Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4524

Appeal PA22-00501

Cabinet Office

June 13, 2024

Summary: The appellant appeals Cabinet Office's decision in response to a request made under the *Act* to disclose certain records relating to iGaming in Ontario. The appellant claims two emails and an attachment are exempt under the mandatory third-party commercial information exemption in section 17(1) of the *Act*. In this decision, the adjudicator finds the records are not exempt under section 17(1) and upholds Cabinet Office's decision to disclose them to the requester.

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

Cases Considered: *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII).

OVERVIEW:

[1] The requester submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to Cabinet Office for "all emails (and their attachments) to and from [a named government employee] regarding internet gaming or iGaming."

[2] Cabinet Office located responsive records and notified several third parties, including the appellant, an online gambling and entertainment provider, as they might have an interest in the disclosure of the requested information. After receiving the appellant's submissions, Cabinet Office decided to grant the requester partial access to

the responsive records relating to the appellant. Cabinet Office withheld portions of the records under the mandatory exemption in section 17(1) (third party commercial information) of the *Act*.

[3] The appellant appealed Cabinet Office's decision to the Information and Privacy Commissioner of Ontario (the IPC) on the basis that the records related to its company are exempt under section 17(1), in their entirety.

[4] Mediation did not resolve the appeal and it was transferred to the adjudication stage of the appeals process. The adjudicator originally assigned to the appeal began the inquiry by inviting and receiving representations from the appellant.

[5] The appeal was then transferred to me to continue the inquiry. I invited Cabinet Office and the requester to submit representations. Neither submitted representations. However, Cabinet Office issued a revised decision advising the appellant and the requester it no longer claims section 17(1) applies to the records at issue in this appeal.

[6] In the discussion that follows, I uphold Cabinet Office's decision to disclose the records at issue and dismiss the appeal.

RECORDS:

[7] There are five pages of records at issue. They consist of two emails and an attachment.

DISCUSSION:

[8] The sole issue to be determined in this appeal is whether the records relating to the appellant are exempt under the mandatory exemption for third party information under section 17(1) of the *Act*. 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]

[9] The relevant paragraphs 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,

[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;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency[.]

[10] For section 17(1) to apply, the appellant, who is arguing against disclosure, 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 Cabinet Office 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 claim in paragraph (a), (b), and/or (c) of section 17(1) will occur.

[11] As the appellant must satisfy the requirements of all parts of the test, the failure to satisfy any part of this test will lead to a finding that the section 17(1) exemption does not apply. For the reasons that follow, I find section 17(1) does not apply because the third part of the test is not established in the circumstances of this appeal.

Part 3: Harms

[12] Parties resisting disclosure of a record cannot simply assert the harms under section 17(1) are obvious based on the record itself. They must provide *detailed* evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume the harms under section 17(1) are self-evident and can be proven simply by repeating the description of harms in the *Act*.[3]

[13] Parties resisting disclosure must show the risk of harm is real and not just a possibility.[4] However, they do not have to prove disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context

[3] Orders MO-2363 and PO-2435.
[4] *Merck Frosst Canada Ltd.* v. *Canada* (*Health*), [2012] 1 S.C.R. 23.

of the request and the seriousness of the consequences of disclosing the information.[5]

Appellant's Representations

[14] The appellant submits the disclosure of the records could reasonably be expected to result in the harms specified under sections 17(1)(a), (b) and (c). Specifically, the appellant submits the disclosure of the records could reasonably be expected to prejudice significantly its competitive position, result in similar information no longer being supplied to Cabinet Office where it is in the public interest that similar information continues to be so supplied, and result in undue loss to the appellant and undue gain to its competitors.

[15] The appellant submits the disclosure of the records will significantly prejudice its competitive position as contemplated by section 17(1)(a) because it will provide its competitors with undue insights into the appellant's competitive strategy and analysis of the size of the Canadian iGaming market. The appellant submits its approach to the liquidity pool is a "key aspect of its strategic positioning in Ontario's gaming market." The appellant explains a liquidity pool represents the number of available players in the market, which significantly impacts the approximate size of the regulated iGaming market and potential profits. The appellant submits if its competitors gain access to the information at issue, they will have "undue insight into the potential for an increase in size and profitability of the current iGaming market in Ontario." The appellant submits its competitors could leverage the appellant's approach and revise their own strategic decisions, such as adjusting capital allocations and investments to match the potential market size the appellant identified in its communications with Cabinet Office.

[16] The appellant also submits competitors could use the information in the records in their market entry strategy. The appellant submits the records include analysis into the potential for liquidity pool expansion, which is information its competitors may not have gathered themselves. Accordingly, if its competitors gain this confidential information about the appellant's position, the appellant submits they could change their strategies to the detriment of the appellant's competitive advantage.

[17] Regarding section 17(1)(b), the appellant submits the disclosure of the records will result in similar information no longer being supplied to Cabinet Office where it is in the public interest that similar information continues to be supplied. The appellant submits Ontario's decision to move to a fully legalized online gaming regime represents a "major shift" in the regulation of gaming. Given this new regulatory regime, the appellant submits that elements of the recently regulated business may be unfamiliar to legislators and governments, and compliance challenges should be raised and discussed candidly without the threat of public disclosure. The appellant submits these confidential discussions would ensure that market participants provide complete and honest feedback on regulated gaming in Ontario and Cabinet Office can respond to concerns to ensure that regulations

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[5] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario* (*Information and Privacy Commissioner*), 2016 ONSC 1616.

do not meaningfully reduce tax revenues without good reason. The appellant submits it is in the public interest to maintain an open and honest line of communication between Cabinet Office and online gaming operators. The appellant submits the disclosure of the records would have a chilling effect on it and other operators' willingness to provide future information to Cabinet as there would no longer be an expectation of confidentiality. The appellant also submits there would be a concern that any insights could be co-opted by competitors in the future.

[18] The appellant submits it provided the information at issue to Cabinet Office to assist it in formulating and approving regulation and if these records were ordered to be disclosed, there is a reasonable expectation that it would not supply similar information to Cabinet Office in the future. The appellant refers to Order PO-2901-F to support its position. The appellant submits in that order the IPC found "sensitive commercial information" voluntarily provided to an institution during a consultation process to be exempt under section 17(1)(b) because the disclosure of this information could reasonably be expected to result in similar information no longer being supplied to the institution.

[19] Finally, with regard to section 17(1)(c), the appellant submits its competitors will "reap the benefits" from the appellant's analysis and strategic decision making if the records are ordered to be disclosed. The appellant submits competitors could use the information in the records to "revise their strategic choices" to enhance their position in the market. In turn, the appellant submits it would lose its "first-mover advantage" along with the competitive advantage gained from its proposed compliance strategy regarding liquidity pools. As a result, the appellant submits it would suffer undue loss while its competitors would reap undue gains from the disclosure of the records.

Analysis and Findings

[20] I have reviewed the records at issue and the appellant's submissions. Based on that review, I am not satisfied the appellant provided sufficient evidence to support its section 17(1) claim.

[21] The law on the standard of proof is clear. In *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*)[6], the Supreme Court of Canada addressed the meaning of the phrase "could reasonably be expected to" in two exemptions under the *Act*, and found it requires a reasonable expectation of probable harm. In order to meet that standard, the Court explained:

> … [the *Act*] tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence well beyond or considerably above a mere possibility of harm in order to reach that middle ground…. This inquiry of course is contextual

[6] 2014 SCC 31.

> and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and inherent probabilities or improbabilities or the seriousness of the allegations or consequences…[7]

[22] I agree with and adopt this principle for the purposes of this appeal.

[23] At issue are two email chains and one summary document regarding liquidity pools. Page 1 is a cover email attaching pages 2 and 3. This email describes, in general terms, the information contained in the attachment and why it is being sent to Cabinet Office. Pages 2 and 3 are a summary document about liquidity pools. It appears the appellant prepared this document for Cabinet Office's review and consideration. Based on my review, this record contains general information about liquidity pools and the iGaming market in Ontario. Finally, pages 4 and 5 are an email chain containing introductory information relating to the appellant and administrative information regarding a potential meeting between Cabinet Office and the appellant or their representative.

[24] Based on my review of the records and the appellant's submissions, I find their disclosure could not reasonably be expected to result in the harms alleged by the appellant. First, the appellant is particularly concerned the information at issue could, if disclosed, provide its competitors with sensitive commercial information relating to its strategy and analysis of Ontario's iGaming market thereby reasonably causing undue loss to the appellant and undue gain by its competitors. From my review, I find the records contain a high-level description of liquidity pools, the appellant's organization and iGaming in Ontario and do not contain "sensitive commercial information" relating to the appellant's analysis of liquidity pools or its unique marketing strategies in iGaming, as claimed. The appellant has not specifically identified where this "sensitive commercial information" is located in the records and it is not evident from my review of the records themselves.

[25] The appellant also claims its approach to the liquidity pool is a "key aspect of its strategic positioning in Ontario's gaming market." However, it is not clear, and the appellant has not identified, which portions of the records contain information that would reveal the appellant's approach to the liquidity pool in iGaming. The information in the email records at pages 1, 4 and 5 is high level and does not contain substantive information about liquidity pools or the appellant's position regarding their use in the iGaming market. Similarly, I find the summary document at pages 2 and 3 contains high level information about liquidity pools, generally, not unique or proprietary information relating to the appellant and the manner it conducts its business in the iGaming market. Upon review of the information at issue and the appellant's representations I find the appellant has not demonstrated how the disclosure of high-level information could reasonably be expected to result in prejudice to its competitive position or undue loss, as

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[7] 2014 SCC 31 at para 54 referring to *Merck Frosst Canada Ltd. v. Canada* (*Health*), 2012 SCC 3.

contemplated by sections 17(1)(a) and (c) of the *Act*.

[26] Secondly, the appellant claims competitors could use the information in the records to "revise their strategic choices" to enhance their position in the market. The appellant is concerned the insights it may have provided to Cabinet Office may be co-opted by competitors in the future resulting in a loss to the appellant "first-mover advantage" in the market. However, the appellant does not specifically identify which information in the records could be co-opted by competitors to revise their strategic choices or how competitors would use the information to do so. The appellant also does not define what it means to have "first-mover advantage", nor did it offer evidence to support how the disclosure of the information at issue could reasonably be expected to result in the loss of its advantage. Regardless, upon review, I find it is not apparent and the appellant has not identified, what specific and unique "insights" are contained in the information in the records or how any such "insights" could be used by its competitors to change their strategies to gain leverage within the market. In the absence of more detailed evidence from the appellant, I am not satisfied the disclosure of the records could reasonably be expected to result in undue loss to the appellant or prejudice to its competitive position, as contemplated by sections 17(1)(a) and (c) of the *Act*.

[27] Finally, the appellant does not provide sufficient evidence to demonstrate it is reasonable to expect that it would not supply similar information in the future to Cabinet Office if these records were disclosed. The appellant does little more than assert this to be true and offers insufficient support for this claim. I agree with the appellant that market participants should feel able to provide complete and honest feedback on regulated gaming in Ontario to Cabinet Office. However, as a gambling and entertainment provider, it appears to be in the appellant's best interest to maintain a frank and comprehensive dialogue with law makers to ensure legislation or regulations will address the service provider's interests. Therefore, it is not evident, and the appellant has not demonstrated why it could reasonably be expected to not supply similar information in the future to Cabinet Office if these records are disclosed. As a result, I do not accept that disclosure of the information could reasonable be expected to result in the harm contemplated by section 17(1)(b).

[28] In conclusion, I find the appellant has not provided sufficient evidence to satisfy the harms part of the section 17(1) test. All three parts of the section 17(1) test must be satisfied to find information exempt under that exemption. In this case, because the third part of the test has not been met, I do not need to consider whether the first two parts of the test (the type of information or supplied in confidence) are satisfied. I find the records are not exempt from disclosure under section 17(1) of the *Act* and uphold Cabinet Office's decision to disclose them to the original requester.

ORDER:

I uphold Cabinet Office's decision and order it to disclose the records to the original requester by **July 5, 2024**.

Original signed by: June 13, 2024

Justine Wai
Adjudicator