



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

# **ORDER PO-2853**

## **Appeal PA08-111**

### **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:**

The Ontario Lottery and Gaming Corporation (the OLGC) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to Request for Proposal (RFP) Number 1506-015, entitled “Instant Lottery Ticket Printing Services.” More specifically, the requester sought access to “all evaluation materials, notes, correspondence, pricing and other related available information that is subject to disclosure and pertaining to this bid and award to [an identified company].”

Upon clarification of the request, which was subsequently narrowed to include only the information contained in the OLGC’s RFP binder relating to the evaluation of the identified company’s bid, the OLGC issued a decision granting partial access to the records. The OLGC did not disclose the remaining evaluative records or parts of records, claiming the application of the mandatory exemption at section 17(1) (third party information) and the discretionary exemptions at sections 18(1)(a), (c), and (d) (economic interests) of the *Act*. I note that the request does not extend to include either the affected party’s response to the OLGC’s RFP or to the contract that was entered into between the parties following the closing of the RFP.

The requester, now the appellant, appealed the OLGC’s decision.

During mediation, the OLGC advised the appellant and this office that following the appellant’s clarification of the scope of the request, all of the information contained in the RFP binder that pertains to unsuccessful proponents is non-responsive to the request, since that information is no longer being sought by the appellant. The OLGC further advised that, although not specified in the decision letter, the non-responsive portions of the records are indicated on the Index of Documents that it provided to the mediator and also subsequently shared with the appellant.

The appellant confirmed with this office that he does not seek access to information relating to the two other proponents. Accordingly, these non-responsive portions of the records are not at issue in this appeal.

The appellant also confirmed with the mediator that he is pursuing access only to information about the evaluation of the identified company’s bid which has been exempted from disclosure. The appellant takes the position that there is a public interest in the disclosure of the requested information, claiming the possible application of section 23 of the *Act* to the records at issue.

Also during mediation, the mediator contacted the identified company (the affected party) to seek its views on the disclosure of the information at issue. The affected party objected to the disclosure of any information relating to the evaluation of its proposal.

At the end of mediation, the OLGC granted partial access to additional pages of records which had been inadvertently omitted from the records disclosed at the request stage. In its letter dated August 5, 2008, the OLGC advised that access has been denied to portions of the additional records pursuant to sections 17(1) and 18(1)(a), (c), and (d) of the *Act*. At the mediator’s request, the OLGC subsequently issued a revised Index of Documents to the appellant to reflect

the disclosure of the additional responsive pages. As no further mediation was possible, the file was transferred to the adjudication stage of the appeal process.

The adjudicator initially assigned to the file began her inquiry into this appeal by sending a Notice of Inquiry to the OLG, requesting that the OLG address all issues outlined therein. The OLG responded with representations. In those representations, the OLG advised that following receipt of the Notice of Inquiry it issued a revised decision letter to the appellant in which it withdrew its claim that certain severed portions of the records were exempt under section 18(1) of the *Act*. The OLG provided the adjudicator with a copy of that decision letter and attached copies of the records indicating the additional portions that were disclosed to the appellant. Accordingly, section 18(1) is no longer at issue in this appeal.

The assigned adjudicator also sent a copy of the Notice of Inquiry to the affected party, who also responded with representations.

A modified version of the Notice of Inquiry removing the reference to section 18(1) was then provided to the appellant, seeking representations. To assist the appellant in preparing his submissions, complete copies of the representations of both the OLG and the affected party were attached to the Notice. The appellant also provided representations in response.

Following the receipt by this office of the appellant's representations, the file was assigned to me to conclude the inquiry. Following my review of the records, I note that Records 93-96 contain information that relates only to one of the unsuccessful proponents. As the appellant has indicated that he is not interested in obtaining access to this information, I find that Records 93-96 are not responsive to the request and I will not address them further in this order.

## **RECORDS:**

The records at issue are described in a revised Index of Document prepared by the OLG and provided to both the appellant and this office. They are identified as follows:

<b>Page Number</b>	<b>Description of Record</b>	<b>Access Denied in Full or in Part</b>	<b>Exemptions Claimed</b>
9-10	Executive Summary with a Recommendation for the Award of the RFP - August 8, 2006	Part	s.17
11-15	Evaluation Questions and Scores allocated to each proponent;	Part	s.17
16-17	Tables comparing Economic Impact Summary	Part	s.17
18, 18A	Mandatory Criteria	Part	s.17
19	Analysis of sales projections submitted by affected party	Full	s.17
20	Pricing Comparison Memo	Full	s.17

21	Pricing Comparison	Part	s.17
22	Inquiry to affected party from OLG	Full	s.17
23-35	Financial Analysis and Statements from affected party	Part	s.17
36	Evaluation of audit reporting	Part	s.17
37	Inquiry from OLG to affected party and response	Full	s.17
44-46	Evaluated Criteria – Evaluator #1	Part	s.17
47-50	Evaluated Criteria – Evaluator #2	Part	s.17
51-54	Evaluated Criteria – Evaluator #3	Part	s.17
55-58	Evaluated Criteria – Evaluator #4	Part	s.17
59-62	Evaluated Criteria – Evaluator #5	Part	s.17
63-66	Evaluated Criteria – Evaluator #6	Part	s.17
67-70	Evaluated Criteria – Evaluator #7	Part	s.17
71	Handwritten Note: inquiry from OLG about an aspect of the affected party submission	Full	s.17
71A	Handwritten Note: further inquiry about an aspect of the submission	Part	s.17
71B, C, D, E, F & G	Handwritten Note: another set of inquiries to the affected party about the submission	Full	s.17
73-79	Analysis of the affected party’s submission on the Economic Impact to Ontario	Full	s.17
80	E-mail from Conference Board of Canada to OLG	Full	s.17
81-102	OLG Power Point Presentation describing the RFP process and the details of the responses from proponents	Part	s.17
104	Highlights of the proposals	Full	s.17
105-107	Summaries of scoring for the RFP with monetary information included	Full	s.17

## DISCUSSION:

The OLGC and the affected party claim that the remaining records or parts of records at issue are exempt under the mandatory exemption at section 17(1), which reads:

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 paragraphs (a), (b), (c) and/or (d) of section 17(1) will occur.

The OLGC's representations focus exclusively on providing information about the expectation of confidentiality on the part of those who enter into the tender process with it, such as the affected party. The affected party has provided extensive representations in support of its argument that section 17(1) applies to all of the information at issue.

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

The types of information listed in section 17(1) have been discussed in prior orders. Those that might be relevant to this appeal have been defined 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].

*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].

The affected party submits that the records contain information that qualifies as its trade secrets, as well as certain financial and commercial information, within the meaning of those terms in section 17(1). It submits that:

The Records contain information supplied by [the affected party] to the OLGC in the course of, and incidental to, [its] successful response to the OLGC's Request for Proposals. Specifically, the Records contain the evaluation scores about [the affected party] as well as the financial and costing information of [the affected party] including, but not limited to, pricing information, actual and proposed business plans and financial statements.

...

[The affected party's] pricing information, for instance, constitutes [its] Information Assets that are used by [it] in the course of its highly competitive business operations. [The affected party] does not publish its pricing information nor disclose it to third parties other than third parties who have a legitimate need-to-know and a legal or contractual obligation to maintain it in confidence such as [the affected party's] auditors, bankers and legal counsel. The number of employees with access to [the affected party's] pricing information is restricted to a very small group who are contractually bound to maintain it in confidence.

[The affected party does not seek to comment on whether the OLGC evaluation scoring records that do not contain any of [its] Information Assets should or should not be disclosed by the OLGC. However, [the affected party's] individual OLGC evaluation scoring clearly constitutes [its] Information Assets since such evaluation scoring contains confidential information *about* [the affected party], including [its] "trade secrets," "commercial information" and "financial information" supplied to the OLGC in the course of the OLGC RFP process, and which identifies [the affected party's] strengths and weaknesses in the OLGC RFP process, in particular, and in the marketplace, in general.

The appellant's representations do not directly address this aspect of the test under section 17(1). It makes the point, however, that many of the financial statements which have been submitted on behalf of the affected party would have been publicly disclosed in its prospectus issued at the time of the creation of the income trust which the appellant claims owns the affected party. The appellant has not, however, provided me with a copy of any such prospectus filings to support his argument that the records are publicly available.

I have carefully reviewed the contents of all of the records, and parts of records, remaining at issue and make the following findings:

- The undisclosed portions of Records 9-10, 11-15, 18, 18A, 20, 22, 36, 37, 44-46, 47-50, 51-54, 55-58, 59-62, 63-66, 67-70, 71A, 71B, 71C, 71D, 71E, 71F, 71G, 80, 81-90, and 100-102 contain only information which does not qualify as one of the types of information which fall within the ambit of section 17(1);
- The undisclosed portions of Records 16, 17, 19, 21, 71, 73-79, 91-92, 97-99 and 104-107 contain information that qualifies as "commercial information" within the meaning of that term in section 17(1);
- Records 23-35 contain information that qualifies as "financial information" for the purposes of section 17(1); and
- None of the records contain information that qualifies as a "trade secret" as that term has been defined in previous orders of this office.

I have found that Records 9-10, 11-15, 18, 18A, 20, 22, 36, 37, 44-46, 47-50, 51-54, 55-58, 59-62, 63-66, 67-70, 71A, 71B, 71C, 71D, 71E, 71F, 71G, 80, 81-90, and 100-102 do not contain

the type of information listed in section 17(1). These records address the OLGC's evaluation of the proposals submitted in response to the RFPs. What differentiates these records from the others however, is the fact that Records 9-10, 11-15, 18, 18A, 20, 22, 36, 37, 44-46, 47-50, 51-54, 55-58, 59-62, 63-66, 67-70, 71A, 71B, 71C, 71D, 71E, 71F, 71G, 80, 81-90, and 100-102 do not contain the actual commercial or financial information that was submitted by the affected party in its proposal. Rather, they simply describe the scoring process and the proposals in general, non-specific terms without reproducing the actual commercial and financial information that the OLGC received in response to the RFP.

As a result, I conclude that these records do not contain the types of information which is subject to exemption under section 17(1). As all three parts of the test under section 17(1) must be satisfied, I conclude that Records 9-10, 11-15, 18, 18A, 20, 22, 36, 37, 44-46, 47-50, 51-54, 55-58, 59-62, 63-66, 67-70, 71A, 71B, 71C, 71D, 71E, 71F, 71G, 80, 81-90, and 100-102 are not exempt from disclosure under that exemption. As no other exemptions have been claimed for them and no mandatory exemptions apply to the information they contain, I will order that they be disclosed to the appellant.

Records 16, 17, 19, 21, 23-35, 71, 73-79, 91-92, 97-99 and 104-107 on the other hand, contain information that describes the actual contents of the affected party's proposal, including information about pricing, the proposed economic benefits that the affected party projects and very detailed financial information about the affected party and its financial affairs and solvency. Based on my review of these documents, I find that they contain the type of commercial and financial information that falls within the ambit of the exemption in section 17(1).

## **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 affected party indicates that the remaining records at issue contain confidential information which it supplied "in the course of, and incidental to, [its] successful response to the OLGC's Request for Proposals." The affected party goes on to submit that its information assets "are the subject of great efforts on the part of [the affected party] that are necessary to maintain their secrecy."

The OLGC also submits that the information remaining at issue in the records was supplied to it by the affected party in response to a Request for Proposals which it tendered.



The appellant submits that any information relating to the numerical scores attributed to the affected party by an OLGC evaluator cannot include information that was “supplied” to the OLGC by the affected party. The appellant relies on the reasoning in Order PO-1993, which was upheld at both the Divisional Court and Court of Appeal [*Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*], [2005] O.J. No. 4047, Tor. Docs. C42061 and C42071 (C.A.); affirming [2004] O.J. No. 224, 181 O.A.C. 171, Tor. Docs. 193/02 and 224/02 (Div. Ct.); application for leave to appeal dismissed, [2005] S.C.C.A. No. 563, File No. 31224 (S.C.C.), in which it was found that evaluation information did not qualify as having been “supplied” to an institution by a proponent in an RFP. I note that the evaluation material in the records at issue was found above to not meet the first part of the test under section 17(1) so it is not necessary for me to consider whether it satisfies the second part. However, I also conclude that the evaluation information does not meet the “supplied” aspect of the second part of the test; and that the disclosure of Records 9-10, 11-15, 18, 18A, 20, 22, 36, 37, 44-46, 47-50, 51-54, 55-58, 59-62, 63-66, 67-70, 71A, 71B, 71C, 71D, 71E, 71F, 71G, 80, 81-90, and 100-102 would not reveal the information supplied by the affected party to the OLGC.

With respect to the other commercial and financial information contained in the records, I find that it was supplied by the affected party to the OLGC within the meaning of that term in section 17(1). The information contained in Records 16, 17, 19, 21, 23-35, 71, 73-79, 91-92, 97-99 and 104-107 was provided to the OLGC by the affected party either in the proposal, which it submitted to the OLGC in response to the RFP, or in its replies to various follow-up inquiries by the OLGC following the closing of the RFP competition. Some of the OLGC-generated records, such as the handwritten notes (Record 71) and the OLGC Power Point presentation (Records 91-92 and 97-99) also set out in detail the commercial and financial information provided to it by the affected party. Accordingly, I am satisfied that this aspect of the section 17(1) exemption has been met for the undisclosed portions of Records 16, 17, 19, 21, 23-35, 71, 73-79, 91-92, 97-99 and 104-107.

### ***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 [Orders PO-2043, PO-2371, PO-2497].

In support of its argument that the information at issue was supplied in confidence, the affected party submits:

[The affected party] supplied such information to the OLG 'in confidence' and, as such, [the affected party] has a reasonable expectation of confidentiality, implicit and explicit, at the time the information was supplied to the OLG. In this respect, the OLG's RFP indicated that such information would be treated in a confidential manner. The Records have been consistently considered to be, and have been treated by [the affected party] and the OLG as confidential. [The affected party] supplied such information to the OLG 'in confidence' and is relying on the OLG's representations and the Act for such information to be kept confidential.

In addition, the OLG submits the following in support of its argument that the affected party submitted the information at issue to it with a reasonably-held expectation that it would be treated confidentially:

- Proponents were advised that information in their proposals (except for the identity of proponents) would be treated as confidential as permitted by law;
- The OLG's express right of use and disclosure is relatively narrow, precludes copying and by virtue of its restrictive terms reinforces proponents' expectation of confidentiality; and
- The OLG does not disclose the information remaining in dispute internally or externally in a manner which conflict[s] with proponents' expectation of confidentiality. To the contrary, it maintains and enforces strict internal controls to restrict access to such information.

The appellant's submissions do not address this aspect of part of the test under section 17(1).

Based on my review of the information contained in the undisclosed portions of Records 16, 17, 19, 21, 23-25, 71, 73-79, 91-92, 97-99 and 104-107 and the representations of the OLG and the affected party, I am satisfied that this information was supplied with a reasonably-held expectation that it would be treated in a confidential manner by the OLG. The very nature of the information itself leads to that conclusion. The information relates to various matters that go directly to the root of the RFP proposal made by the affected party, describing in detail the financial health of the affected party and the often-intricate commercial calculations it has made regarding the services it will be providing under the terms of its proposed contract with the OLG. In my view, given the competitive nature of the industry in question, it is reasonable to

find that the parties intended this information be kept confidential once it was supplied to the OLGC.

**Part 3 of the test: Harms**

*General principles*

To meet this part of the test, the institution and/or the third 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.)].

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].

The need for public accountability in the expenditure of public funds is an important reason behind the need for “detailed and convincing” evidence to support the harms outlined in section 17(1) [Order PO-2435].

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].

*Representations of the parties*

In support of its argument favouring a finding that the disclosure of the information in the records could reasonably be expected to cause harm to its competitive position, the affected party submits:

[Its] Information Assets (which includes the pricing information and its OLGC evaluation scoring) are not generally known to the public or competitors of [the affected party] and have significant economic value to [the affected party] from not being generally known. . . . [the affected party’s] Information Assets are the subject of great efforts on the part of [the affected party] that are necessary to maintain their secrecy.

...

[The affected party’s] pricing information, for instance, derives economic value from not being generally known to competitors who can obtain economic value from knowing or learning it.

...

The disclosure of [the affected party's] Information Assets contained in the Records would significantly harm [it]. As a result, [it] expends great efforts keeping such information in its custody and/or control secret because it enables [it] to negotiate more effectively with customers given their absence of such knowledge. If [the affected party's] information contained in the Records were disclosed to the appellant, it would allow a competitor to under-cut [the affected party's] rates and distinguish their proposals against those of [the affected party] with the knowledge of [the affected party's] individual OLGC evaluation scoring. Such a scenario would grossly undermine [its] competitive position in the marketplace.

The OLGC has chosen not to make submissions with respect to this part of the test under section 10(1).

The appellant submits that the exemption in section 17(1) cannot apply to any publicly-available information. As noted above, the appellant submits that because of the corporate status of the affected party, it is obliged by law to file certain financial documentation in the form of a prospectus. The appellant has not, however, provided me with any prospectus information relating to the affected party to demonstrate that this requirement in fact applies to it or that any such filings or public disclosure ever took place. Accordingly, I am not satisfied that the appellant's assertions about the possible public disclosure of the financial statements of the affected party have been made out, based on the evidence it has provided to me.

In support of its argument in favour of the disclosure of the affected party's pricing information, the appellant submits that "transparency and accountability are the cornerstones of access to information legislation." The appellant then goes on to argue that the public interest override provision in section 23 applies to the pricing information. I will address these submissions in my discussion of the section 23 exception, below.

### ***Findings***

It should be noted that my findings with respect to the third part of the test under section 17(1) apply only to the information contained in the undisclosed portions of Records 16, 17, 19, 21, 23-25, 71, 73-79, 91-92, 97-99 and 104-107, which consist of commercial and financial information that I have found was supplied to the OLGC by the affected party with a reasonably-based expectation of confidentiality. The records which describe the evaluation process undertaken by the OLGC do not fall within the ambit of these records, as the information they contain was found above not to qualify as the type of information that is subject to exemption under section 17(1). Accordingly, I will not undertake an analysis of the application of the third part of the test under section 17(1) for these records.

I find that Records 16, 17, 19 and 21 contain very specific commercial information which relates to the economic impact that would accrue to the Province of Ontario should the affected party be awarded the contract to print lottery tickets. In my view, this information has commercial value and could be extrapolated by a knowledgeable party to reveal the actual dollar values of various components of the affected party's proposal. I am satisfied, based on the representations of the

affected party and my own review of this information, that its disclosure could reasonably be expected to adversely impact upon the affected party's competitive position. I agree that the disclosure of this information to its competitors could reasonably be expected to give rise to the types of harm contemplated by section 17(1)(a).

The financial information in Records 23-35 sets out in great detail the financial status of the affected party including information about its sales, income, debt and liabilities. In my view, the disclosure of such information to its competitors could reasonably be expected to result in harm to the affected party's competitive position. I find the affected party's arguments in favour of a finding that section 17(1)(a) applies to this information to be persuasive.

Records 71, 73-79, 97-99 and 104-107 contain commercial information that was supplied to the OLG by the affected party either with its proposal or as part of the follow-up by the OLG after the submission of proposals. This information relates primarily to an evaluation of the affected party's forecasts on the economic impact for Ontario should it be the successful proponent. The records contain information about certain compromises, accommodations and concessions that the affected party was prepared to make to be the successful proponent. They also include the affected party's projections on the likely financial impact of certain actions it was proposing to take, describing the dollar values to be associated with the various scenarios included in the affected party's proposal. In my view, the disclosure of this information could reasonably be expected to adversely impact upon the affected party's competitive position, as contemplated by section 17(1)(a). Accordingly, I find that Records 71, 73-79, 97-99 and 104-107 are exempt from disclosure under the mandatory section 17(1) exemption.

Records 91 and 92 consist of a document prepared by the OLG entitled "Vendor Submission Highlights" which evaluates the pluses and minuses of two scenarios submitted by the affected party as part of its proposal. In my view, for the reasons stated in my discussion above, the disclosure of this information could reasonably be expected to give rise to the harms contemplated by section 17(1)(a). Therefore, I conclude that Records 91 and 92 qualify for exemption under that section.

In conclusion, as all three parts of the test have been met I find that section 17(1)(a) applies to exempt from disclosure the undisclosed information contained in Records 16, 17, 19, 21, 23-35, 71, 73-79, 91-92, 97-99 and 104-107.

## **PUBLIC INTEREST IN DISCLOSURE**

The appellant submits that there exists a public interest in the disclosure of the records that operates to "override" the operation of the section 17(1) exemption under 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.

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

### **Compelling public interest**

In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*’s central purpose of shedding light on the operations of government [Orders P-984, PO-2607]. 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 or enlightening the citizenry about the activities of their government or its agencies, 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 [Orders P-984 and PO-2556].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347 and 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].

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.)]. If there is a significant public interest in the non-disclosure of the record then disclosure cannot be considered “compelling” and the override will not apply [Orders PO-2072-F and PO-2098-R].

### **Purpose of the exemption**

The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

### **Representations of the parties**

The appellant submits two reasons for his contention that a sufficiently compelling public interest exists in the disclosure of the records to override the application of the exemption in section 17(1). He states:

Firstly, this RFP called for a precedent setting ten (10) year contract estimated at 150M\$, also providing for an additional five (5) year renewal term. Transparency and accountability strongly militate in favour of the public’s right to know that [the affected party] was the best overall.

Secondly, strong NEB [Net Economic Benefits] for the Province of Ontario was a material consideration of this RFP. The public has a right to know full details,

including pricing, about this RFP because it is based, in a material way, on the Provincial NEB which expression, by its own wording, implies that benefits are directed at the citizens of Ontario. Such benefits clearly focus on job creation and citizens are entitled to know whether those jobs, and other benefits, are paid by [the affected party] or the OLG. In other words, are the benefits realized through the OLG accepting higher pricing that ultimately must be borne by the citizens of the Province or alternately, through aggressive pricing and/or novel approaches? Consequently, the appellant submits that the disclosure of the Records would serve to enlighten the public as to the reasons why [the affected party] was chosen as the preferred vendor in particular, as regards the compelling case made by the OLG to leverage the NEB criteria.

The affected party submits that:

... there is a 'public interest' in the non-disclosure of the Records.

The disclosure of [the affected party's] Information Assets contained in the Records would competitively harm [it] and violate the 'public interest' in non-disclosure that is clearly set forth in section 17(1) of the Act.

We note that in the limited cases where the public interest override established in section 23 of the Act has been enforced, such cases involved circumstances involving public safety, public health, national unity or the integrity of the criminal justice system. No such circumstances are present in the case at hand.

Rather, the interests being advanced in the case at hand are private in nature. As such, and considering the significant harm that would occur to [the affected party] if such information were disclosed, there is no compelling public interest that warrants overriding the exemption set forth in section 17(1) of the Act.

## **Findings**

As a result of this order, additional information pertaining to this RFP and how it was awarded to the affected party by the OLG will be disclosed, particularly information about the scoring of the competition. The public interest in the disclosure of information identified by the appellant that relates to the manner in which the competition was conducted will be, for the most part, satisfied with the release of this additional information. Accordingly, I find that the concerns addressed by section 23 in relation to this particular information will be met as a result of the disclosure that will flow from this order.

In my view, the same considerations do not lead to a finding that section 23 applies to the other commercial and financial information about the affected party which I have found to be subject to section 17(1). I find that the same need for public scrutiny of this type of information does not exist and that its disclosure to the appellant is not in the public interest. Specifically, I find that the disclosure of this information will not "serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, 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.”

As a result, I cannot agree that there exists a sufficiently-compelling public interest in the disclosure of the commercial and financial information about the affected party, which forms the majority of the undisclosed records that would outweigh the purpose of the section 17(1) exemption, which is to protect the commercial interests of entities that do business with government.

In conclusion, I find that the “public interest override” provision in section 23 has no application in the present circumstances.

**ORDER:**

1. I uphold the OLG’s decision to deny access to Records 16, 17, 19, 21, 23-35, 71, 73-79, 91-92, 97-99 and 104-107 on the basis that they qualify for exemption under section 17(1) of the *Act*.
2. I order the OLG to disclose Records 9-10, 11-15, 18, 18A, 20, 22, 36, 37, 44-46, 47-50, 51-54, 55-58, 59-62, 63-66, 67-70, 71A, B, C, D, E, F and G, 80, 81-90 and 100-102 by providing the requester with copies by **January 15, 2010** but not before **January 8, 2010**.
3. In order to verify compliance with Order Provision 1, I reserve the right to require the OLG to provide me with a copy of the records that are disclosed to the appellant.

Original signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

December 8, 2009 \_\_\_\_\_