Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4387

Appeal PA21-00016 & PA21-00460

Ontario Lottery and Gaming Corporation (OLG)

May 4, 2023

Summary: This order addresses a request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a financing arrangement for the operation of a group of casinos owned by the Ontario Lottery Gaming Corporation (OLG). Following third party notification, OLG decided to partially release the responsive agreement, withholding portions on the basis of the third-party information exemption at section 17(1) of the *Act*. The third party appealed OLG's decision to disclose any portion of the agreement. The requester also appealed OLG's decision to withhold any part of the agreement. In this order, which addresses both appeals, the adjudicator finds that the exemption at section 17(1) applies to some portions of the agreement but not to others. She also finds that the public interest override at section 23 does not apply to the exempt information. Accordingly, she partially upholds OLG's decision and orders additional disclosure of some of the information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1)(a), 17(1)(c) and 23.

Orders and Investigation Reports Considered: Orders PO-1983, PO-2020, PO-2328, PO-2781 and MO-3019.

OVERVIEW:

[1] After a procurement process, the Ontario Lottery and Gaming Corporation (OLG) selected a private sector entity to operate a group of casinos. This order addresses a request for records relating to a financing arrangement entered into by the successful proponent and another private sector entity for the purpose of providing financing for

the operation of the casinos.

[2] The requester sought access from OLG under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the following information:

> Any of the following records related to [a specific type of financial arrangement] entered into by named company [(the successful proponent)] to finance operation of [named casino bundle]:
>
> 1. agreement/record giving effect to the [financial arrangement];
>
> 2. ancillary agreements to 1;
>
> 3. record evidencing OLG's consent for [the successful proponent to enter into the financial arrangement].

[3] OLG identified the record that was responsive to the request as a financial agreement, which includes a number of schedules. In this order, I will refer to the financial agreement, including all of its schedules, as "the agreement." The schedules are described in more details in the Records section below.

[4] Pursuant to section 28(1) of the *Act*, OLG notified three parties who might have an interest in the disclosure of the agreement. Two of the three third parties did not object to OLG's decision to grant partial access to the agreement. I will refer to these parties who did not appeal as "the affected parties."

[5] Subsequently, OLG issued a decision to the requester, granting partial access to the agreement. OLG withheld portions of the agreement pursuant to the mandatory exemption for third party information at section 17(1) of the *Act*.

[6] The third party who entered into the financial arrangement with the successful proponent to provide financing, the appellant in Appeal PA21-00016, appealed OLG's decision to the Information and Privacy Commissioner of Ontario (the IPC), taking the position that the agreement, in its entirety, should be withheld under section 17(1) of the *Act*. A mediator was assigned to attempt to facilitate a mediated resolution between the parties in Appeal PA21-00016.

[7] During mediation of Appeal PA21-00016, the requester advised that he was also appealing OLG's decision. The requester takes the position that section 17(1) of the *Act* does not apply to any portion of the agreement and accordingly, that it should be disclosed in its entirety. The IPC opened Appeal PA21-00460, to address the requester's concerns and the same mediator was assigned.

[8] At the conclusion of mediation, the parties confirmed their positions:

- OLG – section 17(1) applies to some of the responsive information and partial access to the agreement should be granted.
- Appellant – section 17(1) applies to all of the responsive information and access should be denied to the agreement in its entirety.
- Requester – section 17(1) does not apply to any of the responsive information and the agreement should be disclosed in its entirety.

[9] The requester also raised the possible application of the public interest override provision at section 23 of the *Act,* arguing that it applies to permit disclosure of the agreement.

[10] As neither Appeal PA21-00016 nor Appeal PA21-00460 was resolved during mediation, both appeals were transferred to the adjudication stage of the appeal process where an adjudicator may conduct an inquiry.

[11] As the adjudicator assigned to these appeals, because they involve the same parties and address the same responsive records, I decided to conduct a joint inquiry and consider Appeal PA21-0016 and Appeal PA21-00460 together.

[12] During my inquiry, I sought representations from OLG, the appellant, the requester and two affected parties. The appellant, the requester and one of the two affected parties (the successful proponent) provided representations which were shared in accordance with the IPC's sharing principles set out in the *Code of Procedure* and *Practice Direction 7.* OLG and the other affected party did not submit representations.

[13] In this order, I uphold OLG's decision in part. I find that the exemption at section 17(1) applies to some portions of the agreement but not others and I order this information disclosed. I also find that there is no "compelling public interest" in the disclosure of the information for which section 17(1) has been established and that therefore the public interest override at section 23 does not apply.

RECORDS:

[14] The responsive record in both appeals is a Consent Agreement for the affected party to enter into a financial arrangement for the operation of a bundle of casinos. It includes a Consent Agreement, together with its schedules. Although there are several schedules that are discussed in more detail below, as indicated above, I will refer collectively to the record in this order as the agreement. With its attached schedules, the agreement totals 267 pages.

[15] The following chart represents OLG's decision regarding the disclosure of the different documents that make up the agreement:

Page	Document Title	OLG decision to withhold (in full or part) under section 17(1) or disclose
1 to 12	**<u>Consent Agreement</u>**	Withhold in part
14 to 25	➢ **Schedule A to Consent Agreement: Form of [financial arrangement]**	Withhold in full
26 to 80	○ ***Schedule A to [financial arrangement]: Investor Rights Agreement***	Withhold in full
81	○ *Schedule A to Investor Rights Agreement: Debenture*	Withhold in full
82 to 175	○ *Schedule B to Investor Rights Agreement: Form of Step-in-Lease* - Schedules A to K of Step-in-Lease	Disclose
176	- Schedule L to Step-In-Lease: Existing Subleases	Withhold in full
177 to 180	- Step-in-Lease Table of Contents	Disclose
181 to 198	○ *Schedule C to Investor Rights Agreement: Form of Novation*	Withhold in full
199	○ *Schedule D to Investor Rights Agreement: Capital Investments*	Withhold in full
200	○ *Schedule E to Investor Rights Agreement: List of Shareholders, Shares and Addresses for Notice*	Withhold in full
201	○ *Schedule F to Investor Right Agreement: Acknowledgement*	Withhold in full
202 to 209	- Exhibit 1: Protected Area	Disclose
210 to 214	• ***Schedule B to [financial arrangement]: Form of Amendment Creating Class B Special Shares***	Withhold in full
215 to 218	➢ **Schedule B to Consent Agreement: Form of Subscription Agreement**	Withhold in full
219 to 227	➢ **Schedule C to Consent Agreement: Forms of … Termination Agreements**	Disclose
228 to 229	○ ***Schedule A to Termination Agreement: Legal***	Disclose

230 to 234	○ ***Termination Agreement***	Disclose
235 to 267	➢ **Schedule D to Consent Agreement: Amendments to COSA [Casino Operations and Services Agreement]**	Withhold in part (pages 255 to 259, 261, 265 and 266)

ISSUES:

A. Does the mandatory exemption at section 17(1) for third party information apply to the agreement?

B. Pursuant to section 23, is there a compelling public interest in disclosure of the agreement that clearly outweighs the purpose of the section 17(1) exemption?

DISCUSSION:

Issue A: Does the mandatory exemption at section 17(1) for third party information apply to the agreement?

[16] In this order, I must consider whether section 17(1) applies to any portion of the agreement. OLG takes the position that portions of the agreement are exempt under that section and the affected party agrees. The appellant submits that section 17(1) applies to the entirety of the agreement. The requester submits that the agreement should be disclosed in its entirety. For the reasons that follow, I find that section 17(1) applies only to portions of the agreement.

[17] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[1] where specific harms can reasonably be expected to result from its disclosure.[2]

[18] Despite opposing the disclosure of the information, the appellant does not expressly state the specific paragraph(s) of section 17(1) on which it relies. The affected party relies on sections 17(1)(a) and (c). Based on the arguments of the appellant and the affected party, discussed in more detail below, the relevant portions of section 17(1) state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

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[1] *Boeing Co. v. Ontario* (*Ministry of Economic Development and Trade*), [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> …
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency….[3]

[19] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[4] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[5]

[20] For section 17(1) to apply, the parties arguing against disclosure (in this case, the OLG, the affected party and the appellant) must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

[21] As indicated above, OLG did not submit representations on the applicability of the section 17(1) exemption. The appellant and one affected party did.

Part one: type of information

[22] The appellant and the affected party submit that the agreement, by its very nature, contains information that is commercial and financial in nature. The requester disputes that all of the information is commercial or financial in nature.

[23] Past IPC orders have defined the types of information listed in section 17(1) of the *Act* for part one of the test. The two types of information raised in this appeal are:

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[3] The fourth and last subsection of section 17(1) – section 17(1)(d) – addresses harm arising from the disclosure of information related to a labour relations dispute and is not relevant in this appeal.

[4] *Boeing Co. v. Ontario* (*Ministry of Economic Development and Trade*), [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

[5] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[6] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[7]
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[8]

The parties' representations

[24] The appellant and the affected party submit that the information in the agreement relates to financing arrangements between private sector parties and commercial arrangements between those parties related to private property.

[25] The appellant and the affected party submit that the agreement contains commercial information as it relates to the buying and selling or exchange of merchandise or services[9] – in this case, the lease and licensing of real property and related services. The appellant notes that the agreement reveals its essential business policies; the affected party notes that the agreement contains commercial information as it relates to the commercial viability of its business,[10] as well as information about its proposed business activities, plans and strategies including the corporate structure established between the parties to the agreement.[11]

[26] The appellant and the affected party also submit that the agreement contains financial information, information relating to money and its use or distribution,[12] including financing and the terms and conditions to that financing agreed to between two or more private parties. The affected party submits that the agreement (including some of the schedules) contains information relating to a financial arrangement that it entered into to finance its operation of a group of casinos, a contract it was awarded by OLG.

[27] The requester submits that the agreement does not consist entirely of commercial and financial information. He argues that the names of the parties to the agreement (some of which have been redacted) is not commercial information or

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[6] Order PO-2010.
[7] Order P-1621.
[8] Order PO-2010.
[9] Order P-493.
[10] Order PO-2377.
[11] Order P-1629.
[12] Order MO-3700.

financial information. He also argues that names of some of the schedules to the agreement have been redacted and submits that this information does not qualify as either commercial or financial information.

Analysis and finding

[28] In this case, I am satisfied that the agreement, as a whole, constitutes commercial information as it was created for the purpose of establishing a commercial arrangement between a number of parties, OLG being one of them. I also find that it contains information that qualifies as financial information as it relates to financing arrangements between private organizations. I find therefore, the agreement contains commercial and financial information as contemplated by section 17(1) of the *Act* and the first part of the three-part test has been met.

Part two: supplied in confidence

[29] Part 2 of the three-part test itself has two parts: (1) the agreement must have been "supplied" to OLG and (2) it must have been supplied, "in confidence," either implicitly or explicitly.

Supplied

[30] The requirement that the information have been "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[13] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[14]

[31] The contents of a contract between an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). Contractual provisions are generally treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where it reflects information that originated from one of the parties.[15]

[32] There are two exceptions to this general rule, described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[16] The immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible

[13] Order MO-1706.
[14] Orders PO-2020 and PO-2043.
[15] This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).
[16] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.[17]

In confidence

[33] If it is established that the information was "supplied" it must then be established that it was supplied "in confidence." In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[18]

Representations of the parties

Appellant's representations

Supplied

[34] The appellant, one of the parties opposing disclosure, submits that the information contained in the agreement was supplied to OLG. It submits that the agreement includes pricing, terms, renewal terms and provisions that allocate risk and reward which represent the appellant's way of doing business. It submits that its approach to negotiations and assessment of risks versus reward, part of its business approach and policies and practices, are non-negotiated confidential information. It submits that these are all essential business policies that are applicable to relations and negotiations with other customers and potential customers and not solely related to the agreement. It submits this information, by its nature, is immutable as that term has been considered both by the Court and in IPC jurisprudence. It further submits that the "financing documents"[19] were not negotiated with OLG; OLG was not involved in the negotiations or the decision of the private sector parties to negotiate and enter into the particular financing arrangement. It also submits that its disclosure would permit accurate inferences to be drawn about the financial information provided by the affected party to OLG.

In confidence

[35] The appellant submits that the information in the agreement was supplied to OLG in confidence. It submits that the records contain confidential information that is valuable to its commercial and financial interests, including information about the exercise of rights pursuant to financing arrangements which inherently include the strengths and weaknesses of its position vis-à-vis the other private sector parties to the agreement. It submits that "[t]hese types of documents would not be disclosed to any

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[17] *Miller Transit*, above at para. 34.
[18] Order PO-2020.
[19] The appellant does not identify which specific portions of the agreement consist of the "financing documents."

other person absent a legally enforceable non-disclosure agreement to ensure the confidentiality of the documents. They do not relate to the conduct and management of lottery schemes by OLG." It further submits that OLG has maintained confidentiality with respect to such documents in the past and that it relied on OLG's prior position that "such matters" would be kept confidential.

Affected party's representations

Supplied

[36] The affected party submits that in this case, the information that OLG decided to disclose,[20] was supplied by the affected party to OLG. It submits that this is because it falls within the "immutability" and "inferred disclosure" exceptions.

[37] Specifically, the affected party submits that, when considering the agreement as a whole, the information primarily relates to the affected party's commercial operations and financing which is not susceptible to negotiation. It also submits that the information it provided to form the agreement includes commercial and financial information which, if disclosed, would permit the requester to draw accurate inferences about confidential information. It points to specific information in the agreement which would provide insight into its commercial operations and financing.

In confidence

[38] The affected party submits that, when the information regarding its financing agreement with the appellant was provided to OLG, the affected party had a reasonable expectation of confidentiality with respect to that information and that expectation had an objective basis that arose both explicitly and implicitly.

[39] The affected party points to a number of instances where the schedules contain confidentiality clauses that address the confidentiality of certain information as explicit indications that information in the agreement was to be kept in confidence. The affected party also submits that it had an implied expectation of confidentiality when providing this information to OLG and also points to a number of sections of the agreement and ancillary agreements to support its position. The affected party submits that, for example, after entering into the agreement, it entered into another agreement with OLG which includes a comprehensive confidentiality covenant between the parties whereby they acknowledge the confidential and proprietary nature of "confidential information," a defined term, which read in context establishes an implied expectation of confidentiality with respect to the agreement itself.

[20] As indicated above, the affected party did not appeal OLG's decision to disclose some of the information at issue, therefore, the affected party's submissions only relate to the information, relating to it, that the OLG claims is exempt from disclosure.

Requester's representations

Supplied

[40] The requester argues that the contents of the agreement, including the schedules, are mutually generated and not supplied because they are the products of negotiation. He submits that the agreement, including all of its schedules, form a negotiated agreement entered into with, among other parties, OLG. He submits that, as established in Order P-1105, it is the IPC's practice to include schedules to an agreement as part of the agreement for the purpose of determining what is negotiated versus what is supplied. He submits that this reasoning is consistent with the commercial practice of including substantive, negotiated terms in an agreement's schedules.

[41] The requester submits that neither the appellant nor the affected party has identified portions which fall within either of the "inferred disclosure" or "immutability" exceptions and argues that it is incumbent on them to do so.

[42] The requester responds to the affected party's argument that information relating to its financing and operations is immutable because it is not subject to negotiation. The requester disputes the affected party's position and argues that in *Miller Transit*[21] the Ontario Superior Court disposed of the affected party's arguments that operational protocols were immutable because such protocols are developed over years of experience. He submits that the Court found that if it can be inferred that those operational protocols have changed over time, they are therefore not immutable. The requester points to specific portions of the agreement, to which he seeks access, to demonstrate his position. He submits:

- Schedule D of the Consent Agreement: the amendments to COSA - the changes, which have been withheld, are changes that have been negotiated and are therefore, "literally subject to change."

- Form of [financial agreement] (Schedule A to the Consent Agreement) and its schedules and sub-schedules - the legal arrangement was ultimately entered into with the agreement of OLG (as evidenced by OLG's signature on the Consent Agreement, and the fact it attached this [Form] rather than an executed [financial agreement]).

[43] The requester also disagrees with the affected party's position that the inferred disclosure exception applies. Again, he submits that, as required in *Miller Transit*,[22] the onus is on the affected party to demonstrate that disclosure would permit an accurate inference regarding underlying non-negotiated confidential information supplied by the affected party. He submits that the affected party's non-confidential representations did

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[21] *Miller Transit,* cited above, para 42.
[22] *Miller Transit,* cited above, para 33.

not provide any information about what type of non-negotiated confidential information might be inferred from disclosure.

[44] The requester also submits that summary information about some of the schedules has already been made public through securities disclosures and therefore, any argument that disclosure would result in the inferred disclosure of information that is already in the public domain must fail.

In confidence

[45] The requester submits that if the information can be said to have been supplied to OLG, he concedes that much of it was supplied in confidence. However, he submits that not all of it was supplied in confidence. As an example, he argues that there cannot be any expectation of confidentiality for information already made public through securities disclosure. The requester provided an internet link to a publicly available document entitled "Credit Agreement."

Analysis and findings

[46] Having considered the representations of the parties and the agreement, for the reasons below I find that part two of the section 17(1) test has been met for some parts of the agreement but not for others.

[47] On the face of the agreement itself, OLG provides consent for the affected party, the successful casino operator proponent, to enter into a financial agreement with the appellant, another private entity, for the purpose of financing the affected party's operation of the group of OLG casinos.

[48] In this case, it is clear that the agreement was entered into by OLG and other private entities. In keeping with the well-established principle that the contents of a contract between an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1),[23] I find that, *prima facie*, the agreement is considered to have been negotiated, or mutually generated, rather than supplied.

[49] As I do not accept that the agreement was "supplied" to OLG, I find that, contrary to the appellant's position, the agreement is not exempt from disclosure in its entirety. What I must determine next is whether any of the information contained in the agreement falls within either one of the two exceptions to that general principle: the "inferred disclosure" exception or the "immutability" exception, explained above.

[50] As will be explained below, I find that some of the information in the agreement

[23] This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).

falls within these exceptions and that therefore this information was supplied by the affected party or the appellant to OLG. I also find that some of the information does not fall within these exceptions and that therefore this information was not supplied.

Information that OLG decided to disclose

[51] In considering the exceptions, I will first consider the portions of the agreement that OLG decided to disclose. The affected party did not appeal OLG's decision in this respect and agrees with OLG's position. The appellant, however, disagrees with OLG that this information should be disclosed taking the position that it is exempt under section 17(1) of the *Act*. These portions, which I refer to as the "information that OLG decided to disclose," below are:

- Portions of the Consent Agreement;
- Schedule B to Investor Rights Agreement: Form of Step-in-Lease, Schedules A to K of the Step-in-Lease and the Table of Contents of the Step-in-Lease;
- Exhibit 1: Protected Area of Schedule K to Investor Rights Agreement: Acknowledgement;
- Schedule C to Consent Agreement: forms of CN Termination Agreement, Schedule A to the Termination Agreement: Legal and the Termination Agreement; and
- Schedule D to Consent Agreement: Amendments to COSA, in part.

[52] Having considered the appellant's representations, I find that it has not established that the information OLG decided to disclose falls within the immutability or inferred disclosure exceptions. Despite bearing the burden of establishing that either of these exceptions apply, in its representations the appellant has not specifically addressed any of the portions of the agreement specifically identified above nor do any of its arguments regarding the applicability of the immutability or inferred disclosure exceptions appear to apply to the information that these specific portions of the agreement contain.

[53] I have also carefully reviewed the portions of the agreement that the OLG decided to disclose. I do not accept that their content falls into either of the exceptions.

[54] Accordingly, I find that the appellant has not established that the portions of the agreement that OLG decided to disclose fall within either of the immutability or the inferred disclosure exceptions. As neither of the exceptions apply, this information cannot be said to have been supplied to OLG within the meaning of part two of the test for section 17(1). To establish section 17(1) all three parts of the test must be met. Part two of the test has therefore not been met and the exemption for third party information does not apply. Below, I will order OLG to disclose the information that it

decided to disclose.

Information that OLG decided to withhold

[55] I must now consider whether the information that OLG decided to *withhold* under section 17(1) falls within either of the immutability or the inferred disclosure exceptions. The appellant and the affected party both agree with OLG's decision and take the position that section 17(1) applies to exempt this information from disclosure; the requester disagrees and believes that it does not.

[56] This information is:

- the Consent Agreement – in part;
- Schedule A to Consent Agreement: Form of [financial arrangement];
- Schedule A to [financial arrangement]: Investor Rights Agreement;
- Schedule A to Investor Rights Agreement: Debenture;
- Schedule L to Step-in-Lease – Existing Subleases;
- Schedule C to Investor Rights Agreement: Form of Novation;
- Schedule D to Investor Rights Agreement: Capital Investments;
- Schedule E to Investor Rights Agreement: List of Shareholders, Shares and Addresses for Notice;
- Schedule F to Investor Rights Agreement: Acknowledgements;
- Schedule B to [financial arrangement]: Form of Amendment Creating Class B Special Shares;
- Schedule B to Consent Agreement: Form of Subscription Agreement; and,
- Schedule D to Consent Agreement: Amendments to COSA – in part.

[57] As indicated above, the parties resisting disclosure bear the burden of establishing that the exemption applies. As previously mentioned, OLG chose not to submit representations. The representations of the appellant and affected party are summarized above in relation to the agreement as a whole; as noted, the appellant did not make specific representations about specific portions of the agreement.

[58] As I will explain below, with two exceptions, I find that the information withheld by OLG under section 17(1) was supplied within the meaning of part two of the test.

[59] I will now discuss each of the parts as set out in the list above, first considering whether the information was supplied, then (if necessary) whether it was supplied *in confidence.*

Consent Agreement (in part) – supplied

[60] Although the Consent Agreement is an agreement between the affected party and OLG and ordinarily agreements between third parties and institutions are considered to be negotiated, on careful review of the information in the consent agreement that OLG has identified as being subject to section 17(1), and in light of the parties' representations, I find that much of it amounts to information that falls within the exceptions to that rule. The information relates to the affected party's commercial and financial arrangements, including specific details about the nature of its financial agreements with another non-governmental third party, the appellant. I accept the parties' submissions that none of this information could have been subject to negotiation between OLG and the affected party in the context of the agreement. I find that the severed information is underlying non-negotiated confidential information supplied by the affected party to OLG and that, in some cases, were this information to be disclosed, it would reveal or permit the drawing of accurate inferences about such information.

Schedule A to Consent Agreement: Form of [financial arrangement] (including its the sub-schedules: Schedule A to [financial arrangement]– Investor Rights Agreement, and sub-sub-schedules: Schedules C, D, E and F to Investor Rights Agreement) and Schedule B to the [financial arrangement] – supplied

[61] Schedule A to the Consent Agreement sets out a specific financial arrangement between two third parties, the appellant and the affected party. Although through the Consent Agreement, OLG provided consent for the affected party to enter into this financial arrangement with the appellant, OLG is not a party to it; OLG did not participate in the negotiations between the private entities regarding its terms nor is it a signatory. Accordingly, Schedule A to the Consent Agreement: [financial arrangement] (including its sub-schedules: Schedule A to [financial arrangement]– Investor Rights Agreement, and sub-sub-schedules: Schedules C, D, E and F to Investor Rights Agreement) and Schedule B to the [financial arrangement] reflect commercial and financial arrangements of two non-governmental third parties derived entirely from a private agreement entered into between them. OLG is not a party to the financial arrangement. It was neither involved in its negotiation nor does it have any ability to enforce its terms.

[62] Given that OLG is not a signatory to the financial arrangement and was provided with a copy by the affected party in accordance with the Consent Agreement, I accept that all of this information is immutable as it is not subject to change through negotiations between OLG and the affected party. As information that falls within the exception, I find that it meets the requirement of having been supplied for the purpose

of part two of the section 17(1) test. The requester's argument that the fact that summary information regarding this document is publicly available does not alter my finding that the information contained in this Schedule is immutable.

Schedule L to Step-in-Lease – Existing Subleases – supplied

[63] Considering Schedule L to the Step-in-Lease – Existing Subleases, I find that it consists of information that is immutable. This schedule describes existing subleases, including the term of those subleases. In my view, this information is underlying non-negotiable information as it is information that is fixed, not by OLG, but between the appellant and the affected party, two non-governmental entities, through pre-existing commercial arrangements. I find that this information falls within the immutability exception and therefore meets the requirement of having been supplied for the purposes of part two of the section 17(1) test.

Schedule B to Consent Agreement: Form of Subscription Agreement – supplied

[64] For similar reasons, I find that Schedule B to Consent Agreement - Form of Subscription Agreement consists of information that falls within the immutability exception. This is an agreement between the appellant and another non-governmental entity that addresses financial arrangements to which OLG is not part and is therefore not negotiable by the OLG. As information that falls within the immutability exception, I find that it meets the requirement of having been supplied for the purposes of part two of the section 17(1) test.

Schedule C to Investor Rights Agreement: Form of Novation Agreement and Schedule D to the Consent Agreement: Amendments to COSA (withheld in part) – not supplied

[65] I find that the remaining information identified by the OLG as being subject to section 17(1): Schedule C to Investor Rights Agreement: Form of Novation Agreement and Schedule D to the Consent Agreement: Amendments to COSA (withheld in part) does not fall within either of the immutability or the inferred disclosure exceptions and therefore, does not qualify as supplied within the meaning of part two of the section 17(1) test.

[66] Schedule C to Investor Rights Agreement: Form of Novation Agreement is an agreement between the appellant, OLG and the affected party that transfers the rights and obligations of the tenant under a lease agreement between the appellant and the affected party to the OLG. As OLG is signatory to this Novation Agreement I find that its terms were negotiated, or mutually generated, and do not qualify as having been "supplied" for the purpose of section 17(1). For this reason, I do not accept that the information in Schedule C to Investor Rights Agreement – Form of Novation Agreement falls within either of the immutability or inferred disclosure exceptions. I have insufficient evidence from the parties to conclude that any of this information is not

negotiable by OLG or, if disclosed, would reveal underlying non-negotiable information supplied by a third party.

[67] I also have insufficient evidence before me to conclude that the relevant information in Schedule D to Consent Agreement: Amendments to COSA that OLG has identified as being subject to section 17(1) (on pages 255 to 259, 261, 265 and 266), falls within one of the exceptions. This information relates to an agreement between OLG and the affected party but the affected party does not make any specific representations on whether it was supplied to OLG or whether it falls within one of the exceptions. On its face, in my view, this information does not appear to be the type of information that is not susceptible to negotiation or that, were it disclosed, would permit accurate inferences to be made about information supplied by a third party, including the affected party.

[68] As I find that Schedule C to Investor Rights Agreement: Form of Novation Agreement and the information in Schedule D to Consent Agreement: Amendments to COSA that is at issue, does not qualify as having been supplied within the meaning of part two of the section 17(1) test, it is not necessary for me to consider the "in confidence" portion of the test for this information. Because all three parts of the test must be met for section 17(1) to apply, and because part two has not been met for Schedule C to Investor Rights Agreement – Form of Novation Agreement and Schedule D to Consent Agreement: Amendments to COSA, it is not exempt from disclosure and below, I will order OLG to disclose it.

[69] In summary I find, that the following information falls within either the immutability or the inferred disclosure exception and therefore qualifies as having been supplied to OLG, within the meaning of part two of the section 17(1) test:

- the Consent Agreement – in part;
- Schedule A to Consent Agreement: Form of [financial arrangement];
- Schedule A to [financial arrangement]: Investor Rights Agreement;
- Schedule A to Investor Rights Agreement: Debenture;
- Schedule L to Step-in-Lease – Existing Subleases;
- Schedule D to Investor Rights Agreement: Capital Investments;
- Schedule E to Investor Rights Agreement: List of Shareholders, Shares and Addresses for Notice;
- Schedule F to Investor Rights Agreement: Acknowledgements;

- Schedule B to [financial arrangement]: Form of Amendment Creating Class B Special Shares; and,
- Schedule B to Consent Agreement: Form of Subscription Agreement.

Supplied in confidence

[70] I also accept that based on its content, all of this information was supplied in confidence to OLG. I have no evidence before me to suggest that this information is publicly available or that the parties to whom this information relates generally disclose information of this type to entities who are not party to the type of financial arrangement that this information reflects. I accept both the appellant's and the affected party's evidence that this information was supplied with either an implicit or, in some cases, explicit expectation of confidentiality and that expectation was reasonably held by the parties. I accept that these explicit and implicit expectations of confidentiality are also evident from the content of the information itself. In making this finding, I acknowledge that OLG has not provided any evidence to dispute this, despite having been given the opportunity to do so.

[71] In support of my findings above, I have considered previous orders of the IPC have addressed situations where information relating to private contracts entered into by non-governmental entities that find their way into an institution's records, despite the fact that an institution is not party to the agreement. In those cases, the information was found to qualify as having been supplied in confidence as required by part two of the section 17(1) test.[24] I also considered other previous orders of the IPC have found that information provided to an institution by non-governmental entities pursuant to reporting requirements, established either contractually or by law, have been found to have been "supplied" to the institution for the purposes of this portions of the section 17(1) test.[25]

[72] Although neither of these circumstances are entirely analogous to the circumstances before me, they are similar in that they consider circumstances where information that belongs to third party non-governmental entities has found its way into the hands of an institution governed by the *Act*. Although in this appeal, the information that remains at issue found its way into an agreement to which OLG is a signatory, it is indisputably commercial and financial information derived entirely from a private financial arrangement entered into between the appellant and the affected party. OLG neither participated in its negotiation nor has the ability to enforce its terms. My finding that this type of information falls within the immutability and/or inferred disclosure exceptions and therefore, qualifies as "supplied" is consistent with the purpose of section 17(1), which is to protect the confidential "informational assets" of businesses

[24] Orders PO-2020 and MO-3019.
[25] Orders PO-1983, PO-2328, and PO-2781.

or other organizations that provide information to government institutions.[26]

[73] As part two of the test has been met for the portions of the agreement that I have listed above (the remaining portions), I will continue my analysis to determine whether the parties have established part three of the test, which considers whether disclosure of this information could reasonably be expected to give rise to any of the harms contemplated in section 17(1).

Part three: harms

[74] Parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.[27] In this case, both the appellant and the affected party resist disclosure of the information remaining at issue.

[75] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[28]

[76] In applying section 17(1) to government contracts, the need for public accountability in the expenditure of public funds is an important reason behind the need for detailed evidence to support the harms outlined in section 17(1).[29]

[77] As indicated, despite resisting disclosure, the appellant has not expressly stated the specific paragraph(s) of section 17(1) on which it relies. The affected party relies on sections 17(1)(a) and (c). Based on the arguments of the appellant and the affected party, discussed in more detail below, the relevant potential harms that I will discuss are:

> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency….

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[26] *Boeing Co. v. Ontario* (*Ministry of Economic Development and Trade*), [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[27] *Accenture Inc. v. Ontario* (*Information and Privacy Commissioner*), 2016 ONSC 1616, *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C.R. 23.
[28] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), cited above.
[29] Order PO-2435.

Representations of the parties

Representations of the appellant

[78] Although the appellant does not specifically identify which harms listed in section 17(1) it believes could reasonably be expected to result from the disclosure of the remaining portions, its representations suggest that it is concerned about the harms identified in section 17(1)(a), prejudice to its competitive position, and section 17(1)(c), result in it experiencing an undue loss or gain.

[79] The appellant submits that it operates in a highly competitive environment, both with respect to regional competitors and those in the United States. It submits that, in its industry, information about how prices for services are determined for larger-scale customers is valuable and kept confidential.

[80] The appellant submits that the need for confidentiality has been raised by "the OLG Modernization Initiative" which explicitly created competition between casinos in the region where the group of casinos operated by the affected party is located and those located in the OLG's other "casino bundles" in other parts of Ontario. It submits that the OLG's operation model is for the operators of the casinos in these bundles to compete with each other and, the level of competition has increased.

Representations of the affected party

[81] The affected party submits that disclosure of the remaining portions could be reasonably expected to cause prejudice to its competitive position [section 17(1)(a)] and also, result in it experiencing an undue loss or gain [section 17(1)(c)]. The affected party submits that the requester, or a competitor in the marketplace, could use the commercial and financial information about the affected party in the agreement to undercut prices and marketing strategies resulting in an undue gain of revenues with a corresponding loss of revenues to the affected party. In particular, the affected party notes that the agreement contains financing information, including information relating to shares of the company which, if released into the public realm will result in undue loss to the affected party, placing it at a disadvantage.

Representations of the requester

[82] The requester argues that neither the appellant nor the affected party met their burden to establish that the harms set out in sections 17(1)(a) and (c) could reasonably be expected to occur were the remaining portions to be disclosed. It submits that in particular with respect to the body of the Consent Agreement and Schedules A and B to that agreement which, it submits relate primarily to the financing of the affected party, "it is difficult to imagine how one would use such information to achieve undue benefit, or how it would cause either of the parties undue harm."

Analysis and findings – harms

[83] I have considered the fact that the remaining portions consist of the commercial and financial information of the appellant and the affected party and relate to private arrangements between these non-governmental third parties, not OLG. On this basis, I am satisfied that the disclosure of that information could reasonably be expected to (1) prejudice significantly the competitive position of the parties involved [section 17(1)(a)] or (2) result in undue loss to either the appellant or the affected party and correlative undue gain to their competitors [section 17(1)(c)].

[84] The remaining portions contain confidential information about the commercial and financial arrangements of both the appellant and the affected party. I accept the evidence of the appellant and of the affected party regarding the competitive nature of their respective businesses and the information. I find that disclosure of this information would reveal information about these parties to its competitors; information that would be valuable to those competitors and could reasonably be expected to be used by them, thereby placing the competitors in a position of significant advantage. I also accept the evidence of the affected party and find that it is the type of information that the appellant and the affected party, in turn, could not access from those competitors, thereby placing them at a competitive disadvantage. I find that it is reasonable to expect that the disclosure of this information could negatively impact the appellant's and the affected party's negotiations with existing and future clients with respect to financial arrangements they might seek to enter into, rendering them both less competitive.

[85] I find, therefore, that disclosure of the commercial and financial information of the appellant and the affected party in the remaining portions of the agreement could reasonably be expected to significantly interfere with both the appellant's and the affected party's competitive position and contractual negotiations and also result in undue loss or gain. As all three parts undersection 17(1) have been satisfied, I find that the exemptions at section 17(1)(a) and (c) apply to the information remaining at issue.

Issue B: Is there a compelling public interest in disclosure of the agreement that clearly outweighs the purpose of the section 17(1) exemption?

[86] I have found that section 17(1) applies to portions of the agreement. The requester takes the position that there is a compelling public interest in the disclosure of any portions of the agreement to which section 17(1) is found to apply and that section 23 applies to override the application of the exemption and compel disclosure. For the reasons set out below, I disagree.

[87] 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. [emphasis added]

[88] 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.

[89] 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.[30]

Compelling public interest

[90] For section 23 to apply, it must be established that there is a public interest in the disclosure of the agreement and if so, that the public interest is compelling.

[91] In considering whether there is a "public interest" in disclosure of a 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.[31] 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.[32]

[92] A "public interest" does not exist where the interests being advanced are essentially private in nature.[33] However, if a private interest raises issues of more general application, the IPC may find that there is a public interest in disclosure.[34]

[93] If a public interest is established, next it must be determined whether the public interest in disclosure of the record is compelling. The IPC has defined the word "compelling" as "rousing strong interest or attention."[35]

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[30] Order P-244.
[31] Orders P-984 and PO-2607.
[32] Orders P-984 and PO-2556.
[33] Orders P-12, P-347 and P-1439.
[34] Order MO-1564.
[35] Order P-984.

Parties' representations on compelling public interest

[94] The requester submits that in accordance with the established purposes of the *Ontario Lottery and Gaming Corporation Act, 1999*,[36] OLG is required to ensure that anything done to further any one of the three established purposes of that Act, is also done "for the public good and in the best interests of the Province."[37]

[95] The requester submits that transparency is required for OLG to be properly scrutinized by the public and that "the level of required transparency is elevated in light of, and consistent with, OLG's statutory purposes and its privilege in operating in a legislated monopoly." The requester further submits that public scrutiny of legislated monopolies with "public good" or "best interests" standard is a compelling public interest.

[96] The requester submits that the agreement engages this public interest. He explains that OLG contracts with outside parties to help OLG to fulfill its public mandate and submits that, while these outside parties may be private, they are operating under the elevated public purposes and legislated monopoly that OLG enjoys. The requester submits that simply because OLG has chosen to seek greater private sector involvement does not mean that gaming is no longer an issue for public debate. He submits that OLG's choices of how it carries out its mandate, including who it chooses and how such private sector actors are financed, is an issue of public importance, for which there is a strong and compelling, public interest. He submits that it is a compelling public interest for one of Ontario's largest and most profitable Crown corporations to be transparent about its commercial arrangements: "when a private entity borrows money from another private entity for the purpose of operating a casino in Ontario under the approval granted by a Crown agency, there is a … compelling public interest in such details being disclosed."

[97] The requester further submits that the government seldom engages in an industry that the private sector is capable of serving and that government only does so where there is a compelling public interest that cannot be achieved through regulation alone. He submits that such intervention is exceptional and requires a correspondingly exceptional level of scrutiny to ensure "an informed and enlightened citizenry and a robust public disclosure." The requester submits that the scenario here is analogous to the compelling public interest in the disclosure of information relating to the operation of nuclear facilities, recognized by the IPC in Order P-1190, which was upheld by the Divisional Court on judicial review.[38]

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[36] S.O. 1999, c. 12, Sched. L, section 0.1.

[37] The three established purposes of the *Ontario Lottery and Gaming Act, 1999* are set out in section .01 (a), (b) and (c) and include, respectively: to enhance the economic development of the Province; to generate revenues for the Province; and, to promote responsible gaming with respect to lottery schemes.

[38] *Ontario Hydro v. Ontario* (*Information and Privacy Commissioner*) [1996] OJ No. 4636 (Div. Ct.) leave to appeal refused [1997] OJ No. 694 (CA), followed in Order PO-1805.

[98] In response to the requester's position on the application of the section 23 public interest override to the agreement, the appellant submits that it is important to note that the OLG procurement process with respect to the selection of the service provider noted in the agreement, was overseen by a fairness monitor who was independent of the OLG and of any parties involved in the procurement. The appellant submits that the fairness monitor's role was to ensure that the procurement process was carried out in accordance with appropriate procurement processes, in a fair manner, and in accordance with the law. The appellant submits that there is no evidence that the fairness monitor found that there were any improprieties in the procurement process – indeed, it is understood that the opposite is the case.

[99] The appellant submits that disclosure of the agreement would not shed light on the operations of government in accordance with the *Act*'s stated purpose and the requirements to establish the application of the override at section 23. The appellant submits that the agreement does not reveal any information relating to OLG's decision-making process, therefore, it cannot shed light on its operations. It further submits that agreements between two or more private parties that were not negotiated by OLG (and the appellant submits that there is no evidence that OLG was involved in any negotiations) cannot "shed-light" on OLG's internal approval process. The appellant submits that the agreement relates to commercial matters amongst private sector parties and does not trigger the public interest override at section 23.

[100] The appellant acknowledges that the IPC and the courts have found situations in which agreements between a Crown agency, such as OLG, and private parties are of a public interest but argues that, in those circumstances there were additional elements. For example, evidence of corrupt practices,[39] substantial risk of harm to the public[40] or to the environment,[41] or failure to comply with the terms of an agreement.[42] The appellant submits that commercial information that does not go to the integrity of the procurement process does not, on its own, import a "public interest."[43]

[101] The affected party also takes the position that there is no public interest in the disclosure of the agreement, let alone a public interest that can be said to be compelling. It submits that the withheld portions of the agreement pertain to the commercial and financial operations of third parties, including the affected party and its shareholders and that the requester is seeking the information to advance its private interests.

Analysis and finding on compelling public interest

[102] As noted above, two requirements must be met to establish that the public

[39] Orders M-710 and PO-1804-F.
[40] Order P-270.
[41] Order PO-1688.
[42] MO-3827.
[43] Order PO-2987.

interest override in section 23 of the *Act* applies to the portions of the record to which section 17(1) has been found to apply:

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

[103] I acknowledge that there is a general public interest in ensuring that there is a degree of transparency with respect to the way in which OLG, as a Crown Corporation, conducts its business. A degree of transparency will be achieved as the result of this request and this appeal because a significant amount of information will be disclosed. The portions of the agreement that I have found to be exempt consist of commercial and financial agreements between private, non-governmental, entities. In my view, the exempt information reflects private sector arrangements, disclosure of which would not subject OLG to more scrutiny or provide greater transparency with respect to its actions.

[104] I also disagree with the requester's submission that disclosure of the information remaining at issue in this appeal is analogous to Order P-1190 pertaining to disclosure of information relating to the operation of nuclear facilities. The adjudicator's decision in that order was based on existing public concerns regarding the safety of nuclear facilities and determined that it was not possible to allay those concerns by merely advising the public that reviews of nuclear operations are conducted against the highest possible standard. In this case, the requester has not advanced any evidence that there is any public concern with respect to the consent that OLG has provided to the affected party for the latter to enter into a financial agreement to facilitate its operation of a group of OLG casinos. While there may be an interest held by some members of the public (in particular competitors to the affected party including some of the unsuccessful proponents) as to the nature of the financial arrangement between the affected party and the appellant, I am not satisfied that any public interest in the disclosure of this specific information reaches the threshold of "compelling" – rousing strong interest or attention.

[105] In my view, I have not been provided with sufficient evidence to conclude that the lack of the disclosure of this information rouses strong public interest or concern or that disclosure would provide the public with greater transparency regarding the operations of the OLG. Specifically, I am not satisfied that disclosure of the information that remains at issue would respond to the public interest considerations that the requester alludes to in his representations.

[106] Accordingly, I find that a compelling public interest in the specific information that I have found to be subject to the exemption for third party information at section 17(1), does not exist. In the absence of a compelling public interest in the disclosure of the remaining information to weigh against the purpose of the exemption at section

17(1), I need not continue to the analysis; the public interest override at section 23 does not apply.

ORDER:

1. I order the OLG to disclose the following information to the appellant:

    - the portions of the Consent Agreement that OLG decided to disclose;
    - Schedule B to Investor Rights Agreement: Form of Step-in-Lease, Schedules A to K of the Step-in-Lease and the Table of Contents of the Step-in-Lease;
    - Schedule C to Investor Rights Agreement: Form of Novation;
    - Exhibit 1: Protected Area of Schedule K to Investor Rights Agreement: Acknowledgement;
    - Schedule C to Consent Agreement: forms of CN Termination Agreement,
    - Schedule A to the Termination Agreement: Legal and the Termination Agreement; and Schedule D to Consent Agreement: Amendments to COSA.

2. I uphold OLG's decision to deny access to the remaining information in the agreement pursuant to the exemption at section 17(1).

3. The information that I have ordered disclosed in provision 1 should be disclosed to the appellant by **June 9, 2023** but not before **June 5, 2023**.

4. I reserve the right require OLG to provide me with copies of any records disclosed to the appellant pursuant to this order.

Original Signed by: May 4, 2023
Catherine Corban
Adjudicator