



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

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Order F12-04

BRITISH COLUMBIA LOTTERY CORPORATION

Michael McEvoy, A/Senior Adjudicator

February 2, 2012

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Summary: A journalist requested information from BCLC relating to allegations BCLC failed to comply with the *Proceeds of Crime Act*. The information included a letter by the regulating authority outlining instances where BCLC was alleged to have failed to comply with the *Proceeds of Crime Act* as well as a Notice of Violation fining BCLC. BCLC was ordered to disclose all of the withheld records. The Acting Senior Adjudicator found that disclosure of the records would not deny BCLC's right to a fair trial nor would it facilitate the commission of an offence. Further, there was not sufficient evidence to demonstrate that disclosure of the withheld records would harm intergovernmental relations between the governments of Canada and British Columbia under s. 16 of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 15(1)(h), (k); 16(1)(a), (b); and 25.

Authorities Considered: B.C.: Order F11-32, [2011] B.C.I.P.C.D. No. 38; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order F11-23, [2011] B.C.I.P.C.D. No. 29; Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44; Order 00-01, [2000] B.C.I.P.C.D. No. 1; Order F06-01, [2006] B.C.I.P.C.D. No. 2.
Ont.: Order PO 2657, [2008] O.I.P.C. No. 73.

INTRODUCTION

[1] This case involves a CBC reporter ("journalist") challenging a decision of the British Columbia Lottery Corporation ("BCLC") to withhold records relating to allegations BCLC failed to comply with the federal *Proceeds of Crime*

(*Money Laundering*) and *Terrorist Financing Act* (“*Proceeds of Crime Act*”). The journalist filed three access requests for information related to the matter. The requests followed publically leaked information that the Financial Transactions and Reports Analysis Centre of Canada (“FINTRAC”) fined BCLC almost \$700,000.

[2] BCLC identified four documents as being responsive to those requests but withheld each in their entirety, stating their disclosure would: breach solicitor-client privilege; deprive BCLC’s right to a fair trial; facilitate the commission of an offence; harm BCLC’s security system and harm the conduct of intergovernmental relations between the province and the federal government. The journalist requested that the Office of the Information and Privacy Commissioner (“OIPC”) review this decision, and the OIPC grouped the three requests in one inquiry.

[3] I dealt with the question of the application of solicitor-client privilege in Order F11-32,¹ finding that privilege did not apply to the records. I made that decision based on a detailed description of the records provided by BCLC. However, in Order F11-32, I required BCLC to produce copies of the records for the purpose of determining whether ss. 15, 16 or 25 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) applied. BCLC has done so. Also, while the Notice of Inquiry identifies s. 15(1)(l) of FIPPA as an issue, BCLC made no argument in its submissions that disclosure of the records would harm the security of any property or system, including a computer system. I therefore take BCLC to have abandoned this argument and I will not consider it below.

ISSUES

[4] The issues in this inquiry are whether:

1. BCLC must, without delay, disclose to the applicant the requested records under s. 25 of FIPPA.
2. Disclosure of the records would harm BCLC’s right to a fair trial, under s. 15(1)(h) of FIPPA.
3. Disclosure of the records would facilitate the commission of an offence, under s. 15(1)(k) of FIPPA.
4. Disclosure of the records would harm the conduct of intergovernmental relations between the Province and the federal government, under s. 16(1)(a) of FIPPA.

¹ [2011] B.C.I.P.C.D. No. 38.

5. Disclosure of the records would reveal information received in confidence from the federal government, s. 16(1)(b) of FIPPA.

DISCUSSION

[5] **Background**—The *Proceeds of Crime Act* requires BCLC to report large cash transactions and suspicious transactions to FINTRAC. The *Proceeds of Crime Act* gives FINTRAC the authority to issue Notices of Violation and financial penalties to ensure reporting compliance. FINTRAC sent BCLC a letter setting out its findings with respect to BCLC's compliance with the *Proceeds of Crime Act*. BCLC responded to the letter by addressing each of the findings. FINTRAC subsequently issued a Notice of Violation stating that monetary penalties could be levied against BCLC. BCLC requested FINTRAC to withdraw the notice and proposed penalties. FINTRAC did not withdraw and issued a Notice of Decision. BCLC filed an appeal in Federal Court.

[6] **The Records in Dispute**—The four records at issue are as follows:

1. A letter dated January 29, 2010, from FINTRAC to BCLC setting out the details of FINTRAC's findings regarding whether BCLC had complied with the *Proceeds of Crime Act*.
2. A letter dated February 24, 2010, containing BCLC's response to FINTRAC's findings.
3. A Notice of Violation issued by FINTRAC to BCLC on June 15, 2010. The Notice stated that FINTRAC might levy monetary penalties against BCLC for violations of the *Proceeds of Crime Act*.²
4. Notice of Decision dated October 1, 2010, from the Director of FINTRAC to BCLC setting out the monetary penalties referred to in the Notice of Violation.

[7] **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. In Order 02-38,³ 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)

² I note here that BCLC made representations to FINTRAC on June 30, 2010, asking that it withdraw the Notice of Violation and the proposed penalties. This June 30, 2010 record is not at issue here. As is evident from the fourth record at issue, FINTRAC rejected this representation.

³ [2002] B.C.I.P.C.D. No. 38.

requirement for disclosure “without delay”, whether or not there has been 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.

[8] The journalist submits that given the extent of annual casino revenue, reports of BCLC’s financial reporting irregularities and allegations of money laundering at casinos raises an issue of public trust. The journalist argues that these issues demonstrate that there is a sufficient public interest in learning the details of the violations that FINTRAC has assessed to warrant the application of s. 25(1)(b).

[9] As noted by former Commissioner Loukidelis above, s. 25 is reserved for matters of urgency where circumstances of clear gravity and present significance exist to require immediate disclosure of information. The journalist’s submission fails to identify any element of temporal urgency that 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. I therefore reject the journalist’s argument under s. 25 of FIPPA.

[10] **Would Disclosure Harm BCLC’s Right to a Fair Trial?—**
Section 15(1)(h) of FIPPA reads as follows:

Disclosure harmful to law enforcement

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

...

(h) deprive a person of the right to a fair trial or impartial adjudication, ...

[11] I discussed the standard for the application of s. 15(1)(h) of FIPPA in Order F11-23⁴ and concluded that the standard incorporates the general evidentiary requirement for harms-based exceptions that previous orders have established.⁵ In summary, there must be a real and substantial prospect of harm that a person would be deprived of the right to a fair trial. The exemption is not available as a protection against remote and speculative dangers.⁶

⁴ [2011] B.C.I.P.C.D. No. 29, paras. 29-34.

⁵ See for example, Order 00-01, [2000] B.C.I.P.C.D. No. 1, p. 5.

⁶ The Ontario Information and Privacy Commissioner’s office takes a similar approach to s. 14(1)(f), its equivalent of s. 15(1)(h) under the *Ontario Freedom of Information and Protection of Privacy Act*. See for example, Order PO-2657, [2008] O.I.P.C. No. 73, p. 44.

[12] The issue in Order F11-23 was whether disclosure of the information at issue might have influenced jurors in potential civil trials involving the public body. I analyzed the standard the courts have established for publication bans for the purpose of protecting the right to a fair trial. This case differs because BCLC does not argue that disclosure would have an effect on the impartiality of the judge hearing the appeal. Rather, BCLC submits that an order to disclose the records under FIPPA would undermine the purpose of a confidentiality order it is “considering seeking” from the Federal Court of Appeal with regards to the same records. BCLC is considering seeking this order because of what it says is an obligation to comply with non-disclosure requirements in the *Proceeds of Crime Act*. Therefore, the records need to be withheld from disclosure to preserve its right to have the court hear a possible request for a confidentiality order. Such an order, it argues, would be binding on me.

[13] I find BCLC has not discharged the onus on it to demonstrate the disclosure of the records would deprive it of a fair trial.

[14] What I take from BCLC’s submission⁷ is a concern that an order under FIPPA requiring disclosure of records would conflict with non-disclosure obligations found in the *Proceeds of Crime Act*. However, BCLC does not point to any evidence supporting this. BCLC provides excerpts from the *Proceeds of Crime Act* that impose non-disclosure obligations on FINTRAC.⁸ These obligations do not apply to BCLC.

[15] In any event, BCLC fails to show how this issue creates a real and substantial prospect of denying BCLC a fair trial on the matters related to its appeal. According to BCLC’s Notice of Appeal,⁹ the issues are whether FINTRAC wrongly found BCLC in violation of the *Proceeds of Crime Act* and whether FINTRAC wrongly imposed a monetary penalty on BCLC. The issue of non-disclosure obligations in the *Proceeds of Crime Act*, if such obligations exist, is not at issue in the appeal. At best, it can be said the non-disclosure matter is merely ancillary to the appeal issues. BCLC’s submissions certainly fall short of demonstrating there is a real and substantial prospect that a disclosure order under FIPPA would in any way affect BCLC’s right to a fair disposition of the issues under appeal.

[16] I would also add that the whole matter of a confidentiality order is entirely speculative because no such order exists now nor is BCLC able to definitively tell me it is seeking one. BCLC says in its initial submission that it is “considering” doing so. Its covering letter providing the records is equally equivocal. It states BCLC “expects that the matter of the confidentiality order will be reviewed and resolved on or before the hearing dates.” It does not say the Court will determine

⁷ BCLC initial submission, para. 33; Affidavit of Sydney Jones, para. 16.

⁸ *Proceeds of Crime Act*, s. 55.

⁹ Exhibit M, Affidavit of Sydney Jones.

the issue. BCLC leaves me to speculate about whether it will seek such an order and what the ultimate outcome would be. Since this inquiry commenced some seven months ago, BCLC has continued to deliberate on this point and the question may never go before the court. It would not be appropriate for me to, in effect, suspend the applicant's rights to have his review heard while BCLC continues to ponder its options.

[17] For all of the reasons stated, I find that s. 15(1)(h) of FIPPA does not apply.

[18] **Would Disclosure Facilitate the Commission of an Offence?**—
Section 15(1)(k) of FIPPA reads as follows:

Disclosure harmful to law enforcement

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

...

(k) facilitate the commission of an offence under an enactment of British Columbia or Canada, or ...

[19] BCLC's argument on this point consists solely of pointing out that the *Proceeds of Crime Act* prohibits FINTRAC from disclosing information that it obtained during the course of administering that Act. As the records at issue contain such information, BCLC argues that disclosing the record would put FINTRAC in violation of the *Proceeds of Crime Act*, thus facilitating the commission of an offence.

[20] As I have noted above, the *Proceeds of Crime Act* forbids FINTRAC from disclosing the details of reports that it has received with respect to suspicious financial transactions, except for the purpose of investigating or prosecuting an alleged violation of the Act. There is no prohibition on FINTRAC disclosing the records at issue to BCLC. Any disclosure of those records under FIPPA would be a disclosure by BCLC and not by FINTRAC. Therefore, disclosure of the records would not constitute a violation of the *Proceeds of Crime Act* because FINTRAC would not be responsible for the disclosure. Moreover, it is not clear that the information in the records at issue would even fall under the provision of s. 55 of the *Proceeds of Crime Act*.

[21] As a result, I find the s. 15(1)(k) of FIPPA does not apply to the records at issue.

[22] **Would Disclosure Harm the Conduct of Intergovernmental Relations Between the Province and the Federal Government?**—The relevant parts of s. 16 read as follows:

Disclosure harmful to intergovernmental relations or negotiations

- 16(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
- (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:
 - (i) the government of Canada or a province of Canada; ...
 - (b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies, or

[23] Previous orders on the application of s. 16(1)(a) have not established particular standards, but have adopted the general evidentiary requirement for harms-based exceptions.¹⁰ As noted above, there must be a real and substantial prospect of harm that is not speculative or fanciful.

[24] The application of s. 16(1)(a) requires that disclosure could reasonably be expected to harm the conduct of relations between the government of British Columbia and listed governments and agencies. This means that the public body must either be an agent of the government of British Columbia, or that the records contain information that, if disclosed would cause the same harm. BCLC has satisfied me that it is an agent of the government of British Columbia under the *Gaming Control Act*. Therefore, I find that it meets the requirement as an agent of the government of British Columbia for the purposes of s. 16(1)(a) of FIPPA.

[25] BCLC states, without corroboration, that FINTRAC is a federal government agency for the purpose of s. 16(1) of FIPPA. I note that the appeal of FINTRAC's finding against BCLC lists the Attorney General of Canada as the respondent. Therefore, I find that FINTRAC is an agency of the federal government for the purposes of s. 16(1).

[26] BCLC has not identified any particular harm to the conduct of intergovernmental relations or negotiations between the province and the federal government likely to result from the disclosure of the records at issue. It consulted FINTRAC about the disclosure of the records. FINTRAC stated that, if it received a similar request under the federal *Access to Information Act*, it would withhold the records. BCLC submits that this alone is sufficient to

¹⁰ See for example, Order F06-01, [2006] B.C.I.P.C.D. No. 2, para. 136.

establish that disclosure would harm the relationship between the Province and FINTRAC.

[27] Beyond that, FINTRAC expressly declined to become a party to these proceedings and told BCLC that it could not recommend how BCLC should respond in this inquiry. It expressed a general concern that disclosure of the records at issue would reveal how FINTRAC “administers its compliance mandate”¹¹ but did not elaborate.

[28] I do not find BCLC’s argument persuasive. The most I can conclude from the statement of FINTRAC is that it would prefer that BCLC not disclose the records. However, it has not indicated how doing so would damage the relationship between FINTRAC and the province. It has not indicated, for example, that disclosure would result in FINTRAC no longer disclosing such information in the future. In this regard, it is important to remember the nature of the information at issue here. The Notice of Violation and other documentation flow from FINTRAC’s legislated responsibility to ensure that entities comply with the *Proceeds of Crime Act*. The relationship between these two bodies is that of a regulated entity and a regulator. It is not conceivable that disclosure of the Notice of Violation and related documentation would cause FINTRAC, in the future, to act differently towards BCLC when investigating allegations of violations.

[29] BCLC has also not identified any joint federal provincial initiatives that disclosure would put at risk. It is, in short, difficult to see how disclosure of the records at issue would damage federal-provincial relations. FINTRAC expressed its concerns about disclosure of the records in mild language and gave no indication that it would affect federal-provincial relations. As stated, the relationship between FINTRAC and BCLC is not one of partnership, it is one where one party acts as a regulatory body and the other party is subject to that regulation. BCLC has not met the evidentiary requirement with respect to establishing a reasonable expectation of harm. Therefore, I find that s. 16(1)(a) of FIPPA does not apply to the records at issue.

[30] **Did BCLC Receive the Information from FINTRAC in Confidence?**— I note above that I accept that FINTRAC is an agent of the federal government. FINTRAC supplied three of the records at issue to BCLC. The question for me to determine is whether FINTRAC supplied the records in confidence. Former Commissioner Loukidelis held in Order No. 331-1999¹² that for s. 16(1)(b) to apply “there must be an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving

¹¹ BCLC’s initial submission, Exhibit L, p. 2.

¹² [1999] B.C.I.P.C.D. No. 44.

the information.” He provided the follow, non-exhaustive list of factors to consider when determining whether such an understanding exists:

1. What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the supplier or recipient?
2. Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?
3. Was the record in question explicitly stated to be provided in confidence? (This may not be enough in some cases, since other evidence may show that the recipient in fact did not agree to receive the record in confidence or may not actually have understood there was a true expectation of confidentiality.)
4. Was the record supplied voluntarily or was the supply compulsory? Compulsory supply will not ordinarily be confidential, but in some cases there may be indications in legislation relevant to the compulsory supply that establish confidentiality. (The relevant legislation may even expressly state that such information is deemed to have been supplied in confidence.)
5. Was there an agreement or understanding between the parties that the information would be treated as confidential by its recipient?
6. Do the actions of the public body and the supplier of the record - including after the supply - provide objective evidence of an expectation of or concern for confidentiality?
7. What is the past practice of the recipient public body respecting the confidentiality of similar types of information when received from the supplier or other similar suppliers?

[31] I will now discuss the factors above that are relevant in this case.

[32] The key point is that there is no explicit evidence of an agreement or understanding of confidentiality. There is nothing on the face of the records providing direct evidence of an understanding of confidentiality. When invited by BCLC to review and comment on the records at issue, FINTRAC had the opportunity to indicate explicitly whether it had provided the records to BCLC in confidence, but did not do so. Instead, FINTRAC indicated that it would withhold the information, in the event an applicant requested copies from it under federal legislation. As noted above, it also expressed some vague concerns about the affect of disclosing the information. It did not, however, ask BCLC to keep the information confidential. In fact, it declined to give BCLC any opinion or recommendation as to whether BCLC should keep the information confidential in responding to the journalist’s request. If, at the time FINTRAC provided BCLC with the records, they had agreed that BCLC was receiving the information in confidence, it would be reasonable to expect that FINTRAC would have cited such an agreement when BCLC consulted it about the disclosure of the records.

It would also be reasonable to expect that, if FINTRAC had substantive concerns about the disclosure of the records, it would have wanted to participate in this inquiry to protect its interests.

[33] Moreover, the provision of this information by FINTRAC to BCLC was not voluntary. FINTRAC was acting pursuant to its legislative authority to investigate possible breaches and issue penalties. The information at issue was the product of FINTRAC fulfilling its duties. There is no reason to believe that disclosure of the information by BCLC would dissuade FINTRAC from investigating future allegations against BCLC.

[34] Taking these factors into account, I find that there is insufficient evidence to establish that BCLC received the records in confidence from FINTRAC. Therefore, I find that s. 16(1)(b) of FIPPA does not apply.

CONCLUSION

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

1. No order respecting s. 25 is necessary.
2. I confirm that BCLC is not authorized to withhold any information under ss. 15(1)(h), 15(1)(k), 16(1)(a) or 16(1)(b).
3. I require BCLC to give the journalist access to the information it requested within 30 days of the date of this order, as FIPPA defines “day”, that is, on or before March 15, 2012, and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

February 2, 2012

ORIGINAL SIGNED BY

Michael McEvoy
A/Senior Adjudicator

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