

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4373

Appeal PA21-00118

Ministry of the Attorney General

March 29, 2023

Summary: This appeal deals with an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Alcohol and Gaming Commission (the AGCO) for records relating to an individual's (the affected party) application to the AGCO for specified horse racing licences. In this order, the adjudicator finds that the majority of the records contain the personal information of the affected party and two other individuals, and that this information is exempt from disclosure under the personal privacy exemption in section 21(1). She further finds that other pages of the records (that do not contain personal information) are not exempt from disclosure under the advice or recommendations exemption in sections 13(1), or the law enforcement exemptions in sections 14(1)(c) and 14(2)(a), which were claimed by the AGCO and she orders the AGCO to disclose these records to the appellant. The adjudicator also finds that the public interest override in section 23, which was raised by the appellant, is not applicable to the personal information found to be exempt under section 21(1). The AGCO is ordered to disclose some of the records to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 13(1), 14(1)(c), 14(2)(a), 21(1) and 23.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the Alcohol and Gaming Commission of Ontario (the AGCO). The requester, a member of the media, submitted a request under the *Freedom of*

Information and Protection of Privacy Act (the *Act*) for records relating to applications for a specific horseperson license and a related thoroughbred sublicense over a specified time period. In particular, the access request was for all records of the applications, including the submission, review, approval and granting of the licences.

[2] The Ministry of the Attorney General (the ministry) is the institution that is responsible for responding to access requests to the AGCO. After locating responsive records, the ministry issued an access decision to the requester, granting him partial access to them. The ministry withheld portions of the records under the discretionary exemptions in sections 13 (advice or recommendations) and 14(1)(c) (investigative techniques and procedures) and 14(2)(a) (law enforcement report), as well as the mandatory exemption in section 21(1) (personal privacy) of the *Act*. The ministry also withheld portions of the records as not responsive to the appellant's request.

[3] The requester, now the appellant, appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] During the mediation of the appeal, the ministry confirmed its position regarding the exemptions applied to the records. The appellant advised he was not seeking access to the license applicant's (the affected party's) date of birth, phone number, driver's license information, signature, personal email address or residential address. As a result, this information is not at issue in this appeal, and will not be disclosed to the appellant. The appellant also confirmed his interest in pursuing access to the remaining information at issue, and he raised the possible application of the public interest override in section 23 of the *Act* to the records.

[5] The file then moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. The adjudicator assigned to the file sought and received representations from both the ministry (on behalf of the AGCO¹) and the appellant. The adjudicator also contacted the AGCO and the affected party's business (unrelated to horses) in order to facilitate notifying the affected party of the appeal because the affected party had died following the submission of the access request.² The AGCO did not have contact information for the affected party or the estate/next of kin of the deceased and the business did not respond to the IPC. As a result, it was not possible to notify the affected party and/or his estate of the inquiry. The file was then transferred to me to continue the inquiry.

[6] For the reasons that follow, I find that the majority of the records contain the personal information of the affected party and two other individuals, and that this information is exempt from disclosure under the personal privacy exemption in section 21(1). I further find that other pages of the records not containing personal information

¹ For ease of reference, I will refer to the representations submitted by the ministry on behalf of the AGCO as the AGCO's representations.

² The affected party passed away approximately three months after the appellant filed the appeal with the IPC.

are not exempt from disclosure under either the advice or recommendations exemption in sections 13(1), or the law enforcement exemptions in sections 14(1)(c) and 14(2)(a). Lastly, I find that the public interest override in section 23, which was raised by the appellant, is not applicable to the personal information that I have found to be exempt under section 21(1). The AGCO is ordered to disclose some of the records to the appellant.

RECORDS:

[7] There are 55 pages of records, consisting of the AGCO's eligibility review of the affected party's applications for a horseperson licence and sublicence. These records include the affected party's driving and vehicle history, the affected party's consumer report, emails, a memorandum, two investigation reports (one prepared by the OPP, and the other prepared by AGCO staff) relating to the applicant's background, and the AGCO's summary of its eligibility review of the licence applications. I note that there is some duplication of content in the records. The ministry has claimed the following exemptions to the records:

Exemption or other claim	Page Number(s)	Other
Section 21(1)	1-17, 19-25, 27-30, 32-53 and 55	Pages 20, 21, 23 and 27 were withheld in part ³
Section 13(1)	1-18, 24-26, 39-52 and 53-55	
Section 14(1)(c)	1-16, 24-26, 29-31 and 34-55	
Section 14(2)(a)	24-26 and 32	
See section 21(1)	Part of page 32	Not responsive to the request

ISSUES:

- A. Is the withheld portion of page 32 of the records responsive to the request?
- B. Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

³ The AGCO did not claim any exemptions to the remaining portions of these pages, and disclosed them to the appellant.

- C. Does the mandatory personal privacy exemption at section 21(1) apply to the information at issue?
- D. Does the discretionary exemption at section 13(1) for advice or recommendations given to the AGCO apply to pages 18, 26, 31 and 54?
- E. Does the discretionary exemptions at sections 14(1)(c) and/or 14(2)(a) related to law enforcement activities apply to pages 26, 31 and 54?
- F. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21(1) exemption?

DISCUSSION:

Background

[8] The ministry provided background information about the AGCO. The AGCO is a regulatory agency established under the *Alcohol and Gaming Commission of Ontario Act, 2019*. Part of the AGCO's functions include governing, directing, controlling and regulating horse racing in the province, as well as determining whether to refuse to issue a horse racing licence⁴ to a racing applicant. The AGCO may refuse to issue a horse racing licence⁴ to an applicant if there are reasonable grounds to believe that an applicant will not act in accordance with the law, or with integrity, honesty or in the public interest, having regard to the racing applicant's past conduct. The AGCO may conduct investigations into an applicant's character, financial history and competence. Within the AGCO is a bureau of the Ontario Provincial Police (the OPP), which consists of OPP officers and civilian staff. The OPP officers conduct investigations into the background of applicants.

Issue A: Is withheld portion of page 32 of the records responsive to the request?

[9] The AGCO submits that part of page 32 of the records is not responsive to the request and that, alternatively, it is exempt from disclosure under section 14(2)(a) (law enforcement report) and/or section 21(1) (personal privacy) of the *Act*. I find that page 32 of the records is responsive to the access request.

[10] To be considered responsive to the request, records must "reasonably relate" to the request.⁵ Institutions should interpret requests generously, in order to best serve the purpose and spirit of the *Act*. Generally, if a request is unclear, the institution

⁴ In this order the terms "horseperson licence" and "horse racing licence" are interchangeable.

⁵ Orders P-880 and PO-2661.

should interpret it broadly rather than restrictively.⁶

[11] The AGCO submits that page 32 of the records is not responsive to the request because it does not fall within the parameters of, or reasonably relate to, the access request. I disagree. I have reviewed the appellant's access request, which was for all records of the applications for a specified horseperson licence and sub-licence, as well as all records of the submission, review, approval and granting of the above-referenced licences. I have reviewed page 32 of the records and I find that it reasonably relates to the part of the request for records relating to the review of the licence application. As a result, I find that page 32 of the records is responsive to the request. The AGCO is also claiming the application of two exemptions to this page [sections 14(2)(a) and 21(1)], which I consider below.

Issue B: Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[12] The AGCO is claiming that pages 1-17, 19-25, 27-30, 32-53 and 55 contain the affected party's personal information, as well as the personal information of other individuals. In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the records contain "personal information," and if so, to whom the personal information relates.

[13] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual."

[14] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.⁷ See also section 2(3), which states:

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

[15] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.⁸

[16] Section 2(1) of the *Act* gives a list of examples of personal information:

⁶ Orders P-134 and P-880.

⁷ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁸ Orders P-1409, R-980015, PO-2225 and MO-2344.

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual’s name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[17] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be “personal information.”⁹

[18] The AGCO submits that the records contain the following personal information about the applicant and other individuals:

- The affected party’s personal views and opinions;
- Information relating to the education or employment history of various individuals;

⁹ Order 11.

- Information relating to the affected party's financial information, including financial transactions in which the affected party was involved, as well as another individual's financial background;
- Background checks of the affected party;
- An identifying symbol or other particular assigned to the affected party;
- The affected party's name where it appears with other personal information about him; and
- The findings of an OPP investigation of the affected party.

[19] All of this information, the AGCO argues, relates to the affected party and other individuals in a personal capacity and reveals information of a personal nature about them.

[20] The appellant submits that the information in the records falls within the AGCO's process for granting horseperson licences, and that applicants for these licences are engaging in business or business-type activities. The appellant further submits that these business activities involve investing in a horse, a trainer, a barn and equipment, as well as earning profits from racing winnings and stud fees. Therefore, the appellant argues, the information in the records should not be considered to be related to personal activities, nor should it be considered to be personal information. The appellant also submits that any information about the appellant's connections with certain individuals or organizations in the records would be business relationships, and would not, therefore consist of personal information.

[21] The appellant further submits that financial information about the affected party in his personal capacity would likely qualify as his personal information, but that financial information and any criminal history in his business dealings would not. The appellant concedes that there may be personal information about the affected party in the records, such as credit reporting, and his driving history, and that there may be personal information in the records about other individuals.

Analysis and findings

[22] On my review of the records, I find that they contain the personal information of the affected party and two other individuals, with the exceptions of pages 18, 26, 31 and 54.

[23] With regard to the affected party, I find that all of the records, with the exception of five pages¹⁰ contain information that qualifies as his personal information and that all of these records relate to him in his personal capacity. In particular, the

¹⁰ Pages 18, 26, 31, 32 and 54.

records contain information about the affected party's family status, age and national or ethnic origin, falling within paragraph (a) of the definition of personal information in section 2(1) of the *Act*. In addition, the records contain information relating to the employment history and financial transactions in which the affected party was involved, which qualifies as his personal information under paragraph (b) of the definition. The records also contain information about an "other particular assigned" to the affected party, which qualifies as his personal information under paragraph (c), as well as the personal views of the affected party, which qualifies as his personal information under paragraph (e) of the definition. I also find that the records contain the affected party's name where it appears with other personal information about him, qualifying as his personal information under paragraph (h) of the definition. I am mindful of the appellant's position that the affected party applied for the horse racing licence in order to engage in horse-related business activities. However, it is clear on my review of the information that is contained in these records, it qualifies as the affected party's personal information, notwithstanding that a possible purpose of obtaining the licence may have been to engage in a horse-related business.

[24] I further find that portions of the records contain the personal information of two individuals other than the affected party. In particular, I find that information concerning the first individual is located at pages 5, 7, 24 and 25 of the records, and consists of this individual's personal views of an alleged incident involving the affected party, qualifying as their personal information under paragraph (e) of the definition of personal information in section 2(1).

[25] In regard to the second individual other than the affected party, an OPP Constable, I find that page 32 contains information about the Constable's work schedule, and that this information qualifies as his personal information. Although the work schedule relates to the OPP Constable in a professional, official or business capacity, I find that it qualifies as his "personal information" because it reveals something of a personal nature about him.¹¹

[26] Lastly, I note that the AGCO has not claimed that pages 18, 26, 31 and 54 of the records contain personal information, and I agree. Pages 18 and 54 are the bottom portions of emails, consisting of boiler plate language about the confidentiality of emails. On my review of these pages, I find that they do not contain any personal information. Pages 26 and 31 contain the titles and signatures of AGCO and OPP employees, respectively. I find that both the job titles and the signatures of these employees were made in a professional capacity and do not reveal anything of a personal nature about these employees, and therefore do not qualify as personal information.¹²

¹¹ See Interim Order MO-3552-I and Order PO-3823, in which the IPC made the same findings in regard to an employee's work schedule.

¹² For example, see Order MO-3485 in which signatures of employees in a professional capacity where nothing of a personal nature was revealed did not qualify as personal information.

[27] I will now determine whether the personal information of the affected party and the two other individuals is exempt from disclosure under section 21(1) of the *Act*. With regard to the pages of the records that I have found do not contain personal information, the AGCO has claimed other exemptions for them, which I consider in Issues D and E.

Issue C: Does the mandatory personal privacy exemption at section 21(1) apply to the information at issue?

[28] One of the purposes of the *Act* is to protect the privacy of individuals with respect to personal information about themselves held by institutions.

[29] Section 21(1) of the *Act* creates a general rule that an institution cannot disclose personal information about another individual to a requester. This general rule is subject to a number of exceptions.

[30] The section 21(1)(a) to (e) exceptions are relatively straightforward. If any of the five exceptions covered in sections 21(1)(a) to (e) exist, the institution must disclose the information. Based on the information at issue, and my review, none of sections 21(1)(a) to (e) are applicable to the present appeal.

[31] The section 21(1)(f) exception is more complicated. It allows the institution to disclose another individual's personal information to a requester only if this would not be an "unjustified invasion of personal privacy." Other parts of section 21 must be looked at to decide whether disclosure of the other individual's personal information would be an unjustified invasion of personal privacy. Under section 21(1)(f), if disclosure of the personal information would not be an unjustified invasion of personal privacy, the personal information is not exempt from disclosure.

[32] Sections 21(2), (3) and (4) help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy.

[33] Sections 21(3)(a) to (h) should generally be considered first. These sections outline several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy.

[34] If one of these presumptions applies, the personal information cannot be disclosed unless there is a "compelling public interest" under section 23 that means the information should nonetheless be disclosed (the "public interest override").¹³

[35] If the personal information being requested does not fit within any presumptions under section 21(3), one must next consider the factors set out in section 21(2) to determine whether or not disclosure would be an unjustified invasion of personal

¹³ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

privacy.¹⁴

[36] Section 21(2) lists several factors that may be relevant to determining whether disclosure of personal information would be an unjustified invasion of personal privacy.¹⁵ Some of the factors weigh in favour of disclosure, while others weigh against disclosure. If no factors favouring disclosure are present, the section 21(1) exemption — the general rule that personal information should not be disclosed — applies because the exception in section 21(1)(f) has not been proven.¹⁶

[37] The list of factors under section 21(2) is not a complete list. The institution must also consider any other circumstances that are relevant, even if these circumstances are not listed under section 21(2).¹⁷ The factors relevant in this appeal state:

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;

(b) access to the personal information may promote public health and safety;

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

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

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[38] The AGCO submits that disclosure of the personal information of the affected party would constitute an unjustified invasion of his personal privacy. In particular, the AGCO submits that the presumption in section 21(3)(b) of the exemption in section 21(1) applies to the affected party's personal information because this information was compiled and is identifiable as part of an investigation into a possible violation of law.

¹⁴ However, if any of the situations in section 21(4) are present, then section 21(2) need not be considered. Based on the issues and my review, none of the situations in section 21(4) are relevant to the present appeal.

¹⁵ Order P-239.

¹⁶ Orders PO-2267 and PO-2733.

¹⁷ Order P-99.

The AGCO also argues that the presumption in section 21(3)(d) applies to information about the affected party's employment history, which is contained in page 14 of the records. In addition, the AGCO argues that the presumption in section 21(3)(f) applies to the information in pages 13-16 because it reveals financial information about the affected party.

[39] Turning to the factors in section 21(2), the AGCO submits that none of the factors in section 21(2)(a) through (d), which favour disclosure, apply, but that the factor in section 21(2)(f), which does not favour disclosure, does apply because the personal information at issue is highly sensitive. The AGCO also states that it considered the fact that the affected party is deceased, and that arguably he may have a diminished privacy interest as a result. However, the AGCO concluded that given the affected party has been deceased for a short period of time (less than two years), his privacy interest has not diminished to an extent to justify the disclosure of his personal information.

[40] The appellant submits that the disclosure of the information at issue would not constitute an unjustified invasion of personal privacy, and that the factors in sections 21(2)(a), (b), (e), (h) and (i) are relevant in this appeal as follows:

- Section 21(2)(a) – the appellant says that the affected party had a criminal record and was operating a criminal enterprise and that give the affected party's past and ongoing criminal activities, there are important questions as to why the AGCO would have cleared him to obtain the licences,
- Section 21(2)(b) – knowing more about the details of the AGCO's decision around granting the licence could promote public safety, because other people involved in the horseracing and betting worlds would have a better sense of how diligent the AGCO is about screening participants in horseracing, including those involved in illicit activities,
- Section 21(2)(c) – the affected party would not suffer pecuniary harm,
- Section 21(2)(h) – the affected party did not supply the information in the records at issue to the AGCO, and
- Section 21(2)(i) – the affected party's reputation would not be unfairly damaged because he is deceased, it is already well reported that he had a criminal record and that he was living with an associate of a street gang, and it is well known that he founded and was operating an illegal cannabis business.

[41] The appellant's position is also that the affected party has a diminished right to privacy due to, in part, the fact that the information at issue would not affect the rights or interests of his estate or his family, and that fact that some of the information at issue is publicly known, for example, the criminal record and that some of the information at issue may be material the affected party himself posted on social media.

[42] In reply, the AGCO argues that the fact that the affected party is deceased does not mean that the mandatory personal privacy exemption in section 21(1) does not apply to his personal information. In addition, the AGCO submits that even if an individual's personal information is available on "public channels" or has been released by the individual themselves, that does not mean that the information is not exempt from disclosure under section 21(1).

Analysis and findings

[43] I find that all of the personal information at issue is exempt from disclosure under section 21(1) because its disclosure would constitute an unjustified invasion of the personal privacy of the affected party and other individuals.

[44] As previously stated, the AGCO relies on the presumptions in sections 21(3)(b), (d) and (f) of the *Act*, which state:

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(d) relates to employment or educational history;

(f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

[45] The appellant refers to the factors in sections 21(2)(a), (b), (e), (h) and (i) of the *Act*, and the AGCO relies on the factor in section 21(2)(f). These sections state:

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;

(b) access to the personal information may promote public health and safety;

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The relevant presumptions in section 21(3)(b)

[46] With respect to the affected party, I find that the presumption in section 21(3)(b) applies to his personal information in pages 2, 4, 5, 6, 7, 20, 21, 24, 25, 27 and 35-53. I find that the disclosure of the affected party's personal information in these pages would reveal information that was compiled in past police investigations into possible violations of the *Criminal Code*. I also find that the presumption in section 21(3)(f) applies to the affected party's personal information at pages 1-4 and 13-16 because it describes his financial information, including his creditworthiness, financial activities, assets and liabilities.

[47] Turning to the first of two individuals other than the affected party, I find that the presumption in section 21(3)(b) applies to pages 5 and 7 because the disclosure of this individual's personal information in these pages would reveal information that was compiled by police as part of a past police investigation into a possible violation of the *Criminal Code*.

[48] As previously stated, if any of the section 21(3) presumptions are found to apply, they cannot be rebutted by the factors in section 21(2) for the purposes of deciding whether the section 21(1)(f) exception to the section 21(1) exemption has been established. As a result, I find that disclosure of the personal information referred to above would constitute an unjustified invasion of the personal privacy of the affected party and the other individual under section 21(1)(f), and it is therefore exempt from disclosure under section 21(1) of the *Act*.

[49] Below, I will consider the application of the factors in section 21(2) to the remaining personal information of the affected party or other individuals.

[50] With respect to the personal information of the OPP Constable at page 32 of the records, which consists of information about his work hours during the investigation of the affected party, I find that none of the presumptions in section 21(3) apply to this information. However, I consider the application of the factors in section 21(2) to it, below.

The factors in section 21(2)

[51] The remaining personal information of the affected party is at pages 8-12, 17,

19, 22, 23, 28-30 and 33-34 and 55.¹⁸ I find that the only factor in section 21(2) that applies is section 21(2)(f) because the personal information contained in these pages is highly sensitive and its disclosure would cause personal distress. I further find that, based on my review of the particular personal information at issue, this factor weighs heavily against the disclosure of this information. I also find that the factors the appellant has raised, which weigh in favour of disclosure, are not relevant in the circumstances of this appeal and I have, therefore, given them no weight. For example, I find that the disclosure of the affected party's personal information would not serve the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny or that access to the personal information may promote public health and safety.

[52] As a result, I find that the disclosure of the affected party's personal information in these pages would constitute an unjustified invasion of his personal privacy and that it is, therefore, exempt from disclosure under section 21(1)

[53] Concerning the personal information of the OPP Constable as described above, I find that none of the factors in section 21(2) either weighing for or against disclosure applies to the Constable's work schedule. Because there are no factors in section 21(2) that would weigh in favour of the disclosure of the Constable's personal information, I find that its disclosure would constitute an unjustified invasion of his personal privacy and that it is, therefore exempt from disclosure under section 21(1).

[54] Finally, section 21(4) provides that if any of the circumstances in that section are present, disclosure would not be an unjustified invasion of personal privacy. None of the circumstances are present here.

Summary

[55] I have found above that all of the personal information at issue is exempt from disclosure under section 21(1).

[56] The appellant has raised the application of the public interest override in section 23 of the *Act* to all of the personal information at issue. If section 23 applies, the exemption in section 21(1) does not apply. I consider this in Issue F, below.

Issue D: Does the discretionary exemption at section 13(1) for advice or recommendations given to the AGCO apply to pages 18, 26, 31 and 54?

[57] The AGCO is claiming the application of section 13(1) to the remaining pages at issue, which are pages 18, 26, 31 and 54. These pages contain the following information:

¹⁸ Only portions of pages 20, 21, 23 and 27 were withheld under section 21(1).

- Page 18 – is the bottom portion of an email, containing only boilerplate language about the confidentiality of AGCO emails,
- Page 26 – contains only the title and signatures of three AGCO staff members and the date of the signatures,
- Page 31 – contains information about one of the investigations and the name, title and signature of two OPP employees, and
- Page 54 – same as page 18 along with the first name of an AGCO staff member.

[58] Section 13(1) of the *Act* exempts certain records containing advice or recommendations given to an institution. This exemption aims to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.¹⁹

[59] Section 13(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[60] “Advice” and “recommendations” have distinct meanings. “Recommendations” refers to a suggested course of action that will ultimately be accepted or rejected by the person being advised. Recommendations can be express or inferred. “Advice” involves an evaluative analysis of information. Neither “advice” nor “recommendations” include “objective information” or factual material.

[61] The AGCO’s representations on the section 13 exemption relate to most of the pages that I have already been found to be exempt under section 21(1). The AGCO submits that the records contain recommendations made by AGCO staff to the AGCO’s Deputy Registrar, including a suggested course of action as to whether the affected party’s initial application for a thoroughbred licence should be accepted or rejected and, subsequently, whether the affected party was eligible to continue to hold the licence. The AGCO also submits that the exceptions to section 13(1) in section 13(2) do not apply to the records.

[62] The appellant submits that the purpose of the exemption in section 13(1) is to exempt the advice and recommendations given by civil servants to assist government in making policy decisions, but not specific decisions, for example, about whether to issue one particular licence. In addition, the appellant submits that any factual and background information falls within the exception in section 13(2).

¹⁹ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

Analysis and findings

[63] I have considered the parties' representations and have reviewed the relevant pages at issue. I find that none of these pages contain direct advice or recommendations, nor would it be possible to draw accurate inferences about any advice or recommendations made. The information contained in these pages, I find, is simply factual information. As a result, I find that the discretionary exemption in section 13(1) does not apply to them. The AGCO is not claiming any other exemptions with respect to page 18, and I will therefore order the AGCO to disclose this page to the appellant.

[64] With respect to pages 26, 31 and 54, the AGCO is also claiming the discretionary exemptions in sections 14(1)(c) and/or 14(2)(a) to them, which I consider below.

Issue E: Does the discretionary exemption at sections 14(1)(c) and/or 14(2)(a) related to law enforcement activities apply to pages 26, 31 and 54?

[65] The AGCO is claiming the application of section 14(1)(c) to page 54 and section 14(2)(a) to pages 26 and 31. Section 14 contains several exemptions from a requester's right of access, mostly related to the context of law enforcement.

[66] The relevant portions of sections 14(1) and (2) state:

(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

(2) A head may refuse to disclose a record,

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

[67] The term "law enforcement"²⁰ is defined in section 2(1):

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

²⁰ The term "law enforcement" appears in many, but not all, parts of section 8.

(c) the conduct of proceedings referred to in clause (b)

[68] The IPC has found that "law enforcement" can include these situations, for example, a municipality's investigation into a possible violation of a municipal by-law;²¹ or a police investigation into a possible violation of the *Criminal Code*.²²

[69] For section 14(1)(c) to apply, the institution must show that disclosing the investigative technique or procedure to the public could reasonably be expected to interfere with its effective use. The exemption normally will not apply where the technique or procedure is generally known to the public.²³ The technique or procedure must be "investigative"; that is, it must be related to investigations. The exemption will not apply to techniques or procedures related to "enforcing" the law.²⁴

[70] For a record to be exempt under section 14(2)(a), it must be

1. a **report**,
2. prepared in the course of law enforcement, inspections or investigations, and
3. prepared by an agency that has the function of enforcing and regulating compliance with a law.²⁵

[71] A report is a formal statement or account of the results of the gathering and consideration of information. "Results" do not generally include mere observations or recordings of fact.²⁶ The title of a document does not determine whether it is a report, although it may be relevant to the issue.²⁷

[72] The AGCO submits that pages 53-55 (only page 54 remains at issue) contain investigative techniques as contemplated in section 14(1)(c) that AGCO staff used to obtain background information about the affected party to assist in its eligibility review of the affected party's licence application. If this information was revealed, the AGCO argues, future investigations could be hindered because if an applicant knew in advance what type of investigative techniques the AGCO uses, the applicant could alter the availability of such information.

[73] The AGCO submits that pages 24-26 (only page 26 remains at issue) consist of a report that was prepared by AGCO staff as a result of the affected party's application for a thoroughbred licence. The report, which the AGCO describes as "non-routine," reviewed, among other things, the affected party's background, police-related searches

²¹ Orders M-16 and MO-1245.

²² Orders M-202 and PO-2085.

²³ Orders P-170, P-1487, MO-2347-I and PO-2751.

²⁴ Orders PO-2034 and P-1340.

²⁵ Orders P-200 and P-324.

²⁶ Orders P-200, MO-1238 and MO-1337-I.

²⁷ Order MO-1337-I.

and financial history. This report, the AGCO submits, meets the criteria of section 14(2)(a) as it consists of a formal statement of account of the results of the investigation along with recommendations from AGCO staff.

[74] In addition, the AGCO submits that pages 29-32 (only page 31 remains at issue) comprise a second investigation report related to the affected party. The second investigation was conducted by the OPP after the AGCO issued the licence to the affected party and the resulting report, the AGCO argues, contains the OPP officer's conclusions or opinions of the results of this second investigation, meeting the requirements of a report under section 14(2)(a).

[75] The appellant submits that the AGCO is not acting in a law enforcement capacity in these circumstances because the records resulted from a "simple" licence application review, and were not compiled as part of an investigation as contemplated by the *Act*, adding that no charges or remedial measures would have been possible. The appellant states:

If it were deemed to be an "investigation" for the purposes of the *Act*, the precedent would be that *any* government review and processing of an application for *any* license, no matter how innocuous (e.g. a license to draw groundwater for a water bottling business, as license to operate a food establishment), would have to be shielded from public scrutiny.

[76] The appellant also submits that neither section 14(1)(c) nor section 14(2)(a) apply to the records. In particular, he argues that section 14(1)(c) does not apply because in order for information to qualify as investigative techniques or procedures, it would have to be acquired beyond "obvious or intuitive" steps. In this case, the appellant submits the AGCO compiled the information through open-source information such as running a driver's license and a CPIC check.

[77] With respect to section 14(2)(a), the appellant submits that this exemption does not apply because while the records do potentially constitute some kind of report, they do not constitute a report prepared in the course of a law enforcement inspection or investigation.

Analysis and findings

[78] As previously stated, the AGCO is claiming the application of section 14(1)(c) to page 54 and section 14(2)(a) to pages 26 and 31. These pages contain the following information:

- Page 26 – contains only the title and signatures of three AGCO staff members and the date of their signatures,
- Page 31 – contains information about one of the investigations and the name, title and signature of two OPP employees, and

- Page 54 – this page is the end of an email with standard boiler plate language about the confidentiality of emails, along with the first name of an AGCO staff member.

[79] I find that the information in these pages is not exempt from disclosure under either section 14(1)(c) or 14(2)(a). The AGCO has claimed the application of section 14(1)(c) to page 54. As described above, this page contains only the title and signatures of three AGCO staff members, along with the date of the signatures. I find that this information would not reveal any investigative technique or procedure that, if disclosed, could reasonably be expected to interfere with its effective use. In fact, I find that none of the information at page 54 reveals an investigative techniques or procedures at all.

[80] Similarly, I find that the exemption in section 14(2)(a) that the AGCO is claiming to pages 26 and 31 does not apply. In particular, I find that the information in these pages, if disclosed, would not reveal a formal statement or account of the *results* of the gathering and consideration of information, which is required for information to qualify for exemption under section 14(2)(a). As a result, I find that pages 26 and 31 are not exempt from disclosure under section 14(2)(a).

[81] As no other exemptions have been claimed with respect to these pages, I will order the AGCO to disclose them to the appellant.

Issue F: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21(1) exemption?

[82] Section 23 of the *Act*, the “public interest override,” provides for the disclosure of records that would otherwise be exempt under another section of the *Act*. It states:

An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, **21** and 21.1 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[83] Because I have found that the exemption in section 13 does not apply to the records, I need to consider only whether section 23 applies to the information I have found to be exempt under section 21(1).

[84] For section 23 to apply, two requirements must be met:

- there must be a compelling public interest in disclosure of the records; and
- this interest must clearly outweigh the purpose of the exemption.

[85] The *Act* does not state who bears the onus to show that section 23 applies. The IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure that clearly outweighs the purpose of the

exemption.²⁸

[86] 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.²⁹ In previous orders, the IPC has 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.³⁰

[87] A “public interest” does not exist where the interests being advanced are essentially private in nature.³¹ However, if a private interest raises issues of more general application, the IPC may find that there is a public interest in disclosure.³² A public interest is not automatically established because a requester is a member of the media.³³

[88] The IPC has defined the word “compelling” as “rousing strong interest or attention.”³⁴

[89] The IPC must also consider any public interest in not disclosing the record.³⁵ A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of “compelling.”³⁶

[90] A compelling public interest has been found to exist where, for example, the records relate to the economic impact of Quebec separation,³⁷ the integrity of the criminal justice system is in question,³⁸ and there are public safety issues relating to the operation of nuclear facilities.³⁹

[91] A compelling public interest has been found not to exist where, for example, another public process or forum has been established to address public interest

²⁸ Order P-244.

²⁹ Orders P-984 and PO-2607.

³⁰ Orders P-984 and PO-2556.

³¹ Orders P-12, P-347 and P-1439.

³² Order MO-1564.

³³ Orders M-773 and M-1074.

³⁴ Order P-984.

³⁵ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

³⁶ Orders PO-2072-F, PO-2098-R and PO-3197.

³⁷ 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.).

³⁸ Order PO-1779.

³⁹ 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.

considerations,⁴⁰ a significant amount of information has already been disclosed and this is adequate to address any public interest considerations,⁴¹ or the records do not respond to the applicable public interest raised by the appellant.⁴²

[92] The existence of a compelling public interest is not enough to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the exemption in the specific circumstances.

[93] 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.⁴³

[94] The appellant's position is that there is a compelling public interest in the records because the AGCO decided to issue a licence to the affected party, who had a criminal record and who was involved in a known and ongoing criminal enterprise, and that the licence grants access to a "sensitive area of endeavour," involving wagering which is fraught with the potential for race-fixing. The appellant goes on to make a number of claims about the affected party, for example, that he was engaged in a cannabis pet food company, owned at least one illegal cannabis dispensary, flew first-class on airplanes and chartered a private jet, among other things.⁴⁴ Given affected party's activities, the appellant argues, it is in the public interest to know what the AGCO considered in granting the licence, and why it decided that the affected party met the standards of integrity and honesty under the *Horse Racing Licence Act*. In that regard, the appellant states:

Ultimately, how was it decided that someone with his history, his connections, his ongoing endeavours and the questions about his wealth met the requirements? The very decision-making process of the AGCO itself is in the crosshairs here. It is a public institution that serves an important role in regulating a number of sensitive industries, and for that reason transparency and accountability should be given substantial weight. On the other hand, balancing that against the Owner's privacy, we need to consider once again that his privacy interests are somewhat diminished because of his demise.

[95] The AGCO submits that there is not a compelling public interest in the disclosure of the records at issue. The AGCO submits that any public interest is met by its acknowledgement that there are records about the affected party, notably that an eligibility investigation into the affected party's personal history took place. This fact,

⁴⁰ Orders P-123/124, P-391 and M-539.

⁴¹ Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

⁴² Orders MO-1994 and PO-2607.

⁴³ Order P-1398, upheld on judicial review in *Ontario v. Higgins*, 1999 CanLII 1104 (ONCA), 118 OAC 108.

⁴⁴ The appellant submits that some of this information was gleaned from the affected party's social media.

the AGCO argues, informs the citizenry that horse racing licence applicants and licence-holders undergo eligibility investigations.

[96] In this particular case, the AGCO argues that the appellant has not demonstrated that there is a true and compelling public interest in the disclosure of the records, and that the appellant's interest in the disclosure of the affected party's personal information is of a private nature, namely to write newspaper articles about the affected party. The AGCO states:

The appellant provides some news articles about the history of horse racing in various global jurisdictions and how there were potential issues with race-fixing in the past. The appellant also provided an article about how the Canadian federal government may need to do more to prevent money laundering at Ontario race tracks. The appellant's interest in the disclosure of the records is more aptly described as private in nature. There is no connection between the individual being licensed as a Horseperson and any of those cited potential issues in horse racing. . .

[97] The AGCO further argues that any public interest in an individual's horseperson's licence is not clearly outweighed by the mandatory personal privacy exemption in section 23.

[98] In reply, the appellant submits that the prime object of journalism is to scrutinize public institutions and hold them accountable to the public, which aligns with the aims of the public interest override in section 23, as has been found in many IPC decisions. The appellant goes on to state:

If government transparency and accountability are the *Act's* goals, then "writing newspaper articles" is one of the prime means of achieving these goals. It's a sad day when the ruling government advances the argument that all journalists are only operating out of self-interest.

[99] Regarding the personal information at issue, the appellant submits that there is a compelling public interest in the disclosure of this information – information that arouses a strong interest in or attention on the affected party, his illegal cannabis business and the fact that he obtained the licence despite his (and some associates') illegal activities. The appellant further argues that the public interest override clearly outweighs the affected party's personal privacy under section 21(1). He argues that the fact that the affected party has been deceased for few years has somewhat diminished his privacy interests.

[100] The appellant further submits that the AGCO refers to past orders where the IPC found that the public interest override did not apply where a significant amount of information about the individual had already been disclosed to the public. That is not the case in the circumstances of this appeal, the appellant argues, because there has

been no media attention about the affected party's horseracing activities, or information about this issue disclosed by authorities, and there has been no public discussion about whether the AGCO should have granted the licence(s) to the affected party. The appellant's position is that the manner in which the AGCO's investigation of the affected party was conducted, and particularly whether his criminal record and information about his ongoing illegal drug business were known, is a matter of strong public interest. The appellant goes on to submit that the AGCO claims that because there is no published or proven connection between the affected party and concerns with race fixing and money laundering in Ontario, there can be no public interest in the records. The appellant argues that the AGCO misses the point, and that the news articles he cited in his representations were to show that there are live concerns in the horseracing industry as a whole, such as money laundering and race fixing. These concerns, in concert with the affected party's illegal activities, lead the appellant to the conclusion that there is a public interest in knowing whether the AGCO had the same concerns and, if so, how did it approach these concerns in its decision-making regarding the affected party.

Analysis and findings

[101] The appellant's position is that because of the affected party's alleged criminal background and activities, there is a public interest in learning what material the AGCO reviewed respecting the affected party and how the AGCO came to the conclusion that the affected party was eligible to obtain a horseperson licence and sublicence. The AGCO's position is that the fact that it has an eligibility process for horseperson licences, and the fact that the affected party was subject to eligibility investigations is enough to satisfy any public interest that may exist in this subject area.

[102] I have reviewed the records and find that they consist of the personal information of the affected party, the other individual and the OPP Constable which was gathered and reviewed by the AGCO as part of its investigations into the affected party's eligibility for a horseperson licence and sublicence. However, I also find that the records do not reveal *how* the AGCO came to the conclusion that the affected party qualified for a horseperson licence and sublicence. In other words, the information that is exempt under section 21(1) does not address the public interest consideration raised by the appellant.

[103] Concerning the personal information of the affected party, the other individual and the OPP Constable that was compiled by and for the AGCO as part of its eligibility investigations, I find that there is not a public interest that rouses strong interest or attention in its disclosure. First, there is no reason to find in the circumstances that there is a compelling public interest in disclosure of the work schedule of an OPP Constable working on horseperson licence eligibility investigation. Second, the personal information of the individual other than the affected party is of a private nature unrelated to the public interest considerations raised by the appellant and I find that there is not a compelling public interest in its disclosure.

[104] Turning to the affected party's personal information, I find that the disclosure of his personal information, which is of a private nature, would not raise any issues of more general application that are of a compelling public interest. As I noted above, this information (and the personal information of the other two individuals) does not reveal how the AGCO decided that the affected party was eligible for a horseperson license and sublicense.

[105] In conclusion, none of the information at issue speaks to the public interest raised by the appellant, which is how the AGCO came to the conclusion that the affected party was eligible to obtain a horseperson licence and sublicense. In short, the information in the records does not reveal how the AGCO decided to grant the horseperson licence and sublicense to the affected party.

[106] For these reasons, I find that there is not a compelling public interest in the disclosure of any of the personal information in the records. Because I have found that there is not a compelling public interest in the disclosure of the personal information at issue, I do not need to address the second consideration, which is whether there is a compelling public interest that clearly outweighs the purpose of the personal privacy exemption in section 21(1). In sum, I find that the public interest override in section 23 does not apply to the personal information contained in the records.

ORDER:

1. I order the AGCO to disclose pages 18, 26, 31 and 54 to the appellant by **May 5, 2023** but not before **May 2, 2023**.
2. I reserve the right to require that the AGCO to provide the IPC with a copy of the records it discloses to the appellant.

Original Signed by: _____

Cathy Hamilton
Adjudicator

_____ March 29, 2023