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Order F15-58

## BRITISH COLUMBIA LOTTERY CORPORATION

Elizabeth Barker  
Senior Adjudicator

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**Summary:** A journalist asked for the total value of lottery products purchased through PlayNow.com for each B.C. postal code forward sortation area. A forward sortation area is comprised of the first three characters in a postal code. BCLC withheld the requested information on the basis that it believed disclosure could reasonably be expected to harm BCLC's financial or economic interests, under s. 17 of FIPPA (specifically ss. 17(1), 17(1)(b) and 17(1)(d)). The applicant said that s. 25(1)(b) of FIPPA applies (i.e., disclosure is in the public interest). The adjudicator found that disclosure of the information was not clearly in the public interest, so BCLC was not required to disclose it under s. 25(1)(b). However, the adjudicator ordered BCLC to disclose the information because BCLC had not established that it was authorized to refuse access under ss. 17(1), 17(1)(b) and 17(1)(d) of FIPPA.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 17(1), 17(1)(b), 17(1)(d), 25(1)(b).

**Authorities Considered: B.C.:** Order No. 15-1994, 1994 CanLII 613 (BCIPC); Order No. 312-1999, 1999 CanLII 2786 (BCIPC); Order No. 285-1998, 1998 CanLII 3251 (BCIPC); Order 00-37, 2000 CanLII 14402 (BCIPC); Order 00-39, 2000 CanLII 14404 (BCIPC); Order 00-41, 2000 CanLII 14406 (BCIPC); Order 02-06, 2002 CanLII 42431 (BCIPC); Order 03-02, 2002 CanLII 42472 (BCIPC); Order F07-06, 2007 CanLII 9597 (BCIPC); Order F07-06, 2007 CanLII 9597 (BCIPC); Order F08-03, 2008 CanLII 13321 (BC IPC); Orders F08-22, 2008 CanLII 70316 (BCIPC); Order F09-13, 2009 CanLII 42409 (BCIPC); Order F10-39, 2010 CanLII 77325 (BCIPC); Order F11-14, 2011 BCIPC 19 (CanLII); Order F11-25, 2011 BCIPC 31 (CanLII); Order F14-58, 2014 BCIPC 62 (CanLII); Investigation Report F15-02, 2015 BCIPC 30 (CanLII).

**Ont:** Order PO-2941, 2010 CanLII 77513 (ONIPC); PO-2199, 2003 CanLII 53949 (ONIPC); P-941, 1995 CanLII 6472 (ONIPC).

**Cases Considered:** *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31.

## INTRODUCTION

[1] The British Columbia Lottery Corporation (“BCLC”) is a crown corporation authorized under B.C.’s *Gaming Control Act* and the *Criminal Code* to conduct, manage and operate lottery gaming, casino gaming, commercial bingo gaming and online gaming in B.C. The province of B.C. is its sole shareholder, and all gaming revenue generated by BCLC is public funds.

[2] BCLC offers a number of lottery and casino products for purchase online through its website, PlayNow.com. In 2010, the applicant, who is a journalist for *The Vancouver Sun*, requested the total value of lottery products purchased in fiscal year 2008-09 through PlayNow.com for each B.C. postal code forward sortation area. A forward sortation area (“FSA”) is comprised of the first three characters in a postal code. The first character identifies the province, the second and third characters identify the specific area in a city, town or other geographical location.

[3] BCLC refused to disclose the requested information to the applicant on the basis that disclosure would harm its financial or economic interests under ss. 17(1)(b) and 17(1)(d) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”). The applicant asked the Office of the Information and Privacy Commissioner (“OIPC”) to review BCLC’s decision. The matter was not resolved by mediation, and an inquiry was held in 2011. Commissioner Denham issued Order F11-25,<sup>1</sup> in which she determined that BCLC was not authorized under ss. 17(1)(b) or 17(1)(d) to refuse access to the requested information.

[4] Order F11-25 was set aside by the BC Supreme Court in *British Columbia Lottery Corporation v. Skelton*, 2013 BCSC 12 (“*Skelton*”). The court directed that a new inquiry take place, if the applicant still wanted the sales figures. The applicant confirmed that he did. Therefore, this new inquiry was undertaken in accordance with the directions of the court, which included providing the parties with the opportunity to provide additional submissions. For the purposes of this inquiry, BCLC submitted new written argument and affidavit evidence. However, it also relied on several affidavits from the original inquiry. The applicant chose to rely on his initial submission from the original inquiry, but he provided a new reply submission.

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<sup>1</sup> Order F11-25, 2011 BCIPC 31 (CanLII).

[5] Although s. 25(1)(b) was not identified in the Notice of Inquiry as an issue, in his initial submissions at the first inquiry the applicant asserted that it applied. In the first inquiry, BCLC objected to the late addition of this issue. However, BCLC no longer objects on this ground, and its submissions for this current inquiry address the applicant's assertion that s. 25(1)(b) applies. Therefore, I will also consider the application of s. 25(1)(b) to the information at issue.

## ISSUES

[6] The issues in this inquiry are as follows:

1. Does s. 25(1)(b) of FIPPA apply to the information at issue?
2. Is BCLC authorized under ss. 17(1), 17(1)(b) and/or 17(1)(d) of FIPPA to refuse access to the requested information?

[7] Section 57 of FIPPA places the burden on BCLC to establish that it is authorized under s. 17 to refuse to disclose the information at issue. Section 57 is silent on the burden of proof for s. 25. However, I agree with the following statement from BC Order 02-38:

Again, where an applicant argues that s. 25(1) applies, it will be in the applicant's interest, as a practical matter, to provide whatever evidence the applicant can that s. 25(1) applies. While there is no statutory burden on the public body to establish that s. 25(1) does not apply, it is obliged to respond to the commissioner's inquiry into the issue, and it also has a practical incentive to assist with the s. 25(1) determination to the extent it can.<sup>2</sup>

## DISCUSSION

[8] **Background**--BCLC launched the PlayNow.com website in 2004. During the 2008/09 fiscal year, the products available for online purchase through PlayNow.com were: lottery tickets, Sports Action, Keno, Pacific Hold'Em Poker, eBingo, and interactive games.<sup>3</sup> BCLC refers to these products collectively as "lottery products."

[9] PlayNow.com is only available to B.C. residents who must first register with BCLC to play online.<sup>4</sup> In the 2008/09 fiscal year, there were approximately 115,000 B.C. residents registered to play on the PlayNow.com website.

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<sup>2</sup> Order 03-02, 2002 CanLII 42472 (BC IPC), at para. 39.

<sup>3</sup> In 2010, online casino games, such as slot games, blackjack, roulette and baccarat became available on PlayNow.com, and in 2011, peer-to-peer online poker was added.

<sup>4</sup> BCLC uses IP (internet protocol) geolocation technology to ensure that the device being used to access the PlayNow.com website is in BC (BCLC's Information Systems Security Analyst's affidavit).

[10] BCLC competes directly with gambling websites operated from outside of Canada, which BCLC calls “grey market sites”. According to BCLC, grey market sites are largely unregulated and cannot legally transact with Canadian residents. Nevertheless, they accept wagers from B.C. residents and market online gaming products to B.C. residents from servers in foreign jurisdictions.

[11] **Information in Dispute**--The record in dispute is a four page list consisting of two columns. The first column lists the FSAs in which there were registered PlayNow.com account holders. The second column lists the total value of PlayNow.com lottery products purchased by account holders registered in that FSA for the 2008-09 fiscal year. The information in dispute does not reveal any identifying information about the PlayNow.com account holders or how many account holders there are in each FSA. I will refer to the information at issue as the “FSA Information”.

[12] **Expert evidence**--BCLC’s evidence in the first inquiry included an April 2011 report of Paul Lauzon, who is the Senior Vice President, Lottery Gaming, with Ipsos Reid, a marketing research firm. Mr. Lauzon’s affidavit states that he has been a market research professional for approximately 23 years, and that for over 17 years he has focussed on lottery and gaming market research.<sup>5</sup>

[13] In Order F11-25, Commissioner Denham concluded that Mr. Lauzon’s report was not admissible as expert opinion evidence. In *Skelton*, Mr. Justice Goepel found that Mr. Lauzon’s April 2011 report met the criteria for admissibility as expert opinion evidence, and he directed that it be considered and weighed as such if there was a rehearing.

[14] In addition to Mr. Lauzon’s April 2011 report from the first inquiry, BCLC’s materials include a second report from Mr. Lauzon, dated November 2014. In his later report, he says that the opinions expressed in his April 2011 report remain the same. He also describes how technological advances have provided grey market operators with additional means of marketing to BCLC’s PlayNow.com customers. I have considered this November 2014 report in light of Justice Goepel’s analysis in *Skelton*, and for the same reasons in that decision, find that it is also admissible as expert opinion evidence. Therefore, I will consider and weigh Mr. Lauzon’s evidence accordingly.

### **Public Interest (s. 25)**

[15] Section 25 of FIPPA requires a public body to disclose information, even if other provisions in FIPPA would otherwise require or authorize it to refuse to disclose the information. In addition, if s. 25 applies, the information must be disclosed “without delay” rather than within the usual timeframe for responding set out in s. 7 of FIPPA.

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<sup>5</sup> Lauzon affidavit #1, exhibit A.

[16] The applicant submits that disclosure of the FSA Information is in the public interest so it should be disclosed under s. 25. He believes that the public is interested in knowing the sales revenue generated on PlayNow.com for each FSA in order to determine if online gaming is more concentrated in certain parts of the province and how this might correlate to Statistics Canada data about income levels in those areas. He says, “Critics of gambling have often alleged that casinos and lotteries prey on low income families”.<sup>6</sup> He submits that the public interest in this information clearly outweighs what, in his view, is a purely speculative fear of financial harm to BCLC. For its part, BCLC submits that there is no need for disclosure under s. 25 because there is no temporal urgency and there is no clear public interest in disclosure.

[17] The part of s. 25 that is relevant here states:

**25(1)** Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

...

(b) the disclosure of which is, for any other reason, clearly in the public interest.

[18] In Investigation Report 15-02, Commissioner Denham explained that something that is in the public interest affects or is in the interests of a significant number of people and it transcends private interest. It is not merely that which the public may be interested in learning or is defined by public curiosity.<sup>7</sup> She also discussed the meaning of the term “clearly” and said as follows:

It is not desirable to lay down any hard and fast rule for what the term “clearly” means in s. 25(1)(b). Nor would it be appropriate to conclude that the Legislature intended to create something like a standard of proof. It seems to me, however, that “clearly” means something more than a ‘possibility’ or ‘likelihood’ that disclosure is in the public interest. The ordinary meaning of that word, reflected in dictionary definitions, strongly suggests that more than “possibly” or “likely” is needed. I must also consider that s. 25 overrides all of FIPPA’s discretionary and mandatory exceptions to disclosure, suggesting that the Legislature did not intend a low threshold for disclosure in the public interest.

Given all of this, s. 25(1)(b) requires disclosure where a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest. A public body should, when deciding whether information “clearly” must be disclosed in the public interest, consider the

<sup>6</sup> Applicant’s initial submissions, p. 5.

<sup>7</sup> Investigation Report F15-02, 2015 BCIPC 30 (CanLII), at p. 30.

purpose of any relevant access exceptions (including those protecting third-party interests or rights that will be, or could reasonably be expected to be, affected by disclosure). In addition, the nature of the information and of the rights or interests engaged, and the impact of disclosure on those rights or interests will be factors in assessing whether disclosure is “clearly in the public interest”.<sup>8</sup>

[19] Investigation Report F15-02 also reinterprets the meaning of “without delay” in s. 25 and departs from what was held previously in B.C. Orders, by clarifying that an element of temporal urgency (i.e., urgent or compelling need) is not required for the disclosure of information to be clearly in the public interest under s. 25(1)(b).

[20] I have considered the parties’ submissions as well as the content and context of the FSA Information. Regarding the context of this access request, it is safe to say that the issue of poverty and the welfare of B.C.’s low income citizens is a topic of interest to the general public. The applicant speculates that the FSA Information, when combined with information from Statistics Canada regarding neighbourhood income, could perhaps reveal patterns about online gambling and income levels that would interest the public.

[21] Given the high-level and very general nature of the FSA Information, in my view, it will add little to the public understanding and debate of the poverty issues the applicant raises. It is important to keep in mind that the FSA Information reveals only the total revenue generated by an unknown number of players, and it does not disclose anything about individual players and their income. Further, there are many factors, only one of which is income, that influence in which FSA an individual resides. Anything one could glean by comparing PlayNow.com revenue to neighbourhood income levels is not likely to be sufficiently substantive or credible to advance public debate, such that it warrants disclosure under s. 25(1)(b).

[22] In addition, I am mindful that the reasons for invoking s. 25(1)(b) must be of sufficient gravity to override all other provisions of FIPPA, including the access exceptions found in Part 2 of FIPPA. While information about BCLC’s revenue per FSA may satisfy public interest in the sense of assuaging its curiosity about whether online gaming is more concentrated in certain parts of the province and how this might correlate to Statistics Canada data about income levels in those areas, this does not suffice to meet the threshold of being “clearly” in the public interest. Therefore, I conclude that s. 25(1)(b) does not apply to the FSA Information.

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<sup>8</sup> At pp. 28-29.

### **Harm to Financial or Economic Interests (s. 17)**

[23] BCLC submits that disclosure of the FSA Information could reasonably be expected to result in an undue financial gain to its grey market competitors and harm to BCLC's financial and economic interests. BCLC says that the FSA Information reveals where the largest PlayNow.com revenue was generated. It submits this would allow the grey market operators to refine their marketing strategies, make better use of their advertising dollars and increase the likelihood of reaching the target audience for competitive purposes - PlayNow.com account holders. BCLC submits that the end result will be that it will lose revenue generated from those customers to its competitors' online gambling sites.<sup>9</sup>

[24] The applicant submits that disclosure will not result in the s. 17 harms BCLC alleges because the FSA Information "is not of a highly sensitive commercial nature". He also submits that the public interest in the FSA Information outweighs what he says is a "purely speculative fear that they might cause financial harm to BCLC - a fear that is even harder to justify given BCLC's monopoly on legal online gambling in B.C."<sup>10</sup>

[25] Previous orders have established that ss. 17(1)(a) through (f) provide examples of the type of information the disclosure of which may result in harm under s. 17(1). Information that does not fit in paragraphs (a) to (f) may still be exempt from disclosure under the opening language of s. 17(1).<sup>11</sup> In this inquiry, BCLC relies on ss. 17(1)(b) and (d), as well as s. 17(1) generally.<sup>12</sup>

[26] The parts of s. 17 that are relevant are:

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 and that has, or is reasonably likely to have, monetary value;

...

<sup>9</sup> BCLC's initial submissions, para. 84.

<sup>10</sup> Applicant's initial submissions, pp. 3-5.

<sup>11</sup> Orders F08-22, 2008 CanLII 70316 (BC IPC); F09-13, 2009 CanLII 42409 (BC IPC); F10-39, 2010 CanLII 77325 (BC IPC); F11-14, 2011 BCIPC 19 (CanLII).

<sup>12</sup> In the first inquiry, BCLC relied only on ss. 17(1)(b) and (d).

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

...

[27] The Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* said the following about the standard of proof for exceptions that use the language “reasonably be expected to harm”:

This Court in *Merck Frosst* adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground... This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”: *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.<sup>13</sup>

### Section 17(1)(b)

[28] BCLC submits that the three elements of s. 17(1)(b) are met in this case: the FSA Information is financial and commercial information, it belongs to BCLC and it has monetary value. The applicant makes no submissions directly regarding whether the FSA Information is financial or commercial or whether it belongs to BCLC, but he disagrees that it has monetary value for BCLC’s competitors.

[29] **Financial or commercial information** - The FSA Information is the total dollar value of PlayNow.com lottery products purchased by all account holders in that FSA for the 2008-09 fiscal year. It is information about the buying, selling or exchange of merchandise and services and it is also about revenue generated; therefore, I find that it is both financial and commercial information.<sup>14</sup>

[30] **Belongs to BCLC** - BCLC’s evidence on this point is provided by its Senior eGaming Analyst who extracted the requested data from BCLC’s “business intelligence data warehouse” and created the record at issue. He explains that the data in BCLC’s data warehouse is compiled and stored by BCLC in the course of its PlayNow.com business operations. He adds that the

<sup>13</sup> 2014 SCC 31, at para. 54.

<sup>14</sup> See, for example, Order F14-58, 2014 BCIPC 62 (CanLII), at para. 16; Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62-63; Order F07-06, 2007 CanLII 9597 (BC IPC), at para 20-24.



data warehouse is maintained by BCLC employees and the information in it is treated as confidential and is not publicly available.<sup>15</sup> Based on this evidence, I am satisfied that the FSA Information “belongs to” BCLC.

[31] **Monetary value** - The next question is whether the FSA Information has or is reasonably likely to have monetary value as contemplated by s. 17(1)(b). Previous orders have found that monetary value requires the demonstration of “a reasonable likelihood of independent monetary value in the information concerned”.<sup>16</sup>

[32] BCLC agrees and says that s. 17(1)(b) “requires the demonstration of a reasonable likelihood of objectively ascertainable, independent monetary value in the information concerned.”<sup>17</sup> However, it also submits that information can have monetary value if it would help competitors obtain market share, enable a competitor to assess “market segment size”, or reveals the profitability of a commercial activity, and it cites several older B.C. orders in support.<sup>18</sup> In my view, those orders turned on their own facts, and I disagree with BCLC’s suggestion that they illustrate that s. 17(1)(b) may be satisfied merely by showing that information would allow one to assess the size or likely profitability of the online gaming market in each FSA.<sup>19</sup> Previous orders have determined that the fact that information would be of interest, or benefit, to others does not mean that it has independent monetary value. For example in Order 00-41, former Commissioner Loukidelis said:

There is, in my opinion, a clear distinction between information (including intellectual property) that the public body may wish to sell or license, and that reasonably could be said to have monetary value, and information that would simply be beneficial in some sense, or of interest, to a competitor.<sup>20</sup>

[33] I will apply the test expressed in Order 00-37 and other more recent orders, which state that for information to have monetary value in the context of s. 17(1)(b), there must be a reasonable likelihood of independent monetary value in the information concerned.

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<sup>15</sup> Senior eGaming Analyst affidavit #1.

<sup>16</sup> Order 00-37, 2000 CanLII 14402 (BC IPC) at para. 18. Order 00-39, 2000 CanLII 14404 (BCIPC), at p.8, Order 02-06, 2002 CanLII 42431 (BCIPC); Order 00-41, 2000 CanLII 14406 (BCIPC); Order F07-06, 2007 CanLII 9597 (BCIPC).

<sup>17</sup> BCLC initial submissions, para. 61.

<sup>18</sup> BCLC’s initial submissions, para. 61-62. Order No. 15-1994, 1994 CanLII 613 (BCIPC); Order No. 312-1999, 1999 CanLII 2786 (BCIPC); Order No. 285-1998, 1998 CanLII 3251 (BCIPC).

<sup>19</sup> BCLC’s initial submissions, paras. 75-76.

<sup>20</sup> Order 00-41, 2000 CanLII 14406 (BC IPC), para. 33.

*BCLC's submissions*

[34] BCLC submits that the information at issue has monetary value because its competitors could use it to assess the size of the online gambling market in each FSA and determine where the highest PlayNow.com revenue was generated in the 2008-09 fiscal year. This, in turn, would allow them to target their marketing to those FSAs in an effort to entice customers away from PlayNow.com and take market share away from BCLC.

[35] BCLC says that there is no evidence of grey market operators currently engaging in FSA targeted marketing, but BCLC believes it is reasonable to expect that they would do so if they gain access to the FSA Information.<sup>21</sup> BCLC's argument is supported by the evidence of its expert Mr. Lauzon. Mr. Lauzon believes that information about which FSAs generated the most PlayNow.com revenue would allow grey market operators to focus their marketing efforts in those FSAs.<sup>22</sup> He explains that grey market operators "can then more easily and more cost effectively reach out to them using techniques such as direct mail campaigns, in-person street intercepts, door-to-door canvassing, windshield pamphlet drops, mall intercepts, etc."<sup>23</sup> He also explains how it would be possible to use freely available information such as crowd-sourced lists of anonymous IP addresses (which include latitude and longitude) to digitally advertise to any of the IP addresses located in the desired FSA.<sup>24</sup> According to Mr. Lauzon's calculations, it would cost a grey market operator in excess of \$2 million to conduct telephone surveys to obtain similar, but less precise, information than what is at issue here.<sup>25</sup>

[36] BCLC also provides affidavits from its Senior Manager, eGaming Marketing ("Senior Manager") and its Director of Product & Business Development, eGaming ("Director") who echo Mr. Lauzon's views regarding how they believe the grey market operators could use the FSA Information. They explain how marketing professionals commonly use easily attainable statistical information from Statistics Canada and other commercially available sources to develop consumer profiles and refine their marketing approach in different geographic areas. The grey market operators could do the same, they believe, and the FSA Information could be added to that mix to refine their marketing efforts. The Senior Manager and the Director believe that this would make

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<sup>21</sup> BCLC's initial submissions, para. 67.

<sup>22</sup> Lauzon report #1, p. 3.

<sup>23</sup> Lauzon report #1, p. 3.

<sup>24</sup> Lauzon report #2, p. 3.

<sup>25</sup> BCLC's initial submissions, para. 66. Mr. Lauzon estimates that for every 1 million BC residents who responded to a telephone survey, only 20,000 PlayNow.com customers would be surveyed (there are 115,000 PlayNow.com customers). In addition, he points out that such a survey would not be as accurate as the information in dispute because not all people respond to telephone surveys, and those that do tend to under-report how much they spend on gambling for reasons related to poor recall and social stigma.

marketing efforts easier and/or less costly because the grey market operators would not need to cast their net as widely in their attempt to reach BCLC's customers. The Director also says that there is a "historical correlation" between the FSA Information and current BCLC sales, so despite its age, the information would still be valuable to its competitors.<sup>26</sup>

[37] BCLC also provides information about the competitive nature of the online gambling market. Mr. Lauzon explains that a large number of grey market websites accept wagers from Canadians and B.C. residents, with estimates ranging from 223 to just over 2000 websites.<sup>27</sup> Mr. Lauzon says that data from an Ipsos Reid report called "iGaming National Study – Canada 2012" demonstrates that "BCLC holds 21.7% of the market share with respect to wagers placed by Internet gamers on all Internet gaming sites, including legal and grey market sites."<sup>28</sup> BCLC also provides evidence that its revenue from eGaming was \$91 million in the 2013/14 fiscal year, so it submits even a one percent reduction in online gambling revenue represents close to a million dollars.<sup>29</sup>

[38] To illustrate what BCLC says is the aggressive marketing of its competitors, it provides two examples where it had to share or take less advantageous advertising space with its competitors during major sporting events (televised Vancouver Canucks games in 2011 and BC Place Stadium during the 2011 Grey Cup).<sup>30</sup> Also, Mr Lauzon explains that grey market website operators are not controlled by any of the "restrictions or regulatory parameters" that bind BCLC, so they can use whatever strategies or incentives they want to lure customers away from BCLC.<sup>31</sup> For example, he says that grey market operators' sign-up bonuses and incentives are larger than BCLC's. Mr. Lauzon says that grey market operators are not bound by the advertising and marketing standards that BCLC is obliged to follow to ensure it promotes only responsible gambling and provides information to assist problem gamblers. In addition, he explains how some grey market sites circumvent restrictions against advertising pay-for-gambling by offering free online games as a means of luring customers to the competitor's pay-for-gambling website. Mr. Lauzon's evidence regarding the lack of rules binding grey market operators is echoed in the Senior Manager's affidavit.<sup>32</sup>

[39] Finally, BCLC also submits that the FSA Information has monetary value to BCLC beyond any competitive advantage it offers grey market operators. Specifically, BCLC says, "The Information captures profitability information

<sup>26</sup> Director's affidavit, para. 26.

<sup>27</sup> Lauzon report #1., pp. 2-3.

<sup>28</sup> Lauzon report #2, p. 3.

<sup>29</sup> Director's affidavit, paras. 12 and 31.

<sup>30</sup> Director's affidavit, para. 16. Senior Manager's affidavit, para. 23.

<sup>31</sup> Lauzon report #1, p. 4.

<sup>32</sup> Lauzon report #1, p. 4. Senior Manager's affidavit, para. 22.

regarding PlayNow.com in that it reflects revenue data, which can be compared with the projected budget for the product to assess profitability of PlayNow.com.”<sup>33</sup>

*Applicant's submissions*

[40] The applicant's submissions regarding whether the FSA Information has any independent monetary values are as follows:

I would note that none of the materials submitted by BCLC provides direct evidence that its grey market competitors seek the information in question, value the information as highly as BCLC claims or have made any effort in the past to target online gambling customers in B.C. by postal code. Rather, both BCLC and its expert witness are merely speculating on the desire of its competitors for this information and the value they would place on it.<sup>34</sup>

[41] *Analysis (monetary value)* - Based on the information that BCLC provides, I accept that BCLC has grey market competitors and they could use the FSA Information to determine in which FSAs the higher PlayNow.com revenue was generated in 2008-09. It is possible that BCLC's competitors might consider the FSA Information to be a tool to help them decide where to focus their advertising, and that as a result, some PlayNow.com account holders might be lured to the competitors' websites. However, in my view, BCLC's evidence about what BCLC's competitors might be able to do with the FSA Information is insufficient to establish that it has independent monetary value.

[42] Despite BCLC's opinions and evidence about how the FSA Information could be used by its competitors, BCLC has not established that there is any market for the FSA Information. For instance, there was no evidence that suggests that grey market operators would spend any of their own money or offer any consideration to acquire the FSA Information. The fact that it could conceivably cost over \$2 million in marketing to attempt to recreate the FSA Information does not mean that BCLC's competitors would pay that or any other amount for it, especially given that grey market operators would already have access to publicly available demographic data, as BCLC and its witnesses explained.<sup>35</sup>

[43] In my opinion, it is doubtful that BCLC's competitors would value the FSA Information in the way BCLC believes they would. The PlayNow.com revenue generated in any particular FSA is clearly subject to several changeable factors, not the least being that the account holder(s) who generated the revenue may have moved or may have altered their spending habits. Furthermore, the information pertains to 2008-09, so it is reasonable to conclude that anything it

<sup>33</sup> BCLC's initial submissions, paras. 76-78.

<sup>34</sup> Applicant's reply submissions, para. 10.

<sup>35</sup> BCLC's initial submissions, para. 72.

reveals about the revenue generated by PlayNow.com account holders is outdated and may not reflect the online gambling spending per FSA. The Director's assertion that the information has a "historical correlation" to current sales was not explained, and I am not convinced that grey market operators would see any useful correlation this many years later. Also, the FSA Information reveals nothing about the volume or identity of PlayNow.com account holders in each FSA. In my view, BCLC has not established that there is a reasonable likelihood that its competitors would actually see the FSA Information as valuable and so would pay or offer any consideration to acquire it. In summary, BCLC has not established that the FSA Information has an independent monetary value to grey market operators.

[44] BCLC also submits that the information has monetary value to BCLC itself because it can be used to assess the profitability of PlayNow.com by comparing it to budget projections. However, as I see it, the fact that the FSA Information is of interest or use to BCLC does not mean that it has independent monetary value. There was no evidence that BCLC has any intention of selling the FSA Information or using it in a way that would result in BCLC receiving some form of payment or financial value in return. BCLC's submission on this point was unclear, however, so it may be that BCLC means that its competitors could compare budget projections with the FSA Information. While it was not explained how anyone outside of BCLC could have access to budget projections, even if they did, BCLC did not establish that grey market operators would exchange money or consideration for the FSA Information in order to assess the profitability of PlayNow.com. This seems highly unlikely in light of the fact that the PlayNow.com revenue information is publicly disclosed in BCLC's annual service plan reports.<sup>36</sup>

[45] Finally, BCLC cites three Ontario orders,<sup>37</sup> in support of its assertion that the information at issue in this case has monetary value. Those cases dealt with requests for information from the Ontario Lottery and Gaming Corporation. I am not persuaded by those Ontario orders because the information requested was not the same as here and in two of the orders the meaning of "monetary value" was not at issue. In the third order, detailed information about lottery sales per retail location was found to have monetary value because there was evidence of an actual market for it. In the present case, the evidence did not establish that there is a market for the FSA Information.

[46] In conclusion, while BCLC has demonstrated that the FSA Information is financial and commercial information that belongs to BCLC, it has not established that the FSA Information has or is reasonably likely to have monetary value as contemplated by s. 17(1)(b).

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<sup>36</sup> A copy of the 2013/14 Annual Service Plan Report was attached to the Director's affidavit.

<sup>37</sup> Order PO-2941, 2010 CanLII 77513 (ON IPC); PO-2199, 2003 CanLII 53949 (ON IPC); P-941, 1995 CanLII 6472 (ON IPC).

### Section 17(1)(d) and s. 17(1)

[47] Section 17(1)(d) requires that BCLC show there is a reasonable expectation that disclosure of the FSA Information could result in “undue financial loss or gain to a third party.” With respect to s. 17(1)(d), BCLC maintains that disclosure of the FSA Information will cause it to lose PlayNow.com account holders - and their online gaming dollars - to grey market operators. This, it submits, would result in an undue financial gain to its grey market competitors and an ensuing harm to BCLC’s financial and economic interests, under s. 17(1) in general.<sup>38</sup>

[48] The applicant, on the other hand, says: “In order to withhold the record in question under Section 17(1)(b) and (d), BCLC must prove that a competitor could reasonably use the information in question to better market its products and compete against BCLC. I find that hard to believe given the restrictions on BCLC’s online gambling competitors.”<sup>39</sup>

[49] Regarding BCLC’s fears that it will lose PlayNow.com account holders to grey market websites, Mr. Lauzon provides evidence about player behaviour. He says that research commissioned by the Canadian Gaming Association conducted in 2010 by Ipsos Reid shows that there is a fairly high level of player loyalty to one gaming site. He says that the research showed that 53% of B.C. internet gamers were registered to play with only one site in 2010 but that number had increased to 72% by 2012.<sup>40</sup> He says: “This demonstrates that once a ‘grey’ market competitor lures a PlayNow.com player away from BCLC, statistically speaking those customers are most likely going to remain with the ‘grey’ market operator that lured them...”<sup>41</sup>

[50] I do not accept this logic. As I see it, the players that might be lured away from PlayNow.com would clearly not be the 72%, whose inclination is to remain loyal to one site. There is nothing to indicate that the players who are interested in trying a new site are any more likely to be loyal to the grey market site than they were to PlayNow.com. Further, it does not follow that once lured to a grey market site, an individual will no longer play with PlayNow.com. There was no information about the playing habits of online gamblers to support a finding that if a PlayNow.com account holder is enticed to play at a grey market site that he or she would not also continue to play at PlayNow.com. BCLC’s evidence leaves many questions unanswered about what factors might influence an individual’s choices about how much money to spend and where to spend it.

<sup>38</sup> BCLC initial submissions, para. 31-32.

<sup>39</sup> Applicant’s initial submissions, p. 4

<sup>40</sup> Lauzon report #2, p. 2.

<sup>41</sup> Lauzon report #1, p. 4.

[51] While I accept that the online gambling business is competitive and that both BCLC and its grey market competitors advertise to attract and keep players, BCLC has not established that it is reasonable to conclude that its competitors will use the information in the way BCLC fears. For the same reasons I found for why the information does not have independent monetary value, I am not convinced by BCLC's assertion that the information is "competitively valuable". To my mind, it does not seem likely that grey market operators will consider it an effective use of their advertising resources to focus their marketing around 2008/09 data when there is easily attainable statistical information from Statistics Canada and other sources that BCLC says marketers already use.<sup>42</sup>

[52] However, assuming for the sake of argument, that a grey market operator uses the FSA Information to refine its marketing in the way that BCLC anticipates and succeeds in luring away PlayNow.com players, and the cost of marketing (i.e., incentives, bonuses) does not outweigh any resulting gain in new revenue, there would be a financial gain to the grey market operator.

[53] The fact that disclosure of the FSA Information may lead to a financial gain for the grey market operators, however, does not suffice to establish that s. 17(1)(d) applies. Section 17(1)(d) requires that BCLC show there is a reasonable expectation that disclosure of the severed information could result in "undue" financial gain to a third party. As noted in Order 00-41, "undue" is defined in the Oxford English Dictionary as "excessive or disproportionate".<sup>43</sup> BCLC provided no information that would allow me to assess the nature or magnitude of any financial gain to a third party. Without some information about such matters, I am unable to determine whether any financial gain could be characterized as "undue". Therefore, I find that s. 17(1)(d) does not apply.

[54] In order to assess BCLC's submission that disclosure of the FSA Information could reasonably be expected to harm its financial and economic interests, under s. 17(1), I have returned to what the Courts and previous orders have said about the standard of proof. In short, BCLC needs to provide evidence that the feared harm is "well beyond" or "considerably above" a mere possibility.

[55] I find that BCLC's evidence and arguments about financial or economic harm are speculative and not persuasive. For example, it does not follow that if the 2008/09 FSA Information is available that grey market operators would find it valuable for marketing purposes, and if they did, that their advertising would even successfully reach individual PlayNow.com account holders and convince them to spend money on unregulated and/or illegal sites. Further, it seems highly speculative to conclude that if the advertising reaches a PlayNow.com account holder, that individual will switch allegiances away from PlayNow.com. In fact, BCLC's evidence about player loyalty suggests that this is unlikely. Also, BCLC's

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<sup>42</sup> BCLC's initial submissions, para. 72.

<sup>43</sup> At para. 36.

submissions are based on the assumption that a PlayNow.com customer who was “lured” to a grey market website would leave permanently as opposed to simply digging deeper into their pockets in order to be able to play on a grey market website as well as PlayNow.com. There is no evidence about the average spending habits of PlayNow.com account holders, which might shed light on how much of their playing dollars they would spend elsewhere.

[56] BCLC’s evidence of the nature or magnitude of the loss is that BCLC holds 21.7% of the market share with respect to wagers placed by Internet gamers and that its revenue was \$91 million in 2013/14, so even a one percent reduction in online gaming sales would represent close to a million dollars in lost revenue.<sup>44</sup> BCLC does not explain why it chose one percent, however, or even if it actually believes that this would be the magnitude of the loss.

[57] The “reasonable expectation of probable harm” test requires BCLC demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative.<sup>45</sup> I find that it has not done so in this case. The feared harm is too speculative to qualify as a financial or economic loss under s. 17(1). In conclusion, I find that disclosure of the FSA Information could not reasonably be expected to harm the financial or economic interests of BCLC or the government of British Columbia. Therefore, the information may not be withheld under s. 17(1).

## CONCLUSION

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

1. BCLC is not required to disclose the FSA Information under s. 25(1)(b).
2. BCLC is not authorized under sections 17(1), 17(1)(b) or 17(1)(d) to refuse to disclose the FSA Information in dispute.
3. I require BCLC to give the applicant access to the FSA Information by November 25, 2015 and to provide the OIPC’s Registrar of Inquiries with a copy of its cover letter and the records sent to the applicant.

October 13, 2015

## ORIGINAL SIGNED BY

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Elizabeth Barker, Senior Adjudicator

OIPC File No.: F10-42421

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<sup>44</sup> Director’s affidavit, para. 31.

<sup>45</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, at para. 52.