June 4, 2009

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2009-006

REPORT A-2009-006

Atlantic Lottery Corporation

Summary: The Applicant applied to Atlantic Lottery Corporation ("ALC") under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") for access to PAR (Pay Analysis Report) sheets from several video lottery games. ALC denied access to the PAR sheet information, claiming sections 27 (harm to business interests of a third party), section 24 (harm to the financial or economic interests of a public body) and section 30 (personal information). The Commissioner found that with respect to games still on the market, all three parts of the test set out in section 27 have been met. The information in the PAR sheets consists of technical information which was supplied in confidence. The Commissioner stated that the harm that would result from the disclosure of PAR sheet information for games still on the market was significant and self-evident. As the Commissioner found that section 27 was applicable to PAR sheet information for games still on the market, it was not necessary to deal with section 24. However, for games no longer on the market, the Commissioner found that neither the third parties nor ALC had shown detailed and convincing evidence of the harm that would occur if the information was released. As such, neither section 27 nor section 24 applied to this information and the Commissioner recommended that it be released to the Applicant. The Commissioner also found that section 30 had been properly applied.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A – 1.1, as amended, ss. 24, 27, 30; *Video Lottery Regulations* C.N.L.R. 760/96, s.8; *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c.F-31.

Authorities Cited: *Air Atonabee Ltd. v. Canada (Minister of Transport)*, (1989) 37 Admin L.R. 245 (F.C.T.D.); *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner), 2002 BCSC 60;* Newfoundland and Labrador OIPC Reports 2005-003, 2006-005, A-2008-013; Ontario Orders PO-2774, PO-2145; British Columbia Order 00-10.

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant submitted an access to information request dated 13 November 2007 to Atlantic Lottery Corporation ("ALC"). The request sought disclosure of records as follows:

> *PAR* [Pay Analysis Report] *sheets for all line games among the* [listed] *games. If there are multiple versions of any of the* [listed] *line games, then please provide the PAR sheets for all versions. Please also state the name and address for your testing lab, and the date of commencement of your reliance on their services.*

[2] It is only the initial part of the request (for the PAR sheets) that is under review by this Office. As described by the Applicant, "[s]lot machine PAR sheets are design documents created by slot machine manufacturers to illustrate the math, probabilities and computer algorithms used in each of their slot machine games." According to ALC, "[t]he PAR sheets contain a detailed analysis of the content and configuration of paytables and reel strip listings for video lottery games as well as other information useful in machine setup and maintenance."

[3] On 31 March 2008 the Applicant received the requested records from ALC, with much of the information contained therein redacted pursuant to section 27. Some information had also been redacted pursuant to section 30. On 23 May 2008 this Office received a Request for Review from the Applicant asking the Commissioner to review the decision of ALC. On 11 June 2008 ALC notified this Office and the Applicant that it was also claiming section 24 with respect to all information for which section 27 had been previously claimed.

[4] Attempts to resolve this Request for Review by informal means were not successful and the Applicant, ALC and two third parties were advised that the Request for Review had been referred for formal investigation pursuant to section 46(2) of the *ATIPPA*. As part of the formal investigation process, all parties were given the opportunity to provide written submissions to this Office in accordance with section 47. Formal submissions were received from the Applicant, ALC and both third parties.

II PUBLIC BODY'S SUBMISSION

[5] ALC takes the position that the information in PAR sheets is proprietary business information owned by the third parties, who manufacture and supply games to ALC. ALC supports the third parties' opinion that disclosure of the information contained in the PAR sheets could reasonably be expected to result in undue financial harm to the third parties. ALC also states that this information is provided to ALC under the strict obligation of confidentiality. ALC states that it obtains PAR sheets from its vendors for the "sole purpose of enabling verification through a third party testing agency that the software implementing the math models accurately implements and conforms to the math models outlined in the PAR sheets and the outcome of such games are truly random and cannot be changed or manipulated."

[6] ALC also states that the release of this information could result in PAR sheets no longer being supplied to ALC, which would significantly harm its ability to successfully introduce new games to the marketplace, and could also impact ALC's ability to "ensure the public interest is protected via robust third party testing and verification of the accuracy and integrity of the math models inherent in the games prior to release into the marketplace."

[7] In addition to a contract with its product testing lab which contains a confidentiality clause, ALC also has a confidentiality and non-disclosure agreement in place with its product testing lab which covers the PAR sheet information and explicitly states that the product testing lab acknowledges a duty of confidentiality to ALC and that it shall not use, duplicate or disclose the information in any form or manner, except as required to fulfill its contractual obligations. The agreement covers subcontractors and agents of the product testing lab. This agreement was provided to this Office.

[8] Further, ALC purchasing agreements with vendors include an "intellectual property" clause which states that all intellectual property rights in the VLT software provided by the Vendors are owned by the Vendor and are protected by law. ALC submits that the release of "Vendor PAR sheets would violate this clause". A portion of this agreement was also provided to this Office.

III APPLICANT'S SUBMISSION

[9] The main thrust of the Applicant's argument is that PAR sheets are not as confidential as the third parties and ALC have stated. The Applicant provided a copy of a patent issued in 1995 in the United States for a game manufactured by one of the third parties. Patents are publicly available and this particular patent contained much of the same information as that contained in a PAR sheet. The Applicant argues that if this information is publicly available (via its inclusion in patents), it should be provided to him under the access to information process. The Applicant has also argued that PAR sheets are needed by buyers of the games in order to determine and select the unique math and features of the games, especially where one game has various versions, and that disclosing PAR sheets to potential buyers opens the PAR sheets to access by competitors. Related to this point, the Applicant states that technicians also need to access PAR sheets so they understand how to program the machines.

[10] Further, the Applicant states that one of the third parties, in response to an access request in another jurisdiction, has released PAR sheets for two games that are also in use in this jurisdiction. The Applicant questions the reasonableness of releasing PAR sheets for these games in that jurisdiction, but not in this jurisdiction.

[11] Finally, the Applicant submits that the real motivation in preventing access to the PAR sheets is not a competitive concern, but a desire to prevent the public from understanding the mathematics, and thus the true odds.

IV THIRD PARTIES' SUBMISSIONS

[12] Both third parties state that section 27 is applicable to the information at issue. Third Party 1 states that the information contained in its PAR sheets "represents years of research, testing and cultivation, the economic value of which is extremely hard to measure because it is so vast. [Third Party 1's] proprietary information is not generally known to third parties and [Third Party 1] takes steps to maintain the secrecy of such information…" Third Party 1 also states that in rare instances it has described the math behind a

game in a patent or published application; however, generally it maintains its math models as trade secrets.

[13] Further Third Party 1 states that the provision by the Applicant of a single patent issued to another manufacturer more than 10 years ago proves nothing about Third Party 1 and its practices. Third Party 1 also states that if the patents were publicly available, the Applicant could easily conduct an electronic search of the patent database and find the information he has requested, without going through the access to information process. Third Party 1 states: "It belies Applicant's contention that this information is readily available if Applicant needs to obtain it from the A.L.C."

[14] Third Party 1 also states that generally, its customers have a legal duty to maintain the confidentiality of its PAR sheets and the information they contain. Third Party 1 offered no explanation of how this legal duty arises.

[15] Third Party 2 also states that it does not patent its math models, and even if it wanted to, it would be precluded by section 27(8) of the Canadian *Patent Act*. Third Party 2 states "[a]s mathematical formulae and algorithms are considered equivalent to mere scientific principles or abstract theorem, they would be precluded from patentability under Canadian law."

[16] Third Party 2 also states that its math models "are the result of years of research and development performed by the Company's team of Mathematicians, Product Managers, Game Designers, Game Developers, and Quality Assurance personnel, whom have worked diligently at perfecting formulae and algorithms for use in [Third Party 2's] games. The research and development work has been combined with Market Research, Focus Group testing, in-field Market Trials and numerous Product Launches in order to refine and optimize the products."

[17] With respect to the harm that Third Party 2 would suffer if the information contained in the PAR sheets were released, Third Party 2 says that this information would enable a competitor to design a game without having to incur the significant cost already expended by Third Party 2 to develop the games. This would allow a competitor to "copy [Third Party 2's] market-proven, successful math models

and capture market share that it would otherwise not capture, using an unfair competitive advantage, since they would not have to incur the significant R&D expenses that [Third Party 2] has had to incur and continues to incur, which would significantly harm [Third Party 2's] competitive position."

[18] With respect to the provision of PAR sheets to buyers, Third Party 2 explains the process as follows:

> *VLT jurisdictions operate under different and often unique rules and regulations related to approved game types, mandated payout percentages, maximum bet amounts, maximum win amounts, etc. In the case of a VLT game delivered to ALC, that game's math model is customized to meet specific regulations of ALC's individual markets. The applicant's assumption that buyers use PAR sheets for the purpose of selecting between different versions of a game's math models and features is incorrect. It is customary in the video lottery industry for vendors to provide customers with PAR Sheets that reflect the games customized for their individual market for the sole purpose of enabling customers to verify either directly or through a third party testing agency that the software implementing the math models described by the PAR Sheets accurately implements the math models described by and conforms to the PAR Sheets and that the outcomes of such games are truly random and cannot be changed or manipulated. In the event that the* [PAR sheet information] *is disclosed to* [Third Party 2's] *customers, the provision of such is provided under the strict obligation of confidentiality.*

IV DISCUSSION

[19] Section 27 of the *ATIPPA* states as follows:

> *27. (1) The head of a public body shall refuse to disclose to an applicant information*
>
> *(a) that would reveal*
>
> *(i) trade secrets of a third party, or*
> *(ii) commercial, financial, labour relations, scientific or technical information of a third party;*
>
> *(b) that is supplied, implicitly or explicitly, in confidence; and*
> *(c) the disclosure of which could reasonably be expected to*
> *(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
>
> *(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
>
> *(iii) result in undue financial loss or gain to any person or organization, or*
>
> *(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[20] In Report 2005-003 at paragraph 38, my predecessor discussed the three-part harms test that must be met in order for the exception set out in section 27 to be applicable. The three parts of the test may be stated as follows:

> (a) disclosure of the information will reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party;
>
> (b) the information was supplied to the public body in confidence, either implicitly or explicitly; and
>
> (c) there is a reasonable expectation that the disclosure of the information would cause one of the four injuries listed in 27(1)(c).

[21] All three parts of the test must be met in order for a public body to deny access to information in reliance on section 27(1). If a record fails to meet even one of the three parts, the public body is not entitled to rely on section 27(1) to sever information in the responsive record.

[22] I must first consider whether the information at issue in this case would reveal the type of information referred to in paragraph (a) of section 27(1). In Ontario Order PO-2145, the following statement with respect to technical information was made:

> *Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the Act. [Order P-454]*

[23] I am satisfied that the information contained in the PAR sheets consists of technical information and therefore the first part of the test is met.

[24] Next, I must determine whether the information was supplied to the public body in confidence. The information contained in the PAR sheets is solely that of the relevant third party, and it was given to ALC by each of the third parties. The meaning of "supplied" in the context of section 27 was discussed at length in Report 2006-005 starting at paragraph 35, and need not be repeated here. Generally, information which is the result of contractual negotiations cannot be said to have been "supplied." However, information which is of a proprietary nature, which is not subject to negotiation between a third party and a public body, is generally considered to be supplied. There are nuances to this which I will not discuss in depth here, however I would refer the parties to a detailed discussion of this issue starting at paragraph 69 of Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner), 2002 BCSC 60. In the present matter, the information in the PAR sheets appears to be proprietary in nature, and not developed as part of a negotiated contract.

[25] There is also nothing in the PAR sheets that can be said to have been negotiated. Therefore, there is no question that the information has been "supplied."

[26] As such, I must now consider whether the information was supplied *in confidence*. In *Air Atonabee Ltd. v. Canada (Minister of Transport)*, (1989) 37 Admin L.R. 245 (F.C.T.D.), at paragraph 42, Justice MacKay stated as follows with respect to confidentiality of information:

> *[…] whether information is confidential will depend upon its content, its purposes and the circumstances in which it is compiled and communicated, namely:*
>
> *a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,*
>
> *b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and*
>
> *c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication.*

[27] Despite the Applicant's assertion that the same information contained in the PAR sheets was publicly available in patents, a search by an Investigator from this Office of both the Canadian and United States patent databases failed to return any such patents beyond that which the Applicant provided (which was for an older game whose PAR sheets were not requested). While the Investigator did find some patents containing general formulae, the detail found in the PAR sheets was not found in any patent reviewed by the Investigator. Further, as Third Party 1 points out, if such information was publicly available on a patent database, then the Applicant could have easily searched the databases, at no cost, to find the information he seeks instead of going through the access to information process. The fact that he did not, and the fact that both third parties maintain that they do not (and could not in Canada) patent algorithms and formulas reinforces my belief that the information contained on the PAR sheets is not

publicly available elsewhere. Therefore, the first element of confidentiality, as set out in *Air Atonabee,* is present.

[28] ALC and both third parties maintain that the PAR sheet information is kept strictly confidential. It is only given to ALC or potential buyers so they or a third party testing agency can test the machines to ensure they perform to the standards set out in the PAR sheets, and in keeping with legislated standards governing video lottery machines. If the information is provided to buyers by ALC, they state that this is done under the strict obligation of confidentiality. Third Party 2 also states that if and when this information is provided to customers it is also done under the strict obligation of confidentiality. Third Party 1 states that its customers have a legal obligation to maintain the confidentiality of PAR sheet information if it is provided to them.

[29] While general statements such as these cannot be solely relied upon to prove the confidentiality of PAR sheets, ALC has executed a confidentiality agreement with its product testing lab that specifically covers PAR sheet information. This clearly shows the importance the parties place on maintaining the confidentiality of PAR sheet information. Further, the purchasing agreements entered into by ALC and the vendors state that ALC "may not use, copy, modify….rent, lease, loan, resell, distribute, network or create derivative works based upon the VLT software or any part thereof…" This is further evidence of the confidentiality that surrounds the information contained in PAR sheets. Finally, ALC informed this Office that it has only disclosed PAR sheets once before, and that was in connection with a request by the Nova Scotia Alcohol and Gaming Division, whose mandate is to ensure that casinos and other lottery schemes are conducted and managed in accordance with the relevant legislation. ALC points out that the information was provided in accordance with legislation and states that it was provided to ensure ALC's compliance with the relevant gaming legislation. ALC provided the PAR sheets "on a confidential basis with the understanding/expectation that these would not be released publicly" and there was an understanding by both parties that the information was of a sensitive nature.

[30] Given the above, I believe that when this information is communicated to ALC, buyers or technicians, it is done with a reasonable expectation that it will be kept confidential. This certainly is the expectation of both third parties and also the understanding of ALC (a recipient of PAR sheet information). Therefore, I find that the second element of confidentiality as set out in *Air Atonabee* has been satisfied.

[31] Finally, provision of PAR sheet information to ALC and/or potential buyers is certainly not contrary to the public interest. In fact, the information is provided for the sole purpose of ensuring that the VLT machine performs in accordance with the PAR sheets and legislative standards. The legislative standards were put in place to offer some measure of protection to the public, and it is therefore in the public interest that this information continue to be provided so that independent third party testing can verify VLT performance. However, legislative requirements for the programming of VLT's are few. Section 8 of *Video Lottery Regulations* CNLR 760/96 under the *Lotteries Act,* S.N.L.1991, c.53 states as follows:

> *8. A person shall not operate a video lottery terminal that does not comply with the following requirements:*
>
> *(a) all money accepted shall be divided into credits denominated in $0.25, $0.10 or $0.05 values;*
>
> *(b) only wagers of one credit shall be accepted;*
>
> *(c) a player shall not be exposed, at any one play, to the chance of losing credits of a total value exceeding $2.50;*
>
> *(d) a player shall be permitted to withdraw any accumulated or unused credits for payment or reimbursement;*
>
> *(e) prizes for any one wager shall not exceed $500;*
>
> *(f) the terminal shall not dispense cash prizes;*
>
> *(g) the terminal shall be programmed so that, over time, prizes shall not be less than 80% and not more than 96% of the money accepted; and*
>
> *(h) tickets shall be issued to indicate the value of a prize or credit.*

I am informed by ALC that ALC tests VLT's beyond the requirements of section 8. ALC tests VLT's to ensure that they "meet ALC's own internal operational, security and integrity standards as well and to ensure the product delivered meets ALC's specifications for the game."

[32] I am also informed by ALC that while it is possible to assess compliance with regulatory standards without PAR sheets, the provision of PAR sheets facilitates the testing, particularly with respect to payout percentage requirements, and they are also important in determining whether games "meet ALC's internal due diligence testing against ALC's operation, security and integrity standards."

[33] The final aspect of the third element of confidentiality is that the relationship between the public body and the third party be fostered for public benefit by confidential communication. The third party manufacturers are not obliged by law or contract to supply PAR sheets to ALC, however, provision of PAR sheets to customers (for testing purposes) is common industry practice and ALC requires manufacturers to provide PAR sheets as per its own internal product approval process. Therefore, third party manufacturers could conceivably refuse to provide PAR sheets to ALC, thus diminishing ALC's ability to rigorously test the VLT's. In this way, it is in the public interest that communication between ALC and the third parties remain confidential. Alternatively, if manufacturers refuse to provide PAR sheets to ALC, this could inhibit ALC's ability to offer VLT products to the public if it is unprepared to do so without the benefit of PAR sheets to facilitate testing. Therefore, I am satisfied that the information was "supplied in confidence."

[34] Finally, turning to part (c) of section 27(1), there must be a reasonable expectation that the disclosure of the information would cause one of the four injuries listed therein. This issue was considered in a recent decision (Order PO-2774) of the Ontario Information and Privacy Commissioner's Office. The adjudicator had to determine whether section 17 of the Ontario *Freedom of Information and Protection of Privacy Act* (very similar to section 27 of the *ATIPPA*) was applicable to PAR sheets. She found that the third party had "not adduced the necessary detailed and convincing evidence to show that disclosure of its slot machine game PAR sheets could be expected to 'significantly prejudice' its competitive position…or cause it to experience 'undue loss', or its competitors to benefit from 'undue gain'…"

[35] The adjudicator went on to state as follows:

> *In assessing the reasonableness of the expectation of harm in this appeal, I accept that the competitive nature of the gaming industry is an important consideration [see Order PO-2367]. However, it bears emphasis that the mandatory exemption for confidential third party information in section 17(1) was never intended to be wielded as a shield to protect third parties from competition in the market place, but rather, from a reasonable expectation of significant prejudice to the party's competitive position [PO-2497] through disclosure. On this point, I accept the appellant's detailed position, with the supplementary trade magazine evidence provided, that PAR sheets represent mathematical proof provided in a format required by regulators and/or casino operators for the purpose of verifying the reliability of the game and its performance. Even accepting that the percentages and numerical information in the PAR sheets form the basis of the slot machine game, I have not been provided with sufficient evidence to conclude that the records describe anything further related to the actual design or construction of the game. In my view, the "intimate [mathematical] details" set out in the PAR sheets lack the degree of specificity that would make them useful to a competitor except in a very general sense [see Order PO-2172].*
>
> *In addition, and as previously noted, the other game manufacturer that was notified of the request for its slot machine game PAR sheets consented to their disclosure to the appellant. The mere fact of the other manufacturer consenting to the release of its PAR sheets is not itself determinative of the reasonableness of the expectation of harm that might be experienced by the affected party with disclosure of its own PAR sheets. However, I agree with the appellant that it is a relevant factor to be weighed in evaluating the reasonableness issue. I have also taken into consideration the appellant's evidence, which was supported by several trade publication excerpts provided, that PAR sheets are published in trade magazines, in casino management textbooks and slot machine manuals. There appears to be no great mystery around this type of document. The required reasonableness of the expectation of harm regarding the release of the affected party's PAR sheets is diminished, in my view, both by the other game manufacturer's consent to disclosure of its PAR sheets upon request, and by the general availability of PAR sheets within the industry. It is worth noting, as the appellant has done, that disclosure of the PAR sheets does not deprive the affected party of exclusive ownership of the game.*
>
> *The persuasiveness of the harms arguments briefly put forward by the affected party is further diminished, in my view, by the age of the PAR sheets. Even at the time of the request, the PAR sheets were more than five and a half years old. In the circumstances, I agree with past orders of this office that the risk of competitive harm with disclosure of a record may lessen with the passage of time [Orders MO-1781 and MO- 2249-I]. As I understand it, the nature of the gaming industry is such that the currency of slot machine*

> *games is crucial. In this context, the "shelf-life" of a slot machine game is limited due to the fast-paced development of new technologies that require new slot platforms, as well as continuous improvements to graphics and sound that render older games archaic – and less popular – within a relatively short period of time.*

[36] With respect, I must disagree with some of the adjudicator's findings as noted above. First of all, in my view, the "percentages and numerical information in the PAR sheets" are the very essence of the game design. It is what makes each game unique and it contributes to a game's popularity, especially when one considers the frequency (or infrequency) of payouts. The PAR sheets at issue in this case describe every detail of the math behind each game and in my opinion would be useful to a competitor in a very specific sense. Replication of this math and programming would enable a competitor to have a game that was exactly the same as one owned by one of the third parties.

[37] Second, unlike the Ontario case, both of the third parties in this case strongly oppose the release of the PAR sheets. The Applicant has provided me with an excerpt of an industry magazine article containing PAR sheet information, however, it should be noted that the name of the game to which the PAR sheet corresponds is not published. A competitor would not know if this was a profitable game or not and I have no proof that the PAR sheet related to a real game. Even if the PAR sheet was from a real game, I have no way of knowing if or under what circumstances the manufacturer consented to the release of the published PAR sheet or if the game is still on the market. If the PAR sheet information was used without the manufacturers consent, then I do not think the fact of publication can be used as an argument in favour of disclosure of all PAR sheets in general. Further, if the game is no longer on the market, then the PAR sheet information may no longer be of any commercial value to the manufacturer and thus need not be kept confidential any longer. The fact that PAR sheets are sometimes published in trade magazines does not mean that PAR sheets for games currently on the market and presumably still profitable should be disclosed. As I mentioned, PAR sheets are individual to the particular game. Disclosure of one does not reveal anything about another one. I also have not been presented with any evidence that PAR sheets are generally available within the industry (for purposes beyond product testing) or, if they are, under what circumstances they are provided. In fact, the evidence that has been presented by ALC indicates just the opposite.

[38] The adjudicator in Ontario felt that the age of PAR sheets diminished the harms argument put forward by the third party. I agree with the adjudicator's assessment that "the nature of the industry is such that the currency of slot machine games is crucial". While this argument may be true in many cases, in this case, it is my view that the math behind the games must change much less frequently than the graphics or sound components in order for a game to maintain its currency. PAR sheets describe nothing about the graphics, sound or general premise behind a game. It is purely technical information about the manner in which a game is programmed. To me, the length of time these games have been on the market is proof of the popularity and thus profitability of the games. This is due in some part to the programming of the games. In this way, I do not believe it can be said that the risk of competitive harm always diminishes with time, as the passage of time in this case shows how valuable the information continues to be. Further, this decision has implications beyond just the PAR sheets that have been requested in the present case. PAR sheets for new games will be affected by the decision as to whether section 27 applies to PAR sheet information. This point will be discussed further below.

[39] Contrary to the findings in Ontario Order PO-2774, I am satisfied, from the information given by the third parties in their submissions, that disclosure of PAR sheet information for those games which are still on the market would harm significantly the competitive position of the third parties and/or result in undue financial loss to the third parties. I believe that the connection between the disclosure of PAR sheet information and the harm that could result has been demonstrated, and is also significant.

[40] In Report A-2008-013, I considered the notion of "undue financial loss" and I quoted at length from British Columbia Order 00-10, pages 16-18. In that case, an applicant brewery sought records containing sales data for two competing breweries who both opposed the release of the data. I would like to reproduce a portion of that quotation here:

> *Molson argued that disclosure of this information could, within the meaning of s. 21(1)(c)(iii), reasonably be expected to "result in undue financial loss or gain to any person or organization". Labatt agreed with this. Molson submitted that disclosure of the information would cause loss to it because the information would hurt its competitive position, thus causing a loss of revenue. Molson also said it would allow Pacific Western or another competitor to make profits without having invested any capital to do that:*

"Molson's competitors would reap unfair monetary benefits, and Molson itself would sustain undue monetary losses".

As was noted earlier, the evidence establishes that this information has value. A buyer could be found for it because it would enable a competitor to fine-tune, at the very least, existing data about Molson and Labatt. The information would add value to that data and has value in its own right. Similarly, there is evidence that disclosure of the information could reasonably be expected to cause harm to Molson and Labatt. Whether or not the expected harm is significant, it might also be "undue". The central question is exactly that – would the gain or loss be "undue".

When is a financial gain or loss "undue"? As is the case with the significant harm test under s. 21(1)(c)(i), this test obviously requires one to consider what loss or gain might be 'due' in trying to define what is 'undue'. The ordinary meanings of the word "undue" include something that is unwarranted, inappropriate or improper. They can also include something that is excessive or disproportionate, or something that exceeds propriety or fitness. Such meanings have been approved regarding the similar provision in Alberta's freedom of information legislation. See Order 99-018. The courts have also given 'undue' such meanings, albeit in relation to other kinds of legislation. See, for example, the judgement of Cartwright J. (as he then was) in Howard Smith Paper Mills Ltd. v. The Queen (1957), 29 C.P.R. 6 (S.C.C.), at p. 29.

As Cartwright J. noted in Howard Smith, above, interpretation of the word 'undue' is not assisted by simply substituting different adjectives for that word. That which is undue can only be measured against that which is due. The Legislature did not, however, provide such a frame of reference for the purposes of s. 21(1)(c)(iii). It is necessary, therefore, to approach the issue of what is undue financial loss or gain in the circumstances of each case. This analysis can to some extent be guided by decisions in previous similar cases, which will give some sense of what may be undue in the present situation.

In this case, Molson and Labatt argue, disclosure of the information would give Pacific Western something for nothing. It would be given valuable competitive data without having had to pay for it through independent research or other means. As I understand it, they argue this information would present Pacific Western with a windfall.

. . .

In any case, it is plain that the Ontario and British Columbia provisions both protect against financial gain or loss that is undue. Ontario decisions consistently show that if disclosure would give a competitor an advantage, usually by acquiring competitively valuable information, effectively for nothing, the gain to the competitor will be undue. See, for example, Ontario Orders 125, P-561, P-1105 and M-920. In the last case, the City of Toronto denied access to its contract with a third party computer service provider. The third party successfully argued that disclosure of the contract's details –

> *including the terms between the third party and its sub-contractors – would enable its competitors to "replicate the company's technologies and services" and thus would cause it undue loss. The inquiry officer did not find that the result would also be an undue gain to the competition, although such a finding would appear to be supportable in that case.*
>
> *In my view, this financial gain to Pacific Western, and others, would be undue. It would not be undue because the gain would be large. The evidence does not permit me to make any finding on the costs saved by Pacific Western if it were to obtain information that it would otherwise have to pay for. Nor does it allow me to decide what price Pacific Western would pay to buy such information if it were available. But the information doubtless has value to Pacific Western and to others. The gain to Pacific Western from having that information would be undue because it would be unfair, and inappropriate, for Pacific Western to obtain otherwise confidential commercial information about two of its competitors and thereby reap a competitive windfall. . . .*
>
> [Emphasis added in original]

[41] In Report A-2008-013, at paragraph 78, I made the following finding:

> *…it is my view that the disclosure of either the interview questions, the instructions to the interviewers, or the scoring rubric could probably result in undue financial harm to the Third Party. To disclose this information would reveal confidential technical and scientific information that was developed by the Third Party through many years of research, experience and expertise and would probably result in Memorial no longer being able to use the selection process developed by the Third Party. In addition, it is likely that the Third Party would be unable to offer similar developed processes to other clients with the result being that the Third Party would have to develop other products and processes to offer to Memorial and other clients, at considerable financial cost. It is my view that such a financial cost to the Third Party would be "unwarranted, inappropriate and improper" and, therefore, would result in "undue financial loss"…*

[42] While this finding was made in relation to section 24, I note that section 27(1)(c)(iii) also uses the words "undue financial loss".

[43] Many of these games have been on the market for several years, which is a good indication of their popularity among players. Revealing the mathematics behind these games could reveal what makes them popular among players. If released, this information would be valuable to competitors who could use it to manufacture new games by reproducing the mathematics and algorithms of proven successful games.

Because they would not have to invest as much time and financial resources in the development of the games, they could offer games for sale for a lower price. This would likely result in undue financial loss to the third parties, who can only recoup their investment by selling the games at a certain price. Further, as mentioned above, to the extent that this decision can be considered a precedent with respect to the applicability of section 27 to PAR sheets in general, this loss could continue on an on-going basis, as competitors could continue to request PAR sheets for all new games introduced to the market by the third parties. This greatly increases the magnitude of the potential loss.

[44] Further, even if the competitor chose to sell its product at a price comparable to that charged by the third parties, the profit margin for the competitor would be much higher, resulting in a windfall for the competitor. This, to me, appears to be an undue financial gain to the competitor. This does not appear to have been considered by the adjudicator in decision PO-2774 (Information and Privacy Commissioner of Ontario). Again, this gain could continue into the future. Therefore, as stated, it is my opinion that the harms part of the section 27 test has been satisfied with respect to games still on the market and thus the exception has been properly claimed in this case.

[45] However, several games for which PAR sheets have been requested are no longer on the market. In this case, the harm that would result from disclosure is not self-evident and the third parties and ALC have not presented any detailed and convincing evidence that would demonstrate harm. In the case of games no longer on the market, I do not believe the harm has been demonstrated. These games have been removed from the market and while reasons for the removal were not given, one can assume that perhaps these games were no longer as profitable or as popular as they once were. My own view is that as the games are no longer in use in this jurisdiction, the manufacturers no longer stand to suffer the same likelihood or degree of financial harm if the PAR sheets were disclosed and used by competitors to create a substantially similar game. There would be no significant harm to the third parties' competitive or negotiating position in the present; nor could there be any undue financial loss as the games are no longer on the market in this jurisdiction. Therefore, I do not see how the final criterion of section 27 can be met for these games. I am not aware if they are in use in another jurisdiction, however, the manufacturers themselves have said that the games are configured differently in different jurisdictions (thus making the PAR sheets different). Further, as no evidence was presented with respect to using old

PAR sheets to create games in the future, I am reluctant to speculate regarding future harm. Whether or not the PAR sheets might be used again is too uncertain to amount to a "reasonable expectation."

[46] ALC has also relied on section 24 to withhold information. Section 24 states as follows:

> *24. (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of the province or the ability of the government to manage the economy, including the following information:*
>
> *(a) trade secrets of a public body or the government of the province;*
>
> *(b) financial, commercial, scientific or technical information that belongs to a public body or to the government of the province and that has, or is reasonably likely to have, monetary value;*
>
> *(c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;*
>
> *(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party; and*
>
> *(e) information about negotiations carried on by or for a public body or the government of the province.*

Section 24(1)(d) appears to be the most relevant paragraph to this situation. This section also refers to "undue financial loss", which is the same wording as found in section 27(1)(1)(iii). As I have decided that section 27 is applicable to the information contained in PAR sheets for games still on the market, there is no need to deal with the application of section 24 for these PAR sheets. However, with respect to PAR sheets for those games no longer on the market, I do not believe the undue financial loss is self-evident, and the third parties and ALC have not provided any detailed and convincing evidence to show how financial loss is possible if PAR sheet information for games no longer on the market was disclosed.

[47] Further, even if there had been detailed and convincing evidence with respect to the harm that could occur to the third party, in order for section 24 to apply there must still be a link to the public body. The subparagraphs of section 24(1) serve as examples of the type of information that could harm the financial or economic interests of the public body or the government. Section 24(1)(d) recognizes that there may be instances where undue financial loss to a third party could harm the financial or economic interests of a public body or the government. If this section is to be relied upon, undue financial loss to the third party must be proven, and then it must be shown how this "could reasonably be expected to harm the financial or economic interests of a public body or the government of the province…".

[48] ALC also redacted some information in accordance with section 30. Section 30(1) states as follows:

> *30. (1) The head of a public body shall refuse to disclose personal information to an applicant.*

Personal information is defined in section 2 of the *ATIPPA* to include an individual's name. The information that has been redacted in accordance with section 30 consists of names of individuals associated with the third parties. Thus, section 30 has been properly applied, and the information should not be disclosed.

V CONCLUSION

[49] I have found that with respect to those games still on the market in this jurisdiction, all three parts of the test set out in section 27 have been met. The information in the PAR sheets consists of technical information which was supplied in confidence. In my view the harm that would result from the disclosure of this information has been adequately demonstrated and it is also significant. PAR sheets reveal the mathematics or programming of a particular game. This is the essence of the game. Further, each game is different and games in different jurisdictions are programmed differently to meet different legislative requirements, and arguably, different market conditions. Development of these games involved

considerable investment of both time and monetary resources by each of the third parties and disclosure of PAR sheet information would enable competitors to create and manufacture market-proven successful games on an on-going basis without incurring the same research or development costs.

[50] Further, as section 27 applies, it is not necessary to deal with the applicability of section 24 with respect to PAR sheets for games still on the market.

[51] However, neither section 27 nor section 24 is applicable to PAR sheets for games which are no longer on the market. In this case, the harm or loss that would occur if this information was disclosed is not self-evident and the parties have not provided any evidence to show harm or loss.

[52] Finally, section 30 has been properly applied and the information for which it was claimed should not be released.

VI RECOMMENDATIONS

[53] Under authority of section 49(1) of the *ATIPPA*, I recommend that ALC release to the Applicant all PAR sheets for games that are no longer on the market and withhold the other PAR sheets.

[54] Either third party or the Applicant may appeal the decision of ALC with respect to these recommendations to the Supreme Court Trial Division. This appeal must be filed within 30 days of receiving the decision of the Department, as per section 60 of the ATIPPA. **No records should be disclosed until the expiration of the prescribed time period for an appeal to the Trial Division as set out in the ATIPPA.**

[55] Under authority of section 50(1) I direct the head of ALC to write to this Office and to both third parties and to the Applicant within 15 days after receiving this Report to indicate the Department's final decision with respect to this Report.

[56] Please note that within 30 days of receiving a decision of ALC under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 60 of the *ATIPPA*.

[57] Dated at St. John's, in the Province of Newfoundland and Labrador, this 4th day of June, 2009.

E. P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador