Order F07-06

BRITISH COLUMBIA LOTTERY CORPORATION

Celia Francis, Adjudicator

March 22, 2007

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Summary: Applicant sought access to certain appropriate response training program materials from the BC Lottery Corporation. The public body refused to release any of the information under s. 17. Neither ss. 17(1) or (2) applies to the information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 17(1)(b) & (d), 17(2).

Authorities Considered: B.C.: Order 02-50, [2002] B.C.I.P.C.D. No. 51; Order 00-36, [2000] B.C.I.P.C.D. No. 39; Order 00-37, [2000] B.C.I.P.C.D. No. 40; Order 00-39, [2000] B.C.I.P.C.D. No. 42; Order 01-36, [2001] B.C.I.P.C.D. No. 37; Order F05-09, [2005] B.C.I.P.C.D. No. 10; Order No. 57-1995, [1995] B.C.I.P.C.D. No. 30; Order 00-41, [2000] B.C.I.P.C.D. No. 44; Order 03-03, [2003] B.C.I.P.C.D. No. 3. **Ont.:** Order PO-2308, [2004] O.I.P.C. No. 180; Interim Order P-1281, [1996] O.I.P.C. No. 373; Order PO-2526, [2006] O.I.P.C. No. 199; Order PO-2468, [2006] O.I.P.C. No. 71; Order PO-2433, [2005], O.I.P.C. No. 196; Order PO-2383, [2005] O.I.P.C. No. 48; Order PO-1972, [2001] O.I.P.C. No. 242; Order PO-2189, [2003] O.I.P.C. No. 211; Order PO-2306, [2004] O.I.P.C. No. 178; Order P-811, [1994] O.I.P.C. No. 397; Order PO-2361, [2005] O.I.P.C. No. 5.

Cases Considered: *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.); *Canadian Broadcasting Corp. v. Northwest Territories (Commissioner)*, [1999] N.W.T.J. No. 117 (S.C.).

1.0 INTRODUCTION

[1] This decision concerns a request by the applicant to the British Columbia Lottery Corporation ("BCLC") for access to information relating to BCLC's

Appropriate Response Training ("ART") program course materials.[1] The applicant specifically asked for "information for all 3 levels of training of the 1) Managers 1 day seminars 2) Supervisors ½ day training and the front line workers 1 hour, self-directed online sessions".

[2] Initially, BCLC said that the records falling within the scope of the access request consisted of: (1) two Facilitator's Guides (Levels 2 and 3); (2) the ART Manual; and (3) a CD-ROM Instruction Disk. BCLC refused to provide the applicant with access to any of these records on the basis that they were excepted from disclosure under s. 17 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). This triggered the applicant's request for a review.

[3] BCLC's subsequent review of the identified records during the mediation process revealed that not all of the listed records were responsive to the applicant's access request. BCLC concluded that only part of the ART Manual (the "Participant's Handbook") contained information that responded to the access request (pp. 140-226 and pp. 247-268) and that neither the two Facilitator's Guides nor the CD ROM Instruction Disk were within the scope of the request. Accordingly, during mediation, the focus was on whether some or all of the responsive pages of the Participant's Handbook were properly withheld from the applicant.

[4] Mediation was not successful and a written inquiry took place under Part 5 of FIPPA. During that inquiry, the Office received initial and reply submissions from the applicant and from BCLC. Sometime after, BCLC gratuitously sent "Further Reply Submissions" to the Office and the applicant objected to having them considered. As BCLC's covering letter acknowledged that its further reply was largely a response to statements made by the applicant that were not relevant to the issues, I did not see any need to consider either it or, as a consequence, the applicant's procedural objections.

[5] The records in dispute consist of pp. 140-226 and pp. 247-268 of the Participant's Handbook ("disputed record").

2.0 ISSUE

[6] The only issue is whether BCLC is authorized to refuse access to the disputed record under ss. 17(1)(b), (d) and 17(2) of FIPPA. Section 57(1) establishes that the burden of proof lies with BCLC to establish the applicant has no right to access all or part of this record.

[1] This program is described below.

3.0 DISCUSSION

[7] **3.1 Description of the BCLC, the Gaming Policy and Enforcement Branch and the ART program**—BCLC is a Crown corporation which, under authority of both the *Gaming Control Act* and the *Criminal Code*, conducts, manages and operates casino gaming in the Province. In accordance with its statutory mandate, BCLC contracts with private sector organizations ("gaming service providers") to provide certain of its casino gaming services at site-specific casino facilities. Both BCLC and the gaming service providers are subject to the regulatory oversight of the Gaming Policy and Enforcement Branch ("GPEB") of the Ministry of Public Safety and Solicitor General.[2]

[8] In accordance with its wide regulatory authority over the gaming industry, GPEB has established Responsible Gambling Standards. These standards apply to all of the casinos, commercial bingo halls, community gaming centres and designated lottery distribution centres that BCLC operates, manages or oversees, including those casinos operated by gaming services providers. Among other things, the Responsible Gambling Standards require the gaming industry to adhere to appropriate response training requirements. GPEB monitors compliance with the appropriate response requirements of the Responsible Gaming Standards. In response to these requirements, BCLC developed the ART program for gaming industry employees and representatives.[3] The applicant provided a copy of GPEB's 2004/05 Problem Gambling Program Annual Report, which says the following, at p. 4, under the topic of Problem Gambling Programs:

> **Appropriate Response Training**
>
> The Appropriate Response Training program was developed in conjunction with the BC Lottery Corporation. Appropriate Response Training enhances the knowledge, awareness, attitudes and skills of gaming industry personnel so they can respond appropriately to patrons who may be experiencing distress in a gaming facility. Training includes identifying problem gambling behaviours staff should look for and how to handle different situations. The training also provides workers with a consistent understanding of the roles and responsibilities of gaming personnel across the province.

[9] In support of its position,[4] BCLC submitted an affidavit sworn by Kevin Gass ("Gass Affidavit"), which describes BCLC's ART program objectives as these: (1) increase employee comfort level in their ability to provide appropriate customer assistance; (2) create consistent and uniform training across and within

[2] Paras. 3.1-3.3, initial submission.
[3] Paras. 3.4-3.13, initial submission.
[4] See paras. 3.17-3.21, initial submission.

each sector; and (3) to produce a curriculum that trainees will use.[5] The Gass Affidavit further explains:

> 31. The Appropriate Response Training Program for casinos was created to develop and enhance the knowledge, awareness, attitudes and skills of gaming personnel in order to respond appropriately to customers who may be in distress within casinos in British Columbia. Trainees are provided with a Participant Handbook, a draft copy of which forms the subject matter of this Inquiry.
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> 32. The Appropriate Response Training Program for casinos covers the behaviors that staff should look for, together with protocol and instructions on how to respond to their observations and concerns in different situations.
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> 33. The Appropriate Response Training Program for casinos also provides gaming personnel with a better understanding of how to respond appropriately to customers who may be displaying signs of distress, and increase gaming personnel's level of skill and confidence in handling a variety of situations that may be difficult.

[10] The ART program (Level 3) for casinos is a customized one-day program. BCLC first delivered it, with the assistance of GPEB's Problem Gambling Program Specialists, to BCLC's casino managers and gaming service providers in April 2004. As part of the training, and as noted in the Gass Affidavit, participants received what BCLC describes as a "revised and final version of the draft Participant's Handbook", which is the disputed record.[6] BCLC has withheld all of the responsive information in this record, maintaining that it is authorized to do so under either or both of ss. 17(1) and (2) of FIPPA.

[11] **3.2 Description of the Disputed Record**—My review of the disputed record reveals that it consists of a cover page, a covering letter addressed to course participants, an index, a foreword, a table of contents, various chapters and some attachments. It includes information identifying what problematic customer behaviours staff should look for, as well as information about how to respond to various situations. The attachments include copies of publicly available forms and pamphlets, as well as a GPEB press release. There are references scattered throughout the record to public source materials, including website references. It contains descriptions of certain programs (*e.g.*, BCLC's Voluntary Self-Exclusion Program). As noted, BCLC has withheld all of this information under s. 17 of FIPPA on the basis that its disclosure could reasonably be expected to harm BCLC's financial or economic interests.

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[5] Para. 30, Gass affidavit.
[6] Paras. 36-37, Gass affidavit.

[12] **3.3 Financial or Economic Harm to BCLC**—BCLC relies on both ss. 17(1) and (2) to justify its decision to refuse to disclose the disputed record to the applicant. Under s. 17(1), BCLC relies specifically on ss. 17(1)(b) and (d), as well as s. 17(1) generally. The parts of s. 17 on which BCLC relies read as follows:

> **Disclosure harmful to the financial or economic interests of a public body**
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> 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: …
>
> (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia 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 an undue financial loss or gain to a third party; ….
>
> (2) The head of a public body may refuse to disclose under subsection (1) research information if the disclosure could reasonably be expected to deprive the researcher of priority of publication.

[13] Commissioner Loukidelis reviewed the application of s. 17(1) at length in Order 02-50.[7] He found there that, to engage s. 17(1), the evidence must establish a confident, objective basis for concluding disclosure of the disputed information could reasonably be expected to harm a public body's financial or economic interests. General, speculative or subjective evidence is inadequate to establish such harm. A clear and direct connection between the disclosure of the withheld information and the harm alleged must be established. The evidence must be detailed and convincing enough to establish specific circumstances for the contemplated harm that could reasonably be expected to result from disclosure of the information.

[14] Ontario takes a similar approach to the burden of proof for its similar harms-based exception. It is well established in that jurisdiction that public bodies seeking to rely on that exception must provide "detailed and convincing" evidence of a reasonable expectation of harm—evidence tantamount to speculation of possible harm is insufficient: *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)*.[8]

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[7] [2002] B.C.I.P.C.D. No. 51, at paras. 111-112 and 134-137.
[8] (1998), 41 O.R. (3d) 464 (CA).

[15] The approach under s. 17(2) is much the same. Order 00-36[9] establishes that the quality and cogency of the evidence the public body provides to support non-disclosure under s. 17(2) must be commensurate with a reasonable person's expectation that disclosure of the requested information could deprive a researcher of priority of publication. As is the case with other harms-based exceptions, evidence based on speculation is not acceptable.

[16] **3.4 Section 17(1)(b)**—BCLC claims the disputed record is a commercial or technical product which is wholly owned by and generates revenue for BCLC and therefore comes within the s. 17(1)(b) exception.[10]

[17] Previous orders establish that s. 17(1)(b) is only engaged where three criteria are established.[11] First, the information must fall into the category of "financial, commercial, scientific or technical" information. Second, the information must be owned by ("belong to") the public body. Third, the information must either have or be likely to have monetary value.

[18] I am satisfied that the disputed information "belongs to" BCLC for s. 17(1)(b) purposes. The words "belongs to" in this context equate to ownership—as distinct, for example, from a mere right to possess, use or dispose of information—such that the public body has "some proprietary interest in it either in a traditional intellectual property sense—such as copyright, trade mark, patent or design—or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party".[12] BCLC has provided some affidavit evidence establishing that it is the owner of the copyright in the disputed information.[13] BCLC therefore has a proprietary interest in the material in an intellectual property sense—*i.e.*, the sense of BCLC having copyright over the material—thus satisfying the ownership criterion in s. 17(1)(b).[14]

[19] For reasons that follow, I am not, however, satisfied that the disputed information is "commercial" or "technical" information. BCLC says the disputed information consists of "commercial" or "technical" information because it "contains the information, processes and techniques useful in the specialized

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[9] [2000] B.C.I.P.C.D. No. 39.
[10] Para. 3.50, initial submission.
[11] See, for example, Order 00-37, [2000] B.C.I.P.C.D. No. 40, and Order 00-39, [2000] B.C.I.P.C.D. No. 42.
[12] Ontario Order PO-2308, [2004] O.I.P.C. No. 180, at para. 38. I note here that ss. 27(2)(i) and (j) of the federal *Copyright Act* make it clear that the disclosure of copyright under FIPPA does not give rise to any copyright infringement. Further, the significance of copyright generally in an information access context has been more fully considered in such Ontario Orders as Interim Order P-1281.
[13] Para. 39, Gass affidavit.
[14] Interim Order P-1281, [1996] O.I.P.C. No. 373, at paras. 68-117.

field of appropriate response training for gaming industry employees".[15] It is "commercial information", BCLC says, because it is a commercial product from which BCLC derives revenue and thus can be said to concern the sale, purchase or exchange of goods or services. BCLC says it is "technical" because it relates to a particular subject, craft or profession, or its technique:

> 3.42 … the Participant's Handbook was created as part of BCLC's Appropriate Response Training Program, which is designed to develop and enhance the knowledge, awareness, attitudes, and skills of gaming personnel in order to respond appropriately to customers who may be in distress within casinos in British Columbia. The Participant's Handbook, which is distributed to trainees, contains the information, processes and techniques useful in the specialized field of appropriate response training for gaming industry employees.

Is it commercial information?

[20] FIPPA does not define what "commercial information" is. In Order 01-36,[16] the Commissioner said that "commercial information" relates to a commercial enterprise but need not be proprietary in nature or have an independent market or monetary value. Order F05-09[17] described the types of information that can be considered "commercial", in the context of third-party commercial information under another harms-based exception, s. 21. In that decision, I noted that previous orders have found that such information relates to commerce or the buying and selling of goods and services, including information about: offers of products and services the entity proposes to sell or perform; the entity's experiences in commercial activities where this information has commercial value; terms and conditions for providing services and products; lists of suppliers or subcontractors compiled for use in the entity's commercial activities or enterprises; methods an entity proposes to use to supply goods and services; and the number of hours an entity proposes to take to complete contracted work or tasks.

[21] Similarly, in Ontario, "commercial information" has consistently been interpreted to mean "information that relates solely to the buying, selling or exchange of merchandise or services".[18] In Interim Order P-1281,[19] Assistant Commissioner Mitchinson explained:

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[15] Para. 3.33, initial submission.
[16] [2001] B.C.I.P.C.D. No. 37.
[17] [2005] B.C.I.P.C.D. No. 10, at para. 9.
[18] PO-2308, at para. 30.
[19] In that particular case, the exemption provided for in s. 18(1)(a) of the Ontario *Freedom of Information and Protection of Privacy Act* was in issue. This section provides that the head of a public body can refuse to disclose a record that contains "trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value".

48. The term "commercial information" was originally considered by former Commissioner Sidney B. Linden in Order 16, one of the first orders issued under the Act in 1988. In that order Commissioner Linden states:

> The Act does not define the term "commercial", and I have looked to other sources for guidance.
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> The seventh edition of the Concise Oxford Dictionary defines "commercial" as follows:
>
> > "Of, engage in, bearing on, commerce".
>
> "Commerce" is defined as follows:
>
> > "Exchange of merchandise or services … buying and selling".
>
> Black's Law Dictionary (fifth edition) defines "commercial" as:
>
> > "Relates to or is connected with trade and traffic or commerce in general; is occupied with business and commerce. Generic term for most all aspects of buying and selling."
>
> The records at issue contain no information concerning the buying or selling of goods and therefore, in my view, do not qualify as "commercial" information. While not an exhaustive list, the types of information that I believe would fall under the heading "commercial" include such things as price lists, lists of suppliers or customers, market research surveys, and other similar information relating to the commercial operation of a business.

The approach taken by former Commissioner Linden has been adopted in many subsequent orders, where commercial information has been defined as information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" has also been found to apply to both profit-making and non-profit organizations, and to have equal application to both large and small enterprises.

[22] Under this analysis, the information at issue should itself be associated with the buying, selling or exchange of merchandise or services carried on by the particular entity in order to qualify as "commercial information" for s. 17(1)(b) purposes. The fact that the information at issue may have some or potential commercial value is not the test for whether the information itself is "commercial".[20]

[23] It is helpful to consider the types of information that have been found to constitute "commercial information" under this type of harms-based exception. Some examples are: information that relates exclusively to various business

[20] Interim Order P-1281.

arrangements the Ontario Clean Water Agency and its clients entered into for the purchase and sale of water and wastewater services, primarily involving municipal corporations;[21] a site-holder agreement between the Ontario Lottery Gaming Corporation and a named racetrack;[22] operational reports of the Ontario Lottery Gaming Corporation containing financial data and information;[23] and evaluation criteria used to assess proposals submitted by private sector entities for health care funding.[24]

[24] Having reviewed the disputed record, I find it does not contain information *concerning* the buying, selling or exchange of merchandise or services carried on by BCLC. While it may have commercial value (in the sense that participants are provided with copies for a fee), this alone is not enough to give the information itself a commercial character of the type contemplated by s. 17(1)(b). I would add that the accepted definitions of commercial information would also not apply because the disputed information does not relate *solely* to the buying, selling or exchange of merchandise or services. Rather, the disputed information was generated in response to a regulatory requirement that BCLC provide ART training to its employees. As Kevin Gass deposed[25] in his affidavit on behalf of BCLC, "BCLC designed, developed and produced the draft Participant's Handbook to be used with its Appropriate Response Training Program for casinos". In turn, the program itself was "designed, developed…implemented" and is maintained in accordance with BCLC's obligations under the Responsible Gaming Standards.

[25] My conclusion that the disputed information is not "commercial information" is reinforced by Ontario Order PO-2383.[26] In that case, the applicant had requested "all information and research [the Ontario Lottery and Gaming Corporation] has collected with regards to the self-exclusion program available at Ontario Gaming Venues for problem gamblers". Assistant Commissioner Beamish concluded that the type of information at issue was not properly characterized as commercial:

> 38 … While it can be said that casinos are involved in a commercial activity, the information to which the section 17 exemption has been applied [by the Ontario Lottery and Gaming Corporation] relates to programs designed to address problem gambling. The Section 17 exemption has been applied, for example, to the two paragraph description of the regulatory activities of the Alcohol and Gaming Commission of Ontario … These two paragraphs contain no information of a commercial nature.

[21] Order PO-2308.
[22] Order PO-2526, [2006] O.I.P.C. No. 199.
[23] Order PO-2468, [2006] O.I.P.C. No. 71.
[24] Order PO-2433, [2005] O.I.P.C. No. 196.
[25] At paras. 35 and 29.
[26] [2005] O.I.P.C. No. 48.

> Likewise, the references to OLGC … deal with problem gambling programs, including the self-exclusion program. This is clearly not a commercial activity, although it is tangentially related to the commercial activity of gaming. I have therefore concluded that the records do not reveal information that is commercial information, nor does it reveal information that is a trade secret or scientific, technical, financial or labour relations information ….

Is it technical information?

[26] I will now turn to the question of whether the disputed information can be considered "technical information", a term that FIPPA does not define. Commissioner Flaherty provides helpful comments on the meaning of this term in Order No. 57-1995,[27] in the context of s. 21(1)(a)(ii):

> In my judgment, the intent of the reference to "scientific" or "technical" information in this section is to protect internal secrets of a company. I note that the Information and Privacy Branch's *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual, C.4.12, p. 12, defines "scientific information" as relating to "exhibiting the principles or methods of science." The examples used are a report on the methodology for testing drugs and a prototype aircraft. The Manual defines "technical information" as "information relating to a particular subject, craft or profession or its technique." The examples given are a system design specification and a plan for a solar heating installation. Ontario Order P-584 supports my interpretation of "technical information":
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> > The information contained in the record is the result of a technical study of the subject properties undertaken by a firm of consulting engineers who are experts in the field of environmental testing and analysis. The record details a number of analytical tests undertaken at the subject lands and states the conclusions of its authors as to certain environmental issues.
> >
> > I am satisfied that the first part of the section 17(1) test has been met as the disclosure of the record would reveal technical information.

[27] Another helpful interpretation of "technical information" in the context of this type of harms-based exception is in Ontario Order PO-2010:[28]

> Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the

[27] [1995] B.C.I.P.C.D. No. 30, at p. 5-6.
[28] Page 3.

> construction, operation or maintenance of a structure, process, equipment or thing. …

[28] Numerous other orders have relied on and applied this definition. Examples of its application include situations where the information consists of: techniques the logging industry employs for the transportation of felled timber to its eventual destination;[29] instructor overheads used in a Breath Alcohol Training Course dealing with such topics as the theory, use, operation, protocols and associated scientific and legal aspects of certain specified breathalyzer instruments;[30] and design software a public body develops to structure a database, as well as any "middleware" necessary to run the various search and query functions built into the database design.[31]

[29] The evidence that BCLC provided in support of its reliance on the "technical" nature of the information is scanty to say the least. There is a bald assertion in the Gass Affidavit[32] that the disputed record "contains the information, processes and techniques useful in the specialized field of responsible gambling training". There is no evidence to support the idea that the responsible gambling training is an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts or their techniques. Nor is there evidence to suggest that the disputed record was prepared by a professional in a recognized specialty. I find that the information at issue is not technical information within the meaning of s. 17.

Does the information have monetary value?

[30] My finding that the disputed information is neither commercial nor technical information is sufficient to dispose of BCLC's arguments in support of s. 17(1)(b). Even so, I will add that I have some doubt that the evidence is sufficient to establish that the disputed information has "monetary value", potential or otherwise, in the sense contemplated by s. 17(1)(b). The points BCLC advances in support of the information having monetary value can be summarized as these:

- The disputed information was used to develop BCLC's Online Program Handbook
- BCLC plans to incorporate the disputed information into other ART programs developed for "the various levels of employment within each gaming sector or channel"
- BCLC's Online Program is offered to gaming industry employees for a fee

[29] Order PO-1972, [2001] O.I.P.C. No. 242, at para. 26
[30] Order PO-2189, [2003] O.I.P.C. No. 211, at paras. 1, 47.
[31] Interim Order P-1281, at para. 56.
[32] Para. 45.

- BCLC is currently negotiating with gaming authorities in other jurisdictions for the sale of the disputed record
- BCLC is negotiating with horse racing industry representatives in an effort to reach an arrangement whereby BCLC, as an independent consultant, would assist with the creation of ART programs for the horse racing industry; training materials would be based in large measure on the disputed information[33]

[31] The applicant points out that course participants have access to the disputed records. She also points out that BCLC's non-disclosure is based in part on its fear of losing anticipated or hoped-for revenue, as opposed to guaranteed revenue. The applicant speculates that BCLC's real fear is not losing revenue, but rather losing public acceptance if the material reveals that less than responsible practices are actually being taught to gaming employees. The applicant believes that the only reason the ART program information is being withheld is that BCLC "does not want to have the program that it paid for … be scrutinized by the public". Public scrutiny by public and health experts potentially threatens one of BCLC's stated corporate goals, namely that of being a respected organization that has a broad base of public support. The applicant also believes that should such scrutiny reveal that the ART program was deficient resulting, for example, in its redevelopment through the Ministry of Health, this "might benefit the most invisible population of society, the pathological gamblers".[34]

[32] The applicant argues further that there is evidence to suggest that the objectives of the Responsible Gaming Standards are not being met. In her view, neither BCLC nor GPEB has "proven that harm to gamblers is being minimized, that responsible gambling practices are being promoted, or that gaming environments are safe". The applicant refers to a number of examples of what she believes to be system deficiencies.[35]

[33] The applicant also makes the point that BCLC does not disclose what fee it charges for its online materials, nor does its 2004/2005 annual report indicate how much revenue the sales of its ART program materials generated. Although BCLC says it hopes to sell the materials to other jurisdictions, she says it does not specify which ones and provides no financial estimates of how many books it expects to sell or how much it hopes to profit from such sales. BCLC did not provide any information about what it cost to develop the program, she continued, and copyright protection should moreover be more than adequate to protect BCLC if the Participant's Handbook has value.[36]

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[33] Paras. 3.39-3.56, initial submission; see also Gass affidavit at para. 44.
[34] Page 3, initial submission; p. 1, reply submission.
[35] Page 8, reply submission.
[36] Pages 18-19, reply submission.

[34] Relying on a number of Ontario cases, the Commissioner has said that s. 17(1)(b) requires a public body to demonstrate that there is a "reasonable likelihood of independent monetary value in the information concerned".[37] In Order 00-39,[38] the Commissioner held that the concept of financial information of "monetary value entails the … element of objectively ascertainable, independent monetary value for the purposes of the s. 17 harm test". In that case, the Commissioner rejected the public body's arguments that the records in issue there (analyses, reports, studies and other documents relating to pay and/or benefits for persons employed in trades in the GVRD including comparisons between municipalities and people working for other employers) had monetary value:

> … In the absence of evidence on the point, I am unable to conclude … that information in the records has, or is likely to have independent monetary value by reason of any application by the GVRD of skill, judgement or other effort in compiling the records. This is especially true for information derived from public sources … The GVRD says in its initial submission that it charges fees to compile this information and also that it incurs costs to do so. There is no indication whether the amounts involved are significant. Even if significant service fees and costs were involved, this would not necessarily establish that the information has, or is reasonably likely to have, independent monetary value or that disclosure poses a reasonable expectation of harm to the GVRD.[39]

[35] As noted, BCLC provided some evidence supporting its legal and beneficial ownership of the copyright in and to the disputed information. I note that Ontario Order PO-2189 considered whether the fact that information has been copyrighted by the Crown or a Crown body removes its monetary value (or its potential value). In that case, the information at issue consisted of Breath Alcohol Training Program overheads and there was some evidence to suggest there was a market for such training materials. Assistant Commissioner Mitchison ultimately concluded as follows:

> 65 I also find the appellant's arguments on the impact of Crown copyright to be compelling. Copyright protection of the overhead materials would appear to place the Ministry in a position of legal control over their legitimate use by others. Accordingly, even if the materials become publicly available through the Act or otherwise, they can have no actual monetary value to others, absent agreement by the copyright holder.
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> 66 Therefore, given the wide availability of information concerning the breathalyzer and intoxilyzer technology contained in the overheads, I am not persuaded that they have inherent monetary or potential monetary

[37] Order 00-37, at para. 18.
[38] At p. 8.
[39] Order 00-39, at p. 8.

> value, despite the fact that they are protected by Crown copyright. In other words, the copyright obtained by the Ministry for these materials is evidence to support the second requirement of section 18(1)(a), but is not sufficient to establish the third requirement. Alternatively, even if it could be successfully argued that the overheads have intrinsic potential monetary value, I find that the copyright protection serves to eliminate any actual monetary or potential monetary value in the information unless the CFS decides to allow it.

[36] The circumstances in Ontario Order PO-2189 are distinguishable from those at hand as BCLC has provided some evidence establishing that it charges a fee for its on-line training materials and that it hopes to sell the materials to others in the gaming industry. However, I am not persuaded that the evidence demonstrates that the disputed information has an independent commercial value that can be financially exploited if it is made publicly available. As the applicant points out, BCLC does not disclose the amount of the fee it charges its on-line trainees, nor how much revenue has thus far been generated by the sale of that material. BCLC says it is negotiating with gaming authorities in other jurisdictions for the sale of the information, but it does not identify those authorities or what amounts of revenue are potentially involved. BCLC has not provided any evidence identifying who its competitors are or even what fee it has thus far charged course participants.

[37] In any event, while I have reservations about BCLC's assertions that the disputed information has monetary value, I find that s. 17(1)(b) does not apply because the information is neither commercial nor technical information within the meaning of that exception.

[38] **3.5 Section 17(1)(d)**—With respect to s. 17(1)(d), BCLC maintains that disclosure of the disputed records will result in an undue financial gain to a third party. In support of its position, BCLC points to the fact that the disputed record has not been released "to the public at large", but rather its access has been restricted to course participants and course trainers. In such circumstances, disclosure to the applicant would, according to BCLC, give the applicant an unfair competitive advantage. BCLC maintains that:

> 3.53 All gaming industry employees are required to take appropriate response training which meets GPEB standards. The Participant's Handbook complies with and meets the requirements of the Responsible Gambling Standards. However, it is not designated as "required materials" for all gaming industry employees, nor is it the only set of materials which will satisfy the Responsible Gaming Standards. Thus, BCLC competes with other private entities [which] provide appropriate response training.
>
> 3.54 If the Participant's Handbook were publicly disclosed, the Applicant and others would be able to use BCLC's work product in order to compete with BCLC in the provision of appropriate response training in and other sectors of the BC gaming industry, as well as in other gaming jurisdictions.

> 3.55 The Applicant and others would be able to compile their own appropriate response training programs based on the Participant's Handbook, without incurring any research costs, labour costs, creative costs and production costs incurred by BCLC.
>
> 3.56 As such, disclosure of the Participant's Handbook would enable the Applicant and others to gain an unfair competitive advantage over BCLC. In the specialized market of responsible gambling training, such unfair competitive advantage would, in all likelihood, result directly in the competitors receiving undue financial gain.

[39] Although it provided no evidence on this point, BCLC argues that its employees sign confidentiality agreements which prohibit unauthorized reproduction, distribution or use of its ART Program materials (including the Participant's Handbook). BCLC also argues that facilitators who teach the program sign contracts requiring them to treat these materials as confidential.[40]

[40] To the extent BCLC relies on s. 17(1)(d) as the basis for non-disclosure, the applicant says in her reply submission that BCLC's assertion it will suffer a financial loss (with a corresponding third-party gain) is "highly speculative" and that:

> … considering the background information on the policies of the BCLC it remains of high importance to the public to be able to scrutinize the material. What the BCLC considers appropriate responses for angry and suicidal gamblers may not match that of people in the field of health. Especially when [it is] known that highly disproportionate revenues come from problem gamblers.[41]
>
> … As for me having any interest in producing my own ART type of program that is simply ridiculous thinking on the part of the corporation ….[42]

Undue loss or gain

[41] Section 17(1)(d) requires BCLC to demonstrate harm in the sense of "undue financial loss or gain to a third party". The meaning of "undue financial loss or gain" has often been considered. As noted in Order 00-41,[43] "undue" is defined in the Oxford English Dictionary as "excessive or disproportionate". Its ordinary meaning includes something that is unwarranted, inappropriate or improper. In Order 03-03,[44] the Commissioner referred to the decision of

[40] Paras. 1.6-1.7, reply submission.
[41] Pages 17-18, reply submission.
[42] Page 19, reply submission.
[43] [2000] B.C.I.P.C.D. No. 44, at para. 36.
[44] [2003] B.C.I.P.C.D. No. 3, at para. 42.

Canadian Broadcasting Corp. v. Northwest Territories (Commissioner)[45] where Vertes J. said this:

> [62] … The burden on the government here is to establish that release of this information could reasonably be expected to result in undue financial loss or gain. Just establishing prejudice to one's competitive position does not necessarily lead to the conclusion that undue financial loss is probable …
>
> [63] It seems to me that the word "undue" is used … for the very purpose of distinguishing between mere financial losses or lower returns (caused say by not getting a contract or by having to renegotiate a rent not as high as the previous one) and financial losses that are unfair, improper, inappropriate, or excessive; in other words, "undue". I do not think this exemption is meant to shield third parties from lower profit margins. The word "undue" must have some meaning beyond that of mere loss of income in the sense of less profit.

[42] BCLC has not met its evidentiary burden of providing clear and cogent evidence of harm in the form of undue financial gain by a third party as a consequence of the disclosure of the disputed information. BCLC says it competes with other private entities that deliver appropriate response training, but it does not provide any evidence about the identity, number or location of such entities. There is no evidence to illustrate how competitive the market for this type of training is. Although BCLC maintains it incurred research, labour, creative and construction costs in developing the disputed record, it has provided no information about these costs. There is no evidence, for example, that BCLC retained outside consultants for this purpose.

[43] At a practical level, the material before me in this inquiry makes it clear that BCLC has been collaborating with the regulator, GPEB, in the development of the ART Program and delivery of the training materials. As my description of the disputed record makes clear, it contains a good deal of information from publicly-available sources, including copies of brochures and forms. Finally, as BCLC claims copyright in the disputed information, it is protected against any unauthorized use for commercial purposes by its private sector competitors, whoever they may be.

[44] Based on this, I find that the evidence does not establish that the release of the disputed record will cause undue financial loss to BCLC or cause undue financial gain to its unidentified competitors.

[45] Finally, to the extent that BCLC relies generally on s. 17(1), I am similarly not persuaded that BCLC can reasonably be expected to suffer the financial or economic harm it identifies, which harm to a large extent duplicates the harms it

[45] [1999] N.W.T.J. No. 117 (S.C.).

identified under s. 17(1)(b). Applying the standard described above, BCLC has simply not provided sufficiently detailed and clear evidence to demonstrate that disclosure of the disputed record could reasonably be expected to harm its financial or economic interests.

[46] I therefore find that BCLC is not authorized to withhold the disputed record under s. 17(1)(d).

[47] **3.4 Disclosure of Research Information—**Section 17(2) of FIPPA, on which BCLC also relies, gives the head of a public body the discretion to refuse to disclose research information if its disclosure could reasonably be expected to deprive the researcher of priority of publication.

[48] With respect to its reliance on s. 17(2), BCLC says that its training materials contain "research information" which has not yet been published and distributed to the general public.[46] In its November 15, 2004 letter to the applicant, BCLC said that, under FIPPA, the term "researcher" includes "researchers who are employees of BCLC" and that BCLC employees "have researched, gathered, assessed and compiled information to create" the ART materials. In its initial submission, BCLC elaborates slightly by saying that it is authorized to withhold the Participant's Handbook under s. 17(2) because it contains the results of its "investigations into and its study of various problem gambling issues, responsible gaming issues and appropriate response training for gaming industry employees, all of which was undertaken in an effort to develop and enhance the knowledge, awareness, attitudes and skills of gaming personnel in order to respond appropriately to customers who may be in distress within" BC casinos.[47] Coupled with the fact that the Handbook has not been "publicly distributed" (*i.e.*, it is not distributed to the "general public"), BCLC reasons that its disclosure would deprive it of priority of publication.[48]

[49] The applicant does not have much to say about this aspect of BCLC's submissions, although she does point out that BCLC did not reveal any information about the expertise of those employees who developed the ART program materials.[49]

Research information

[50] In Order 00-36, Commissioner Loukidelis considered s. 17(2) in the context of an application for access to a copy of a research protocol for a publicly-funded study of possible human health effects of aerial spraying for

[46] Para. 3.33, initial submission.
[47] Para. 3.58, initial submission.
[48] Paras. 3.58-3.62, initial submission.
[49] Page 18, reply submission.

European gypsy moth. In that order, the Commissioner explained what a public body needs to establish to engage this harms-based exception:

> … In order to rely on s. 17(2), a public body must establish a number of things. It must establish that the requested information is "research information". It must then establish that there is a reasonable expectation that disclosure of that information could deprive a specific researcher, who is connected in some rational way with the research information, of priority of publication of the research information itself or, in my view, of the research that uses the research information or proceeds from it.[50]

[51] FIPPA does not define what "research information" means for s. 17(2) purposes. Various dictionary definitions (such as the *Illustrated Oxford English Dictionary*[51]) define "research" as "the systematic investigation into and study of materials, sources etc in order to establish facts and reach new conclusions".

[52] Considered in the context of s. 17(2), and in particular the reference to priority of publication, I think that "research information" encompasses the product of, or information relating to, the investigation or study by experts in a field as a scholarly or scientific pursuit. For example, in Order 00-36, the Commissioner was satisfied that a study protocol setting out the research methodology for a multi-faceted scientific study of any possible health effects of aerial spraying was information relating to research. Some examples from Ontario are: research undertaken, under the supervision of an expert in the field, on a specific aspect of the control of wildlife rabies using vaccine baits where the data obtained was to be published in the Journal of Wildlife Diseases;[52] an electronic version of a computerized "alcohol data base" assembled by a scientist employed in the Toxicology section of the Ontario Centre for Forensic Sciences;[53] a review of the biological and conservation implications of game farming which the researcher intended to publish in a scientific forum;[54] and raw data collected by a research scientist conducting a cormorant nest count survey which he intended to submit to a scientific journal for peer review and publication.[55]

[53] Even if I were prepared to accept that the disputed record could be characterized as "research information", a proposition about which I have serious doubts, BCLC has in any case not met its burden of providing clear, cogent and convincing evidence that its disclosure "could reasonably be expected to deprive the researcher of priority of publication".

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[50] Order 00-36, at p. 6.
[51] Dorling Kindersley Limited and Oxford University Press, Inc., 1998.
[52] Order PO-2306, [2004] O.I.P.C. No. 178.
[53] Order PO-2189.
[54] Order P-811, [1994] O.I.P.C. No. 397.
[55] Order PO-2361, [2005] O.I.P.C. No. 5.

Priority of publication

[54] In Order 00-36, the Commissioner observed that, even though the burden of proof is on a public body, the individual researcher whose priority of publication is allegedly jeopardized is best placed to demonstrate in an inquiry whether his or her priority of publication is in fact threatened within the meaning of s. 17(2) and so, as a practical matter, the best evidence may well come from that individual. If, for example, the researcher has or retains no intellectual property in the methods he or she devises—assuming those methods qualify as research information—those methods will not be the research information "of" that person.[56] The approach the Commissioner has taken to this kind of harms-based exception is consistent with that taken in Ontario. For example, in Order PO-2361, the Adjudicator referred to s. 18 of the Ontario *Freedom of Information and Protection of Privacy Act* and described the applicable evidentiary burden this way:

> 36 Previous orders dealing with this exemption have upheld its application where cogent evidence was provided to support the position that an employee intended to publish a specific record. For example, in Order P-811 … Adjudicator Donald Hale was provided with an affidavit, sworn by the author of the record, wherein she stated that she intended to publish the record following an internal peer review of it. Based on the information contained in the affidavit, Adjudicator Hale was satisfied that the identified employee intended to publish the record in an appropriate scientific forum, and that the premature release of the record could reasonably be expected to deprive her of priority of publication.
>
> 37 In Order PO-2166 … I found that the Ministry had not provided sufficiently detailed and convincing evidence to support its position that section 18(1)(b) applied to [the] records. In making that finding, I stated:
>
> > The Ministry's representations do not state that the information in the records will be published. It specifically states that the records contain raw data, and that the study will be published after further data is gathered and the study is completed. The Ministry has not identified the employee who could reasonably be expected to be deprived of the priority of publication, nor has the Ministry provided detailed and convincing evidence that disclosing the record will affect priority of publication ….

[55] BCLC does not identify who its individual researchers are (other than to say they are BCLC employees) nor does it provide any information about their relevant qualifications or areas of expertise. All that BCLC has said is that its employees have "researched, gathered, assessed and compiled information" that has been used to deliver the ART program. There is no evidence to suggest that any of these unidentified employees intends to publish the information in the disputed record in any publication or that BCLC would allow any employee to do

[56] Order 00-36, at p. 6.

so. BCLC has clearly not met its burden of establishing that it is authorized to withhold the disputed record under s. 17(2) of FIPPA.

4.0 CONCLUSION

[56] For the reasons given I find that ss. 17(1) and (2) do not authorize BCLC to refuse access to the disputed record (*i.e.*, p. 140-226 and pp. 247-268 of the Participant's Handbook) and, under s. 58 of FIPPA, I require BCLC to give the applicant access to it.

March 22, 2007

ORIGINAL SIGNED BY

Celia Francis
Adjudicator

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