the Crown

For a record to qualify for exemption under section 12(1)(d), the institution must establish that the record:

> (a) was used for consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy; or
>
> (b) reflects consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy.

(Order P-1621)

Section 12(1)(e): Record Prepared to Brief a Minister of the Crown

In order to qualify for exemption under this section, the Ministry must establish that the record itself has been prepared to brief a Minister in relation to matters that are either:

(a) before or proposed to be brought before the Executive Council or its committees; or,

(b) the subject of consultations among ministers relating to government decisions or the formulation of government policy.

[Orders 131 and P-1182]

Records 1, 2, 3, 6, 10, 11 and 18

With respect to these records, the Ministry submits that:

> … [R]ecord 1 is a confidential briefing note to inform and advise the Minister on an upcoming submission by the Ministry of Health regarding a proposed smoking bill. The briefing note also identifies the date the submission will be presented and dealt with by the Health and Social Services Policy Committee of Cabinet. Disclosure of this record would reveal or give an accurate inference of information actually contained in a Cabinet submission and used to brief the Minister on matters before a Cabinet committee. Further, disclosure would reveal the subject of future policy options and initiatives submitted to the Executive Council, the formulation of government policy and decisions and the substance of future Cabinet deliberations.
>
> Record 2 is a confidential briefing note informing and advising the Parliamentary Assistant, who was a member [of] the Legislation and Regulations Committee of Cabinet, of a proposed smoking bill by the Ministry of Health and Long-Term Care. The briefing note identifies the date the submission will be presented to and dealt with by the Legislation and Regulations Committee of Cabinet.
>
> Record 3 is a confidential briefing note, with accompanying background materials, used to inform and advise the Minister on a submission by the Ministry of Agriculture and Food to develop and implement a transition strategy for the tobacco growing industry with respect to the proposed smoking ban. The presentation date, of the submission before the Executive Council for its consideration, is identified. Moreover, the date the Ministry of Agriculture and Food intends to make a further submission to another Cabinet committee (Management Board of Cabinet) is also clearly indicated. Disclosure of this record would reveal or give an accurate inference of information actually contained in a Cabinet submission and used to brief the Minister on matters before a Cabinet committee. Further, disclosure would reveal the subject of future policy options and initiatives submitted to the Executive Council, the formulation

of government policy and decisions and the substance of future Cabinet deliberations.

Record 6 is a confidential briefing note informing and advising the Minister in preparation for a meeting with a business organization that requested a meeting regarding the proposed smoking ban. Pages 6c to 6f are copies from the above-noted Record 1 and cannot be released for the aforementioned reasons. The information at pages 6, 6a and 6b identify the date and direction by Cabinet on the crafting of the proposed legislation, and the corresponding strategies and options for its implementation. Disclosure of this information would reveal the minutes or substance of deliberations or decisions of Cabinet, including the options or recommendations prepared for Cabinet, and the record used for consultations among ministers relating to the formulation of government policy and decisions.

Records 10 and 11 are confidential briefing notes that both inform and advise the Minister, in preparation for a meeting with two business organizations. The records identify the date and direction by Cabinet of a proposed tobacco strategy and the date of further submissions to the Priorities and Planning Board of Cabinet and to Cabinet. Disclosure would reveal deliberations of the Executive Council and its committees, and give an accurate inference of information contained in a Cabinet submission and used to brief ministers on matters before Cabinet and its committees. Further, disclosure would reveal the subject of future policy options and initiatives to be submitted to the Executive Council, the formulation of government policy and decisions and the potential substance of future Cabinet deliberations.

Record 18 is a confidential briefing note that informs and advises the Minister of the impact of a smoking ban, including on OLGC [Ontario Lottery and Gaming Corporation] gaming facilities, and includes various implementation and mitigation strategies. The proposed date when the Legislation and Regulations Committee of Cabinet will consider a proposed bill is apparent.

The appellant submits that these representations fail to establish that releasing the records would give rise to an accurate inference about, or reveal information, contained in a Cabinet submission. The appellant submits that these briefing notes are not official Cabinet documents or items that receive an official Cabinet minute, but are simply information or background used only for explanatory purposes. Furthermore, the appellant submits that the same briefing notes are sometimes also used by political staffers, communications aides within the Ministry, officials or other civil servants.

In reply, the Ministry acknowledges that a briefing note can be prepared for many reasons, but that does not alter the fact that, in the circumstances of this appeal, the referenced briefing notes at issue all qualify for exemption under the claimed exemption(s).

Analysis and Findings

I am satisfied that disclosing Records 1 (and the copy of Record 1 that is found at pages 6c to 6f of Record 6) and 3, which contain policy options or recommendations and were used to brief a Minister on matters before the Executive Council (Cabinet) and one of its committees, would reveal the substance of deliberations of Cabinet or its committees. I am satisfied, therefore, that these records qualify for exemption under the introductory wording of section 12(1).

I make the same finding with respect to Record 2 which has similar characteristics, although it was prepared for a Parliamentary assistant and not a Minister. In my view, disclosing Record 2 which contains policy options or recommendations on matters before the Legislation and Regulations Committee of Cabinet, would reveal the substance of deliberations of Cabinet or its committees.

The severances at Pages 6, 6a, 6b, 10a, 11a and 18 also contain information that would reveal the substance of the actual deliberations of Cabinet or its committees, or to the content of a Cabinet minute, or its disclosure would permit the drawing of accurate inferences with respect to these deliberations and the minute. I am satisfied, therefore, that these records also qualify for exemption under the introductory wording of section 12(1).

In my view, the undisclosed information at pages 18k and 18m do not contain any information that qualifies for exemption under sections 12(1)(a), (b), (d) or (e) and/or the introductory wording of section 12(1). As no other discretionary exemptions were claimed by the Ministry for this severed information and no mandatory exemptions otherwise apply, I shall order it to be provided to the appellant.

Records 4 and 5

With respect to these records, the Ministry submits that:

> Record 4 is a submission prepared by MEDT [Ministry of Economic Development and Trade], the Ministry of Health and Long-Term Care, and the Ministry of Finance, regarding the possible economic impact of the proposed smoking ban on businesses and Ontario gaming revenues, along with possible options and strategies. The date the submission will be presented to and dealt with by the Health and Social Services Policy Committee of Cabinet is also identified.
>
> Record 5 is a submission prepared by MEDT, regarding the possible economic impact of the proposed smoking ban on businesses and Ontario gaming revenues and includes potential options and strategies. The record clearly indicates the date the submission will be presented to the Health and Social Services Policy Committee of Cabinet.
>
> Disclosure of Records 4 and 5 would also reveal agenda documents of the Executive Council and its committees, and would allow for an accurate inference

> of information contained in a Cabinet submission and used to brief Ministers on matters before Cabinet and its committees. Further, disclosure would reveal the subject of future policy options and initiatives that were and are to be submitted to the Executive Council, the formulation of government policy and decisions, as well as form the substance of future Cabinet deliberations.

The appellant submits that the Ministry has failed to establish the application of the exemptions and that it is "alarming" that the Ministry is "trying to suppress" the very information in Records 4 and 5 that she has requested be disclosed.

Analysis and Findings

I am satisfied that disclosing Records 4 and 5, which contain policy options or recommendations and were submitted to the Health and Social Services Policy Committee of Cabinet, would reveal the substance of deliberations of the Executive Council or one of its committees, and thereby qualify for exemption under the introductory wording of section 12(1).

Section 12(2)(b):

In its representations, the Ministry also addressed the application of section 12(2)(b) of the *Act*, in explaining what steps were taken before it was decided to rely on the section 12(1) exemption.

Section 12(2)(b) provides that despite the application of mandatory exemptions set out in section 12(1), a record may be disclosed if the Executive Counsel for which, or in respect of which, the record has been prepared consents to access being given.

The Ministry explains:

> It should be noted that [the Ministry] considered whether to seek the approval of the Executive Council to release the records. After careful consideration [the Ministry] exercised its discretion not to seek the approval of the Executive Council, as the information in the records is not known to the public but may continue to be under review and consideration by the government, and may form the basis of further formulation of government policy making and decision making and submissions to the Executive Council and its committees. Therefore, [the Ministry] determined that it would be inappropriate to seek the consent of the Executive Council to release this information. In reaching this decision, the Ministry also considered the fundamental principles of [the *Act*] reflected in its section 1 - purposes. Accordingly, [the Ministry] weighed the principle that information should be available to the public against the purpose of the mandatory Cabinet records exemption, which is to protect the confidentiality of Cabinet deliberations and to ensure that the Executive Council is able to deliberate on matters in a free manner without undue pressure being brought to bear on those discussions by disclosure of the subject matter of present or future deliberations.

I am satisfied that the steps taken by the head with respect to the records, or parts of the records, that I have found to be exempt under section 12(1), satisfy any requirements that may be contained in section 12(2)(b).

SOLICITOR-CLIENT PRIVILEGE

The Ministry has claimed the application of the solicitor-client privilege exemption in section 19 to page 15b. At the time the request was made, section 19 stated as follows:

> 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 was recently amended (S.O. 2005, c. 28, Sched. F, s. 4). However, the amendments are not retroactive, and the original version (reproduced above) applies in this appeal. Section 19 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

In this case the Ministry submits that Record 15 is a confidential briefing note that, although not written by legal counsel, contains certain legal advice and recommendations of Crown Counsel to MEDT regarding compliance with and enforcement of the proposed legislation in gaming operations. The Ministry submits that page 15b of Record 15 qualifies for exemption under Branch 1 of section 19.

Branch 1: common law privilege

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 457 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

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]. 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.)].

Based on my review of the information severed from page 15b of Record 15 and the circumstances surrounding its creation, I agree that it represents a confidential communication from a client to their solicitor made for the purpose of obtaining or giving professional legal advice. As a result, I find that the information severed from page 15b of Record 15 to which the Ministry has applied section 19 is properly exempt under Branch 1 of that exemption. As I have found at page 15b to be exempt under section 19, it is not necessary for me to also consider whether it is also exempt under section 13.

ADVICE OR RECOMMENDATIONS

The Ministry has claimed that section 13(1) applies to undisclosed portions of Record 17. 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 [Order 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.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

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 (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and*

Privacy Commissioner), [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563]

Record 17

Record 17 is a briefing note prepared by Ministry of Finance staff on the potential impact of a smoking ban on provincial gaming revenues and anticipated reactions. The Ministry submits that:

> … the record details the potential impact of the ban on specific sectors in the economy and consequences on the province's finances. The redacted portion provides information to the Minister to assist in his deliberations concerning application of the smoking ban and alternative strategies to mitigate any forecasted decline in gaming revenues. The record contains the conclusions and findings of a staff member to the Minister, and therefore ought to constitute advice and recommendations within the meaning of subsection 13(1). (Order PO-2097)

I have carefully reviewed the undisclosed portions of Record 17 and conclude that they do not include any information which could reasonably be described as representing "advice or recommendations" within the meaning of section 13(1). Rather, Record 17 simply sets out a number of potential problem areas and forecasts certain outcomes should the proposed course of action be undertaken. I cannot agree that this information represents a suggested "course of action that will ultimately be accepted or rejected by the person being advised". As a result, I find that the undisclosed portions of pages 17, 17a, 17b and 17c of Record 17 do not qualify for exemption under section 13(1).

ECONOMIC AND OTHER INTERESTS

The Ministry has applied the discretionary exemption in sections 18(1)(a),(c),(d) and (g) to portions of Records 12, 13, 15, 17 and 28. These sections state:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

> (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

The purpose of section 18 is to protect certain economic interests of institutions. The report titled *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) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For sections 18(b), (c), (d) or (g) to apply, the institution must 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) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]. This contrasts with section 18(1)(a), which is concerned with the **type** of the information, rather than the consequences of disclosure (see Orders MO-1199-F, MO-1564).

The undisclosed portions of Records 12, 13, 15, 17 and 28

The Ministry submits that:

> Records 12, 13 and 15 are confidential briefing notes that both inform and advise the Minister on the impact of a proposed smoking ban on OLGC gaming facilities. Record 13 is a briefing note on the impact of a proposed smoking ban on OLGC gaming facilities. The redacted information includes the revenue impact on various site-specific operations. The disclosure of these records could reasonably be expected to result in premature disclosure of a pending policy decision, pursuant to clause 18(1)(g) [incorrectly identified as 18(1)(e) in the Ministry's submissions]. Moreover, disclosure of this information could in fact prejudice both the economic interests and competitive position of the institution.
>
> Record 28 is a briefing note regarding a review of the impact of the smoking ban on the OLGC operations and revenues. The redacted information identifies provincial revenues on a site-by-site basis. Disclosure of the redacted information in this record, as well as records 12, 13 and 15, would identify the impact of the

> proposed smoking ban on specific Ontario revenues and gaming sites, including potential unrecoverability and revenue losses, including loss of Ontario's competitive position. The Crown's agent, the OLGC, conducts and manages gaming on behalf of the province of Ontario, and in order to do so, is required to enter into various service agreements with private providers. A number of Ontario gaming operations are in close proximity to US gaming jurisdictions and operations, particularly at the border, and Ontario and American gaming facilities routinely compete for the same market share. Therefore it can reasonably be contemplated that disclosure of such information could result in undue financial loss to the gaming facilities located near the Ontario-American border. Moreover, the IPC has previously recognized that disclosure of information by the OLGC could reasonably be expected to prejudice economic interests and harm Ontario's competitive position (Orders P-1026, PO-1639).
>
> Disclosure of the information contained in the above records would provide legal gaming competitors and associated businesses with valuable information, particularly about specific gaming sites and operations, and place these persons in a preferable competitive position with more market share/advantage. It can be reasonably expected that this would hence harm or prejudice Ontario's economic interests or competitive position. In addition, disclosure of the redacted information would provide a competitive advantage or material benefit to persons wishing to establish or operate illegal gaming operations in Ontario, notwithstanding that only the province of Ontario may conduct and manage gaming in Ontario. Disclosure of the information at issue would assist illegal operators in obtaining valuable information about the impact of the smoking ban on provincial gaming, particularly regarding specific site revenues and operations. This information could be used, for example, to establish where specific sites have particular strengths or weaknesses, scouting for new gaming sites or operations, or to determine how market share and gaming operations might be established.
>
> It is respectfully submitted that release of this information would impact Ontario's economy or competitive position by impairing the ability of the government of Ontario to deal on a confidential basis with potential business partners or participants. Companies that are considering investment in Ontario could be reluctant to share confidential financial and commercial information with [the Ministry] if that information could be disclosed to others, or competitors, which would result in [the Ministry] being unable to enter into agreements having positive benefits for the Ontario economy.

Although the Ministry's index identifies Record 17 as being subject to section 18(1), it makes no representations as to how it qualifies under that exemption.

The appellant submits that:

> [With respect to Records 12, 13 and 15] the Ministry fails to demonstrate how the release of the briefing notes could prejudice the economic interests and competitive position of the province. [The appellant] has not asked for trade information, a trade secret, or strategies, we've merely asked for the possible ramifications of a policy decision that has already been made. Further, the Ministry has failed to provide detailed and convincing evidence to establish a reasonable expectation of harm. However, concealing this information will harm the many small businesses that will have to acclimatize to a new business environment, without having the necessary tools to prepare for the changes.
>
> [With respect to Record 28], even though the Ministry claimed that the information would be detrimental to the competitive position of the province under section 18, it has since released this information to the appellant. The Ministry had put up a vigorous defense as to why releasing this information would "...identify the impact of the proposed smoking ban on specific Ontario revenues and gaming sites, including potential unrecoverability and revenue losses, including loss of Ontario's competitive position." Despite that argument, the Ministry has obviously now concluded that the documents will no longer hurt Ontario's competitive position. It leads to the conclusion that other documents could also be released without harming Ontario's financial or competitive position.

In reply, the Ministry submits that releasing records after revisiting the issue of disclosure does not lead to a conclusion that all the records could be released without causing harm under section 18(1) of the *Act*. The Ministry submits that the remaining severances still qualify for exemption.

Analysis and Findings

Section 18(1)(a)

In order for a record to qualify for exemption under section 18(1)(a) of the *Act*, it must be established that the information contained in the record:

1. is a trade secret, or financial, commercial, scientific or technical information; **and**

2. belongs to the Government of Ontario or an institution; **and**

3. has monetary value or potential monetary value [Orders 87, P-581].

The Ministry's submissions do not explicitly refer to the components of the section 18(1)(a) test.

I am satisfied, however, that the information in Records 12, 13, 15, 17 and 28 which the Ministry generally identified as being subject to the 18(1) exemptions qualifies as "financial" and/or

"commercial" information within the meaning of part one of the test [see Orders P-1621, PO-2010].

In Order PO-1763 [upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)* (April 25, 2001), Toronto Doc. 207/2000 (Ont. Div. Ct.)], Senior Adjudicator David Goodis reviewed the meaning of the phrase "belongs to" as it appears in the second part of the section 18(1)(a) test. After reviewing a number of previous orders, he summarized the reasoning in the relevant previous orders as follows:

> The Assistant Commissioner [Tom Mitchinson] has thus determined that the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right to simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business to business mailing lists (Order P-636), customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, there is a quality of confidence about the information, in the sense that it is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others. (See, for example, *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.), and the cases discussed therein).

I have considered the submissions of the Ministry and reviewed the records at issue. Although I am satisfied that the first part of the test was met, the Ministry has not provided sufficient evidence to enable me to make a finding that the information severed under section 18(1) in Records 12, 13, 15, 17 and 28 either "belongs to" the Province of Ontario, or has monetary value or potential monetary value, a factor that is common to the second and third parts of the section 18(1)(a) test. For the most part, the severed information relates to projections, anticipated impacts of the legislation or pending plans, policies or projects at the time that the record was created. In my view the information has little monetary value now. The smoking ban legislation has been passed and there is, I presume, empirical, as opposed to the hypothetical data in the records, for the Ministry to consider regarding its impact. Furthermore, there is no evidence before me to establish that any information in these records relates to plans, policies or projects that currently remain pending. I find, therefore, that section 18(1)(a) does not apply.

Sections 18(1)(c) and (d)

I further find that the Ministry has failed to provide sufficiently detailed and convincing evidence to demonstrate that disclosure of the withheld information could reasonable be expected to cause the section 18(1)(c) and/or (d) harms alleged. As set out above, the severances relate to projections, anticipated impacts of the legislation or pending plans, policies or projects at the time that the record was created. As I indicated above, with the implementation of the smoking ban legislation, the severed information has little current monetary, commercial or other value (including potential illegal use) as it is dated. Furthermore, there is no evidence before me to establish that any information in these records relates to plans, policies or projects that currently remain pending. In my view, the Ministry has failed to establish that releasing the information in these records would give rise to the type of harms alleged under sections 18(1)(c) and (d).

Section 18(1)(g)

The Ministry has claimed the application of section 18(1)(g) to certain undisclosed portions of Records 12, 13 and 15. In order for section 18(1)(g) to apply, the institution must show that:

1. the record contains information including proposed plans, policies or projects of an institution; and

2. disclosure of the record could reasonably be expected to result in:

   (i) premature disclosure of a pending policy decision, or
   (ii) undue financial benefit or loss to a person.

[Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)]

In Order PO-1709, Senior Adjudicator Goodis explained:

> In Order P-726, former Assistant Commissioner Glasberg considered the application of section 18(1)(g) to two reports which together constituted a business review of the provincial parks system. In this order, former Commissioner Glasberg stated:
>
> > I will turn first to the second part of the [section 18(1)(g)] test. In Order M-182, Inquiry Officer Holly Big Canoe considered the municipal equivalent of section 18(1)(g) of the Act. In this decision, she found that the term 'pending policy decision' contained in the second part of the test refers to a situation where a policy decision has been reached, but has not yet been announced. More specifically, the phrase does not refer to a scenario in which a policy matter is still being considered by an institution.

> The Ministry disagrees with this interpretation and submits that the appropriate definition of a pending policy decision 'contemplates a situation that has started but remains unfinished.' I have carefully reflected on this argument.
>
> The intent of section 18(1)(g) is to allow an institution to avoid the premature release of a policy decision where that disclosure could reasonably be expected to harm the economic interests of the institution. In my view, it follows that for this section to apply, there must necessarily exist a policy decision which the institution has already made. In the absence of such a determination, the assessment of harm would be an entirely speculative exercise. In addition, the first part of the section 18(1)(g) test makes specific reference to proposed policy decisions. In my view, the nature of this wording also contemplates that the type of decision referred to in the second part of the test will be one that has already been made.

For these reasons, I do not accept the interpretation which the Ministry has advanced and prefer to follow the approach articulated in Order M-182.

Applying this approach in the present appeal, I find that disclosure of the severed information could not reasonably be expected to result in the premature disclosure of a pending policy decision, as any such policy decision at issue has already taken place. As a result, paragraph (i) of the second part of the test does not apply.

The second part of the section 18(1)(g) test may still apply if it is established that disclosure of the record "could reasonably be expected to result in undue financial benefit or loss to a person" under paragraph (ii). For the reasons given above, I am similarly not satisfied that the Ministry has provided sufficient evidence to establish that release of the undisclosed portions of Records 12, 13 and 15 would "cause undue financial benefit or loss to a person".

In my view, as both parts of the section 18(1)(g) test must be met to qualify for exemption, the Ministry has failed to establish that the undisclosed portions of Records 12, 13 and 15 qualify for exemption under section 18(1)(g).

In conclusion, I am not satisfied that sections 18(1)(a),(c),(d) or (g) apply to the undisclosed portions of Records 12, 13, 15, 17 and 28.

PUBLIC INTEREST IN DISCLOSURE

The appellant submits that there exists a public interest in the disclosure of the information in the records, as contemplated by section 23 of the *Act*, which reads:

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

I have not found any of the records at issue to be exempt under sections 13(1) or 18(1). Section 23 does not apply to records exempt under sections 12(1) or 19. I have found above that only Records 1 (and the copy of Record 1 that is found at pages 6c to 6f of Record 6), 2, 3, 4, 5 and the severances at Pages 6, 6a, 6b, 10a, 11a and 18 qualify for exemption under sections 12(1) or 19. As a result, I conclude that the "public interest override" provision in section 23 has no application in the circumstances of this appeal.

ORDER:

1. I uphold the Ministry's decision to withhold Records 1 (and the copy of Record 1 that is found at pages 6c to 6f), 2, 3, 4 and 5 in their entirety, as well as pages 6, 6a, 6b, and the portions of pages 10a, 11a and 18 the Ministry claims are subject to the sections 12(1)(a),(b),(d), and/or (e) exemptions.

2. I also uphold the Ministry's decision to withhold the portion of page 15b that it claimed was subject to the section 19 exemption.

3. I order the Ministry to disclose to the appellant the withheld portions of pages 12, 13c, 15, 15a, 17, 17a, 17b, 17c, 18k, 18m and 28a by sending her a copy of those records by **June 6, 2007** but not before **June 1, 2007**.

4. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the records as disclosed to the appellant, upon request.

Original Signed By: May 1, 2007
Steven Faughnan
Adjudicator