Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3122

Appeal PA11-499

Ontario Lottery and Gaming Corporation

October 24, 2012

Summary: The appellant made a request to the Ontario Lottery and Gaming Corporation for the approved annual operating budgets for the Niagara casinos from 2000 to the present. The institution identified two responsive records and denied the requester access, claiming the application of the mandatory exemption in section 17(1) (third party information) and the discretionary exemption in section 18(1) (economic and other interests). In this order, the adjudicator finds that the records are exempt under section 18(1)(c), and that the institution properly exercised its discretion in denying access to them. The appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 18(1)(c) and 18(1)(d).

Orders Considered: PO-3116.

Cases Considered: *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.) and *Merck Frosst Canada Ltd. v. Canada (Health)* 2012 SCC 3 (SCC).

OVERVIEW:

[1] This order disposes of the issues raised as a result of a decision of the Ontario Lottery and Gaming Corporation (the OLGC) in response to an access request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the

approved annual operating budgets for the Niagara casinos from 2000 to the present, and consolidated budget information for the resort casinos from previous OLGC annual reports.

[2] Following notification of a party whose interests might be affected by disclosure of the records, the OLGC issued a decision letter to the requester, granting access to the consolidated budget information for the resort casinos available in its Annual Reports for the fiscal years 2000/2001 to 2009/2010. The OLGC also advised the requester that information relating to the 2010/2011 fiscal year was contained in the OLGC's financial statements, posted on the Ministry of Finance's website, at a specified website address.

[3] However, with respect to the approved annual operating budgets for the Niagara casinos, the OLGC denied access to the records, in full, claiming the application of the exemptions in sections 17(1) (third party information) and 18(1)(c) and 18(1)(d) (economic and other interests) of the *Act*.

[4] The requester (now the appellant) appealed the OLGC's decision to this office.

[5] Mediation did not resolve the appeal and it moved to the adjudication stage of the process, where an adjudicator conducts an inquiry under the *Act*. I received representations from the OLGC, the affected party and the appellant. Representations were shared in accordance with this office's *Practice Direction 7*, and those portions which met the confidentiality criteria were withheld and will not be referred to in this order.

[6] For the reasons that follow, I find that the records are exempt under section 18(1)(c) of the *Act*; I uphold the OLGC's exercise of discretion and, accordingly, dismiss the appeal.

RECORDS:

The two pages of records at issue consist of a Statement of Operations/Annual Budget of one Niagara casino from 2001-2012 and of another from 2005-2012.

ISSUES:

A: Does the discretionary exemption in sections 18(1)(c) and 18(1)(d) apply to the records?

B: Did the institution exercise its discretion under section 18(1)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the discretionary exemption in sections 18(1)(c) and 18(1)(d) apply to the records?

[7] The OLGC has claimed the application of the discretionary exemption in sections 18(1)(c) and (d) of the *Act*, which state:

> A head may refuse to disclose a record that contains,
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

[8] The purpose of section 18(1) is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*[1] explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[9] For sections 18(1)(c) and (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[2]

[10] 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 18(1).[3]

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[1] Vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report).
[2] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[3] Orders MO-1947 and MO-2363.

[11] The OLGC submits that this office has traditionally required "detailed and convincing evidence" in order to justify the application of sections 18(1)(c) and 18(1)(d). The OLGC goes on to request that I consider two broader considerations, one relating to the Supreme Court of Canada's decision in *Merck Frosst Canada Ltd. v. Canada (Health)*,[4] and another relating to this office's jurisprudence, which supports an inference of harm in the circumstances. In any event, the OLGC states, the affidavit accompanying its representations provides the type of "detailed and convincing evidence" historically required by this office to uphold the exemption.

[12] The OLGC submits that in *Merck*, the Supreme Court of Canada held that it is an error of law to require proof of an "immediate" and "clear" harm under the third party harms based exception in the federal *Access to Information Act*.[5] The appellant states:

> The language of the *ATIA* considered by the Supreme Court of Canada, "reasonable expectation of probable harm," is similar to the language of sections 18(1)(c) and (d) of *FIPPA*, which turn on a mere "reasonable expectation of prejudice [or injury]." At paragraph 196 of *Merck*, Justice Cromwell questioned whether the word "probable" in the *ATIA* formulation adds anything to the applicable test at all. Rather than re-formulate the test to read out "probable," however, Justice Cromwell simply made clear that the word "probable" does not require proof of harm on a balance of probabilities. His treatment of the word "probable" highlights that the *ATIA* formulation is substantively equivalent to the *FIPPA* formulation.
>
> [emphasis added]

[13] The OLGC also submits that the purpose of section 20.(1) of the *ATIA* is similar to the purpose of sections 18(1)(c) and (d) of the *Act*. Although the court was dealing with an exemption that protects third parties from economic harm, the OLGC argues that commercially valuable information of institutions should be exempt from the general rule of public access to the same extent as similar information belonging to non-governmental organizations.[6] The OLGC submits that the Supreme Court of Canada held that the exemption that protects third parties from economic harm under the *ATIA* requires something "considerably above a mere possibility" and "somewhat less" than a likelihood of harm. The OLGC states:

> This is the test the IPC should adopt in lieu of the "detailed and convincing evidence" test that it has relied upon to date and that has been rendered highly questionable by *Merck*.

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[4] 2012 SCC 3 (SCC) (*Merck*).
[5] R.S.C. 1985, c. A-1 (*ATIA*).
[6] *Williams Commission Report*.

[14] The third party information exemption in section 20.(1) of the *ATIA* states:

> Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains
>
> (a) trade secrets of a third party;
>
> (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
>
> (b.1) information that is supplied in confidence to a government institution by a third party for the preparation, maintenance, testing or implementation by the government institution of emergency management plans within the meaning of section 2 of the Emergency Management Act and that concerns the vulnerability of the third party's buildings or other structures, its networks or systems, including its computer or communications networks or systems, or the methods used to protect any of those buildings, structures, networks or systems;
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> (c) information the disclosure of which would reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
>
> (d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

[15] In Order PO-3116, I dealt with a similar argument with respect to the effect of the *Merck* decision on this office's approach to the application of section 17(1) of the *Act*. I stated:

> In *Merck*, the Supreme Court of Canada engaged in a thorough examination of the elements of the third party information exemption in the *ATIA.* It may be that there are aspects of this decision that will inform this office's application of section 17(1). With respect to the particular argument made by the appellant here, I do not find anything in *Merck* which necessitates a departure from the requirement that a party provide "detailed and convincing" evidence of harm in order to satisfy its burden of proof. As the Ontario Court of Appeal stated in the *WCB* decision, the phrase "detailed and convincing" is about the quality of the evidence required to satisfy the onus of establishing a reasonable expectation of harm:

> . . . the use of the words "detailed and convincing" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed.[7]

[16] While the exemptions being examined in this appeal are sections 18(1)(c) and 18(1)(d) of the *Act*, I adopt the same approach I took in Order PO-3116 with respect to the evidentiary burden to be met by the OLGC to justify the application of the exemption. Consequently, the OLGC is still required to provide "detailed and convincing" evidence establishing harm to its economic interests, competitive position, the financial interests of the Government, or the ability of the Government to manage the economy of Ontario.

[17] As previously stated, the OLGC has also requested that I make a finding of inferred harm, because the information in the records is detailed and confidential commercial information related to a highly competitive commercial venture. The OLGC cites a number of previous orders of this office, in which harm was inferred based on the nature of the records and the competitive context in which they existed.[8]

[18] It is not necessary for me to determine that harm can be inferred from the circumstances in this appeal, as I am satisfied that the OLGC has provided sufficiently "detailed and convincing" evidence establishing a reasonable expectation of harm to its competitive position under section 18(1)(c) of the *Act*. My reasons follow.

[19] The OLGC provided its evidence on the sections 18(1)(c) and 18(1)(d) harms by way of affidavit evidence provided by its Senior Vice President responsible for managing all of its gaming related assets. The OLGC states that it maintains authority over four resort casinos in Ontario, which generate over a billion dollars of revenue per year, a portion of which is directed to the province for use in healthcare, amateur sports, cultural activities and education. In 2010, for example, the OLGC states, the resort casinos contributed 176 million dollars to the province. The two Niagara casinos, the OLGC advises, are a significant part of its resort casino business. The OLGC states that in the fiscal year ending March 31, 2011, the Niagara casinos had revenues of approximately 600 million dollars, employing approximately 4,200 individuals.

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[7] See note 2 at para. 26.
[8] Orders PO-1745, PO-1695, P-314 and Order 204.

[20] The OLGC submits that disclosure of the records will cause harm to both it and the province. In particular, the OLGC states that the Niagara casinos face intense competition from American competitors, including the Seneca Niagara Casino and Hotel (Seneca), which opened in 2002 and expanded significantly in 2006. The OLGC advises that Seneca is located directly across the Niagara River from Niagara Falls, Ontario and offers an identical gaming-based experience as the Niagara casinos. In addition, the OLGC submits that the Niagara casinos also compete for business with local restaurants and hotels. The OLGC states:

> Though OLGC draws the majority of its customers from Canada and Seneca draws the majority of its customers from the United States, cross-border competition is significant. Seneca actively targets Canadian consumers, both through promotions aimed at the Greater Toronto Area market (e.g. Toronto Maple Leaf promotions and Toronto-based bus tours and advertising campaigns run through GTA media) and at visitors to Niagara Falls (e.g. through marketing partnerships with Canada-side hotels).

[21] The OLGC states that the records at issue contain annual budget amounts for the two Niagara casinos, which were presented to it by the affected party for approval. The OLGC states that the records display:

- Annual budgeted revenue and expenses or "input costs" for the business lines, namely slots, tables, food and bar, entertainment and non-gaming business;

- Annual budgeted payroll expenses, the win tax expense, customer loyalty expenditures and unallocated gaming expenses; and

- Cost of sales information, payroll information and other expense information relating to the non-gaming business lines, including the hotel.

[22] The OLGC further submits that it does not publish or broadly distribute the information set out in the records. Instead, it states that it reports its financial performance on a consolidated basis in its annual reports and on the public accounts. In addition, the OLGC states that it publishes quarterly performance reports, which include total unaudited revenue for each quarter for each of the four resort casinos, including the Niagara casinos. The OLGC also advises that the "top-line" data is reported in the quarterly performance reports, but not data broken down by business line or expense data.[9]

[9] The OLGC provided the IPC with examples of the type of information that it publishes, from excerpts from an annual report, the public accounts and a quarterly performance report.

[23] The OLGC further submits that disclosure of the records could permit a competitor to gain insight into the Niagara casinos' operation and adjust its own strategy to compete more effectively against the OLGC, causing it the type of harm set out in section 18.

[24] The OLGC states:

> We do not publish or broadly disclose more detailed financial information than included in the exhibits[10] to this affidavit because detailed financial information would be helpful to Seneca and our other competitors (e.g. local restaurants and hotels). This is the same reason why OLGC has an interest in keeping the information in the two pages of budget information confidential; this information would enable Seneca and other competitors to conduct an analysis about how we operated a single casino in competition with Seneca from 2002 to 2006 and how we use our two casinos to compete with Seneca since.
>
> The information in the two pages under appeal captures 100% of our planned investment in each casino operation in each year broken down by business and expense type. It gives a reader insight into our operating strategy over time and can be examined in light of external events (e.g. Seneca casino expansions, changes to the exchange rate) to see how we have adjusted our operating strategy. Older data is as sensitive as newer data because it shows how we think. The entire information in the two pages can be used to understand our approach, anticipate our moves and make competitive adjustments.

[25] The OLGC then goes on to cite five specific examples of the type of analysis that could be undertaken by Seneca or any other competitor to compare each expenditure against its own, in order to develop insight into how the OLGC operates the Niagara casinos. The OLGC argues that this insight and potential action taken by competitors would result in prejudice to its economic interests or its competitive position. The examples provided by the OLGC cannot be described in detail in this order for confidentiality reasons, but I will consider them as part of the OLGC's representations.

[26] The affected party states that it agrees with the OLGC's representations in regard to the application of the exemption in sections 18(1)(c) and 18(1)(d). The appellant did not make representations on the application of this exemption.

[27] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities,

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[10] *Ibid*.

and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[11]

[28] This exemption does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[12]

[29] Although the two resort casinos are operated by the affected party, it is clear from the OLGC's public financial records that it receives revenues from these operations. Having carefully reviewed the representations of the OLGC, I am satisfied that it has provided credible, detailed and convincing evidence that disclosure of the information in the records could reasonably be expected to cause harm to its economic interests and competitive position with respect to the revenues generated by the two Niagara casinos.

[30] Therefore, I find that the records are exempt from disclosure under section 18(1)(c), subject to my finding regarding the OLGC's exercise of discretion. Consequently, it is not necessary to determine whether the records are exempt under section 18(1)(d) or under the mandatory exemption in section 17(1), which was also claimed by the OLGC in its decision letter, and the affected party in its representations.

Issue B: Did the institution exercise its discretion under section 18(1)? If so, should this office uphold the exercise of discretion?

[31] The section 18(1) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[32] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose;
- it takes into account irrelevant considerations; or
- it fails to take into account relevant considerations.

[11] Orders P-1190 and MO-2233.
[12] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

[33] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[13] This office may not, however, substitute its own discretion for that of the institution.[14]

[34] Relevant considerations may include the purposes of the *Act*, including the principles that information should be available to the public, and exemptions from the right of access should be limited and specific.

[35] The OLGC submits that it exercised its discretion properly in denying access to the records under section 18(1) and that its competitive interests should prevail over the public right of access. The OLGC states that it:

> [R]eflected on the need to make information available to the public as per the purpose of *FIPPA*. It considered the nature of the information at issue and the significance of the information to its competitive endeavor.
>
> [emphasis added]

[36] The affected party agrees that the OLGC exercised its discretion properly. The appellant did not provide any representations on this issue.

[37] I have reviewed the circumstances surrounding this appeal and the OLGC's representations on the manner in which they exercised their discretion. As set out in its representations, the OLGC publishes consolidated information concerning its revenues, including quarterly reports, which set out the combined gaming revenue for the Niagara casinos. In my view, there is a considerable amount of information in the public domain relating to the OLGC's revenues and expenses in relation to resort casinos. I am satisfied that the OLGC weighed the appellant's interest in access to information against its reasonable expectation of harm to its competitive position and economic interests should the records be disclosed. I am also satisfied that the OLGC took into account relevant considerations and did not take into account irrelevant ones. Accordingly, I am satisfied that the OLGC did not err in the exercise of its discretion to refuse to disclose the records to the appellant.

[38] Consequently, I find that the records qualify for exemption under section 18(1)(c) of the *Act*. I uphold the OLGC's decision and dismiss the appeal.

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[13] Order MO-1573.
[14] Section 54(2) of the *Act*.

ORDER:

I uphold the OLGC's decision and dismiss the appeal.

Original Signed By: October 24, 2012
Cathy Hamilton
Adjudicator