OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Decision F10-07

BRITISH COLUMBIA LOTTERY CORPORATION

Jay Fedorak, Adjudicator

July 29, 2010

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Summary: The respondent requested copies of reports relating to BCLC's voluntary self-exclusion program. BCLC has asked that an inquiry on the respondent's request for review not be held, because his actions, including publicly disclosing information during the OIPC mediation process, constituted an abuse of process under FIPPA. BCLC's request that an inquiry not be held is denied, because the respondent's actions deemed not to constitute an abuse of process. Furthermore, BCLC also failed to demonstrate that the application of ss. 13, 14 and 17 of FIPPA were not arguable.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 56.

Authorities Considered: B.C.: Decision F07-04, [2007] B.C.I.P.C.D. No. 20; Decision F08-08, [2008] B.C.I.P.C.D. No. 26; Decision F08-11, [2008] B.C.I.P.C.D. No. 36; Order 01-16, [2001] B.C.I.P.C.D. No. 17; Order 02-57 [2002] B.C.I.P.C.D. No. 59; Order No. 291-1999, [1999] B.C.I.P.C.D. No. 4; Decision F06-04, [2006] B.C.I.P.C.D. No.16; Decision F07-01, [2007] B.C.I.P.C.D. No. 3; Decision F05-05, [2005] B.C.I.P.C.D. No. 34. **Ont.:** Order MO-2494, [2010] O.I.P.C. No. 11; Order P-1101, [1996] O.I.P.C. No. 22; Order MO-2436, [2009] O.I.P.C. No. 103; Order MO-2481, [2009] O.I.P.C. No. 200; Order M-618, [1995] O.I.P.C. No. 385; Order M-850, [1996] O.I.P.C. No. 366.

Cases Considered: *Toronto (City) v. C.U.P.E. Local 79,* 2003 SCC 63, [2003] 3 S.C.R. 77; *Canam Enterprises Inc. v. Coles,* 2000 51 O.R. 3(d)481 (CA); *Brown v. Miller,* [2010] BCSC 737

1.0 INTRODUCTION

[1] The British Columbia Lottery Corporation ("BCLC") has asked that, under s. 56 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), an inquiry on the respondent's request for review not be held respecting his request for records. For reasons that follow, I have exercised my discretion not to grant BCLC's request.

2.0 DISCUSSION

The access request

[2] The respondent, a journalist, made a request for records relating to the auditing, evaluating, monitoring or reporting on the performance of BCLC's voluntary self-exclusion program ("program"). BCLC responded by providing him with a fee estimate for over $26,000 to process his request. The respondent then narrowed his request to only reports on the program. BCLC disclosed a series of reports, withholding some information under ss. 13, 14 and 17 of FIPPA. The respondent was dissatisfied with this response and requested a review from the Office of the Information and Privacy Commissioner ("OIPC"). During mediation with the OIPC, BCLC offered to provide the respondent with copies of two, soon-to-be-completed, final reports on the program, if he cancelled his request for review and relinquished his right to request an inquiry in on the records he had already received. The respondent declined the offer but made a separate request for the final reports. BCLC provided the respondent with copies of the draft reports in response to the original request but withheld some information under s. 14 of FIPPA. The respondent then posted information about his requests and BCLC mediation offer on a public blog on his website.

[3] When the respondent requested that the matter concerning his original request proceed to inquiry under Part 5 of FIPPA, BCLC asked, under s. 56, that the inquiry not proceed.

Issue

[4] Section 56(1) of the Act reads as follows:

> **Inquiry by Commissioner**
>
> 56(1) If the matter is not referred to a mediator or is not settled under section 53, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[5] A number of previous decisions and orders have laid out the principles relevant to decisions of the OIPC whether to exercise of discretion not to proceed

with an inquiry under s. 56.[1] BCLC cites Senior Adjudicator Francis, who noted in Decision F08-11 that the reasons for exercising discretion to decline to hold an inquiry are not limited. She held that the relevant principles guides these decisions are as follows:

- the public body must show why an inquiry should not be held.
- the respondent (the applicant for records) does not have a burden of showing why the inquiry should proceed; however, where it appears obvious from previous orders and decisions that the outcome of an inquiry will be to confirm that the public body properly applied FIPPA, the respondent must provide "some cogent basis for arguing the contrary".
- the reasons for exercising discretion under s. 56 in favour of not holding an inquiry are open-ended and include mootness, situations where it is plain and obvious that the records fall under a particular exception or outside the scope of FIPPA, and the principles of abuse of process, *res judicata* and issue estoppels.
- it must in each case be clear that there is no arguable case that merits an inquiry.[2]

[6] I have taken the same approach here.

OIPC Mediation Process

[7] As BCLC submits that the actions of the respondent have undermined the mediation process of the OIPC, I think it would helpful to begin with a synopsis of what the mediation process entails to put it in context. Under s. 55 of FIPPA, the OIPC may attempt to resolve requests for review through mediation. Most requests are assigned to a Portfolio Officer who attempts to facilitate a resolution acceptable to all sides. The Portfolio Officer reviews the records and discusses the request with all parties. This often involves the Portfolio Officer both providing an opinion as to whether the response of the public body complied with FIPPA and attempting to persuade the parties to accept a resolution based on that opinion. If the Portfolio Officer is successful in helping the parties find a resolution, or otherwise persuades the applicant to close the file, the matter does not proceed further. If the Portfolio Officer is unsuccessful, the applicant has the option of requesting that the matter proceed to formal adjudication at an inquiry.

Submissions

[8] BCLC submits that the OIPC should exercise its discretion not to grant the respondent's request for an inquiry because the following actions on the part of the respondent "constitute an abuse of process under FIPPA":

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[1] See, for example, Decision F07-04, [2007] B.C.I.P.C.D. No. 20, Decision F08-08, [2008] B.C.I.P.C.D. No. 26, and Decision F08-11, [2008] B.C.I.P.C.D. No. 36.
[2] Decision F08-11, [2008] B.C.I.P.C.D. No. 36, para. 8.

- Making a second request for records based on information provided to the [respondent] in the offer to settle during mediation.
- Publishing details of the offer to settle and mediation process on his public website blog.
- Commenting negatively about BCLC's reasonably held legal position under FIPPA and insinuating inaccurately that BCLC was not acting in good faith.
- Seeking comment from a Member of the Legislative Assembly on the offer to settle and mediation process, and publishing those comments on his public website blog.
- Breaching an explicit or implicit term of confidentiality in the mediation process.
- Bringing the administration of Part 5 of FIPPA by OIPC into disrepute by making aspects of the mediation process public.[3]

[9] BCLC's greatest concern is the respondent's public disclosure of BCLC's offer made during mediation. According, to BCLC, this constitutes an abuse of process under the OIPC's "Policies and Procedures, May 2009":[4]

> 5.17 If a request for review does not settle, the OIPC has discretion to decide whether all or part of the matter will proceed to an inquiry under s. 56 of FIPPA. Considerations for the exercise of that discretion include whether:
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> (a) the review has no reasonable prospect of succeeding, including because it is plain and obvious that requested records are subject to an exception to disclosure in FIPPA or fall outside the scope of FIPPA;
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> (b) the review is frivolous, vexatious or otherwise an abuse of process;
>
> (c the review is trivial or no meaningful remedy is required or available under FIPPA;
>
> (d) the substance of the review is more appropriately dealt with in another proceeding or process.

[10] BCLC argues that the respondent's disclosure of its mediation offer violates the confidentiality of the OIPC's mediation process. In its opinion, this "has resulted in an undermining of the OIPC's authority and must result in a loss of the applicant's right to proceed to inquiry".[5]

[11] BCLC submits that the OIPC should deny the respondent's inquiry request "as a means of controlling its processes under FIPPA and make certain that its

[3] BCLC's submission, p. 7.
[4] http://www.oipc.bc.ca/advice/FIPPA_Policies_and_Procedures(May2009).pdf, pp. 10-11.
[5] BCLC's submission, p. 3.

processes are respected and not abused".[6] BCLC argues that Commissioner Loukidelis's ruling in Order 01-16, which dealt with an abuse of process,[7] supports its position that "fairness in the review process" should be a consideration in making these decisions. It also submits that cases from Ontario support its argument that courts and administrative tribunals have the authority to deal with abuse of process.[8]

[12] BCLC states that it is concerned with the potential effect of the respondent's actions on the OIPC mediation process. BCLC contends that, for the mediation process to be effective, parties must negotiate in good faith and maintain the confidentiality of the negotiations. Parties should not share information from the mediation, in BCLC's opinion, unless all parties provide consent. BCLC submits that a breakdown of these principles might lead public bodies to refrain from participating in mediation, resulting in a larger number of requests for review going to inquiry.

[13] BCLC submits that parties should be aware that confidentiality is essential to the OIPC mediation process. It states, "[i]f the critical elements of mediation were not made explicit to the applicant by OIPC as conditions for participating in the mediation of this Request for Review, BCLC submits that they are implicit terms that the applicant should be aware of and abide by."[9]

[14] BCLC believes that the OIPC's "Policies and Procedures" support this position. It references paragraphs 6.20 and 6.21 with respect to mediation material and submissions to inquiries:

> 6.20 A party must not include any mediation material in a submission, unless that party has obtained the written consent of other parties to do so. If written consent is not obtained, the OIPC will remove any mediation material from the submission.[10]

[15] BCLC acknowledges that the position that it takes could result in curbing free speech. Nevertheless, it feels that some restraint on free speech is appropriate in adjudicative processes. BCLC submits: [11]

> The principles applied in such cases provide valuable guidance for OIPC in exercising its discretion to find that an abuse of process has taken place, that in some contexts freedom of expression is at odds with a fair process and that an Inquiry should not proceed.

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[6] BCLC's submission, p. 3.
[7] Order 01-16, [2001] B.C.I.P.C.D. No. 17.
[8] BCLC submission, p. 4; Ontario Order MO-2494, [2010] O.I.P.C. No. 11; *Toronto (City) v. C.U.P.E. Local 79,* 2003 SCC 63, [2003] 3 S.C.R. 77; *Canam Enterprises Inc. v. Coles*, 2000 51 O.R. 3(d)481 (CA).
[9] BCLC's submission, p. 7.
[10] http://www.oipc.bc.ca/advice/FIPPA_Policies_and_Procedures(May2009).pdf
[11] BCLC's submission, p. 5.

[16] The respondent did not reply to BCLC's submission, despite several reminders. As a result, the only submission before me is BCLC's initial submission.

Abuse of Process

[17] The real issue in this case is to determine what constitutes an "abuse of process" and whether disclosing information from the mediation process falls within those parameters. While Decision F08-11 stated that "abuse of process" could be a justification for deciding not to hold an inquiry, it did not define the term. In legal terms, an abuse of process is using a legal process for a purpose other than that which is intended by the law.[12] Several orders in British Columbia and Ontario have dealt with the concept of "abuse of process".[13] Assistant Ontario Commissioner Mitchinson provided a description in Ontario Order M-850[14] that other orders have adopted:

> To summarize, the abuse of process cases provide several examples of the meaning of "abuse" in the legal context, including:
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> - proceedings instituted without any reasonable ground;
> - proceedings whose purpose is not legitimate, but is rather designed to harass, or to accomplish some other objective unrelated to the process being used;
> - situations where a process is used more than once, for the purpose of revisiting an issue which has been previously addressed.
>
> In my view, although this is not intended to be an exhaustive list, these are examples of the type of conduct which would amount to "an abuse of the right of access" … .

[18] There are examples in British Columbia orders and decisions illustrating these types of abuse of process and how they should be remedied. In cases where an applicant makes a large number of requests to the same public body that were systematic, repetitious or vexatious requests, the public body has obtained relief under s. 43 of FIPPA.

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[12] For example, *Merriam-Webster's Dictionary of Law* (Springfield, Mass.: Merriam-Webster, 1996) defines it as: "the tort of bringing and following through with a civil or criminal action for a purpose known to be different from the purpose for which the action was designed".

[13] See, for example, Ontario Order P-1101, [1996] O.I.P.C. No. 22; Ontario Order MO-2436, [2009] O.I.P.C.No. 103; Ontario Order MO-2481, [2009] O.I.P.C. No. 200, Ontario Order M-618, [1995] O.I.P.C. No. 385; Order 01-16, [2001] B.C.I.P.C.D. No. 17; Order 02-57, [2002] B.C.I.P.C.D. No. 59.

[14] Ontario Order M-850, [1996] O.I.P.C. No. 366, paras. 28-29.

[19] The Courts have dealt with abuse of process involving a party attempting to resurrect an issue that has already been decided. In *Saskatoon Credit Union v. Central Park Enterprises Ltd*., McEachern, C.J.S.C., held:

> no one can relitigate a cause of action or an issue that has previously been decided against him in the same court or in any equivalent court having jurisdiction in the matter where he has or could have participated in the previous proceedings unless some overriding question of fairness requires a rehearing.[15]

[20] Arbour, J. analyzed this issue in depth in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.)*.[16] Bowden J. confirmed this approach in finding a similar abuse of process in *Brown v. Miller.*[17]

[21] Commissioner Loukidelis has identified similar circumstances that would warrant the OIPC preventing an abuse of its processes. In Order 01-03, he held that Commissioner Flaherty had previously settled the matter at issue in his decision in Order 315-1999. He also found that the same principle could apply to matters that had been settled in mediation. In Order 01-16, he held:

> [40] The integrity of the process for mediating requests for review made under Part 5 is important to the Act's efficient and fair functioning. Abuse of the review and inquiry processes under Part 5 of the Act calls that process into question. In the context of this case, it is also relevant, to my mind, that the remedies under s. 58(3) of the Act are discretionary. In my view, an abuse of process by the applicant is a proper factor to take into account when deciding whether to make an order under s. 58(3).
>
> [41] I conclude that it is open to me, in an inquiry under Part 5, to decline to order a public body to process an access request where all of the following apply:
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> 1. The present access request is, in substance, for the same records as a previous access request made by the same applicant to the same public body,
> 2. The previous access request was the subject of a request for review under Part 5 of the Act,
> 3. The previous request for review under Part 5 was settled or resolved by mediation by this Office under Part 5, and
> 4. The present applicant agreed to, or accepted the resolution or settlement of, the previous request for review through mediation by this Office under Part 5.[18]

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[15] CanLII 2941 (BC S.C.), [1988] B.C.J. No. 49, 47 D.L.R. (4th) 431, 22 B.C.L.R. (2d) 89.
[16] *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.)*, Local 79, [2003] 3 S.C.R. 77. Paras. 35-57.
[17] *Brown v. Miller,* [2010] BCSC 737.
[18] Order 01-16, [2001] B.C.I.P.C.D. No. 17.

[22] In Order 291-1999, Commissioner Flaherty found another applicant to have committed an abuse of process for deliberately controverting and refusing to comply with the OIPC's policies and procedures:

> I find that the applicant has demonstrated a singular determination not to comply with my Office's procedural directives for this inquiry but rather, for reasons best known to himself, to dictate his own terms of participation. The applicant, though well aware of the procedures of my Office, has refused to adhere to dates or conditions which are not of his own choosing. ... In my view, the applicant has gone beyond using the review and inquiry process under the Act, to abusing it.[19]

[23] These examples show that an abuse of process in this context involves requesters making requests for records or requests for review for reasons other than for obtaining the information, making repeated attempts to obtain the same information after already receiving a fair settlement with respect to access to that information, or being deliberately obstructionist. In short, abuse of process relates to a party using a process for purposes other than that for which it was intended.

Analysis

[24] In effect, BCLC is asking me to penalize the respondent for breaking what it considers to be an unwritten rule of the mediation process. The appropriate penalty, according to BCLC, would be to deprive the applicant of his right of review of BCLC's decision that denied him access to information in records he requested. First, I will determine whether the respondent's actions constituted an "abuse of process". If I decide that they do, I will determine whether they warrant the OIPC deciding not to hold an inquiry.

[25] It is clear that BCLC is upset that the applicant publicly disclosed information that it provided during mediation. It argues that mediation functions more effectively when the parties negotiate in good faith and treat in confidence the information that is communicated during the process. However, nothing in FIPPA, its regulations or OIPC policy forbids parties from disclosing the nature or details of discussions during mediation, except in submissions to an inquiry.

[26] BCLC's argument that the applicant's publication of the information obtained through mediation constitutes an abuse of process is also not persuasive. BCLC does not reference any court case or order that finds this type of activity to be an abuse of process; nor does the activity fall within conduct that previous cases have found to be an abuse of process.

[19] Order No. 291-1999,[1999] B.C.I.P.C.D. No. 4, p. 11.

[27] There is also no evidence that the respondent made his requests for an improper or frivolous purpose. Moreover, as a journalist, he is free to use material from OIPC mediation processes for his published work, in the same way as he is free to use information or records he obtains under FIPPA. In fact, all applicants are free to disseminate records and information that they receive through making requests and request for reviews. Therefore, I cannot find that the respondent has done anything inappropriate or broken any explicit or implicit rules that would warrant me to impose a penalty or sanction.

[28] Even in a hypothetical case, where a requester contravened a policy or rule regarding the mediation of requests for review, it would not necessarily constitute an abuse of process. As long as the requester was not using the request process and the request for review process to harass the public body or for some purpose other than for the sake of obtaining the requested information, the fact that the requester might have contravened a policy or procedure would not be in and of itself an abuse of process.

[29] BCLC points to the fact that, according to Senior Adjudicator Francis, the reasons for the OIPC exercising discretion to decline to hold an inquiry are open-ended. I would point out that she issued a qualification to this: "it must in each case be clear that there is no arguable case that merits an inquiry". The issue for the inquiry that the respondent has requested would be the application of ss. 13, 14 and 17 of FIPPA to the information that BCLC has withheld from disclosure. BCLC has provided no evidence or otherwise established that the application of these exceptions is not arguable.

[30] Previous decisions to decline to proceed with inquiries have generally been based on the fact that it was clear and obvious that the appropriate exception applied or that a matter was moot. In these cases, the respondents did not have a case to argue. It was obvious, for example, that s. 22 applied to the personal information of students in a decision of July 9, 2003.[20] Previous cases have established that s. 22(3)(b) applied to the identities of bylaw complainants.[21] In one case, an applicant received in mediation all of the information the public body withheld, but wanted to have an inquiry anyway.[22] In all these cases, an inquiry would have served no useful purpose—there was no remedy available to the applicant.

[31] A decision to deny an inquiry results in an applicant being denied his right to review a public body's decision. It must be made on unquestionable grounds. In the present case, I find no good reason to deprive the respondent of his legal right to a review of the public body's decision, as provided in s. 52(1) of FIPPA. It is appropriate for an inquiry to determine whether BCLC has correctly applied ss. 13, 14 and 17 to the requested records.

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[20] http://www.oipc.bc.ca/orders/section56/16991partiesltr070903.pdf
[21] Decision F06-04, [2006] B.C.I.P.C.D. No.16; Decision F07-01, [2007] B.C.I.P.C.D. No. 3.
[22] Decision F05-05, [2005] B.C.I.P.C.D. No. 34.

3.0 CONCLUSION

[32] BCLC has the burden of demonstrating why its s. 56 application should be granted and it has not done so in this case. An inquiry will therefore be held.

[33] Nothing in this decision reflects any opinion or decision as to the merits of BCLC's case. The merits remain to be decided in the Part 5 inquiry, on the basis of the evidence and argument the respondent and BCLC submit.

July 29, 2010

ORIGINAL SIGNED BY

Jay Fedorak
Adjudicator

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