



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

Order F07-14

MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL

Celia Francis, Senior Adjudicator

July 10, 2007

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Summary: Campbell River Indian Band requested records related to its proposed destination casino project. Ministry disclosed some records and withheld information and records under ss. 12, 13, 14, 17, 21 and 22. Ministry found to have properly withheld information under ss. 13(1) and 22(1) and some information it withheld under s. 14. Ministry ordered to disclose some information it withheld under ss. 14 and 21(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 14, 21(1), 22(1) and 22(3)(f).

Authorities Considered: B.C.: Order F07-11, [2007] B.C.I.P.C.D. No. 16; Order F07-12, [2007] B.C.I.P.C.D. No. 17; Order F07-13, [2007] B.C.I.P.C.D. No. 18; Order 04-32, [2004] B.C.I.P.C.D. No. 33; Order F06-03, [2006] B.C.I.P.C.D. No. 8; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 00-06, [2000] B.C.I.P.C.D. No. 6; Order F06-16, [2006] B.C.I.P.C.D. No. 23; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 00-10, [2000] B.C.I.P.C.D. No. 11; Order 00-22, [2000] B.C.I.P.C.D. No. 25; Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order 01-36, [2001] B.C.I.P.C.D. No. 37; Order 01-39, [2001] B.C.I.P.C.D. No. 40; Order 03-05, [2003] B.C.I.P.C.D. No. 5; Order 03-33, [2003] B.C.I.P.C.D. No. 33; Order F05-01, [2005] B.C.I.P.C.D. No. 1; Order F05-05, [2005] B.C.I.P.C.D. No. 5.

Cases Considered: *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665.

1.0 INTRODUCTION

[1] This order is a companion to three others—Orders F07-11,¹ F07-12² and F07-13³—involving the Campbell River Indian Band (“CRIB”) and three other public bodies, which I am issuing concurrently with this order. CRIB submitted the same request, for records related to its proposed destination casino project, to all four public bodies. CRIB’s full request appears in Order F07-11. That order also sets out relevant background information on CRIB’s casino project.

[2] The Ministry of Public Safety and Solicitor General (“PSSG”)⁴ processed CRIB’s request jointly with the Ministry of Attorney General (“AG”). PSSG provided CRIB with a partial response nine months after it received the request, at the beginning of September 2004, saying that it was withholding some information and records under ss. 13 and 14 of FIPPA. CRIB then requested a review by this Office of the decision to deny access.

[3] PSSG’s failure to respond to the rest of the request became the subject of an inquiry and in Order 04-32⁵ the Information and Privacy Commissioner ordered PSSG to provide a complete response by mid-November 2004. PSSG did so, telling CRIB that it was withholding information and records under ss. 12, 13, 14, 17, 21 and 22 of FIPPA. CRIB requested a review of this denial as well. Because the matter did not settle in mediation,⁶ a written inquiry took place under Part 5 of FIPPA. The Office invited and received representations from CRIB, PSSG and a third party, Gateway Casinos Inc.

2.0 ISSUE

[4] The notice for this inquiry said that the issues in this case were:

1. Whether the Ministry is required by ss. 12, 21 and 22 of the Act to refuse access to information.
2. Whether the Ministry is authorized by ss. 13, 14 and 17 of the Act to refuse access to information.

¹ [2007] B.C.I.P.C.D. No. 16.

² [2007] B.C.I.P.C.D. No. 17.

³ [2007] B.C.I.P.C.D. No. 18.

⁴ The information in this paragraph and the next comes from the Portfolio Officer’s fact report which accompanied the notice for this inquiry.

⁵ [2004] B.C.I.P.C.D. No. 33.

⁶ CRIB stated at para. 17 of its initial submission that, after this Office issued the notice of inquiry for this case, it received a shipment of records on June 1, 2005 that the Ministry had previously withheld in full. At para. 2 of its reply, CRIB said it had received a further package of records in the week of July 18, 2005 and asked why it had not received them in the first place.

[5] Although PSSG's decision letter said it was applying s. 12 to the requested records and the notice for this inquiry listed s. 12 as an issue in this inquiry, I saw no mention of s. 12 on the records nor in the accompanying table of disputed records. Its application is also not evident on the face of the records. I have therefore not considered s. 12(1) in this decision.

[6] I also do not need to consider s. 17(1) as PSSG applied it only to a portion of a letter of September 18, 2002 from PSSG to Gateway, at pp. 2-3. I note however that CRIB received a copy of this letter from BCLC.⁷

[7] Under s. 57(1) of the Act, the Ministry has the burden of proof regarding s. 13, 14 and 21 while, under s. 57(2), the applicant has the burden of proof regarding third-party personal information.

3.0 DISCUSSION

[8] **3.1 Background**—This case has considerable overlap with those in Orders F07-11, F07-12 and F07-13, involving AG and the Ministries of Finance and Agriculture and Lands—which now has responsibility for the records requested of Land and Water British Columbia Inc. ("LWBC")—which I am issuing concurrently with this decision. The applicant and request are the same in all four cases, as are most of the exceptions and related issues. In addition, many of the records are the same or overlap in the four inquiries. All four inquiries proceeded together on this basis and the same legal counsel represented the four public bodies.

[9] PSSG made a joint submission with AG and many of its arguments and evidence also overlap with those in the inquiries on the Ministries of Finance and Agriculture and Lands. To avoid repetition in this order, I have, as appropriate, applied my reasoning in those decisions to the evidence before me in this case. I have also considered the evidence and submissions before me in this inquiry in making my findings and orders here.

[10] **3.2 Search for Records**—CRIB complained in its initial submission that PSSG had failed to provide all responsive records, saying it had received from other public bodies copies of records which it should also have received from PSSG.⁸ PSSG objected to the applicant questioning the adequacy of its search for records, saying it was not listed as an issue in the notice for this inquiry.⁹

⁷ CRIB's legal counsel provided me with his client's copies of the records that the British Columbia Lottery Corporation disclosed to CRIB in an earlier request with the same wording. That matter became the subject of Order F06-03, [2006] B.C.I.P.C.D. No. 8.

⁸ Paras. 26-27, initial submission.

⁹ Reply submission.

[11] I agree with PSSG on this point and also observe that CRIB did not raise the adequacy of PSSG's search in its request for review. I therefore do not address the search issue in this decision.

[12] **3.3 Some Information Outside Scope of Request**—PSSG said that it had removed some information from the records in dispute as being outside the scope of the request,¹⁰ although it did not explain why it thought so. CRIB did not comment on this statement.

[13] If PSSG means that the information in question is not responsive to the request because it concerns other matters, with the exception of the information on p. 52,¹¹ I agree with PSSG. The information in question is clearly marked, e.g., "outside the scope of the request" or "o/s", and concerns topics other than CRIB's casino project. As for the "out of scope" information on p. 52, it appears to be responsive as far as its subject matter is concerned. However, it pre-dates the timeframes specified in the request and for this reason I consider it to be outside the scope of the request.

[14] **3.4 Inconsistencies in Application of Exceptions**—In reviewing the records in dispute in the four inquiries, I noted a number of inconsistencies in the four public bodies' severing of information and in their annotation of the records with applicable exceptions, both within their own records and in comparison with the other public bodies' records. There were also cases where the exceptions noted on the records did not match those on the accompanying severance tables.

[15] CRIB did not raise any objections to these inconsistencies. As it was not clear what positions the four public bodies were taking, however, I offered them the opportunity to reconsider their positions collectively, with a view to reconciling the inconsistencies. As a result, the four public bodies disclosed some more information and records and cleared up some, though not all, of the inconsistencies.

[16] **3.5 Advice or Recommendations**—The relevant portions of s. 13(1) read as follows:

Policy advice or recommendations

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.

(2) The head of a public body must not refuse to disclose under subsection (1) ...

¹⁰ Para. 4.15, initial submission.

¹¹ Part of a "Continuation Log", marked "GAITS File: 00710 Page: 8".

(n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

(3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

[17] Numerous orders have considered the interpretation of s. 13(1). See, for example, Order 02-38.¹² I will apply here, without repeating them, the principles for interpreting s. 13(1) set out in those orders.

[18] CRIB suggested, without elaborating, that s. 13(2)(n) applies to the information which PSSG withheld under s. 13(1)¹³ and generally rejected PSSG's arguments on that exception, suggesting that they "would allow the withholding of most documents considered at the ministerial level".¹⁴

[19] PSSG provided much the same discussion and interpretation of s. 13(1) in past orders and case law as LWBC did in the related inquiry, saying that s. 13(1) applies to communications between staff of PSSG and other public bodies involved in the issues related to CRIB's casino project. PSSG also said that s. 13(2)(n) does not apply to the information in question and that CRIB has also not stated what legal rights of CRIB could be at issue in this case.¹⁵

[20] PSSG applied s. 13(1) only to a few lines (principally recommended changes to a letter) in emails at pp. 14, 16-20¹⁶ and 43. The withheld information falls under s. 13(1) as previous orders have interpreted this exception and I find that s. 13(1) applies to this information. PSSG may therefore withhold this information. I am also satisfied s. 13(2), including s. 13(2)(n), and s. 13(3) do not apply.

[21] **3.6 Solicitor-Client Privilege**—Section 14 reads as follows:

Legal advice

14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[22] The Information and Privacy Commissioner has considered the application of s. 14 in numerous orders and the principles for its application are well

¹² [2002] B.C.I.P.C.D. No. 38.

¹³ Paras. 29-31, initial submission. The Ministry denied this in its reply.

¹⁴ Paras. 32 & 34, initial submission; paras. 8-10, reply submission.

¹⁵ Paras. 4.36-4.61, initial submission; p. 1, reply submission.

¹⁶ These pages are mostly duplicates.

established. See, for example, Order 02-01,¹⁷ 03-02,¹⁸ 03-32,¹⁹ 03-22,²⁰ 00-06²¹ and F06-16.²² I apply those principles here without repeating them.

[23] In the related AG order, I set out PSSG's and AG's joint submission on s. 14,²³ which overlaps with LWBC's in the related case. PSSG also said that litigation was in reasonable prospect because of communications from CRIB's legal counsel.²⁴ Derek Sturko, Assistant Deputy Minister and General Manager, Gaming Policy Enforcement Branch ("GPEB"), PSSG, said that communications involving Gordon McPherson, acting as a solicitor to GPEB from mid-June 2003 to mid-June 2004, related to this possible litigation. Mr Sturko did not point to specific records in this regard.²⁵ PSSG did not however seek to rely on litigation privilege but stated that the records are protected by legal professional privilege.²⁶ PSSG added that some records are confidential communications between itself, LWBC and AG, the sharing of which did not constitute a waiver of privilege, as the Province of British Columbia is the sole shareholder of LWBC.²⁷

[24] PSSG did not refer to specific records on this last point, although it appears from the Proverbs affidavit that it is referring to communications between LWBC and its external legal counsel, Cook Roberts, among PSSG's records here. PSSG also did not elaborate on or provide any authority for the proposition that sharing privileged material between the Province and a separate legal entity does not constitute waiver of privilege, solely on the basis of the Province's ownership of that legal entity. Although I am sceptical of this argument, I do not need to deal with it here, as the only LWBC/Cook Roberts communication I could find among PSSG's records was at pp. 66-68, which AG disclosed as its record 54, as I note below and in the related AG order.

[25] As for records that PSSG shared with the British Columbia Lottery Corporation ("BCLC"), PSSG said that, as the province's agent, BCLC has responsibility for conducting and managing gaming in this province. As the Crown's agent, BCLC would have conducted and managed the resulting casino²⁸

¹⁷ [2002] B.C.I.P.C.D. No. 1.

¹⁸ [2003] B.C.I.P.C.D. No. 2.

¹⁹ [2003] B.C.I.P.C.D. No. 32.

²⁰ [2003] B.C.I.P.C.D. No. 22.

²¹ [2000] B.C.I.P.C.D. No. 6.

²² [2006] B.C.I.P.C.D. No. 23.

²³ Paras. 4.62-4.94; paras. 4-10, Proverbs affidavit; paras. 3-12, Sturko affidavit.

²⁴ The Ministry did not describe or provide copies of such communications.

²⁵ Para. 4.77, initial submission; para. 11, Sturko affidavit; McPherson affidavit.

²⁶ Para. 4.78, initial submission.

²⁷ Para. 4.84, initial submission; paras. 3-12, Sturko affidavit; para. 7, Proverbs affidavit, LWBC's initial submission; paras. 7-12, Hallam affidavit, LWBC's initial submission.

²⁸ PSSG referred here to the *Gaming Control Act* which it said came into effect in 2002 while the Campbell River Destination Casino Request for Proposal was issued in 1997. It said that a third-party service provider would provide the operational services and receive a percentage of the net casino profits, based on the various economic development aspects of the proposal,

if CRIB's casino had been approved. Gordon McPherson, as legal counsel for GPEB, communicated frequently with BCLC representatives so that he could advise GPEB about the CRIB destination casino proposal, said PSSG, and those communications were in confidence and not disclosed to any third party. Given the common interest between PSSG, the Province and BCLC in gaming matters and dealings over the casino proposal,²⁹ PSSG argued that sharing privileged records between BCLC and PSSG did not waive privilege over those records.³⁰

[26] PSSG did not elaborate on or provide any authority for this proposition either. However, I accept that there was a common interest between BCLC and PSSG in this matter and that the sharing of privileged information between them on this basis did not constitute a waiver of privilege. See Order 03-02 and Order F06-16 for similar findings.

[27] CRIB acknowledged that s. 14 incorporates the common law of solicitor-client privilege. It pointed out that privilege does not apply to all communications between solicitor and client but only to confidential communications between solicitor and client where legal advice is sought and where no waiver has occurred.³¹ It argued that PSSG applied s. 14 incorrectly in several cases, for example, attachments and indirect communications, and expressed concern about the number of lawyers with whom PSSG had communicated for the purposes of legal advice.³²

[28] The records and information to which PSSG applied s. 14 consist of confidential communications (emails, faxes and letters) of the type PSSG described, as set out above. There is considerable duplication among the records and information. I do not need to consider PSSG's application of s. 14 to records where other public bodies disclosed in related cases, for example:

- Pages 66-68; AG disclosed them as part of record 54³³
- Pages 69, 72-75, 117-119, 121, 240, 304-307, 394; BCLC disclosed them in full or severed form as pp. 2-142, 2-162, 2-380, 2-398 to 2-399, 4-126 to 4-130, 4-146 and I confirmed its decision in Order F06-03³⁴

approval of which was determined jointly by BCLC and the various levels of government involved in the project.

²⁹ This included the underlying financial arrangements and in making sure it met BCLC's requirements.

³⁰ Paras. 4.85-4.94, initial submission; paras. 3-12, Sturko affidavit.

³¹ CRIB also discussed other situations in which solicitor-client privilege applies such as with litigation.

³² Paras. 32-37, initial submission; paras. 11-18, reply submission.

³³ See the related AG order for further detail.

³⁴ In my letter of August 9, 2006 to legal counsel for the four public bodies in these inquiries, which I copied to CRIB's legal counsel, I drew his attention to the overlap between specific

- The bottom of p. 388 and all of pp. 389-391; these contain duplicates of an email from Katherine Dann, an AG lawyer acting as solicitor to GPEB, to Robert Banno, CRIB's legal counsel, and of related emails between PSSG and BCLC staff flowing from the Banno/Dann email, which BCLC disclosed to CRIB³⁵

[29] I have carefully reviewed the remaining records and, with a few minor exceptions, I am satisfied that disclosure of these records and information would reveal information subject to solicitor-client privilege. I therefore find that s. 14 applies to them. The exceptions are:

- Page 350, a fax cover sheet from Robert Banno, CRIB's legal counsel, to GPEB and CRIB, the attachments to which³⁶ PSSG disclosed in September 2006
- Pages 372-377; from the fax information at the bottom of these pages, it is evident that they follow pp. 351-377, the attachments to Robert Banno's fax cover sheet at p. 350

[30] **3.7 Harm to Third-Party Business Interests**—PSSG applied s. 21(1) to portions of pp. 1-9, letters between GPEB and Gateway. Gateway correctly noted that, in the related case that led to Order F06-03, BCLC disclosed pp. 4-5, a letter of September 20, 2002 from Gateway to GPEB.³⁷ In the same order, I found that the attachments to this letter³⁸ were outside the scope of CRIB's request. I therefore need not consider pp. 4-9 here. I also need not deal with pp. 2-3 because, as mentioned above in the "Issues" section, BCLC disclosed them to CRIB. This leaves only p. 1, a letter of September 6, 2002 from Gateway to GPEB.

[31] Many orders have addressed s. 21 and the principles for its application are well-established.³⁹ I have applied those principles here without repeating them. Section 21 contains a three-part test, all three parts of which must be satisfied before a public body is required by s. 21 to withhold information. The relevant parts of s. 21 read as follows:

records and information in dispute in this case and those disclosed in the matter that led to Order F06-03.

³⁵ See CRIB's pp. 101701-100703.

³⁶ See pp. 351-371.

³⁷ Para. 12, initial submission.

³⁸ Pages 6-9 here and pp. 3-46 to 3-49 in the BCLC case.

³⁹ See, for example, Order 00-10, [2000] B.C.I.P.C.D. No. 11, Order 00-22, [2000] B.C.I.P.C.D. No. 25, Order 01-20, [2001] B.C.I.P.C.D. No. 21, Order 01-36, [2001] B.C.I.P.C.D. No. 37, Order 01-39, [2001] B.C.I.P.C.D. No. 40, Order 03-05, [2003] B.C.I.P.C.D. No. 5, Order 03-33, [2003] B.C.I.P.C.D. No. 33, Order F05-01, [2005] B.C.I.P.C.D. No. 1, and Order F05-05, [2005] B.C.I.P.C.D. No. 5.

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 ...
 - (ii) commercial, financial ... information of or about 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 ...
 - (iii) result in undue financial loss or gain to any person or organization,

[32] PSSG argued that the information it withheld under s. 21(1) is the commercial or financial information, or both, of Gateway Casinos Inc. and said that it relies on Gateway's submissions and evidence in this matter.⁴⁰

[33] CRIB said that, while it is not necessary for a public body to prove that harm will flow from disclosure, speculation will not suffice and PSSG must show a rational connection between the disclosure and the expected harm.⁴¹

[34] Gateway said that it and CRIB "are competitors in a small, closely regulated market", that CRIB's "commercial interests are engaged" in this request and that the "viability" of Gateway's involvement with CRIB's casino project "ultimately depended on the financial arrangements between them. Gateway said that the letter concerns discussions between Gateway and PSSG and that the severed information is its commercial and financial information which it provided, implicitly in confidence, to PSSG to assist it in carrying out its regulatory duties. Gateway argued that its disclosure might result in harm to Gateway's "competitive position in the gaming industry", resulting in undue loss to Gateway and undue gain to CRIB or other casino operators, and would enable Gateway's competitors "to identify, assess, and evaluate the business strategies" of Gateway "in future negotiations with regulators such as [PSSG]".⁴² Gateway did not explain how any of these harms could flow from disclosure.

[35] I accept that the withheld information on p. 1 is Gateway's financial information and that it supplied this information to PSSG. However, while Gateway asserted that it supplied this information implicitly in confidence, it provided no support for this, including in the form of affidavit evidence.

⁴⁰ Paras. 4.112-4.118, initial submission.

⁴¹ Paras. 41-42, initial submission.

⁴² Paras. 7-11, initial submission.

The disputed record itself does not state that it was submitted in confidence and there is no other objective basis for determining that the letter was supplied in confidence. I therefore find that the first part of the s. 21(1) test is met but not the second part.

[36] In any event, even if the second part of the test had been met, I am not persuaded that disclosure of the rest of p. 1 would have the dire effects that Gateway argues. The withheld information, a few lines, consists of Gateway's routine update on a certain activity and a proposal for proceeding with that activity. I fail to see how disclosure of this information, which is similar in character to information CRIB has received in the other Gateway letters, would result in any of the harms that Gateway argues would follow. I find that ss. 21(1)(c)(i) and (iii) do not apply to it.

[37] To summarize, for the reasons discussed above, I find that s. 21(1) does not apply to the withheld information on p. 1.

[38] **3.8 Personal Privacy**—The relevant parts of s. 22 read as follows:

Disclosure harmful to personal privacy

- 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
- (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether ...
- (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
- (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if ...
- (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, ...

[39] Numerous orders have considered the principles for applying s. 22. See, for example, Order 01-53.⁴³ I will not repeat those principles but have applied them in this decision.

⁴³ [2001] B.C.I.P.C.D. No. 56.

[40] CRIB generally questioned PSSG's application of s. 22 in this case and suggested that disclosure of the information in question would not be an unreasonable invasion of third-party privacy.⁴⁴

[41] PSSG described the information it withheld under s. 22 as information about third-party shareholders, third-party employment and credit history information and information about a third party's personal finances and assets. In its view, s. 22(3)(f) of FIPPA applies to this information and s. 22(2)(a) does not.⁴⁵

[42] PSSG has accurately described the personal information in question, which it severed from a "Continuation Log" about the casino project and a "Report of Findings". The third parties in question appear to have provided their personal financial information as part of PSSG's consideration of the casino project. I find that the information falls within s. 22(3)(f). Its disclosure is therefore presumed to be an unreasonable invasion of third-party privacy.

[43] Although CRIB has the burden of proof regarding third-party personal information, it provided no argument on this issue other than the brief statement I set out above.

[44] I agree with PSSG that s. 22(2)(a) has no relevance here. Neither party has raised any other relevant circumstances and I see no others on the material before me that apply here. CRIB has not rebutted the presumption regarding this information and I find that s. 22(1) requires PSSG to withhold it.

4.0 CONCLUSION

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

1. I confirm that PSSG is authorized to refuse CRIB access to the information it withheld under s. 13(1).
2. Subject to para. 3 below, I confirm that PSSG is authorized to refuse access to the information it withheld under s. 14.
3. I require PSSG to give CRIB access to the information it withheld under s. 14 in pp. 350 and 372-377.
4. I require PSSG to give CRIB access to the information it withheld under s. 21(1) on p. 1.

⁴⁴ Paras. 43-45, initial submission.

⁴⁵ Paras. 4.119-4.125. The AG & PSSG joint submission also listed the "home e-mail address of an employee" as falling under s. 22 but this must refer to the records in dispute in the related AG inquiry as PSSG's records did not show that it withheld an email address.

5. I require PSSG to refuse CRIB access to the information withheld under s. 22(1).

July 10, 2007

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

OIPC Files: F04-22713 & F04-23408