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

Order F10-14
(Additional to Order F08-03 and Order F08-07)

MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL

Michael McEvoy, Adjudicator

May 12, 2010

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Summary: The applicant requested records compiled under s. 86 of the *Gaming Control Act* reporting suspected or actual illegal activities in registered gaming establishments and casinos. This Order follows Order F08-03 wherein the Ministry was not authorized to withhold the records under s. 15 or required to withhold them under s. 21 but was required withhold some personal information under s. 22. Following a request by the third parties, Order F08-07 was issued granting all parties the opportunity to make further argument concerning whether the names of casino employees which appear in the s. 86 reports should be withheld under s. 22. The third parties argued that the names of their employees, including the writers of the s. 86 reports, should not be disclosed. The Ministry must disclose the names of the s. 86 report writers and other employees acting in the course of their employment responsibilities. However, the Ministry is required to withhold the names of employees who are identified in the reports as being threatened or assaulted, who were subject to investigation or who were witnesses to an incident.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(2)(a), (e) and (f), 22(3)(b); *Gaming Control Act*. s. 86(2)

Authorities Considered: B.C.: Order F08-03, [2008] B.C.I.P.C.D. No 6; Order F08-07, [2008] B.C.I.P.C.D No. 12; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 01-52, [2001] B.C.I.P.C.D. No. 55.

1.0 INTRODUCTION

[1] This matter began as an access request by a CBC reporter ("applicant") to the Ministry of Public Safety and Solicitor General ("Ministry") for reports, made

under s. 86(2) of the *Gaming Control Act* ("s. 86 reports"), about suspected or actual illegal activities in registered gaming establishments and casinos.

[2] In Order F08-03,[1] Commissioner Loukidelis found that neither s. 15 nor s. 21 of the *Freedom of Information and Protection of Privacy Act ("*FIPPA") authorized or required the Ministry to withhold access to the records, but that it was required to withhold some third-party personal information under s. 22.

[3] The Commissioner specifically stated that the Ministry must withhold the names of employees in the s. 86 reports who were the subject of an investigation. Based on the Commissioner's comments at paragraphs 91, 98 and 99 of Order F08-03, it is also evident the names of employees in s. 86 reports who were witnesses to incidents were to be withheld.

[4] The Commissioner then said the following guidelines were to govern the Ministry's severing of other third-party personal information in the s. 86 reports:

> 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 [the Ministry's Gaming Policy and Enforcement Branch] 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.
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> 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.

[5] I observe here that Commissioner Loukidelis refers in paragraph 1 to GPEB employees as authors of the s. 86 reports. I take it that Commissioner Loukidelis intended to say, as he did earlier in Order F08-03, that casino employees author these reports. The disputed records reflect this fact and all parties have made submissions based on the assumption that casino employees sign the s. 86 reports.

[6] Subsequent to the issuance of Order F08-03, two third-party casino operators, Great Canadian Gaming Corporation and Gateway Casinos ("third parties") requested that the Commissioner allow them to make additional submissions on the s. 22 issues and in particular with respect to paragraph 1

[1] [2008] B.C.I.P.C.D. No.6.

above. Subsequently Commissioner Loukidelis issued Order F08-07[2] granting all parties the opportunity to make additional submissions on "the narrow question of the application of s. 22 to the names of casino employees acting in a professional or employment capacity."[3] In other words the Commissioner agreed to give further consideration to his decision that the Ministry was required to disclose the names of employees acting in a professional or employment capacity. The parties made submissions and the matter was still pending when Commissioner Loukidelis left office on January 19, 2010, for appointment as the Deputy Attorney General of British Columbia, effective February 1, 2010. I was reassigned the matter pursuant to a delegation of the Commissioner's powers under s. 49 of FIPPA and I considered and decided the issue without consultation or input from Commissioner Loukidelis.

2.0 ISSUES

[7] Order F08-07 states that the issue for this inquiry is whether s. 22 of FIPPA requires the Ministry to refuse access to the names of casino employees in s. 86 reports who are acting in a professional or employment capacity. The issues can be further refined based on the submissions of the parties.

[8] The applicant states in his initial submission to this inquiry that:

> In your existing decision [referring to Order F08-03] you have carefully considered the application of s. 22 to these [s. 86] reports. We accept your rationale, and see nothing in the new submissions that would affect it.[4]

[9] The Ministry also states that Commissioner Loukidelis was generally correct in applying s. 22 to the information at issue in Order F08-03, with one exception. The Ministry adds that paragraph 1 of the guidelines should also exclude employees who were the victims of threats or assaults.

[10] The third parties, of course, agree that Commissioner Loukidelis properly ordered the withholding of names of employees noted as witnesses or the subject of investigation in the s. 86 reports. The third parties however urge that I reconsider the disclosure order in F08-03 concerning employees who authored the s. 86 reports.

[11] The common ground between the parties in these submissions is that Commissioner Loukidelis correctly ordered the Ministry to withhold the names of employees in the s. 86 reports who were targets of the investigation or witnesses to an incident. I will therefore not revisit these findings in this inquiry.

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[2] [2008] B.C.I.P.C.D. No.12.
[3] Order F08-07, para. 20.
[4] Applicant's initial submission, p. 4.

[12] However, three classifications of employees whose names appear in the s. 86 reports remain in issue under s. 22 of FIPPA and I will consider each below. Based on my review of the submissions, evidence and records these classifications are:

1. Employees who are victims of assaults or threats.
2. Employees who author s. 86 reports.
3. Other employees.

[13] Under s. 57 of FIPPA, the applicant has the burden of proof with respect to third-party personal information.

[14] I should also note here that the third parties assert that their business operations would be harmed if the names of the s. 86 report writers were released.[5] I will say at once that Order F08-03 dealt with this issue conclusively and it is not before me here.

3.0 DISCUSSION

[15] **3.1 Background**—The background facts to this matter, including a detailed description of the records, are set out in Order F08-03 and I will not repeat them here.[6]

[16] The relevant sections of s. 22 to this inquiry are 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,
>
> …
>
> (e) the third party will be exposed unfairly to financial or other harm,

[5] Third parties' initial submission, para. 51.
[6] Background information is primarily at paras. 1 to 5 and 8 to 15 of Order F08-03. See paras. 16 to 20 of the same order for a detailed description of the records in issue.

> (f) the personal information has been supplied in confidence,
>
> …
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> …
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation

[17] The proper approach to the application of s. 22 of FIPPA to this information has been discussed in many previous orders. Order 01-53[7] is a thorough example. First, a determination is made as to whether the information is personal information and then if it is, whether s. 22(4) applies such that disclosure of the information is deemed not to be unreasonable invasion of a third party's privacy. If s. 22(4) does not apply then the information must evaluated as to whether any of the factors listed in s. 22(3) create a rebuttable presumption that disclosure of the information would be an unreasonable invasion of a third party's privacy. Finally, all relevant circumstances must be considered in making a final determination.

[18] **3.2** ***Employees who are victims of assaults or threats***—The Ministry argues that, while Commissioner Loukidelis took a "generally correct" approach in Order F08-03, the order should be modified to withhold the names of employees who are noted as victims of criminal activity or threatening behaviour.[8] The Ministry says Commissioner Loukidelis correctly noted that employees appear in the s. 86 reports in their employment capacity and more rarely, as the subject of the report. However it submits that a small number of s. 86 reports mention employees as targets of physical and/or verbal assaults or because threats have been uttered against them. In these instances, the Ministry argues that releasing the employee names would be an unreasonable invasion of their privacy because the information does not speak to how they perform their jobs. The identification of an individual as the victim of a threat or assault is information that is more personal in nature, it argues, and relates more to the individuals themselves than to their employment.

[19] The Ministry provided me with thirty-three s. 86 reports where employees are named as the target of threats or assaults. The Ministry states:[9]

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[7] [2001] B.C.I.P.C.D. No. 56.
[8] Ministry initial submission, p. 1.
[9] Ministry initial submission, p. 2.

> The 33 reports have been highlighted to illustrate the severing proposed by the Ministry i.e. employee information has not been severed, unless that employee is a victim.

[20] The Ministry submits that the release of the records with the names of victims severed does not significantly affect the applicant's ability to follow up on s. 86 reports and that, with certain exceptions, the reports were filed by people other than victims.

[21] Neither the applicant nor the third parties addressed their arguments to this group of employees referred to in the s. 86 reports.

[22] There is no question that the names of casino employees who have been threatened or assaulted are the personal information of those employees. I also find that s. 22(4) does not directly apply to any of the names because the individuals in question are not employees of a public body.

[23] As for the presumption that disclosing this information would unreasonably invade these employees' privacy, the personal information of a threatened or assaulted casino employee in a s. 86 report is also compiled and identifiable as part of an investigation. Therefore s. 22(3)(b) applies to this information.

[24] I agree with the Ministry that the identification of employees in s. 86 reports as being subject to threats and/or physical or verbal abuse is of a more personal nature and relates more to the individuals themselves than to their employment. Having considered the applicable presumption, as well as all relevant circumstances, I conclude that the revelation of their names would constitute an unreasonable invasion of those employees' personal privacy. Nothing in the applicant's submission persuades me that any public interest is served in revealing the identity of employees who are the subject of threats or assaults.

[25] **3.3** ***Employees who author s. 86 reports*****—**The third parties argue that the s. 86 reports were compiled and identifiable as part of an investigation into a possible violation of the law and thus s. 22(3)(b) applies so that the information's release is presumed to be an unreasonable invasion of the employees' privacy under FIPPA.

[26] The third parties argue other circumstances support the withholding of the s. 86 report writers' names. They say that s. 86 report writers are part of the surveillance department of the casino and the third parties go to some length to protect the anonymity of these employees. The third parties submit that identifying s. 86 report authors will compromise their safety because it will allow an aggrieved person, who is the subject of a report, to direct an "inappropriate response" to the writer. The third parties also express concern that disclosure of the employee names could expose these employees to potential coercion and

threats of harm. They provide, *in camera*, what they call an example of this. They also submit that release of these names will cause the employees to suffer "serious mental distress or anguish"[10] and will make them fearful and discourage them from meeting their s. 86 reporting responsibilities.[11]

[27] Another circumstance the third parties cited in support of withholding the information is their contention that the report writers believed they were supplying the information in confidence.

[28] As for s. 22(2)(a), the third parties submit that disclosing the employee names adds nothing to making the Ministry more publicly accountable for its actions. They say that, if the applicant wants to use the names to interview these employees that would constitute an inducement to the employees to breach their employment contract. This is because, the third parties submit, the employees in question are prohibited under their terms of employment from disclosing any employment related information.[12]

[29] The third parties also ask that I consider as part of the context here the "interplay" between FIPPA and the *Personal Information Protection Act* ("PIPA") and what they say is the employer's obligation to protect the employee names and other personal information from disclosure outside of the purposes necessary for managing the employment relationship.

[30] The applicant's argument does not refer to s. 86 authors specifically. Rather the applicant refers to all casino employee names in its arguments. The applicant argues that the names of the casino employees in the s. 86 reports should be provided because among other things:[13]

- It would permit the s. 86 reports to be read more easily by allowing the applicant to separate references to affected individuals and to identify the separate roles in the narratives
- It would allow the applicant to see how many reports specific employees generate, how the investigation process works, how many officers are deployed to review suspicious activities and how effective they are as a substitute for or complement to police
- It could facilitate the applicant's potential access to the employees themselves in order to interview them to put the s. 86 reports in context. This would assist in identifying patterns in crime detection and prevention and evaluating the strengths and weaknesses in current practices

[10] Third parties' initial submission, para. 55.
[11] Third parties' initial submission, para. 73.
[12] Third parties' initial submission, para. 69.
[13] Applicant's initial submission, p. 2.

[31] In short, the applicant submits that access to the employee names is a "step past casino public relations to the truth" concerning possible criminal activity in BC casinos.

[32] The Ministry did not take issue in this inquiry with the release of the names of the s. 86 report writers except for those who were themselves the victims of threats or assaults.

[33] The applicant argues that compelling proof is required to demonstrate that harm would come to casino employees. The applicant submits the third parties offer limited proof for this. The applicant says it is also difficult to assess the third parties' claims because portions of their submissions are supplied *in camera*,

[34] Commissioner Loukidelis stated in Order F08-03 that on many previous occasions, he found the release of the names of employees acting in an employment or professional capacity did not amount to an unreasonable invasion of privacy under s. 22. He said that the context of those orders was with respect to public body employees but that he saw no principled reason why this general proposition should not apply equally to the casino employees acting in such a capacity.[14] I agree with these findings made by Commissioner Loukidelis.

[35] The Commissioner went on to find that the names of the s. 86 report writers were disclosable because the reports, although written by them, were not about them. I also agree with this conclusion. While those employees being investigated, or who have been assaulted, are the very subject of the s. 86 reports, the same cannot be said about those employees whose task, as the third parties describe it, is simply to prepare the report on the basis of the materials provided to them. While these employees sign the s. 86 reports, the reports are not about those employees. The authors are simply acting in a professional capacity on behalf of their employers and as scribes to the incidents.

[36] With respect to other relevant circumstances concerning the s. 86 authors, I have carefully considered the third parties' arguments, both *in camera* and otherwise, including the affidavits of casino employees. These materials assert that s. 22(2)(e) is a circumstance which weighs in favour of not disclosing, as a class, the names of those employees who sign s. 86 reports. I do not find them persuasive. There is no evidence beyond mere speculation that disclosing the name of someone whose task is to write a report of an incident would cause harm to that person or, as Commissioner Loukidelis noted in Order F08-03, to any other person named in the report for that matter. With respect to the *in camera* evidence at paragraph 52 of the third parties' initial submission, I can say, without revealing its contents, that there is no evidence at all to suggest this circumstance resulted from the public disclosure of an employee's name.

[14] Order F08-03.

[37] Moreover, I do not find persuasive arguments that the persons writing the reports then supplied them in confidence to their employers, the casino operators. There is no objective evidence that this is so. The reports are not, in fact, matters over which an employee may attach conditions. As the affidavit of one of the third parties' notes, employees are required to file s. 86 reports as a condition of employment and the casino operator is in turn required by law to file them with the GPEB.

[38] The same affidavit referred to in the above paragraph also suggests that employees might be "careful"[15] about what activities are accounted for in the s. 86 reports if the name of the report writer is disclosed. This is similar to the third parties' submissions above that disclosing the employees' names might "discourage" them from meeting their s. 86 reporting responsibilities. If by all of this the third parties are suggesting s. 86 report writers will not meet their employment or legal obligations, I reject this assertion. First, the third parties provide no substantive basis for this assertion. Second, it is not tenable for the application of FIPPA to be determined by the possibility that persons having obligations at law will fail to meet those obligations because of an information access right under FIPPA. This is not unlike the issue facing Commissioner Loukidelis in Order 01-52[16] wherein he held that such a proposition would subvert both the rule of law and purposes of the legislation.

[39] Finally, I find the third parties' arguments about the "interplay" of FIPPA and PIPA to be without merit. There is no interplay here because this is a matter determined solely under FIPPA.

[40] For these reasons, I conclude that the disclosure of names of employees who author s. 86 reports would not be an unreasonable invasion of their privacy under s. 22(1), except where the author of the s. 86 report is also described in that same report as being threatened or assaulted. In this event, the author's name must be severed throughout the s. 86 report.

[41] **3.4** ***Other Employees***—There are other employees mentioned in the s. 86 reports that do not fall within the specific employee categories just mentioned. Nor do these other employees fall under a specific category that Commissioner Loukidelis ordered withheld in Order F08-03. Rather, they fall under a general category Commissioner Loukidelis described in Order F08-03 as employees acting in their employment or professional capacity. For example, a s. 86 report might describe an employee answering a phone, escorting an unruly patron from casino or issuing instructions to a subordinate. In a number of these examples (and these are only examples) the employee is not under investigation, the victim of assault or threat, nor is he or she witness to an incident. Rather, the described identified employee is simply acting in the course of their employment.

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[15] Affidavit #1, para. 12.
[16] [2001] B.C.I.P.C.D. No. 55, para. 141.

[42] Under the guidelines Commissioner Loukidelis delineated in Order F08-03, the names of these employees were subject to disclosure. As I noted above, the Ministry accepted this ruling.

[43] The third parties requesting further consideration of Order F08-03 did not specifically address this class of employees described by Commissioner Loukidelis. However, I have considered all the relevant circumstances and submissions relating to this grouping of employees including the arguments advanced by the third parties concerning the s. 86 report writers.

[44] It is my view that, while the names of the employees I have identified in this section are compiled as part of an investigation under s. 22(3)(b), the circumstances are such that the disclosure of this kind of information does not give rise to an unreasonable invasion of personal privacy. The identification of these employees is not unlike that of the police officers whose names are included in and disclosed in the s. 86 reports. Each is acting in her/his employment or professional capacity. I have already noted and agreed with the findings of Commissioner Loukidelis in Order F08-03 wherein he stated many previous orders have found the release of the names of employees acting in an employment or professional capacity does not amount to an unreasonable invasion of personal privacy under s. 22.[17] I find this to be especially so here where we are dealing with an industry under such rigorous public oversight.

[45] As noted, I have also considered here those relevant circumstances the third parties cited in the previous section concerning the s. 86 report authors. I find that none weighs against disclosure of the disputed information for the same reasons as stated in respect of the s. 86 authorship discussion above.[18]

4.0 CONCLUSION

[46] For reasons given above, I make the following orders:

1. Under s. 58(2)(c) of FIPPA, I require the Ministry to refuse access to the names of casino employees appearing in s. 86 reports who are the subject of threats or assaults or who are witnesses to an incident or who are subject to investigation.

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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 personal information in the s. 86 reports concerning casino employees who author s. 86 reports and

[17] See para. 83 of Order F08-03 and cited Orders in the footnote as well as the extensive discussion of this issue in para. 83-87 all of which I adopt here.

[18] As previously noted, the Ministry's May 5, 2008 submission provided me with thirty-three s 86 reports in which casino employees were the target of harassment or assault along with its proposed severing of those records. I agree with the way the Ministry has severed those records.

casino employees whose names appear in those reports who are acting in a professional or employment capacity

3. I require the Ministry to give the applicant access to this information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before June 24, 2010 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

May 12, 2010

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

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