Office of the Information & Privacy Commissioner for British Columbia

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Order F17-20

BRITISH COLUMBIA LOTTERY CORPORATION

Celia Francis
Adjudicator

April 26, 2017

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Summary: A journalist requested copies of emails between BCLC's chief executive officer ("CEO") and its former Chair and director ("director"). The director objected to disclosure on the grounds that the emails are personal correspondence and thus outside the scope of FIPPA. He argued alternatively that BCLC had improperly "collected" his personal information in the emails. The adjudicator found that the emails are under BCLC's control for the purposes of ss. 3(1) and 4(1) of FIPPA. The adjudicator also found that BCLC had not "collected" the director's personal information in those emails for the purposes of s. 26 of FIPPA. The adjudicator ordered BCLC to comply with Order F11-28, by disclosing the emails in severed form as previously ordered.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1), 4(1), 26, 27.1.

Authorities Considered: B.C.: Order F13-23, 2013 BCIPC 30 (CanLII); Order F13-04, 2013 BCIPC 4 (CanLII); Order F07-10, 2007 CanLII 30395 (BC IPC); Order F15-26, 2015 BCIPC 28 (CanLII); Order F09-07, 2009 CanLII 21709 (BC IPC); Order 02-29, 2002 CanLII 42462 (BC IPC); Order F15-65, 2015 BCIPC 71 (CanLII); Order F09-06, 2009 CanLII 21403 (BC IPC); Order F08-01, 2008 CanLII 1644 (BC IPC); Order F11-28, 2011 BCIPC 34 (CanLII); Decision F10-01, 2010 BCIPC 5 (CanLII); Order 02-30, 2002 CanLII 42463 (BC IPC); Order F08-03, 2008 CanLII 13321 (BC IPC). **Ontario:** Ontario Privacy Complaint

Report PC08-39, 2010 CanLII 30187 (ON IPC); Order MO-2993, 2013 CanLII 85973 (ON IPC).

Cases Considered: *Dagg v. Canada (Minister of Finance),* 1997 CanLII 358 (SCC); *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (CanLII) (leave to appeal denied (C.A. M39605)); *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25; *Fontaine v. Canada (Attorney General)*, 2016 ONCA 241; *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 247 (CanLII).

INTRODUCTION

[1] This order is a court-ordered reconsideration of Order F13-23[1] and redetermination of an investigation report[2] by the Office of the Information and Privacy Commissioner ("OIPC"). This matter arose from a journalist's request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to the British Columbia Lottery Corporation ("BCLC") for correspondence between BCLC officials and a named third party, who was BCLC's former Chair and director ("director"). Among other things, this case deals with issues that can arise when mixing business with friendship in emails.

[2] BCLC is the provincial Crown Corporation responsible for conducting, managing and operating lottery and casino gaming and electronic and commercial bingo in the province.[3]

ISSUES

[3] The issues before me are these:

1. Whether the requested records are in the custody or under the control of BCLC within the meaning of ss. 3(1) and 4(1) of FIPPA.
2. Do the records contain the director's personal information?
3. Did BCLC collect the director's personal information?
4. If BCLC collected the director's personal information, was BCLC authorized under s. 26 of FIPPA to do so?
5. If BCLC collected the director's personal information, did it comply with s. 27 of FIPPA?

[1] 2013 BCIPC 30 (CanLII).
[2] Unpublished.
[3] BCLC submission of October 16, 2015; Madill affidavit #1, Exhibit A, extract from 2004/2005 BCLC annual report. Director's submission of June 19, 2011, paras. 9-11.

[4] Section 57 of FIPPA does not specify who has the burden of proof in cases involving s. 3(1) and 4(1). In this case, the director argued that it is in the parties' interests to present evidence to support their cases.[4] BCLC argued that the director has the burden of proof.[5] Some past orders on custody and control for the purposes of FIPPA have said nothing about the burden of proof, while others have placed it on the public body.[6] In my view, in light of the absence of a statutory burden of proof, it is incumbent on all parties to provide argument and evidence to support their positions on this issue.

[5] Issues 2 to 5 in this case arise from a complaint to this Office under s. 42 of FIPPA, not a request for review to which a burden of proof set out in s. 57 applies. Past orders on ss. 26 and 27 have noted that FIPPA is silent on the burden of proof for those two issues and that in the absence of a statutory burden of proof, it is incumbent on both parties to provide evidence to support their positions.[7] I agree.

DISCUSSION

Records in dispute

[6] The records in dispute are 46 pages of emails between the director and BCLC's President and CEO ("CEO"), spanning the period from December 12, 2005 to May 27, 2007.[8] There are approximately 25 communications. All remain fully withheld. I refer to them below collectively as the "emails".

Background

[7] This case began in April 2010, when the applicant, a journalist, made the following request to BCLC:

> Please provide any copies of records sent between [the director] and British Columbia Lotteries Corp. board members, the Crown corporation's president and chief executive officer or its vice-presidents from December 10, 2005 onward.

[4] Director's submission of June 29, 2011, para. 19.
[5] BCLC's submission of March 22, 2016, para. 21.
[6] For example, Order F16-15, 2016 BCIPC 17 (CanLII), Order F15-26, 2015 BCIPC 28 (CanLII), Order F09-07, 2009 CanLII 21709 (BC IPC), Order 02-29, 2002 CanLII 42462 (BC IPC), Order F15-65, 2015 BCIPC 71 (CanLII), F11-31, 2011 BCIPC No. 37 (CanLII), Order F09-06, 2009 CanLII 21403 (BC IPC), Order F08-01, 2008 CanLII 1644 (BC IPC).
[7] See, for example, Order F13-04, 2013 BCIPC 4 (CanLII), at para. 5, and Order F07-10, 2007 CanLII 30395 (BC IPC).
[8] Some are single emails and some are strings of two or more emails. Approximately 12 of the 46 pages contain very little text.

Order F11-28[9]

[8] In May 2010, BCLC gave notice of the request under s. 23 of FIPPA to the director. The director objected to disclosure of the requested records. Initially, BCLC disclosed one email to the journalist[10] and told him it was withholding the other responsive records under ss. 21 and 22 of FIPPA.[11] The journalist requested a review by the OIPC of BCLC's decision to deny access to the remaining records. He also argued that s. 25(1)(b) of FIPPA applied to them.[12]

[9] During the review, BCLC revised its position and told the director it had decided to disclose the records, withholding some information under s. 22 of FIPPA. The director asked the OIPC to review BCLC's decision. Order F11-28 decided that matter. The adjudicator found that s. 22(1) applied to some of the information in the records and that ss. 21(1) and 25(1)(b) did not apply. He ordered BCLC to sever the s. 22(1) information and disclose the rest of the information.

[10] The adjudicator declined to consider the director's argument that the records are outside the scope of FIPPA ("custody and control issue") and his complaint about the alleged improper collection and use of the director's personal information under ss. 26-32 of FIPPA ("privacy complaint"), on the grounds that they were new issues.

[11] The director filed for judicial review of Order F11-28 respecting the adjudicator's refusal to consider the custody and control issue and the privacy complaint.[13] In December 2012, the Court ordered that the part of Order F11-28 in which the adjudicator had declined to deal with the custody and control issue and the privacy complaint be set aside and remitted to the OIPC for reconsideration. The Court also said that the OIPC was at liberty to remit the privacy complaint for investigation.

Investigation report

[12] The OIPC investigated the director's privacy complaint and issued an investigation report in August 2014. The report found that the emails contain the director's personal information, BCLC had collected it, BCLC was authorized

[9] 2011 BCIPC 34 (CanLII).
[10] An email of December 18, 2005. The material before me indicates that it was one of the records in issue in the earlier inquiries and investigation. However, BCLC confirmed in an email of April 29, 2016 to the OIPC Registrar that it disclosed this email to the journalist on June 25, 2010.
[11] BCLC told the journalist it was withholding 38 pages of records but told the director that it proposed to disclose 46 pages in severed form. With its letter of December 17, 2015, BCLC provided me with 46 pages of emails as the records in dispute. It also included a copy of the email it had disclosed.
[12] Section 25(1)(b) requires a public body to disclose information in the public interest.
[13] In his petition for judicial review, the director stated that he did not seek to set aside the adjudicator's decisions on ss. 21 and 22.

under s. 26 to collect it and BCLC was not obligated to notify the director of the collection under s. 27.

[13] The director filed for judicial review of the OIPC's findings. In July 2015, the judicial review was discontinued and the OIPC agreed to carry out the current redetermination of the privacy complaint.

Order F13-23

[14] In April 2013, the OIPC invited the parties to participate in a hearing of the custody and control issue, as the Court directed in the judicial review decision of Order F11-28. Order F13-23 decided that inquiry. The adjudicator found that BCLC had custody of the records and ordered BCLC to comply with Order F11-28. Given her finding on custody, the adjudicator decided she did not need to consider whether the records were also under BCLC's control.

[15] The director filed for judicial review of Order F13-23. The judicial review was discontinued when the parties agreed that Order F13-23 would be set aside and remitted to the OIPC for reconsideration.

This order

[16] In September 2015, the OIPC invited inquiry submissions from the parties regarding the privacy complaint. The OIPC subsequently determined that it would be more efficient to hear the custody and control issue and the privacy complaint together. The parties agreed. Accordingly, the OIPC invited submissions from the parties on the custody and control issue as well.

[17] I therefore have before me the parties' submissions on the custody and control issue and on the privacy complaint. I also have the submissions that led to Orders F11-28 and F13-23.

[18] I will first consider the issue of whether the records in dispute are in the custody or under the control of BCLC for the purposes of ss. 3(1) and 4(1). If I find that some or all are not, then FIPPA does not apply to them. I will only go on to consider the privacy complaint regarding those records to which FIPPA applies.

Sections 3(1) and 4(1)

[19] Sections 3(1) and 4(1) of FIPPA provide rights of access to records which are in the custody or under the control of a public body. Section 3(1), which defines the scope of FIPPA, states:

> 3(1) This Act applies to all records in the custody or under the control of a public body …

[20] Section 4(1) of FIPPA incorporates the element of custody or control into the right of access to records:

> 4(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

[21] FIPPA does not define "control" or "custody".

[22] Following the modern approach to statutory interpretation, the words of a provision are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of legislators.[14]

[23] With regards to the objects of FIPPA, s. 2(1) states: "The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy." Further, with regards to the first of those two objects, the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)* [*Dagg*][15] said:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. [para 61]

[24] Either custody *or* control over a particular record will suffice to bring it within the scope of s. 3(1) and both are not required. Given my findings below, it was only necessary to consider the issue of "control" in this case.

Control

[25] I have determined that the interpretation of "control" that the Supreme Court of Canada used in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*[16] [*Minister of National Defence]* is the appropriate one to follow. In *Minister of National Defence,* the Court considered the meaning of "control" in relation to s. 4(1) of the federal *Access to Information Act*, which states that a requestor has a right to access "any record under the control of a government institution". The Court made the following observations about "control":

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[14] See, for example: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3.
[15] 1997 CanLII 358 (SCC), at para. 61.
[16] 2011 SCC 25.

> [48] As "control" is not a defined term in the Act, it should be given its ordinary and popular meaning. Further, in order to create a meaningful right of access to government information, it should be given a broad and liberal interpretation. Had Parliament intended to restrict the notion of control to the power to dispose or get rid of the documents in question, it could have done so. It has not. In reaching a finding of whether records are "under the control of a government institution", courts have considered "ultimate" control as well as "immediate" control, "partial" as well as "full" control, "transient" as well as "lasting" control, and "*de jure*" as well as "*de facto*" control. While "control" is to be given its broadest possible meaning, it cannot be stretched beyond reason. Courts can determine the meaning of a word such as "control" with the aid of dictionaries. The *Canadian Oxford Dictionary* defines "control" as "the power of directing, command (under the control of)" (2001, at p. 307). In this case, "control" means that a senior official with the government institution (other than the Minister) has some power of direction or command over a document, even if it is only on a "partial" basis, a "transient" basis, or a "*de facto*" basis. The contents of the records and the circumstances in which they came into being are relevant to determine whether they are under the control of a government institution for the purposes of disclosure under the Act (paras. 91–95).[17]

[26] Further, in analyzing whether the emails are under BCLC's control, I have considered relevant indicators from previous BC orders. Those indicators include whether: the record was created by an officer or employee in the course of carrying out his or her duties; the public body has statutory or contractual control over the records; the public body has possession of the records; the public body has relied on the records; the records are integrated within the public body's other records; the public body has the authority to regulate the use and disposition of the records; the content of the record relates to the public body's mandate and functions.[18] The list of indicators is not exhaustive and not all will apply in every case.[19]

Parties' submissions on control

[27] BCLC submitted that the indicators of control favour a finding that it has control of the emails in this case.[20]

[28] The director argued that the emails are all personal correspondence arising out of his friendship with the CEO and that they are therefore outside FIPPA's scope.[21]

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[17] In *Fontaine v. Canada (Attorney General)*, 2016 ONCA 241, at paras. 155-160, the Ontario Court of Appeal referred to this passage in its discussion of "control" of certain records.
[18] See, for example, Order 02-29, 2002 CanLII 42462 (BC IPC), at para. 18.
[19] See, for example Decision F10-01, 2010 BCIPC 5 (CanLII), at para. 9.
[20] BCLC's submission of March 22, 2016, paras. 46-65.
[21] Director's submission of June 29, 2011, para. 3.i.

[29] The journalist argued that the emails are under BCLC's control.[22] He said that the CEO was the senior corporate officer of the public body responsible for managing BC's gambling industry. He added that the director had a business relationship with Paragon Gaming, one of BCLC's service providers, and was also involved in the gambling industry as a director with Mobile Lottery Solutions Inc. The journalist argued that it was appropriate to determine the extent of the director's "interactions with government on behalf of the private sector" and to subject his relationship with the CEO to public scrutiny.[23]

[30] The Attorney General did not take a position respecting whether the emails are under BCLC's control. However, it drew my attention to *City of Ottawa v. Ontario*[24] [*City of Ottawa*] and *University of Alberta v. Alberta (Information and Privacy Commissioner)*[25] [*University of Alberta*] which, it said, had placed "great weight" on the democracy enhancing principles of Ontario's and Alberta's respective freedom of information and protection of privacy Acts.[26]

[31] In *City of Ottawa*, the Court addressed the meaning of "custody or control" in s. 4(1) of Ontario's *Municipal Freedom of Information and Protection of Privacy Act*. A municipal employee worked as the City of Ottawa solicitor and in his spare time did volunteer work. He used his work email address to send and receive emails relating to his volunteer work. He segregated such emails in a separate file folder, but they were stored within that folder on the City's email server. There was no other connection between the City and the emails. The Court determined that, when the employee used his workplace email address to send and receive personal emails completely unrelated to his work for the municipality, those emails did not fall within the scope of that *Act*. The Court referred to the above statement in *Dagg* and said that the intent of the legislature in enacting the Act was to enhance democratic values by providing citizens with access to government information and allowing them to fully participate in democracy. It found that interpreting "custody or control" as including employees' private communications — when those communications are unrelated to government business — did not advance the purpose of the legislation.

[32] In *University of Alberta*, the Court also referred to the above passage in *Dagg* in considering whether the University had custody or control, under Alberta's *Freedom of Information and Protection of Privacy Act,* of emails a professor sent and received as part of his voluntary participation in a federal

[22] Journalist's submission of July 13, 2011, p. 1.
[23] Journalist's request for review, received by the OIPC on June 29, 2010, and submission of July 13, 2011.
[24] *City of Ottawa v. Ontario,* 2010 ONSC 6835 (CanLII) (leave to appeal denied (C.A. M39605)).
[25] *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 247 (CanLII).
[26] Attorney General's initial submission, paras. 3.01-3.23. The Attorney General participated in the judicial reviews on the earlier matters. The OIPC therefore invited it to make submissions in the reconsideration and redetermination that are the subject of this order.

grant program. The Court noted that this situation was similar to that in *City of Ottawa* and concluded that the University did not have custody or control of the requested emails.

Analysis and findings

[33] I have considered the relevant indicators of control, including those drawn from previous orders and court cases. I conclude, for the reasons that follow that the emails are under BCLC's control for the purposes of ss. 3 and 4 of FIPPA.

Nature of relationship between the director and the CEO

[34] The director said that, while he was on the BCLC Board of Directors, he and the CEO became friends.[27] He said that they often discussed BCLC's "projects and happenings" and that the CEO would often "bounce ideas off" him, given the director's "previous business experience". The director said that, after he left his position as BCLC Chair, he and the CEO continued their friendship, golfing, attending conferences, sporting and social events together, and sometimes emailing each other. He added that the two men would act as "sounding boards" for each other's ideas and thoughts, and would also discuss business matters, such as the CEO's career as CEO of BCLC. He said that, from time to time, he would discuss his own business issues with the CEO, who "has been a friend and support" to him on his business issues since they became friends in 2001.[28]

[35] The CEO provided similar evidence on the evolution of his relationship with the director. The CEO added that, while the director was on the Board of BCLC, he was a "valuable sounding board for the BCLC's various projects". The CEO also said that the director "had a good business sense and we had a mutual respect for each other". The CEO said that, after the director left BCLC, he "continued to bounce ideas off of [the director] and discuss various personal issues".[29]

[36] The journalist did not dispute that the CEO and the director had a personal relationship. He noted, however, that, by their own admission, the CEO and director had asked each other for advice regarding their respective work matters.[30]

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[27] The director said he was appointed a director on the BCLC Board of Directors in September 26, 2001 and Chair of the BCLC Board from December 2001. He stepped down as Chair on December 9, 2005. He has since served in positions such as board chair or director for other bodies, including ICBC and Paragon Gaming; director's affidavit of June 29, 2011; Exhibit B, Madill affidavit #1. The CEO served as President and CEO of BCLC from 1999 to spring 2007.

[28] Director's submission of June 29, 2011, paras. 4-33. Director's submission of May 29, 2013, paras. 3-15.

[29] CEO's affidavit of July 8, 2011.

[30] Journalist's submission of July 13, 2011.

[37] The evidence of the CEO and director is that they developed a close, mutually beneficial working and personal relationship while the director was on the BCLC Board and that this relationship continued after the director left BCLC. Their evidence and the emails themselves show that they made efforts to maintain this relationship, not just for reasons of friendship but, I infer, also because it was advantageous from a business perspective. In the circumstances before me, I conclude the two men's friendship and business relationships did not exist as separate, watertight compartments, but rather were intertwined.

[38] The mixed nature of the relationship is reflected in the emails themselves, in which the discussions range over a variety of business and personal matters, sometimes interleaved within individual emails. Indeed, it is not always possible to determine whether they are discussing business issues or personal matters or both. This mix of business and personal in the relationship colours their entire correspondence. In my view, it is not possible to draw a line in the continuum of emails where one aspect of their relationship takes up and the other leaves off. As I note elsewhere, this does not, of course, mean that the entirety of these emails, including those portions the disclosure of which would unreasonably invade either individual's personal privacy, will be disclosed. That is a s. 22 matter, which Order F11-28 addressed. This decision deals only with the issue of whether BCLC has control of the records in dispute.

Was the record created or received by a BCLC employee in the course of his duties for the public body?

[39] BCLC said that the CEO's duties included the management of relationships with Government and stakeholders, general supervision, leadership, management and control of BCLC's operations. BCLC submitted that "most of the Emails were created or received" by the CEO in the course of carrying out these duties, with the primary purpose of conducting business, for example, the approval of a Vancouver 2010 Olympic lottery scheme and government relations. BCLC said it was a sponsor of the 2010 Olympics and that the director was acting as a "resource" for the CEO in this matter.[31] BCLC also noted that both men sent the emails from their respective business email addresses and the emails contained their corporate signature blocks.[32]

[40] The director acknowledged that the CEO used his BCLC email account to create what he called "this personal correspondence". However, he argued, the emails were not created in the context of the CEO's duties as CEO of BCLC but rather "reflect an ongoing dialogue between two friends discussing the events in their lives".[33]

[31] BCLC referred to the email of December 12, 2005 as an example.
[32] BCLC's submission of March 22, 2016, para. 53; BCLC's submission of November 23, 2015, para. 9.
[33] Director's submissions of June 29, 2011, paras. 4-33, and May 29, 2013, paras. 3-15.

[41] Several emails show that, after the director stepped down as Chair of BCLC, the CEO "continued to bounce ideas off" him respecting BCLC matters.[34] For example, the CEO asks the director for advice and assistance on specific BCLC matters (*e.g.*, the 2010 Olympic lottery scheme), says he would like to bounce ideas off the director regarding other BCLC matters, and gives the director updates on BCLC projects.[35]

[42] In my view, the CEO created and received these emails in the course of carrying out his duties as CEO. The director said he did not view these exchanges as official communications about BCLC business matters. However, the CEO did not explicitly state that he communicated with the director only as a friend in these instances. Moreover, the content of these emails makes it clear that the CEO was communicating with the director respecting matters arising out of the CEO's duties, which included managing BCLC operations and relationships with stakeholders. Other emails contain information on the director's own business matters.[36] In these cases, I take the director to have approached the CEO in his capacity as CEO of BCLC.

[43] I acknowledge that the emails contain information on personal matters, such as personal greetings, attempts to co-ordinate telephone calls or social events and updates on their private lives.[37] However, I conclude the CEO's overall purpose in creating and receiving the emails was to conduct BCLC business.[38]

Does the content of the records relate to BCLC's mandate and functions?

[44] BCLC argued that the "majority" of the emails relate to BCLC's mandate, which it said included the conduct and management of lottery and casino gaming in BC.[39]

[45] The director said he did not intend his emails with the CEO to be "communications with BCLC as a corporate entity, either on my personal behalf or on behalf of any corporate entity with which I was associated".[40] He said he considered the CEO's first email (about the 2010 Olympic lottery scheme) to be a personal request and not about official BCLC business.[41]

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[34] CEO's affidavit of July 8, 2011, paras. 4 & 7.
[35] Emails of December 12, 2005, December 29-30, 2005 and January 17-19, 2006.
[36] Emails of August 22, 2006 and May 1, 2007.
[37] For example, the emails of February 13, 2006, March 15, 2006, March 6, 2006, April 19, 2006, May 5, 2006, June 30, 2006, July 5, 2006, April 14, 2007, May 27, 2007.
[38] It bears emphasis once again that this does not mean that all of the emails, including portions the disclosure of which could reasonably invade either individual's personal privacy will be disclosed. Order F11-28 addressed that issue.
[39] BCLC's submission of March 22, 2016, paras. 62-63.
[40] Director's affidavit of June 29, 2011, para. 31.
[41] Director's submission of December 12, 2012.

[46] I found above that the CEO created and received the emails in the course of his duties as CEO of BCLC. I recognize that the director said that, for his part, he was acting in a personal capacity in these email exchanges. In my view, however, the primary purpose for the email exchanges (even those which contain personal information arising out of their friendship) was to communicate about business matters related to BCLC's mandate and functions. This included cultivating the mixed business and personal relationship between the two men.

Does BCLC have possession of the records?

[47] BCLC argued that it has possession of the emails, because they were sent and received by the BCLC email system and are stored on BCLC servers.[42] The director said that the emails may be in BCLC's possession in the "technical sense", but argued that control is not satisfied "merely by the Records being located on the premises of a public body".[43]

[48] I accept that BCLC has possession of the records in that they are physically located on BCLC's servers. As past OIPC orders have found, physical possession of records — in the sense that they are located on a public body's premises — does not, on its own, establish that a public body has control of records.[44]

Are the records integrated with other records held by BCLC?

[49] BCLC said that the records are integrated with its other records, as they were received and stored on its email server.[45] The director did not specifically address this factor, except to deny it applies.[46] The CEO's evidence did not address this factor.

[50] Past orders have found that, if requested records were kept in separate files, *i.e.*, filed separately from the public body's other records — so they were not intermingled or integrated with those other records — this favoured a finding that the records were not under the public body's control.[47]

[51] I accept that the emails in this case are stored on BCLC's server. BCLC did not, however, explain how, in its view, storage of the emails on its email server constitutes integration with other records it holds. BCLC also did not provide evidence of how it stores or files its records generally or its emails in particular, nor how the CEO stored his emails. The evidence in this case does

[42] BCLC's submission of March 22, 2016, para. 57; Madill affidavit #2 of March 22, 2016.
[43] Directors' submission of June 19, 2011, paras. 21 and 27.
[44] See, for example, Order 02-29, at para, 49, and Order F15-65, at para. 34.
[45] BCLC's submission of March 22, 2016, para. 60; Madill affidavit #2 of March 22, 2016.
[46] Director's submission of June 19, 2011, paras. 23-24.
[47] See, for example, Order 02-30, 2002 CanLII 42463 (BC IPC), at paras. 26-27, and Order F15-65, at para. 61.

not suffice for me to make a finding on whether or not the emails are integrated with other records that BCLC holds.

Has BCLC relied on the records to a substantial extent?

[52] BCLC said the emails relate to BCLC business and, given the CEO's "responsibilities for management, vision and direction for BCLC, it is possible that the information in the Emails was relied on by BCLC as a whole".[48] The director did not specifically address this factor, except to deny it applies.[49]

[53] Based on the CEO's evidence and the content of the emails, I find that the CEO initiated communication with the director with the intention of relying on the advice he received about BCLC's business matters.

Does BCLC have statutory or contractual control over the records or authority to affect the contents of the record and to regulate the record's use, disclosure and disposition?

[54] BCLC said it has statutory and contractual control of the emails because they were sent to a BCLC email address, incorporated into records created by the CEO of BCLC and are stored on servers that BCLC owns and controls. It argued that it is entitled to deal with the emails as it sees fit, subject to its statutory obligations to retain and safeguard the records.[50]

[55] The *Document Disposal Act* ("DDA") governed disposition of BCLC's records at the time in question and prohibited disposal of records except in accordance with approved records management schedules.[51] BCLC's evidence is that the government's "Executive Records Schedule",[52] issued under the authority of the DDA, governed the retention and disposition requirements for BCLC's "executive records", which included the CEO's. "Executive records" are defined in the Executive Records Schedule as the "administrative and operational" records of executives which document the development, implementation, operation of government legislation, programs and services. Under the Executive Records Schedule, BCLC had to retain its "executive records" for 10 years.[53]

[56] BCLC's evidence was also that, at the time of the request, it did not have an approved "Operational Records Classification System" retention and disposition schedule and was therefore not authorized to destroy many of its

[48] BCLC's submission of March 22, 2016, paras. 58-59.
[49] Director's submission of June 19, 2011, paras. 23-24.
[50] BCLC's submission of March 22, 2016, paras. 56, 61.
[51] Section 3. The DDA was repealed in May 2016.
[52] Executive Records Schedule (102906), Exhibit H to Madill affidavit #1.
[53] Madill affidavit #1.

non-transitory records.[54] Because the CEO had retained his emails, BCLC said, it was unable to destroy non-transitory emails for ten years, to ensure compliance with the document disposal requirements.[55]

[57] I found above that the CEO created or received the emails in the course of carrying out his duties and that the content of these emails relates to BCLC's mandate and functions. In my view, the Executive Records Schedule is intended to cover this kind of work-related record. I am satisfied from BCLC's evidence that it had statutory control over the emails in issue here, including authority to affect their retention and disposition.

[58] In addition, I find that BCLC has authority to affect the content and use of the emails in this case. BCLC's email policies state that employees are to use its email system mainly for business purposes but that they may make limited use of it to send and receive personal communications. BCLC's email policies also say that BCLC does not routinely monitor the content of its employees' electronic communications, although it may be necessary to monitor the usage and content of electronic communications or intercept them in certain circumstances (*e.g.*, for systems maintenance and security or to ensure employees adhere to standards of appropriate conduct). In my view, these policies give BCLC control of the usage and content of the emails in this case.

[59] I recognize that previous cases involving requests for personal emails found that the public bodies' right to monitor and access their employees' emails under an acceptable use policy did not mean that the emails were under the public bodies' control.[56] In those cases, however, the emails at issue were entirely unrelated to the public bodies' mandate and functions. That is not the case here, where the emails have a mixed personal/business character.

Summary of findings on control

[60] I found above that, on the records before me:

- the CEO and the director had a dual relationship which mixed personal and work-related matters;
- the CEO created or received the emails in the course of his duties and activities as CEO of BCLC;
- the content of the emails relates to BCLC's mandate and functions;
- the CEO sent and received the emails with the intention of relying on them; and
- BCLC had authority over the content, use and disposition of the emails.

[54] BCLC said it obtained approval for its retention schedule in 2012.
[55] Madill affidavit #1, paras. 21, 29-30.
[56] See, for example, Ontario Order MO-2993, *City of Ottawa* and *University of Alberta*.

[61] In my view, these factors lead to the conclusion that the emails are under BCLC's control. In particular, the factors related to the two men's mixed relationship and the emails' connection to the CEO's mandate, functions and duties weigh heavily in favour of such a finding. I said above that the evidence regarding the storage of the emails on BCLC's servers did not suffice for me to make a finding on whether or not they were integrated into BCLC's other records. This factor thus carries little to no weight in my view. I also give little weight to the possession factor.

[62] I acknowledge that some of the emails contain information arising out of the two men's friendship, noting that the issue of disclosure of this information does not necessarily flow from the finding of control. I found above, however, that the CEO created and received the emails in the course of his duties and that they related to BCLC's mandate and functions. In my view, these factors and the nature of the relationship between the CEO and the director weigh heavily in favour of the conclusion that the emails are under BCLC's control. Such a determination will of course depend on the circumstances of each case. For example, I do not foreclose the possibility that, in a case involving emails on matters entirely unrelated to work, between employees who are also, say, friends or spouses, the emails could be found not to be in a public body's control.

[63] For the reasons given above, I find that the emails are under BCLC's control.

Collection and notice - sections 26 and 27

[64] I will now consider the director's complaint about collection of personal information and notice of collection. The issues are these:

1. Do the emails contain the director's personal information?
2. Did BCLC collect the director's personal information?
3. If BCLC collected the director's personal information, was the collection authorized under s. 26 of FIPPA?
4. If BCLC collected the director's personal information, did its method of doing so comply with s. 27 of FIPPA?

[65] In November 2011, ss. 26 and 27 were amended (and s. 27.1 added). As the email exchanges all took place prior to that date, I have considered ss. 26 and 27 as they were worded before the amendments. The relevant parts of those sections were as follows:

> **Purpose for which personal information may be collected**
>
> 26 No personal information may be collected by or for a public body unless

(a) the collection of that information is expressly authorized under an Act,
(b) that information is collected for the purposes of law enforcement, or
(c) that information relates directly to and is necessary for an operating program or activity of the public body

How personal information is to be collected

27 (1) A public body must collect personal information or cause personal information to be collected directly from the individual the information is about unless

(a) another method of collection is authorized by

(i) that individual,
(ii) the commissioner under section 42 (1) (i), or
(iii) another enactment,

(a.1) the collection of the information is necessary for the medical treatment of an individual and it is not possible

(i) to collect the information directly from that individual, or
(ii) to obtain authority under paragraph (a) (i) for another method of collection,

(b) the information may be disclosed to the public body under sections 33 to 36, or

(c) the information is collected for the purpose of

(i) determining suitability for an honour or award including an honorary degree, scholarship, prize or bursary,
(ii) a proceeding before a court or a judicial or quasi judicial tribunal,
(iii) collecting a debt or fine or making a payment, or
(iv) law enforcement.

(2) A public body must ensure that an individual from whom it collects personal information or causes personal information to be collected is told

> (a) the purpose for collecting it,
> (b) the legal authority for collecting it, and
> (c) the title, business address and business telephone number of an officer or employee of the public body who can answer the individual's questions about the collection.

Do the emails contain the director's personal information?

[66] FIPPA defines "personal information" as "recorded information about an identifiable individual other than contact information". "Contact information" is defined as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual."[57]

[67] BCLC said that the primary purpose of the emails was to conduct business and the "majority" of the emails relate to BCLC's programs. It acknowledged that "a small proportion" of the information in the emails is the director's personal information.[58] It argued that the email signature blocks are "contact information" and thus not personal information.[59]

[68] The director disputed BCLC's argument that the primary purpose of the emails was to conduct business, although he admitted that there was some discussion about "business-related topics". Rather, he argued, the emails were a "conversation between friends, including about their professional lives". In the director's view, the two men's thoughts and observations about their professional lives are personal information, just as the information about the director's health and medical issues is his personal information.[60]

[69] The Attorney General submitted that the emails contain the director's personal information, as well as that of other individuals.[61]

Analysis

[70] All of the emails contain the director's name and business email address and some contain his business signature block. Past orders have said "[w]hether information will be considered 'contact information' will depend on the context

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[57] See Schedule 1 of FIPPA for both definitions.
[58] In the records it provided to me, BCLC highlighted the information it considers to be the director's personal information. It is not quite the same as the information the adjudicator ordered be severed under s. 22(1) in Order F11-28.
[59] BCLC's submission of October 16, 2015, paras. 13-18.
[60] Director's submission of November 5, 2015, paras. 33-37; director's affidavit of June 29, 2011, paras. 17-31.
[61] Attorney General's submission of October 16, 2005, para. 2.02.

in which the information is sought or disclosed."[62] In exchanging these emails, the director was not an employee or appointed official of BCLC at this time. Nor was he a paid contractor. The director had no obligation to advise or otherwise respond to the CEO but rather apparently chose to do so as a personal favour to the CEO. He was, however, as the CEO said, acting as a "resource" or "sounding board" on BCLC business matters. He was someone whom the CEO contacted for advice and assistance with BCLC business matters, just as he had while the director was Chair of BCLC.[63] I therefore find that, in this context, the director's name, business email address and business signature block are "contact information" and not "personal information".

[71] A number of emails contain comments and updates on the director's health and details about non-work activities arising out of the two men's friendship.[64] Another email contains the director's name and title as former BCLC Chair.[65] There are also emails in which the CEO sends personal greetings and well-wishes to the director and his family. In my view, this information is about the director and his family as identifiable individuals and is their personal information.

[72] In other emails, the director approaches the CEO respecting the director's own business matters and asks the CEO for advice or assistance, apparently in his capacity as CEO of BCLC.[66] In my view, the director was acting in a personal capacity regarding his own business interests. In Order F13-04,[67] former Commissioner Denham declined to exclude information that is associated with an individual in a professional, official or business capacity from the definition of personal information. She said that if the Legislature had wished to exclude professional, official or business information from the scope of "personal information", it could have done so explicitly. It chose instead to exclude only 'contact information'.[68] In light of this guidance, I find that the information in the emails about the director's own business interests is his personal information.

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[62] See, for example, Order F08-03, 2008 CanLII 13321 (BC IPC), at para. 82.

[63] The director confirmed that, while he was the Chair of BCLC, he and the CEO would discuss BCLC projects and the CEO "bounced ideas off" him on BCLC's projects; he also acknowledged that he had some knowledge of the area on which the CEO approached him initially (the 2010 Olympic lottery scheme); paras. 5, 17, director's affidavit of June 29, 2011.

[64] For example, emails of December 29-30, 2005, January 17-19, 2006, February 13, 2006, March 15, 2006, May 5, 2006, June 30, 2006, April 14, 2007, May 27, 2007, March 6, 2006, April 19, 2006, July 5, 2006, February 1, 2007, December 30, 2005, November 26, 2006, October 26, 2006 and March 27, 2007; see also director's affidavit of June 29, 2011, para. 8

[65] Emails of May 1, 2007.

[66] Emails of August 22, 2006.

[67] 2013 BCIPC 4 (CanLII).

[68] Order F13-04 at paras. 34-35.

Summary of findings on character of information in emails

[73] For reasons given above, I find that

- some of the information in the emails is the director's "contact information" and therefore not his "personal information" (his name, business email address and business signature block); and
- some of the information in the emails is the director's personal information (*e.g.*, personal greetings and comments about his health and family; comments on activities related to his friendship with the CEO; the director's requests for assistance with his own business matters).

Did BCLC "collect" the director's personal information?

[74] I will now consider whether, under s. 26, BCLC "collected" the director's personal information in the emails. Section 26 lies in Part 3 of FIPPA which governs the collection, use and disclosure of personal information by public bodies, in provisions often called "Fair Information Practices". As former Commissioner Denham said in Order F13-04,

> … FIPPA's substantive provisions, certainly, reflect internationally-accepted 'fair information practices'. These are generally expressed in personal information legislation as rules that place reasonable limitations on the power of public institutions to compel individuals to give up their personal information without consent. ...[69]

Parties' submissions

[75] Both BCLC and the Attorney General argued that BCLC did not "collect" the director's personal information. In their view, the director provided it voluntarily and thus BCLC passively received it. Both noted that ss. 26 and 27 of FIPPA use the term "collect", while ss. 32 through 33.2 refer to personal information that has been "obtained or compiled". They submitted that the Legislature is presumed to have intended "collect" to have a different meaning from "obtained or compiled". In their view, "collect" applies to personal information that a public body has actively solicited or has taken active steps to acquire.[70]

[76] The director said that he did not volunteer his personal information to BCLC. Rather, he said, the CEO initiated the email correspondence and it is by that means that BCLC actively collected the director's personal information.[71]

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[69] Order F13-04, para. 30.
[70] BCLC's submission of October 16, 2015, paras. 19-42. Attorney General's submission of October 16, 2015, paras. 2.02-3.28.
[71] Director's submission of November 5, 2015, paras. 17, 28, 39.

What does "collect" mean?

[77] The parties did not refer me to any BC orders which expressly interpret the term "collect" for the purposes of s. 26. Nor could I find any. However, the parties referred me to Ontario Privacy Complaint Report PC08-39[72] for its helpful interpretation of "collect" in the context of Ontario's FIPPA, which uses the term "collect" in a similar way to BC's FIPPA:

> I note that personal information may come into the custody or control of an institution in a variety of circumstances: it may be actively solicited, it may be passively received, or it may be created by the institution. In my view, the term "obtained or compiled" is intentionally broad, and is intended to accommodate the various ways in which an institution may acquire personal information. This analysis supports the notion that the term "collect" is intended to be interpreted narrowly so as not to apply to situations such as this where correspondence is sent to institutions voluntarily and without solicitation.

[78] FIPPA also uses the words "obtained or compiled" when addressing the use and disclosure of personal information. I agree that the term "collect" must have a different meaning.

[79] Section 26 circumscribes public bodies in their acquisition of personal information, recognizing that in many situations individuals have no choice but to provide their personal information to obtain benefits or services. For example, if an individual wants a driver's licence or medical care, he or she is compelled to give personal information to the respective public body. Public bodies have control over this process. The term "collect" should thus, in my view, be interpreted narrowly to cover situations in which public bodies actively solicit personal information they need in order to provide those benefits or services. Thus, in my view, a public body "collects" information when it makes a conscious decision, or forms an intention, to actively seek or solicit personal information.

[80] By contrast, the terms "obtained or compiled" in ss. 32(a) and 33.2(a), in my view, recognize that personal information may come into a public body's custody or control in different ways. The public body may actively seek out or solicit personal information, it may generate or create personal information internally or individuals may voluntarily provide their personal information.[73]

[81] The director argued that "collection" should not be interpreted narrowly and that BCLC should have given him notice of its "collection" of his personal information. He argued that Alberta considers that a public body has "collected" personal information when it passively receives personal information from

[72] 2010 CanLII 30187 (ON IPC), at p. 6.

[73] I note that public bodies are, for example, obligated under s. 30 to protect all personal information in their custody or under their control, not just personal information they have "collected" under s. 26.

an individual and that a public body is required to give the individual notice of the "collection" in such a case. In his view, Alberta's approach is preferable.[74] Alberta's FIPPA is, however, worded differently from BC's and Ontario's and Alberta's guidance on this issue is therefore, in my view, of little assistance.

[82] In my view, it is immaterial that the CEO initiated the correspondence. The CEO's purpose in doing so was to conduct BCLC business. Although the CEO asked the director for his advice, the director was under no compulsion to communicate with the CEO. The director was not a client or employee of BCLC and was not seeking programs or services from BCLC that would necessitate him "giving up" his personal information. Rather he was acting in his personal capacity as a friend to the CEO and voluntarily provided the CEO with his personal information. The director also voluntarily provided his personal information to the CEO when seeking the CEO's assistance with his business matters. The CEO did not take active steps on BCLC's behalf to solicit the director's personal information in any of these exchanges in order to provide BCLC services. I therefore find that BCLC did not "collect" the director's personal information in the emails.

[83] I find support for these interpretations in s. 27(2) which requires public bodies to give notice where they "collect" personal information. Public bodies receive large volumes of unsolicited or volunteered personal information from individuals. The public bodies do not ask for it, may not need it and have no control over this process. Moreover, individuals who voluntarily submit their own personal information know they have submitted it. The Legislature cannot, in my view, have intended public bodies to have to give notice to individuals in such cases. It would, in my view, impose an enormous and unnecessary administrative burden on public bodies to interpret the notice requirements in s. 27(2) as applying to personal information which individuals have voluntarily provided. I note that Ontario Privacy Complaint Report PC08-39 reached a similar conclusion.

[74] The director referred in this regard to Service Alberta's 2009 Bulletin No. 12, "Email: Access and Privacy Considerations", which states that (1) a public body has "collected" personal information when it receives an written communication containing personal information from a member of the public and (2) all of the privacy requirements in Alberta's FIPPA thus apply, including the requirement to give notice; director's submissions May 29, 2013, paras. 38-39, and of November 5, 2015, paras. 43-44. The director did not refer me to any orders or guidance by the Alberta OIPC on this point.

Section 27.1

[84] The director argued that the wording of s. 27.1 of BC's FIPPA supports his argument that "collect" should not be interpreted narrowly.[75] BCLC noted that s. 27.1 was not in effect at the time in question and argued that it is therefore not relevant. BCLC argued, however, that the purpose of s. 27.1 is to allow public bodies to deal with personal information they receive in error by deleting or transferring it.[76]

[85] Section 27.1 states that personal information "received" by a public body is not "collected" by the public body for the purposes of FIPPA, if the personal information does not relate to the public body's programs or activities and the public body takes no action with the information other than to read all or part of it and then delete, destroy, return or transfer it (*e.g.*, to another public body). The Hansard debates on this proposed new provision indicate that it was intended to deal with situations where a public body receives unsolicited personal information in error and, for example, transfers it to the correct public body.[77] A public body is not considered to have "collected" personal information in such situations and thus the requirements of Part 3 of FIPPA do not apply.

[86] However, s. 27.1 does not appear to be intended to address the kind of situation I am dealing with here, where the personal information was not received in error and where it was not solicited in order for BCLC to provide the public services it is mandated to provide. In any case, s. 27.1 came into effect in November 2011, after the events under discussion here, and is thus of no relevance.

Conclusion on privacy complaint

[87] In light of my finding that BCLC did not, for the purposes of s. 26 of FIPPA, "collect" the director's personal information in the emails, I do not need to consider the remaining privacy issues. I also need not consider the director's argument on a remedy under s. 58(3).

CONCLUSION

[88] In Order F11-28, the adjudicator ordered disclosure of the emails, with some information severed under s. 22(1). The director expressly did not take issue with that part of Order F11-28 in his judicial review and the Court did not address it. I therefore conclude that the adjudicator's order, with respect to s. 22, remains in force.

[75] Director's submissions of May 29, 2013, para. 37, and of November 5, 2015, paras. 43-44
[76] BCLC's submission of October 16, 2015, paras. 41-42.
[77] Thursday afternoon, October 20, 2011.

[89] For reasons given above, under s. 58 of FIPPA, I require BCLC to comply with Order F11-28, on or before June 8, 2017 and concurrently to copy the OIPC Registrar with a copy of its covering letter to the journalist, together with a copy of the records as the adjudicator ordered them to be severed.

April 26, 2017

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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