



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2011-007

April 12, 2011

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 no longer on the market in Newfoundland and Labrador. ALC denied access to the PAR sheet information, claiming section 27 (harm to business interests of a third party), and section 30 (personal information). The Applicant did not take issue with the severing of information pursuant to section 30. The Commissioner found that all three parts of the test set out in section 27 were met. The information in the PAR sheets consists of technical information which was supplied in confidence. The Commissioner stated that the third party had provided detailed and convincing evidence of the harm that would result from the disclosure of PAR sheet information, even for games that were no longer on the market. As the Commissioner found that section 27 was applicable to relevant PAR sheet information for games no longer on the market, no recommendations were made.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A – 1.1, as amended, s. 27.

Authorities Cited:

Newfoundland and Labrador OIPC Report 2005-003, 2009-006; Ontario Orders PO-2774, PO-2903.

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 May 28, 2010 to Atlantic Lottery Corporation (“ALC”). The request sought disclosure of records as follows:

Please provide PAR [Pay Analysis Report] Sheets for all line games only among the attached list of games, provided such line games are no longer on the market in Newfoundland and Labrador. If there are multiple versions of a line game which is no longer on the market in NL, please provide copies of all versions of the game. For example, if there is a 93% and a 95% version of a line game please provide PAR sheets for both versions, If there is a 5-line version and a 9-line version please provide PAR sheets for both.

- [2] On July 27, 2010 (after giving notice to the affected Third Parties) ALC sent the requested records to the Applicant, with much of the information contained therein withheld pursuant to section 27. Some information had also been severed pursuant to section 30. On August 18, 2010 this Office received a Request for Review from the Applicant asking the Commissioner to review the decision of ALC with respect to section 27. The Applicant did not object to the severing done under section 30.
- [3] 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

- [4] ALC takes the position that PAR sheets, even for games no longer on the market, constitute “valuable proprietary assets of the third parties who supply AL’s games...”. ALC supports the third parties’ views with respect to the release of this information and submits that:

PAR sheets describe math models unique to each particular manufacturer which were developed after significant investment and many years of research and testing by each of the vendors. The information severed from the PAR sheets would enable a competitor to design VLT games based upon the math models outlined in the PAR sheets.

- [5] ALC further asserts that often, new VLT games are built upon math models from previous games which have been modified in some way or even reused with no changes and that some of the most successful games are evolutions of games no longer on the market in this jurisdiction.
- [6] ALC also states that this information is provided to ALC under the strict obligation of confidentiality. ALC obtains PAR sheets from its vendors for the sole purpose of submitting the games to rigorous third party testing which ensures that “the software implementing the math models accurately implements and conforms to the math models outlined in the PAR sheets and that the outcome of such games are truly random and cannot be changed or manipulated.” ALC states that vendors include confidentiality statements when providing PAR sheets to them and further confidentiality agreements are executed when PAR sheets are provided by ALC to third parties for testing. Further, the purchasing agreements entered into by ALC with its vendors also provide that ALC ‘may not use, copy, modify...rent, lease, loan, resell, distribute, network or create derivative works based upon the VLT software of any part thereof...’
- [7] With respect to the harm that would occur if PAR sheet information was released, ALC supports the views of the third parties and also states that the release of this information could result in PAR sheets no longer being supplied to ALC, which would render ALC unable to submit the games to the third party testing described above. Lack of such testing, ALC submits, could compromise ALC’s financial results and harm its reputation (if the games did not perform as they were supposed to).
- [8] Specifically with respect to games that are no longer on the market, ALC feels this Office came to an improper conclusion in Report A-2009-006 with respect to those games and states that removal of games from the market is not indicative of profitability or popularity and gives examples of games that were removed for reasons of marketing tactics and strategies and then brought back at a later time. It also submits that bringing older games back on the market assists ALC to deliver on its financial commitments to its shareholders, as bringing past popular games back onto the market

is much more cost effective than purchasing, researching and marketing a new one. Thus, ALC submits that as games may be removed and brought back onto the market at any time, the harm that could result from releasing PAR sheets for games no longer on the market is the same as for those games still on the market.

III APPLICANT'S SUBMISSION

[9] The main focus of the Applicant's argument is the harm that is alleged by the Third Parties and ALC. The Applicant refers to Report A-2009-006 and my finding that VLT games are configured differently in different jurisdictions. Thus, the Applicant states that there is no danger that PAR sheets could be misused extra-provincially as a PAR sheet for a game in Newfoundland and Labrador would be of no use to a manufacturer seeking to introduce a game in another province.

[10] Further, the Applicant submits that any concerns of the Third Parties or ALC with respect to misuse of PAR sheet information can be dealt with and prevented by ALC. The Applicant states that as ALC is the regulator of VLT games in the province, ALC approves for use all games in the province and the alleged harm can be dealt with by a contractual undertaking by ALC not to approve any games for use unless the game is being put forward by its rightful owner.

[11] Further to this point, the Applicant states that even if PAR sheets are disclosed, the Third Parties would still have intellectual property rights in the information contained in PAR sheets, which rights are accompanied by remedies that the Third Parties would be free to pursue.

IV THIRD PARTIES' SUBMISSIONS

[12] Third Party 1 states that the

[...] information at issue is the detailed mathematical information from the PAR sheets including (1) the frequency, probability and odds that certain symbol combinations from the reels will occur during a play and the payback if those combinations occur; (2) the minimum and maximum win frequency [...] (3) the return or percentage of the wager that can be expected to be returned to the player and (4) the specific layout of the reels.

It submits that the mathematical parameters of a game can be arranged in an infinite number of ways, and must provide a certain expected rate of return to both the player and the operator over a large number of plays while providing an acceptable risk and reward to the player so that the player finds it fun to play. These considerations are factored into the games by the mathematical information which is revealed in the PAR sheets.

[13] Third Party 1 also states that:

[...] the usefulness and value of the mathematical information in the Par sheets is not reduced and does not expire after the games are no longer on the market in Newfoundland and Labrador. [Third Party 1] continues to use this information outside of this market and on other games.

Third Party 1 submits that new games are based in whole or in part on the mathematical information used in prior games and sometimes “clones” of old games (games with the same math but different artwork or themes) are developed using the same mathematical information.

[14] Third Party 1 also states that PAR sheets are provided to ALC with the expectation of confidentiality for the purpose of ensuring its games comply with relevant regulation. It also states that it enters into confidentiality and non-disclosure agreements with persons who request access to them and knows of no other legal way for a person to obtain access to PAR sheets.

[15] With respect to harm, Third Party 1 states that its competitive position would be harmed in that disclosure of this information would reveal to others how it designed successful games and enable them to easily and more quickly make copies of these products, which would result in undue financial loss to Third Party 1 in the form of lost profits and undue financial gain to the competitor (as there would be little or no research and development costs).

[16] Third Party 2 completed a very detailed and well considered submission. It is the position of Third Party 2 that all PAR sheets should be treated the same, whether or not the game is still on the market, as the harm that it would suffer should the PAR sheets be disclosed is the same in both cases.

[17] Third Party 2 submits that the PAR sheet information is clearly technical information and that it “represents years of research and development, the monetary value of which is hard to quantify as it is immeasurable. It details math models which are the results of carefully tested and refined mathematical formulae and algorithms performed by [Third Party 2’s] Mathematicians, Game Designers, Game Developers.” Similar to Third Party 1, Third Party 2 argues that disclosure of this information would allow competitors to design games based upon their unique math models.

[18] With respect to confidentiality, Third Party 2 states that PAR sheets are provided to ACL in confidence for the purpose of verification of math models, and are not publicly available to other parties. Further, it is submitted that the disclosure of certain portions of the information was supplied pursuant to a non-disclosure agreement or “in accordance with confidentiality markings in [Third Party 2’s] response to a Request for Proposal issued by AL.”

[19] Third Party 2 says that with respect to the harm it would suffer, it makes no difference whether the games are still on the market or not. While such games may no longer be offered in this jurisdiction, these games or evolutions thereof may still be offered elsewhere. Further, while the games may be altered to conform with gaming regulations in different jurisdictions, a competitor could still reasonably benefit from the PAR sheet information from a single particular jurisdiction.

[20] Further, Third Party 2 stated that many of its customers choose to remove games in a particular jurisdiction for reasons other than popularity or profitability, perhaps so the game may be brought back at a later time as ‘retro’ or sequel game. Third Party 2 asserts that such games are popular with players and are valuable to Third Party 2 as development costs for these games are much less than those required to develop new games, which makes such games very profitable. Third Party 2 went on to give two concrete examples of PAR sheet information being reused to create new games. Third Party 2 states:

...[i]f the [PAR sheet information] for an original game were to be disclosed at any time, [Third Party 2] would lose the ability to capitalize on past research and development investments allowing [Third Party 2] to develop games more quickly for customers.

[21] Third Party 2 also states that features and functionalities from one game are carried forward to future designs. As an example, Third Party 2 described how in one case, a game was removed due to

declining performance but when further market research was done, it was determined that the reason the game was unsuccessful was related to the theme of the game, not the math model. So, the same math model was then re-used with a different theme. In another example, a new game was developed for use in another jurisdiction using PAR sheet information from a game that had been taken off the market in this jurisdiction. Third Party 2 submits that had the PAR sheet information for the old games been disclosed, the development costs associated with the new games would have been substantially higher. Similarly, Third Party 2 gave examples of two other games that were taken off the market in this jurisdiction, but are still on the market in other jurisdictions with only slight math modifications to adhere to market regulations. Third Party 2 states that “although these games were not on the market in Newfoundland and Labrador, were the corresponding PAR sheets made available therein, a competitor could use such [information] to clone or create competing games in other jurisdictions.”

[22] In the final part of its submission, Third Party 2 states that if the PAR sheet information were to be shared with its competitors, it would provide insight into Third Party 2’s game development process “and the effects of such shared [information] may reasonably be felt by [Third Party 2] worldwide.” Third Party 2 states it could reasonably expect to be significantly harmed in the form of decreased profits and reduced sales, resulting in undue financial loss and improper financial gain to its competitors, as this information could be used to design competing games in the worldwide gaming market. Further, Third Party 2 submits that should this information be disclosed, it could result in such information no longer being provided to customers such as ACL for integrity testing, as it would not be able to rely on those customers to keep such information confidential. Consequently, this could compromise the reputation of such customers and lead to diminishing financial results.

V DISCUSSION

[23] 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.*

[24] 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).

[25] 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.

[26] In Report A-2009-006, I determined that the information contained in the PAR sheets consists of technical information and therefore met the first part of the test. The information at issue in the present case is the same, and therefore I am satisfied that the first part of the test is met.

[27] Also in that Report, I examined, in detail, whether PAR sheet information was supplied to ALC in confidence. I will not repeat that analysis again here, but using the same criteria as set out therein and considering the evidence presented, once again, I am satisfied that PAR sheet information is supplied by the Third Parties to ALC in confidence.

[28] I must now consider the criteria set out in section 27(1)(c). In order for information to be withheld under this section, 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 at length in Report A-2009-006. In summary, I concluded that with respect to those games still on the market in this jurisdiction, all three parts of the test set out in section 27 were met. The information in the PAR sheets consisted of technical information which was supplied in confidence and the harm that would result from the disclosure of this information was adequately demonstrated and also significant. PAR sheets reveal the mathematics or programming of a particular game which is the essence of the game. 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, which can be significant.

[29] However, for games no longer on the market, I concluded, in Report A-2009-006, that there was insufficient evidence before me to show significant harm and thus the test set out in section 27 had not been met. Therefore, I recommended release of PAR sheet information for those games no longer on the market. In case at hand, the Applicant has only requested PAR sheet information for games no longer on the market.

[30] A claim of section 27 by a public body requires this Office to consider the technical aspects of the industry in question, including market conditions in that industry. Section 64 of the *ATIPPA* clearly puts the burden of proof on the party asserting an exception. Without evidence to back up an argument, the burden of proof cannot be met, and in order to discharge its burden, the public body or third party must provide convincing and detailed evidence as to the harm that would occur should the information at issue be disclosed. The assertion of harm must be more than speculative, and it should establish a reasonable expectation of probable harm.

[31] Any decision of this Office must be based on the information that is put before it. There is often much research done during the investigation of a Request for Review, however, independent research cannot always uncover information about the inner workings of a particular industry. This Office cannot reasonably be expected to become expert in, or to do significant independent research into, a particular industry every time section 27 is claimed. Public bodies and third parties ultimately bear the burden of proving their right to rely on section 27, which includes not only argument on the specific issue at hand, but where necessary, the relevant context and particulars of a given industry or business so that we can make informed decisions based on solid evidence.

[32] As I stated previously, Third Party 2 provided this Office with an excellent submission. It was very well considered and detailed and gave several concrete examples to support its arguments against disclosure of PAR sheet information for games no longer on the market in this jurisdiction. Third Party 2 argued quite convincingly that because math models from old games are re-used in the development of new games, the harm from disclosure of PAR sheet information is the same whether the game is still on the market or not. This type of high calibre submission is exactly what this Office is looking for when we say that we require detailed and convincing evidence.

[33] The evidence that is before me in this case was not presented in the previous file, and therefore, I have arrived at a different conclusion than before. In report A-2009-006, I stated:

[...] 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'.

[34] However, as a result of the evidence and persuasive argument presented to this Office by the parties, in particular Third Party 2, I am convinced that that the harm from disclosure of PAR sheet information is similar whether or not the game is still on the market, because old games are often brought back or used to create new games either in this jurisdiction or other jurisdictions. PAR sheet information does not become valueless once a game is taken off the market. The decision to remove a game from the market may not be the result of declining performance (which, as I surmised in my earlier decision would make the information less attractive to competitors), but may simply be a marketing strategy. Or, if the game is not performing well, perhaps the math model will be reused with a different theme or graphics. Or, perhaps the math model of a game removed from the market

will be re-used in a different jurisdiction (requiring only slight variation to comply with jurisdictional regulations and thus saving significant research and development costs). These are not just mere possibilities put forth by the parties; these situations have actually occurred and examples were provided to this Office. Therefore, I am satisfied that the harms part of the section 27 test has been met with respect to games no longer on the market.

[35] I note that in Ontario Order PO-2903, the Assistant Commissioner for Ontario also found that PAR sheet information was excepted from disclosure under section 17(1) of Ontario's *Freedom of Information and Protection Privacy Act* (which contains the same three part test). Order PO-2903 distinguishes a previous Ontario Order (Order PO-2774) for much the same reasons that I have distinguished this case from my previous decision. In Ontario Order PO-2774, the adjudicator found, among other things, that the third party in the appeal had not produced detailed and convincing evidence that disclosure of PAR sheets would significantly prejudice its competitive position or cause undue financial loss. In Order PO-2903, the Assistant Commissioner had detailed representations with "focused evidence and argument" from the third party including affidavit evidence that showed the harm that would result if the PAR sheet information was to be released. This evidence, along with his findings that the information met the definitions of both "technical" information and "trade secret" information and that it had been supplied in confidence by the Third Party to the Public Body was sufficient to convince the Assistant Commissioner that provision of the withheld PAR sheet information could "reasonably be expected to prejudice significantly the competitive position of the third party" as disclosure of the PAR sheet information would enable competitors to create an identical game without incurring the significant research and development costs normally associated with the production of these games. Therefore, the Assistant Commissioner found that the information should be withheld.

[36] I would also like to address two arguments made by the Applicant. These arguments centered around two ways in which the harm that was being alleged by the Third Parties and ALC could be avoided. The Applicant first suggested that the harm associated with PAR sheets being used by competitors could be addressed through a contractual undertaking by ALC to not approve for use games based on disclosed PAR sheets unless it is being put forward by its rightful owner. I question how easily this could be ascertained, as ALC would have to determine first, which PAR sheets had been disclosed by all its suppliers in every jurisdiction, and then may have to engage experts (in-

house or otherwise) to determine whether the game being put forward is sufficiently similar to any of a competitor's disclosed games. In my view, this could be quite time consuming and costly. Then, if a mistake was made and a "pirated" game was approved, ALC would possibly be open to litigation by the game's rightful owner for breach of contract, likely resulting in significant legal costs for both the game manufacturer and ALC.

[37] This leads me to the Applicant's second argument wherein he asserts that even if the PAR sheets are disclosed, the Third Parties continue to have intellectual property rights in the information. Should those rights be violated, the Third Parties would be free to pursue legal remedies. Leaving aside the issue of whether there are such rights in PAR sheets (for example, the algorithms and the math behind the games are not patentable, as they are scientific principles or abstract theorems) pursuing legal remedies is expensive and is an expense that the Third Parties would not have otherwise incurred. Further, there is also the question of whether a legal action would be successful and if so, how much money would be recouped should they prevail.

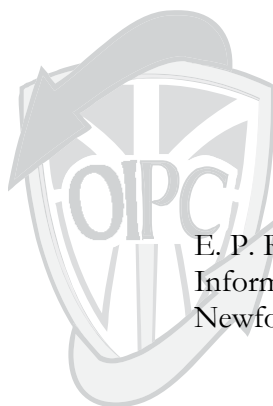
[38] Therefore, I am not convinced that these are viable options to avoid the harm that would reasonably occur if the PAR sheet information was disclosed. Indeed, these options may even be seen as further harm, as the expense associated with ascertaining whether or not a game's rightful owner is proffering the game to ALC and potential legal action (with no guaranteed return) that could be involved with these options might also be seen as undue financial loss to the parties.

VI CONCLUSION

[39] Given the foregoing, I am satisfied that the requirements of section 27 have been met with respect to games no longer on the market and thus the exception has been properly claimed in this case.

VII RECOMMENDATIONS

- [40] Having found that ALC properly applied section 27 in this case, I have no recommendations to make under section 49(1) of the *ATIPPA*.
- [41] 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 ALC's final decision with respect to this Report.
- [42] Please note that within 30 days of receiving a decision of ALC under section 50, the Applicant or either Third Party may appeal that decision to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 60 of the *ATIPPA*.
- [43] Dated at St. John's, in the Province of Newfoundland and Labrador, this 12th day of April, 2011.



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