Order F11-28

BRITISH COLUMBIA LOTTERY CORPORATION

Jay Fedorak, Adjudicator

September 22, 2011

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Summary: A journalist requested correspondence between BCLC and a director of a gaming company, who was also a former Chair of the Board of Directors of BCLC. BCLC identified email correspondence between the CEO of BCLC, as he then was, and the director to be responsive to the request and decided to disclose the records to the journalist. BCLC provided notice of the request to the director. The director requested a review on the grounds that disclosure would be an unreasonable invasion of his privacy under s. 22 of FIPPA and would harm the interests of one of his businesses under s. 21. Section 22 applies only to the information about the director's medical history and some information about other third parties. The journalist argues that s. 25 of FIPPA requires disclosure of the correspondence as being in the public interest. Section 25 does not apply to any of the information. Section 21 does not apply to any of the information. The adjudicator ordered BCLC to withhold the information about the director's medical history and some information about other third parties and disclose the remainder of the information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 21(1), 22(1), 22(2)(a), 22(2)(e), 22(2)(f), 22(2)(h), 22(3)(a), 22(3)(d), 22(4)(e), 25(1)(b).

Authorities Considered: B.C.: Order F10-37, [2010] B.C.I.P.C.D. No. 55; Decision F07-03, [2007] B.C.I.P.C.D. No. 14; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order No. 97-1996, [1996] B.C.I.P.C.D. No. 23; Order 00-53, [2000] B.C.I.P.C.D. No. 57; Order F11-05, [2011] B.C.I.P.C.D. No. 5; Order 01-19, [2001] B.C.I.P.C.D. No. 20; Order F09-17, [2009] B.C.I.P.C.D. No. 23; Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 03-15, [2003] B.C.I.P.C.D. No. 15.

INTRODUCTION

[1] This case concerns email correspondence between the Chief Executive Officer ("CEO") of the British Columbia Lottery Corporation ("BCLC"), as he then was, and former Chair of the Board of BCLC who is now a director ("director") of, and investor in, a company, Paragon Gaming, Inc. ("Paragon") that owns a casino. The director is challenging a decision of BCLC to disclose the email correspondence to a journalist on the grounds that disclosure would be an unreasonable invasion of his personal privacy under s. 22 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") and would harm the business interests of his company under s. 21. The journalist has also asked that BCLC make all of the records publicly available, as to do so would be in the public interest under s. 25 of FIPPA.

ISSUES

[2] The three questions that I must decide are:

1. Is there a compelling public interest requiring disclosure under s. 25 of FIPPA?

2. Would disclosure be an unreasonable invasion of the director's personal privacy under s. 22 of FIPPA? and

3. Would disclosure harm the business interests of Paragon under s. 21 of FIPPA?

DISCUSSION

[3] **Background**—BCLC is a Crown Corporation responsible for conducting, managing, and operating:

- Lottery gaming, including marketing lottery games;
- Casino gaming; and
- Electronic and commercial bingo.

[4] BCLC has the statutory authority to contract with private companies to manage gaming operations in British Columbia. The director is currently a director of Paragon and was so at the time of the correspondence. Paragon currently operates the Edgewater Casino, but the records at issue predate Paragon's involvement with Edgewater. According to published reports in the media that the journalist has submitted, Paragon has also signed an agreement with the BC Pavilion Corporation to build an entertainment complex next to the BC Place Stadium that will include a casino. These reports also suggest that the director contacted the minister responsible to discuss the issue of the government building a retractable roof for the stadium.

[5] The director was also a former Chair of the Board of both BCLC and the Insurance Corporation of British Columbia and a board member for the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games. According to the published reports in the media provided by the journalist, Elections BC indicates that the director and two of his companies have donated $80,000 to the BC Liberal Party.

[6] The director submits that he developed a working relationship and a personal friendship with the CEO when he was Chair of the Board at BCLC.

[7] The journalist requested the correspondence of the director with board members and executives at BCLC. BCLC identified the correspondence between the director and the CEO to be records responsive to the request. After the journalist requested the correspondence, BCLC gave the director formal notice of the request as a third party under s. 23 of FIPPA and invited him to comment on the possible disclosure of the records. The director objected to the release of the correspondence, and BCLC informed the journalist that it would release only one page to him, withholding the remaining 47 pages of information under ss. 21 and 22 of FIPPA.

[8] The journalist requested a review by the Office of the Information and Privacy Commissioner for British Columbia ("OIPC") of this decision. During the course of the review, BCLC changed its position and informed the director that it would release most of the information to the journalist.[1] The director requested a review of BCLC's new decision.

[9] **Records at Issue**—The records consist of 47 pages of emails between the director and the CEO from December 2005 to May 2007. The director's emails were from the email system of one of his companies and many include his corporate signature block incorporating the name, address and telephone numbers for the company. The CEO's emails were from BCLC email system and include a BCLC signature block.

[10] **Preliminary Issues**—The director raised two new issues that were not included in the Notice of Inquiry. The first is whether the records at issue are in the custody or under the control of BCLC. The second is a privacy complaint about alleged improper collection and use of the director's personal information by BCLC.

[1] BCLC indicated in its letter of notification to the director that it had decided to disclose the records with some portions withheld under s. 22. BCLC did not identify which passages in the records it intended to withhold. BCLC did not make any submissions to this inquiry. Therefore, it is not clear to me which information it was intending to withhold. Consequently, I am treating all of the information as being at issue in this inquiry.

[11] Past orders and decisions of the OIPC have said parties may raise new issues at the inquiry stage only if permitted to do so.[2] The director did not ask the permission of the OIPC to raise this issue prior to the inquiry. I decline to permit the director to raise these issues now.

[12] Generally, the right to raise the issue of custody or control of records should remain solely within the purview of the public body, in this case BCLC. It is not appropriate to deal with this issue in a third-party inquiry concerning the applications of ss. 21 and 22. In any case, BCLC has treated the correspondence as being in its custody. These are communications to and from its CEO, under his corporate signature block on the BCLC email system, and concerning subjects relating to gaming in general, the operations of BCLC and his role in BCLC. BCLC had stored and retrieved the correspondence and disclosed part of it to the journalist pursuant to his access request. In its management of the correspondence, BCLC has demonstrated clearly that it has custody for the purposes of FIPPA.

[13] The director also alleges that BCLC inappropriately collected and used emails that he sent to the BCLC mailbox of the CEO. This constitutes a privacy complaint that is unrelated to the disposition of the matters at issue in this inquiry, which concerns BCLC's application of ss. 21 and 22 of FIPPA to correspondence that a journalist has requested. I am prepared to refer this complaint to a separate investigation, if the director wishes to pursue it.

[14] **Does the Public Interest Require Disclosure?**—FIPPA requires public bodies to proactively disclose, without delay, information about a risk of harm to the environment, health, or safety, or where disclosure is otherwise clearly in the public interest. The journalist has submitted a series of news articles that raise questions as to whether the director, owing to his connections to the governing party of the provincial government, exercises influence on government decisions to the benefit of his companies. The journalist suggests that, if the records reveal that he has influenced government decisions that have led to the expansion of the availability of gambling, it could be sufficient to trigger the requirement for BCLC to disclose the information under s. 25(1)(a) of FIPPA. In support, he submits evidence concerning the public health risks that gambling poses.

[15] I reject the journalist's argument. In Order 02-38, former Commissioner Loukidelis established the standard for the application of s. 25(1)(a) and (b), which I adopt here:

> [53] As the applicant notes, in Order 01-20 and other decisions, I have indicated that the disclosure duty under s. 25(1)(b) is triggered where there is an urgent and compelling need for public disclosure. The s. 25(1) requirement for disclosure "without delay", whether or not there has been

[2] See for example Order F10-37, [2010] B.C.I.P.C.D. No. 55; Decision F07-03, [2007] B.C.I.P.C.D. No. 14, and Decision F08-02, [2008] B.C.I.P.C.D. No. 4.

> an access request, introduces an element of temporal urgency. This element must be understood in conjunction with the threshold circumstances in ss. 25(1)(a) and (b), with the result that, in my view, those circumstances are intended to be of a clear gravity and present significance which compels the need for disclosure without delay.

[16] The emails at issue are all more than four years old. The journalist's submission fails to identify any element of temporal urgency that previous orders have indicated is necessary for s. 25 to apply. Nor does my review of the disputed information support the conclusion that there is an urgent and compelling need for disclosure.

[17] Even setting aside the issue of temporal urgency, my review of the correspondence does not support the journalist's public safety arguments. I see no indication that the director exercised any influence that led to the expansion of gambling or that he even raised the issue. For these reasons, I reject the applicant's arguments that disclosure of the records would be in the interest of promoting public safety or otherwise in the public interest.

[18] **Would Disclosure be an Unreasonable Invasion of Privacy?**—FIPPA requires public bodies to withhold personal information where its disclosure would be an unreasonable invasion of a third party's personal privacy. The test for determining whether disclosure would be an unreasonable invasion of privacy is contained in s. 22 of FIPPA.

[19] Numerous orders have considered the application of s. 22, for example, Order 01-53.[3] First, the public body must determine if the information in dispute is personal information. Then, it must consider whether disclosure of any of the information is not an unreasonable invasion of third-party privacy under s. 22(4). If s. 22(4) does not apply, then the public body must determine whether disclosure of the information is presumed to be an unreasonable invasion of third-party privacy under s. 22(3). Finally, it must consider all relevant circumstances, including those listed in s. 22(2), in deciding whether disclosure of the information in dispute would be an unreasonable invasion of third-party privacy. I take the same approach here.

Is it personal information?

[20] The first step in applying s. 22 is to determine whether the requested information is personal information. The responsive records consist of correspondence between the director and the CEO. The correspondence contains information about the correspondents and other individuals. This constitutes the information of identifiable individuals, and, therefore, this information constitutes personal information. Not all of the information in the

[3] [2001] B.C.I.P.C.D. No. 56.

correspondence, however, is personal information. Some of it is factual information about BCLC, other public bodies, and a number of companies.

Not an unreasonable invasion of privacy

[21] The first step in applying s. 22 is to determine whether any of the provisions of s. 22(4) apply. None of the parties have identified any that apply. Some of the information is about the functions of the CEO. This is the kind of information that previous orders have found constitutes the functions of an officer or employee of a public body under s. 22(4)(e).[4] Therefore, I find that s. 22(4)(e) applies to the information relating to the functions of the CEO and that disclosure would not be an unreasonable invasion of privacy. [5]

Presumed unreasonable invasion of privacy

[22] The director submits that parts of the correspondence contain his medical history and that s. 22(3)(a) applies. I agree that some of the emails contain references to his medical history. I find that s. 22(3)(a) applies to the portions of the emails that reference his medical history and that creates the presumption that disclosure would be an unreasonable invasion of privacy. I note that one passage contains a reference to the medical history of the CEO. I find that s. 22(3)(a) applies to that passage and that it creates the presumption that disclosure would be an unreasonable invasion of privacy.

[23] The director also submits that the correspondence contains the employment history of the CEO and himself and that s. 22(3)(d) applies. The previous orders mentioned above draw a distinction between employment information that is distinctly personal about the employee and information that is functional about the position. The information that is personal would include resumes and other chronological descriptions of an individual's career, evaluations of job performance, and information collected during a workplace investigation. The information that is functional about the position would include factual descriptions of workplace activities and operational records created during the normal course of business.

[24] There is some distinctly personal information about the employment history of two other individuals. It is information relating to two appointments to the Board of BCLC. I find that s. 22(3)(d) applies to that information and weighs in favour of withholding the information. There is no such information about the director and the CEO. There is factual information about some of the activities of the CEO. I find that s. 22(3)(d) does not apply to that information.

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[4] See for example, Order No. 97-1996, [1996] B.C.I.P.C.D. No. 23; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 00-53, [2000] B.C.I.P.C.D. No. 57; Order F11-05, [2011] B.C.I.P.C.D. No. 5; Order 01-19, [2001] B.C.I.P.C.D. No. 20.

[5] This information is found on pages 1, 3, 7, 8, 10, 15, 24, 26, 28, and 39.

[25] There are no other factors that provide a presumption of unreasonable invasion of privacy. I will now turn to reviewing the relevant circumstances to determine whether they rebut the presumption of unreasonable invasion of privacy with respect to the information of the two other individuals and the medical history of the director and CEO. As there was no presumption of unreasonable invasion of privacy for the remaining information about the director and CEO, I will review the relevant circumstances to determine whether disclosure would be an unreasonable invasion of their privacy.

Relevant circumstances

[26] I find that disclosure of the information relating to the director, the CEO and the two Board appointments is desirable for the purpose of subjecting BCLC to public scrutiny, under s. 22(2)(a) of FIPPA.

[27] With respect to the two Board appointments, BCLC should be publicly accountable for ensuring that individuals appointed to its Board are qualified. I also note that the information at issue is of the kind that is usually disclosed in news releases that announce such appointments.

[28] With respect to information concerning the director and the CEO, the circumstances surrounding the records at issue clearly raise issues of accountability. There is general interest in transparency regarding individuals communicating with public bodies. In this case, the communications involve a former official of a regulatory body who subsequently joined a private-sector company that is subject to oversight by that regulatory body. I think that these facts argue in favour of disclosure on the grounds of the desirability of holding BCLC accountable and would facilitate transparency of that body.

[29] I find that the desirability of holding BCLC accountable is a relevant circumstance that weighs in favour of disclosure. I note that I come to this conclusion based only on the general issues that the circumstances of this case raise and not on the specific contents of the records.

[30] The director submits that another relevant circumstance is that disclosure would expose him to harm under s. 22(2)(e), including serious mental distress, anguish and harassment or otherwise unfairly damage his reputation under s. 22(2)(h). He cites the recent high sensitivity given to issues of conflict of interest and this could lead him to "experience unfair harassment from politicians and the media".[6] He suggests that it is likely that his actions would be characterized unfairly, and that this could have an impact on his position as director of one of his companies and damage his reputation. He claims that the exposure that disclosure of the records would cause would be unfair because there is nothing improper in the correspondence.

[6] Director's initial submission, para. 63.

[31] The director has not persuaded me that s. 22(2)(e) or s. 22(2)(h) are relevant circumstances in this case. He has stated that there is nothing improper in the correspondence at issue. He alleges that some readers might misinterpret the information in the correspondence and this could lead to him suffering harassment from politicians and the media. He has not supported this hypothesis with any substantive evidence. There is always the risk that disclosure of any information under FIPPA could be open to misinterpretation, but this, in itself, is not a justification under FIPPA for withholding the information. I see nothing in the correspondence to suggest that the director is likely to suffer unfair harm to himself or his reputation, as the result of disclosure of its contents.

[32] The director also submits that the information in the correspondence was supplied in confidence under s. 22(2)(f) of FIPPA. There are no explicit indicators of confidentiality. The director's email signature block includes a standard statement that the contents were only intended for the recipient and "may contain privileged or confidential information". Previous orders have found that this type of embedded, boilerplate-type statement on email is insufficient, without more, to establish that the information so supplied attached was confidential or was supplied on the basis that it would be kept confidential.[7] I find the same here. The director also provides affidavit evidences from the CEO and himself indicating that it was their understanding that their communications were in confidence. One of the indicators of confidentiality is whether the information is the kind that a reasonable person would regard as confidential. Another is whether it was created for a purpose where a reasonable person would expect that the contents could be disclosed to other parties. From my review of the content of the correspondence, I conclude that the correspondents intended the communications to remain confidential, and I see no evidence to suggest that these communications would be disclosed to anyone else. Therefore, I find that all of the information was supplied in confidence under s. 22(2)(f) of FIPPA and that this is a relevant circumstance that weighs in favour of withholding this information.

[33] There is a small amount of information about a few individuals who are not employees of BCLC or any of the director's companies. The information is about them in their personal capacities. I find that this is a relevant circumstance that weighs in favour of withholding this information.

Conclusion

[34] I have determined that some of the information is about the medical history of the director and the CEO, which means it is presumed to be an unreasonable invasion of privacy to disclose that information. I find that none of the relevant circumstances applies to that information. Therefore, I find that s. 22(1) applies to that information and BCLC must withhold it. This information

[7] For example, see Order F09-17, [2009] B.C.I.P.C.D. No. 23, para. 25.

appears on pages 6, 8, 31, 32, and 34. I have prepared the relevant pages indicating for BCLC the information that must be withheld.

[35] There is some personal information about the director and CEO that relates to them in a purely personal capacity and disclosure of that information would not promote accountability of BCLC. I find that s. 22(1) applies to that information and BCLC must withhold it. This information appears on pages 20 and 34. I have prepared the relevant pages indicating for BCLC the information that must be withheld.

[36] There is some personal information about identifiable third parties relating to them in a purely personal capacity. I find that s. 22(1) applies to that information and BCLC must withhold it. This information appears on pages 4, 22, 24, 26, 28, 30, 32, 36, and 39. I have prepared the relevant pages indicating for BCLC the information that must be withheld.

[37] I have determined that some of the information at issue is about the functions of the CEO of BCLC and, therefore, it is not an unreasonable invasion of privacy to disclose. I find that s. 22(1) does not apply to that information.

[38] For the remaining information, including the employment history of the two board members, I have found that the desirability of subjecting BCLC to public scrutiny weighs in favour of disclosing the information, while the fact that the information was supplied in confidence weighs in favour of withholding the information. In assessing the relative weight of these two considerations, I find that the desirability of subjecting BCLC to public scrutiny outweighs the fact that the information was supplied in confidence. The CEO submits that he was in the habit of discussing BCLC business with the director, and the extent of the director's influence on public-sector decisions involving gambling is an issue that has received considerable media attention. Disclosure would lead to transparency and openness about the decision-making process of a senior executive in a public body. I find that s. 22(1) does not apply to this information.

[39] **Would Disclosure Harm the Business Interests of a Third Party?**— Numerous orders have considered the application of s. 21(1) and the principles for its application are well established.[8] Loukidelis conducted a comprehensive review of the body of case decisions in several jurisdictions in Order 03-02.[9]

[40] Section 21(1) of FIPPA requires public bodies to withhold information the disclosure of which would harm the business interests of a third party. It sets out a three-part test for determining whether disclosure is prohibited, all three elements of which must be established before the exception to disclosure applies.

[8] See for example, Order 03-02, [2003] B.C.I.P.C.D. No. 2 and Order 03-15, [2003] B.C.I.P.C.D. No. 15.
[9] At paras. 28-117.

[41] The first part of the test requires the information to be a trade secret of a third party or the commercial, financial, labour relations, scientific or technical information of or about a third party. The second part of the test requires the information to have been supplied to the public body in confidence. The third part of the test requires that disclosure of the information could reasonably be expected to cause significant harm to the third party's competitive position or other types of harm as set out in s. 21(1)(c).

[42] With respect to a third-party review, such as this inquiry, the burden of proof is on the third party to demonstrate that the information at issue meets this three-part test. In this case, the director has merely stated that the information meets the test without explanation.

[43] There is very little information about third party businesses in the correspondence. For the most part, the correspondence consists of the CEO consulting the director about BCLC business. The only substantial passage concerning third party business is a couple of sentences concerning one of the director's companies. This information could be considered commercial in nature, but the director has made no submissions to this effect. In addition, there is no indication, in either the records or in his submission, as to who supplied that information to BCLC and whether they did so in confidence. Finally, there is no explanation of how disclosure would cause any financial harm to any party and it is not evident on the face of the record. Therefore, the director has not met the burden of proof and I find that s. 21 of FIPPA does not apply to any of the information.

CONCLUSION

[44] For the reasons given above, under s. 58 of FIPPA, I make the following orders:

1. No order respecting s. 25(1)(b) is necessary.

2. I confirm that BCLC is not required to withhold any information under s. 21(1) of FIPPA.

3. I require BCLC to refuse to disclose, in accordance with s. 22(1) the yellow highlighted information in the requested records on the following pages: 4, 6, 8, 20, 22, 24, 26, 28, 30, 31, 32, 34, 36, and 39.

4. I require BCLC to disclose all of the information in the records, except the information that I have highlighted in yellow.

5. I require BCLC to give the journalist access to this information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before November 4, 2011 and, concurrently, to copy me on its cover letter to the journalist.

September 22, 2011

ORIGINAL SIGNED BY

Jay Fedorak
Adjudicator

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