



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER PO-2774**

## **Appeal PA08-45**

### **Ontario Lottery and Gaming Corporation**



Tribunal Services Department  
2 Bloor Street East  
Suite 1400  
Toronto, Ontario  
Canada M4W 1A8

Services de tribunal administratif  
2, rue Bloor Est  
Bureau 1400  
Toronto (Ontario)  
Canada M4W 1A8

Tel: 416-326-3333  
1-800-387-0073  
Fax/Téloc: 416-325-9188  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

A researcher affiliated with an academic institution submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ontario Lottery and Gaming Corporation (the OLG) for the following information:

The PAR [Probability Accounting Report] Sheets for [first named] slot machine game with a progressive that is approved for use at [a named] slots facility.

The PAR sheets for [second named] slot machine game that is approved for use at [a named] slots facility.

The OLG notified the two companies that manufacture the named slot machine games (the affected parties) of the request, pursuant to section 28 of the *Act*. Section 28 requires notification of affected parties prior to disclosure of information that might be subject to the third party information exemption in section 17(1) of the *Act*. Section 28 also provides an opportunity for an affected party to make submissions on the proposed disclosure before a final decision respecting access is made.

Both affected parties responded to the OLG's notification. One affected party manufacturer consented to the disclosure of its PAR sheets while the other one provided submissions objecting to disclosure. Consequently, the OLG issued a decision letter denying access to the objecting affected party's PAR sheets under section 17(1) of the *Act*, while granting access to the consenting manufacturer's PAR sheets pursuant to section 17(3). The requester (now the appellant) appealed the OLG's decision to this office.

This office appointed a mediator to try to resolve the issues between the parties. However, it was not possible to resolve the appeal through mediation and it was transferred to the adjudication stage of the appeal process, where it was assigned to me to conduct an inquiry. I sent a Notice of Inquiry outlining the facts and issues to the OLG and to the objecting affected party, initially, to seek representations. The OLG did not submit representations, but the affected party provided brief submissions for my consideration. Next, I sent a modified Notice of Inquiry to the appellant, along with a complete copy of the affected party's representations. I received representations from the appellant.

## **RECORDS:**

The records at issue in this appeal consist of the Probability Accounting Reports for a specified slot machine game (9 pages). These records are referred to by the parties and in this order as "PAR sheets."

## **DISCUSSION:**

### **THIRD PARTY INFORMATION**

Section 17(1) of the *Act* is a mandatory exemption that applies to exempt the information of a third party if certain requirements are met. The affected party's representations suggest that sections 17(1)(a) and (c) form the basis of its opposition to disclosure. These provisions state:

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

Section 17(1) of the *Act* recognizes that in the course of carrying out public responsibilities, government bodies receive information about the activities of private businesses. The exemption 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.), leave to appeal refused (November 7, 2005), Doc. M32858 (C.A.)].

Although one of the central purposes of the *Act* is to shed light on the operations of government through the release of information to the public, 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-2371, PO-2384, MO-1706].

For section 17(1) to apply, the affected party in this appeal 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) and/or (c) of section 17(1) will occur.

### **Part 1: type of information**

The affected party submits that the PAR sheets contain information that fits within the definitions of trade secret, scientific and technical information in Part 1 of section 17(1). These particular types of information have been described in a number of past orders as follows:

*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].

I adopt these definitions for the purposes of this appeal.

The affected party submits that:

The Par Sheets contain the exact type of information routinely considered to be trade secrets in the gaming industry. The Par Sheets consist of mathematical formulas and equations used to determine the probabilities of winning, frequency of winning, and payback percentages for our [specific] slot machines. These calculations encompass the core of our product and provide the basis for building the game's other components. ... Additionally, since the math, formulas, and processes contained in the sheets are developed by our engineers, the Par Sheets also fall within the exemption set forth for scientific information and technical information...

The appellant describes PAR sheets as records that contain information related to the design of a slot machine game. With his representations, the appellant provided several articles from a magazine titled *Slot Tech Magazine*, one of which refers to PAR sheets as "legal documents

issued by the manufacturer as proof of the game's theoretical performance." The appellant further submits:

As shown in the articles, PAR Sheets contain information related to payback percentages, hit frequency, number of symbols per reel, number of reels, winning combinations, payouts, layout of virtual reels, layout of physical reels, and volatility index. ...

The appellant asserts that the information does not qualify as trade secrets, or scientific information, but admits to being uncertain as to whether or not it qualifies as technical information.

On my review of the records and the representations of the parties, I find that the probability statistics and other related information contained in the PAR sheets fall within the scope of the definition of "technical information" as that term has been defined in previous orders of this office. In my view, gaming operation can properly be characterized as an applied science, and the probability statistics reflected in the affected party's PAR sheets would constitute a process prepared by professionals in this specific field of expertise [see Order MO-1564]. Accordingly, I find that this information qualifies as the "technical information" of the affected party for the purposes of Part 1 of the test in section 17(1).

In summary, I find that the requirements of Part 1 of the section 17(1) test have been established for the records at issue in that they contain technical information for the purposes of the *Act*. This being the case, it is unnecessary for me to determine whether the records also contain scientific and/or trade secret information.

I will now go on to consider whether the affected party's technical information was "supplied in confidence" to the OLGC under Part 2 of the test.

## **Part 2: supplied in confidence**

In order to satisfy Part 2 of the test under section 17(1), the affected party must have "supplied" the information to the OLGC in confidence, either implicitly or explicitly.

### ***Supplied***

The requirement that the information be demonstrated as having been "supplied" reflects that the purpose of section 17(1) of the *Act* is to protect 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 affected party submits that it supplied the PAR sheets to the OLGc pursuant to the OLGc's installation of the slot machine game at a specific location. The appellant's representations do not address this issue directly.

Having considered the representations, and based on my review of the records, I find that the PAR sheets were not the product, or subject, of negotiations between the affected party and the OLGc. Rather, I am satisfied that the information constitutes the non-negotiated information of the affected party and I find, therefore, that the PAR Sheets were "supplied" by the affected party to the OLGc.

### *In Confidence*

In order to satisfy the "in confidence" component of part 2, the party resisting disclosure, in this case the affected party, must establish that it had a reasonable expectation of confidentiality, implicit or explicit, at the time the information in the record was provided to the OLGc. This expectation must have an objective basis [Order PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case must be considered, including whether the information was:

- communicated to the OLGc on the basis that it was confidential and that it was to be kept confidential;
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected party prior to being communicated to the OLGc;
- not otherwise disclosed or available from sources to which the public has access;
- prepared for a purpose that would not entail disclosure [Order PO-2043].

The affected party asserts that although PAR sheets are released to their customers for the monitoring of game performance where regulations require it, this release is done "subject to the casino's agreement to keep the information confidential." The affected party refers to a confidentiality provision contained in its agreement with the OLGc and submits that its reliance on this term is reasonable. According to the affected party, the confidentiality term states, in part:

The parties agree that all proprietary and/or trade secret information which is directly or indirectly furnished by any party to another in connection with the business dealings between the parties contemplated by the Agreement is confidential information, and will be maintained by the recipient in confidence and shall not be used by the recipient nor disclosed to any third person or business entity of any kind without the prior written consent of the disclosing party.

The appellant disputes the affected party's position regarding the confidentiality of the PAR sheets. According to the appellant, "although the mathematical details vary from game to game, the general information regarding 'formula, pattern ... or process' is common across all slot machine games and ... is available to the public." Referring to the confidentiality provision in the affected party's agreement with the OLCG, the appellant submits that the PAR sheets do not constitute "proprietary and/or trade secret information" for the purposes of the provision. As I understand it, the thrust of the appellant's argument is that because the information in the PAR sheets does not fit within the categories described in the provision, the agreement of confidentiality does not apply to it.

### *Analysis and Findings*

Having considered the representations of the parties, I am satisfied that, in the circumstances, the affected party had a reasonably held expectation that the OLCG would treat the information in the PAR sheets supplied to it by the affected party in confidence. Specifically, I am satisfied that this expectation was expressly and clearly communicated to the OLCG through the confidentiality provision contained in the agreement between them. The presence of the specific term in their agreement persuades me that the affected party was concerned for the protection of its information. Moreover, although the appellant argues that this "type of information" is available in the public realm, I am satisfied based on the evidence that the specific PAR sheets at issue have not otherwise been disclosed, nor are they routinely made publicly available. Finally, I am also satisfied that the purpose for which the PAR sheets are prepared – the monitoring of slot machine game performance – is a purpose that does not generally contemplate disclosure to the public.

The factors reviewed above weigh in favour of a finding that there is a reasonable basis for the expectation of confidentiality. For these reasons, I am persuaded that the affected party had a reasonable expectation of confidentiality respecting the PAR Sheets. Accordingly, I find that it was "supplied in confidence" for the purposes of Part 2 of the test under section 17(1). I will now review the third part of the test for exemption under section 17(1).

### **Part 3: harms**

#### *General principles*

To meet this part of the test, the affected party 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.)]. Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order PO-2435].

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].

As stated above, the affected party has alluded to the application of sections 17(1)(a) and (c) of the *Act*. These parts of section 17(1) will apply to certain types of information:

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

### ***Representations***

The affected party's position with respect to this part of the section 17(1) test is that the mathematical formulae and equations contained in the PAR sheets form the core of its "product and provide the basis for building the game's other components." According to the affected party, the PAR sheets represent the great time and expense put into the development of its game and their disclosure would equip a competitor to design and produce "competitive games" at significantly reduced expense. Some elaboration on the affected party's position was provided in an email sent to the OLG C after it was notified of the request. In this e-mail, the affected party stated:

Par sheets contain confidential and proprietary information about the precise manner in which the games in question operate. The probabilities and frequency of winning and the payback percentages that the par sheets contain are the factors that make up a game's volatility and ultimate appeal to players.

The appellant submits that the affected party has not provided "detailed and convincing" evidence of harm. The appellant acknowledges that there are variations in the mathematical details of individual slot machine games, but he asserts that general information about such formulae and patterns is common to all games and is available to the public through such sources as *Slot Tech Magazine*.

Further, the appellant refutes the affected party's argument that disclosure of the PAR sheets would significantly prejudice its competitive position or result in undue gain for a competitor, noting that he received four different sets of PAR sheets from one of the affected party's main competitors upon simple request. The appellant notes that among the PAR sheets received from the affected party's competitor are those for two of the competitor's most popular current slot



machine games that are also played at the same facility named in the request. The appellant states:

[The affected party's competitor] is obviously 'in the gaming industry' as they are the major supplier of slot machines in North America. Note that by releasing the PAR Sheets, [the affected party's competitor] has not somehow given up ownership of these four games. [It] still owns the games.

Portions of the appellant's submissions also allude to the public's right to "understand how slot machine 'games operate and their real chances of winning and losing,' so that efforts can be made to enhance gaming regulations in an effort to reduce the prevalence of problem gambling in Ontario."

### ***Analysis and Findings***

For the reasons that follow, I find that the affected party has not adduced the necessary detailed and convincing evidence to show that disclosure of its slot machine game PAR sheets could reasonably be expected to "significantly prejudice" its competitive position [section 17(1)(a)] or cause it to experience "undue loss," or its competitors to benefit from "undue gain" [section 17(1)(c)].

The affected party's position is that the PAR sheets "represent the intimate details" of one of its most popular slot machine games and that those details determine the popularity and success of this game. Disclosure of the details, it is alleged, would allow competitors to develop competitive games at significantly reduced cost. On the whole, however, the affected party's submissions are characterized by a lack of particularity as to the connection between the "intimate details" and those projected harms that is, in my view, fatal to the claim of exemption under section 17(1) in the circumstances.

In assessing the reasonableness of the expectation of harm in this appeal, I accept that the competitive nature of the gaming industry is an important consideration [see Order PO-2367]. However, it bears emphasis that the mandatory exemption for confidential third party information in section 17(1) was never intended to be wielded as a shield to protect third parties from competition in the market place, but rather, from a reasonable expectation of *significant* prejudice to the party's competitive position [PO-2497] through disclosure. On this point, I accept the appellant's detailed position, with the supplementary trade magazine evidence provided, that PAR sheets represent mathematical proof provided in a format required by regulators and/or casino operators for the purpose of verifying the reliability of the game and its performance. Even accepting that the percentages and numerical information in the PAR sheets form the basis of the slot machine game, I have not been provided with sufficient evidence to conclude that the records describe anything further related to the actual design or construction of the game. In my view, the "intimate [mathematical] details" set out in the PAR sheets lack the degree of specificity that would make them useful to a competitor except in a very general sense [see Order PO-2172].

In addition, and as previously noted, the other game manufacturer that was notified of the request for its slot machine game PAR sheets consented to their disclosure to the appellant. The mere fact of the other manufacturer consenting to the release of its PAR sheets is not itself determinative of the reasonableness of the expectation of harm that might be experienced by the affected party with disclosure of its own PAR sheets. However, I agree with the appellant that it is a relevant factor to be weighed in evaluating the reasonableness issue. I have also taken into consideration the appellant's evidence, which was supported by several trade publication excerpts provided, that PAR sheets are published in trade magazines, in casino management textbooks and slot machine manuals. There appears to be no great mystery around this type of document. The required reasonableness of the expectation of harm regarding the release of the affected party's PAR sheets is diminished, in my view, both by the other game manufacturer's consent to disclosure of its PAR sheets upon request, and by the general availability of PAR sheets within the industry. It is worth noting, as the appellant has done, that disclosure of the PAR sheets does not deprive the affected party of exclusive ownership of the game.

The persuasiveness of the harms arguments briefly put forward by the affected party is further diminished, in my view, by the age of the PAR sheets. Even at the time of the request, the PAR sheets were more than five and a half years old. In the circumstances, I agree with past orders of this office that the risk of competitive harm with disclosure of a record may lessen with the passage of time [Orders MO-1781 and MO- 2249-I]. As I understand it, the nature of the gaming industry is such that the currency of slot machine games is crucial. In this context, the "shelf-life" of a slot machine game is limited due to the fast-paced development of new technologies that require new slot platforms, as well as continuous improvements to graphics and sound that render older games archaic – and less popular – within a relatively short period of time.

My review of the parties' representations in conjunction with the PAR sheets has led me to conclude that I do not have before me the requisite "detailed and convincing" evidence to support a finding that disclosure of the PAR sheets could reasonably be expected to lead to "significant" prejudice to the affected party's competitive position, undue loss to the affected party or undue gain to its competitors, as those terms are contemplated by paragraphs (a) and (c) of section 17(1).

Given that all three parts of the test in section 17(1) have not been met, I find that section 17(1) does not apply to the PAR sheets. As no other exemptions have been claimed, I will order that the records be disclosed to the appellant in their entirety.

## **ORDER:**

1. I order the OLGC to release the affected party's PAR sheets in their entirety by sending a copy to the appellant by **May 13, 2009** but not before **May 8, 2009**.

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

Original signed by: \_\_\_\_\_  
Daphne Loukidelis  
Adjudicator

\_\_\_\_\_ April 8, 2009