

Commission of Inquiry into Money Laundering in British Columbia

Application for Directions Regarding Redactions – Ruling #13

Ruling of the Honourable Austin Cullen, Commissioner

Issued October 27, 2020

[1] This ruling addresses a series of five applications seeking directions with respect to the redaction of personal information on “public facing documents” (meaning documents which the media and public will be able to see and read) that are entered as exhibits during Commission hearings. The first application, which initiated three subsequent applications, was brought by the Gaming Policy and Enforcement Branch (“GPEB”) in a letter dated October 21, 2020. It was framed as follows:

...GPEB’s application pursuant to Rule 28 of the Commission’s *Rules of Practice and Procedure* (the ‘Rules’) seeking a direction that Commission counsel redact third party personal information on the publicly accessible versions of GPEB documents that are entered as exhibits at the Inquiry hearings, with leave to any person to apply for access to the redacted information.

[2] In its letter of application, GPEB defines third party personal information as “including without limitation names, addresses, phone numbers, driver’s licences, licence plates, business names, photographs and SIDs (personal identifying numbers used by casinos)”.

[3] Following distribution of GPEB’s application to other participants, counsel for Great Canadian Gaming Corporation (“GCGC”) responded by letter on October 21, 2020. GCGC supports the direction sought by GPEB and brings its own application “that a direction in the same terms be made with respect to third party Personal Information (as defined in GPEB’s application) within the publicly accessible versions of GCGC documents produced to the Commission”.

[4] In its letter, GCGC submits that given the volume of documents that Commission counsel have given notice they intend to enter as exhibits, “... it is impractical that an application be advanced by GCGC for each document

individually setting out the redactions sought and explaining why they are warranted”.

[5] Following receipt of GCGC’s response and application, Commission counsel brought an application on October 22, 2020 seeking a direction:

...that, unless the Commissioner otherwise directs, the following information should be redacted from the publicly facing version of records tendered as exhibits during the Commission’s hearings: a. email addresses; b. phone numbers; and c. home addresses.

[6] That application followed on the heels of an email from Commission counsel Alison Latimer sent to participants and counsel on October 20, 2020 signalling an intention to limit public access to “all or a portion of an exhibit, including by ordering that certain information, such as personal, private information, be redacted”. Ms. Latimer’s email specified email addresses, phone numbers and home addresses as information that should be redacted.

[7] Ms. Latimer noted that Commission counsel and participants are obliged to give advance notice of all documents to be tendered in part “to give participants an opportunity to consider whether they need to seek a direction that the public facing version of an exhibit needs to be redacted in any way”.

[8] Ms. Latimer suggested that “[s]hould any participant feel that further redactions are warranted in respect of an exhibit or potential exhibit, ... they [should] bring an application, setting out the redactions sought and why they are warranted”.

[9] On October 22, 2020, counsel for the British Columbia Lottery Corporation (“BCLC”) responded to GPEB’s application. BCLC supports the application and asks “that the same direction be given for documents produced by BCLC”, adopting the submissions of GPEB and GCGC. BCLC further submits that “it would be appropriate for a similar direction to be made for all documents containing personal information that are made public in the Inquiry process”.

[10] In its October 22, 2020 response to BCLC’s application, GPEB supports BCLC’s and GCGC’s applications and “further supports BCLC’s suggestion that it would be appropriate for a similar direction to be made for all documents containing personal information that are made public in the Inquiry process”.

[11] By a letter via email on October 22, 2020, counsel for the Government of Canada (“Canada”) submits that the direction sought by GPEB and GCGC should be granted on the terms sought. Canada also brings its own application pursuant to Rules 28 and 60 of the Rules of Practice and Procedure “seeking a direction from the Commissioner on the same terms set by GPEB and GCGC with respect to Personal Information (as defined in GPEB’s application) in the publicly accessible versions of Canada’s documents”.

[12] Canada adopts the submissions set out in GPEB’s application. Pursuant to a response received on October 23, 2020, GPEB supports Canada’s application.

[13] On October 23, 2020, Gateway Entertainment Ltd. (“Gateway”) emailed its response supporting “an order that all personal information be redacted from public-facing documents, including affidavits”. Gateway “echoes Canada’s submission that releasing personal information to the public may result in undue reputational harm, and would be an unreasonable invasion of privacy”.

A. GPEB’S SUBMISSIONS

[14] GPEB’s application was prompted by notice that “at least 77 GPEB documents containing Personal Information” may be tendered by Commission counsel and its expectation that, as the hearings progress, it will receive notice that additional documents will be tendered as well.

[15] GPEB submits that “the sheer volume of individuals whose Personal Information may be released” and the potential “reputational impact from some of the information” is a cause for concern. GPEB notes that, in many cases, the documents state that “named individuals are suspected of money laundering or otherwise suspected to be involved in illegal activity”.

[16] GPEB emphasizes that it is not seeking to apply redactions to the documents used in the hearings, but only to versions published on the Commission’s website.

[17] GPEB relies on ss. 15(1)(b) and (c) of the *Public Inquiry Act*, S.B.C. 2007, c. 9 [*PIA*], which read as follows:

Power to prohibit or limit attendance or access

15 (1) A commission may, by order, prohibit or restrict a person or a class of persons, or the public, from attending all or part of a meeting or hearing, or

from accessing all or part of any information provided to or held by the commission,

...

(b) for any reason for which information could or must be withheld by a public body under sections 15 to 19 and 21 to 22.1 [*privacy rights, business interests and public interest*] of the *Freedom of Information and Protection of Privacy Act*, or

(c) if the commission has reason to believe that the order is necessary for the effective and efficient fulfillment of the commission's terms of reference.

[18] GPEB contends that s. 22 of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 [*FOI*] referenced in s. 15(1)(b) of the *PIA* has application in the circumstances. Section 22(1) provides that information must be withheld “if the disclosure would be an unreasonable invasion of a third party’s personal privacy”. To determine whether disclosure would constitute an unreasonable invasion of a third party’s personal privacy, s. 22(2)(h) of *FOI* requires consideration of whether “the disclosure may unfairly damage the reputation of any person referred to in the record...”. Section 22(3)(b) of *FOI* creates a presumption of an unreasonable invasion of a third party’s privacy if “the personal information was compiled and is identifiable as part of an investigation into a possible violation of the law, except to the extent that the disclosure is necessary to prosecute the violation or continue the investigation”.

[19] GPEB seeks a direction “that Commission counsel redact third party personal information on the publicly accessible versions of any GPEB documents that are entered as exhibits at the Inquiry hearings”, including by making reasonable efforts to obscure personal information in copies of documents screen shared during the hearing and visible in the webcast archive published on the Commission’s website, with leave to any person, including the media and the public, to apply for access to the redacted information, on notice to Commission counsel and GPEB.

[20] GPEB’s submission is that such a direction strikes an appropriate balance of protecting third-party privacy interests with no involvement in the Inquiry and no notice that their personal information may be released to the public, while not unduly restricting the openness of the Inquiry hearings.

B. COMMISSION COUNSEL'S POSITION

i. Commission Counsel's Application

[21] As I have noted, Commission counsel has both brought an application in relation to redactions of personal and private information and has made responding submissions to GPEB's application and the other subsequent applications.

[22] As all the applications at issue involve redactions to documents anticipated to become exhibits to protect private information, it is useful to deal with them compendiously.

[23] Commission counsel's application limits the presumptive redaction of records tendered as exhibits in publicly facing versions of documents to email addresses, phone numbers, and home addresses.

[24] In bringing their application, Commission counsel rely on Rules 27(b) and 28 of the Rules of Practice and Procedure.

[25] Those rules provide:

Public Access to Records

27. Unless the Commissioner otherwise determines:

...

b. a record that has been entered as an exhibit may be made available to the public on the Commission's website including with redactions made by Commission counsel.

28. A participant or witness may apply to the Commissioner in accordance with Rule 60 (Applications) for an order that an exhibit, or parts of an exhibit, be redacted, sealed or otherwise made unavailable to the public.

[26] Commission counsel note that there is a principle of fundamental and constitutional importance that proceedings, including those of provincial inquiries, will be open and accessible to the public. Commission counsel argue that, although the default position of the Commission is one of openness, the redactions they seek "are routinely made in various legal proceedings". They protect the personal privacy of individuals who may be witnesses, participants or those whose names appear in records, without impairing the flow of information to the public and in keeping with those persons' reasonable expectations of privacy.

ii. Commission Counsel's Amended Response to GPEB's Application and the Related Applications of GCGC, BCLC and Canada

[27] Commission counsel confirm in their submissions that both GPEB and Canada will be applying, on a rolling basis, their respective requested redactions to each of their documents for which notice has been given of an intention to tender it as evidence. Commission counsel notes that s. 15 of the *PIA* allows redactions of the sort sought, subject to an obligation to observe the presumption of open and accessible proceedings, which encompass a principle of fundamental and constitutional importance.

[28] Commission counsel submit that in determining the issue of the nature and extent of “redactions in public facing exhibits” it is appropriate to adopt the so-called *Dagenais / Mentuck* test of demonstrating that the orders are necessary and proportional, citing the need for an applicant to surmount the barriers set forth in *R. v. Mentuck*, 2001 SCC 76 at para. 32:

- a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
- b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[29] In Ruling #12, Application for Witness Accommodation, issued October 23, 2020, I held that the *Dagenais / Mentuck* test is applicable to a determination of whether some restriction on public access to information/evidence put before an inquiry hearing is at issue.

[30] I conclude that Ruling #12 is applicable in the present circumstances and accordingly these applications should be determined within the framework established by the *Dagenais / Mentuck* test.

[31] In Ruling #12, dealing with an application by BCLC for witness accommodation, I accepted that the *Dagenais / Mentuck* test has broad application and applies to “all discretionary decisions that affect the openness of proceedings”, citing *Canadian Broadcasting Corp. v. The Queen*, [2011] 1 S.C.R. 65 at para. 13.

[32] I also accepted that the test justifying an order affecting the openness of proceedings is a stringent one, which is met only when a decision-maker concludes that disclosure would subvert the ends of justice or unduly compromise its proper administration, citing *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188 at para. 4.

[33] The evidence to establish necessity for an order to prevent a serious risk to the administration of justice must be “convincing” and it must meet “rigorous standards”. In support of that proposition I relied on *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332; and *Toronto Star* at para. 41.

[34] At the same time, I accepted that the test is a “flexible and contextual one” which focuses on the circumstances giving rise to the application. For that proposition I relied on *Toronto Star* at para. 31.

[35] I also accepted that any order made within the *Dagenais / Mentuck* test framework must be crafted in a minimally restrictive way relying on in *N.E.T. v. British Columbia*, 2018 BCCA 22 at para. 44 (Fitch J.A. in Chambers).

[36] As I noted, GPEB’s application relies primarily on s. 22 of *FOI*. The relevant portions of that section relied on by GPEB read as follows:

Disclosure harmful to personal privacy

22 (1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

...

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and

...

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,

[37] Commission counsel's contention is that the definition of personal information adopted by GPEB is "overly broad". While Commission counsel agree that email addresses, telephone numbers and home addresses are personal information that should be redacted in the public facing versions of documents, other types of information are either not personal information "or are unlikely to be usable by the public to identify an individual". Commission counsel cites business or company names, SIDs and licence plate numbers as information not likely to be used by members of the of the public to identify an individual.

[38] With respect to names, photographs, and driver's licence information of third parties, Commission counsel "would not necessarily oppose the redaction of such information, as requested on a document-by-document basis, so long as the information is adequately identified and a rationale provided".

[39] In other words, Commission counsel take the position that the only unconditional items of information that should be subject to a blanket redaction direction are email addresses, telephone numbers and home addresses. Insofar as names of an individual, photographs of an individual and driver's licence information, Commission counsel do not "necessarily" oppose redactions but submitted such redactions should not be categorical but, rather, subject to a flexible and contextual assessment.

[40] Commission counsel submit that an appropriate resolution of the applications at issue is to limit categorical redactions to email addresses, telephone numbers and home addresses and to adopt an approach to other redactions where the participants providing the documents should clearly identify the redaction sought and articulate the rationale for it. Commission counsel seek to exclude business names, SIDs and licence plate numbers from that procedure on the footing that they are not identifying information for individuals. Commission counsel would agree, however, that individual's names, photographs and driver's licence information would be subject to that process.

[41] Commission counsel submit that, if I direct categorical redactions beyond those sought by Commission counsel, that direction should include a provision that any participant could ask for redactions to be revisited at a later date to allow reconsideration of a decision to shield a person's identity from the public if evidence developed indicating that the public interest requires otherwise.

C. DISCUSSION

[42] As I see it, the issue to be resolved is whether directing all the redactions sought in GPEB's and Commission counsel's respective applications, taken cumulatively, would be consonant with the *Dagenais / Mentuck* test, or whether it would violate the presumption that this hearing will be open and accessible.

[43] The alternatives that arise on the submissions are: (i) to order some categorical redactions but leave the others to be considered on a document-by-document basis; (ii) to make all the categorical redactions sought, but in respect of some of them permit applications to be brought to set aside the redaction; or (iii) to direct only some categorical redactions, only some of which may be the subject of further directions, with others to be dealt with on a document-by-document basis, but subject to further directions to change the status of the item in light of developing evidence.

[44] I have no hesitation in ordering that individuals' email addresses, telephone numbers, and home addresses be categorically redacted from versions of the documents accessible to the public. I can see no justification for permitting that information to be made public by this Commission. I thus would give effect to Commission counsel's application as far as it goes in that respect. I similarly conclude that there is no persuasive reason to permit public access to a third party's driver's licence information, social insurance numbers or personal bank information, and I order that information redacted on a categorical basis.

[45] Insofar as names are concerned, I conclude that a blanket redaction of names goes too far. To redact all names from the documents would deprive the media and the public of insights into or understanding of the nature and extent of interactions and relationships between and among those individuals who work within the gaming industry as representatives of one or another of the participants. As I see it, those parties, whether current or former employees of one or another of the participants, are not in essence third parties whose identity and information warrants shielding.

[46] Insofar as the names of gaming patrons are concerned, I conclude that their names should be redacted, in the public version of the documents, but subject to further directions to remove the redactions in an appropriate context. In my view, documents which are relevant to the issue of money laundering in casinos which

name casino patrons may cause unfair or unwarranted reputational harm by linking the patrons to criminal activity which they may or may not be complicit of. Where, in the view of Commission counsel, other participants, the media, or the public, the evidentiary context establishes either that the redactions are not necessary to prevent a serious risk to the proper administration of justice, or the deleterious effects of the redactions to the public or the parties outweigh their salutary effects, then directions may be sought to set them aside if there is no agreement.

[47] Similarly, for the names I have not ordered to be redacted, if the evidentiary context establishes the requisite justification, directions for a redaction may be sought, if counsel are unable to agree.

[48] Insofar as licence plate numbers, business names, photographs and SIDs are concerned, I conclude that they should not be categorically redacted. However, in any particular case where the evidentiary context appears to meet the *Dagenais / Mentuck* test justifying affecting public access, an application for directions may be brought to seek appropriate redactions if counsel are unable to agree.

[49] The issue that remains to be addressed is who shoulders the burden of identifying the proposed redactions in the various documents.

[50] As I understand it, counsel for GPEB have advised Commission counsel that it will apply its requested redactions to each of the GPEB documents on a “rolling basis”, that is, as the documents are being presented.

[51] Similarly, Canada has confirmed in a letter sent by email on October 23 that it will provide proposed redactions of its documents. Counsel for Canada note: “[Canada] expect[s] that the redactions to Canada documents that have already been identified by Commission counsel or other participants for use in the hearings will be complete by Monday, October 26th”.

[52] Canada confirms that other documents that are identified “could generally be completed within one business day of being advised that a specific Canada document will be tendered as a proposed exhibit”.

[53] Insofar as GCGC is concerned, by letter dated and emailed on October 23, it submits that the burden of proposing redactions to third party personal information should not rest on participants, but rather on Commission counsel. GCGC notes that

is the procedure proposed by Commission counsel in its own application for redaction of personal information and should, for several reasons, equally apply for the residual information defined in GPEB's application.

[54] GCGC enumerated seven reasons in support of argument that Commission counsel should be required to propose and redact third party personal information.

[55] First, GCGC submits the redactions are tied to the public interest and it is Commission counsel, not the participants, "who should be tasked with protecting the public interest".

[56] Second, GCGC argues it is Commission counsel, not the participants, who have put "a very extensive volume of records [into evidence]". GCGC expresses some uncertainty about whether Commission counsel will lead all the records they have indicated. It also expresses that it has some difficulty in accessing and reviewing the records Commission counsel says it will need.

[57] Third, there are duplicate or substantially similar records produced by different participants, and there may be different redactions in different versions of the same record.

[58] Fourth, GCGC says as it is not the party leading the record in evidence, it should not be the party making the determination of what redactions should be proposed.

[59] Fifth, GCGC argues that if Commission counsel is successful in its application they will, in any event, be reviewing all the documents for redactions.

[60] Sixth, GCGC contends if there is a delay occasioned by Commission counsel having to review all the documents, it should not fall at GCGC's feet as it has raised the issue "on multiple occasions" with Commission counsel beginning in December 2019.

[61] Seventh, GCGC expresses concern about resources to identify and propose redactions, noting that GCGC and the other gaming participants have been subject to casino closures in British Columbia since March 16, 2020 and have no current meaningful sources of revenue.

[62] Insofar as Commission counsel suggests a procedure for document-by-document redaction proposals requiring a rationale, GCGC submits that, given the volume of records being led as exhibits, “it is necessary that categories of information be protected” rather than be addressed document by document.

[63] GCGC submits that, applying Commission counsel’s position to sample documents provided by GPEB in the course of its application, detailed information about a wide variety of identifiable casino patrons, including suggestions that they are engaging in loansharking, would be publicly available indefinitely. GCGC says that would, in turn, give rise to unacceptable reputational and safety risks for the third parties named.

[64] In my view, as a general proposition, the approach adopted by GPEB and Canada is preferable to that advanced by GCGC for a number of reasons.

[65] In the first place, each participant is familiar with its own documents, what they reveal and what they represent. Although Commission counsel has had the opportunity to review the documents and to explore them with witnesses, they did not author the documents or decide what was important to include and why it was important to include it. Commission counsel are on the outside looking in. The participants have the inside knowledge and understanding of the documents.

[66] Secondly, it does not follow that Commission counsel’s proposed approach would lead to the circumstances outlined in GCGC’s submissions set out in paragraph 63 (above), arguing that Commission counsel, rather than participants, should identify the proposed redactions. The object of the exercise proposed by Commission counsel and adopted by GPEB and Canada is to ensure that there are not unreasonable invasions of a third party’s personal privacy which unfairly would put their safety or reputation at risk. The question is not whether in such cases there should be redactions, but rather what is the most efficacious way of determining whether they are necessary.

[67] Third, if there were to be a delay to the proceedings caused by casting the entire burden of document review and third party redactions on Commission counsel, the delay would affect not just the Commission, but also all the participants and the public.

[68] Fourth, even if Commission counsel were to be tasked with the role of proposing redactions for all the participants' documents, it is difficult to imagine that participants would not conduct their own review to ensure that what Commission counsel propose is consistent with their view of what is or is not appropriate. The participants undoubtedly have some interest in the nature and extent of any redaction to their own documents.

[69] Finally, although it is accurate to say that the Commission is created to serve the public interest, and it is accurate to say that the issue of protecting third parties from unreasonable violations of their personal privacy is a significant matter of public interest, it is important to note that GCGC applied to become a participant in this Inquiry. In light of that, I do not think it can be said that it is only Commission counsel who has a responsibility to the Commission to protect or advance the public interest or the objectives of the Inquiry.

[70] In deciding whether a person or an entity should be granted standing as a participant, the Commissioner is obliged to consider under ss. 11(4)(b) and (c) of the *PIA*, among other things whether "the person's participation would further the conduct of the Inquiry" and "whether the person's participation would contribute to the fairness of the Inquiry". In connection with GCGC, I found that its participation would both further the conduct of the Inquiry and contribute to its fairness. I also noted that GCGC may have some documentation and information that would further the conduct of the Inquiry.

[71] I am, of course, alive to GCGC's submission concerning the question of its resources to identify and propose redactions. It is, however, difficult to address that directly because it does not appear that GCGC is submitting that it does not have the resources, only that Commission counsel has not addressed what would occur if a participant does not have resources. If GCGC has specific submissions to make on that point, they must be made more directly.

[72] I am satisfied that categorical redactions should be made to individuals' email addresses, telephone numbers, and home addresses, as well as their driver's licence information, social insurance numbers, health card information and bank account information. I am satisfied that only the names of casino patrons reflected in the documents should be redacted, but with liberty for Commission counsel, other participants, the media, or the public to propose setting aside any such redactions. I am not satisfied that names other than casino patrons in connection with the gaming

sector should be redacted, except that proposals may be made for redactions of other names where justified by the evidentiary context.

[73] I similarly direct that licence plate numbers, business names, photographs and SIDs not be categorically redacted but, in any case where the evidentiary record appears to justify it, proposals may be made to seek appropriate redactions.

[74] Insofar as procedure to be followed is concerned, all the participants will be responsible for making their own redactions to the categorical items and they will be responsible for proposing and making redactions with respect to any other category of information. If counsel are unable to agree with proposed redactions they may seek further directions.

D. CONCLUSION

[75] In summary, I direct as follows:

[76] Participants shall redact the following information from public facing documents produced by them that are entered as exhibits: email addresses, telephone numbers, home addresses, driver's licence information, social insurance numbers, health card numbers, bank account information, and names of casino patrons.

[77] Participants are responsible for proposing and making redactions to their own documents with respect to any other category of information.

[78] The names of current or former employees of participants, licence plate numbers, business names, photographs and SIDs are not to be redacted.

[79] Commission counsel, participants and members of the media may propose to alter the redactions, or non-redactions, as the case may be, under directions (i), (ii) and (iii).

[80] Further to direction (iv), Commission counsel and participants will endeavour at first instance to resolve any proposals under directions (i), (ii) and (iii) by agreement.

[81] In the event that Commission counsel and participants are unable to resolve a proposal, parties may apply to the Commissioner for a direction under Rule 28 of the Rules of Practice and Procedure.

[82] I leave for counsel to reach an agreement on how to address the circumstances when an exhibit which is redacted for public viewing is shown via video in unredacted form to a witness in a livestream hearing.

A handwritten signature in cursive script, appearing to read "Cullen".

Commissioner Austin Cullen