Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3313

Appeal PA12-492

Ontario Lottery and Gaming Corporation

February 27, 2014

Summary: The appellant sought access to information on the payout rates for all of the slot machines at two specific slot machine facilities. OLG relied on the discretionary exemptions in sections 18(1)(c) and (d) (economic and other interests) to deny access to the requested information. This order upholds OLG's decision.

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

Orders and Investigation Reports Considered: Orders PO-1745, PO-3116 and PO-3122.

OVERVIEW:

[1] The Ontario Lottery and Gaming Corporation (OLG) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to casino slot machine payout rates as follows:

> For the 14,313 slot machines indicated on the "Ontario Lottery and Gaming Corporation Quarterly Performance Report for OLG Casinos and Slots at Racetracks – Unaudited Results, Fourth Quarter of Fiscal 2011-2012 (January – March)" document posted on OLG.ca, a breakdown by location of payout rates for the slot machines at each location.

[2] In response to the request, OLG wrote to the requester and advised him that information regarding payout levels of slot machines at OLG gaming facilities is available on OLG.ca. It also enclosed a copy of a fact sheet entitled "Payout Levels of Slot Machines at OLG Gaming Facilities." In addition, OLG returned the fee submitted by the requester for the information request.

[3] The requester replied by clarifying his request. He advised OLG that he is aware that the minimum payout for a slot machine in Ontario is 85%. He stated that the purpose of his request was an attempt to determine, in aggregate, what the actual payouts are for the machines identified in OLG's Financial Report for the fourth quarter of 2012. He also specified that he was more interested in the slot machine information for Woodbine Racetrack, Rideau Carlton Raceway and Niagara Casino. The requester also asked OLG to define how the 85% payout rate should be interpreted so that he could have a clear understanding of what a slot machine player could expect.

[4] OLG confirmed the clarified request to be the following:

> The actual payouts in aggregate for the slot machines identified in the 2012 fourth quarter performance highlights for Woodbine, Rideau and Niagara Casino.

[5] OLG then issued a decision denying access to the requested information. OLG relied on the discretionary exemption in section 18(1) of the *Act* to deny access to the slot machine information relating to Woodbine Racetrack and Rideau Carleton Raceway. For slot machine information regarding Niagara Casino, which is privately owned, OLG told the requester to contact Niagara Casino directly.

[6] The requester, now the appellant, appealed OLG's decision to this office. In his appeal letter, he stated that slot machines were the only gaming opportunity offered by OLG for which players could not determine the odds in favour of the house and the potential payouts. The appellant noted that the payout rate on individual slot machines can vary from 85% to 99%, and the chances of winning a jackpot can vary between one in 4096, and one in 16 million. He stated that an important part of responsible play is to know the chances of winning. The appellant also submitted that slot machines earned a total return of over $2 billion in 2012 and to state that the mechanics behind the machines and the actual odds of winning a jackpot at any one machine relates to the economic interests of Ontario is to "by force of law, withhold critical information that any responsible player should be entitled to know."

[7] During the mediation stage of the appeal, OLG confirmed that it relied on the discretionary exemptions in sections 18(1)(a) (valuable government information), and 18(1)(c) and (d) (economic and other interests) to deny access to the requested information. OLG also advised that the requested information for Niagara Casino was not reported to OLG because Niagara Casino is a private casino. Accordingly, this part of the request is no longer at issue.

[8] Also during mediation, the appellant raised the possible application of the public interest override in section 23 of the *Act* as an issue in the appeal.

[9] Mediation did not resolve the issues in the appeal and it was moved to the adjudication stage for an inquiry under the *Act.*

[10] I sought and received representations from the parties and shared them in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction Number 7.*

[11] In this order, I uphold OLG's Decision.

RECORDS:

[12] The records at issue are two tables that set out the theoretical percentage payouts for all of the slot machines at Woodbine Racetrack (two pages) and Rideau Carleton Raceway (one page) as of March 31, 2012. Each table identifies the specified rates above the minimum 85% at which the slot machines pay out, as well as the total number of machines at each location that are set at each of the specified payout rates.

ISSUES:

A. Does the discretionary exemption at section 18(1)(c) or (d) apply to the records?

B. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 18(1)(c) exemption?

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

DISCUSSION:

A. Does the discretionary exemption at section 18(1)(c) or (d) apply to the records?

[13] In its representations, OLG claims that the records are exempt from disclosure under 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;

[14] The purpose of section 18 is to protect certain economic interests of institutions, including 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, 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.[1]

[15] The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[2]

[16] Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians.[3]

[17] For sections 18(1)(c) or (d) to apply, OLG 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

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[1] Orders P-1190 and MO-2233.
[2] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.
[3] Order P-1398 upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233.

"reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.[4]

[18] 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.[5]

[19] Parties should not assume that harms under section 18 are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[6]

OLG's Representations

[20] OLG asserts that this office has previously affirmed, in Order PO-1745, that theoretical payout rates qualify for exemption under section 18 of the *Act*. OLG submits that the context of this appeal and the significance of the information at issue are the same as those in Order PO-1745. In that order, Senior Adjudicator David Goodis upheld the Ontario Casino Corporation's decision to withhold under section 18(1)(c) information about slot machine theoretical payouts in Ontario broken down by casino and betting denomination. OLG submits that Senior Adjudicator Goodis inferred a reasonable expectation of probable harm based on the general competitive context and it relies on the following reasoning from pages 6 and 7 of Order PO-1745:

> The information at issue, the "hold percentages", describes the pricing practices and/or strategies of the casinos for specific types of slot machines at specific locations. This information reveals how patrons, as an overall group, are "charged" on a monthly basis for the use of the machines, expressed as a percentage of amount wagered rather than as a dollar figure. Disclosure of this information could well increase competition by setting off a price or "winnings" war among casinos within Ontario, as well as between Ontario casinos and those in border states such as Michigan and New York. It is reasonable to expect that, in response to disclosure, one or more of the Ontario casinos would lower their hold percentages in order to attract patrons, to prevent losing business to neighbouring competitors in Ontario or in border states which may already have lower hold percentages, or which may lower them in order to gain a competitive advantage. In either eventuality, this increased competition from disclosure could reasonably be expected to produce lower revenues or profits for Ontario casinos, which in turn would prejudice the economic interests of the OCC. While I have not been presented with detailed and convincing evidence to demonstrate the degree of likelihood of increased

[4] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[5] Orders MO-1947 and MO-2363.
[6] Order MO-2363.

> competition of the sort described (which would have made this decision much easier), I am prepared in the circumstances to accept that this kind of competition among casinos serving a common market is, on balance, more likely than not to occur, with resulting prejudicial consequences to the economic interests of the OCC.

[21] OLG asserts that this appeal should be dismissed on the basis of the reasonable protection to its multi-billion dollar slot play market offered by Order PO-1745.

[22] Along with its representations, OLG provides an affidavit sworn by its Senior Vice President of Gaming. It argues that the affidavit establishes the same competitive context that supported the inference of Senior Adjudicator Goodis in Order PO-1745. It further asserts that the affidavit on its own establishes a reasonable expectation of harm sufficient to justify the application of the section 18(1)(c) and (d) exemptions. OLG asserts the following with reference to paragraphs from the affidavit:

- The Rideau Carleton and Woodbine casinos face "strong, direct" competition from out of jurisdiction competitors with large slot facilities (paragraphs 8 to 12);

- Players in the market will prefer to play on "loose" machines that have a greater return (paragraph 15);

- OLG's competitors can adjust their theoretical payouts to compete with OLG (paragraph 17); and

- The competitive "stakes" are high, with over $700 million in combined revenue at stake at Rideau Carleton and Woodbine and almost $3 billion at stake across the province (paragraph 6).

[23] OLG continues that the significance of the information at issue in Order PO-1745 is the same as the significance of the information at issue in this appeal. It states that the average rates by facility, although general, are competitively significant because they are a "simple comparator"; this assertion is repeated in paragraph 19 of the affidavit.

[24] OLG further submits that the specific cross-border competition described in the affidavit and the harm flowing from asymmetrical availability of information on payout rates from the two casinos' most direct competitors, constitute additional detailed and convincing evidence which makes the case for protection of theoretical payout information even stronger in this appeal than it was in Order PO-1745.

[25] OLG also argues that the standard of proof of harm that I should adopt in this appeal is that set out by the Supreme Court of Canada in its recent decision in *Merck*

Frosst Canada Ltd v Canada (Health).[7] OLG argues that, in accordance with the ruling in *Merck*, sections 18(1)(c) and (d) are engaged if there is evidence establishing a risk of harm that is "considerably above a mere possibility" and "somewhat less" than a likelihood.

[26] The affidavit sworn by OLG's Senior Vice President of Gaming states:

- The affiant is responsible for managing all of OLG's gaming related assets, including OLG's slot facilities at Rideau Carleton Raceway featuring over 1,200 slot machines and Woodbine Racetrack featuring 3,000 slot machines.

- The contribution from OLG's slot facility business generates a significant economic benefit to the province.

- Slot facility revenues are directed to the province for investment in hospitals, amateur sport, recreational and cultural activities, communities and provincial priority programs such as health care and education.

- Slot machines in Ontario generate almost three billion dollars in revenue a year.

- Rideau Carleton Raceway and Woodbine Racetrack employ over 950 employees combined.

- The Rideau Carleton Raceway slot facility faces strong, direct competition from:
    - Casino Lac-Lemay in Gatineau, Quebec, which regularly runs active media campaigns in Ottawa to attract gaming patrons to its approximately 1,800 slot machines; and
    - Mohawk Casino in Hogansburg, New York, which advertises that it has over 1,600 slot machines.

- The Woodbine Racetrack slot facility faces strong, direct competition from:
    - Seneca Niagara Casino in Niagara Falls, New York, which advertises that it has more than 2,000 slot machines; and
    - the Buffalo Creek slots in Buffalo, which total more than 450.

- Though OLG 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 and Seneca actively targets Canadian consumers through promotions aimed at the Greater Toronto Area market (for

[7] (2012) SCC 3. (*Merck*)

example Toronto Maple Leaf promotions and Toronto based bus tours and advertising campaigns run through GTA media) which is the major market for the Woodbine Racetrack slot facility.

- The records identify how OLG has set theoretical payouts for its slot machines by identifying how many machines are set at specified theoretical payout rates, which is the percentage of money wagered on slot machines that will be paid out to players over the life cycle of the slot machine.

- Gaming regulators establish minimum theoretical payouts rates; in Ontario, the minimum rate is 85%.

- OLG chooses a mix of slot machines at each of its slot facilities so it has an array of machines that operate at or above the minimum. This is a business decision that OLG makes in light of market and competitive factors, and its competitors in Quebec and New York have the same choice.

- The information at issue is confidential and competitively significant.

- OLG does not publish or broadly distribute information about is theoretical payout rates at any level of aggregation.

- Although a facility average is a general measure of how "loose" or "tight" slot play is at a facility on the whole, it is also a simple comparator that would have significant meaning to OLG's customers and competitors.

- OLG does not publish or broadly disclose information about its theoretical payouts because the sharing of this information is not a feature of the slot play market in Ontario and its surrounds.

- None of Casino Lac-Leamy, Mohawk Casino, Seneca Niagara Casino or Seneca Buffalo Creek Casino currently makes any information about its theoretical payouts available to the public or to OLG. Quebec theoretical payout information has previously been published in an American "loosest slots" publication, but not since 2010.

- The publication of average theoretical payouts has become a feature in many American markets, where facilities compete on and promote their slot play based on their average theoretical payout rates. However, OLG's market is different, and if the information at issue is disclosed, it will invite a significant change in OLG's market.

- The appellant's comparison of knowing the odds of winning and prize distribution in horserace betting and lottery ticket purchases does not illustrate a problem that justifies the disclosure of OLG's theoretical payout rates for slot machines.

- The odds on horserace bets represent the amount a bookmaster will pay out on a winning bet; this is similar to information OLG provides to players about the prize payouts for slot machine wagers.

- As for lotteries, OLG publishes information about the approximate odds of winning and the amount of money OLG expects to return to players. It can do this because the market for its lottery products works very differently than the market for slot play. OLG's lottery business faces significant indirect competition (including from non-gaming alternatives) but little direct competition that warrants against publication of the information identified by the requester.

[27] The affidavit also contains three confidential paragraphs that set out specific concerns of the harm that could result if the information at issue were disclosed, given the unfair competitive advantage OLG's competitors would enjoy as a result of knowing OLG's average theoretical rates while not disclosing their own rates to OLG. The affidavit then describes how such rate information was used in the past. For confidentiality reasons, I am not able to provide further details on these three paragraphs in this order.

The appellant's representations

[28] When I invited the appellant to submit his representations, I asked him to consider Order PO-1745 and specifically address why I should decide this appeal differently.

[29] In his representations, the appellant relies on three arguments:

- The dissimilarity between slot machines and every other form of legalized gambling in Ontario.

- The availability of identical information from other jurisdictions.

- The assertion that OLG should not be provided with the scope to operate in a way that is designed to minimize competition both from within the province and from neighbouring jurisdictions.

[30] The appellant provides information on slot machine revenue which he has obtained from OLG publications and web sites, and he compares this information to that

for other forms of gambling offered by OLG, including lottery tickets, sports games, horseracing and gaming tables. He asserts that the odds of winning are available for all forms of gambling except slot machine play. He states "[t]he odds may be poor but the player has the choice to play or not." The appellant then contrasts this with slot machine play, which, he argues, is not different than other forms of legalized gambling despite OLG's submissions. He refutes OLG's assertion that providing "slot machine players with the same information that is provided for every other form of gaming would jeopardize its revenue base."

[31] Regarding his second argument, the appellant asserts that some of OLG's competitors provide, to some extent, the information he seeks. He refers me to a publication from Loto Quebec which states that the "take out rate" on slot machines in Quebec is approximately 8%. He asserts that casino magazines publish information on the "loosest" slot machines and he provides a link to a 2007 article on this subject. The appellant claims that this information contradicts the evidence from the affidavit provided by OLG. He then argues that if OLG presently has higher "take outs" than its competitors, withholding the information at issue is prejudicial to the citizens of Ontario and against the public interest. Immediately after this point, he writes:

> Similarly, if certain casinos within the province are authorized to have higher takeouts than others then this is detrimental to the citizens of Ontario served in that particular OLG Gaming Zone and therefore against the public interest of those Ontarians.

[32] The appellant also rejects OLG's argument that the gambling market in Ontario is different than in other jurisdictions. He points out that horseracing uses simulcasting to increase wagering and track odds are paid off in different jurisdictions while the originating track is paid a percentage of the handle. He notes that horseracing in Ontario accepts the fact that the take out rates at every horseracing simulcast track and for every available wager are known, and gamblers have the ability to discriminate between tracks based upon this information, as there is no alternative.

[33] The appellant challenges OLG's contention that competition from neighbouring jurisdictions would place it at a disadvantage should the information at issue be disclosed. He submits that given that the information is available in neighbouring jurisdictions, OLG is asking that it be treated differently from its competitors. He then asserts that competition is good and that in a competitive environment, the casino frequenter is the winner. On this basis, he argues that disclosure of the information is in the interests of the casino frequenter. He notes that OLG markets itself aggressively within a non-competitive environment and that its mandate, in his view, is to responsibly operate gambling options in the province and return the revenue generated to provincial coffers.

[34] Finally, the appellant opines that it is preferable for the information to be disclosed, and the change that OLG fears is long overdue.

Analysis and findings

[35] The theoretical payout rate information that the appellant seeks identifies the specified rates above the 85% minimum at which each slot machine at Woodbine Racetrack and Rideau Carlton Raceway pays out. The information reveals the payout rates selected by OLG for the slot machines at these two facilities, as well as, the total number of slot machines at each location that are set to each of the specified payout rates.

[36] Having reviewed the evidence before me, I find that disclosure of the theoretical payout rate information in the record could reasonably be expected to prejudice the economic interests or competitive position of OLG such that the exemption in section 18(1)(c) applies. My reasons for this finding are the following.

[37] OLG's evidence establishes that theoretical payout rates for slot machines in Ontario and its surrounding areas are not currently publicly disclosed and have not been since 2010. While the appellant asserts the opposite, he relies on an article from 2007 to do so; this predates the 2010 date provided by the appellant. OLG acknowledges that theoretical payout rates are published in many American markets, but not the markets in Quebec or New York that are relevant to the records at issue due to their direct competition with Carleton Rideau Raceway and Woodbine Racetrack.

[38] I have no evidence before me that the information at issue in this appeal is publicly disclosed by any of OLG's competitors in the jurisdictions surrounding the Rideau Carleton Raceway and Woodbine Racetrack slot machine facilities. This is significant and in this context, I find OLG's submissions about the unfair advantage that disclosure would give to OLG's competitors persuasive.

[39] OLG describes in the affidavit and in its representations, the use that its competitors could make of the information at issue in order to lure customers away from Rideau Carleton Raceway and Woodbine Racetrack. If the information were disclosed, OLG's competitors would know the payout rates above the 85% minimum that are available at the slot machine facilities at Woodbine Racetrack and Rideau Carleton Raceway and the number of slot machines that are set to each of these specified payout rates. I agree with OLG's submission that the theoretical payout information and the facility average that could in turn be determined from the information at issue, is a simple but significant comparator for OLG's customers and competitors. I accept OLG's assertion that its competitors, armed with the information at issue, could use it to implement measures and mount campaigns to promote superior returns to players, and thus, lure customers away from OLG's slot machine facilities. Taken with the fact that OLG would not have access to the reciprocal information from

its competitors to counteract any such measures or campaigns, I find it is reasonable to expect that OLG would lose customers and revenue from its slot machine facilities. The appellant bolsters my finding with his remarks on the value of the information at issue to players who could use the information to decide where and how much to wager; and with his acknowledgement that the increased competition for slot machine players that would result from disclosure of the information would cause the "change" that OLG fears, which in his opinion is "long overdue."

[40] I also rely on the confidential paragraphs in the affidavit sworn by OLG's Senior Vice President of Gaming, which point to the specific use that could be made of the information to prejudice OLG's economic interests and competitive position, and also provide evidence of this specific use of similar information in the past. While I cannot provide further details on these paragraphs, I am satisfied that they provide the detailed and convincing evidence required to establish a reasonable expectation of harm under section 18(1)(c).

[41] Regarding the appellant's arguments that slot machine play information on the odds of winning should emulate that in other forms of legalized gambling in Ontario, I do not find them persuasive for the purposes of the section 18(1)(c) test. The fact that the odds of winning are posted for lottery ticket sales and for horserace betting does not detract from the fact that disclosure of theoretical payout rates for OLG's slot machines could reasonably be expected to prejudice its economic interests or its competitive position. Moreover, the appellant is aware that in Ontario, the minimum theoretical payout rate for slot machines is 85%; this means that slot machines in Ontario will pay out a minimum of 85% of the money wagered over their life cycle. I find that this is information on the odds of winning at slot machine play in Ontario.

[42] Accordingly, I find that the records are exempt from disclosure under section 18(1)(c), subject to my determination of issues B and C below.

[43] As I have found the records to be exempt under section 18(1)(c), it is not necessary for me to consider the application of the section 18(1)(d) exemption to the records.

[44] With respect to OLG's submissions on the standard of proof and the application of *Merck* in this appeal, I note that this is the third time that OLG has raised this argument with this office since the *Merck* decision was issued in 2012. In Order PO-3122, Adjudicator Cathy Hamilton, faced with the same argument, wrote the following at paragraph 15 of the decision:

> 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:
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> > . . . 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.[8]

[45] Adjudicator Hamilton's reasoning in Orders PO-3116 and PO-3122 applies in this appeal as well, and I adopt it in response to OLG's argument.

B. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 18(1)(c) exemption?

[46] Section 23 states:

> 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.

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[8] *Supra*, note 4 at paragraph 26.

[47] 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.

[48] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his contention that section 23 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by an appellant. Accordingly, this office will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[9]

[49] 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.[10] 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.[11]

[50] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[12]

[51] Any public interest in *non*-disclosure that may exist also must be considered.[13] 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.[14]

[52] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation[15]

- the integrity of the criminal justice system has been called into question[16]

- public safety issues relating to the operation of nuclear facilities have been raised[17]

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[9] Order P-244.
[10] Orders P-984 and PO-2607.
[11] Orders P-984 and PO-2556.
[12] Order P-984.
[13] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[14] Orders PO-2072-F and PO-2098-R.
[15] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).
[16] Order PO-1779.

- disclosure would shed light on the safe operation of petrochemical facilities[18] or the province's ability to prepare for a nuclear emergency[19]

- the records contain information about contributions to municipal election campaigns.[20]

[53] A compelling public interest has been found *not* to exist where, for example, a significant amount of information has already been disclosed and this is adequate to address any public interest considerations.[21]

[54] 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.

[55] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[22]

[56] The appellant does not directly address this issue in his representations. However, throughout his representations, as set out above, he makes various assertions about why it would be preferable and fair for OLG's casino customers to have access to the information at issue. He asserts that individuals who frequent slot machine facilities in Ontario would be able to make more responsible gaming decisions and would have the choice to play or not play at a specified facility.

[57] The appellant also makes a number of statements regarding why the public interest would be served by disclosure of the records. Then, rather confusingly, he argues that certain Ontario casinos should not be authorized to have higher payouts than those in other Ontario gaming zone regions because this would be detrimental to the Ontarians served in the other OLG gaming zones, and for this reason, disclosure is in the public interest. Finally, the appellant makes a number of statements about the benefit of competition and asserts that in a competitive environment, the casino frequenter is the winner.

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[17] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.
[18] Order P-1175.
[19] Order P-901.
[20] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.
[21] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[22] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.).

[58] While the appellant makes a number of policy oriented arguments about what is good for the public with respect to the use of OLG slot machines, these submissions do not address, let alone establish, the two requirements for the application of the public interest override in section 23.

[59] In Order PO-1745, which I asked the appellant to consider, the same claim was made about the application of the public interest override. Senior Adjudicator Goodis addressed that claim as follows:

> In British Columbia Information and Privacy Commissioner Order 285-1998, referred to above, the Commissioner states:
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> > The applicant has asked for access to information on "the gross revenue from 275 slot machines" operated by the third party at the Stockmen's Hotel Casino. The Lottery Corporation provided the applicant with the province-wide "revenue after prizes" (RAP) per slot machine for the period of his request. The Lottery Corporation says that it uses the RAP as its equivalent of gross revenue and has therefore assumed, reasonably in my view, that what the applicant is seeking is the RAP for the 275 slot machines in question . . . As an aside, it is my view that by disclosing the province-wide RAP for the period in question the Lottery Corporation has gone a considerable way towards meeting the goals of accountability and transparency of public bodies as contemplated by the Act.
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> He later rejects the argument that the "public interest override" in the B.C. legislation should apply to compel disclosure.
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> In my view, the B.C. Commissioner's comments are relevant here. The OCC has gone a considerable way towards meeting the goals of accountability and transparency of government institutions by disclosing that the minimum payout percentage for its slot machines is 85%.
>
> I do not accept the submissions of the OCC and the casinos that the information in the records would not be useful to patrons in determining whether and how to play various slot machines. Indeed, this argument diminishes the force of the OCC's submissions under section 18(1)(c) on the impact of disclosure of this information on competition. The information, although generalized and based on past experience, would allow individuals to identify pricing trends and strategies, and thereby enhance the development of their own playing strategies. However, I am not persuaded that the enhanced ability of some members of the public to

> become "smarter" players amounts to a "compelling public interest". As a result, I find that section 23 does not apply to override the application of the section 18(1)(c) exemption.

[60] I adopt the reasoning set out in Order PO-1745 by Senior Adjudicator Goodis on the issue of the public interest override.

[61] I find that the appellant has not established a compelling public interest in disclosure of the records, and none is evident from my review of the records and the evidence before me.

[62] Having found that the first requirement of section 23 is not met, I find that the public interest override has no application in this appeal.

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

[63] The section 18(1)(c) 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.

[64] 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
- it fails to take into account relevant considerations.

[65] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[23] This office may not, however, substitute its own discretion for that of the institution.[24]

[66] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[25]

- the purposes of the *Act*, including the principles that

[23] Order MO-1573.
[24] Section 54(2).
[25] Orders P-344 and MO-1573.

- ○ information should be available to the public
- ○ individuals should have a right of access to their own personal information
- ○ exemptions from the right of access should be limited and specific
- ○ the privacy of individuals should be protected

- the wording of the exemption and the interests it seeks to protect
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the historic practice of the institution with respect to similar information.

[67] OLG asserts that it exercised its discretion properly in denying access to the records under section 18(1)(c). It states that it reflected on the need to make information available to the public in accordance with the purpose of the *Act*, and considered the nature of the information and the significance of the information to its competitive endeavours. It relies on the reasons set out in the affidavit as the basis for deciding that its competitive interests should prevail over the public right of access.

[68] I find that OLG exercised its discretion in deciding to withhold the records under the section 18(1)(c) exemption. OLG considered the nature of the information and its significance as it is supposed to under section 18(1)(c). OLG also considered the fact that it has withheld similar information in the past and its decision has been upheld by this office. Based on OLG's representations, I have found above that the records are exempt under section 18(1)(c). Accordingly, I uphold OLG's exercise of discretion as reasonable.

ORDER:

I uphold OLG's decision and dismiss the appeal.

Signed By: February 27, 2014
Stella Ball
Adjudicator