Order F08-07
(Additional to Order F08-03)

MINISTRY OF PUBLIC SAFETY & SOLICITOR GENERAL

David Loukidelis, Information and Privacy Commissioner

March 20, 2008

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Summary: The third-party casino operators requested further consideration of one aspect of the s. 22 guidelines contained in Order F08-03. Further submissions are permitted on that issue. In the meantime, the Ministry must disclose the s. 86 reports, as ordered in Order F08-03, with the exception of the information required to be withheld according to the guidelines in Order F08-03 and the names of casino employees acting in a professional or employment capacity, the disclosure of which remains unresolved pending further consideration of s. 22 arising from Order F08-03.

Key Words: duty to assist—reasons for refusal—commissioner's orders.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 4(2), 6(1), 8(1)(c)(i), 22, 55 and 58(2).

Cases Considered: *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848.

1.0 INTRODUCTION

[1] This order concerns a February 29, 2008 request by two third-party casino operators, Gateway Casinos Inc. and Great Canadian Casinos Inc. (collectively, "Casino Operators"), for further consideration of the right of access under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to the names of casino employees, acting in a professional or employment capacity, found in reports made under s. 86(2) of the *Gaming Control Act*. The Casino Operators had participated in the inquiry leading to Order F08-03, which I issued on January 31, 2008.

[2] In Order F08-03, I found that s. 15 and s. 21 of FIPPA did not authorize or require the Ministry of Public Safety and Solicitor General ("Ministry") to refuse to disclose information in reports the applicant requested. The reports are of

suspected or actual illegal activities that casinos are required to make to the General Manager of the Ministry's Gaming Policy and Enforcement Branch under s. 86(2) of the *Gaming Control Act* ("s. 86 reports").

[3] A third issue addressed in Order F08-03 was that, although the Ministry had not applied s. 22 the Portfolio Officer's Amended Fact Report for the inquiry and the Notice of Inquiry had not identified s. 22 as an issue for consideration, the majority of the s. 86 reports contain some personal information and Gateway Casinos Inc. had raised the applicability of s. 22 in the inquiry. The Ministry maintained that it had not considered s. 22 because of its decision to refuse to disclose all of the records in their entirety under s. 15 and s. 21. It acknowledged however that there was personal information in the reports to which the application of s. 22 would have to be considered. In Order F08-03, I said that, when a public body believes that a mandatory exception such as s. 22 applies to information in records responsive to an access request, that exception ought to be relied on in the public body's initial response to the access request or, at the very least, as soon as the public body becomes aware that s. 22 should be applied. It is not appropriate for a public body to refrain from doing this only because it is relying on other exceptions to the right of access.

[4] Section 22 is a mandatory exception to the right of access to records under which a public body must refuse to disclose personal information in circumstances where disclosure of the information would unreasonably invade personal privacy. In Order F08-03, I found that, despite the fact that the Ministry, the Portfolio Officer's Amended Fact Report and the Notice of Inquiry had overlooked s. 22, it was both necessary and appropriate to consider the application of s. 22 to the s. 86 reports. This was even clearer after I concluded that s. 15 and s. 21—the only exceptions on which the Ministry had relied in its response to the applicant's request—did not authorize or require the denial of access to information in the s. 86 reports.

[5] The absence of the Ministry's response and severing for the application of s. 22 obviously hampered review of that matter in the inquiry. I addressed this by dealing with s. 22 in Order F08-03 in the form of guidelines:

> [101] In summary, the s. 22 guidelines that I find are to govern the Ministry's severing of third-party personal information from the s. 86 reports are as follows:
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> 1. The names, position titles and other work-related identifying information (such as a business telephone number or email) of public body and casino employees must be disclosed to the applicant where the context is one where they are acting in a professional or employment capacity. Some examples include: the names and email addresses of GPEB employees and casino employees in email exchanges relating to s. 86 reports; the names of police officers attending at a casino in relation to a reportable incident; and the names of the GPEB employees who author s. 86 reports.

> 2. Subject to the previous paragraph, the names of casino patrons and employees - along with any associated identifying information such as addresses, telephone numbers, birth dates, driver's licence numbers, motor vehicle licence plate numbers contained in the s. 86 reports must be withheld under s. 22.

[6] Order F08-03 concluded with an order under s. 58 requiring the Ministry to give the applicant access to the s. 86 reports, except for information withheld in accordance with the s. 22 guidelines. I specified that the Ministry was to comply with the order within 60 days and that the parties could apply to me about any issues arising from the order or the Ministry's compliance with it.

[7] As of this date, the applicant has not been given access to any information in the records in issue in Order F08-03.

2.0 ISSUES

[8] Again, on February 29, 2008, the Casino Operators requested further consideration of the applicant's right of access, having regard to s. 22, to the names of casino employees acting in a professional or employment capacity in the s. 86 reports. The Casino Operators asked for leave to make "full submissions on this aspect of your Order". There was no request for further consideration from the Ministry or the applicant, although the Casino Operators said their request was made with the Ministry's concurrence.

[9] In seeking further consideration of s. 22, the Casino Operators explained as follows:

> As you have correctly recorded in your Order, Great Canadian did not make submissions on s. 22 of FIPPA. Although Gateway did make a s. 22 submission, it did not distinguish employees from customers or subjects, authors and witnesses as the case may be. Nor did it support its submission with affidavit material from casino employees who are involved in preparing the s. 86 reports.
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> It is unfortunate that you did not have the opportunity to review and consider a s. 22 submission from Great Canadian or the Ministry, or a more detailed submission from Gateway. In particular it is unfortunate that you were not provided with the opportunity to review affidavit material from casino employees who would be directly affected by a decision to release their names to the applicant.
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> It may be the case that the Casino Operators ought to have squarely raised the concerns of casino employees in their submissions. However, in our respectful submission, it is not surprising that there could have been some confusion or misapprehension as to the timing of when s. 22 issues would be raised in the context of this case. As you have fairly acknowledged at para. 75 of the Order, the February 28, 2006 letter from your Office was not "helpful". Certainly, it did raise various possibilities about the manner and

> timing in which s. 22 severing issues would be addressed, including severing being conducted by the Ministry, which would then submit the proposed severing to your Office for approval.
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> It is evident that the Ministry understood, based upon the above referenced letter, that the s. 22 severing issue would not be addressed until after the s. 15 and s. 21 issues had been addressed: reference para. 4 of the submission of the Ministry dated June 1, 2006.
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> In the result, an issue which is of importance to casino employees has been decided with no input from those persons who will now be directly affected by the Order. In these circumstances, we respectfully submit that this is an appropriate circumstance to permit the Casino operators and the Ministry to make additional submissions on the s. 2 issue alone.

[10] The only issue arising from Order F08-03 comes from the Casino Operators with the Ministry's concurrence. The issue concerns the status under s. 22 of the names, in the s. 86 reports, of casino employees acting in a professional or employment capacity. As discussed below, the Ministry's compliance with Order F08-03 pending possible further evidence and submissions around that one issue needs to be resolved now.

[11] In order to address the Casino Operators' request for further consideration of the s. 22 issue they raised, on March 10, 2008, I extended the above 60-day period for the Ministry to comply with Order F08-03 by a further 20 days, to April 28, 2008.[1]

[12] On March 6, 2008, the applicant responded to the Casino Operators' request for consideration of further evidence and argument on the application of s. 22. The applicant's submissions can be summarized as follows:

1. Gateway Casinos Inc. had addressed s. 22 in the inquiry to the knowledge of the others, who chose to ignore the issue, and it was carefully considered in Order F08-03;

2. Order F08-03 permitted, at most, further clarification about compliance, not reconsideration of findings. I am *functus officio* (retain no authority to act) regarding the wholesale re-arguing of the application of s. 22 being sought by the Casino Operators;

3. Alternatively, the applicant should be given immediate access to copies of the s. 86 reports without the names of casino employees, pending resolution of the Casino Operators' request for further consideration of the s. 22 issue regarding those names.

[13] I then asked the Ministry and the Casino Operators for representations as to why—regardless of the outcome of possible issues around access to the

[1] The definition of "day" in Schedule 1 of FIPPA, which excludes holidays and Saturdays, also applies to the calculation of time for compliance with orders made under s. 58.

names of casino employees in the s. 86 reports—the applicant should not be given immediate access to the remainder of the information that Order F08-03 required the Ministry to disclose.

[14] The Casino Operators replied on March 19, 2008 that they had no objection to the Ministry providing access to the applicant "to the remainder of the information in the s. 86 reports, pending the outcome of possible continuing issues around access to the personal information of the Casino Operators' employees in the s. 86 reports."

[15] In the Ministry's March 18, 2008 response, by contrast, the Ministry said it was willing to disclose the rest of the information it had been ordered to disclose only if the applicant agreed to drop the names of casino employees from the scope of the access request. The Ministry took this position on the basis that the resources required to remove the names of casino employees "would have a significant adverse impact on the Ministry's ability to respond to other applicants under the Act and, as such, the Ministry must respectfully reply that it is not willing to make such a commitment".

3.0 DISCUSSION

[16] **3.1 Access to Information Now**—Section 22 is, again, a mandatory exception that cannot be ignored. The Ministry was and is obliged to apply s. 22 for that reason. The Ministry is, further, duty-bound, as part of its duty under s. 8(1), to tell the applicant the reasons for refusing access, including by specifying the FIPPA provisions under which access is denied. The Ministry also has a duty under s. 6(1) to "make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely". These provisions are not mere words, wishes or aspirations. They are legal obligations that the Legislature intended to have real meaning and that the Ministry is to take seriously. The Ministry's obligation to apply to s. 22 when considering its response to an access request is also crucial to the applicant's right to request a review of a decision refusing access. How can decisions to refuse access be reviewed effectively if public bodies do not articulate what disclosure exceptions they have applied and to what information?

[17] If the applicant in this case is not seeking access to the names of casino employees named in the s. 86 reports, acting in a professional or employment capacity, that aspect of the access request can and should be dropped. It is not too late for this to happen and the upshot would obviously be one less burden on the Ministry. Access applicants should never impose unnecessary burdens on public bodies. That said, the Ministry's unwillingness here to commit resources to its obligation to apply s. 22 is no justification whatsoever for refusing to disclose any information at all to the applicant as ordered by Order F08-03. Worse yet, that refusal cannot properly be a means of holding the applicant to ransom on the scope of the access request. These are not legitimate methods under FIPPA.

[18] The application of s. 22 has not, candidly, gone smoothly in this case—there were oversights in various quarters. As I said in Order F08-03, the Portfolio Officer's Amended Fact Report for the inquiry and the Notice of Inquiry did not identify s. 22 as an issue. This was not, as I acknowledged in Order F08-03, satisfactory and it compounded the problem raised by the Ministry not having applied s. 22 as and when it was legally required to do. Gateway Casinos Inc. did address s. 22 in its initial submission in the inquiry and in reply the applicant objected that this was a new issue. The inquiry submissions of the Ministry and the other participating casino operator did not deal with s. 22.

[19] Section 58(2) requires me to make certain orders if the inquiry is into a decision to refuse access to all or part of a record. The inquiry into the Ministry's decision to refuse access to all of the s. 86 reports led me to find that denial of access was not authorized by s. 15 or s. 21, which were the disclosure exceptions the Ministry relied on in its response to the access request. Because s. 22 is a mandatory exception, I could not ignore it and order the Ministry to give the applicant access to all of the s. 86 reports when the records clearly include personal information, thus raising s. 22.

[20] The responsibility to consider and where appropriate apply s. 22 rests with the Ministry and is reviewed by the commissioner. Order F08-03 will not conclude until the application of s. 22 to the s. 86 reports is fully addressed. The Ministry sees unresolved issues around s. 22 as a barrier to disclosure of any part of the s. 86 reports. As indicated above, that is not a proper perspective at all. The Ministry's obligation to apply s. 22 to the s. 86 reports is integral to achieving completion of the inquiry on the issues that Order F08-03 necessarily had to leave outstanding. It has to be done and—barring an application for judicial review of the s. 15 or s. 21 outcome in Order F08-03—since the only outstanding issues relate to the narrow question of the application of s. 22 to the names of casino employees acting in a professional or employment capacity, the applicant is entitled to, and the Ministry now must give, access to all of the s. 86 reports, except for:

1. The information that is required to be withheld in accordance with the guidelines in Order F08-03; and

2. The names of casino employees acting in a professional or employment capacity, the disclosure of which remains unresolved because of the Casino Operators' February 29, 2008 request for further consideration of issues arising from Order F08-03.

[21] **3.2 Retained Jurisdiction**—The Supreme Court of Canada stated the basic principles of the doctrine of *functus officio* as it relates to administrative tribunals in *Chandler v. Alberta Association of Architects*:[2]

[2] [1989] 2 S.C.R. 848.

> [76] …Apart from the English practice, which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error….
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> [77] To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
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> [78] Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation….
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> [79] Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute: …[case reference omitted].

[22] Clearly, *functus officio* must be more flexible, and less formalistic, in its application to administrative proceedings under FIPPA than to a court. It should not be strictly applied where there are statutory indications that the decision-making process is continuing or can be resumed or reopened to enable functions to be completed and objectives to be achieved under FIPPA.

[23] It follows from my discussion of Order F08-03 that in my view an inquiry under FIPPA may give rise to preliminary rulings, as well as interim and successive orders under s. 58, and that continuing jurisdiction may be retained after a ruling or order is made. This view flows from the purpose and structure of the legislation. The Legislature intended through FIPPA to give the public an effective right of access to records in the custody or under the control of public bodies. Section 4(2) makes it clear that the right of access is not to be frustrated by the presence of information that is excepted from disclosure if that information can be reasonably severed. Public bodies have a positive duty under s. 6(1) to

make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely. For large access requests such as the request at hand, it is an everyday practice, as it should be, for public bodies to meet the duty to assist under s. 6(1) by making successive releases as requested records are available or their severing is completed (or both), rather than to allow ongoing searches or unresolved issues about small amounts of information to stymie the right of access altogether. For each release, if access to all or part of a record is refused, the public body's response must give the reason for the refusal and the provisions of FIPPA on which the refusal is based.

[24] These obligations also extend to the request for review and inquiry processes under Part 5 of FIPPA. They are crucial for giving the public a right of access to records and to the efficiency and ability of this office to conduct reviews and inquiries. Section 55 empowers the commissioner to authorize a mediator to investigate and try to settle a matter under review and this office's Portfolio Officers are routinely assigned to investigate and mediate matters under review. The work of this office is remedial and it is well known that the bulk of our work is accomplished not through inquiries and orders, but through both formal and informal investigation and mediation that results in clarification or narrowing of access requests, improved searches and new or amended record releases by public bodies. The s. 6(1) duty to assist does not end when a Part 5 inquiry begins, and the commissioner's jurisdiction with respect to reviews and inquiries is intended to be fully complementary to the entire structure of FIPPA and all its rights, obligations and legislative objectives.

[25] In this case, it was unavoidably necessary for me to retain jurisdiction over issues around the application of s. 22 to the s. 86 reports. I explained above why the Ministry must apply s. 22 to the s. 86 reports and must give the applicant access to all of the reports, except for information required to be withheld in accordance with the guidelines in Order F08-03 and except for the names of casino employees acting in a professional or employment capacity. The latter issue will be given further consideration as regards s. 22. In the context of Order F08-03, it makes sense for me to retain jurisdiction to finish the inquiry, make any necessary further orders and oversee any issues with respect to the Ministry's implementation of those orders.

4.0 CONCLUSION

[26] At the conclusion of Order F08-03, I made the following order:

> 1. Under s. 58(2)(c) of FIPPA, I require the Ministry to refuse access to the third-party personal information of casino employees and patrons in accordance with the guidelines set out above.
> 2. Subject to para. 1, under s. 58(2)(a) of FIPPA, I require the Ministry to give the applicant access to the remainder of the information in the s. 86 reports.
> 3. Under s. 58(4) of FIPPA, I specify that the Ministry is to comply with this order within 60 days, and that the parties are at liberty to apply

> to me with respect to any issues arising from this order or the Ministry's compliance with it.

[24] On March 10, 2008, I extended the 60-day compliance period for the Ministry by a further 20 days, to April 28, 2008.

[25] I now further vary Order F08-03 to require the Ministry to give the applicant access by March 31, 2008 to all of the s. 86 reports, except for:

1. The information that is required to be withheld in accordance with the guidelines in Order F08-03, and

2. The names of casino employees acting in a professional or employment capacity, the disclosure of which remains unresolved because of the Casino Operators' February 29, 2008 request for further consideration of issues arising from Order F08-03.

[26] The Ministry must deliver to me written confirmation of its compliance with the above requirement to give access to the applicant as soon as practicable on or after March 31, 2008.

[27] The schedule for further submissions on the applicant's right of access to the names of casino employees acting in a professional or employment capacity in the s. 86 reports is as follows:

1. The Ministry and the Casino Operators each may provide a written submission, including evidence, regarding s. 22 and disclosure of the names of casino employees acting in a professional or employment capacity contained in the s. 86 reports by 12:00 noon PST on May 5, 2008;

2. The applicant may make a written submission, including evidence, in reply by 12:00 noon PST on May 12, 2008; and

3. The Ministry and the Casino Operators each may provide a written reply to the applicant's submission by 12:00 noon PST on May 16, 2008.

[28] All submissions are to be directed to the attention of this office's Registrar of Inquiries.

March 20, 2008

ORIGINAL SIGNED BY

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David Loukidelis
Information and Privacy Commissioner
for British Columbia