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Order F15-66

BRITISH COLUMBIA LOTTERY CORPORATION

Celia Francis
Adjudicator

December 3, 2015

CanLII Cite: 2015 BCIPC 72
Quicklaw Cite: [2015] B.C.I.P.C.D. No. 72

Summary: A journalist requested records related to the use of free vouchers on BCLC's PlayNow.com gaming site. BCLC withheld some of the information under s. 13(1) (advice or recommendations), s. 16(1)(b) (information received in confidence) and s. 17(1) (harm to BCLC's financial interests). The adjudicator found that s. 13(1) applied to much of the information and that s. 17(1) applied to other information. The adjudicator also found that s. 17(1) did not apply to some information and ordered BCLC to disclose this information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, 13(1), 16(1)(b), 17(1)(a), 17(1)(b), 17(1)(d).

Authorities Considered: B.C.: Order F07-17, 2007 CanLII 35478 (BC IPC); Order 01-15, 2001 CanLII 21569 (BC IPC); Order F13-08, 2013 BCIPC 9 (CanLII); Order F15-58, 2015 BCIPC 61 (CanLII); Order F08-22, 2008 CanLII 70316 (BC IPC); Order 03-11, 2003 CanLII 49176 (BC IPC); Order 00-10, 2000 CanLII 11042 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC); Order 01-20, 2001 CanLII 21574 (BC IPC); Order F11-12, 2011 BCIPC 15; Order 01-22, 2001 CanLII 21576 (BC IPC); Order 07-06, 2007 CanLII 9597 (BC IPC).

Cases Considered: *College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 (CanLII); *Insurance Corporation of British Columbia v. Automotive Retailers Association,* 2013 BCSC 2025 (CanLII); *3430901 Canada Inc. v. Canada (Minister of Industry)*, 1999 CanLII 9066 (FC); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3; *British Columbia Lottery Corporation v. Skelton*, 2013 BCSC 12; *John Doe v. Ontario (Finance)*, 2014 SCC 36.

INTRODUCTION

[1] In mid-2013, a journalist made a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to the public body, the British Columbia Lottery Corporation ("BCLC"), for records related to the use of "free play" vouchers on PlayNow.com, for the period April 1, 2012 to March 31, 2013. The request included records on the number of vouchers BCLC had issued, as well as associated costs, policies and procedures and incentives for using BCLC products.

[2] BCLC responded by providing 68 pages of records, withholding some information in these pages under s. 13(1) (advice or recommendations) and ss. 17(1)(b) and (d) (harm to financial and economic interests) of FIPPA. BCLC withheld a further 203 pages, in full, under the same exceptions.

[3] The journalist asked the Office of the Information and Privacy Commissioner ("OIPC") to review BCLC's decision. He argued that the public has a right to know how BCLC is conducting its affairs, including the use of free play vouchers as an incentive to stimulate people to gamble.

[4] Mediation by the OIPC was not initially successful and the journalist requested an inquiry. At that point, BCLC notified two third parties of the request under s. 23 of FIPPA. One third party, Openbet Technologies Limited ("Openbet"), consented to the release of information related to it. The other, the Manitoba Liquor and Lotteries Corporation ("MLLC"), did not. BCLC then disclosed more information to the journalist and told him it was applying ss. 16 and 21 to some of the withheld information, in addition to ss. 13 and 17. The inquiry proceeded and the OIPC received submissions from the journalist, BCLC and the MLLC.

ISSUES

[5] The issues before me are whether BCLC is required to withhold information under s. 21 and authorized to withhold information under ss. 13, 16 and 17. BCLC has the burden under s. 57 of FIPPA of proving that the journalist is not entitled to have access to the withheld information.

DISCUSSION

Background

[6] BCLC, an agent of the Government of British Columbia, is a Crown corporation of the Province of British Columbia (the "Province") and is governed by a government-appointed Board of Directors that reports to the

Minister of Finance. BCLC conducts, manages and operates lottery gaming, casino gaming, commercial bingo gaming and eGaming in the Province under the authority of both the *Gaming Control Act* and the *Criminal Code*. BCLC is subject to the regulatory oversight of the Gaming Policy and Enforcement Branch ("GPEB"), under the Ministry of Finance.[1]

[7] PlayNow.com is an online gaming ("eGaming") platform that BCLC developed. BCLC launched the PlayNow.com website in British Columbia in 2004, offering online gaming to players located within the province. BCLC uses Internet Protocol ("IP") and other geolocation technology to monitor the location of PlayNow.com players, in an effort to restrict use of the site to people located within British Columbia. Originally, PlayNow.com offered online "Sports Action" games to customers in British Columbia. Over time, lottery games, interactive games, eBingo and, most recently, online casino games and peer-to-peer online poker were added.[2]

[8] BCLC has contracted with MLLC to operate PlayNow.com in Manitoba on MLLC's behalf, under the "principal E-Games Supply and Service Provider Agreement". BCLC also provides MLLC with related marketing and advertising services under the "Marketing Services Agreement". Operation of Manitoba's PlayNow.com began in January 2013. BCLC receives payment from MLLC for its services in providing the PlayNow.com platform and for operating eGaming on Manitoba's PlayNow.com site.[3]

Records in dispute

[9] BCLC described the withheld information in the records in dispute, some of which relates to MLLC's voucher promotions, as follows:

(a) "Marketing Data" regarding PlayNow.com promotional offers. BCLC says this information reveals the outcome of a voucher offer, *e.g.*, rate at which it was accessed or redeemed;

(b) "Objective Information" that identifies the intended objective of a voucher promotion. BCLC said these objectives include increasing revenue (player "spend"), encouraging existing customers to "cross-over" to a new PlayNow.com game, attracting new players, retaining existing players; encouraging registered but inactive players to resume use of PlayNow.com (*i.e.*, "reactivating" players who have "lapsed");

(c) "Target Information" that identifies the intended target audience of a voucher promotion;

[1] Madill affidavit, paras. 3-6, BCLC's initial submission.
[2] Adams affidavit, paras. 9-10.
[3] BCLC's initial submission, para. 2; Adams affidavit, paras. 12-15.

(d) "Strategy Analysis" which BCLC describes as internal BCLC analysis or discussions of the Marketing Data and/or marketing strategy relating to PlayNow.com voucher promotions, including communications on the development, implementation and outcome of voucher promotions; and

(e) "Policy and Procedure Information", in policy and procedure documents pertaining to BCLC vouchers.[4]

Section 13(1) – Advice or recommendations

[10] Section 13(1) is a discretionary exception. It says that a public body

> … may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

[11] Section 13(2) of FIPPA states that a public body may not refuse to withhold certain types of information under s. 13(1). Numerous orders have considered the application of s. 13 of FIPPA, for example, Order F07-17,[5] where Adjudicator Boies Parker stated that:

> In making a determination regarding s. 13, a public body must first determine whether the material fits within the scope [of] s. 13(1). If it does, the public body must then go on to determine whether the material falls within any of the categories set out in s. 13(2). If the records at issue are caught by one of the categories under s. 13(2), the public body must not refuse disclosure under s. 13(1). If the public body determines that the material falls within s. 13(1) and is not caught by any of the s. 13(2) categories, the public body must then decide whether to exercise its discretion to refuse disclosure.

Standard for applying s. 13(1)

[12] Many orders and court decisions have considered the purpose, interpretation and application of s. 13(1).[6] Evans JA considered the purpose of the equivalent federal provision in *3430901 Canada Inc. v. Canada (Minister of Industry)*[7] ("*Telezone*") and held that "advice" is broader in meaning than "recommendations". He also found that advice includes an expression of opinion on policy-related matters but excludes information of a "largely factual nature".

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[4] Adams affidavit, paras. 33-48.
[5] Order F07-17, 2007 CanLII 35478 (BC IPC), at para 18.
[6] Order 01-15, 2001 CanLII 21569 (BC IPC), at para. 22.
[7] *3430901 Canada Inc. v. Canada (Minister of Industry)*, 1999 CanLII 9066 (FC), at paras. 50-52, (leave to appeal denied June 13, 2002, [2001] S.C.C.A. No. 537). Former Commissioner Loukidelis referred to this discussion in Order 02-38, 2002 CanLII 42472 (BC IPC), at para. 116.

[13] In *John Doe v. Ontario (Finance*)[8] ("*John Doe*"), the Supreme Court of Canada referred to *Telezone* in addressing Ontario's equivalent of s. 13 and noted the distinction Evans JA made in *Telezone* between "advice" and objective "factual information". The Court also said this in *John Doe*:

> ... The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring that such advice or recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process.[9]

[14] The leading case in BC on s. 13(1) is *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*[10] ("*College of Physicians"*), which found that "advice" includes expert opinion on matters of fact on which a public body must make a decision for future action. The Court there recognized that some degree of deliberative secrecy fosters the decision-making process. More recently, the BC Supreme Court considered the purpose and scope of s. 13(1) in *Insurance Corporation of British Columbia v. Automotive Retailers Association* (*ICBC*)[11] and held that factual material could be protected where it was integral to the analysis and thus part of the deliberative process. The Court also recognized that s. 13 applies when disclosure of information might allow an accurate inference to be drawn about the underlying advice or recommendations. In arriving at my decision on s. 13(1), I have considered the principles for applying s. 13(1) as set out in the court decisions and orders cited above, as well as others I discuss below.

BCLC's position and evidence

[15] BCLC said that the BC government requires it to optimize its financial performance and propose new revenue opportunities as they arise.[12] BCLC submitted that the records contain raw data and results regarding PlayNow.com promotions, higher level analysis of voucher promotions and recommendations for future initiatives. BCLC also argued that disclosure of the raw data would allow an individual to accurately infer advice or recommendations to BCLC.[13]

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[8] 2014 SCC 36.
[9] 2014 SCC 36, at para. 45.
[10] 2002 BCCA 665.
[11] 2013 BCSC 2025, at para. 52.
[12] Government's Letter of Expectations for 2012/2013, p. 2, Exhibit A, Madill affidavit.
[13] BCLC's initial submission, paras. 7-12; Groumoutis affidavit, paras. 18-21.

[16] Stewart Groumoutis, BCLC's Monetization Manager for PlayNow.com for the period in question, was responsible for determining opportunities to "grow" the value of PlayNow.com's player base, both for BCLC and MLLC. He explained that the records came to exist through BCLC's efforts to improve PlayNow.com's performance and increase revenues. In summary, he said:

- Prior to the 2012/2013 fiscal year, marketing PlayNow.com focused mainly on online promotions available to all users of PlayNow.com.
- The primary objective of this marketing was "monetization" (achieving higher sales or "spend" from PlayNow.com customers).
- BCLC wanted PlayNow.com to grow as a business but had little analysis of the past performance of PlayNow.com marketing promotions to draw on.
- The field of marketing was shifting to more targeted marketing directed at individuals, based on consumer profiles, and building and maintaining player satisfaction.
- Most of the records in dispute arose out of internal email discussions, circulation of reports and presentations designed to improve reporting and knowledge-sharing among key PlayNow.com employees and to develop advice and recommendations for future PlayNow.com marketing and business development.
- Placing more emphasis on internal reporting and analysis of PlayNow.com's marketing and sales data has improved BCLC's understanding of promotions and how they relate to PlayNow.com's performance. It has also formed the basis of better-informed business decisions by BCLC on PlayNow.com's future operations and marketing decisions.
- Improved reporting and analysis have taken PlayNow.com's business from little or no growth, year over year, to growth in the 20% range.[14]

[17] Cameron Adams, BCLC's Director of Product and Business Development, eGaming, provided evidence on how BCLC attracts new PlayNow.com customers. He also explained the use of voucher offers to promote and market PlayNow.com to new and existing customers. He said:

- Voucher offers are increasingly important in marketing PlayNow.com.
- In 2014, BCLC ran approximately 285 different voucher offer promotions.
- Some vouchers are blanket offers circulated by email or advertisement on the PlayNow.com site and others are targeted to specific PlayNow.com customers.

[14] Groumoutis affidavit, paras. 10-17.

- A voucher (also known as a "token" or "freebet") is a complimentary credit or offer that a qualified customer (player) can redeem for eGaming play on PlayNow.com.
- BCLC uses the withheld information to evaluate and measure the success or failure of voucher offers and to inform internal advice and recommendations on strategies for marketing and developing PlayNow.com.[15]

Journalist's position

[18] The journalist argued that BCLC derives most of its revenue from money lost by gamblers at casinos, race tracks, bingo halls, lottery retailers and online. He also argued that gambling, while a source of revenue to the Province, costs society from a health and safety point of view, because of "at risk" and "problem" gamblers. He suggested that BCLC is contravening its own guidelines on responsible gambling by offering incentives and rewards, including in the form of "free play vouchers". In light of these things, the journalist believes that BCLC should be made more accountable through disclosure of the records in dispute.[16] The journalist also argued that the fact that BCLC does business with a lottery corporation in another province does not mean it should be shielded from scrutiny by confidentiality clauses. He said citizens of other provinces have a right to know how their statutory monopolies are operating.[17]

Analysis

[19] I accept BCLC's evidence that it took steps to improve PlayNow.com's performance and that it needed to gain a better understanding of how promotions could contribute to that goal and to making better-informed decisions about PlayNow.com.[18] The withheld information, in my view, consists of advice, recommendations and expert opinions of BCLC staff about BCLC and MLLC promotions, developed by or for BCLC, and forming part of BCLC's deliberative processes regarding PlayNow.com's performance, how to improve it and how to increase revenues. I also find that it would be possible to accurately infer advice or recommendations from the withheld information, from the way it is presented. The withheld information is, in my view, the kind of information that past orders and court cases have considered to be advice or recommendations. I find that the withheld information described above falls under s. 13(1).

Section 13(2)

[20] The next step is to consider if one or more of the provisions in s. 13(2) apply to the withheld information. If so, the information may not be withheld

[15] Adams affidavit, paras. 32-47.
[16] Journalist's submission, paras.1-25,
[17] Journalist's submission, paras. 35-39.
[18] Groumoutis affidavit, para. 22; Adams affidavit, para. 18.

under s. 13(1). The journalist argued that ss. 13(2)(a), (i) and (m) apply to the withheld information but did not explain why.[19] The relevant provisions read as follows:

> 13(2) The head of a public body must not refuse to disclose under subsection (1)
>
> (a) any factual material,
> …
> (i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,
> …
> (m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or
> …

[21] Factual material – BCLC said that s. 13(2)(a) does not apply in this case because, with the exception of records containing a compilation of data for all voucher promotions ("campaign reports"), the withheld information was selectively compiled by BCLC's analysts, applying their judgement and expertise, for their evaluation of a particular promotion. BCLC also argued that the data is intertwined with the advice and recommendations and integral to BCLC's decision-making process.[20]

[22] I find that there is factual material in the records in the form of data, figures, graphs and tables. However, it is intertwined with the advice and recommendations in the records. It was, moreover, in my view, integral to the advice about the success or failure of promotions and the related implications for PlayNow.com's performance. Its disclosure could also allow for the drawing of accurate inferences about the associated advice and recommendations. I find that s. 13(12)(a) does not apply to the withheld information.

[23] Feasibility or technical study – BCLC disputed the journalist's argument on s. 13(2)(i), saying the records do not consist of a feasibility or technical study. It pointed to Order F13-08[21] in support of its position. I agree with BCLC that the records do not constitute a study into a policy or project of BCLC, for the purposes of s. 13(2)(i).[22]

[24] Information cited publicly – BCLC said it has not cited the information publicly as a basis for making a decision. The evidence is that the information is

[19] Journalist's submission, para. 27.
[20] BCLC's initial submission, paras. 13-15.
[21] 2013 BCIPC 9 (CanLII), at para. 65.
[22] BCLC's initial submission, para. 10.

kept confidential.[23] There is also no evidence that BCLC has cited the withheld information publicly as a basis for making a decision or formulating a policy. I find that s. 13(2)(m) does not apply here.

Exercise of discretion

[25] Having concluded that certain information is "advice or recommendations", public bodies must nevertheless exercise their discretion in deciding whether or not to disclose requested information, having regard for the relevant factors.

[26] The journalist pointed out that s. 13(1) is discretionary but argued that BCLC has not exercised its discretion properly in this case.[24] He did not elaborate on this argument.

[27] BCLC said it withheld advice or recommendations, together with the underlying analysis, that are still relevant to BCLC's current decision-making and ongoing strategic development of PlayNow.com business. Even though the information dates to the 2012/2013 fiscal year, BCLC said it still uses the information to inform its decisions on PlayNow.com development.[25]

[28] I accept BCLC's evidence that it still uses the withheld information as a basis for its current decision-making processes regarding PlayNow.com development. This is, in my view, an appropriate factor for BCLC to consider in exercising its discretion. I am therefore satisfied that BCLC properly exercised its discretion in deciding what to sever and what to disclose.

Conclusion on s. 13(1)

[29] I found above that the withheld information consists of advice or recommendations developed by or for BCLC. I also found that s. 13(2) does not apply and that BCLC properly exercised its discretion when making its decision. Therefore, I find that s. 13(1) applies to the information that BCLC withheld under this exception. This finding applies to the withheld information in the following records: 1-5, 7-8, 10-12, 15-24, 26-33, 35, 38-39, 48.[26]

Section 17 – harm to financial or economic interests

[30] BCLC applied ss. 16(1)(b), 17(1) and 21(1), in various combinations, to the information to which it applied s. 13(1). Given my finding on s. 13(1), I need

[23] Groumoutis affidavit, para. 22. Taubensee affidavit, para. 27.
[24] Journalist's submission, paras 28-32,
[25] BCLC's initial submission, para.18; Groumoutis affidavit, para. 22; Adams affidavit, paras. 46, 54.
[26] BCLC did not withhold any information in the following records: 6, 9, 13-14, p. 191 of record 34, 47.

not also consider whether ss. 16(1)(b), 17(1) and 21(1) apply to the same records. Further, given my findings on s. 17 that follow, ultimately it was not necessary for me to consider s. 16(1)(b) or 21(1) at all.

[31] However, in the case of the BCLC "campaign reports", an MLLC campaign report and "policy and procedure information", the only exception that BCLC applied was s. 17(1). BCLC said that it relies generally on s. 17(1) and that the information also falls under the examples in ss. 17(1)(a), (b) and (d). These provisions read as follows:

> **Disclosure harmful to the financial or economic interests of a public body**
>
> 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:
>
> (a) trade secrets of a public body or the government of British Columbia;
> (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;
> …
> (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;
> …

Standard for applying s. 17(1)

[32] The Supreme Court of Canada set out the standard of proof for harms-based provisions in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*:

> 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: paras. 197 and 199. 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".[27]

[33] Previous orders have noted that ss. 17(1)(a) to (f) are examples of information the disclosure of which may result in harm under s. 17(1). Information that does not fit in the listed paragraphs may still fall under the opening clause of s. 17(1).[28] I have approached the evidence as to harm in this case on the basis that disclosure to the applicant under FIPPA would be disclosure to the world.[29] In my deliberations, I also considered MLLC's argument and evidence on harm under s. 21(1)(c) regarding the MLLC campaign report.

Campaign reports

[34] These records are spreadsheets listing BCLC and MLLC promotions for a number of four-week periods.[30] BCLC disclosed the names and time periods of the promotions. It withheld what it called "marketing data" and information about the objectives and targets of the campaigns, including the number of players and the number of tokens or vouchers issued during each promotion.

Expert evidence of Paul Lauzon

[35] BCLC's evidence included two reports, Lauzon #1 and Lauzon #2, from Paul Lauzon, Senior Vice President, Lottery and Gaming, Ipsos Reid. BCLC argued that the Lauzon reports meet the criteria for expert evidence in *R. v. Mohan*.[31] BCLC also referred to *British Columbia Lottery Corporation v. Skelton*, 2013 BCSC 12 ("*Skelton"*), where the court found that Paul Lauzon's evidence met the criteria for admissibility as expert opinion evidence. I have considered the Lauzon reports in light of the Court's analysis in *Skelton* and find that they are admissible as expert opinion evidence.[32] I refer to them below as appropriate.

Sections 17(1) and 17(1)(d) - undue financial gain or loss

[36] Past orders have said that, if disclosure would give a competitor an advantage, usually by acquiring competitively valuable information, effectively for

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[27] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, at para. 54, citing *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3, at para. 94.

[28] See for example, Order F15-58, 2015 BCIPC 61 (CanLII), at para. 25, and Order F08-22, 2008 CanLII 70316 (BC IPC), at para. 43.

[29] See Order 03-11, 2003 CanLII 49176 (BC IPC), at para. 20, another case involving s. 17(1).

[30] Pages 192-201 of record 34; records 36, 37, 40.

[31] [1994] 2 S.C.R. 9 at para. 20.

[32] See Order F15-58, 2015 BCIPC 61 (CanLII), at para. 14, where Senior Adjudicator Barker made a similar finding in the re-hearing that followed *Skelton*.

nothing, the gain to the competitor and the loss to the third party will be "undue".[33]

Grey market competition

[37] BCLC and MLLC said that their PlayNow.com operations have "significant third-party" competition from "grey market" gaming sites. BCLC said that, according to 2012 data, it has 21.7% of the internet gaming market share in BC and that grey market competitors have the rest. BCLC and MLLC said that their grey market competitors are located in foreign jurisdictions and do not operate lawfully in Canada. However, BCLC and MLLC said, these grey market sites, of which there are hundreds, not only accept wagers from Canadian residents, they also "aggressively market" to residents of Canada, by such means as online advertising, voucher offers, spam emails, social media, sponsorships and use of free gaming sites to lure customers to "for-money" sites.[34]

[38] BCLC and MLLC argued that disclosure of the withheld information could reasonably be expected to result in undue financial gain to their grey market competitors, by allowing them to acquire competitively valuable information, effectively for nothing. They argued that this information would provide grey market competitors with "valuable insight" into PlayNow.com marketing results (*e.g.*, relative success of voucher promotions), which they would use to inform and refine marketing of their own promotions and improve their ability to attract their customers, reducing or ending the customers' use of PlayNow.com. BCLC and MLLC argued that the loss of customers and associated revenues to their grey market competitors would cause BCLC financial harm, undue financial loss to Manitoba and undue financial gain to the grey market competitors.[35]

Analysis

[39] I accept that BCLC and MLLC have competition in their PlayNow.com or eGaming business from grey market competitors. The question is: could disclosure of the withheld information reasonably be expected to lead to undue gain by BCLC's and MLLC's competitors, by giving them an advantage through the acquisition of competitively valuable information, effectively for nothing? I have concluded, for reasons given below, that it could.

[40] I discussed above how BCLC analyzes the withheld information and uses it to inform decisions on the development of PlayNow.com's business and

[33] See, for example, Order 00-10, 2000 CanLII 11042 (BC IPC), at p. 18-1, where former Commissioner Loukidelis considered the interpretation of "undue financial loss and gain" in the context of s. 21(1)(c)(iii).

[34] BCLC's initial submission, paras. 28-32; Lauzon reports; Adams affidavit, paras. 19-24, 31. MLLC's initial submission, paras. 15-16, Taubensee affidavit, pars. 21-24.

[35] BCLC's initial submission, paras. 29-32, 44-49; Adams affidavit, paras. 49-62. MLLC's initial submission, paras. 23-27; Taubensee, affidavit, paras. 27-32.

marketing, with the goal of increasing revenues. Paul Lauzon said that the cost of generating this type of analysis represents "significant monetary value" to BCLC and MLLC. He said that their grey market competitors could incur "significant" costs of $50,000 to $200,000 to conduct market research to obtain the kind of marketing data in the records in dispute and that such research could potentially lead to a "lifetime market yield" of millions of dollars for these competitors. He said that businesses can use the information resulting from such market research to formulate marketing programs and products designed to maximize their revenue, just as BCLC and MLLC do.[36]

[41] BCLC's and MLLC's evidence is that the withheld information is kept confidential and is not publicly available[37]. The evidence is also that the withheld information would be "highly valuable" to BCLC's and MLLC's grey market competitors and they would want to acquire it,[38] as it would provide them with "valuable insight" into PlayNow.com marketing results (*e.g.*, relative success or failure of voucher promotions), which they could use to inform and refine marketing of their own promotions and improve their ability to attract BCLC's and MLLC's customers.[39] Moreover, MLLC argued, its PlayNow.com operations are particularly vulnerable to competition, because it is relatively new to the eGaming market in Canada.[40]

[42] The journalist did not attempt to refute BCLC's and MLLC's arguments on the issue of undue gain or loss and did not specifically address the campaign reports. He noted however that the application of harms-based exceptions considers the interests at stake and argued that there is an expectation of transparency around the expenditure of public money.[41]

[43] The withheld information in the campaign reports would, in my view, allow the reader to follow the relative success or failure of individual promotions over a period of time. I therefore accept the evidence that, if the campaign reports were disclosed, grey market competitors would not have to conduct their own "costly" market research but could, for free, obtain competitively valuable information which they could analyze and fine-tune to improve their own voucher promotions and potentially take market share from BCLC and MLLC. This could, in my view, reasonably be expected to result in "undue" gain to BCLC's and MLLC's grey market competitors, "undue" loss to MLLC and financial harm to BCLC.

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[36] Lauzon reports; Taubensee affidavit, para.19.
[37] Groumoutis affidavit, para. 22; Adams affidavit, para. 53. Taubensee affidavit, para. 27.
[38] Groumoutis affidavit, para. 22.
[39] Adams affidavit, paras. 49-62. Taubensee affidavit, para. 30.
[40] Taubensee affidavit, para. 32.
[41] Journalist's submission, paras. 41-43. He pointed to Order F08-22 in support of his position.

[44] BCLC submitted that even a one per cent reduction in online gaming sales due to lost market share would represent close to $1 million in lost revenue.[42] MLLC said that, based on 2011 numbers, the loss of 1% of its market share could amount to $360,000 in lost revenue.[43] BCLC and MLLC did not say if this is what each could expect to lose in revenue if the information were disclosed. Nevertheless, whether or not the expected harm is significant, the gain to BCLC's and MLLC's competitors and the corresponding loss to MLLC would in, my view, be "undue". This is not because the gain or loss would be large, but because it would be unfair and inappropriate for BCLC's and MLLC's grey market competitors to obtain otherwise confidential information about BCLC and MLLC and "thereby reap a competitive windfall."[44]

[45] I find that ss. 17(1) and 17(1)(d) apply to the withheld information in the campaign reports. I am also satisfied that BCLC properly exercised its discretion in deciding whether to withhold this information, given its value to BCLC and MLLC. Given my finding on ss. 17(1) and 17(1)(d), I need not consider if ss. 17(1)(a) and (b) also apply to the campaign reports. BCLC applied s. 16(1)(b) and s. 21(1)(c) to the MLLC campaign report, in addition to s. 17(1). However, I need not consider whether these other exceptions apply, as I have found that s. 17(1)(d) applies.

Policy and procedure information

[46] These records consist of BCLC's internal procedures on how to deal with various PlayNow.com disputes.[45] BCLC disclosed most of the procedural information and, in a few places, withheld a few lines or words of text. BCLC said that disclosure of this information would reveal circumstances in which BCLC distributes vouchers (*i.e.*, to resolve disputes) and thus allow players to report false circumstances in order to obtain vouchers fraudulently. This would, BCLC argued, result in financial harm to BCLC for the purposes of ss. 17(1)(a), (b) and (d).[46]

[47] As noted above, the journalist said that the application of harms-based exceptions considers the interests at stake and that there is an expectation of transparency around the expenditure of public money.[47] He did not specifically address the policy and procedure documents or the provisions of s. 17(1).

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[42] BCLC's initial submission, para. 30, Adams affidavit, para. 62.
[43] Taubensee affidavit, para. 32.
[44] See Order 00-10, at p. 19, where former Commissioner Loukidelis made a similar finding. He also referred to a number of relevant Ontario orders which made similar findings.
[45] Records 25, 41-45.
[46] Adams affidavit, para. 63 and attached table.
[47] Journalist's submission, paras. 41-43.

Section 17(1)(a) – trade secret

[48] The relevant provision reads as follows:

> 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:
>
> (a) trade secrets of a public body or the government of British Columbia;
>
> …

[49] The term "trade secret" is defined in Schedule 1 of FIPPA as follows:

> "trade secret" means information, including a formula, pattern, compilation, program, device, product, method, technique or process, that
>
> (a) is used, or may be used, in business or for any commercial advantage,
>
> (b) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use,
>
> (c) is the subject of reasonable efforts to prevent it from becoming generally known, and
>
> (d) the disclosure of which would result in harm or improper benefit.

Analysis on s. 17(1)(a)

[50] The first step is to determine whether the withheld information constitutes one of the types of information in the non-exhaustive list in the opening words of the definition of "trade secret". The policy and procedure information is, in my view, a "process", in that it sets out steps in an action (*i.e.,* dealing with complaints).

[51] The next step is to consider if the information meets the criteria in the definition itself. The definition of "trade secret" is exhaustive and all four elements must be satisfied in order for information to be a "trade secret".[48]

[52] BCLC's main concern with disclosure of the withheld information was the potential financial harm that could occur, through fraudulent complaints made

[48] Order 01-20, 2001 CanLII 21574 (BC IPC), para. 69.

solely to obtain vouchers. This does not show how BCLC uses the information in the ways contemplated by paragraph (a) of the definition of trade secret.

[53] I am also not convinced that the withheld information falls under paragraph (b) of the definition. Past orders have accepted that "independent economic value" means the ability of an asset to generate income.[49] BCLC's fraud argument[50] amounts to saying that saving money equates to generating revenue or income. This does not, in my view, establish that the information has an "independent economic value", as past orders have interpreted this term.[51] As Commissioner Loukidelis said in Order 01-22:[52]

> The term "trade secrets" is also used in s. 21. The substance of ICBC's argument is, in effect, that the documents under consideration represent the trade secrets of ICBC because they demonstrate ICBC's methodology in investigating, detecting and prosecuting fraud. The information is argued to have financial value, as reflected in the savings accruing to ICBC insured as a result of these fraud investigations being completed and prosecuted. In my view, such information does not have sufficient independent, objectively ascertainable financial value to constitute a trade secret.

[54] BCLC has also not demonstrated how it keeps this information from being generally known for the purposes of paragraphs (b) and (c) of the definition. Its evidence on this issue was all directed at the marketing, objective, target and strategy analysis data and did not specifically address the policy and procedure information.[53]

[55] BCLC expressed concern over revealing the threshold at which disputes could be escalated and hence resolved before that point by the awarding of a voucher.[54] It did not, however, provide any evidence on the extent of any possible fraud that might result from disclosure of this threshold information. Moreover, some of the withheld information sets out what appear to be fixed procedures[55] and it is not clear to me how customers could use this information to fraudulently obtain vouchers. In other cases, it seems to me that the awarding of tokens or vouchers is not automatic in the situations the procedures cover.[56] It does not therefore necessarily follow that customers would be able to manipulate BCLC's dispute resolution process to their own, improper, benefit. The policy and procedure information does not, in my view, meet the criterion in paragraph (d) of the definition.

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[49] See Order F11-12, 2011 BCIPC 15, at para. 45, for example.
[50] BCLC's initial submission, paras. 33-38; Adams affidavit, para. 63 and attached table.
[51] See for example, Order 07-06, 2007 CanLII 9597 (BC IPC), at paras. 30-37 .
[52] 2001 CanLII 21576 (BC IPC), at para. 71.
[53] Groumoutis affidavit, paras. 20, 22.
[54] Adams affidavit, attached table.
[55] For example, the middle of p. 256 and the top of p. 266.
[56] For example, the bottom of p. 256 and the middle of p. 263.

[56] BCLC has not, in my view, established that the withheld policy and procedure information constitutes a "trade secret". I find that s. 17(1)(a) does not apply to this information.

Section 17(1)(b) - monetary value

[57] BCLC argued that s. 17(1)(b) also applies to the withheld policy and procedure information. For convenience, I reproduce below the relevant provision:

> 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;
>
> …

[58] 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.[57]

Analysis on s. 17(1)(b)

[59] BCLC argued that the withheld information is "commercial information" for the purposes of s. 17(1)(b). Its argument and evidence on this point did not explicitly refer to the policy and procedure documents but, rather, related to the other withheld information.[58]

[60] FIPPA does not define "commercial information". However, previous orders have said that "commercial information" relates to commerce, or the buying, selling or exchange of goods and services, and that the information does

[57] Order 00-41, 2000 CanLII 14406 (BC IPC), para. 33. See also Order F15-58.
[58] Paragraphs 39-40, BCLC's initial submission.

not need to be proprietary in nature or have an actual or potential independent market or monetary value.[59]

[61] The withheld information in the policy and procedure documents forms part of BCLC's procedures on how to deal with various customer disputes regarding PlayNow.com, including the awarding of vouchers worth money. It thus relates to products and services BCLC provides in the context of its commercial relationship with its customers. I find that the withheld information is "commercial information" as past orders have interpreted this term.

[62] BCLC said that Openbet provided the policy and procedure documents to BCLC for "internal operation use".[60] I accept that the records "belong" to BCLC.

[63] BCLC did not, however, explain how the withheld policy and procedure information has "independent monetary value" as past orders have interpreted this term. Its arguments on this point related only to the other withheld information. BCLC did not, for example, say if it sells, or plans to sell or licence, the policy and procedure information nor, if it does, how much money it could expect to charge for this information. I also do not see how, on its face, the withheld information has independent monetary value.[61] BCLC has not, in my view, established that the policy and procedure information falls under s. 17(1)(b).

Section 17(1)(d) and section 17(1)

[64] This provision reads as follows:

> 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:
>
> …
>
> (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;
>
> …

[65] BCLC argued that disclosure of this information would allow customers to fraudulently obtain vouchers and that this would in turn harm BCLC's financial interests. For reasons I gave above, in the discussion of s. 17(1)(a), BCLC has not, in my view, established how customers could reasonably be expected to

[59] See Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17, and Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62.
[60] Adams affidavit, para. 48.
[61] BCLC's initial submission, para. 42.

gain from disclosure of the withheld policy and procedure information, still less how any such gain could be "undue". The potential amounts involved would appear to be relatively small. Moreover, as I discuss above, it does not necessarily follow, in my view, that the awarding of vouchers or tokens would inevitably flow from disclosure of the information in issue. I find that s. 17(1)(d) does not apply to the withheld policy and procedure information in records 25 and 41-45. BCLC has also not, in my view, shown how harm under s. 17(1) generally could reasonably be expected to result from disclosure of this policy and procedure information.

CONCLUSION

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

1. Under s. 58(2)(b) of FIPPA, I confirm that BCLC is authorized to withhold information as follows:
    a. Under s. 13(1), the withheld information in records 1-5, 7-8, 10-12, 15-24, 26-35, 38-39, 48.
    b. Under s. 17(1)(d), the withheld information in pp. 192-201 of record 34 and records 36, 37 and 40.

2. Under s. 58(2)(a) of FIPPA, I require BCLC to give the applicant access to the information it withheld under s. 17(1) in records 25 and 41-45.

3. I require BCLC to give the applicant access to the information described in item 2 of this paragraph by January 19, 2016. BCLC must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

December 3, 2015

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File No.: F13-54243