ISSN 1198-6182

Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 315-1999
July 21, 1999

INQUIRY RE: The British Columbia Lottery Corporation's withholding of its contracts with Leslie Nielsen, an actor

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on February 17, 1999 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision by the British Columbia Lottery Corporation (the Corporation) to withhold records requested by the applicant.

2. Documentation of the inquiry process

On May 30, 1998 Stanley Tromp (the applicant), a freelance news reporter, submitted a request to the Corporation for contracts that it has with Leslie Nielsen (the actor), who has appeared in commercials for the Corporation. On August 20, 1998 the Corporation denied access on the basis of sections 17 and 21 of the Act.

On August 25, 1998 the applicant requested that my Office review the Corporation's decision. The ninety-day period would have ended on December 14, 1998; however, the parties agreed to an extension. The Notice of Inquiry was sent to the parties on December 17, 1998, setting the inquiry for January 29, 1999. The applicant requested two further extensions of this period. As a result, the inquiry was rescheduled to February 17, 1999.

3. Issue under review and the burden of proof

At the inquiry, I reviewed the Corporation's application of sections 17 and 21 to copies of contracts with the actor.

The relevant parts of sections 17 and 21 are as follows:

Disclosure harmful to the financial or economic interests of a public body

17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

(a) trade secrets of a public body or the government of British Columbia;

(b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;

…

(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;

….

Disclosure harmful to business interests of a third party

21(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets defined in the schedule of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party,

(b) that is supplied, implicitly or explicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

….

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(1), where access to information in the record has been refused under sections 17 and 21, it is up to the public body, in this case the Corporation, to prove that the applicant has no right of access to the record or part of the record.

4. The records in dispute

The records in dispute are two contracts between the Corporation and the actor.

5. The applicant's case

The applicant wishes to review the records of payments made by "taxpayers" to the actor for appearing in advertising on behalf of the Corporation. He advances a variety of arguments to the effect that advertising for gambling encourages people to spend resources on lottery tickets that they can ill afford. Advertising only encourages this trend: "For many gambling critics in B.C., the advertisements in question here, in total, do more social harm than good." The applicant draws attention to the issue of problem gamblers.

The applicant further objects that the payments to the actor do not appear in the Public Accounts of the province as mandated under the *Financial Reporting Act*.

6. The British Columbia Lottery Corporation's case

The Corporation has two agreements with the actor (and his agent) in this inquiry, dated January 6, 1997 and December 3, 1997. Each calls for him to travel to Vancouver to do a certain number of television and radio commercials. The second agreement contains a confidentiality agreement added at the request of the actor and his agent:

> 14. Confidentiality. The parties agree to keep the terms of this Agreement strictly confidential and to not disclose the said terms without the prior written consent of the other party.

I have addressed below the Corporation's submissions on the application of sections 17 and 21 of the Act to the records in dispute.

7. Discussion

Section 17(1)(a): Disclosure harmful to the financial or economic interests of the Corporation…trade secrets of the Corporation

The Corporation submits, on the basis of affidavit evidence from the president of the Corporation, the actor, and the account director of the agent for the actor, that the information in dispute meets the four criteria for a "trade secret" set out in Schedule 1 of the Act. "Trade secret" is defined in Schedule 1 as follows:

> "trade secret" means information, including a formula, pattern, compilation, program, device, product, method, technique or process that:
>
> (a) is used or may be used, in business or for any commercial advantage,
>
> (b) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use,
>
> (c) is the subject of reasonable efforts to prevent it from becoming generally known, and
>
> (d) the disclosure of which would result in harm or improper benefit.

According to the Corporation, this information is used to its commercial advantage, is not generally known to the public or to other persons who could obtain economic value from its disclosure or use, is the subject of reasonable efforts to prevent it from becoming generally known, and its disclosure would result in harm or improper benefit.

In my view, the negotiated agreements do not constitute "trade secrets" within the meaning of the Act. Even if I accept that the information in the agreements is used or may be used in business or for commercial advantage, I am unable to conclude that the information derives independent economic value from not being generally known. The evidence fails to establish what actual or potential economic value the negotiated information has, or how someone would derive economic value from that information. In view of my conclusion on this branch of the test, it is not necessary to consider whether the information was the subject of reasonable efforts to prevent disclosure and whether disclosure would result in harm or improper benefit.

I conclude that the negotiated information does not constitute a "trade secret" within the meaning of section 17(1)(a) of the Act.

Section 17(1)(b): financial and commercial information of the Corporation

The Corporation also relies on section 17(1)(b) to argue that the information has, or is reasonably likely to have, monetary value. The president of the Corporation deposes that the information in the agreements has monetary value. In supplementary submissions, the Corporation indicates that disclosure may result in the actor refusing to contract with the Corporation again, or insisting on a higher fee for the next agreement ("he would undoubtedly charge fees more in line with what he would get in the United States"). (Supplementary Submission of the Corporation, p. 1) Since the advertising

campaign has proven to be effective, the Corporation intends to negotiate further agreements with the actor. Hence the contents of the agreements are of "great monetary value" to the Corporation.

The test under section 17(1)(b) is whether the information has, or is reasonably likely to have, monetary value. While it could be argued that the Corporation's argument is speculative, I accept that the evidence is sufficient to establish that the information is reasonably likely to have monetary value, since the Corporation derives a significant benefit from the current arrangement with the actor. I note that the Corporation has released to the applicant the total cost of a television commercial featuring Mr. Nielsen, which is considerably less than that paid for an average commercial in this province.

Thus I find the information falls within the scope of section 17(1)(b) of the Act.

Section 17(1)(d): undue financial loss to the actor

The Corporation also relies on section 17(1)(d) of the Act on the basis that disclosure of the information could reasonably be expected to result in undue financial loss to a third party. It points out that the "actor has clearly made special arrangements with the Corporation which if disclosed would prejudice and inhibit his negotiating ability so far as other similar acting engagements are concerned, resulting in undue financial loss to him." (Initial Submission of the Corporation, p. 3) The nub of the issue is contained in the actor's statement:

> I am a Canadian and as such I am willing, for sentimental reasons, to provide my services in Canada for fees which I would not consider acceptable in the United States, and if those fees are disclosed such disclosure would significantly undermine my bargaining position for all future contracts negotiated by me and cause me irreparable financial harm and loss. (Affidavit of Leslie Nielsen, p. 1)

The applicant submits that it is speculative for the Corporation to argue that the actor might be "forced to accept a lower pay rate in Hollywood, because he worked for a low rate in Canada for a government project." He demands actual evidence of harm.

Although the actor's evidence of potential harm is not detailed, there is no evidence to refute the actor's statement that disclosure of fees would significantly undermine his bargaining position for future contracts. I accept the actor's sworn statement as some evidence that disclosure could reasonably be expected to result in undue financial loss to the actor. I also accept that it could reasonably be expected that the actor would refuse to work at the same rate for the Corporation, if indeed at all, in the event of such loss. Thus, I find that the information falls within the scope of section 17(1)(d) of the Act.

Section 21: Disclosure harmful to business interests of the actor

The Corporation submits that the information in dispute meets the three-part test set out in section 21, since it contains the trade secrets and commercial and financial information of the actor, was supplied implicitly or explicitly in confidence, and its disclosure could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of the actor, or result in undue financial loss to him.

Although I do not accept that the information constitutes a "trade secret" under section 21(1)(a)(i), there is no question that the information meets the first branch of the test under section 21(1)(a)(ii), namely that disclosure would reveal the commercial or financial information of a third party.

The second branch of the test under section 21(1)(b) requires that the information be supplied, implicitly or explicitly, in confidence. The Corporation submits that the "fees reflected in the two agreements were negotiated between the parties. Both of the parties engaged independent agents who are expert and knowledgeable in negotiating fees for this type of service." (Supplementary Submission of the Corporation, p. 2)

Although there was no confidentiality clause in the first agreement, the affidavit evidence establishes that the contents of both agreements were understood to be strictly confidential (Affidavit of Gerard Simonis, paragraph 3; Affidavit of Leslie Nielsen, paragraph 4; and Affidavit of Leslie Robertson Gascoigne, paragraph 3). The second agreement contained an express confidentiality provision preventing the parties from disclosing the terms without the prior written consent of the other parties.

I conclude, however, that the information does not meet the second branch of the test, because it was not "supplied in confidence" within the meaning of section 21(1)(b). The phrase "supplied in confidence" does not include information resulting from contractual negotiations, regardless of whether the information was treated as confidential or not. See Order No. 61-1995, November 1, 1995.

As a consequence, I find that the information does not fall within the scope of section 21 of the Act.

8. Order

I find that the British Columbia Lottery Corporation was authorized to withhold the information in dispute under sections 17(1)(b) and (d) of the Act.

I find that the British Columbia Lottery Corporation was not authorized to withhold the information in dispute under section 17(1)(a) and was not required to withhold the information in dispute under section 21 of the Act.

Under section 58(2)(b) of the Act, I confirm the decision of the head of the British Columbia Lottery Corporation to withhold the information in dispute under sections 17(1)(b) and (d) of the Act.

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David H. Flaherty
Commissioner

July 21, 1999