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Order F11-23

BRITISH COLUMBIA LOTTERY CORPORATION

Michael McEvoy, Adjudicator

August 22, 2011

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Summary: A journalist requested a Progress Report on a program designed to help problem gamblers. The adjudicator ordered the Progress Report disclosed. Virtually nothing in the Report constituted recommendations or advice as BCLC argued. Instead, what it contained was a narrative, punctuated by charts and tables that describe the answers to questions posed by the report's authors. The Report was also found to be a "statistical survey" under s. 13(2)(b) and therefore the few passages containing advice or recommendations were ordered disclosed. Further, the adjudicator rejected as speculative claims that the disclosure of the Report could reasonably be expected to deny BCLC a fair trial.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 13(2)(b) and 15(1)(h).

Authorities Considered: **B.C.:** Order 00-01, [2000] B.C.I.P.C.D. No. 1; Order F08-22, [2008] B.C.I.P.C.D. No. 40; Order F10-06, [2010] B.C.I.P.C.D. No. 9; Order No. 71-1995, [1995] B.C.I.P.C.D. No. 44; Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order 02-38, [2002] B.C.I.P.C.D. No. 38. **Alta.:** Order F2008-032, [2011] A.I.P.C.D. No. 1; Order F2008-008, [2008] A.I.P.C.D. No. 51. **Ont.:** Order P-948, [1995] O.I.P.C. No. 255.

Cases Considered: *College of Physicians of B.C. v. British Columbia*, 2002 BCCA 665; *Athey v. Leonati*, [1996] 3 S.C.R. 458; *Dagenais v. Canadian Broadcasting Corporation*, 1994 CanLII 39 (SCC); [1994] 3 S.C.R. 835.

INTRODUCTION

[1] According to evidence submitted by the British Columbia Lottery Corporation (“BCLC”), 85% percent of British Columbians gamble and of those, almost 5% have moderate or severe gambling problems.¹

[2] This case concerns an application by a journalist to get information about a program designed to help problem gamblers.

[3] BCLC and those companies that operate gaming facilities in the province established a voluntary self-exclusion program (“VSE”) to aid problem gamblers in 1988. The VSE program enables people who gamble on BCLC’s online sites and at BC gaming venues to exclude themselves voluntarily from those activities for a pre-determined amount of time.²

[4] In 2007, BCLC commissioned the BC Centre for Social Responsibility (“Centre”)³ to conduct an independent, four-year longitudinal evaluation of the VSE program.⁴ A CBC journalist, the applicant in this case, learned that BCLC received a progress report on the evaluation in the latter part of 2009. She asked for a copy of it on May 20, 2010. The BCLC identified “Time Out: A Progress Report on the Evaluation of British Columbia Lottery Corporation’s Voluntary Self-Exclusion Program” (“Progress Report” or “Report”) as the responsive record. However, BCLC withheld the Progress Report because it said disclosing the Report would result in financial harm to BCLC under s. 17(1) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) and would deprive a researcher of priority of publication under s. 17(2). Subsequently BCLC added two reasons for withholding the Report: that it constituted advice and recommendations under s. 13 of FIPPA and its release could reasonably be expected to deprive a person of the right to a fair trial or impartial adjudication under s. 15(1)(h).

[5] This Office (“OIPC”)⁵ also invited the Centre as the party who prepared the VSE program to make submissions. The Centre declined. Prior to the close of the inquiry on May 27, 2011, BCLC said that it would no longer rely on s. 17 to withhold the records.

¹ According to the British Columbia Problem Gambling Prevalence Study (2003), 4.2% have moderate gambling problems while 0.4% are considered severe problem gamblers: BCLC initial submission, Exhibit B to affidavit of Paul Smith.

² Paul Smith affidavit, para. 5.

³ The BCCSR is an “independent Centre set up to provide reliable, empirical, unbiased, and relevant information to communities, stakeholders, and the public on risk activities”: Affidavit of Paul Smith, Exhibit C.

⁴ Paul Smith affidavit, para. 6.

⁵ Office of the Information and Privacy Commissioner.

ISSUE

[6] The issues in this inquiry are:

1. Does s. 13(1) of FIPPA authorize BCLC to refuse to disclose the Progress Report because it contains advice or recommendations?
2. Does s. 15(1)(h) of FIPPA authorize BCLC to refuse to disclose the Progress Report because disclosing it would deny BCLC a fair trial?

[7] Section 57(1) of FIPPA provides that it is up to BCLC to prove that the applicant has no right of access to the record.

DISCUSSION

[8] **The Record in Dispute**—The province’s Gaming Policy and Enforcement Branch (“GPEB”)⁶ requires BCLC and all BCLC gaming service providers to provide a VSE program. The BCLC intended the Progress Report to provide a “scientific, empirically based assessment of VSE in BC from the perspective of the client.”⁷ The Centre’s proposal to do the research describes two branches of study:

First, survey questionnaires will be administered to all new participants of the VSE who agree to participate with this study. Second, focus groups will be conducted with service providers, treatment providers, and BCLC staff members.

[9] The Progress Report concerns the survey questionnaires. Participants in the study answered a series of questions about “behaviour management, awareness and information, and VSE processes.”⁸ The Centre’s researchers interviewed study participants on four separate occasions over the course of four years. The Report contains “a portion of the interviews being completed.”⁹ Of the four sets of interviews, the data from the first set of interviews was complete. The second and third set of interviews were started but not completed and the fourth was not started at all when the Progress Report was filed.

[10] **Does the Progress Report Contain Advice or Recommendations?**—BCLC says the Progress Report contains both advice and recommendations and therefore s. 13(1) authorizes it to withhold the Report:

⁶ The GPEB is under the responsibility of the Ministry of Public Safety and Solicitor General.

⁷ Affidavit of Paul Smith, para. 6.

⁸ Affidavit of Paul Smith, para. 9.

⁹ Affidavit of Paul Smith, para. 13.

Policy advice, recommendations or draft regulations

13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

[11] The exception protects a public body's internal decision-making and policy-making processes, "by encouraging the free and frank flow of advice and recommendations."¹⁰

[12] Recommendations involve proposing a future course of action about which the public body is making a decision.¹¹ The British Columbia Court of Appeal stated in *College of Physicians of B.C. v. British Columbia*¹² that "advice" is not necessarily limited to words offered as an opinion or recommendation about future action. As BCLC notes,¹³ Levine J.A. states in the *College of Physicians* that "advice" includes "expert opinion on matters of fact on which a public body must make a decision for future action."¹⁴

[13] Applying the law to this case, I find there is virtually nothing in the Progress Report that constitutes either recommendations or advice. Instead, what the Progress Report contains is a narrative, punctuated by charts and tables that describe the answers to questions posed by the Report's authors. In a handful of instances the Report's authors, who I take to have expertise in the field of problem gambling, offer an opinion about the compiled data.¹⁵ I consider those small passages to be advice as defined in *College of Physicians*. There is one passage where the authors recommend BCLC take a particular course of future action.¹⁶ The passages of advice and recommendations I have just described are discrete. Contrary to BCLC's contention, they are not so intertwined with the descriptive narrative in the body of the Report that they cannot be easily severed from the body of the text, were it necessary to do so. For reasons that follow below it is not necessary to do so here because the application of s. 13(2) means that BCLC must not refuse to disclose these discrete passages under s. 13(1).

[14] I also reject BCLC's argument that the disclosure of the final report could somehow result in the "inferring" of the advice in the Progress Report. The final report is not before me and therefore any claims about what a reader may or may not infer from it, is entirely hypothetical and speculative.

¹⁰ Order 01-15, [2001] B.C.I.P.C.D. No. 16. BCLC mischaracterizes this statement by stating baldly and without qualification, that s. 13 "protects the deliberative process." The section does not say this. What s. 13 protects is the *advice or recommendations* within the deliberative process.

¹¹ For a full discussion of "advice and recommendations see for example Order 02-38, [2002] B.C.I.P.C.D. No. 38, at paras. 101-127.

¹² 2002 BCCA 665.

¹³ BCLC initial submission, para. 40.

¹⁴ Para. 113.

¹⁵ Pages 3, 4, 7, 8, 18 and 22.

¹⁶ Progress Report, p. 6.

[15] **Does any s. 13(2) Exception Apply?**—Even where disclosing information reveals advice or recommendations developed by or for a public body, if the information falls within the ambit of any part of s. 13(2), the Ministry may not withhold the information under s. 13(1). Section 13(2) lists 14 specific types of information which a public body must not refuse to disclose under s. 13(1). It is therefore necessary that I determine if the passages I have identified as advice and recommendations fall under s. 13(2).

[16] The applicant argues it is “highly likely” a number of exceptions under s. 13(2) applies here.¹⁷ It is only necessary for me to deal with one of those exceptions.

Section 13(2)(c) a statistical survey

[17] This section provides that a public body must not refuse to disclose a “statistical survey” even where it contains advice or recommendations. The applicant states that the section applies but does not elaborate. BCLC says the Progress Report is not a statistical survey because it is incomplete. It submits that only a “final and complete statistical survey would qualify under the [s. 13(2)(c)] exclusion, for the same rationale that the Progress Report does not qualify as a “final report” or “final audit” for the purposes of s. 13 (2)(g).” It adds that the final report at the conclusion of the VSE longitudinal study “will likely qualify as a statistical survey.”¹⁸

[18] Beyond these submissions, neither party attempted to define “statistical survey”. Nor have previous OIPC orders.

[19] The *Policy and Procedures Manual* (“Manual”) maintained by government provides direction to public bodies on the interpretation of FIPPA. It is not binding on me but can provide useful guidance with respect to the legislation. The manual states the following, in part, with respect to s. 13(2)(c):

“**Statistical Survey**” refers to a specific study of a condition, situation or program, by means of data collection and analysis.

...

The statistical survey might include facts, methodology, data, analysis, findings, and conclusions. These would form part of the survey and could not be withheld under section 13(1)

[20] Like s. 13 of BC’s FIPPA, Section 24 of Alberta’s *Freedom of Information and Protection of Privacy Act* (“FOIP”) excepts certain kinds of information from disclosure, including advice and recommendations. Like s. 13(2)(c) of FIPPA, s. 24(2)(d) of FOIP does not apply to information that is a “statistical survey.”

¹⁷ Those named sections include (a), (c), (d), (e), (g), (i), (k) and (l).

¹⁸ BCLC reply submission, para. 13.

[21] Adjudicator Cunningham considered the “statistical survey” provision of FOIP in Alberta Order F2008-032¹⁹ and stated:

The *Canadian Oxford Dictionary* defines “statistics” as

...the science of collecting and analyzing numerical data, especially in or for large quantities, and usually inferring proportions in a whole from proportions in a representative sample. Any systematic collection or presentation of such facts...

“Statistical” is defined as “of or relating to statistics”.

“Survey” is defined as “a general and comprehensive discussion, description, view, consideration, or treatment of something.”

[22] She then agreed with the following passage from Alberta Order F2008-008:

I also note the following definitions of a statistical survey in manuals prepared to assist in the interpretation and application of the Act, or of comparable legislation:

“Statistics” is the science of collecting and analyzing numerical data and the systematic presentation of such facts. “Statistical surveys” are general views or considerations of subjects using numerical data. [Government of Alberta, *Freedom of Information and Protection of Privacy: A Guide*, p. 175.]

“Statistical survey” refers to a specific study of a condition, situation or program, by means of data collection and analysis. [Government of British Columbia, *FOIPPA Policy and Procedures Manual*, online.]

A “statistical survey” is a record showing the collection, analysis, interpretation and presentation of aggregate data in relation to a topic or issue which is the object of study, for example, a poll. [Government of Ontario, *The Manual (Access and Privacy)*, online.]

On review of the foregoing definitions, and for the purpose of section 24(2)(d) of the Act, I conclude that a “statistical survey” is a collection, interpretation and presentation of numerical data relating to the study of a topic, issue, situation or program. The data being collected may consist of the general views of the subjects being surveyed, and a poll can be an example of a statistical survey (but is not necessarily one).

[23] Having regard to the Manual and the above orders, I adopt the definition the adjudicator proposed in Order F2008-008. I also agree with the Manual’s statement that a statistical survey might include facts, methodology, data, analysis, findings and conclusions.

[24] Given this definition, it is clear that the Progress Report is a statistical survey. The Report specifically sets out its methodology. The Progress Report is a study of the VSE program. The Centre collected the data for the study through a survey. The survey is longitudinal, meaning the information represents discrete snapshots of data over time, in this case, three distinct periods. The survey presents and interprets the data largely through a narrative as well as using charts

¹⁹ [2011] A.I.P.C.D. No. 1.

and graphs. Some of the analysis contains findings and conclusions but for the most part the Progress Report is descriptive in nature.

[25] BCLC concedes that when the final report issues it “will likely qualify as a statistical survey”. While the Progress Report does not contain a fourth set of interviews, it is no less a statistical survey in its own right. The factors constituting a statistical survey outlined above are all present in the Report. Indeed, the Progress Report was of sufficient value that BCLC used it “to inform program adjustments” to the VSE program that it already had underway.²⁰ BCLC correctly notes that the Legislature used the term “final” to describe reports and audits under s. 13(2)(g). Clearly if the Legislature intended to qualify statistical surveys in a similar way, it would have said so explicitly.

[26] For these reasons, s. 13 of FIPPA does not authorize BCLC to withhold the Progress Report.

[27] **Would Disclosing the Progress Report Deprive BCLC of the 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, ...

[28] BCLC faces seven civil lawsuits relating to its VSE program. It says disclosure of the Progress Report would deprive BCLC of its right to a fair trial in those lawsuits.

The evidentiary test

[29] Former Commissioner Loukidelis outlined the evidence required to meet the harms-based test applicable to s. 15 in Order 00-01:²¹

...a public body must adduce sufficient evidence to show that a specific harm is likelier than not to flow from disclosure of the requested information. There must be evidence of a connection between disclosure of the information and the anticipated harm. The connection must be rational or logical. The harm feared from disclosure must not be fanciful, imaginary or contrived.

²⁰ Journalist’s reply submission, Schedule A. This is an excerpt from BCLC’s *Submission for Accreditation to the World Lottery Association, Level 4 Continuous Improvement*.

²¹ [2000] B.C.I.P.C.D. No. 1, at p. 5.

[30] BCLC referred me to the former Commissioner's elaboration on this point in Order F08-22:²²

Civil law conventionally applies the balance of probabilities for determining what happened in the past, with anything that is more probable than not being treated as certain.²³ This approach is not followed for hypothetical or future events, which can only be estimated according to the relative likelihood that they would happen.²⁴ Disclosure exceptions that are based on risk of future harm, therefore—as in other areas of the law dealing with the standard of proof for hypothetical or future events—are not assessed according to the balance of probabilities test or by speculation. Rather, the chance or risk is weighed according to real and substantial possibility.²⁵

[31] 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*. In Order P-948,²⁶ the adjudicator pointed to the Supreme Court of Canada decision in *Dagenais v. Canadian Broadcasting Corporation*²⁷ as a guide to applying the Ontario section. *Dagenais* considered whether a publication ban infringing the right to freedom of expression under the *Charter of Rights and Freedoms* was justified in order to ensure that an accused's right to a fair and public hearing under the *Charter* was not violated. Lamer C.J.C., speaking for the majority, stated that:²⁸

The common law rule governing publication bans has always been traditionally understood as requiring those seeking a ban to demonstrate that there is a real and substantial risk of interference with the right to a fair trial.

[32] He added:²⁹

[P]ublication bans are not available as protections against remote and speculative dangers.

[33] In separate reasons, McLachlin J. said:³⁰

What must be guarded against is the facile assumption that if there is any risk of prejudice to a fair trial, however speculative, the ban should be ordered.

...

²² [2008] B.C.I.P.C. D. No. 40.

²³ *Athey v. Leonati*, [1996] 3 S.C.R. 458, at paras. 28-29.

²⁴ *Ibid.*, at paras. 27, 29.

²⁵ *Ibid.*

²⁶ [1995] O.I.P.C. No. 255.

²⁷ 1994 CanLII 39 (SCC); [1994] 3 S.C.R. 835.

²⁸ 1994 CanLII 39 (SCC) at para. 68.

²⁹ 1994 CanLII 39 (SCC) at para. 76.

³⁰ Para. 226.

[34] In my view, the Ontario adjudicator's statements, in the context of a nearly identical provision to s. 15(1)(h), are both consistent with and reinforce the evidentiary obligations former Commissioner Loukidelis explains above.

Does BCLC meet the s. 15(1)(h) test?

[35] BCLC relies on the evidence of Paul Smith, its Director of Corporate Social Responsibility, to support its contention that disclosure of the Progress Report could prejudice BCLC's right to a fair trial.³¹ Paul Smith states that he and his staff consulted with one of the Progress Report's authors who advised them the data presented was preliminary "and could be misinterpreted by a reader or the public as final report findings."³² Paul Smith concluded that releasing the Report "could negatively affect...the VSE program and public opinion."³³ BCLC concludes that there is a "very real possibility"³⁴ the expected pre-trial publicity generated by the CBC will deprive BCLC of its right to a fair jury trial.

[36] As the affidavit evidence and argument disclose, BCLC's case rests on a number of assumptions, the first and most critical being the Report could be "misinterpreted" as final.

[37] I find there to be no persuasive evidence that sustains BCLC's underlying premise. BCLC does not point me to anything within the document that would cause the reader to misinterpret its findings as final. Indeed, the Report's very title, encompassing the word "Progress", suggests a final report is yet to issue. The submissions of the parties and the contents of the Report itself confirm that it is a longitudinal study containing data related to the conduct of three sets of interviews.

[38] I can also say, without disclosing the Report's specific contents that the Report's authors take considerable care to explain the methodology utilized. They clearly state which aspects of the study are complete and which are not, and report on the data to date.

[39] In my view, BCLC's argument amounts to mere speculation that the journalist or the public reading the Progress Report would "misinterpret" it. Accepting this conjectural assertion would be to make the facile kind of assumption that McLachlin J. cautioned against in *Dagenais*.

[40] As I noted in Order F10-06,³⁵ it is always possible that any member of the public could take out of context any information disclosed under FIPPA. Were this a basis for withholding records, one could easily envision very little information

³¹ BCLC initial submission, para. 50.

³² Smith affidavit, para. 13(c).

³³ Smith affidavit, para. 13(c).

³⁴ BCLC initial submission, para. 54.

³⁵ [2010] B.C.I.P.C.D. No. 9.

being disclosed by public bodies concerned about how information might be used or viewed by members of the public.

[41] I would also note the conjectural nature of the prejudice arising from the release of the Progress Report sets it apart from the information in dispute in Order No. 71-1995 cited to me by BCLC.³⁶ That order concerned records containing unproven allegations of sexual harassment against a former cabinet minister. Unlike the Progress Report, those records by their very description revealed their prejudicial nature. What also distinguishes Order No. 71-1995 is what former Commissioner Flaherty described in that case as the “inevitable publicity” that would result from the disclosure of the records containing sexual harassment allegations. In contrast to the present case, the facts in Order No. 71-1995 reveal an exceedingly high level of public interest in the matter at issue that would only have increased with the disclosure of clearly prejudicial records.

[42] Moreover, accepting BCLC’s submissions, would involve acceding to a series of further speculative assumptions. I would have to, for example, assume that the CBC, for whom the applicant works, would broadcast a “misinterpretation” of the Report. There is no evidence the CBC would report the matter in the manner contended by BCLC. Further, the extent of pre-trial publicity generated by the CBC would have to be such that it would not be possible to select an impartial jury, assuming of course that any of the lawsuits would eventually result in a jury trial. Here, I agree with the applicant that it is conjectural to suggest that existing screening methods³⁷ for ensuring appropriate jury selection would not be adequate to protect BCLC’s right to a fair trial.

[43] While all of the above reasons suffice to reject BCLC’s s. 15(1)(h) submissions I also note the somewhat paradoxical nature of BCLC’s position—it asserts that disclosure of the Report might result in harm while at the same time publically referring to the Report as part of an effort to generate favourable publicity for itself. I refer here to BCLC’s attempt to gain the World Lottery Association’s (“WLA”) coveted ‘Level 4’ accreditation for responsible gaming. In the course of this effort, BCLC touted its commissioning of the VSE study as an example of a strategy to develop responsible gaming programs.³⁸ Although its submission to the WLA noted that any formal response to the VSE study would await the final report, BCLC did state that it had already used the Progress Report “to inform program adjustments” that were underway. That statement combined with the rest of its submissions, earned BCLC the accreditation it sought. It thereafter issued a press release stating that BCLC was “recognized as a ‘world leader’ in responsible gaming”³⁹ and it invited the public to read BCLC’s

³⁶ [1995] B.C.I.P.C.D. No. 44.

³⁷ See Journalist’s reply submission, para 34.

³⁸ Journalist’s reply submission, Schedule A. This is an excerpt from BCLC’s *Submission for Accreditation to the World Lottery Association, Level 4 Continuous Improvement*. BCLC also said a “formal” response to the study’s findings would await release of the final report.

³⁹ See footnote 41.

submission to the WLA that contains the reference to the Progress Report.⁴⁰ While the submission does not reveal the specific findings of it, BCLC's open and positive reference to the Progress Report does not assist its claims that disclosing the Report's contents would negatively affect public opinion.

[44] To summarize, BCLC's argument with respect to s. 15(1)(h) is built upon a series of conjectural assertions none of which meets the evidentiary test established by previous orders and court decisions. I therefore cannot agree that disclosure of the Progress Report could reasonably be expected to deprive BCLC of the right to a fair trial.

CONCLUSION

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

1. I require BCLC to give the journalist access to the Progress Report it withheld under ss. 13(1) and 15(1).
2. I require BCLC to give the applicant access to the Progress Report within 30 days of the date of this order, as FIPPA defines "day", that is, on or before October 4, 2011 and concurrently, to copy me on its cover letter to the journalist.

August 22, 2011

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

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⁴⁰ Journalist's initial submission, Schedule A.