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

ORDER PO-2607

Appeal PA06-287

Ministry of Government Services

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NATURE OF THE APPEAL:

The Ministry of Government Services (the Ministry) received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

> …We are requesting information relating to ownership, licensing and investigation/hearings relating to [named] Raceway (the Raceway). Specifically, we are asking for the following:
>
> 1. A list of any and all [named] Raceway owners that own over 5% of the business dating back to January 1, 2003;
>
> 2. Copies of any and all filings regarding changes of ownership or potential changes in ownership reported to the Commission by [named] Raceway dating back to January 1, 2003;
>
> 3. Details of any and all breaches, investigations, hearings or "discipline" conducted by the Commission of any employees, directors or owners of [named] Raceway, dating back to January 1, 2003;
>
> 4. Any and all details available relating to documents filed by directors or owners of the raceway for licensing purposes, including teletheatre operations dating back to January 1, 2003.

The Ministry located responsive records and granted partial access to the requested information. Access to the remaining information was denied pursuant to the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act*.

The Ministry also contacted a number of corporations and individuals pursuant to section 28 of the *Act*, as it appeared that the corporations' interests may be affected by the disclosure of the records or that the records may contain the "personal information" of the individuals. The Ministry sought the consent of these individuals and corporations to release additional information from the records. With respect to the records at issue, one lawyer responded on behalf of all of the corporations and individuals (the affected parties), except one individual. The remaining individual (the affected person) responded on his own behalf to the Ministry, objecting to the disclosure of his personal information in the records. The affected parties also did not consent to the release of any additional information from the records.

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

During mediation, the appellant clarified its request, resulting in the removal of Records 3, 4 and 5 as listed in the Ministry's Index of Records from the scope of the appeal. The appellant also informed the mediator that it believes that there exists a compelling public interest in the disclosure of the records, as contemplated by section 23 of the *Act*. Therefore, the possible application of section 23 has been added as an issue in this appeal.

As further mediation was not successful in resolving the issues in this appeal, the file was transferred to me to conduct the inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Ministry, the affected parties and the affected person, seeking their representations, initially. I received representations from the Ministry, the affected parties and the affected person. I then sent a Notice of Inquiry to the appellant, along with a complete copy of the Ministry's and a partial copy of the affected parties' representations. Portions of the representations submitted on behalf of the affected parties were withheld due to confidentiality concerns. Due to confidentiality concerns, I also did not provide the appellant with any portions of the affected person's representations. I received representations from the appellant in response.

RECORDS:

The Records at issue are listed in the following index:

Index of Records

Record #	Description of Record	Exemption(s) Claimed
1a-1m	Licensing Information/Ownership	17(1) & 21(1)
2a-2n	Sale Agreement/Shareholder Disclosure Forms/ Personal History Reports	17(1) & 21(1)
6a-6c	Ownership Information/Financial Information/Business Plan	17(1)
7a-7d	Shareholder Disclosure Form/shareholders List/Articles of Incorporation	17(1) & 21
8	Correspondence	17(1)
9a-9j	Personal History Reports/Personal Disclosure Forms	17(1) & 21(1)
10a-10e	Correspondence/Share Subscription Agreement	17(1) & 21(1)
11	Share Subscription Agreement	17(1) & 21(1)
12	Correspondence/Organization Chart/Sale Agreement	17(1)
13	Correspondence/Organization Chart/Sale Agreement	17(1)

14	Correspondence/Loan Agreement/Sale Agreement	17(1)
15a-e	Shareholders Disclosure Forms/Business Papers/ Personal History Forms/Shareholders List/Financial Statements	17(1) & 21(1)
16	Sale Agreement	17(1)

DISCUSSION:

BACKGROUND INFORMATION

I received representations from the Ontario Racing Commission (the ORC) on behalf of the Ministry. The ORC is described on the Ministry's website as:

> …a Crown agency of the Ontario Government responsible for regulating the horse racing industry in Ontario. The Commission reports to the Ministry of Government Services and assists the Ministry in fulfilling its responsibilities in ensuring public confidence and social controls in the gaming sector. The ORC maintains the integrity of the horse racing industry through regulation and standards setting.

In its representations, the ORC states:

> The Province of Ontario has enacted the *Racing Commission Act, 2000* to govern horse racing in Ontario. The *Racing Commission Act, 2000* entrusts the ORC with the power to govern, direct and control horse racing in the Province of Ontario. The ORC is also responsible for the licensing of individuals and all racetracks that operate in Ontario. As part of the licensing process, all racetracks are currently required to provide certain information to the ORC, which includes a complete Application to Operate a Racetrack (including address, corporate, property, financial, equity, legal declarations regarding legal actions), financial statements, declaration of key employees, schematic of corporate ownership structure, Security Plans, Racetrack Maintenance Plans and Fire and Safety Plans.
>
> The Director has responsibilities under the *Racing Commission Act, 2000* with respect to ensuring that applicants for licenses or license renewals meet the requirements prior to being (re)licensed and that licensees continue to meet those requirements during the time in which they hold their licenses.
>
> As the authority responsible for issuing licenses to racetracks, the ORC has the ongoing responsibility for monitoring the conduct and management of the racetracks in accordance with the *Racing Commission Act, 2000* and the Rules of Racing.

THIRD PARTY INFORMATION

The Ministry has claimed that all of the records are exempt by reason of the mandatory exemption in section 17(1).

Section 17(1) states:

> 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; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution 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), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

The types of information listed in section 17(1) have been discussed in prior orders:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].
>
> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].
>
> *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].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of

information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

Labour relations information has been found to include:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute [P-1540]

- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees [P-653],

but not to include:

- an analysis of the performance of two employees on a project [MO-1215]

- an account of an alleged incident at a child care centre [P-121]

- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation [P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]

Representations

In its representations, the ORC states that the records:

> …contain financial and commercial information about the licensed Racetrack that was part of the licensing process set out in the *Racing Commission Act, 2000*.

The affected parties represented by the lawyer (hereinafter referred to as the affected parties) also submit that the records contain financial and commercial information.

The appellant did not directly address this issue in its representations with respect to the records at issue.

Analysis/Findings

Upon review of the records, I find that all of the records contain commercial and financial information. The records contain commercial information as they relate to the buying, selling or exchange of ownership interests in the Raceway. The records also contain financial information

as the records contain or refer to specific data concerning cost accounting methods concerning the Raceway. Therefore, I find that part 1 of the test has been satisfied.

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].

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 or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706].

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 the institution 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 the government organization
- 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]

Representations

The ORC submits that:

> The financial and commercial information is supplied to the ORC for the express purpose of complying with the licensing requirements of racetracks. There is an expectation that when financial and commercial information is provided to the ORC it will be kept confidential. This is especially important given the competitive nature and the significant economic challenges facing the horse racing industry.
>
> At the time the financial and commercial information was received by the ORC, the Racetrack had provided such information with the understanding that the information would be kept in confidence.

The affected parties submit that:

> The records at issue include licensing information, confidential ownership information, business plans, confidential agreements, Organization Charts, Loan Agreement, Share Subscription Agreement and a draft Shareholders Agreement which are made between private (not public) contracting institutions, are private and confidential and contain personal information. The records at issue were supplied by the [affected parties] to the regulators who are government institutions with the reasonable expectation that they would be kept private and confidential having regard for the nature of the information supplied. The transactions are not between any of the [affected parties] and any government institution - they are between private persons.

The appellant submits that:

> It is critical to recall that the information supplied by the affected parties here (relating to items 1, 2 and 4 [of the request]) is information filed with the Ontario Racing Commission for the purpose of conducting a due diligence review of the affected parties to ensure that the raceway is, and continues to be, an appropriate entity to license under the *Racing Commission Act*. In collecting this information and considering it, the ORC is discharging a public duty entrusted to it by the Legislature, and discharging this duty in the public interest. The licensing process is, therefore, in no way a private transaction...
>
> The Commission has previously considered expectations of confidentiality in respect of a regulatory scheme, and has noted that "records created in the context of an environmental regulatory scheme are reasonably and necessarily subject to a "diminished expectation of confidentiality" [Order MO-2004]. The Commission has further noted in another appeal "I have not been provided with sufficient

evidence to support a finding that a business entity in the position of the appellant could have a reasonable expectation of confidentiality with respect to information supplied to a public authority in the position of the Ministry, which is tasked with the responsibility of overseeing statutes such as the *Environmental Protection Act* and the *Ontario Water Resources Act*" [Order PO-2558].

In that case, the records requested were reports relating to an investigation of soil and groundwater contamination on a number of properties, and were submitted to the Ministry of the Environment as part of "the appellant's compliance with a statutory obligation to investigate possible contamination on its property…".

Furthermore, the Commission has made clear that any expectation of confidentiality must be "reasonable and objectively-based." The Ministry claims that the information was supplied with an expectation that it would be kept in confidence. However, there is absolutely no evidence of this. The requester has reviewed the forms that are filled out by the raceway... The sole requirement of confidentiality mentioned therein is information gathered from other institutions, other than the affected parties in this case, about the affected parties. Reference is made in the form to information that may be gathered from banks, the Registrar of Bankruptcy and other third parties. There is no reference to the information supplied by the affected parties being kept confidential…

The affected parties' submissions, to the extent these have been disclosed to the requester, are similarly lacking in particularity as to the basis of the "expectation" or "understanding" of confidentiality. There is not one reference to anything in the process of filing the required documents with the ORC to any expectation of confidentiality. This is to be contrasted with other matters where the Commission has found that a reasonable expectation of confidentiality exists based on specific references in, for example, requests for proposals, or confidentiality statements, etc. In such cases [see, e.g., Order PO-2478], the Commission has conducted a specific review of the confidentiality expectations surrounding each of the documents whose disclosure was resisted, and has refused to rely on any generalized statement such as that found in the affected parties' submissions here.

Analysis/Findings

I have reviewed the records at issue and find that the following documents were not supplied in confidence. These documents were prepared for a purpose that would entail disclosure or are available from sources to which the public has access. In particular, the name of the company operating the Raceway is publicly available information on the ORC website. I further find that other information contained in the records is available from other sources to which the public has access.

Record #	Description of Document in Records
1	Raceway Licenses for 2004, 2005; cover letters for licenses containing terms of licenses; business plan minimum requirements and cover letter
2	newspaper articles; articles of incorporation
7	articles of incorporation; articles of amendment

I find that the affected parties did not supply the information in the above-noted documents with a reasonable expectation of confidentiality, and part 2 of the test has not been met. Therefore, these documents are not exempt under section 17(1).

Furthermore, I find that by reason of the provisions of the *Corporations Information Act* and Regulation 182 enacted thereunder, the information in the records related to the names and addresses for service of the corporation's directors and five most senior officers, including municipality, street and number, if any, and postal code, is available from sources to which the public has access. Therefore, this information was also not supplied in confidence to the ORC and does not qualify for exemption under section 17(1).

In addition, section 68.1 of the *Occupational Health and Safety Act* (*OHSA*) specifically provides that the Director under that *Act* "may publish or otherwise make available to the general public the name of the person, a description of the offence, the date of the conviction and the person's sentence" if a person or individual is convicted of an offence under the *OHSA*. Therefore, any information in the records concerning a conviction under the *OHSA* is also available from sources to which the public has access. Therefore, this information was also not supplied in confidence to the ORC and is not subject to exemption under section 17(1).

As a result, I find that part 2 of the test has not been met with respect to the above-noted information in the records that I have determined to be available from sources to which the public has access. I will order that this information be disclosed to the appellant, below.

I have reviewed the contents of the remaining records and find that the financial and commercial information contained in these records was supplied to the ORC by the affected parties with a reasonably-held expectation that it would be treated in a confidential fashion.

The appellant has made reference to the following clause contained on various ORC forms in the records:

> As required by the *Freedom of Information and Protection of Privacy Act*: In conformity with the *Racing Commission Act*, in order to complete or verify the information provided on this form and to determine eligibility for licensing, it may be necessary for the Ontario Racing Commission (the "Commission") to collect and receive additional information from some or all of the following

> domestic and foreign sources: federal, provincial, state or municipal licensing bodies and police services, other law enforcement agencies, sheriff's offices, the Registrar of Bankruptcy, credit bureaus, trust companies, banks, professional and industry associations, former and current employers, and any government Ministry or Agency. The Commission is required under *the Freedom of Information and Protection of Privacy Act* to protect the confidentiality of such information in its possession and control and to use the information only for purposes for which it is collected or for consistent purposes.

The appellant submits that this clause restricts the ORC's ability to treat the affected parties' information confidentially to include only the additional information received from third parties. I disagree with its interpretation of this clause. I find that the ORC is not restricted to protecting the confidentiality of additional information from third parties concerning license applications, but also may be required by the *Act* to protect the confidentiality of the information received from license applicants themselves. As stated above, section 17(1) protects information supplied to an institution in confidence, either implicitly or explicitly.

I find that I have been provided with sufficient evidence to support a finding that a business entity in the position of the corporate affected parties could have a reasonable expectation of confidentiality with respect to information supplied to a public authority in the position of the ORC. The information at issue consists of commercial and financial documents, as described above by the affected parties. The disclosure of these documents would reflect or reveal commercial and financial transactions involving private entities.

The appellant relies on Order PO-2558. In that case, Adjudicator Daphne Loukidelis relied on the findings of Adjudicator John Swaigen in Order MO-2004. In Order MO-2004, Adjudicator Swaigen concluded that records created in the context of an environmental regulatory scheme are reasonably and necessarily subject to a "diminished expectation of confidentiality." He took into consideration the broader context of the supply of the information, including:

> …the nature of the problem addressed in the record at issue (contamination or potential contamination of soil, groundwater and structures); disclosure requirements imposed by authorities …, and the fact that the Ministry of the Environment does not consider related information provided to it to be confidential, as indicated by the appellant's evidence that "the Ministry of the Environment released three of the four records, without claiming any exemption"; the number and nature of different authorities involved; the potential impacts on public health and safety and on the environment of such situations …; the number of surrounding properties and public infrastructures potentially impacted by the situation …; and the fact that the information relates in part to monitoring that was done on the properties in addition to those owned by the affected person and the City, such as the appellant.

I find that many of the considerations relied upon by Adjudicator Swaigen in Order MO-2004 are not present in this appeal. The remaining records refer exclusively to commercial information and financial transactions concerning private entities. I find that the circumstances surrounding the creation of the records in this appeal do not necessarily result in a "diminished expectation of confidentiality."

As a result, I find that part 2 of the test under section 17(1) has been satisfied with respect to the remaining information in the records.

Part 3: harms

To meet this part of the test, the institution 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].

Representations

The ORC submits that:

> The Director requires the racetracks to provide information to allow the ORC to make licensing decisions based on the best possible relevant information. Ensuring that all relevant information is available to the Director also serves as a safeguard to protect the integrity of the licensing process and the industry as a whole. Without the prospect of confidentiality, racetracks would be discouraged from submitting detailed financial and commercial information. For these reasons, it is in the public interest to ensure that the ORC's promise of confidentiality is honoured. In addition, prior to these submissions, counsel for the racetrack indicated his opposition to the release of such information.

The affected parties submit in the non-confidential portions of their representations that disclosure of the records will adversely affect their competitive position and their relationship with affiliated corporations, suppliers, customers, competitors, employees, bankers and the other financial institutions upon whom they rely for financing. In particular, it submits that:

> The records at issue were filed with the ORC, OLGC [Ontario Lottery and Gaming Corporation] and AGCO [Alcohol and Gaming Commission of Ontario] by a regulated corporation or corporations and there are parties to the various

agreements who are not regulated and who consented to such filing on the basis they would remain confidential. Those corporations are private corporations and they will be prejudiced by the disclosure of the information that relates to them and such disclosure will constitute an invasion of their privacy and will result in their no longer freely consenting to provide such information.

The records at issue contain confidential commercial and financial information supplied in confidence to Ontario Racing Corporation, Ontario Lottery and Gaming Corporation, Alcohol and Gaming Commission and other Provincial regulatory agencies and the disclosure will result in undue loss/damage to the corporations and individuals supplying the information and to the other corporations that are named in the records at issue but did not supply them to the regulatory agency.

The records at issue disclose personal and confidential financial information respecting each of the parties thereto and were entered into on the understanding that the information was confidential and the disclosure thereof would constitute an unjustified invasion of their right to privacy. The records also contain information which describes the organization of a group of private and closely held corporations, their assets, liabilities, finances and credit facilities collected by a Provincial regulatory agency on a confidential basis and is not otherwise available to the public.

The records at issue contain confidential information referred to in subsection 17(1) of the *Act* that affects the interest of third parties who are not the persons requesting the information.

Disclosure of the records at issue will result in such third party corporations not freely supplying this or similar information in the future.

The appellant submits that:

The Ministry's submissions make no reference to a reasonable prospect of harm.

The affected parties' submissions, to the extent they have been disclosed to the requester, simply assert conclusions of harm without explanation. Again, it is critical to note that all of the entities involved - the affected parties and the various entities with which they deal - are engaged in a highly-regulated business that is highly-regulated in the public interest. Furthermore, this business is a public-private partnership with the OLGC. Any entity engaged in this business must come to it with a reasonable expectation that the business will be open to public scrutiny.

The requester makes particular reference to the Commission's observations in Order PO-2383. In that case, the OLGC resisted disclosure of information gathered by it in relation to the self-exclusion programme and consultations on that programme. The Commission noted the OLGC's claim that disclosure of the records would "interfere" in the relationship between the OLGC and various third parties and noted that "the assertion by OLGC that industry stakeholders such as the affected parties will no longer co-operate 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".

The requester submits that this is a critical point. The raceway, its owners and other stakeholders, are not in a position to refuse to disclose the information that is the subject of this request. The information is collected for the purpose of administering and regulating this industry. This situation is very different from, for example, a governmental agency seeking proposals for a project in which the agency acts essentially as a private contracting party. In those situations, the government agency has an interest in protecting the private commercial interests of the parties submitting proposals, and the entire transaction occurs outside the government agency's authority as a regulator.

The submissions made by the affected parties simply state conclusions or speculate as to possible harm. These submissions do not meet the test required by subsections 17(1)(a)-(d) as elaborated by the Commission of "detailed and convincing evidence of a reasonable expectation of harm". Similarly generalized submissions, alleging similarly generalized potential commercial harm, were rejected by the Commission in Order PO-2383.

Given the generality of the affected parties' submissions, it is simply not possible for the requester to respond. The requester does, however, make the general observation that the affected parties seem to regard the regulatory scheme governing the raceway as a necessary evil and an intrusion into a private business. This approach completely negates the public interest in the proper operation of gaming facilities, as detailed below.

The requester further submits that even if the affected parties are able to establish a real expectation of harm, the Commission must still review all of the records to determine whether some of the information may be disclosed without potentially harming the affected parties. For example, information from what are effectively "fourth parties" to this proceeding could be scrutinized and determined whether it ought to be excluded from disclosure, while still disclosing information filed by the affected parties with the public regulatory body.

Analysis/Findings

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

The affected parties claim that disclosure of the information in all of the remaining records could reasonably be expected to, prejudice significantly its competitive position or interfere significantly with its contractual or other negotiations of a person, group of persons, or organization. However, it has not made specific representations concerning each record.

The appellant relies on the findings of Assistant Commissioner Beamish in Order PO-2383. In that case, the affected parties argued that disclosing the records could interfere significantly with the relationship between the institution and third parties. Assistant Commissioner Beamish found that disclosure of the information in the records could not be expected to impact on the principal business of the parties involved. However, in this appeal, I agree with the affected parties that its relationship with third parties, such as those entities which they rely upon for financing, would be harmed by disclosure of certain information in the records. I refer specifically to the types of information which describes the organization of the corporate affected parties, their assets, liabilities, finances and credit facilities.

The affected parties comprise a group of private and closely-held corporations, along with the principals of these corporations. Based on my review of the confidential and non-confidential portions of the affected parties' representations, I find that disclosure of specific information in the records, namely, the organizational charts of the corporate affected parties and details of the corporate affected parties' assets, liabilities, finances and credit facilities, could reasonably be expected to result in the harms specified in section 17(1)(a). Therefore, subject to my discussion below of the possible application of the public interest override in section 23, I find that the information in all of Records 2a to c, 10 to 14, 15e and 16, and portions of the information in the remaining records are exempt by reason of section 17(1)(a) of the *Act*.

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

The ORC and the affected parties claim that disclosure of the records could result in similar information no longer being supplied to the ORC. The ORC submits that disclosure of the records would result in racetracks being discouraged from submitting detailed financial and commercial information to it. I disagree with this claim. Rather I agree with the appellant's argument that "the Raceway, its owners and other stakeholders, are not in a position to refuse to disclose the information that is the subject of this request. The information is collected for the purpose of administering and regulating this industry".

Therefore, I find that paragraph (b) of section 17(1) has not been satisfied in this appeal to exempt the records at issue.

Neither the affected parties nor the ORC relied on paragraphs (c) and (d) of section 17(1). Based upon my review of the records, I find that the disclosure of the records could not reasonably

result in the harms contemplated by these paragraphs. Therefore, I find that paragraphs (c) and (d) do not operate to exempt the records at issue.

PERSONAL INFORMATION

The ORC has claimed the application of the mandatory invasion of privacy exemption in section 21(1) for certain discrete portions of the records. Only information that qualifies as personal information can be subject to the section 21(1) exemption. Accordingly, I must determine whether the records or portions of the records listed in the Index of Records as Records 1e, 2f, g, k - n, 7a - c, 9a - j, and 15a – d contain "personal information" as defined in section 2(1) and, if so, to whom it relates. There is no need for me to determine whether Records 10e and 11 contain personal information, as I found these records, which are a Shareholder's Agreement and a Share Subscription Agreement, to be subject to the exemption in section 17(1)(a). The term "personal information" is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and

> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Representations

The ORC submits that Records 1e, 2f, g, k - n, 7a - c, 9a - j and 15a - d contain the personal information of identifiable individuals other than the appellant in accordance with paragraphs (c), (d) and (h) of the definition.

The affected parties submit that the records contain:

> …the personal assets, disclose activities and interests respecting the Corporations, their officers, directors and shareholders including persons from whom representations have not been sought and who are not parties to this appeal.

The affected person also objected to the disclosure of his personal information in the records.

The appellant submits that:

> There is no indication whatsoever that any individual has disclosed "personal information" as distinct from information relating to the individual in his or her official or professional capacity. Given that the records relate to the operation of a business and the filing of documents required by a regulatory scheme, it is difficult to understand how any of the records would contain "personal

information". The [appellant] takes note of the Commission's comment set out in Order PO-2225:

> Based on the principles expressed in these [previously referenced] orders, the first question to ask in a case such as this is: "In what context do[es] the names of the individuals appear"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?

The [appellant] submits that this distinction must be drawn, and there is nothing in either the Ministry's submissions or those of the affected parties that identifies what information is considered "personal"…

[T]he [IPC] has consistently concluded that a name, in and of itself, is not "personal information". To the extent the records requested disclose home addresses, home telephone numbers, dates of birth and drivers' license numbers, this is not information that the [appellant] seeks and can easily be excised from the disclosure.

The regulatory scheme of the ORC requires that the names of owners or potential owners, above a 5% interest in the racetrack, be disclosed to the ORC. The reasons for this public interest in the ownership of racetracks are obvious and are part of what the ORC refers to as its "due diligence" process. In such a context, the names of owners or potential owners do… not constitute "personal information".

Analysis/Findings

The appellant is not interested in receiving information from the records that discloses home addresses, home telephone numbers, dates of birth and drivers' license numbers. As a result, this information is no longer at issue in this appeal.

The records at issue also contain the names and family status of individual shareholders of the corporate affected parties, along with the number of shares held by each shareholder. Although the records relate to the operation of a business and the filing of documents required by a regulatory scheme, I find that some of the records contain personal information. I find that the individual shareholders' names and family status in Records 1e, 2f, g, k - n, 7a - c, 9a - j, and 15a – d are personal information in accordance with paragraphs (a) and (h) of the definition of personal information in the *Act*. With respect to paragraph (h), disclosure of these individuals' names would reveal the extent of their ownership interest in the corporate affected parties, thereby revealing other personal information, namely, a description of the financial transactions in which the individual has been involved in (paragraph (b) of the definition).

PERSONAL PRIVACY

I will now determine whether the mandatory exemption at section 21(1) applies to the information at issue in the records or portions of the records listed in the Index of Records as Records 1e, 2f, g, k - n, 7a - c, 9a - j and 15a - d.

Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21.

In the circumstances, it appears that the only exception that could apply is section 21(1)(f), which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 21(1)(f).

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

Representations

The ORC relies on section 21(3)(b) which reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of a law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

The ORC submits that:

> … [The] records identified … as 2g, k - n, 7a - c, 9a - j, 15a - d and other similar records are submitted to the ORC as part of the licensing process. Upon receipt, seconded OPP [Ontario Provincial Police] officers or investigators conduct due diligence investigations with respect to the information provided. This ensures that those involved in Racetrack operations in Ontario meet certain basic requirements. It is submitted that information such as the records noted above makes the disclosure of this information an unjustified invasion of the personal privacy of the third party. The records include such personal information as the home address, home telephone number, date of birth and drivers license number of the individual.
>
> It is important to note that the information being requested by the appellant is of third parties who, prior to these submissions, have specifically indicated that they are opposed to the release of their personal information.

The affected parties submit that:

> The records at issue are protected by the mandatory exemptions in subsection 21(1) and none of the exceptions therein apply thereto... The revelation to the appellant of the personal investments of a person and the extent thereof would constitute an unjustified invasion of that person's personal privacy and there is no public interest to be served in making that information available to the appellant.

The appellant submits that:

> The …affected parties here have engaged in a highly regulated industry subject to considerable public oversight. To the extent that the information at stake here is "personal" at all, disclosure does not constitute an "unjustified" invasion of privacy, given the regulatory scheme involved. The affected parties have chosen to engage in this industry and have chosen to be subject to a certain level of public scrutiny not normally required of actors in private business. This is necessary, however, because the racing industry is not a private business but a highly-regulated one.

Analysis/Findings

The personal information in the records was compiled as part of the licensing application process to operate a racetrack. I disagree with the ORC that the personal information was compiled, and is identifiable, as part of an investigation into a possible violation of law. I find that disclosure of the personal information in this case is not presumed to constitute an unjustified invasion of personal privacy of identifiable individuals under section 21(3)(b). Therefore, the presumption

in section 21(3)(b) does not apply to the personal information in the records. I further find that none of the other presumptions under section 21(3) apply to this personal information.

As no section 21(3) presumption applies to the personal information in the records, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239].

The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2) [Order P-99].

Section 21(2) states that:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> (b) access to the personal information may promote public health and safety;
>
> (c) access to the personal information will promote informed choice in the purchase of goods and services;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (g) the personal information is unlikely to be accurate or reliable;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The appellant has raised the application of the factor in section 21(2)(a) in favour of disclosure, namely, that disclosure is desirable for the purpose of subjecting the activities of the ORC to public scrutiny. I find, however, the factors in paragraphs (e) and (f) weigh against the disclosure of the personal information in the records which consists of individual shareholders' names and family status. Although the personal information in the records was submitted to the ORC as part of the licensing process, it was submitted as a result of the corporate applicants' licensing application. It is the corporate applicants' information that was key to the application. Disclosure of this information would reveal the extent of the individual shareholders' personal financial interest in the corporate affected parties. I find that disclosure of this sensitive financial information will expose the individual shareholders to pecuniary harm. Subject to my determination as to whether the public interest override in section 23 applies, I find that the personal information in the records, which consists of individual shareholders' names and family status, is exempt from disclosure.

PUBLIC INTEREST OVERRIDE

I will now determine whether there is a compelling public interest in disclosure of the records that clearly outweighs the purpose of the sections 17(1) and 21(1) exemptions.

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.

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. Mitchinson*, [1996] O.J. No. 4636 (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]

Representations

The ORC did not provide representations on the issue of whether the public interest override in section 23 applies to the records.

The affected parties submit that:

> There is no compelling public interest that outweighs the purpose of subsections 17(1) and 21(1) of the *Act*. As a matter of fact, the disclosure of personal information concerning a transaction between private contracting parties to satisfy the curiosity of a person not a party to the transaction simply because a regulatory agency requires the production of otherwise confidential information serves no public purpose whatsoever and it is not in the public interest to disclose that information.

The appellant submits that:

> The gaming industry in Canada has steadily grown in Canada to become an industry worth over $15 billion in Canada and employing 100,000 workers. Ontario has been a leader in sanctioning many types of gaming including casinos and racetrack operations - the latter being the only type of gaming that can be privately owned in Ontario. Increased availability of gaming in Ontario has led to an increase in the public discourse. …In a free, open and democratic society, it is critical to know whom the government is doing business with; transparency dictates that basic regulatory information should be readily available - the public should not be forced into a blind trust with government agencies.
>
> The public's interest in gaming appears to be vast; there seems to be an increased interest in knowing about many aspects of the gaming industry, whether it is who owns or operates gaming operations or social issues associated with gaming. These matters have been raised consistently in many forums including the provincial legislature and the media.

In support of its claim the appellant also cited a number of publications demonstrating the public's concern about the lack of transparency that surrounds gaming operations in the province. The appellant submits that the information pertaining to the tenants who operate the Raceway and who owns the gaming operations, should be made public.

In addition, the appellant is concerned about a potential move of the racetrack operation elsewhere in Essex County, which may result in the City of Windsor losing valuable slot and tax revenue. The appellant submits that the public deserves to be aware of who is making decisions that could potentially materially affect the City revenue since, for example, a loss of millions of dollars could result in a cut back of services.

Analysis/Findings

As noted above, to order the disclosure of the information which I have previously found exempt under sections 17(1) and 21(1), I must be persuaded that there is a compelling public interest in the disclosure of the records which clearly outweighs the purpose of those exemptions. In my view, in the current appeal, a compelling public interest does not exist and section 23 does not apply.

The appellant argues that with respect to the records at issue in this appeal, accountability and transparency are required to enable the public to better participate in the decision-making processes of government. Specifically, the appellant argues that there is a compelling public interest in the public scrutiny of the Raceway operations.

Upon review of the information in the records which I have found to be exempt under sections 17(1) and 21(1), I find that most of this information in the records at issue in this appeal does not relate to or reveal anything about government decision-making. All of the records that I have found to meet the mandatory exemptions at section 17(1) and 21(1) were supplied by private corporations and do not include corporate or personal information that is publicly available. This information describes specific aspects of the organization and operations of the private corporate entities and the personal information of their shareholders. Having reviewed the information contained in the records that I have found to be exempt, in my view, its disclosure would not reveal or shed light on government decision-making with respect to the "ownership, licensing and investigation/hearings" of the Raceway, as suggested by the appellant.

As noted above, the word "compelling" has been defined in previous orders as "rousing strong interest or attention". Also noted above, for there to be a compelling public interest in disclosure of a record, the information 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 means of expressing public opinion or to make political choices [Order P-984]. I accept the appellant's argument that the public has an interest in gaming. However, in the circumstances of this appeal, I do not find that the appellant has established that a public interest of a compelling nature exists that clearly outweighs the purpose of the established exemptions claimed to support the disclosure of the information at issue. I find that disclosure of the information that I have found to be exempt in the records would contribute little to government accountability and transparency.

In sum, I find that no compelling public interest in the disclosure of the information in the records that I have found to be exempt in this appeal exists. Accordingly, the public interest override at section 23 of the *Act* does not apply in this appeal.

ORDER:

1. I uphold the Ministry's decision to deny access to all of Records 2a to c, 10 to 14, 15e and 16 and to those portions of the remaining records that I have found to be exempt

from disclosure by reason of 17(1) of the *Act*. For ease of reference I have highlighted those portions of the records that I have found to be not subject to disclosure. For greater certainty, the information **not** to be disclosed is the information that is highlighted in colour on a copy of the records provided to the Ministry with this order.

2. I uphold the Ministry's decision to deny access to those portions of the records that I have found to be exempt from disclosure by reason of 21(1) of the *Act*, that relates to the individual shareholder's names and family status, along with any portions of the records that contain the home addresses, home telephone numbers, dates of birth and drivers' license numbers of identifiable individuals. For ease of reference I have highlighted those portions of the records that I have found to be not subject to disclosure. For greater certainty, the information **not** to be disclosed is the information that is highlighted in colour on a copy of the records provided to the Ministry with this order.

3. I order the Ministry to disclose to the appellant the non-highlighted information in the records by sending the appellant a copy of this information **before October 3, 2007 but not earlier than September 28, 2007.**

4. In order to verify compliance with this order I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant pursuant to Provision 3, upon my request.

Original signed by: August 29, 2007
Diane Smith
Adjudicator