



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

ORDER PO-2903

Appeal PA09-335

Ontario Lottery and Gaming Corporation



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NATURE OF THE APPEAL:

Pursuant to its legislative mandate, the Ontario Lottery and Gaming Corporation (the OLG), among other things, operates casino facilities in the province of Ontario. This order addresses the issues raised by a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the Probability Accounting Reports (PARs or PAR sheets) supplied to the OLG by an identified supplier (the third party), in relation to slot machine games.

PAR sheets are described by the third party as including the symbol combinations and theoretical percentages for each designated winning combination of symbols in a particular slot machine game.

The OLG denied access to portions of the PAR sheets, claiming that these portions were exempt pursuant to section 17(1) (third party information) of the *Act*. The OLG granted access to the remaining portions of the PAR sheets.

The appellant appealed the denial of access to this office.

During the inquiry, I invited representations from the OLG, the third party and the appellant. I received representations from the parties with the exception of the OLG. The third party also provided me with affidavit evidence of one of its game designers who has a masters' degree in mathematics. The representations and affidavit were shared with the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction* number 7.

In this order, I uphold the OLG's decision to deny access to the withheld portions of the records pursuant to section 17(1).

RECORDS:

The records at issue consist of the withheld portions of 151 pages of PARs for four slot machines. The withheld portions contain symbol combinations and theoretical percentages for each designated winning combination of symbols, the pay for each combination, and the percentages contributed by any features and bonuses. Some of the withheld portions also contain Reel Strips, or a reproduction of Reel Strips, which are the patterns of symbols on the spinning reels in the games.

DISCUSSION:

The sole issue to be determined is whether the undisclosed portions of the records are exempt under section 17(1). This provision states, in part:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

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.

Do the records reveal information that is a trade secret or scientific, commercial, financial or labour relations information?

The third party states that the withheld portions of the PAR sheets qualify as “technical information” and as “trade secret” information under the first requirement for the application of section 17(1), as outlined above. These particular types of information have been described in a number of previous 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).

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 third party submits that the withheld portions of the PAR sheets contain information which would reveal the mathematical formulas or mathematical “DNA” upon which the slot machine games are based.

The third party explains that the mathematical formulas contain “pathways” which identify the symbol combinations and theoretical percentages and other game components which are not publicly available or to which access is restricted by the use of a “machine key” or by trained industry personnel (e.g. a licensed gaming machine technician). It states that it has spent years designing and honing mathematical concepts and formulas that are popular in the gaming marketplace and it is these concepts and formulas that it seeks to protect in this appeal.

The third party also states that it has consistently made efforts to protect the confidentiality of the PAR sheets as evidenced by the requirement for a non-disclosure agreement to be signed by all third parties who are given access to them, the “confidential” markings on the PAR sheets, and the fact that it requires all of its employees who have access to the PAR sheets to maintain their confidentiality.

The appellant’s representations do not address this issue.

In Order PO-2774, Adjudicator Daphne Loukidelis found that the information contained in the PAR sheets at issue in that appeal qualified as “technical information.” I agree with this finding. Although Order PO-2774 relates to PAR sheets for different slot machine games than those that are at issue here, the general nature of the information contained in the PAR sheets is the same as the information that has been withheld in this appeal. Consequently, I will adopt a similar approach here and find that the withheld information in the PAR sheets qualifies as “technical information.”

Applying the definition set out in previous orders for “trade secrets,” I am also satisfied by the evidence before me that the PAR sheets amount to mathematical formulas which are used in the third party’s business, are not generally known in the industry, have economic value from not being known and are the subject of efforts that are reasonable under the circumstances to maintain their secrecy. On this basis, I accept the third party’s position that the PAR sheets also qualify as “trade secrets.”

For all of these reasons, I find that the records contain both “trade secret” information and “technical” information for the purposes of section 17(1).

Was the information supplied to the OLG in confidence, either implicitly or explicitly?

The third party submits that the PAR sheets were “supplied” to the OLG with a reasonable expectation of confidentiality for the purposes of obtaining approval for the sale and lease of the

games in Ontario and were not the product of negotiations. It also submits that they were provided to the OLG pursuant to a regulatory requirement with a reasonable expectation of confidentiality.

The appellant did not address this issue in his representations.

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 and PO-2043).

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 third party prior to being communicated to the government organization;
- not otherwise disclosed or available from sources to which the public has access; and
- prepared for a purpose that would not entail disclosure (Orders PO-2043, PO-2371, PO-2497).

Previous orders of this office have found that information provided to an institution pursuant to a mandatory reporting requirement in legislation or regulation is “supplied” for the purposes of section 17(1) (Orders P-345 and PO-2142). I will adopt the same approach here and, in doing so, I accept the evidence of the third party that the PAR sheets were “supplied” to the OLG pursuant to a regulatory requirement and were not the product, or subject, of negotiations.

I am also satisfied that the withheld portions of the PAR sheets were explicitly “supplied in confidence,” a finding which is consistent with the findings made in Order PO-2774. This information was provided on the basis that it was confidential; it has been treated consistently as confidential; it has not been previously disclosed; it is not available from other sources to which the public has access; and it was prepared for a purpose that would not entail disclosure. For all of these reasons, I find that there was a reasonable expectation of confidentiality on the part of the third party when this information was supplied to the OLG and was, therefore, “supplied in

confidence” as required by section 17(1). I now turn to consider the parties’ arguments regarding the harms requirement of section 17(1).

Would disclosure of the records give rise to a reasonable expectation that one of the harms specified in paragraphs (a) and/or (c) will occur?

The third party claims that disclosure could reasonably be expected to prejudice its competitive position [17(1)(a)] or would result in undue financial loss to the third party and financial gain to its competitors [17(1)(c)]. The third party provided me with detailed representations, portions of which were confidential, and a supporting affidavit sworn by an employee who has a masters’ degree in mathematics and whose current position is in the field of game design.

With respect to the claim that the harms set out in paragraph (a) could reasonably be expected to result, the third party submits:

- the third party is an industry leader in innovative game design;
- disclosure would provide substantial commercial and competitive intelligence about the third party, namely its strategies and secret formula in relation to game design and development;
- it may take several months of trial and error and hundreds of thousands of dollars to create a PAR sheet that translates to the desired game performance and, once established, other games can be created using the same formula;
- it is not possible to replicate the exact formula for the games by observing the game and deconstructing the symbol arrangements on the reels; and
- although PAR sheets appear to be relatively standard documents in the gaming industry, its PAR sheets are a “unique recipe for its brand of slot games.”

With respect to the harms set out in paragraph (c), the third party submits:

- disclosure could reasonably be expected to result in undue loss to the third party and undue gain by competitors;
- the cost to develop a PAR sheet and a slot machine game is significant;
- an average slot machine has a cost of \$17,000 (US) and if the formula is copied, this would result in significant loss to the third party because it would impact game sales, diminish its brand value and goodwill, and would result in undue gain for the competitor who would not incur any costs to develop the PAR sheets if it were able to acquire them under the *Act*.

In response, the appellant disputes that any harms could reasonably be expected to result from disclosure of the PAR sheets. He argues that disclosure of the PAR sheets does not mean that

the third party gives up “ownership of their game” and a competitor could not legally create a game that is “exactly the same as a game of the affected party.” He also argues that merely by playing the game a competitor can gain an understanding of how that game works and create a game that is similar. He adds that a competitor of the third party provided him with requested PAR sheets for its games and argues that this corroborates his position that PAR sheets are not “so crucial to the competitiveness of the slot machine manufacturing companies.”

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.)). 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).

As noted above, the application of section 17(1) to slot machine PAR sheets was at issue in Order PO-2774. In finding that the PAR sheets at issue before her were not exempt pursuant to section 17(1), Adjudicator Loukidelis relied on three material circumstances. She was persuaded by the evidence before her that a competitor of the third party had consented to the disclosure of its PAR sheets. As well, the records before her did not describe the actual design or construction of the game and would not be useful other than in a general sense. The third material circumstance she considered was the fact that “PAR sheets are published in trade magazines” and, therefore, were generally “available” within the industry. Adjudicator Loukidelis also took into account the evidence before her that the PAR sheets were more than five and a half years old and found that the risks from disclosure would lessen with the passage of time. However, underpinning her decision was the finding that the third party in that appeal had not:

... adduced the necessary detailed and convincing evidence to show that disclosure of its slot machine game PAR sheets could be expected to ‘significantly prejudice’ its competitive position . . . or cause it to experience ‘undue loss,’ or its competitors to benefit from ‘undue gain.’ . . .

Following the issuance of Order PO-2774, the Information and Privacy Commissioner of Newfoundland and Labrador considered the question of whether slot machine PAR sheets in the possession of the Atlantic Lottery Corporation (ALC) were exempt pursuant to section 27(1) of the *Access to Information and Protection of Privacy Act* [the equivalent to section 17(1)] in Order A-2009-006. In that order, Commissioner Ring distinguished Order PO-2774 and found that the PAR sheets were exempt. In doing so, he disagreed with the findings made in Order PO-2774 regarding the nature of the information at issue. He stated that the PAR sheets were the essence of the game design and described every detail of the mathematics behind the game. He found that the PAR sheets would be useful to a competitor and if disclosed would enable a competitor to build a game exactly the same as the one owned by the third party in that appeal. He added:

The fact that PAR sheets are sometimes published in trade magazines does not mean that PAR sheets for games currently on the market and presumably still profitable should be disclosed. As I mentioned, PAR sheets are individual to the

particular game. Disclosure of one does not reveal anything about another one. I also have not been presented with any evidence that PAR sheets are generally available within the industry (for purposes beyond product testing) or, if they are, under what circumstances they are provided. In fact, the evidence that has been presented by the ALC indicates just the opposite.

The appellant was invited to comment on the implications of the findings in Orders PO-2774 and A-2009-006. In response, the appellant stated that disclosure of PAR sheets does not mean that the third party would give up its ownership of the games and that competitors would not legally be able to replicate the games. However, he does not specifically address Commissioner Ring's finding that "math and numerical information are the essence of the game design and if shared, competitors could make a game that is exactly the same." I also note that the appellant does not comment on the findings of Commissioner Ring in relation to the publication of PAR sheets in trade magazines, the fact that PAR sheets are not generally available in the industry and the fact that the mathematics behind the games changes less frequently than the graphics or outward appearance of the game. He merely states in his letter of appeal that Order PO-2774 provides justification for the disclosure of the PAR sheets.

I have carefully reviewed the representations of the parties and Orders PO-2774 and A-2009-006, and I am satisfied that disclosure of the portions of the PAR sheets that have been withheld by the OLG could reasonably be expected to result in the harms identified in section 17(1)(a) and 17(1)(c).

In the circumstances before me, I have detailed representations from the third party including affidavit evidence from one of the employees who is involved in the design of slot machine games. Unlike the circumstances before the adjudicator in Order PO-2774 where the entire PAR sheets were at issue, only portions of the PAR sheets are at issue here and I have been provided with focused evidence and argument which address these withheld portions.

Turning first to section 17(1)(a), in my view, the evidence is sufficient to support a finding that the withheld portions describe the essence of the games' design and are the very details that would be useful to a competitor in the industry. Much of the third party's evidence here is consistent with the evidence described by Commissioner Ring in A-2009-006 and is materially different than the evidence before Adjudicator Loukidelis in Order PO-2774.

In particular, I accept the evidence of the third party that the withheld portions of the PAR sheets contain mathematical formulas which, if disclosed, would enable a competitor to copy the game to which each PAR sheet relates. Contrary to what is suggested by the appellant, the fact that the copying may be illegal does not negate the possibility that someone could copy or adapt the information, and there remains a reasonable expectation that this harm could result. This is not a reflection on the current appellant, but a recognition that disclosure under the *Act* is, in effect, disclosure to the world.

It may be true, as is alleged by the appellant, that by playing the third party's games a competitor can observe many aspects of the game, and "can gain an understanding of how that game works and create a game that is similar." However, I am not satisfied that by playing the game, one

would be able to construct a game that is a *replica* of the third party's games. In that regard, I accept the evidence of the third party that access to the PAR sheets would enable a competitor to make an exact replica of its games. It states:

Although a competitor could try to reverse engineer the PAR sheets by repeatedly observing the game and deconstructing the symbol arrangements on the reels, the winning combinations and the pays, because of features and bonuses it is unlikely the correct "DNA" could be extracted.

The appellant also argues that a competitor of the third party has previously disclosed to him the PAR sheets for its slot machines. However, I have no evidence before me about the circumstances of that decision, including the conditions under which disclosure was made, the company's position in the industry, the age and popularity of the machines to which those PAR sheets relate, or the public availability of information relating to those PAR sheets. Consequently, I am not able to draw an inference, or otherwise conclude, on this basis, that the third party's claims about the reasonable expectation of harm should not be accepted.

Accordingly, I find that disclosure of the withheld portions of the PAR sheets could reasonably be expected to prejudice significantly the competitive position of the third party. On that basis, I find that the information is exempt pursuant to section 17(1)(a).

I also accept the third party's position that the harms that could reasonably be expected to result from disclosure include those set out in section 17(1)(c). For example, I accept the third party's evidence regarding the costs it has incurred for the creation of the game PAR sheets and the value of the slot machine games to which they relate. If a competitor were to gain access to the withheld information in the PAR sheets and, as a consequence, became able to build an equivalent game at a lower cost, this would amount to an undue advantage. There is a reasonable expectation that any sales of replica games could result in a loss of business from which the third party might have otherwise benefitted. In my view, this amounts to an undue advantage to the competitor and an undue loss to the third party. This bolsters my finding under section 17(1)(a) that there is a reasonable expectation of *significant* prejudice to the party's competitive position (Order PO-2497), and also leads me to conclude, under section 17(1)(c), that disclosure could reasonably be expected to give rise to an undue advantage to the competitor and undue loss to the third party through disclosure. I therefore find that, in addition to being exempt under section 17(1)(a), the withheld portions of the PAR sheets are also exempt pursuant to section 17(1)(c).

Much of the balance of the appellant's arguments set out the reasons why access to the information is required. However, the reasons for the appellant's request or his stated need for the information is not relevant to the application of the exemption in section 17(1). In addition, some of the appellant's arguments allude to a public interest in the information at issue however; the appellant has not raised the possible application of section 23. Regardless, I have considered the appellant's arguments and I am not satisfied that even if he had raised section 23, there would be a sufficient basis to find that the section applies. 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. I am not satisfied that

either of these criteria have been met in this appeal because the appellant has not been able to establish a sufficient connection between the disclosure of the records at issue and the public interest issues that he alludes to, or that disclosure would outweigh the purpose of the exemption.

In summary, I find that the information at issue is exempt pursuant to sections 17(1)(a) and (c) as all three criteria for the application of the exemptions have been met in this appeal.

ORDER:

I uphold the decision of the OLG to deny access to the withheld portions of the records.

Original signed by: _____
Brian Beamish
Assistant Commissioner

_____ August 10, 2010