



S=117399

No.
Vancouver Registry

BETWEEN:

T. RICHARD TURNER

PETITIONER

AND:

**BRITISH COLUMBIA INFORMATION & PRIVACY COMMISSIONER, BRITISH
COLUMBIA LOTTERY CORPORATION, SEAN HOLMAN, and the ATTORNEY
GENERAL OF BRITISH COLUMBIA**

RESPONDENTS

PETITION TO THE COURT

ON NOTICE TO:

British Columbia Lottery Corporation
74 West Seymour Street
Kamloops, B.C. V2C 1E2

Sean Holman
c/o Public Eye Online
3556 Cedar Hill Road
Victoria, B.C. V8P 3Z1

Ministry of Attorney General
Deputy Attorney General
P.O. Box 9280 Stn Prov Govt
Victoria, B.C. V8W 9J7

British Columbia Information & Privacy Commissioner
P.O. Box 9038, Stn. Prov. Govt.
Victoria, B.C. V8W 9A4

This proceeding has been started by the petitioner for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner
 - (i) 2 copies of the filed response to petition, and

- (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

TIME FOR RESPONSE TO PETITION

A response to petition must be filed and served on the petitioner,

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

(1) The address of the registry is:	800 Smithe Street, Vancouver
(2) The ADDRESS FOR SERVICE of the petitioner is:	c/o Farris, Vaughan, Wills & Murphy LLP
(3) The name and office address of the petitioner's lawyer is:	Farris, Vaughan, Wills & Murphy LLP Barristers & Solicitors 2500 - 700 West Georgia Street Vancouver, British Columbia V7Y 1B3 Attention: David E. Gruber
Fax number address for service of the petitioner's lawyer is:	604-661-9349
E-mail address for service (if any) of the petitioner:	dgruber@farris.com

CLAIM OF THE PETITIONER

Part 1: ORDERS SOUGHT

1. An order and declaration that Office of the Information and Privacy Commissioner Order F11-28 by J. Fedorak, Adjudicator (the "**Adjudicator**") of September 22, 2011 (the "**Order**") be set aside and remitted to the Office of the Information and Privacy Commissioner for redetermination; and
2. Costs.

Part 2:FACTUAL BASIS

Background

1. The Petitioner is the President and CEO of TitanStar Capital Corp., which is a private equity firm specializing in financing of mid-market businesses, real estate and acquisitions. He has been a business person primarily working in real estate and finance for over thirty years. He was previously the CEO of International Aviation Terminals Inc., which is the operating subsidiary of IAT Air Cargo Facilities Income Fund, a public company active on-airport aviation facilities.
2. The Petitioner was appointed as a Director of the BC Lottery Corporation (the "BCLC") in September 2001 and as Chair in December of 2001 and stepped down from that position on December 9, 2005. The Chair of the BCLC is a non-executive position.
3. While Chair of the BCLC, the Petitioner developed a personal friendship with Victor Poleschuk, who had been an employee at the BCLC since its founding in 1985 and served as its CEO from 1999 to the Spring of 2007.
4. Following the Petitioner stepping down as Chair of the BCLC, he and Mr. Poleschuk corresponded by email about various personal issues.
5. In October 2004, the Petitioner became an indirect investor, through a limited partnership, in a casino development in Alberta operated by a subsidiary of Paragon Gaming Inc. ("Paragon"). The Petitioner notified the BCLC Board of this investment at the next Board meeting, which occurred sometime in late 2004 or early 2005.
6. The Edgewater Casino in Vancouver, BC opened in early 2005, while the Petitioner was still the Chair of BCLC. Shortly thereafter, the owners of the operator of that casino began negotiating a possible sale of its operations to Great Canadian Gaming Corp.
7. Although the Petitioner did not know it at the time, it is now a matter of public record that in mid-December 2005, shortly after he stepped down as Chair of BCLC, entrepreneur and Vancouver Whitecaps owner Greg Kerfoot entered into an agreement with the owners to buy the operations of the Edgewater Casino, a transaction that was

supposed to have completed by April 21, 2006. The transaction did not complete, apparently because certain conditions could not be satisfied or removed.

8. In the spring of 2006, Paragon approached the Petitioner about assuming a role as a Director of an affiliate company that was considering acquiring the Edgewater Casino operations. The Petitioner accepted the position subject to an investigation by the Gaming Policy Enforcement Branch (“GPEB”) into the Petitioner’s suitability in this role. The Petitioner was cleared by the GPEB of any conflict of interest or ethical issues that might have been said to arise based on his previous involvement as Chair of the BCLC.
9. In the spring and summer of 2006, BCLC had official dealings with Paragon regarding the approval of one of its affiliates’ intended acquisition of the operating contract for the Edgewater Casino. Those business dealings were conducted directly with officers of Paragon, not with the Petitioner, although Mr. Poleschuk was aware that at some point Mr. Turner had become a director of a Paragon entity.
10. In early May 2006, the intended acquisition of the Edgewater Casino operations became public knowledge, when its owners filed for bankruptcy protection. In or around September 2006, the operations of the Edgewater Casino were acquired by a Paragon affiliate, following approval by the GPEB and BCLC (which technically owns the casino under the regulatory regime, although its operations are entirely privately run).
11. The Petitioner has continued to serve as a director of the Paragon affiliate that operates the Edgewater Casino, but has no executive position in respect of the Edgewater Casino or its operations.
12. Also in 2006, The Petitioner became a director of a public company then known as Mobile Lottery Solutions Inc. (“MT”). That company was in the business of marketing and developing computer, mobile phone and PDA applications including gaming applications. MT was never actively involved in the gaming business in British Columbia. It has since become inactive, and the Petitioner is no longer a director.

13. The Petitioner's involvement with Paragon and MT have been matters of public record for a number of years.

FOI Request and Initial BCLC determination

14. By letter dated May 19, 2010 BCLC advised the Petitioner it had received a request under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("FIPPA") for records between the Petitioner and BCLC board members and executive from December 10, 2005 onward. BCLC sought the Petitioner's position with respect to the applicability of the exemptions in sections 21 and 22 of FIPPA to certain records attached to the correspondence.
15. By letter dated June 8, 2010 (the "**Initial Statement of Position**") counsel for the Petitioner objected to release of the records in their entirety, on the basis that:
 - (a) BCLC did not have custody and control of the records within the meaning of section 3(1) of FIPPA (the "**Custody and Control Argument**");
 - (b) If the records were considered to be in the custody or control of BCLC, they were improperly collected contrary to section 32 of FIPPA in breach of his privacy rights and contrary to the collection procedures set out in part 3 of FIPPA (the "**Privacy Argument**");
 - (c) The exception in section 21 of FIPPA for protection of business interests applies (the "**Section 21 Argument**"); and
 - (d) Various exemptions related to unreasonable invasion of personal privacy in section 22 of FIPPA apply (the "**Section 22 Arguments**").
16. By email dated June 25, 2010 BCLC advised the Petitioner that after considering his counsel's submissions BCLC had decided to refuse access to the records.

OIPC Review and BCLC Redetermination

17. By email dated July 22, 2010 BCLC advised the Petitioner that it had received notification from the Office of the Information and Privacy Commissioner (“OIPC”) that there would be a review of BCLC’s decision to withhold the records from disclosure which had been sent for consultation. A request for review from the OIPC was attached.
18. By email dated January 27, 2011 BCLC advised counsel for the Petitioner that an investigator at OIPC had indicated he did not agree with the application of section 21 to the records but did agree to the limited use of section 22. BCLC sought the Petitioner’s position as to whether the records could be released in redacted form as recommended by the OIPC investigator.
19. By letter dated February 2, 2011 counsel for the Petitioner advised BCLC that the Petitioner was not in agreement with releasing any of the information, and requested that BCLC advise the investigator from the OIPC of the Petitioner’s position as soon as possible, and forward the letter of June 8, 2010 Initial Statement of Position explaining that position.
20. By email dated February 2, 2011 BCLC advised counsel for the Petitioner that BCLC had advised the OIPC investigator of the Petitioner’s position and sent him a copy of the June 8, 2010 Initial Statement of Position.
21. By email dated March 1, 2011 BCLC forwarded to counsel for the Petitioner comments from the investigator from OIPC, including comments on the Custody and Control Argument and the Privacy Argument.
22. By letter dated March 2, 2011 counsel for the Petitioner advised BCLC that the Petitioner’s position continued to be that none of the records should be disclosed.
23. By letter dated March 4, 2011 BCLC advised counsel for the Petitioner that after considering the Petitioner’s representations, BCLC had decided to disclose the records with some portions withheld from disclosure under section 22 of FIPPA.

The Inquiry

24. By letter dated March 24, 2011 counsel for the Petitioner wrote the OIPC requesting and inquiry, in which the Petitioner would seek an order requiring BCLC to withhold the records in their entirety (the “**Inquiry Request**”). That letter sets out in summary the Custody and Control Argument, the Privacy Argument, and the objections to production under sections 21 and 22 of FIPPA. It also includes the June 8, 2010 Initial Statement of Position.
25. On or about April 26, 2011 a representative of the OIPC contacted counsel for the Petitioner suggesting the matter should proceed straight to an Inquiry.
26. On or about April 28, 2011 a representative of the OIPC advised counsel for the Petitioner of the procedure at an Inquiry. Counsel for the Petitioner was not advised that any of the issues set out in the March 24, 2011 Inquiry Request or the attached June 8, 2010 Initial Statement of Position would be excluded from the Inquiry.
27. By email dated June 9, 2011 the Registrar of Inquiries of the OIPC provided the parties to the Inquiry with a contact list, a letter dated June 9, 2011, a Investigators Fact Report dated June 9, 2011, a Notice of Written Inquiry dated June 9, 2011, a redacted copy of the Inquiry Request and a letter to Sean Holman dated June 9, 2011.
28. In the Notice of Written Inquiry, under the heading “Issues”, the following text appeared:
 1. Issues – In the inquiry the adjudicator will consider whether the public body is required to refuse access under sections 21 and/or 22 of FIPPA.

The adjudicator will also consider the applicant’s assertion that section 25 requires the disclosure of information, clearly in the public interest, in the records responsive to the applicant’s requests.

The OIPC sought no input from the Petitioner in to the content of the Notice of Written Inquiry.
29. By letter dated June 22, 2011 counsel for the Petitioner proposed that initial submissions be exchanged by email on June 30, 2011.

30. By letter dated June 29, 2011 delivered by email, counsel for the Petitioner provided submissions of the Petitioner and an affidavit of the Petitioner in support of an order that the records not be produced in their entirety. The submissions raise the Custody and Control Arguments, the Privacy Arguments, the Section 21 Argument and the Section 22 Arguments.
31. By email dated June 29, 2011, Sean Holman delivered his initial submission.
32. By email dated July 13, 2011, counsel for the Petitioner delivered reply submissions of the Petitioner and an affidavit of Mr. Poleschuk.
33. By email dated July 13, 2011 Mr. Holman delivered his reply submissions. In the reply submissions Mr. Holman addresses the Custody and Control Argument, the Privacy Argument, the Section 21 Argument and the Section 22 Arguments.
34. By letter dated July 13, 2011 counsel for the Petitioner delivered hard copies of the Petitioner's initial submissions, reply submissions and the affidavits of the Petitioner and Mr. Poleschuk. By email dated July 22, 2011 electronic copies of the initial submission, the reply submission and the affidavit of the Petitioner were provided to the OIPC.

The Order

35. The Registrar of Inquiries at the OIPC provided BCLC and the Petitioner with the order under cover of an email dated September 22, 2011.
36. In the order, the Adjudicator declined to consider the Custody and Control Argument or the Privacy Argument as follows:

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

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

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

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

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

37. At no time prior to the issuance of the Order was the Petitioner or his counsel advised that the Custody and Control Argument or the Privacy Argument would not be considered, nor were submissions sought regarding the conclusions reached by the Adjudicator on those arguments.
38. The Adjudicator went on to determine that some information in the records should be excised and not disclosed pursuant to the Section 22 Arguments. The Adjudicator rejected the Petitioner's Section 21 Argument.

Part 3:LEGAL BASIS

1. Pursuant to section 3 of FIPPA, FIPPA only applies to records in the custody and control of a public body. If a record is not in the custody and control of a public body for the purposes of FIPPA, then the public body cannot be required to produce it, nor can the OIPC have the jurisdiction to order that the public body produce it.
2. The Adjudicator's failures to:

(a) advise the Petitioner that it would not consider the Petitioner's Custody and Control Argument; and

(b) consider the Petitioner's Custody and Control Argument,

were both errors that denied the Petitioner procedural fairness.

3. In the alternative, the Adjudicator misapprehended his jurisdiction or was incorrect or acted unreasonably in failing to consider the Petitioner's Custody and Control Argument on the basis that the Custody and Control Argument could only validly have been advanced by BCLC.
4. In the further alternative, the Adjudicator's decision with respect to section 3 of FIPPA was arbitrary for the following reasons:
 - (a) the Adjudicator failed to consider the Petitioner's Custody and Control Argument;
 - (b) the Petitioner was not advised that the Custody and Control Argument would not be considered in the inquiry; and
 - (c) there was no evidentiary basis before the Adjudicator to make a finding of custody and control pursuant to section 3 of FIPPA.
5. Pursuant to section 58(3)(f) of FIPPA, the OPIC may require a public body to destroy personal information collected in contravention of FIPPA.
6. If the records were in the custody and control of BCLC, the failure of the Adjudicator to consider the Petitioner's Privacy Argument would deny the Petitioner the ability to obtain the remedy set out in section 58(3)(f) of FIPPA, or render that remedy useless.
7. Accordingly, the Adjudicator's failures to
 - (a) advise the Petitioner that it would not consider the Petitioner's Privacy Argument; and
 - (b) consider the Petitioner's Privacy Argument

were breaches of the Petitioner's rights to natural justice and procedural fairness.

- 8. The Petitioner does not seek to set aside the Adjudicator's decisions with respect to the Section 21 Argument and the Section 22 Arguments.
- 9. The Petitioner relies on the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, and the *Rules of Civil Procedure*.

Part 4: MATERIAL TO BE RELIED ON

- 1. Affidavit of T. Richard Turner, sworn October 31, 2011.
- 2. Other materials filed in this proceeding.

The petitioner estimates that the hearing of the petition will take one day.

Dated: November 2, 2011



Signature
 Petitioner
 Lawyer for petitioner
David E. Gruber

To be completed by the court only:	
Order made	
<input type="checkbox"/>	in the terms requested in paragraphs _____ of Part 1 of this notice of application
<input type="checkbox"/>	with the following variations and additional terms:
Date: _____	Signature of
	<input type="checkbox"/> Judge <input type="checkbox"/> Master