Order F06-03

BRITISH COLUMBIA LOTTERY CORPORATION

Celia Francis, Adjudicator

April 10, 2006

Quicklaw Cite: [2006] B.C.I.P.C.D. No. 8
Document URL: http://www.oipc.bc.ca/orders/OrderF06-03.pdf
Office URL: http://www.oipc.bc.ca
ISSN 1198-6182

Summary: The Campbell River Indian Band requested records related to its destination casino project. The BC Lottery Corporation disclosed some records and withheld and severed others, mainly under ss. 14, 17(1) and 21(1). It also argued that records and information fell outside the scope of the request by virtue of their date or subject matter. Section 14 found to apply but not ss. 17(1) and 21(1). Other records and information found not to be within the scope of the request.

Key Words: duty to assist—solicitor-client privilege—financial or commercial information—trade secrets—supplied in confidence—undue financial loss or gain—competitive position—negotiating position—interfere significantly with.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 14, 17(1), 21(1)(a)(i) & (ii), (b) & (c)(i), (ii) & (iii).

Authorities Considered: B.C.: Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order 02-50, [2002] B.C.I.P.C.D. No. 51; Order 01-52, [2001], B.C.I.P.C.D. No. 55; Order 02-56, [2002] B.C.I.P.C.D. No. 58; Order 00-24, [2000] B.C.I.P.C.D. No. 27; Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 03-33, [2003] B.C.I.P.C.D. No. 33; Order 01-10, [2001] B.C.I.P.C.D. No. 11; Order F05-09, [2005] B.C.I.P.C.D. No. 10.

1.0 INTRODUCTION

[1] This decision arises out of a request of the Campbell River Indian Band ("CRIB"), the applicant, to the British Columbia Lottery Corporation ("BCLC") for specified types of records related to CRIB's proposed casino project. BCLC responded in four stages, disclosing a number of records and withholding and severing others under

ss. 12(1), 13(1), 14, 17(1) and 21(1) of the *Freedom of Information and Protection of Privacy Act* ("Act"). CRIB then requested reviews by this Office of BCLC's decisions, questioning the validity of BCLC's decision to apply these exceptions. No further information was disclosed during mediation by this Office.

[2] Because the matter did not settle in mediation, a written inquiry was held under Part 5 of the Act. The Office invited and received submissions from CRIB, BCLC and three third-party businesses, a hotel company, Executive Inn Inc., and two casino companies, Lake City Casinos ("Lake City") and Gateway Casinos ("Gateway").

2.0 ISSUES

[3] The notice for this inquiry said that issues in this case are:

1. Is BCLC required to refuse access to information under ss. 12(1) and 21(1)?

2. Is BCLC authorized to refuse access to information under ss. 13(1), 14 and 17(1)?

[4] Under s. 57(1) of the Act, BCLC has the burden of proof regarding ss. 12(1), 13(1), 14, 17(1) and 21(1).

Exceptions not under consideration

[5] The original and revised tables which BCLC provided with its submissions stated that, in addition to the exceptions listed above, BCLC was withholding two records[1] under s. 16(1). BCLC also annotated the withheld records with s. 16. BCLC did not, however, cite this exception in its decision letters. Nor did it provide argument or evidence on this section in its submissions. The applicability of this exception is also not evident from my review of the face of the records. As I find that s. 14 applies to these two records, however, I need not deal with s. 16(1) in this decision.

[6] In addition, I find below that, aside from pp. 4-327 to 4-333, all of the records to which BCLC argues s. 13(1) applies are, in my view, protected under s. 14. I therefore need not consider whether s. 13(1) applies to the same records. Finally, for reasons I explain below, I do not need to consider whether ss. 12(1),[2] 13(1), 14 and 17(1) apply to pp. 4-327 to 4-333.

[7] The upshot is that I need not consider ss. 12(1) and 13(1) but I will consider ss. 14, 17(1) and 21(1).

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[1] Pages 4-22 to 4-23 and 4-128 to 4-130.

[2] The only record to which BCLC argued s. 12(1) applied was pp. 4-327 to 4-333.

3.0 DISCUSSION

[8] **3.1 Background**—BCLC says that part of its mandate is to conduct and manage gaming, including casino gaming, within the province. In addition to implementing the Province's policies on gaming, BCLC makes its own policies respecting the conduct, management and operation of gaming in the province. It says that CRIB's request arises out of the failure of a proposed destination casino project in which CRIB and others were involved as co-proponents. It says CRIB and a co-proponent received approval in principle from BCLC to build a destination casino and that the approval in principle was subject to various conditions. Over the next few years, CRIB negotiated with other third-party businesses, the Province and others about the project. Third-party businesses in turn engaged in their own negotiations with the Province and BCLC. BCLC says CRIB was unable to satisfy the conditions BCLC had set and BCLC ultimately rescinded the approval in principle.[3] CRIB made the request for records a few weeks later.[4] The casino companies[5] provide similar background to this case.[6]

Records in dispute

[9] BCLC says that it disclosed over 2,300 pages of records and withheld or severed several other pages.[7] The withheld and severed records that remain in dispute consist primarily of correspondence (emails – many with handwritten annotations – memoranda and letters to and from BCLC, CRIB and the third parties) and meeting minutes.

[10] 3.2 **Preliminary Issues**—I will first deal with some preliminary matters that arose in this inquiry.

Submission of in camera material

[11] BCLC provided portions of its submission on an *in camera* basis, that is, for the eyes of the Information and Privacy Commissioner or his delegate only. CRIB objected to this, saying it had been deprived of the opportunity to make a meaningful reply. The Commissioner received comments from BCLC on this issue, held an *in camera* hearing by telephone with BCLC's legal counsel and exchanged further letters with BCLC. As a result of this process, BCLC agreed to re-submit its initial submission with some *in camera* portions now disclosed and with additional material which could be disclosed to the applicant.

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[3] CRIB disputes BCLC's submissions on these points at para. 1 of its reply, saying they should be treated as allegations and are also irrelevant to the issues in this inquiry.
[4] Paras. 1-37, BCLC's initial submission.
[5] Lake City participated in discussions with the applicant on the casino project; Gateway acquired Lake City part way through the process.
[6] Paras. 1-5, initial submission; para. 3, Gadhia affidavit.
[7] Para. 4, reply submission.

[12] The casino companies, Gateway and Lake City, which made a joint submission, also provided some portions of their initial submission *in camera*. The Commissioner questioned whether all of the material was properly received *in camera*. After an exchange of letters, the Commissioner held an *in camera* hearing by telephone with the casino companies' legal counsel. As a result of this process, Gateway and Lake City re-submitted their submission with additional material disclosed.

Information BCLC says is outside scope of request

[13] BCLC said in its initial submission that some information and records are outside the scope of CRIB's request, either because they are outside the timeline specified in the request or because they relate to topics other than those of interest to CRIB (for example, other casinos or discussions of matters between BCLC and Gateway or Lake City that were unrelated to CRIB's casino project) or both.[8] BCLC also provided argument and evidence, apparently in the alternative, on the applicability of various exceptions, principally ss. 14, 17 and 21, to these same records.[9]

[14] Gateway and Lake City also said that some of the records in dispute are not covered by the access request.[10]

[15] CRIB questioned BCLC's position on the scope issue, saying its original request "broadly relates to consideration of [its casino project] as well as its interaction and relationship with other Casino projects both before and after its cancellation".[11]

[16] It was not clear from the material before me what position BCLC was really taking on the scope issue nor, if it now (and not before) considered these records to be outside the scope of the request, why it did so, and why it had included them among the records in dispute in this inquiry. The question of whether certain information falls outside the scope of the applicant's request by reason of date or subject matter was not listed as an issue in the notice for this written inquiry.

[17] Given the nature of the records in this case, however, and in the interests of narrowing the scope of the records in issue, if possible, I considered it an appropriate preliminary issue to consider as, if I found that certain information or records were outside the scope of the request because of their date or subject matter, or both, I need not consider whether exceptions apply to them. This issue relates to whether BCLC complied with its duty under s. 6(1) to make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely.

[18] I therefore requested clarification[12] from BCLC as to which of the records in dispute – or portions of records – BCLC considers to be outside the scope of CRIB's

[8] See, for example, paras. 89(a) & 98, initial submission; see also *in camera* paras. 43-45, Reid affidavit.
[9] See for example, paras. 89(b)-89(f).
[10] See para. 17, initial submission.
[11] Para. 11, applicant's reply submission.

request because of date or subject matter and why, given the wording of CRIB's access request, which reads as follows:

> - All records dating back to June 1, 2002 pertaining to any discussion or consideration of the Campbell River destination casino project and associated approval-in-principle, including documents where the project is raised as part of a general discussion of casino projects; [item 1]
>
> - All records pertaining to any discussion or consideration whatever of any reallocation of the permitted slot machines or other permitted gambling potentially assigned to the Campbell River destination casino project to other locations or other casino operations; all records pertaining to any other discussion of the consequences of the cancellation of the Campbell River destination casino project, or such projects generally, on the extent of permitted gambling elsewhere in British Columbia; [item 2]
>
> - All records dating back to June 1, 2002 pertaining to the extent of or the possible expansion of gaming in British Columbia in which the status of destination casino projects which had been granted approvals-in-principle at or around the time of approval of the Campbell River destination casino project are discussed generally, or the Campbell River destination casino project is discussed; [item 3]
>
> - All records recording or pertaining to phone conversations, meetings, discussions, and other communications that relate to the foregoing requests, whether or not the records themselves disclose the subject matter of the discussion; [item 4]
>
> - All records recording or pertaining to phone conversations, meetings, discussions, and other communications with Crown corporations and bodies that relate to the foregoing requests, whether or not the records themselves disclose the subject matter of the discussion; [item 5] and
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> - All records recording or pertaining to phone conversations, meetings, discussions or other communications between government officials and any employee, agent or representative of the Lake City Casinos group of companies including the Gateway Casinos group of companies, since January of 2003, that relate to the foregoing requests. [item 6]

[19] BCLC responded by saying that, after receiving the notice for this inquiry, it "determined that several of the records originally thought to be responsive to the Applicants' request were, in fact, outside the scope of the request".[13] BCLC listed a number of pages,[14] some or all of which it argued are outside the scope of CRIB's request, in most cases because they do not relate to the subject matter of the second item

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[12] See my letter of December 2, 2005.

[13] See BCLC's further submission of January 16, 2006.

[14] Some or all of pp. 2-42, 2-62, 2-76, 2-96, 2-122, 3-1 to 3-13, 3-46 to 3-49, 3-50 to 3-51 (except third paragraph), 3-59, 3-64, 3-66 to 3-68, 4-1, 4-5, 4-22 (last paragraph only), 4-81, 4-104 to 4-121, 4-138, 4-151 to 4-152, 4-179 to 4-182, 4-327 to 4-333.

in CRIB's request or because they pre-date the first and third items in the request.[15] BCLC added that, because the particular records or portions noted also do not "relate to" the first three items, they are also outside the scope of the fourth to sixth items in the request. In some cases, BCLC said the records or portions in question are out of scope because they do not relate to any of the items listed in the applicant's request. Alternatively, BCLC said, the severed information and records fall under one or more of ss. 13, 14, 17 and 21.[16]

[20] CRIB, Lake City and Gateway were given an opportunity to comment on BCLC's response on these points but did not do so.

[21] I do not consider CRIB's request to be as broad-ranging as it suggests. It is in fact quite specific as to what CRIB wants in terms of subject matter and time lines. Having carefully reviewed the records and portions of records in question, I conclude that, for the reasons BCLC put forward in its submission on this point, BCLC correctly classified the items listed above as outside the scope of CRIB's request and that BCLC has complied with its s. 6(1) duty in that respect.[17] I have added to this class of records a letter (p. 3-26) which BCLC did not argue was out of scope but which relates to another casino. Although this letter mentions the applicant's casino project in passing, the severed portions relate to the other casino and are in my view outside the scope of the request.

[22] Because I have found that these records or portions of records are outside the scope of the request, I need not consider whether any exceptions apply to them. I note in passing that many of these records or portions thereof[18] would, in my view, be protected by s. 14, if they were within the scope of the request.

[23] Some clarification is necessary regarding my findings on pp. 4-327 to 4-333. BCLC provided the following documentation regarding its position on these pages:

- paras. 192-198 of BCLC's initial submission, which argue that "the vast majority of this document" is outside the scope of the request by reason of its topic and, alternatively, that "the document has been properly severed under sections 12, 13, 14 and 17 of the Act";
- BCLC's original table of withheld and severed records, which lists s. 12, s. 13 and s. 14 as exceptions and then says "*Out of Scope";

[15] BCLC said at para. 4 of its January 16, 2006 further submission that the portfolio officer advised it to include the "out of scope" records among those in dispute, arguing first that they are out of scope and alternatively that they fall under various exceptions.
[16] BCLC's further submission of January 16, 2006.
[17] In one case, pp. 4-151 to 4-152, BCLC said portions were outside the scope of the request because of their topic and in the alternative protected by ss. 13 and 14. However, the record post-dates the request and is thus entirely outside the scope of the request by reason of its date.
[18] Pages 2-42, 2-62, 2-76, 2-96, 2-122, 4-1, 4-5, 4-81, 4-104 to 4-122, 4-138 and 4-151 to 4-152.

- the original set of pp. 4-327 to 4-333 which BCLC provided, which have these handwritten annotations: "severed entire docs sections 12 and 13"; and then slightly below, "partially out of scope";[19]
- para. 32 of BCLC's January 16, 2006 further submission, which says that portions of p. 4-327, as well as all of pp. 4-328 to 4-333 are outside the scope of the request and that "Further, and in the alternative, the entire record is withheld under sections 12, 13 and 14";
- BCLC's revised table of withheld and severed records, which says that portions of p. 4-327 and all of pp. 4-328 to 4-333 are out of scope and, in the alternative, list ss. 12, 13 and 14 as the applicable exceptions for this record;
- the revised copies of pp. 4-327 to 4-333 which BCLC provided with its January 2006 further submission as clarification of its position on the out of scope records, on which p. 4-327 is annotated by hand "*Portions of page 4-327 and all of pages 4-328 to 4-333 out of scope or alternatively, severed entirely under sections: s. 12 s. 13 s. 14"; in this case, BCLC clearly marked the portions of p. 4-327 that it considers to be outside the scope of the request by drawing boxes around them and annotating them with a stamp saying "Out of Scope".

[24] There is no doubt that pp. 4-328 to 4-333 are outside the scope of the request. They appear to be a separate document from p. 4-327 (having a separate heading) and do not mention CRIB's casino project, implicit or explicitly.

[25] As for p. 4-327, this record is almost entirely unrelated to CRIB's casino project. In my view, only the portions that BCLC did not box on this page – the heading, the introductory line, the heading of the fourth section and the one line that mentions the applicant's casino project within the fourth section – are responsive to the request. I agree with BCLC that the boxed portions on the rest of this page are outside the scope of the request.

[26] From the documentation cited above – particularly the three items BCLC provided as clarification with its January 2006 submission – I take BCLC's first position to be that the responsive portions of this page (perhaps six lines of text) do not fall under ss. 12(1), 13(1), 14 and 17(1) and that the applicability of these exceptions arises only if one considers the whole page to be responsive. It follows that I take BCLC to be saying that the responsive portions do not fall under any exceptions and may be disclosed to CRIB. I agree. BCLC must therefore disclose the responsive portions of this page to the applicant.

[27] Even if I did need to consider the applicability of ss. 12(1), 13(1), 14 and 17(1) to the responsive portions of p. 4-327, I would find that they do not apply, for reasons which follow. BCLC merely asserted that these sections apply and provided little argument and evidence in support of its position.

[19] The pages were not otherwise annotated to show which portions BCLC considered to be outside the scope of the request.

[28] First, in the case of s. 12(1),[20] BCLC did not explain how it believes disclosure of this record would reveal the substance of Cabinet deliberations and did not provide any argument or evidence to support its position that s. 12(1) applies to this page.[21] There is also no indication on its face that this page was submitted, or prepared for submission, to Cabinet or one of its committees, nor that its contents would reveal the substance of Cabinet deliberations.

[29] In the case of s. 13(1),[22] internal evidence shows that this record was prepared for the information of the Minister responsible for gaming at the time but there is no indication that the intent of the record was that the Minister make a decision. There are no explicit or implicit recommendations or advice as to options to consider nor suggested courses of action for the Minister to choose among. There is also no indication on its face that it formed part of a deliberative process. Such information does not constitute advice or recommendations, as previous orders and court decisions have interpreted this term.

[30] Regarding s. 14, BCLC said that this record "constitutes legal advice to the Minister in respect of potential legal liabilities".[23] It did not elaborate on the "potential legal liabilities" nor otherwise explain how in its view s. 14 applies to this record. There is no indication in the material before me, including the face of the record itself, that a lawyer prepared this record for the purpose of providing confidential legal advice to a client or that it otherwise relates to the giving, seeking or formulating of legal advice. The record reveals no explicit or implicit advice of any kind, legal or otherwise.

[31] Finally, with respect to s. 17,[24] for reasons I discuss below, there is no basis in the material before me on which to conclude that disclosure of the responsive portions of this page could reasonably be expected to harm the financial or economic interests of BCLC or the Province.

Information applicant is not interested in

[32] CRIB appears to be most interested in records related to dealings about its proposed casino project between BCLC and Gateway and Lake City, particularly after

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[20] See para. 193-194, BCLC's initial submission where BCLC says the records would reveal the substance of Cabinet deliberations.

[21] For example, affidavit evidence from a knowledgeable employee that this information formed the basis of Cabinet deliberations or a copy of any relevant Cabinet submissions.

[22] See paras. 195-196, BCLC's initial submission, where BCLC says the record contains advice and recommendations developed by BCLC and Gaming Policy and Enforcement Branch ("GPEB"), Ministry of Public Safety and Solicitor General, for the Minister and Cabinet in respect of gaming.

[23] Para. 197, initial submission.

[24] BCLC did not list s. 17 as an exception for this record in either the original or revised table of withheld and severed records. At para. 198 of its initial submission, however, it says disclosure of the record would likely result in financial or economic harm to BCLC or the Province. It reiterates this in its further submission of January 16, 2006.

Gateway took over Lake City.[25] Although it disputed the applicability of exceptions to all of the records, CRIB also stated that it was not interested in certain types of information in the records, as follows:

> The applicant has no interest in reviewing the private financial details of Executive Inn, whether or not these should be disclosed under the Act. The applicant is interested in all details of the dealings between the public body (and other public bodies) and Executive Inn in relation to the project. It therefore requests that such documents be produced with the financial figures redacted.[26]

[33] I found above that the pages that relate to the proposed Executive Inn hotel[27] are outside the scope of the request. Of these pages, pp. 3-11 to 3-13 are what BCLC calls "financial projections"[28] for the proposed hotel,[29] presumably the type of information in which the applicant would not in any case be interested, given its comments above.

[34] Regarding records related to Gateway and Lake City (mainly correspondence), the applicant said the following:

> … The applicant has no interest in actual financial data which can be redacted.[30]

[35] CRIB did not initially explain what it meant by "actual financial data". In response to my request for clarification of this point,[31] CRIB said that it

> … is referring to numerical financial information disclosed by Lake City or Gateway about its operations. It does not object if such information is redacted so that the numbers are concealed.[32]

[36] I was unable to identify any such information in the remaining disputed records.

[37] In addition, CRIB had this to say about the various casino-related agreements:

> The applicant has no interest in disclosure of draft contractual documents internal to the public body relating to the COSA [Casino Operating Service Agreement] proposal unless the documents were disclosed to other entities like Gateway, in which case no privilege or confidentiality attaches to them and they should be disclosed. The applicant is interested in documents discussing the progress of the COSA negotiations and is content if those documents are severed to conceal actual and prospective business terms of the ultimate agreement.[33]

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[25] See, for example, paras. 14 & 29, reply submission.
[26] Para. 8.a., reply submission.
[27] Pages 3-1 to 3-13.
[28] See para. 79, BCLC's initial submission.
[29] Executive Inn withdrew from discussions with the applicant about the proposed hotel part way through the proposed casino project.
[30] Para. 27, reply submission.
[31] In my letter of March 24, 2006.
[32] Para. 3, applicant's letter of March 30, 2006.
[33] Para. 21, reply submission.

[38] CRIB said the same thing about the two other types of agreements that appear among the records, a Host Financial Assistance Agreement ("HFAA") and a Destination Casino Project Development Agreement ("DCPDA").[34] Among the records that BCLC disclosed in January 2006 were complete copies of versions of, or extracts from, the HFAA, DCPDA and COSA and almost complete disclosure of four other versions of, or extracts from, the COSA. Of all the various agreements that BCLC originally withheld, only a few portions of four COSA records remained withheld under ss. 17(1) and 21(1) as of January 2006.[35]

[39] However, it was not possible to say with any reasonable assurance from the material before me whether the draft agreements were only internally circulated, so I requested clarification of this point from BCLC.[36] It replied that, as far as it could tell, the portions that remained severed under s. 17(1) had been circulated internally and to the provincial government's Gaming Policy and Enforcement Branch ("GPEB) while those that remained withheld under s. 21(1) had been circulated to those bodies and to the casino companies.[37]

[40] I then told CRIB that, on this basis, I did not propose to deal with the portions of the COSA records that BCLC had severed under s. 17(1)[38] and asked if CRIB still wanted access to the information in those pages that remained severed under s. 21(1).[39] CRIB clarified that it was not interested in the remaining information in the COSA records.[40] Accordingly, I do not need to deal with any of the severed information in the draft COSA records.[41]

[41] I also asked CRIB for clarification of its lack of interest in "actual and prospective business terms of the ultimate agreements", so that I need not consider any such information or records.[42] CRIB responded as follows:

> 2. The Applicant has previously stated that it is interested in documents that discuss the progress of the COSA negotiations. Such documents may contain references to the actual terms of the COSA that may include terms kept internal to the government. The Applicant does not object if references to such actual terms are severed. Otherwise, it wants to see such documents.[43]

[42] I was unable to identify any such information in the remaining disputed records that I consider below under ss. 17 and 21.

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[34] Para. 22, reply submission.
[35] Portions of pp. 4-100 to 4-102, 4-214 to 4-217, 4-275 to 4-277 and 4-323 to 4-325.
[36] See my letters of December 2, 2005 and March 16, 2006.
[37] BCLC's further submission of March 22, 2006.
[38] CRIB did not comment on this proposal in its letter of March 30, 2006.
[39] See my letter of March 24, 2006.
[40] Para. 1, CRIB's letter of March 30, 2006.
[41] Pages 4-100 to 4-102, 4-214 to 4-217, 4-275 to 4-277 and 4-323 to 4-327.
[42] See my letter of March 24, 2006.
[43] CRIB's letter of March 30, 2006

More records and information disclosed

[43] BCLC said in its January 2006 response that, with the passage of time, it was now able to disclose more information and records. It provided a list of several pages which it had originally withheld in full and which it had just disclosed in full or severed form. It also said it was no longer claiming ss. 13(1) and 14 in some cases, mainly regarding the remaining severed agreements.[44]

BCLC's search for records not an issue

[44] CRIB argued that BCLC failed to disclose records which fall within the scope of its request. CRIB said it had received a number of records from another public body which it had not received from BCLC but which in CRIB's view BCLC should have included. CRIB provided copies of these records and asks why BCLC did not include them in its disclosures.[45]

[45] BCLC pointed out that the question of whether it had conducted an adequate search was not listed as an issue in this inquiry. BCLC said that it would be premature for me to make an order on this point when it has not been able to review its records or been given an opportunity to respond to the applicant's allegation. It added, however, that it does not maintain parallel files which are identical to those of public bodies with which it communicates. It is therefore reasonable that another public body might have records which BCLC does not. BCLC said that nevertheless it would review its files to ensure that it had provided the applicant with all the records it was entitled to.[46]

[46] I agree with BCLC that, for the reasons it says, the search issue is not properly before me. It would therefore not be appropriate for me to consider whether BCLC complied with its s. 6(1) duty to carry out an adequate search for responsive records. If CRIB still wishes to pursue this issue, it may do so, directly with BCLC.

[47] **3.3 Solicitor-Client Privilege**—Section 14 reads as follows:

Legal advice

14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[44] Its revised table of withheld records also indicated that BCLC had dropped its application of s. 12 to p. 4-81, a page I found is outside the scope of the request.
[45] Paras. 13-14 & tab 35, initial submission.
[46] Paras. 2-6, reply submission.

[48] The Information and Privacy Commissioner has considered the application of s. 14 in numerous orders and the principles for its application are well established. See, for example, Order 02-01.[47] I will not repeat those principles but apply them here.

[49] CRIB and BCLC both acknowledged that s. 14 protects the two branches of solicitor-client privilege: legal professional privilege and litigation privilege. They gave examples of the types of information to which s. 14 may apply, referring to relevant orders and court decisions.[48]

[50] BCLC originally said that s. 14 applies to all or parts of numerous records. Many of these are records which I found above are outside the scope of the request. In addition, BCLC said it was no longer claiming that s. 14 applies to some records, mainly the agreements. I have therefore considered s. 14 only in respect of the records that are within the scope of the request and which BCLC still argues fall under s. 14.[49]

[51] BCLC said that it and its lawyers communicated regularly with the Province and its lawyers during negotiations on the project, for the "purposes of collecting, formulating, providing and receiving legal advice". BCLC said that BCLC and the Province "shared a common legal interest" in "almost all aspects" of the casino project.[50]

[52] BCLC said the communications between BCLC and its lawyers or the Province and its lawyers were intended to be confidential and for the purpose of seeking or giving legal advice (or both), including as to what ought to be done in a particular legal context, "the ascertainment and investigation of the facts upon which the advice was rendered or intended to be rendered" or information passed between BCLC's representatives and its legal advisors "as part of the continuum aimed at keeping both informed so that advice could be sought and given as required". It said it is the Province's agent and that it claims solicitor-client privilege over the pages themselves as well as descriptions of the pages. It said it has not waived privilege over the information in question. BCLC provided *in camera* argument and evidence, both generally and on specific records, in support of its position on the records to which it argued s. 14 applies.[51]

[53] CRIB questioned BCLC's application of s. 14, saying none of the communications in question appears to relate to legal advice between solicitor and client. CRIB also said that all the documents were generated before it started any legal action and that no litigation had commenced as of the date of the inquiry under the Act.[52]

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[47] [2002] B.C.I.P.C.D. No. 1.
[48] Paras. 49-53, BCLC's initial submission; paras. 25-30, applicant's initial submission.
[49] Pages 2-142, 2-156, 2-195, 2-380, 2-410, 4-19, 4-22 (first withheld paragraph only), 4-30, 4-37, 4-41, 4-45, 4-123 to 4-124, 4-125, 4-126, 4-128 to 4-129, 4-131, 4-132 to 4-133, 4-134, 4-136 to 4-137, 4-139 to 4-140, 4-141, 4-142, 4-143, 4-144 to 4-145, 4-147 to 4-149 and 4-150.
[50] Para. 129, initial submission.
[51] Paras. 129-130, 137-141, 144, 146-148, 152, 156-161 & 197, initial submission; paras. 81-82, 89-93, 95, 97-99, 107-109 & 111, Reid affidavit; paras. 38-41, BCLC's further submission of January 16, 2006.
[52] Para. 30, initial submission.

[54] The material before me indicates that CRIB threatened litigation in October 2003, following BCLC's rescission of its approval in principle.[53] This was not long before CRIB made its access request and after the records in dispute came into existence. However, there is no need for me to consider whether litigation privilege applies in this case, as BCLC is not relying on it for the records that remain in dispute under s. 14. There is also no indication in the records themselves that any were created for the dominant purpose of litigation with CRIB, either contemplated or underway at the time. I have therefore considered only the legal professional branch of solicitor client privilege.

[55] Of the records that remain in issue for s. 14 (which I list in a footnote above), BCLC applied s. 14 to all or parts of a series of emails, some notes, a few letters and memoranda. I am readily satisfied from the material before me that the information or records which BCLC withheld under s. 14 all relate to the giving, seeking or formulation of confidential legal advice between solicitor and client. They are thus protected by solicitor client privilege and I find that they fall under s. 14.

[56] **3.4 Financial Harm**—Section 17(1) permits a public body to withhold information where its disclosure could reasonably be expected to result in financial or economic harm to the public body. The relevant parts read as follows:

> **Disclosure harmful to the financial or economic interests of a public body**
>
> 17(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 British Columbia or the ability of that government to manage the economy, including the following information: …
>
> (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;
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia.

[57] Numerous orders have looked at the application of s. 17(1)[54] and have established that, while it is not necessary to prove that harm will result, speculative arguments on harm will not suffice. Public bodies must make a connection between disclosure of the disputed information and a reasonable expectation of harm of the type contemplated by s. 17(1). I have applied here without repeating it the approach taken in those orders.

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[53] See applicant's letter of October 16, 2003, Exhibit "A" to the Reid affidavit.
[54] See Order 02-50, [2002] B.C.I.P.C.D. No. 51 for example.

Records remaining for s. 17 purposes

[58] BCLC originally applied s. 17 to a number of records which I found above are either outside the scope of the request[55] or fall under s. 14.[56] It also initially applied s. 17 to records it later disclosed[57] or portions of pages in which the applicant said it was not interested.[58] Finally, BCLC applied s. 17 to meeting minutes and a few letters, which remain withheld and are still in dispute in this inquiry. I have therefore considered BCLC's application of s. 17 only to the following records: pp. 3-29 to 3-30, the responsive portion of pp. 3-50 to 3-51 and pp. 4-183, 4-184 and 4-185 to 4-188.

Applicant's status

[59] BCLC acknowledged that the applicant may already be privy to certain information in the records but said that, in that case, the information is protected by common law contractual principles of confidentiality and non-disclosure. (It did not elaborate on this point.) BCLC then said that "disclosure under the Act constitutes disclosure to the world", referring to para. 73 of Order 01-52,[59] where the Commissioner said the following:

> [73] … Further, despite the good faith and legitimacy of the applicants' intentions, I consider that, as in Order 01-11, the s. 18(b) analysis should be approached on the working assumption that disclosure to the applicants amounts to public disclosure. With the exception of access by individuals to their own personal information, Part 2 of the Act is an instrument for public access to information and is not an instrument for selective or restricted disclosure. The idea of an applicant being bound to make only restricted use of non-personal information disclosed through an access request under the Act is inconsistent with the objective of public access articulated in s. 2(1) of the Act.

[60] BCLC argued that the harm CRIB would suffer by not receiving, through the Act, information that it already has is outweighed by the harm BCLC and third-party stakeholders would suffer as a result of the information becoming widely known to the public.[60]

[61] I have considered CRIB's status as a participant in discussions with BCLC and the third parties (together with its possible awareness of at least some of the withheld information through those processes, the extent of which I have no way of knowing) and whether that status entitles CRIB to more information than an unrelated applicant would receive. Bearing in mind the Commissioner's approach as set out above, not to mention the fact that CRIB did not provide me with copies of any records it might have obtained

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[55] Pages 3-1 to 3-10, 3-11 to 3-13, 3-26, non-responsive portions of 3-50 to 3-51, 3-59, 3-64, 3-66 to 3-68, 4-1, 4-109 to 4-117, 4-179 to 4-182 and 4-28 to 4-333.
[56] Pages 4-123 to 4-124, 4-126 to 4-130, 4-132 to 4-135, 4-139 to 4-140 and 4-142.
[57] Pages 3-31 to 3-34, 4-153 to 4-161, 4-162 to 4-178, 4-189 to 4-191, 4-279 to 4-299.
[58] That is, the portions of the draft COSA records that remain severed under s. 17(1), as discussed above.
[59] [2001], B.C.I.P.C.D. No. 55.
[60] Para. 83, initial submission.

through other processes, I conclude that I should approach this applicant's entitlement to information as I would any other applicant's.

Parties' submissions

[62] BCLC provided examples of the types of information to which ss. 17(1)(a) to (e) apply and argued that portions of many of the disputed records fall under ss. 17(1)(c)-(e). BCLC then made arguments[61] regarding the records and information related to or involving the casino companies (correspondence and minutes of meetings of BCLC's Board of Directors), saying they refer to or would divulge "material details" of the following:

- BCLC's future administrative plans related to BCLC's legal and commercial risk management, financial, contract, property, facilities and information management, and support and delivery of specific services and programs, which BCLC said are contingent on factors such as "the ever-changing market conditions, property prices, contractual concessions, and negotiating positions"; BCLC also said the information has not been implemented or made public and that its disclosure "would result in harm to BCLC's financial or economic interests, because BCLC's contractors and its own entertainment competitors would inevitably adjust their commercial and legal positions, so as to accord with what they know BCLC was prepared to accept and proceed with in this case";
- future proposals and projects, which BCLC said are contingent on various factors including the "ever-changing market conditions, property prices, contractual concessions, and negotiating positions"; it said "premature disclosure of this information would result in undue financial loss to some third party stakeholders and corresponding undue financial gain to competing stakeholders because some, not others, would be in a position to take advantage of the notice so as to adjust their commercial and legal positions; again BCLC's own financial or economic interests would also be harmed by such disclosure because the parties with whom BCLC contracts and the parties with whom BCLC competes would inevitably adjust their commercial and legal positions, so as to accord with what they know BCLC was prepared to accept and proceed with in this case"; and
- extended negotiations carried on by or for BCLC and the province regarding the terms of a settlement agreement; BCLC said that if its negotiating position were made public, its financial and economic interests would be harmed "as future contractors would undoubtedly adjust their commercial and legal positions, so as to accord with what they know BCLC was prepared to accept and proceed with in this case".[62]

[63] BCLC also said that, to the extent the letters between it and the casino companies disclose information about negotiations between BCLC and those companies, the

[61] Paras. 54-70, 89, 109-115, 123-128, 172-174, 179, initial submission; paras. 117-124, Reid affidavit.
[62] Paras. 89, 115, 123-125, initial submission.

information in these records relates to BCLC's administration of past and potential gaming developments and contractual arrangements. It said other third-party businesses would be able to adjust their legal positions (including various contractual concessions and pricing) so as to accord with what they know BCLC was prepared to accept in this case, affecting BCLC's ability to negotiate with future proponents, harming BCLC's ability to negotiate with service providers in the future.[63]

[64] CRIB suggested that the withheld information does not fall under s. 17(1) as it does not appear to relate to BCLC or the Province and there is nothing to indicate that disclosure could reasonably be expected to cause harm.[64]

[65] BCLC did not explain or provide evidence as to how the information relates to its own past or future gaming developments, contractual arrangements, proposals, projects or negotiations. Nor did it elaborate in argument or evidence on how service providers or other third parties could use the information in question to BCLC's disadvantage or to the disadvantage of other third parties in future negotiations. This is also not obvious from the face of the records themselves.

[66] In Order 02-56,[65] I discussed the meaning of "information about negotiations" as interpreted in previous orders, as follows:

> ***Interpretation of "information about negotiations"***
>
> [43] The Commissioner has dealt with the interpretation of the phrase "information about negotiations" in previous orders. In Order 00-39, [2000] B.C.I.P.C.D. No. 42, for example, at pp. 10-11, he considered arguments from the Greater Vancouver Regional District ("GVRD") regarding the alleged harm that could reasonably be expected to flow from disclosure of records of compilations, from various sources, of salaries and benefits of various unionized and non-unionized employees. Among other things, the GVRD argued that disclosure of the requested records would have a negative effect on future negotiations by giving the applicant, a union, an unfair advantage.
>
> [44] The Commissioner said that information that might be collected or compiled for the purpose of negotiations, that might somehow be used in negotiations, that was the subject of collective bargaining or that, if disclosed, might affect negotiations, was not necessarily *about* negotiations. The Commissioner found that information *about* negotiations included analysis, methodology, strategy or other information about labour negotiations. He also pointed out that only the Legislature could address any perceived inequity between positions of employer and union in collective bargaining.
>
> [45] In Order 01-17, [3001] B.C.I.P.C.D. No. 18, the Commissioner considered arguments (including *in camera* argument) that information about BC Hydro's "strategy, options, and positions" in its negotiations with its union and information

[63] Paras. 112-114, initial submission.
[64] Paras. 31-33, initial submission.
[65] [2002] B.C.I.P.C.D. No. 58.

> about "negotiations criteria" was information *about* negotiations. The Commissioner found that BC Hydro had made specific links between the withheld information and harm to its financial interests. The Commissioner then found that, if disclosed, the information would disclose BC Hydro's negotiating position and that s. 17(1)(e) applied to this information. In the same order, the Commissioner rejected arguments that he interpreted as BC Hydro requesting that he "level the playing field", saying he had no ability to do so. [emphasis in original]

[67] BCLC did not explain how the records contain information on negotiations that BCLC or the provincial government has carried on, as described above. Nor did it explain how, in its view, disclosure of the information could reasonably be expected to result in the harms contemplated by ss. 17(1)(c)-(e). Again, this is also not obvious from the records themselves.

[68] I do not accept BCLC's argument that Gateway's competitors could tailor future proposals to "accord" with what they know BCLC accepted in this case. First, BCLC indicates that discussions and negotiations among the parties were never completed, as BCLC rescinded its approval in principle and Gateway then withdrew from the project.[66] It is thus not clear that BCLC "accepted" anything in this process.

[69] Moreover, each case is unique and has its own factors which will play a role in a particular project. BCLC itself acknowledges this at para. 89 of its initial submission, where it says its plans, proposals and projects are "contingent on various factors, including the ever-changing market conditions, property prices, contractual concessions, and negotiating positions". In any future proposed casino projects, it is reasonable to conclude that other businesses would craft proposals and "legal positions" suited to the particular project and that these would differ according to the circumstances of each situation. Moreover, BCLC is under no obligation to accept future proposals from other third parties, similar or not, simply because it may have accepted certain proposals in this project. See p. 6 of Order 00-24[67] where the Commissioner made a similar finding in response to similar arguments.

[70] I also reject the argument that disclosure of the record would result in the premature disclosure of a proposal or project. Gateway withdrew from the casino project late in the process and the proposal as crafted did not go ahead. I therefore fail to see how disclosure of information related to the proposed casino could be said to be premature.

[71] There is also no basis on which to find that disclosure of the records could reasonably be expected to result in an undue loss or gain to a third party under s. 17(1)(d). I have already said that BCLC's submission did not explain how disclosure might have this result and that this is not evident from the records themselves. Gateway and Lake City made only a brief submission on the issue of undue loss or gain[68] which

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[66] See para. 107, initial submission.
[67] [2000] B.C.I.P.C.D. No. 27.
[68] Paras. 9-17, initial submission; paras. 1-6, Gadhia affidavit.

I discuss below in my consideration of s. 21(1). They also did not provide any evidentiary support for this argument.

[72] General assertions unsupported by evidence, which is what BCLC's and the casino companies' s. 17 positions amount to, fall far short of establishing the asserted s. 17(1) harms. Nor do the records themselves support the s. 17(1) harms arguments that have been made. I therefore find that s. 17(1) does not apply to the following records: pp. 3-29 to 3-30, the responsive portion of pp. 3-50 to 3-51 and pp. 4-183, 4-184 and 4-185 to 4-188.

[73] **3.5 Third-party Business Interests**—Section 21(1) of the Act requires public bodies to withhold certain types of information where their disclosure could reasonably be expected to cause one or more of the harms listed in the section. Section 21 comprises a three-part test, all three parts of which must be satisfied in order for the exception to apply. The parties do not cite specific subsections in their submissions but their arguments clearly relate to ss. 21(1)(a)(i) and (ii), (b) and (c)(i), (ii) and (iii), which read as follows:

> **Disclosure harmful to business interests of a third party**
>
> 21(1) The head of a public body must 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 or about 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, …

[74] Schedule 1 to the Act contains this relevant definition:

> **"trade secret"** means information, including a formula, pattern, compilation, program, device, product, method, technique or process, that
>
> (a) is used, or may be used, in business or for any commercial advantage,

(b) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use,

(c) is the subject of reasonable efforts to prevent it from becoming generally known, and

(d) the disclosure of which would result in harm or improper benefit.

[75] Section 21(1) has been the subject of many orders, for example, Order 03-02,[69] which provides a useful overview of other orders dealing with this exception. These orders have established that information that has been the subject of negotiations will generally not meet the "supplied" test and, as with s. 17(1), that there must be a reasonable expectation that disclosure of the disputed information will result in one of the harms set out in s. 21(1)(c).

Records remaining in issue for s. 21(1)

[76] BCLC discussed the application of s. 21(1) and argued that it applies to portions of remaining disputed records.[70] BCLC originally applied s. 21 to some information and records which I have found are outside the scope of the request[71] as well as to some items it has since disclosed[72] or in which the applicant is no longer interested.[73] I therefore only need to consider BCLC's application of s. 21 to the following severed or withheld records: pp. 3-29 to 3-30, 3-50 to 3-51 (one responsive paragraph only), 4-183, 4-184 and 4-185 to 4-188.

BCLC's submissions

[77] BCLC said the records that relate to Gateway refer to confidential financial, commercial and legal matters which Gateway claims to have developed over the years at great expense and supplied in confidence to BCLC, as follows:

- a description of its current and proposed commercial operations, including its current and projected financial structure, tax structure and shareholder structure; and
- and its strategy in relation to its direct competitor.

[78] BCLC also said Gateway takes the position that the information is a trade secret or commercial or financial information or both.[74] It said that Gateway claims proprietary

[69] [2003] B.C.I.P.C.D. No. 2.
[70] Paras. 71-77, initial submission.
[71] Pages 3-1 to 3-10, 3-11 to 3-13, 3-26, 3-46 to 3-493-50 to 3-51, 3-59 to 3-60, 3-64, 3-66 to 3-68, 4-179 to 4-182.
[72] Pages 3-19 to 3-20, 3-31 to 3-34.
[73] The portions of the COSA records that remain severed under s. 21, as discussed above.
[74] BCLC does not explain why Gateway thinks this.

rights over all such information and that disclosure of the information would result in harm to the casino company's competitive position, interfere with its negotiations and cause harm to each of its individual shareholders.[75] BCLC also said Gateway takes the position that it provided "this private information to BCLC and the Province in order to assist with the protection of the integrity of gaming, in accordance with the *Gaming Control Act*" and that disclosure might also result in Gateway refusing to provide such information in the future. BCLC also provided *in camera* argument and open and *in camera* evidence on these points. It made similar arguments about the Lake City records, of which only pp. 3-29 to 3-30 remain in dispute.[76]

[79] BCLC made these arguments generally about the records related to Gateway and Lake City and did not identify specific records or portions of those records that contain the particular categories of information just described. Many of BCLC's arguments appear to be directed at information and records I found above to be outside the scope of the request.[77] BCLC devoted relatively little attention to the specific records which remain in dispute and what it does say is *in camera*.

[80] BCLC also argued[78] that, to the extent CRIB has been privy to certain portions of the records, the information is protected by "certain common law and contractual principles of confidentiality and non-disclosure". I do not see how any such rule or prohibition, the existence of which is neither in issue here nor established, is relevant to the s. 21(1) issue before me. My jurisdiction in this matter arises under the Act and is limited to determining issues arising under the Act, in this instance, s. 21(1).[79]

Casino companies' submissions

[81] Gateway and Lake City said they were involved in discussions with CRIB regarding a proposed destination casino project and also communicated with BCLC about the proposal and other matters. They argued that BCLC must not disclose any of the information related to them as it contains their trade secrets and their commercial and financial information, information that they say they supplied in confidence to BCLC to help BCLC fulfil its regulatory obligations and disclosure of which would harm their business interests.[80] They said the casino industry is

> 9. … highly competitive and regulated, which means the supply of business opportunities is restricted. Therefore, it is essential for the Third Parties to differentiate themselves and gain advantage over other gaming operators in negotiations with regulators such as BCLC and with partners.

[75] BCLC does not explain why Gateway thinks this.
[76] Paras. 89, 102(e), 104-105, 115-120, 126-128, initial submission; paras. 43-51, 124-126, 136-145, Reid affidavit.
[77] For example, pp. 3-46 to 3-49 which relate to Gateway's corporate structure.
[78] at paras. 83(e) and 89(g) and 115(f) of its initial submission.
[79] I accept that a contractual confidentiality obligation could go to the question of confidentiality of supply of information associated with the transaction or relationship, but this does not arise in the circumstances of this case.
[80] Paras. 4-8, initial submission.

[82] The casino companies said that there were three sets of relationships in this situation: between CRIB and BCLC; between CRIB and the casino companies; and between BCLC and the casino companies. They said these relationships, though overlapping, were "not aligned", without elaborating on what they mean by alignment. The casino companies say they were not the first or only potential partners that CRIB I negotiated with and the viability of their involvement in the project depended on the financial arrangements (such as revenue sharing) the casino companies and CRIB were able to negotiate. The casino companies said they and CRIB were, ultimately, "arm's length competitors".[81] They provided *in camera* argument and evidence on these points, as well as other arguments.

[83] As with BCLC's submissions, some of the casino companies' arguments and evidence relate to records I found above are outside the scope of the request. While some of their arguments applied generally to the records, they also referred in some cases specifically to records containing information of concern. I set out below the parts of the additional arguments which, as far as I can tell, relate to the remaining disputed records:[82]

- Disclosure of the information related to the casino companies would reveal their profit margins,[83] giving CRIB, other competitors and potential other partners an unfair competitive advantage over the casino companies in this and other projects and significantly harming the third parties' competitive position
- Disclosure of the information would also provide competitive insight to a prospective partner of the casino companies relating to other projects and provide such a party with undue leverage against the casino companies in its negotiations with them
- Disclosure would also cause the casino companies to lose confidence in BCLC, with which they had negotiated in an "atmosphere of co-operation", and they would be less open in future
- Certain information is not commercially available and a competitor (including the applicant) could use it to gain an accurate inference of their economics, operating competitiveness, break-even thresholds and profitability, to the third parties' disadvantage in future proposals
- The severed parts of p. 3-29, a record related to Lake City, concern costs of leased slot machines and specific numbers that would trigger the billing back by BCLC[84], information which could give undue insight into the company's margins and operating profitability and the economics of the company's involvement in the project, as well as information on certain capital expenditures; the information could

[81] The applicant disputes this at para. 28 of its reply and says that it was a co-proponent of the third parties in negotiations with BCLC.
[82] Paras. 10-17, initial submission; paras. 1-6, Gadhia affidavit.
[83] Para. 5, Gadhia affidavit.
[84] The letter states that "it was agreed that the billing back to Lake City for the costs incurred by BCLC relating to the lease costs of specific slot machines and for certain capital costs paid for by BCLC will be subject to the following condition:"

be used against the casino company's interests in bids or negotiations on other projects

[84] The casino companies did not explain in argument or evidence on what basis they consider the information in question to be commercial or financial. Nor did they explain how, or provide evidence that, it was supplied in confidence to BCLC. They also did not explain how the applicant and competitors could use the disputed information to bring about the harms they allege would occur. Nor did they support their argument on the competitive nature of the gaming industry beyond the assertions I have set out above.

[85] Their submissions do however support the conclusion that the information remaining in dispute was negotiated, not supplied, for the purposes of s. 21(1)(b). A letter from Lake City, which it sent to BCLC during the processing of the applicant's access request,[85] supports this conclusion as well. This letter addresses, in part, a record still in dispute[86] and states that the subsidies which are the subject of the letter were negotiated between Lake City and BCLC. It also says that disclosure of the information would harm its negotiating and competitive position with other organizations, although it does not say how.

[86] In their reply submission, the casino companies argued that any presumption that information that has not been "supplied" within the meaning of s. 21(1)(b) will only arise where there is a process of give and take between the public body and the third party. Where there is not, they said no presumption can arise.[87] They also said CRIB misconstrues the test for confidentiality of supply and that they supplied the information to BCLC "with a reasonable expectation of confidentiality". They also said that the information in question is in the form of a proposal that relates to "fixed costs that were immutable to negotiations" and that was not created and did not arise in the course of negotiations between the third parties and BCLC. They also said that in arguing that the records do not show that harm "will" result, the applicant is setting too high a standard. The test is, rather, whether there is a reasonable expectation of harm on disclosure.[88]

[87] The casino companies reiterated that they operate in a "highly regulated and competitive market with a small number of facilities", with only 19 casinos operating in the province.[89] They cited Order 00-10 in which, they said, the Commissioner said he had evidence that the market for internet payment transaction-processing services was highly competitive, with only a small number of competitors[90] and that the applicant's competitive interests were engaged. The supply of gaming destinations is closely

[85] Exhibit "C" to the Reid affidavit, BCLC's initial submission.
[86] Pages 3-29 to 3-30 of the records in dispute.
[87] See para. 12, reply. I do not agree with the casino companies on this point. "Negotiated" information is not, in my view, limited to contract terms negotiated between a public body and a third party.
[88] Paras. 7-23 & 30, reply submission.
[89] BCLC's website currently lists 18 casinos.
[90] The order related to internet payment processing is actually Order 03-33, [2003] B.C.I.P.C.D. No. 33. It concerned RFPs and there were few suppliers. The Commissioner also said he had evidence of competitive nature of industry and of significant harm. Order 01-10, [2001] B.C.I.P.C.D. No. 11, concerns beer companies and similar issues.

regulated to ensure stability and profitability, they said, and opportunities for new or expanded facilities are limited, creating competition among participants. They also said that the applicant would gain unduly from disclosure of their business information.[91]

[88] Again, the casino companies did not explain in what way the gaming industry is highly competitive and closely regulated in British Columbia, nor how any of these allegedly harmful things might occur. The fact that there are 18 or 19 casinos in British Columbia is not on its own a sufficient basis to conclude that this is a "small number" for the market here or to establish the existence of the "highly competitive" environment claimed by the casino companies.

CRIB's submissions

[89] For its part, CRIB said s. 21(1) does not apply to the records in question because, for example, there is no indication they were supplied in confidence, they do not appear to relate to third parties or they do not indicate that harm will result from disclosure. CRIB also argued that the casino companies are in the business of operating casinos and must provide certain information to BCLC. As such, CRIB said, it is unlikely that they would refuse to provide such information in future.[92]

[90] CRIB expressed skepticism generally about the casino companies' arguments, calling them "bare assertions" of harm and saying it cannot comment meaningfully, due to what it considers extensive *in camera* portions in the casino companies' submissions. CRIB said it is very interested in records related to what it describes as the "atmosphere of cooperation" between BCLC and the third parties.[93]

Application of s. 21(1) to records

[91] Beginning with pp. 3-29 to 3-30, a two-page letter, the severed information is as the casinos have described it—related to the circumstances under which BCLC would bill back costs for leasing slot machines to Lake City and bill back certain capital expenditures. BCLC withheld the second and the third paragraphs of the letter. It disclosed the opening paragraph, which states that the purpose of the letter "is to confirm the understanding of the agreement" between BCLC and Lake City about these matters. The letter then says it was agreed that the billing back regarding the leased slot machines and capital expenditures would be subject to certain conditions. The withheld information describes those conditions.

[92] I accept that the information in question is financial and commercial information of Lake City and thus meets the test of s. 21(1)(a)(ii). However, the material before me, including the record itself, shows that the severed information was the result of an "agreement", that is, negotiations between BCLC and Lake City. Considering previous

[91] Paras. 24-29 & 30, reply submission.
[92] Paras. 34-37, initial submission; paras. 7-18, reply submission.
[93] Paras. 3-4, 6-18, 20-22, 26-30, reply submission.

decisions of this Office, and the courts, respecting the concept of supply in s. 21(1), I conclude that this information was not "supplied" within the meaning of s. 21(1)(b).

[93] Nor does the evidence support the contention that the information was supplied "in confidence". The letter is not marked confidential and the contents do not otherwise support BCLC's and Lake City's assertions on the confidentiality of supply. The affidavit evidence on this point simply asserts that the contents were supplied in confidence without providing any basis to conclude that there was implicit confidentiality or explicit confidentiality.

[94] Finally, beyond the assertions of harm that I have set out above, BCLC and the casino companies have not, in my view, established a reasonable expectation of any harm from disclosure of the information, let alone a reasonable expectation of "significant" harm of the types contemplated by ss. 21(1)(c)(i) and (iii). I also note that the severed information related to slot machines is largely reflected in p. 3-20, part of a letter to CRIB, that BCLC had earlier severed and later disclosed in full to CRIB. I also agree with CRIB that Lake City is not likely to resist providing BCLC with similar information in the future, when it is in Lake City's financial interests to co-operate.[94]

[95] I find for all these reasons that s. 21(1) does not apply to the severed information on pp. 3-29 to 3-30.

[96] Regarding pp. 3-50 to 3-51, this record is a letter from Gateway to BCLC and is headed "confirmation of understanding". It sets out the understanding of BCLC and Gateway on a number of matters. BCLC withheld the bulk of this letter, disclosing only the header, date and address and signature blocks. Only the third paragraph of this letter (four lines of text) relates to CRIB's casino project and is thus within the scope of CRIB's request. Accordingly, this is, for reasons given earlier, the only portion I need to consider regarding s. 21(1).

[97] The paragraph in question does not provide any specifics as to the parties' understanding or negotiations on the issue but makes only general remarks on the issue. It does not constitute what I would consider to be commercial or financial information "of or about" or a trade secret of Gateway. Nor is there any implicit or explicit indication on the letter that the information in this paragraph was "supplied". Rather, it confirms a mutual agreement or understanding of the issues. In other words, it constitutes information that the parties negotiated. As above, there is also nothing to show that it was supplied "in confidence".

[98] Even if I assume, as I do for discussion purposes only, that the paragraph contains commercial or financial information of or about Gateway, BCLC and Gateway have asserted, but not explained how, disclosure of this paragraph could reasonably be expected to result in any of the harms listed in s. 21(1)(c)(i) and (iii). Nor is this evident from the information itself. I am unable to conclude on the basis of the material before

[94] See Order F05-09, [2005] B.C.I.P.C.D. No. 10, for a similar finding.

me that there is a reasonable expectation of any harm from disclosure of this innocuous paragraph, much less significant harm of the types contemplated by s. 21(1)(c)(i) and (iii). I also consider that the casino companies are not likely in the circumstances to be less open with BCLC in the future, when it is in their financial interests to co-operate with BCLC by providing information that BCLC requests. I find that s. 21(1) does not apply to the responsive portion of pp. 3-50 to 3-51.

[99] Page 4-183 is an email between BCLC and Gateway, while p. 4-184 is a letter from BCLC to Gateway. The email sets out a series of discussions and agreement between Gateway and BCLC on a certain matter, while the letter confirms what appears to be the same agreement. BCLC withheld both records in full. While they contain commercial or financial information of or about Gateway, they also set out a give and take (in other words, negotiations) and then an agreement. I find that the information was not "supplied" for the purposes of s. 21(1)(b).

[100] There is also no implicit or explicit indication that the information in question was supplied "in confidence".

[101] As above, BCLC and Gateway did not explain how disclosure of this record would result in any of the harms listed in s. 21(1)(c)(i) and (iii), nor is this evident from the records themselves. For the same reasons as above, I also reject the argument regarding s. 21(1)(c)(ii).

[102] I find that s. 21(1) does not apply to pp. 4-183 and 4-184.

[103] Pages 4-185 to 4-188 are minutes of a meeting of BCLC's Board of Directors which BCLC withheld in full. BCLC's revised table of withheld records of January 16, 2006 indicates that BCLC withheld this record under both s. 17 and s. 21. Its initial submission also addresses the applicability of s. 21 to this record, although the copy of the record which BCLC supplied with its further submission of January 16, 2006 is annotated only with s. 17. Given the explicit reference to the minutes in BCLC's discussion of s. 21 in its initial submission, I have considered whether s. 21 applies to the minutes.

[104] The minutes deal principally with a proposed tentative agreement reached between BCLC and Gateway on a particular matter, information related to the negotiation of the final agreement on this matter and resolutions on future steps to take. There is some repetition of information within the record, as well as some overlap in content with pp. 4-183 and 4-184. While I cannot say much about BCLC's arguments and evidence on this record, as the specifics are *in camera*, I can say that they confirm that the information in this record that relates to this agreement was the result of negotiations between BCLC and Gateway. There is also no indication of "confidentiality" of supply. This means that, although I accept that the information is commercial or financial information of the casino company, it does not meet the second part of the s. 21(1) test. I also do not consider that BCLC has shown how any of the harms in s. 21(1)(c) might

reasonably be expected to result on disclosure of this information. As noted above, BCLC simply asserted that this harm might occur but did not explain how.

[105] The information in the minutes that does not relate to the agreement consists of the Board's resolutions. I do not consider it to be Gateway's commercial or financial information or its trade secret, nor could I say that it was "supplied" since it reflects internal directions. I also cannot conclude on the evidence that its disclosure could reasonably be expected to result in any of the harms in s. 21(1)(c).

[106] I find that s. 21(1) does not apply to pp. 4-185 to 4-188.

4.0 CONCLUSION

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

1. I confirm that BCLC has performed the duty imposed on it by s. 6(1) in that it correctly classified certain records and portions of records as outside the scope of the applicant's request and also that BCLC is not required or authorized to refuse the applicant access to the responsive portions of p. 4-327, as shown in the copy of that page provided to BCLC with its copy of this order.

2. I confirm BCLC's decision that it is authorized to refuse the applicant access to the information it withheld under s. 14.

3. I require BCLC to give the applicant access to the information it withheld under ss. 17(1) and 21(1) in pp. 3-29 to 3-30, the responsive portion (the third paragraph) of pp. 3-50 to 3-51 and pp. 4-183, 4-184 and 4-185 to 4-188, as shown in the copies of those pages provided to BCLC with its copy of this order.

April 10, 2006

ORIGNAL SIGNED BY

Celia Francis
Adjudicator