

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## ORDER PO-3034

Appeal PA11-23

Alcohol and Gaming Commission of Ontario

January 11, 2012

**Summary:** The appellants sought access to a copy of a report. The Alcohol and Gaming Commission of Ontario (AGCO) denied access pursuant to the third party commercial information exemption at section 17(1), section 49(a) in conjunction with the law enforcement report exemption at section 14(2)(a) and the personal privacy exemption at section 49(b). In the course of adjudication the AGCO advised that it was no longer relying on section 17(1) to withhold the responsive record. Section 49(a) in conjunction with section 14(2)(a) does not apply because the report is a "routine inspection report" thereby falling under the exception at section 14(4). The AGCO is ordered to disclose to the appellants the information in the record that relates to a company, falls within the scope of section 2(3) or qualifies as the personal information of either, or both, of the individual appellants. The balance of the personal information in the record is exempt under section 49(b).

**Statutes Considered:** *Criminal Code of Canada*, s. 207(1)(a); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1), 2(3), 14(2)(a), 14(4), 17(1), 21(2)(d), 21(2)(h), 21(3)(b), 21(3)(f), 49(a), 49(b); *Gaming Control Act, 1992*, ss. 9(1), 31

**Orders and Investigation Reports Considered:** P-136, PO-1988

### OVERVIEW:

[1] The Alcohol and Gaming Commission of Ontario (AGCO) is a regulatory agency established under the *Alcohol and Gaming Regulation and Public Protection Act (AGRPPA)* and administers the *Liquor Licence Act (LLA)* and the *Gaming Control Act*,

1992 (*GCA*). Gaming is prohibited by the *Criminal Code of Canada (CCC)*, subject to an exception which allows provincial governments to conduct and manage a lottery.<sup>1</sup>

[2] The Registrar of Alcohol and Gaming (the Registrar) is responsible for a variety of functions including ensuring that registered suppliers<sup>2</sup> of gaming services comply with the *GCA* in accordance with the statutory requirements of honesty, integrity and considerations of the public interest, both prior to being registered and during their period of registration.

[3] The Registrar appoints investigators pursuant to section 31 of the *GCA* to carry out investigations into registered suppliers of gaming services. The AGCO's Investigations and Enforcement Branch (IEB) is also staffed with officers seconded from the Ontario Provincial Police (OPP).

[4] The AGCO received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) from a company involved in supplying gaming services for access to:

A copy of the report filed by [named individual] in 2002 that would have been prepared for the [AGCO] in conjunction with his 2002 investigation and the renewal of the registration for an AGCO Gaming Services Supplier license by [the company].

[5] The AGCO identified a 19 page document as being responsive to the request and, relying on sections 14(2)(a) (law enforcement report), 17(1) (third party information) and 21(1) (invasion of privacy) of the *Act*, denied access to it, in full.

[6] The company appealed the decision.

[7] During mediation, the company's legal representative confirmed that he is representing the company, as well as two individuals whose personal information appears in the responsive record. The company and the two individuals were then treated as the appellants for the purposes of the processing of the appeal.

[8] Mediation did not resolve the matter and it was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

[9] I invited representations from the AGCO and the appellants. I received representations from the AGCO and the appellants and shared them in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction* number 7. The AGCO advised in its representations that it was no longer relying on section 17(1) of the *Act* to

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<sup>1</sup> Section 207(1)(a) of the *CCC*.

<sup>2</sup> Defined in section 1(1) of the *GCA*.

withhold the responsive record. As a result, section 17(1) is no longer at issue in this appeal.

[10] In the discussion that follows, I reach the following conclusions:

- the record contains the personal information of the individual appellants and other identified individuals
- the record is a law enforcement report but falls within the exception at section 14(4) of the *Act* and is not exempt under section 49(a)
- only certain portions of the letter qualify for exemption under section 49(b).

## **ISSUES:**

- A. Does the record contain personal information?
- B. Is the record a law enforcement report?
- C. Does the record fall within the exception at section 14(4)?
- D. Is the personal information in the record exempt under section 49(b)?
- E. Does the absurd result principle apply?
- F. Has the AGCO appropriately exercised its discretion?

## **DISCUSSION:**

### **A. Does the record contain personal information?**

#### ***Personal Information***

[11] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term 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 where 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 if 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;

[12] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[13] 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.<sup>3</sup>

[14] 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.<sup>4</sup>

### *Findings*

[15] I have carefully reviewed the record at issue and find that the record contains significant amounts of personal information of the two individual appellants. This information includes information relating to their age and marital or family status [paragraph (a)], their education or their psychological, criminal or employment history [paragraph (b)], information relating to financial transactions in which they have been involved [paragraph (b)], their addresses and telephone numbers [paragraph (d)], the views or opinions of other individuals about them [paragraph (g)] and their names appearing with other personal information relating to them [paragraph (h)].

[16] I also find that significant portions of the record relate to the appellant company, and do not contain the personal information of identifiable individuals.

[17] In addition, some information contained in the record contains information relating to named individuals in their business or professional capacity. This includes named individuals who are identified as employees of the appellant company (a list on page 3), as well as named individuals who have provided professional references for the appellant company or the two identified appellants (certain bits of information on pages 5, 7, 9 and 12). In my view, this information relates to these individuals in their professional or business capacity, and does not reveal something of a personal nature about these individuals. Accordingly, I find that this information is not the personal information of these named individuals.

[18] Lastly, there are small portions of the record that contain detailed, sensitive information about other named individuals, including information relating to their age and marital or family status [paragraph (a)], their education or employment history [paragraph (b)], information relating to financial transactions in which they have been involved [paragraph (b)], their addresses [paragraph (d)], and their names appearing with other personal information relating to them [paragraph (h)]. This information also includes information concerning the relationship these named individuals had with the two individual appellants. This information is contained in four brief items on page 10, two brief items on page 12, 6 brief items on page 13 and one item on page 14. I find

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<sup>3</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>4</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

that the information in these items contains the personal information of the identifiable individuals.

***Section 49(a)***

[19] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Sections 49(a) and 49(b) provide a number of exceptions to this general right of access. Because the record contains the personal information of the individual appellants I have decided to consider whether the record is exempt under sections 49(a) and, if necessary, section 49(b).<sup>5</sup> I will begin by considering the application of section 49(a) in conjunction with section 14(2)(a).

[20] Section 49(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, **14**, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information. [emphasis added]

**B. Is the record a law enforcement report?**

***Section 14(2)(a)***

[21] The AGCO submits that the record at issue qualifies for exemption under section 14(2)(a) of the *Act* which reads:

A head may refuse to disclose a record

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

[22] Section 14(4) provides an exception to section 14(2)(a). It reads:

Despite clause (2)(a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency where that agency is authorized to enforce and regulate compliance with a particular statute of Ontario.

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<sup>5</sup> See in this regard Order M-352.

[23] The term "law enforcement" is defined in section 2(1) of the *Act* as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
- (c) the conduct of proceedings referred to in clause (b)

[24] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.<sup>6</sup>

[25] In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the institution must satisfy each part of the following three-part test:

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.<sup>7</sup>

[26] The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact.<sup>8</sup>

[27] The title of a document is not determinative of whether it is a report, although it may be relevant to the issue.<sup>9</sup>

[28] Section 14(2)(a) exempts "a report prepared in the course of law enforcement *by an agency which has the function of enforcing and regulating compliance with a law*" (emphasis added), rather than simply exempting a "law enforcement report." This wording is not seen elsewhere in the *Act* and supports a strict reading of the exemption.<sup>10</sup> An overly broad interpretation of the word "report" could create an

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<sup>6</sup> *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

<sup>7</sup> Orders P-200 and P-324.

<sup>8</sup> Orders P-200, MO-1238 and MO-1337-I.

<sup>9</sup> Orders MO-1238 and MO-1337-I.

<sup>10</sup> Order PO-2751.

absurdity. If "report" means "a statement made by a person" or "something that gives information", all information prepared by a law enforcement agency would be exempt, rendering sections 14(1) and 14(2)(b) through (d) superfluous.<sup>11</sup>

[29] The AGCO submits that the IPC has recognized that it is a "law enforcement institution" for the purposes of the *Act*. In support of its position the AGCO relies upon Orders P-1399, P-1587, PO-1889 and PO-2796.

[30] The AGCO states that as a result of the appellant company requesting a renewal of its registration as a Gaming Services Supplier, in accordance with section 9(1) of the *GCA*,<sup>12</sup> the Registrar conducted an investigation of the company's character, financial history and competence. At paragraph 15 of its representations, the AGCO states:

The investigation was conducted to determine the honesty and integrity that are required of each registrant under the *GCA*.

[31] The AGCO states that the report was prepared by an OPP officer attached to the IEB for review by a senior OPP officer. The AGCO states:

This report describes the outcome of the officer's investigation. The report was based on an analysis and review of witness interviews, various background checks including references, criminal and regulatory checks, a review of contracts and other legal documentation, financial information and other materials.

[32] The appellants concede that the AGCO is an agency which has the function of enforcing and regulating compliance with the law. The appellants submit, however, that the record is not a report. They submit:

The purpose of the [record] is to describe rather than evaluate the appellants' circumstances, all for the purpose of the license renewal application. To the extent that the [record] contains some commentary with respect to the facts, that commentary does not change the overall quality of the document as a routine, standard report with respect to the appellants' activities.

[33] In support of its position the appellants rely on Order PO-1988.

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<sup>11</sup> Order MO-1238.

<sup>12</sup> Section 9(1) of the *GCA* reads: The Registrar may make such inquiries and conduct such investigations into the character, financial history and competence of an applicant for registration or renewal of registration, a registrant or persons interested in the applicant or registrant, as are necessary to determine whether the applicant meets the requirements of this Act and the regulations.



[34] The appellants further assert that in any event, the record was not prepared in the course of law enforcement. Rather, it was prepared as part of the AGCO's ongoing review of licensees' operations.

### *Analysis and Finding*

[35] I have reviewed the record and considered the representations of the parties. In my view the record clearly falls within the scope of the section 14(2)(a) exemption. I find that the record is a report, related to an investigation or inspection conducted by the AGCO, which is an agency which has the function of enforcing and regulating compliance with a law, namely the *GCA*.<sup>13</sup> The investigation or inspection and report are clearly part of this enforcement function.

[36] I will now address whether the report falls within the exception at section 14(4) of *FIPPA*.

### **C. Does the record fall within the exception at section 14(4)?**

#### ***Section 14(4): routine inspection report***

[37] The appellants submit in the alternative, that if the record qualifies as a law enforcement report under section 14(2)(a), it falls under the exception at section 14(4) of *FIPPA*, because it was "prepared in the course of routine inspections by an agency."

[38] Section 14(4) states:

Despite clause (2)(a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency where that agency is authorized to enforce and regulate compliance with a particular statute of Ontario.

[39] The section 14(4) exception is designed to ensure public scrutiny of material relating to routine inspections and other similar enforcement mechanisms in such areas as health and safety legislation, fair trade practices laws, environmental protection schemes, and many of the other regulatory schemes administered by the government.<sup>14</sup>

[40] Generally, "complaint driven" inspections are not "routine inspections".<sup>15</sup> The existence of discretion to inspect or not to inspect is an important but not necessarily determinative factor in deciding whether an inspection is "routine".<sup>16</sup>

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<sup>13</sup> See in this regard Orders P-1399, P-1587, PO-2177, PO-2253, PO-2796 and PO-2891.

<sup>14</sup> Order PO-1988.

<sup>15</sup> Orders P-136 and PO-1988.

<sup>16</sup> Orders P-480, P-1120 and PO-1988.

[41] The appellants submit:

The key consideration in determining whether the [record] is a "routine inspection report" is whether the process that generated the record is part of an agency's ongoing monitoring efforts or is, instead, the product of an investigation driven by a specific complaint or concern held by an agency.

Here, the [record] is of the most routine variety. The appellants are required to be licensed by the AGCO in order to provide gaming services. They were first licensed in 2000, and have successfully renewed their license in each year since. The [record] is an AGCO record prepared in conjunction with the routine license renewal.

The AGCO in its representations has not provided any evidence of any complaint or specific concern that led to the creation of the [record] nor has it even suggested that there was any such complaint or concern. There is no suggestion that the decision to review the appellants' operations was discretionary, or of the basis upon which any such discretion was exercised.

Rather, the AGCO's representations refer to a review of the appellants' operations as part of the appellants' application for license renewal (see paragraph 15 "including renewal of registration") and to confirming that the appellants meet the criteria "that are required of each registrant" (see para. 15). The references to renewal and to criteria applicable to "each registrant" demonstrate that this was a routine matter that applies to all similar registrants and not an investigation that was caused by any particular concern with respect to the appellants.

[Emphasis in original]

[42] In reply, the AGCO relies on its earlier representations and further submits that:

The granting or renewal of a gaming license is permitted pursuant to the *CCC* and [the *GCA*], only in certain limited circumstances and is not automatic. The gaming investigation report at issue is not a routine report. It is not analogous with a routine inspection report by a liquor inspector, for example. A specific investigation plan is set up every time there is an application or renewal of a gaming license, depending on the circumstances specific to that applicant, and other information which may come to the attention of the AGCO. The Registrar, who has a specific statutory mandate and responsibilities at the AGCO, a quasi-judicial regulatory agency, must put his mind to the requirements set out by statute prior to making that determination. The gaming investigation

report at issue which assists the Registrar in making that determination is not a routine document.

*Analysis and Finding*

[43] In Order PO-1988 Adjudicator Sherry Liang discussed the historical genesis and purpose of the section 14(4) exception. She wrote:

The inclusion of section 14(4) in the *Act* followed from a recommendation in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vols. 2 and 3 (Toronto: Queen's Printer, 1980) (the Williams Commission Report). The drafters of that Report recommended that information gathered for regulatory enforcement purposes be treated the same as information gathered for criminal law enforcement, for the purposes of the law enforcement exemption. However, they were concerned that such an exemption not be too broadly construed:

...if the notion of material relating to civil and regulatory enforcement is too broadly construed, much that should be made accessible under a freedom of information law would be brought within the exemption. In particular, it would be inappropriate to withhold routinely from public scrutiny all material relating to routine inspections and other similar enforcement mechanisms in such areas as health and safety legislation, fair trade practices laws, environmental protection schemes, and many of the other regulatory schemes administered by the government.

Under the U.S. act, it has been accepted that routine material of this kind not gathered for the purpose of investigating a particular offence is not exempt from the general rule of access merely because it relates to the enforcement of law.

Consistent with the above discussion, orders interpreting section 14(4) of the *Act* have found that "complaint driven" inspections are not "routine inspections" (see, for instance, Order 136). Other orders have concluded that the existence of a discretion to inspect or not to inspect is an important factor in deciding whether an inspection is "routine" (see, for instance, Order P-480 and P-1120).

I agree that the existence of a discretion to inspect is a factor to be considered in deciding whether an inspection is "routine" for the purpose

of section 14(4) of the *Act*. Since discretion, however, takes many forms and can be of varying levels of significance in the whole scheme of regulatory enforcement, I find that it is not always a determining factor. As was noted in Order 136 by former Commissioner Sidney B. Linden, "it is the nature of the inspection itself" which is important. I turn therefore to consider the nature of the inspections which are recorded in the area inspection reports.

[44] In Order P-136 Former Commissioner Sidney B. Linden explained that:

... it is the nature of the inspection itself which should be considered in deciding whether it falls within the scope of subsection 14(4). As far as "complaint driven" inspections (such as the one that generated the records at issue in this appeal) are concerned, the components of these types of inspections would necessarily vary depending on the nature of the information supplied by the complainant, and, in my view, they could not be said to be "routine".

[45] In the appeal before me it is clear that the process that took place was not complaint driven. Furthermore, although section 9(1) of the *GCA* provides for a discretionary element in the decision to make inquiries or conduct an investigation, based on the reply representations of the AGCO, the process reflected in the record is consistently done in the face of an application for renewal.

[46] In my view, in all the circumstances the report falls within the scope of the section 14(4) exclusion. Although the report at issue is tailored to the specific circumstances, no doubt similar types of inquiries or investigations are routinely conducted on the same type of renewals. Furthermore, as acknowledged by the AGCO, this type of procedure is consistently done in the face of renewal. Accordingly, in my view, this qualifies as a "routine inspection" for the purposes of section 14(4).

[47] I find therefore that section 14(4) applies in the circumstances and the report is therefore not exempt under section 49(a) in conjunction with 14(2)(a).

[48] I will now consider whether the information in the report is exempt under section 49(b).

#### **D. Is the personal information in the record exempt under section 49(b)?**

[49] As set out above, section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exceptions to this general right of access, including section 49(b). Section 49(b) introduces a balancing principle that must be applied by institutions where a record contains the personal information of both the requester and another individual.

In this case, the AGCO must look at the information and weigh the individual appellants' right of access to their own personal information against another identifiable individual's right to the protection of their privacy.

[50] In determining whether the exemption in section 49(b) applies, sections 21(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of another individual's personal privacy. Section 21(2) provides some criteria for the AGCO to consider in making this determination;<sup>17</sup> section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

[51] The appellants submit that there is no unjustified invasion of personal privacy because the information contained in the record "was supplied almost entirely by the appellants." The AGCO's representations confirm that the individual appellants' names and personal information "are mentioned repeatedly" in the record.

[52] As I noted above, a great deal of information in the record relates to the company, falls within the scope of section 2(3) or qualifies as the personal information of either, or both, of the individual appellants. Accordingly, disclosing this information to the appellants would not constitute an unjustified invasion of another individual's personal privacy, and I will order that these portions of the record be disclosed to the appellants.

[53] I will now address the remainder of the personal information in the record.

***Section 49(b)***

[54] Section 49(b) states:

A head may refuse to disclose to the individual to whom the information relates personal information,

Where the disclosure would constitute an unjustified invasion of another individual's personal privacy

[55] The AGCO's representations refer to the factor in section 21(2)(h) and the presumption in section 21(3)(b) in support of its decision. The appellants refer to the possible application of the factor at section 21(2)(d).

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<sup>17</sup> 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].

[56] Sections 21(2)(d) and (h) read:

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,

(d) the personal information is relevant to a fair determination of rights of the person who made the request;

(h) the personal information has been supplied by the individual to whom the information relates in confidence.

[57] Section 21(3)(b) 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 law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[58] The AGCO submits that information and opinions of various individuals was obtained during the course of a law enforcement investigation. In particular, the AGCO submits that certain pages of the record at issue contain the names and positions and/or relationships of various individuals involved in the overall investigation. Furthermore, the AGCO submits that as part of its investigation certain individuals provided information to the investigators in confidence and had "reasonable expectations that their involvement in the investigation would not be revealed."

[59] The appellants dispute the AGCO's assertion that the information was compiled as part of a law enforcement investigation. They submit:

There is always a *possible* violation of law anytime an institution is reviewing the conduct of a licensee. However, to apply s.21(3)(b) in the manner that the AGCO does in its representations would mean that that section is always available to institutions to deny disclosure. The real question is whether there was an active and particular investigation into a specific violation known or alleged. That is not the case here as a review of [record] will undoubtedly demonstrate.

[Emphasis in original]

[60] The appellants further submit that:

To the limited extent that information has been supplied by other parties [than the appellants], disclosure is justified for two reasons. First, the information supplied must, based on the purpose of the record, relate to the appellants' business. Second, the appellants are requesting disclosure in order to ensure a fair determination of their rights in a civil action. As such, section 21(2)(d) applies.

The appellants are defendants in a civil proceeding commenced by a third party. At the heart of the proceeding is the question of who really owns the appellants' business. The issue of ownership is part of the information collected by the AGCO and, as such, the [record] is directly relevant to the civil action. The author of these representations is counsel to the appellants in the civil proceeding, and confirms that the [record] is likely to be important in the civil proceeding, perhaps significantly important.

[61] The AGCO submits in reply:

S. 21(2)(d) of *FIPPA* identifies personal information being relevant to a fair determination of rights affecting the person as only one of a list of factors to consider. The appellant has not established why the report is necessary for a fair determination of the appellant's "rights in ongoing civil litigation", other than a statement that it is "likely to be important" in the civil proceeding regarding who really owns the appellant's business. The appellants should themselves have information to establish this fact, including their corporate registration and filing records as required by government; their corporate minute book and/or other records; and the records of their solicitors, accountants, or other financial advisors. The appellant's request for disclosure of this report contradicts their submission that information contained in the report is supplied by them and their assertion that there is no investigation or analysis in the report. Furthermore, the appellant's request for information was not restricted to information among AGCO records to establish the composition of its ownership, but for disclosure of a law enforcement report.

*Section 21(3)(b)*

[62] Previous orders have established that the investigative and compliance functions of the AGCO qualify as law enforcement activities.<sup>18</sup> Therefore, personal information which is compiled as part of an investigation by AGCO staff constitutes an "investigation into a possible violation of law" within the presumption at section 21(3)(b).

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<sup>18</sup> See for example, Orders P-1399, P-1587, PO-1889 and PO-2796.

[63] I accept the evidence of the AGCO that the remaining personal information in the record was compiled and is identifiable as part of the AGCO's investigation into a possible violation of the *GCA*, which could result in non-renewal of the company's gaming license. I find that the presumption in section 21(3)(b) therefore applies and disclosure of this information is presumed to constitute an unjustified invasion of personal privacy.

*Section 21(2)(d)*

[64] For section 21(2)(d) to apply, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing<sup>19</sup>

[65] In my view, the factor favouring disclosure at section 21(2)(d) does not apply to the personal information remaining at issue in this appeal. The appellants assert that information pertaining to the question of who really owns the appellants' business is required in order to prepare for a civil proceeding in which they are involved. I have reviewed the balance of the information remaining at issue and in my view, it does not relate to the question of who really owns the appellants' business. In my view, this factor does not apply in the circumstances.

*Section 21(2)(h)*

[66] In my view, the AGCO has failed to establish that the factor favouring privacy protection in section 21(2)(h) applies. The AGCO's submissions to support the application of this factor are extremely general and do not, in my view, provide sufficient evidentiary foundation for the application of this factor. I find, therefore, that section 21(2)(h) has no application.

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<sup>19</sup> Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).



## Conclusion

[67] Given the application of the presumption in section 21(3)(b), I am satisfied that the disclosure of the remaining personal information in the record which relates to individuals other than the individual appellants would constitute an unjustified invasion of the personal privacy of those individuals. Accordingly, I find that this information is exempt from disclosure under section 49(b) of the *Act*, subject to the application of the absurd result principle and my review of the AGCO's exercise of discretion.

### **E. Does the absurd result principle apply?**

[68] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.<sup>20</sup> The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement<sup>21</sup>
- the requester was present when the information was provided to the institution<sup>22</sup>
- the information is clearly within the requester's knowledge<sup>23</sup>

[69] If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.<sup>24</sup>

[70] The appellants submit:

An absurd result will follow if the appellants are denied access to the [record]. The [record] contains primarily information provided by the appellants as well as some other minor information provided by their family members and their employees. The appellants have owned the company in issue since its inception, and were therefore present and involved when the information contained in the document sought was provided to the AGCO. They personally have detailed knowledge of the information contained in the [record].

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<sup>20</sup> Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622.

<sup>21</sup> Orders M-444 and M-451.

<sup>22</sup> Orders M-444, P-1414 and MO-2266.

<sup>23</sup> Orders MO-1196, PO-1679, MO-1755 and MO-2257-I.

<sup>24</sup> Orders MO-1323, PO-2622 and PO-2642.

[71] The AGCO submits in reply:

The AGCO disputes that an absurd result will follow by the non-disclosure of the report. As mentioned above, it is a non-routine law enforcement report, which also contains information which is subject to privacy. While the appellants assert that they personally have detailed knowledge of the information contained in the report, there are no written consents from individuals other than the appellants. The OPP investigator is not restricted to information supplied by the appellants. The OPP investigator can and does conduct its own investigation, including independent reference checks.

### *Findings*

[72] As identified above, I found that much of the record does not qualify for exemption. I also found that small portions of pages 10, 12, 13 and 14 of the record contain detailed, sensitive information about named individuals other than the appellants. In the circumstances of this appeal, I have not been provided with sufficient evidence to satisfy me that the absurd result principle applies to these items of information. Although the appellants would be aware of some of the information in the brief items on these pages, much of the information contains sensitive personal information of these individuals relating to them at the time the record was created. In these circumstances, without clear evidence that the information was provided by the appellants, and given the nature and the age of the information, I find that the absurd result principle does not apply to this information, and I uphold the application of the exemption in section 49(b) to this information. I have provided the ministry with a highlighted copy of the record, highlighting the brief portions of pages 10, 12, 13 and 14 which qualify for exemption.

### **F. Has the AGCO appropriately exercised its discretion?**

[73] The section 49(b) exemption is discretionary and permits the AGCO to disclose information, despite the fact that it could be withheld. On appeal, this office may review the AGCO's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.<sup>25</sup>

[74] I have reviewed the circumstances surrounding this appeal and the AGCO's representations. In all the circumstances, including the amount of information that will be disclosed to the appellants as a result of this order, I am satisfied that the AGCO has not erred in the exercise of its discretion not to disclose the remaining information to the appellants.

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<sup>25</sup> Orders PO-2129-F and MO-1629.

[75] Accordingly, I find that the balance of the personal information in the record at issue in this appeal qualifies for exemption under section 49(b).

**ORDER:**

1. I order the AGCO to disclose the portions of the record that are not highlighted on a copy of the record provided to the AGCO with this order by sending it to the appellants by **February 15, 2012** but not before **February 10, 2012**.
2. I uphold the AGCO's decision to deny access to the balance of the information in the record.
3. In order to verify compliance with provision 1 of this order, I reserve the right to require the AGCO to provide me with a copy of the record as disclosed to the appellants.

Original Signed by: \_\_\_\_\_  
Steven Faughnan  
Adjudicator

\_\_\_\_\_ January 11, 2012