ISSN 1198-6182

Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 143-1997
January 16, 1997

****** This Order has been subject to Judicial Review ******

INQUIRY RE: A decision of the British Columbia Gaming Commission to withhold the name and address of a third party from an applicant for access to records

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on November 13, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision of the British Columbia Gaming Commission (the Commission) to withhold the name, address, and telephone number of a third party from a record provided to an applicant.

2. Documentation of the inquiry process

The applicant's initial request for access to records of the British Columbia Gaming Commission was made to the Ministry of Finance and Corporate Relations (the Ministry) on March 7, 1996. As noted by the Gaming Commission in its submissions, the Ministry responds on behalf of the Gaming Commission to access requests made under the Act. The applicant received certain records from the Ministry on April 24, 1996 and subsequently requested a review of the Ministry's response.

On September 10, 1996 during an extended mediation period, the applicant received additional records, including a severed version of a letter sent to the Gaming Commission by the third party and previously withheld in its entirety. On September 26, 1996 the applicant requested a review of the decision to withhold the information severed under section 22 of the Act.

3. Issue under review at the inquiry and the burden of proof

The issue in this inquiry is the Commission's application of section 22(1) to withhold information in the record. Although section 15 was used by the Ministry in its initial response to the applicant's initial request, it was not used to withhold the information at issue in this inquiry. The Gaming Commission, however, in its reply submissions, sought to include the section 15 ground "because of the broader public interest concerns and implications of the disposition of this application."

The relevant portions of section 22 are:

Disclosure harmful to personal privacy

22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

....

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,

...

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,

> (g)(1) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation, ...

Section 57 of the Act establishes the burden of proof. Under that section, if the record or part that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure would not be an unreasonable invasion of the third party's personal privacy under section 22 of the Act. Thus, in this inquiry, the burden of proof is on the applicant.

4. The record in dispute

The record in dispute is a two-page letter authored by the third party; the applicant was given access to the letter without the name, address, telephone number, and signature of the third party.

5. The applicant's case

The applicant is the president of Adagio Rhythmic Gymnastics Society (now Pacific Rhythmic Gymnastics Association), which I refer to below as the Society. His request was for correspondence and other records about Adagio received by the Gaming Commission. The applicant's specific arguments for disclosure of additional information are discussed further below.

The applicant believes that the third party is a former member of the Society. At the time of the original correspondence at issue in this case, the B.C. Gaming Commission was considering a request for a casino license from the Society for the purpose of raising money for its Rhythmic Gymnastics club. (Submission of the Applicant, pp. 2, 3)

The applicant argues that the record in dispute is a "business" letter written by a disgruntled member that should now be disclosed to him, because it represented an effort to involve public bodies in the affairs of this Society, a private club. He cites in this regard my decision to release similar information in Order No. 87-1996, February 29, 1996. (Submission of the Applicant, p. 3) Moreover, the applicant states, the third party was unsuccessful in persuading the public bodies to become involved in the affairs of the Society. The applicant wishes to protect the interests of the Society under section 22(2)(c) of the Act. (Submission of the Applicant, p. 4) The applicant also seeks to distinguish this inquiry from the decision of the B.C. Supreme Court in J. Doe v. The Information and Privacy Commission for British Columbia, Doris Ackerman, The Minister of Environment, Lands and Parks for British Columbia and J.M. Campbell, British Columbia Supreme Court, Nos. A951426 and A960295, September 11, 1996.

6. The B.C. Gaming Commission's case

The task of the Gaming Commission is to legitimate gambling in the province by ensuring that certain terms and conditions of its licenses are followed: "it issues licenses, monitors, audits and inspects compliance." (Submission of the Gaming Commission, pp. 4, 5)

The Adagio Rhythmic Gymnastics Society has from time to time held licenses issued by the Gaming Commission to conduct casino or bingo gaming events. The latter argues that there is "an important public interest to be recognized in protecting the identity of persons who are informants to gaming regulatory authorities." (Submission of the Gaming Commission, p. 2; see also pp. 6-9)

> In the Commission's submission, irreparable harm to the public interest in the preservation of the integrity of gaming could potentially flow from an order to disclose the identity of any confidential informant of the Commission. (Submission of the Gaming Commission, p. 9)

I have discussed below the Gaming Commission's submissions on section 22 of the Act.

7. The third party's case

The third party made an *in camera* submission and reply submission, which I have reviewed carefully for purposes of my decision. This person has attempted to rely on sections 22(2)(e), (f), and (g) of the Act to prevent disclosure of the information in dispute.

8. Discussion

The applicant has attempted to argue that the information in dispute should be disclosed to him because he claims to have been able to adduce from other evidence the identity of its author. Whatever the merits of this detective work, it does not establish a legal claim for explicit disclosure under the Act. (Submission of the Applicant, pp. 1, 2)

An additional argument of the applicant is that the information in dispute should be disclosed because the third party was not acting in good faith in writing to public authorities about the private Society. (Submission of the Applicant, p. 5) Whatever the usual tangle of motives on both sides in a case of this sort, it is not my role to adjudicate between competing sides on the substance of a disagreement, especially in what essentially appears to be a private dispute.

Section 22: Disclosure harmful to personal privacy of a third party

Section 22(2): In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal

privacy, the head of a public body must consider all the relevant circumstances, including whether

> ***(a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,***

The Gaming Commission argues that this section has no application in the present inquiry, because there would be no public benefit to offset the potential loss of an important enforcement tool. (Submission of the Gaming Commission, p. 10) I am of the view that the fact that this is essentially a private dispute among the applicant, his Society, and the third party militates against reliance on this section in this inquiry. (Reply Submission of the Applicant, p. 5) In fact, the submission of the applicant informs me that the Registrar of Companies has refused to intervene in the internal affairs of this Society, or to enforce the constitution or bylaws of the Society. (Reply Submission of the Applicant)

> ***(c) the personal information is relevant to a fair determination of the applicant's rights,***

I agree with the Gaming Commission's submission that there is no reason for the identity of the informant to be disclosed in order to protect the rights of the applicant, especially since the applicant is not really acting in a personal capacity (the purpose of this section of the Act) but in a corporate role as president of a Society. (Submission of the Gaming Commission, pp. 10, 11; Reply Submission of the Applicant, pp. 5, 6)

> ***(e) the third party will be exposed unfairly to financial or other harm,***

I find no merit in the Gaming Commission's submission that revealing the identity of a confidential informant might deprive him or her of membership "in some organization which has been an important element of their lives." Such an argument does not, in my view, rise to a level of unfair harm anticipated by this section. (Submission of the Gaming Commission, p. 11) However, I do accept the third party's submission about the relevance of this section.

> **(f) the personal information has been supplied in confidence,**

The Gaming Commission has informed me that it has always treated the identity of informants as confidential. In the present matter, the third party did state, in the letter in dispute, that he appreciated "the confidentiality of the Gaming Commission while it investigates these issues." The Commission argues that this meant his or her information was supplied in confidence. (Submission of the Gaming Commission, p. 12. The applicant accepts this same position in Reply Submission of the Applicant, p. 6) The third party states that he or she was assured confidentiality when an official of the Gaming Commission invited him or her to put his or her concerns in writing. (Reply

Submission of the Third Party) I accept this evidence and interpretation in the context of the present inquiry. In my view, this is an important factor that militates against disclosure in this case.

Section 22(3): A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

> ***(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,***

The Gaming Commission submitted that the remaining information in dispute should be protected from disclosure under this section, which would be in accordance with various earlier Orders. (Submission of the Gaming Commission, pp. 12, 13) (See Order No. 97-1996, April 18, 1996, p. 7; Order No. 81-1996, January 25, 1996, p. 6)

The problem in the present case is that the entire contents of the letter have already been released, except for the specific identifiers of its author. That is too selective an application of this subsection to persuade me in the overall context of this case that it is personal information compiled for purposes of an investigation into a possible violation of law. The contents of this letter further indicate that this complainant was not specifically concerned about gambling as a possible violation of law but about the internal workings of this particular Society.

Section 15: Disclosure harmful to law enforcement

The Gaming Commission has attempted to argue this section essentially at the inquiry stage. I am unprepared to accept this submission in the context of this present inquiry; and I agree with the applicant's position on this point. (Reply Submission of the Applicant, pp. 7, 8) The Gaming Commission is officially represented for purposes of the Act by one of the most experienced Ministries of government, which made an informed decision on what should or should not be disclosed and under what sections of the Act, including the receipt of a representation from the third party. The Gaming Commission then used outside counsel for purposes of the inquiry itself. (Submission of the Gaming Commission, pp. 14, 15) Unless there is an exceptional reason to do so, I am not prepared to accept changed reasons for an existing decision, from experienced public bodies in particular, once my Office has issued a Notice of Inquiry. This is particularly true for the discretionary exceptions such as section 15. (See Order No. 47-1995, July 7, 1995, p. 10)

Conclusion:

Having reviewed the record in dispute, the evidence, and the submissions in this inquiry, I conclude that the applicant has failed to meet his burden of proving that

disclosure of the information severed from the record would not constitute an unreasonable invasion of the third party's personal privacy. In my view, the most significant factor in this case is that set out in section 22(2)(f). I also conclude that section 22(3)(b) is applicable to create a presumption that disclosure would be an unreasonable invasion of privacy, and that presumption has not been rebutted by the applicant.

8. Order

I find that the British Columbia Gaming Commission is required to refuse access to the information in dispute under section 22 of the Act. Under section 58(2)(c), I require the head of the Ministry to refuse access to the information in dispute to the applicant.

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David H. Flaherty
Commissioner

January 16, 1997