



OFFICE OF THE  
INFORMATION & PRIVACY  
COMMISSIONER  
for British Columbia

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Order F11-32

## BRITISH COLUMBIA LOTTERY CORPORATION

Michael McEvoy  
A/Senior Adjudicator

November 2, 2011

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**Summary:** The applicant asked BCLC for records relating to its compliance with federal *Proceeds of Crime* legislation. BCLC identified four responsive records, withholding each in their entirety citing three exceptions to disclosure under FIPPA including solicitor-client privilege. BCLC said it provided the records to their solicitor to prepare for litigation in the Federal Appeals Court and as a result they became privileged as part of the “solicitor’s brief”. The A/Senior Adjudicator found the “solicitor’s brief” test did not apply because BCLC’s lawyer did not gather the records from third parties. Rather, counsel obtained the records from BCLC itself who came to possess them in the ordinary course of its business through the regulatory oversight of its operations. They were neither originally gathered nor created for the purpose of litigation. Records that are “ingathered” in this manner do not become privileged simply because they are later handed to the public body’s solicitor.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, s. 14.

**Cases Considered:** *Hodgkinson v. Simms* (1988), CanLII 181 (B.C.C.A.).

### INTRODUCTION

[1] This inquiry arises from a CBC reporter’s (“reporter”) research into allegations the British Columbia Lottery Corporation (“BCLC”) failed to comply with rules set out in the federal *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (“*Proceeds of Crime Act*”). The query followed publically leaked information that the Financial Transactions and Reports Analysis Centre of Canada (“FINTRAC”), the body responsible for enforcing compliance with the *Proceeds of Crime Act*, fined BCLC almost \$700,000. The Reporter filed three

access requests for information related to the matter. BCLC identified four documents as being responsive to those requests but withheld each in their entirety, stating their disclosure would: breach solicitor-client privilege; deprive BCLC's right to a fair trial; facilitate the commission of an offence; harm BCLC's security system and harm the conduct of intergovernmental relations between the Province and the federal government. The reporter requested that the Office of the Information and Privacy Commissioner ("OIPC") review this decision, and the OIPC grouped the three requests into one inquiry. After the issuance of the Notice of Inquiry, BCLC requested that the OIPC decline to hold the inquiry, arguing it was plain and obvious that there would be harm to the conduct of intergovernmental relations between the Province and the federal government. It also contended that the OIPC should allow federal court proceedings, about matters related to the disputed records, to take their course. The OIPC registrar adjourned this inquiry to consider both matters. Adjudicator Jay Fedorak dismissed BCLC's arguments, finding there was at least an arguable issue to be considered at inquiry, and previous orders have held that having possible rights of access through the courts does not preclude an applicant from seeking the same records through FIPPA simultaneously.<sup>1</sup> This inquiry resumed and final submissions were received September 29, 2011.

## ISSUES

[2] The issues in this inquiry are whether:

1. BCLC is authorized by s. 14 of FIPPA to refuse to disclose the records because doing so would breach solicitor-client privilege.
2. BCLC is authorized by s. 15(1)(h) of FIPPA to refuse to disclose the records because it would harm BCLC's right to a fair trial and/or s. 15(1)(k) of FIPPA to refuse to disclose the records because it would facilitate the commission of an offence.
3. BCLC is authorized by s. 16(1)(a) and (b) of FIPPA to refuse to disclose the records because it would harm intergovernmental relations and would reveal information received in confidence from a government.

[3] BCLC initially told the journalist that it relied on s. 15(1)(l) to withhold the records because their disclosure would harm the security of BCLC's computer system. BCLC did not pursue this argument in its submission, and I conclude it has abandoned this position. Therefore, I will not consider it.

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<sup>1</sup> Adjudicator Fedorak also noted that the reporter is not a party to the federal court proceedings and therefore would have no access to the records through that process.

## DISCUSSION

[4] BCLC applied the s. 14 exception to all of the records at issue but did not provide those records to me. After reviewing the submissions and affidavit evidence, I concluded that I did not require the disputed records for review because BCLC described them in sufficient detail to allow me to determine the s. 14 issue. If BCLC properly applied s. 14, then this matter is at an end. Should I find that s. 14 does not authorize BCLC to apply solicitor-client privilege then I will require that BCLC produce the records in order to assess whether it has properly applied the other claimed exceptions. In that event, I would issue a separate order to deal with these other exceptions.

### *The records in dispute*

[5] Under the *Proceeds of Crime Act*, BCLC is required, among other things, to report large cash transactions and other suspicious transactions to FINTRAC. Failure to do so can result in FINTRAC issuing a Notice of Violation and assessing a monetary penalty.

[6] With this context in mind the four records at issue are as follows:

- A letter dated January 29, 2010 from FINTRAC to BCLC setting out the details of FINTRAC's findings regarding whether BCLC's had complied with the *Proceeds of Crime Act*.
- A letter dated February 24, 2010 containing BCLC's response to FINTRAC's findings.
- A Notice of Violation issued by FINTRAC to BCLC on June 15, 2010. The Notice stated that FINTRAC might levy monetary penalties against BCLC for violations of the *Proceeds of Crime Act*.<sup>2</sup>
- Notice of Decision dated October 1, 2010 from the Director of FINTRAC to BCLC setting out the monetary penalties referred to in the Notice of Violation.

### *Discussion*

[7] BCLC responded to the Notice of Decision by appealing its findings to the Federal Court of Appeal, pursuant to s. 73.21 of the *Proceeds of Crime Act*.

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<sup>2</sup> I note here that BCLC made representations to FINTRAC on June 30, 2010 asking that it withdraw the Notice of Violation and the proposed penalties. This June 30, 2010 record is not at issue here. As is evident from the fourth record at issue, FINTRAC rejected this representation.

[8] BCLC says that its in-house lawyers assembled the disputed records “for the purpose of advising BCLC’s appeal of the FINTRAC penalties, and to retain and instruct external counsel.”<sup>3</sup> Accordingly, BCLC submits the records form part of the “solicitor’s brief” for the purpose of the Federal Appeals Court proceedings and are therefore privileged. BCLC relies on the British Columbia Court of Appeal decision in *Hodgkinson v. Simms*<sup>4</sup> in support of this submission.

[9] In the *Hodgkinson* case, McEachern C.J.B.C. stated as follows:

It is my conclusion that the law has always been, and in my view should continue to be, that in circumstances such as these, where a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled, indeed required, unless the client consents, to claim privilege for such collection and to refuse production.

[10] It is important to remember the context in which the *Hodgkinson* case arose. It concerned the document discovery process in a civil proceeding. The court faced the issue of whether photocopies of documents collected by the defendant’s solicitor from third parties as part of his brief were privileged, even though the original documents were not created for the purpose of litigation.

[11] The issue in this case is different because BCLC’s counsel did not obtain the disputed records from a third party. BCLC’s counsel obtained the records from BCLC itself. BCLC came to possess the records in the ordinary course of its business through FINTRAC’s regulatory oversight of its operations. McEachern C.J.B.C. made clear in *Hodgkinson* that records collected this way that end up in a lawyer’s hands do not form part of the “solicitor’s brief” that is subject to privilege. He stated:

... I agree that a document or a copy of a document in the possession of a party before litigation, or “ingathered” by a party before that time in the ordinary course of events and not for the dominant purpose of litigation, does not become privileged just because it or a copy of it is later given to a solicitor.

[12] These records were clearly “ingathered” by BCLC prior to Federal Court action. Three of the four records were created by FINTRAC for the purpose of pursuing alleged violations of the *Proceeds of Crime Act*, and the fourth is BCLC’s response to those allegations. Therefore, none were gathered or created for the dominant purpose of litigation. To paraphrase McEachern C.J.B.C., the records do not become privileged simply because they were later handed to BCLC’s solicitors.

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<sup>3</sup> BCLC initial submission, para. 27.

<sup>4</sup> (1988), CanLII 181 (B.C.C.A.).

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[13] For these reasons, I find that s. 14 does not apply to the records at issue.

[14] As noted above, BCLC also argues that other exceptions of FIPPA apply to the records and I will consider those arguments by way of a separate Order after reviewing the records and the parties' submissions.

## **CONCLUSION**

[15] BCLC is not authorized to refuse disclosure of the records under s. 14 of FIPPA. Pursuant to s. 44(1)(b) of FIPPA, within 10 days of the date of this Order, as FIPPA defines "day", that is, on or before November 17, 2011, I require BCLC to produce an unsevered copy of the four records at issue identified at para. [6] above, to me for the purpose of adjudicating the balance of the exceptions that BCLC applies here.

November 2, 2011

## **ORIGINAL SIGNED BY**

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Michael McEvoy  
A/Senior Adjudicator

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