Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4236

Appeal PA18-00743

Ontario Lottery and Gaming Corporation

February 17, 2022

Summary: The appellant requested access to financial forecasting information pertaining to casino gaming bundles in Ontario. The Ontario Lottery and Gaming Corporation identified a responsive record containing financial information and relying on the exemptions at sections 17(1) (third party information) and 18(1) (economic and other interests of Ontario) denied access to it, in full. In this order the adjudicator finds that the information at issue qualifies for exemption under sections 18(1)(c) and/or (d) of the Act and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, sections 18(1)(c) and (d).

Orders Considered: Orders PO-2758, PO-3122, PO-3313, PO-3415, PO-3475, PO-3495 and PO-3926.

OVERVIEW:

[1] This order relates to an access request made to the Ontario Lottery and Gaming Corporation (the OLGC or OLG) under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to information about a specific type of forecast relating to gaming bundles in Ontario. The request read as follows:

> … I would like to request [OLGC's] forecast of gross revenue (before deduction of the service provider fee), net revenue and net profit to the province for each gaming bundle that underpins the F2018-19 annual

plan/budget. I would like this data for the next three years (i.e. forecast of fiscal 2018-19, 2019-20, 2020-21 by bundle).

[2] The OLGC explains in its representations that the request was received on October 18, 2018 and is for financial data used in OLGC's fiscal 2019 ("F2019") budget and 3-year plan for land-based gaming. OLGC says that the relevant data is based on the financial data used in the F2019 budget and 3-year plan per gaming bundle, which was prepared in the fall of 2017.

[3] By way of background, starting in 2010, the OLGC undertook a review of its gaming and lottery operations in order to generate more revenue for the Province of Ontario (Ontario). As part of OLGC's modernization strategy, the OLGC divided all its slot machines at racetracks and casino operations, with the exception of Caesars Windsor, into eight different regional "bundles" and began a process to identify private sector service providers (Service Providers) to enter into a Casino Operating and Services Agreement (COSA) with the OLGC to operate each bundle.[1]

[4] The OLGC states that the COSA for each gaming bundle was arrived at by a separate competitive procurement process. It submits that a "threshold" amount proposed by a bidder constitutes a key distinguishing factor within the bidding process for each gaming bundle and in the award of the bid. The threshold amount represents the revenue level above which the revenues are shared by the service provider and the OLGC (the OLGC is entitled to all the revenue up to the threshold amount).

[5] As set out in the OLGC's publicly available Notes to its Consolidated Financial Statements the information below reflects the particulars of OLGC gaming bundles for the year ending March 31, 2019:

OLG Gaming Bundle	Sites	Service Provider	COSA Effective Date	COSA Term Expiration
East	Casino Thousand Islands Slots at Kawartha Downs Casino Belleville Casino Peterborough	Ontario Gaming East Limited Partnership (OGELP)	Jan 11, 2016	Mar 31, 2040
Southwest	Gateway Casinos:	Gateway Casinos &	May 9, 2017	Mar 31, 2037

[1] This information is sourced from the publicly available Financial Accountability Office of Ontario's Financial Analysis of the OLG's Gaming Expansion and Sale of the Greater Toronto Area Gaming Bundle, Spring 2018.

	Point Edward London Clinton Hanover Woodstock	Entertainment Limited (Gateway)		
North	Gateway Casinos: Sault Ste. Marie Thunder Bay Sudbury North Bay (new build) Kenora (optional new build)	Gateway	May 30, 2017	Mar 31, 2037
Ottawa	Rideau Carleton Raceway Casino	H.R. Ottawa L.P (Hard Rock)	Sept 12, 2017	Mar 31, 2037
Greater Toronto Area	Casino Woodbine Casino Ajax Great Blue Heron Casino Pickering (new build)	Ontario Gaming GTA Limited Partnership (OGGLP)	Jan 23, 2018	Jan 22, 2039
West Greater Toronto Area	Elements Casino Brantford Flamboro Mohawk Grand River	Ontario Gaming West GTA Limited Partnership (OGWGLP)	May 1, 2018	Mar 31, 2038
Central	Slots at Georgian Downs Casino Rama Resort Simcoe County (new build)	Gateway	Jul 18, 2018	Jul 31, 2041
Niagara	Casino Niagara Fallsview	Mohegan Gaming & Entertainment	Jun 11, 2019	Jul 31, 2041

[6] As set out in the OLGC's publicly available Notes to its Consolidated Financial

Statements the information below reflects the particulars of OLGC gaming bundles for the year ending March 31, 2021,[2]:

OLG Gaming Bundle	Sites	Service Provider	COSA Effective Date	COSA Term Expiration
East	Thousand Islands Kawartha Downs Belleville Peterborough	Ontario Gaming East Limited Partnership (OGELP)	Jan 11, 2016	Mar 31, 2040
Southwest	Point Edward London Clinton Chatham Hanover Woodstock Sarnia	Gateway Casinos & Entertainment Limited (Gateway)	May 9, 2017	Mar 31, 2037
North	Sault Ste. Marie Thunder Bay Sudbury North Bay (new build) Kenora (new build)	Gateway	May 30, 2017	Mar 31, 2037
Ottawa	Rideau	H.R. Ottawa L.P (Hard Rock)	Sept 12, 2017	Mar 31, 2037
Greater Toronto Area	Woodbine Ajax Great Blue Heron Pickering (new build)	Ontario Gaming GTA Limited Partnership (OGGLP)	Jan 23, 2018	Jan 22, 2039
West Greater Toronto Area	Brantford Flamboro Mohawk Grand River	Ontario Gaming West GTA Limited Partnership (OGWGLP)	May 1, 2018	Mar 31, 2038
Central	Innisfil Rama Wasaga Beach	Gateway	Jul 18, 2018	Jul 31, 2041

[2] In the course of adjudication, the OLGC confirmed that it has not yet started the procurement process for the Windsor gaming bundle.

	(new build)			
Niagara	Casino Niagara Fallsview	MGE Niagara Entertainment Inc. (MGE)	Jun 11, 2019	Mar 31, 2040

The Request and Appeal

[7] After receiving the request, the OLGC identified a responsive record, being a one-page document that is divided into nine rows, one for each gaming bundle. Each row sets out gaming revenue (before deduction of a Service Provider's fee), net revenue (after deduction of a Service Provider's fee) and Net Profit to the province for each of eight gaming bundles and the Windsor region with columns listing the associated budgeted amounts for 2018-2019 and the projected amounts for 2019-2020 and 2020 to 2021. The OLGC further explains that for each bundle:

> Budgeted or Projected Gross Revenue is the total gaming revenue from all slot machines and tables;
>
> Budgeted or Projected Net Revenue is the gaming revenue after deduction of the Service Provider Fee;
>
> Budgeted or Projected Net Profit to the Province is the profit that accrues to the Province after expenses payable by OLGC, including, for example, HST, municipal commissions and other discrete costs.

[8] The record does not set out the threshold amount for each bundle.

[9] Relying on the mandatory exemption at section 17(1) (third party information) and the discretionary exemption at 18(1) (economic and other interests of Ontario) the OLGC denied access to the record, in full. The appellant appealed the OLGC's decision.

[10] In the course of mediation, the OLGC clarified that with respect to the application of the section 18(1) exemption, it was specifically relying on sections 18(1)(a), (c) and (d) of the *Act*.

[11] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*.

[12] I decided to first seek representations on the possible application of the exemptions at sections 18(1)(a), (c) and (d) and to defer my determination on the possible application of section 17(1) of the *Act*.

[13] During the inquiry into the appeal representations were sought and received from the OLGC and the appellant, and were shared in accordance with section 7 of this office's *Code of Procedure and Practice Direction Number 7*. Given the volume of

materials received as well as confidentiality concerns expressed by the OLGC,[3] I can only reference some of it, although all of it has been reviewed and considered.

[14] In this order, find that the information at issue qualifies for exemption under sections 18(1)(c) and/or (d) of the *Act*. Accordingly, it is not necessary to consider the application of sections 17(1) or 18(1)(a) of the *Act*.[4] The appeal is dismissed.

RECORD AT ISSUE:

[15] The record at issue is a one-page document entitled "Land-Based Gaming - Financial Data Used in F2019 Budget and 3-year Plan"

ISSUES:

A. Do the discretionary exemptions at sections 18(1)(c) and/or (d) apply to the information at issue?

B. Did the OLGC exercise its discretion under sections 18(1)(c) and/or (d)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Preliminary matter - Burden and standard of proof

[16] Some of the submissions of the parties related to the appellant's reference to the failure of the OLGC to provide "detailed and convincing" evidence in support of its allegations of harm. A debate on the appropriate standard of proof then ensued.

[17] In this case, the OLGC bears the burden of establishing that sections 18(1)(c) and/or (d) apply.[5] It must provide detailed evidence about the risk of harm if the record is disclosed.

[18] To do so the OLGC must show that the risk of harm is real and not just a possibility.[6] However, it does not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the

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[3] Portions of the OLGC's representations were withheld from the appellant as they met the criteria for withholding representations in *Practice Direction 7*.
[4] Similarly, I need not address the OLGC's confidential submissions on the non-responsiveness of a portion of the record because I would have found in any event that the information qualified for exemption under sections 18(1)(c) and/or (d) for the same reasons set out in my analysis below.
[5] Section 53 of the *Act*.
[6] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

information.[7]

Issue A: Do the discretionary exemptions at sections 18(1)(c) and/or (d) apply to the information at issue?

[19] The OLGC takes the position that the information at issue qualifies for exemption under sections 18(1)(c) and/or (d) of the *Act*. Those sections provide that:

> 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;

[20] The purpose of section 18 is to protect certain economic and other interests of institutions. It also recognizes that an institution's own commercially valuable information should be protected to the same extent as that of non-governmental organizations.[8]

[21] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. It recognizes that institutions may have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse to disclose information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[9]

[22] The section 18(1)(d) exemption is intended to protect the broader economic interests of Ontarians.[10]

[23] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial

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[7] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paragraphs 52 to 54; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

[8] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

[9] Orders P-1190 and MO-2233.

[10] 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.

interests.[11]

Do sections 18(1)(c) and/(d) not apply because the information is similar to information already received by the appellant in a previous access request?

[24] The appellant states that in 2017 it submitted a request for access to information pertaining to the OLGC fiscal 2017-18 budget and 3-year plan and received disclosure of the projected gross gaming revenue and net profits to the province by gaming bundle for the fiscal years 2019, 2020 and 2021. It also requested revenues, net profit paid to the province and a detailed breakout of costs by property for each for-profit casino in Ontario for the last three fiscal years ending March 2017, and the quarters ending June 2017 and June 2016. The appellant states that the OLGC provided the appellant with the requested revenues, total costs and profits to the province for all casinos and all time-periods requested.[12] The appellant submits that there is no material difference in the information disclosed by the OLGC in its previous response and the appellant's current request and that the record at issue is simply an updated version of earlier disclosures by the OLGC. Regarding the OLGC's position that it has never disclosed projections, the appellant states that in response to its earlier request the OLGC provided the appellant with a breakdown of projections for future revenue by bundle. The appellant asserts that this is a clear precedent for the disclosure of the information at issue in this appeal.

[25] The OLGC disagrees. It acknowledges that it partially released projections relating to gross revenue and that some information relating to total costs on a per site (versus per bundle) basis was also released. Furthermore, the OLGC admits that data relating to historical net profit to the Province and projected revenue and net profit was released in the aggregate for the fiscal years 2019, 2020, and 2021. The OLGC states that there is a difference between the information it previously disclosed and the information at issue here:

> For the prior request […], the projected gross revenue and net profit data provided was based on OLG's own assumptions formulated in the fall of 2016, since at that time, only the East gaming bundle had been awarded as a result of the procurement process. The projections were based on the information OLG had before the announcement of the successful proponent. Any data from the East bundle would have only informed the projection data for the East bundle in a limited way. The competitive procurement process for all other gaming bundles was ongoing, such that the projections were based almost entirely on high-level OLG forecasting.

[11] Orders MO-2363 and PO-2758.

[12] The appellant states that the OLGC did not provide a detailed breakdown of costs. It disputes the OLGC's allegation in its submissions that data relating to the historical net profit to the province was publicly available at that time, and therefore released to appellant on that basis. The appellant asserts that there is no evidence that this information was publicly available.

> In particular, OLG made assumptions regarding anticipated service provider fees.
>
> By contrast, the data sought by the appellant in the current request was compiled in and around September 2017. By that date, the East, North, Southwest, Ottawa, and GTA gaming bundles had already been selected. The West GTA gaming bundle was in the late stages of the procurement process.
>
> The Service Providers for Central and Niagara gaming bundles had not yet been selected, and the procurement process for Windsor had not begun.

[26] The OLGC submits that the requested information is based on specific revenue budgets and projections that were provided by the Service Providers for each gaming bundle, either through the receipt of the confidential Service Provider's proposals in the procurement process, or from their confidential annual business plans. The OLGC states that the net revenue projections are, for the most part, based on the actual revenue sharing agreed to between OLGC and the Service Provider within the applicable COSA.[13] The OLGC states that the revenue projections provided by the Service Providers and certain components of the revenue sharing model constitute information that the OLGC has agreed to maintain in confidence under the COSAs[14]. The OLGC submits that revenue forecasting is an exercise which requires the application of skill and effort to develop the information.

[27] It further submits that the revenue projections were developed either by the OLGC or the Service Provider acting on behalf of the OLGC under the terms of the COSA's. It adds that the revenue projections comprise proprietary work undertaken by both the Service Providers and the OLGC based on sophisticated formulae and modeling that take account of anticipated development and investments within gaming bundles.

[28] The OLGC further elaborates upon its position that the information it disclosed to the appellant in response to the prior request was different, as follows:

> … It contained historical total revenue and net profit to the province, which is public information, and unlike the information at issue, did not reflect projected data based on confidential information regarding such projections, …
>
> … More importantly, [the appellant's] reference to the prior FOI matter deals with historical data. In that sense, there is no semblance of similarity between the prior FOI and this appeal. This appeal deals with

[13] The OLGC adds that the Niagara and Central bundle data was based on "assumed" revenue sharing data.

[14] The OLGC included with its representations excerpts of the GTA bundle COSA pertaining to confidentiality.

> forward looking thresholds and future projected revenue, both of which OLGC has consistently maintained as confidential.

[29] The OLGC submits that since the prior disclosure of information occurred in a much different context (prior to the modernization of gaming facilities in Ontario) it does not set a "precedent" that justifies the release of the requested information in the current post-modernization context. However, OLGC anticipates that if projection data is released now, post-modernization, this will be presented as setting a precedent for continual release of similar projection data.

[30] The appellant asserts that the OLGC has provided no evidence to enable a determination to be made of how the information at issue was generated.

[31] In any event, if the forecasts were produced by the OLGC, the appellant argues that they are simply a product of input from the Service Providers and the agreement between the OLGC and Service Providers. The appellant submits that there is no evidence that the revenue projections contain any proprietary information beyond the information contained in the COSAs and historic revenue data of the OLGC which has already been publicly disseminated. The appellant adds:

> Similarly, the threshold and Service Provider fee amounts are information that is produced in the course of negotiations between the OLGC and the service provider. Information that is produced in the course of negotiations and included in a mutually generated agreement does not "belong" to an institution.[15]

[32] The appellant submits that although the OLGC attempts to distinguish historical data from projections, the OLGC has not provided any reason to justify why projections are more sensitive than historical data. The appellant argues that actual revenue amounts carry more significance, if any, than projections in any current or future negotiations.

[33] The appellant submits that at the time of disclosure, the OLGC had already awarded the East gaming bundle. Furthermore, contrary to the representations of the OLGC that its projections in the response would have only been "informed by the projection data for the East bundle in a limited way", the response included the total revenue, total cost and total net profit to the province for each casino contained in the East gaming bundle for time periods after the East gaming bundle was transitioned to its new service provider.[16]

[34] The appellant submits that:

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[15] In support of this submission, the appellant relies on Order PO-3475 at paragraphs 107 and 108.

[16] The appellant referenced a string of emails between the appellant and the OLGC that the appellant reproduced in its representations, in which the appellant says the OLGC admits that service provider input was used to create the gaming bundle projections.

> It appears that the OLG is trying to create ambiguity where it does not exist in order to differentiate the Previous FOI Request from the request for the Record. This argument has no merit. There is no principled reason to distinguish the historical data produced in relation to the Previous FOI Request from the historical information currently sought.
>
> … [None] of the requested data contains projections any longer. The time period for all projections has or will soon pass.

[35] With respect to the OLGC's submission that distinguishing factors exist between the context in which it provided projected revenues and forecasts of net profit to the province in its response to the previous request and the request at issue before me, the appellant submits that:

> This is false. By email sent on January 30, 2018, the OLG confirmed to [the appellant] that the projections contained in the Previous FOI Request were created in the Fall of 2016. [Footnote omitted] Prior to the projections being created and the release of the Previous FOI Request to [the appellant], Great Canadian took possession of the East bundle in January, 2016, at which time it signed a COSA with the OLG. [Footnote omitted] Thus, a COSA had been entered into prior to the Previous FOI Request.

Analysis and finding

[36] In my view, although the evidence is not entirely clear as to what percentage of the information in the record is Service Provider information or input from an OLGC analysis, I am satisfied that the information disclosed previously by the OLGC is of a different nature to the information contained in the record. The information in the record was based on the information that various service providers furnished the OLGC as interpreted by the OLGC, or generated by the OLGC and, at the time it was of a different nature and created in a different context than the information the OLGC previously provided. The information in the record is forward looking and was based on the evolution in the robustness of the data since the earlier information was disclosed. In my view, the information previously provided and the information at issue here is not the same as the information that was previously disclosed to the appellant.

[37] Furthermore, disclosure of information by an institution on a previous occasion, without more, does not automatically establish a precedent for disclosure, particularly where, as here, the relevant exemptions, sections 18(1)(c) and (d), are discretionary ones. I also note that ordering disclosure on one occasion does not result in continuous disclosure, unless continuous disclosure has been requested and addressed.[17]

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[17] See in this regard, section 24(3) of *FIPPA*.

Do sections 18(1)(c) and/(d) not apply because the information is publicly available?

[38] As demonstrated by the chart in the background above, and the various annual or other reports it provides to the public, the OLGC discloses a great deal of information about its Casino bundles. It publicly discloses the total budgeted and total projected land-based gaming revenues (after the deduction of Service Provider fees) and net profit to the Province, in the aggregate, for all gaming bundles.[18]

[39] The appellant submits that the majority of the information in the record is also publicly available, or is possible to determine using other publicly available information. The appellant states that this includes the gross gaming revenues of properties and the total fixed fee amounts paid to the Service Provider by the OLGC.

[40] The OLGC states that it has never before released the granular forecasting information sought by the appellant. The OLGC takes the position that the information requested by the appellant cannot be derived from publicly available information. The OLGC submits that with respect to revenues, it has undertaken an analysis of the publicly available information presented by the appellant and can confirm that the only information that the appellant can derive is historical gross gaming revenues, based on municipal contribution agreements. However, the OLGC submits that this does not justify the release of the requested information, which comprises projected gross gaming revenues (in addition to other data).

Calculations based on municipal taxes

[41] The appellant submits that by applying the total tax revenue received by a municipality to the formula on revenue contributions to the municipality, one can calculate the total slot revenues obtained at each casino in Ontario and accordingly, information on total slot revenue is effectively publicly available.

[42] In addition, the appellant submits that it can also calculate table revenues at each casino in Ontario using information previously and routinely disclosed to it by the OLGC. It states that with both slot and table revenues for each property, one has the complete information needed to calculate total gross gaming revenues for each property.

[43] The OLGC takes issue with the appellant's assertion that by applying the total tax revenue of a municipality to the formula on gaming revenue contributions to the municipality, one can calculate the total slot revenues obtained at each Casino in Ontario, which renders total slot revenue publicly available. It adds:

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[18] This information is found in the OLGC's yearly business plan and Annual Reports, both of which are publicly available. In this appeal the appellant seeks the information that underpins the 2018-19 annual business plan, but on a per bundle, rather than global basis.

> … Municipal tax revenues are based on historical information. They do not contain information about future projections. In the past, the Information and Privacy Commissioner only considered historical thresholds in relation to the OLGC, not figures which provide information about forecasted revenue.
>
> [The appellant] argues that by dividing the total table contributions set out in the OLG records by 4%, one is able to calculate total table game gross gaming revenues for each casino. While this is accurate insofar as historical data about the manner in which gaming revenue can be derived, again, it is only one factor in arriving at the threshold amount. Importantly, the OLGC does not publish any projections of what future municipal contribution payments will be at a municipality level. If information is produced in the aggregate, it is never done in a level of detail where a third party could derive revenue by site or by bundle.

[44] The OLGC also challenges the relevance of the appellant's assertion that gaming tax rates are available in "some" other jurisdictions:

> It is essential to note that Ontario does not conduct gaming in the Province on the basis of "gaming tax rates". Under the OLG model, service providers participate in a procurement process that includes complex revenue forecasting and a financial analysis that is not necessarily static over time. The data sought by the [appellant] is not comparable to "gaming tax rates".

Information provided by casinos

[45] The appellant also states that the threshold amount for certain gaming bundles is publicly available in the Prospectus of Gateway Casinos & Entertainment Limited (Gateway).[19] Similarly, the appellant states that Great Canadian Gaming Corporation is part of a consortium that operates the East, GTA and West GTA gaming bundles. The appellant submits that this Service Provider has historically disclosed their revenues generated from the operation of the GTA and West GTA gaming bundles.[20]

[46] With respect to the OLGC's assertion that the data presented in the Gateway Prospectus is historical and "notional" data (i.e. not based on actual figures), the appellant submits:

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[19] In support of this submission, the appellant refers to a preliminary IPO prospectus filed by Gateway, which the appellant states provides data for the respective gaming bundles in the regions in which Gateway operates for certain time periods. The appellant states that the data contained in the Prospectus for each of the regions in which Gateway operates, among other things, gaming revenue, adjustments and pro forma gaming revenue and that similar data is disclosed in the Prospectus in respect of its operation of other gaming bundles.

[20] The appellant refers to Great Canadian's Condensed Interim Consolidated Financial Statements in support of this submission.

> This is inaccurate. On December 18, 2018, Gateway filed a preliminary IPO prospectus (the "Gateway Prospectus") with the U.S. Securities Exchange Commission. The Gateway Prospectus states:
>
> > This unaudited pro forma combined schedule of revenue and direct expenses of the Central Bundle has been prepared for illustrative purposes only, to show the effect of the acquisition of the assets of the Central Bundle as if the Company acquired the Central Bundle on January 1, 2018 and the terms of the first operating year under the COSA were in effect for the period.
>
> The Gateway Prospectus provides one with the information needed to calculate the first year threshold because the pro forma data is calculated using the terms of the first operating year under the COSA (i.e. the threshold). This method is repeated in the Southwest and Central bundles disclosures as well. [Footnote omitted]
>
> Likewise, each of the Gateway prospectuses provide actual figures for revenue and net income before tax. [Footnote omitted]

[47] The appellant further submits that additional sources of public information exist for the data sought in relation to the North, Southwest and Central bundles:

> For example, information on Gateway is publicly available from Leisure Acquisition Corp., a company that was in the process of acquiring Gateway when the COVID-19 pandemic began, which sets out the actual revenue of the bundles owned by Gateway. [Footnote omitted]

[48] The appellant submits:

> Most American casino operators are publicly traded and routinely provide public projections. It is counterintuitive to suggest that this behaviour is harmful in Canada when American casino operators in contiguous U.S. states regularly release similar forecasts. [Footnote omitted]. In fact, even Gateway Casinos & Entertainment Limited ("Gateway"), which operates several gaming properties in Ontario (and other areas of Canada), publicly released their revenue projections in 2020. [Footnote omitted]
>
> From air travel to media, companies that operate and compete in cross-border industries regularly release their revenue projections. There is nothing proprietary about this information.

Analysis and finding

[49] I am not satisfied that the appellant has provided sufficient evidence to establish that the information at issue in this appeal is publicly available in the form contained in

the record, broken down by bundle. I agree that calculations based on municipal taxes or historical revenues released by the casinos that do report casinos would be backward, rather than forward looking. In addition, any information that is provided by casinos, is that of the casinos, not of the OLGC. There is a difference. I pause to note here that even on the appellant's own evidence Great Canadian Gaming Corporation has not historically provided information pertaining to its east bundle.

[50] Accordingly, I am not satisfied that the projection information in the form in the record, based on information supplied by service providers as interpreted by the OLGC, which is broken down by bundle, is publicly available.

[51] I now turn to consider disclosing the projection information in the form in the record, which is broken down by bundle, could reasonably be expected to result in the harm alleged by the OLGC.

Do sections 18(1)(c) and/(d) not apply because there is no reasonable expectation of harm resulting from disclosure?

[52] The OLGC submits that:

> […], the business forecast information at issue in this appeal has intrinsic value to a number of third parties, including: (i) participants in ongoing procurements, who will base their bid offers (including the variable threshold amount) on forecasts for revenue, net revenue and profit to the Province; (ii) competitors of each gaming bundle Service Provider, who will utilize the information in order to direct marketing and promotional offerings and target particular regions for growth; and (iii) suppliers and vendors to the Service Providers within each gaming bundle, who will utilize the information to ascertain the amount of business they can be expected to generate by providing products and services to the Service Providers, and therefore tailor their supply and pricing practices accordingly.

[53] The OLGC submits that the harm associated with the release of the projected gross revenue figures includes:

> […], (2) changes in market behavior by suppliers doing business with the Service Providers, a corollary impact on Service Providers' negotiations with suppliers and business partners, and by implication on OLGC; and (3) changes in market behavior from gaming properties in contiguous U.S. States.

[54] The OLGC submits that a number of IPC orders[21] have recognized that the

[21] The OLGC references Orders PO-3122, PO-3313, PO-3332, PO-3415 and PO-3495 in its representations.

economic/financial interests of an institution and the Province of Ontario can reasonably expect to be prejudiced as a result of disclosure of budget information for facilities operated on behalf of a government entity, as well as pricing models and "value for money" conditions agreed upon between government institutions and private parties for the delivery of goods and services.

[55] It submits that the financial harm to the OLGC associated with disclosure of the data results from the following:

> Use of the data by non-OLGC gaming facilities (e.g. outside Ontario) to target potential patrons of OLGC gaming bundles based on perceived opportunities for growth, which may lead to a decrease in revenue for the OLGC gaming bundles, and ultimately, a decrease in revenue for OLGC and the Province of Ontario.
>
> Negative competitive impacts on Service Providers in negotiations with their vendors and suppliers, therefore leading to lower revenues on a per-gaming bundle basis. Since OLG participates in revenue sharing with the Service Providers, any adverse impact on Service Provider revenues has a corresponding negative impact on OLG and the Province of Ontario.

[56] The OLGC adds:

> There is also competitive and financial harm to OLG associated with release of the budgeted/projected Gross Revenue for the gaming bundles for which the procurement process is not yet complete. In an ongoing procurement context, bidders can be expected to tailor their bid offering according to the perceived opportunity for overall revenue generation within the specific gaming bundle region.

[57] The appellant challenges the OLGC's assertions. The appellant points out that the awarded COSAs provide the successful bidder with an exclusive contract to deal within the gaming bundle for at least 20 years, and that:

> Once a COSA is signed, the Service Provider has a monopoly on for-profit gaming in the geographic area where the bundle is located for the next 20-plus years. There is effectively no competition since no other for-profit casino can operate within the Service Provider's designated territory. Contrary to the representations of the OLG, there is no evidence that non-OLG gaming facilities (e.g. outside Ontario) have any significant effect on the revenue of Ontario-based gaming facilities. They simply cater to different markets.

[58] Relying on my determinations in Order PO-3475, which arose out of a request for access to the undisclosed portions of an agreement between the Niagara Parks Commission and Hornblower Canada Co. pertaining to the operation of boat tours at

Niagara Falls over a 30-year period, the appellant argues that the duration of the award of the eight gaming bundles means that the disclosure of information could not affect the competitive interests between any of these Service Providers, or the OLGC.

[59] The appellant further submits:

> In Order PO-3122, the OLG successfully provided a very detailed explanation and "clear and convincing" evidence of the harm it would suffer if the record at issue was disclosed. [footnote omitted] It included multiple clear examples of ways in which the information at issue could be misappropriated by established cross-border competitors. Conversely, there is no clear evidence of harm in the present situation. In addition, the information requested in Order PO-3122 was of an entirely different and more sensitive nature, including "100% of [OLG's] planned investment in each casino operation in each year broken down by business and expense type." The OLG asserted that this information would provide insight into the OLG's operating strategy and how it adjusted to external events. [footnote omitted] This type of information is also generally kept private among commercial casinos in order to stay competitive in their markets, while the data requested by [the appellant] is consistently disclosed elsewhere outside of Ontario.
>
> Conversely, in Order PO-3042, the adjudicator dismissed the OLGC's argument against disclosure of forecasted profits under sections 18(1)(c) and (d) because the OLGC did not provide evidence of how its competitors would use the forecasted profit information to prejudice the OLGC's competitive or economic interests and compete against the OLGC. The adjudicator noted, "The possible threat that competitors could potentially use this information to change or alter their business practices does not establish the harms in section 18(1)(c) and (d)."

Harm to ongoing procurements

[60] The OLGC asserts that if its forecasting information is made public, this can be expected to impact OLGC's negotiations with future Service Providers in ongoing procurements, because the revenue sharing offer agreed to by a Service Provider with the OLGC may affect the Service Provider's negotiations in other Canadian and United States jurisdictions in which gaming facilities are publicly owned and administered.

[61] The OLGC submits that Service Providers operate in a highly competitive industry in Canada and around the world, in which financial and commercial information including forecasted revenues and profit are kept confidential to prevent competitors from interfering with the operations. It submits:

> Release of such information would permit competitors to understand the particulars of each gaming bundle's business and to focus marketing efforts in a particular area, therefore leading to material financial losses and prejudice to competitive positioning.

[62] The OLGC states that it is also not in the interests of the OLGC to have such information publicly available, in that disclosure will lead to competition that is not revenue maximizing.

[63] The OLGC submits that disclosure of the Gross Revenue on a per gaming bundle basis can reasonably be expected to result in competitive and financial harm, even if released on its own, without the other figures:

> Knowledge of the figure by business competitors will allow competitors to target their marketing and promotional activities in those regions that are anticipated to have the highest revenues. These business competitors include the other gaming bundles in the region, as well as non-OLG casino competitors such as casinos outside Ontario that are located in relative proximity to the Ontario gaming bundles.

[64] OLGC submits that disclosure of the forecasted Net Profit to the Province per gaming bundle also will be harmful to the OLGC, even if disclosed on a "stand alone" basis. The OLGC submits that this is not publicly available information, nor is it information that the OLGC provides to the Service Provider for a specific gaming bundle. OLGC submits that it would not agree to share the Net Profit to the Province data even with the service provider for a specific gaming bundle.

[65] The appellant submits that a general argument that a precedent of a ceiling threshold amount will be established for a prospective service provider would cause harm to an institution was dismissed by an adjudicator in Order PO-2758.

[66] The appellant adds:

> The OLGC operates in an open market. Competition for contracts creates value. […] It is equally likely that disclosure of threshold amounts will cause future bidders to exceed current thresholds in order to secure a contract.
>
> In any event, there are no ongoing procurements. The gaming bundles will next be available for purchase in nearly 20 years. Current forecasts will have no value or importance for potential future purchasers in 20 years.

[67] The appellant further submits that the determinations in Orders PO-3313, PO-3415 and PO-3495 relied on by the OLGC, are distinguishable because they related to ongoing procurement processes and/or clear evidence was adduced in those appeals of

how disclosure would affect competition.

Harms to the Windsor region procurement

[68] The OLGC submits that the Net Profit to the Province data is particularly sensitive with respect to the Windsor region. It submits that potential Service Providers would not be privy to the OLGC's forecast as to its revenue expectations for the Windsor region, and that this could impact the procurement process.

[69] The appellant argues that any potential award of the Windsor region is years away and likely has no relevance to the information in the record. The appellant submits that any contract for the Windsor region appears to be outside the scope of the forecast period, and many years after the OLGC created the requested information. The appellant submits that this "likely renders the forecasts useless for any purpose with respect to Windsor."

[70] The appellant adds that the OLGC's assertion that the release of information in relation to the eight regions will affect the bidding process in the Windsor region is incorrect because it presupposes that the information in other regions is relevant to the Windsor procurement. The appellant submits:

> The OLGC has admitted that the terms of the COSAs vary between regions, as one would expect. Moreover, this argument is speculative as there is no evidence to support any potential harm to the Windsor procurement through the release of information pertaining to other regions. There is no basis or reason to believe that the environment surrounding Caesars Windsor is the same as in the other eight regions.

Harm from disclosing the threshold amount

[71] As I stated above, the record at issue does not contain the threshold amounts. However, the OLGC submits that disclosure of the record could reveal the threshold amounts and that information that reveals the threshold amount agreed to by each Service Provider in their respective COSA's can reasonably be expected to cause financial, competitive and future negotiating harm to the OLGC and/or the Service Providers.

[72] The OLGC submits that the threshold amounts bid by the Service Providers are included in the COSAs and only apply for the first ten years of the duration of the contract.

[73] The appellant submits that:

> Given the public disclosure by Gateway and Great Canadian of the threshold revenues payable in connection with their operations in five regions, there is no reason why similar information cannot be disclosed by

> the OLGC. There is no reason to believe that release of all similar data regarding threshold revenues payable to the OLGC in other regions would result in harm to anyone. Moreover, there is no evidence of harm resulting from disclosure of this information, nor any evidence that it would negatively impact the bidding process for regions that have not yet gone through a procurement process, namely Windsor.

[74] Relying on Order PO-3926, the appellant submits that it is not reasonable to expect that disclosure of current terms of an agreement will harm the OLGC's economic interest or competitive position in future negotiations, particularly negotiations that will take place 20 years from now.

Harm to Ontario through cross-border competition

[75] The OLGC asserts that if non-OLGC competitors (such as competitors located across the border in the U.S.) learn of the OLGC's revenue and profit expectations, they will use such data to target particular gaming regions and customers.

[76] The appellant submits that the OLGC has exclusive authority to operate casinos in Ontario and the OLGC has not provided any evidence or sufficient details, beyond bald assertions, to demonstrate how U.S. entities could use the information to undercut Canadian casinos in such a way to motivate a Canadian customer to cross the border and travel to another jurisdiction to use their services. The appellant submits that there is no reason to believe that disclosure of the information in the record will result in Canadian gamblers travelling to the U.S. to gamble.

[77] The appellant adds that U.S. and other cross-border casinos already invest in marketing in Ontario and are free to divert business from Ontario casinos. It submits that there is no evidence that disclosure of the record will improve their efforts to do so. This is because most bundles are not situated near a border and do not face significant competition from properties located outside of Ontario.

[78] With respect to the appellant's position on U.S market competition, the OLGC states that public reports on the impact of US casinos in Canada suggest that market forces are interwoven and contingent on the value of the Canadian dollar, the cost of transportation, labour strikes, and relative scales of economy:

> For example, in a report published by the Financial Post in 2013, sources cited that "Canadians are benefitting less as casinos open up across the border in the U.S." and that profits at Canadian casinos near the US border have collectively dropped to $100 million in 2011 from $800 million 10 years earlier". [footnote omitted] The report goes on to confirm that OLG's modernization process was largely driven in response to US competition, demographic shifts and ongoing advances in technology. [footnote omitted] Specifically, in the case of Windsor, early reports

> confirmed that the opening of gaming centres in Detroit hurt Windsor's gaming facility. Multi-factorial elements such as longer lines at customs, the value of the Canadian dollar and tighter security are just few of the factors that have led gamers to US facilities. [footnote omitted] Comparatively, and according to a 2017 academic article, there are "508 commercial casinos in 15 states, while in Canada, there are only 71 casinos in 8 out of the 10 provinces". [footnote omitted]
>
> In October 2017, researchers who studied the phenomenon of cross-border casino competitions relied on the Windsor-Detroit example as a baseline reference. They confirmed that Windsor faced competition after Detroit opened its facilities and that various factors such as the cost of commuting, the value of the dollar, taxation, and city growth were all relevant to the analysis. [footnote omitted] Other reports corroborate this analysis and are readily available to the public. [footnote omitted] Increased US competition from the Detroit area casinos were also significant factors which contributed to the net income of the Niagara Casinos. [footnote omitted] Accordingly, it is incorrect for [the appellant] to assert that disclosure of figures such as projected revenues will not have a competitive impact on Service Providers, given the evidence that Service Providers operate in a highly competitive environment in which release of such projections can be expected to significantly alter market behaviour and generate competitive pressures.

[79] The appellant submits that the OLGC attempts to conflate the impact of issues such as differences in currency values, labour strikes and scales of economy with disclosure of the information, and fails to address how disclosure of the information will have any financial impact in the manner that these other factors might have:

> It provides no basis for how disclosure of the record will result in harm as a result of border competition. It is not sufficient to state that information should not be disclosed because the OLG operates in a competitive environment. There must be a direct link between disclosure of the Record and the harm asserted.
>
> Finally, the OLG's assertion that the sensitive nature of the projections contained in the Record will significantly alter market behaviour is undermined by its previous disclosure of information delineated by gaming bundles.

[80] The appellant adds that although it was silent before, the OLG now advances new evidence through a press release that the Windsor procurement is now proceeding. The appellant submits that the OLGC advises in the press release that it expects to release a Request for Pre-Qualification (RFPQ) for the Windsor Gaming Bundle by the fall of 2020. As of the date of the appellant filing its sur-sur reply submissions, however,

the RFPQ had not been released.

[81] The appellant adds:

> At the time of its January 7 press release, the OLG simultaneously announced that it had extended its agreement with Caesars Entertainment Windsor Limited beyond July 31, 2020, for another three years. A new operator will not take over the operations Caesars Windsor until at least mid-2023.

[82] The appellant submits that in the case of the eight gaming bundles that were previously awarded to date, bidders needed to obtain pre-qualification through the RFPQ process several years before the Request for Proposal (RFP) was issued and the bundle was awarded. The appellant submits that:

> Any contract for Caesars Windsor, therefore, appears to be outside the scope of the forecast period for the Record and many years after the OLG's forecasts requested in the Record, rendering the forecasts useless for any purpose in relation to Caesars Windsor.
>
> It is misleading for the OLG to assert that there is some "imminence" to the Caesars Windsor procurement. …, the award of an RFP for Caesars Windsor is still years away. The release of threshold projections for other gaming bundles for the years of 2018-2019, 2019-2020 and 2020-2021 will not and cannot have any meaningful impact on that procurement process.

[83] The appellant submits that with the exception of Windsor Caesars, given that any new procurement will not likely take place for almost two decades, the release of projections related to the years between 2018 and 2021 cannot legitimately be expected to have any impact on those future procurements.

Harm to suppliers or business partners

[84] The OLGC submits that the disclosure of any one of the Gross Revenue, Net Revenue or Net Profit to the Province figures on a per gaming bundle basis will negatively impact the market position of Service Providers by setting expectations within their negotiations with suppliers, vendors and other third parties. The OLGC submits that any negative impact to Service Provider revenue that occurs as a result of such expectations and the pressures generated will in turn negatively impact the economic interests of the OLGC and the Province of Ontario.

[85] The appellant states that since all gaming bundles are locked into 20-plus year COSAs, it is unclear how the release of any current information can impact future negotiations for a gaming bundle or any alleged negotiations with other "suppliers" or "business partners". Regarding the OLGC's position that the resulting harm to service

providers from the release of projections includes changes in market behaviour by suppliers doing business with the service providers, and an impact on service providers' negotiations with suppliers and business partners as well as changes in market behaviour from gaming properties in contiguous U.S. states, the appellant submits that it is counterintuitive to suggest that this behaviour is harmful in Canada when American casino operators in contiguous U.S. states regularly release similar forecasts.

Analysis and findings

[86] The purpose of section 18 is to protect certain economic and other interests of institutions. It also recognizes that an institution's own commercially valuable information should be protected to the same extent as that of non-governmental organizations.[22]

[87] Section 18(c) was enacted to protect government entities doing business from competitors in the marketplace. Hence, an institution's budget and revenue projections are as worthy of protection, subject to establishing harm from disclosure, the exercise of discretion and the public interest, as those of a private enterprise.

[88] The section 18(1)(d) exemption is intended to protect the broader economic interests of Ontarians, and those interests can be affected by the reduction of revenue streams that the Province uses to partly or wholly fund programs.

[89] I find that the information at issue in this appeal is the type of information that may prove useful to a non-OLGC competitor or a new entrant to the field, in particular with respect to the Windsor region figures. It is information set out in a form that the OLGC does not disseminate. These projections also provide a guidepost for market expectations, and in my view, are commercially sensitive information, especially in the form in which it is found allowing an easy comparison of each gaming bundle. In that regard, I accept that an awareness of the content of the record and OLGC's view of market performance by bundle (as well as the Windsor region) would allow non-OLGC competitors as well as current Service Providers an insight into OLGC's market expectations and indicate where competitive efforts should be directed. It would also allow suppliers of labour or materials to adjust their delivery prices accordingly, resulting in a domino effect whereby the cost of doing business, and the profits derived, are reduced as a result of this information being in the marketplace. All this could reasonable be expected to negatively impact the revenue sharing agreement between the OLGC and the Service Providers, and reduce the overall revenue received by the OLGC. I am satisfied that the disclosure of the information in the record could reasonably be expected to significantly interfere with its activities in performing its unique role in exercising its mandate and making business decisions and thereby negatively impact the broader economic interests of Ontarians.

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[22] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

[90] I therefore find that in all the circumstances the information contained in the record is exempt from disclosure under sections 18(1)(c) and/or 18(1)(d) of the *Act*.

[91] In that regard, while some of the information may be in the public domain, not all Service Providers have provided their figures, and any projections they provide may, or may not be reflected in the final projection figures in the record. In my view there is a distinction between conjecture and certainty. Furthermore, it is the reporting of data at the bundle level that the OLGC seeks to avoid. I am not satisfied that the existence of information in the public domain is sufficent to result in there being no reasonable expectation of harm from the disclosure of the projection information in the record.

[92] I have also considered the appellant's arguments that this type of information is disclosed in other non-Canadian jursidictions. Every jurisdiction is unique and my responsibility lies in applying the *Act*. Furthermore, I accepted above that the information that the OLGC has disclosed in the past is not the same type of information at issue here.

[93] In addition, as considerations and evidence led may vary from one matter to another, disclosure of information by an institution on a previous occasion, or the practice of another jurisdiction, does not automatically establish a precedent for disclosure, and even more so where, as here, the information was forward looking rather than historical at the time that it was generated.

[94] I am also satisfied that this case is distinguishable from the facts at issue in my Order PO-3475. In that appeal, amongst other things, I was satisfied that replacing the successful proponent was not realistic, as a great deal of infrastructure was not transferable and that the Niagara Parks Commission had not established a reasonable expectation of harm from cross-border competition. Unlike that appeal, I am satified that in this case there is sufficient evidence of a real threat of cross border competition from non-OLGC casinos, notably close to the Windsor region. I am also satisfied that even though the COSA's have lengthy terms there are situations where a bundle Service Provider can change, at the end of the term, as may be the case with the Windsor Region, or if the Service Provider is somehow in breach of its governing COSA.

[95] Finally, in making this finding it was not necessary for me to draw any conclusion as to whether revealing the information would thereby disclose the threshold amount that the OLGC agreed to with a bundle Service Provider. I make no finding in that regard but note that the appellant has argued that if this amount is the product of negotiation it does not belong to the OLGC. Whether the information "belongs" to the OLGC is not, however, the test under sections 18(1)(c) or (d), and I make no finding in that regard, either.

[96] Accordingly, in all the circumstances and subject to the discussion of the exercise of discretion below, I find that the information at issue qualifies for exemption under sections 18(1)(c) and/or 18(1)(d) of the *Act*. As I have found this information to be

subject to sections 18(1)(c) and/or (d) it is not necessary for me consider whether it also qualifies for exemption under section 18(1)(a) of the *Act*.[23]

Issue B: Did the OLGC exercise its discretion under sections 18(1)(c) and/or 18(1)(d)? If so, should this office uphold the exercise of discretion?

[97] The section 18(1)(c) and 18(1)(d) exemptions are discretionary, and permit the OLGC to disclose information, despite the fact that it could withhold it. The OLGC must exercise its discretion. On appeal, the Commissioner may determine whether the OLGC failed to do so.

[98] In addition, the Commissioner may find that the OLGC 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.

[99] In either case, this office may send the matter back to the OLGC for an exercise of discretion based on proper considerations.[24] This office may not, however, substitute its own discretion for that of the institution.[25]

The OLGC's representations

[100] The OLGC submits that it has considered that its financial data should be made available to the public and recognizes the purpose of the *Act*, but notes that aggregated information regarding forecasted revenue and net profit to the Province are already provided to the public. In addition, it submits that the OLGC's Fiscal 2018-19 Business Plan Annual Budget and Financial Projections, Fiscal 2019-20 to 2021-22 provides significant transparency regarding the land-based gaming competitive procurement process, the transition to Service Providers, as well as the factors relating to forecasting that were considered by OLGC in view of the transition to new operators. From the perspective of the OLGC, the aggregate information provided allows for a full evaluation of OLGC's administration of land-based gaming in this changing environment, therefore meeting the important transparency purpose of the *Act*.

[101] The OLGC submits that in considering all of these factors and coming to its determination to withhold the information under sections 18(1)(c) and/or (d), the OLGC has not acted in bad faith or for an improper purpose, but rather with the interests of

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[23] Similarly, I need not address the OLGC's confidential submissions on the non-responsiveness of a portion of the record because I would have found in any event that the information qualified for exemption under sections 18(1)(c) and/or (d) for the same reasons set out in my analysis above.
[24] Order MO-1573.
[25] Section 54(2) of the *Act*.

the current Service Providers in mind, as well as OLGC's mandate to maximize value for its sole shareholder, the Province of Ontario.

[102] The OLGC submits that the appellant does not seek the data in question in fulfillment of any public interest objective; however, to the extent that is relevant, there are numerous accountability mechanisms to address the public's interest in OLGC's modernization of land-based gaming.

[103] The OLGC further submits that the appellant has not raised any specific compelling need to receive the information. In contrast, the OLGC submits that it has an important mandate to safeguard the economic interests of the Province associated with land-based gaming, and therefore ought to be entitled to withhold specific and detailed financial information, the disclosure of which could reasonably be expected to compromise those economic interests.

[104] The OLGC acknowledges that exemptions from the right of access should be limited and specific, and that an institution must sever and disclose non-exempt information in a record. It has therefore considered whether any element of the per-gaming bundle financial forecasts may be disclosed without causing harm to the economic interests of OLGC and the Province. After undertaking this review, however, the OLGC has concluded that harm can be expected to result from disclosure of any one of the requested figures, both due to the confidential and competitive nature of each discrete piece of information on its own, and due to the ability to reverse engineer the highly sensitive threshold information by combining various data elements.

[105] The OLGC states that the obligation exists both to protect the ability of the Service Provider to operate in a competitive environment, and also to protect the attendant ability of the OLGC to maximize profits to the Province based on achieving optimal competitive conditions for the Service Providers.

[106] Finally, it submits that it has considered whether the information ought to be released based on its prior release of similar information. However, it submits that it has taken into account the significant distinctions between the manner in which the prior data was generated and the competitive conditions at the time of its generation, versus the nature of the information at issue in this appeal.

The appellant's representations

[107] The appellant takes the position that the OLGC has failed to take into account relevant considerations, did not follow its previous procedures and did not exercise its discretion in a manner that is consistent with the *Act*.

[108] The appellant submits that disclosure of the information increases public confidence in the OLGC's operation and decision-making, and increases competition. It adds that a failure to disclose, without proper justification, raises public concerns about the OLGC's management of public assets.

[109] The appellant reiterates that the OLGC has a history of producing the same or very similar information and that although the OLGC asserts that there are significant distinctions with the earlier request, it provides insufficient support for its assertion.

[110] The appellant submits that most Canadian and American government organizations freely disclose gross gaming revenues and the government's share in gross gaming revenues and that some of the information at issue is available publicly or can be determined from publicly available sources. The appellant asserts that the OLGC's discretion should be exercised in a manner consistent with its historic practices and the current practices of the third parties to whom the information pertains.

[111] Finally, the appellant submits that the OLGC made no attempt to sever the record to disclose non-exempt information. It submits that there is no reason to withhold access to the portions of the record pertaining to the eight gaming bundles that have been awarded.

Analysis and finding

[112] I have reviewed the circumstances surrounding this appeal and the representations on the manner in which the OLGC exercised its discretion. In my view, there is a considerable amount of information in the public domain to address any public concerns about the OLGC's management of public assets. I found above that there was a difference between the information previously disclosed to the appellant and the information at issue in this appeal. I also addressed the disclosure of information in other jurisdictions. I am satisfied that the OLGC weighed the appellant's interest in access to information against OLGC's 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 record to the appellant.

[113] I have also considered whether the information that I have found to be subject to sections 18(1)(c) and/or 18(1)(d) can be severed and portions of the withheld information be provided to the appellant. In my view, the record cannot be further severed without disclosing information that I have found to be exempt. Furthermore, as held in previous orders, an institution is not required to sever the record and disclose portions where to do so would reveal only "disconnected snippets", or "worthless" or "meaningless" information, which any other severance would result in here.[26]

[114] Consequently, I find that the information at issue qualifies for exemption under sections 18(1)(c) and/or 18(1)(d) of the Act, and I uphold the OLGC's exercise of discretion in relying on these exemptions. Given my findings, it is unnecessary to decide whether the section 17 or 18(1)(a) exemptions relied upon by the OLGC also apply. I

[26] See Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, (1997), 192 O.A.C. 71 (Div. Ct.).

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

ORDER

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

Original signed by: February 17, 2022

Steven Faughnan
Adjudicator