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Order F15-34

CITY OF SURREY

Caitlin Lemiski,
Adjudicator

August 13, 2015

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Summary: The applicant requested records detailing payments made by the City of Surrey to the London Speakers Bureau. The City withheld payment amounts from a chart, invoices, and a schedule of fees and expenses on the basis that disclosure would be harmful to the business interests of a third party (s. 21). The Adjudicator determined that s. 21(1) did not apply to any of the information in dispute, and the City must disclose it. The Adjudicator further determined that s. 22(1) did not require the City to withhold any of the information in dispute.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 21(1); *Financial Information Act,* s. 2.

Authorities Considered: B.C.: Order 01-39, 2001 CanLII 21593 (BC IPC); Order 03-02, 2003 CanLII 49166 (BC IPC); Order F05-29, 2005 CanLII 32548 (BC IPC); Order F12-08, 2012 BCIPC 12 (CanLII), Order F13-20, 2013 BCIPC 27 (CanLII). **A.B.:** Order F2007-032, 2008 CanLII 88777 (AB OIPC).

Cases Considered: *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; *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603.

INTRODUCTION

[1] This inquiry pertains to an applicant's request to the City of Surrey ("City") for records detailing payments made in 2012 by the City to the London Speakers

Bureau ("Bureau"). The Bureau represents a speaker ("speaker") who spoke at the City's 2012 Economic Summit ("Summit").[1] The City located records responsive to the applicant's request. It denied access to some of the information in those records under s. 21 (disclosure harmful to the business interests of a third party) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

[2] The applicant was not satisfied with the City's decision to withhold this information, and he requested a review by the Office of the Information and Privacy Commissioner ("OIPC"). OIPC mediation did not resolve the matters in dispute. A written inquiry was held. The City and the applicant made initial submissions. Neither party made reply submissions. The Bureau was invited to participate in this inquiry but did not make submissions.

[3] In this case, the City has not severed any information on the basis that s. 22(1) applies and neither party has raised s. 22(1) in its submissions. However, s. 22 is a mandatory provision and after reviewing the records, I have determined that it is necessary to determine whether it applies here. Section 22(1) requires a public body to withhold information if disclosing it would be an unreasonable invasion of a third party's personal privacy.

ISSUES

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

1. Is the City required to refuse to disclose information because disclosure would be harmful to the business interests of a third party under s. 21(1) of FIPPA?
2. Is the City required to refuse to disclose information because disclosure would be an unreasonable invasion of personal privacy under s. 22(1) of FIPPA?

[5] The City has the burden of proof, under s. 57(1) of FIPPA, to establish that s. 21 requires it to refuse to disclose the requested information. However, s. 57(2) of FIPPA places the burden on the applicant to establish that disclosure of personal information contained in the requested records would not unreasonably invade third party personal privacy under s. 22 of FIPPA.

DISCUSSION

[6] **Background—**The applicant is a journalist. He requested the disputed information after the City published its 2012 Statement of Financial Information, which disclosed that the City paid the Bureau a total of $419,767.13.[2]

[1] Public body's submission at para. 10.
[2] Public body's submission at para. 28.

The applicant requested details from the City about this amount, such as payment dates, dollar amounts of each payment and transaction numbers. The applicant also requested any contract numbers related to the payments, but not the contracts themselves.

[7] **Records in dispute—**There are four pages of records in dispute. One page is a chart called "2012 Economic Summit Expense Breakdown" ("Chart"). The Chart lists payments made by the City to the Bureau and to the Canada Revenue Agency ("CRA") in relation to the speaker's appearance at the Summit. The City has disclosed descriptions of the payments but has severed the dollar amount of each payment, as well as the combined total of those amounts. Another page in dispute is a schedule of fees and expenses related to the speaker ("Schedule"). The Schedule also contains the Bureau's banking details and other related financial information. The City is withholding the Schedule in its entirety. The City is also withholding in its entirety copies of two invoices from the Bureau to the City ("Invoices"). I note that in its submissions, the City characterizes the records in dispute as being the City's contract with the Bureau for the speaker's appearance at the Summit.[3] However, the four pages of records in dispute do not include a contract.

[8] I will now consider whether s. 21 applies to the information the City has severed.

[9] **Reasonable expectation of harm to a third party (s. 21)—**Section 21(1) requires public bodies to withhold information if disclosing it could reasonably be expected to harm a third party's business interests.

[10] Section 21(1) is as follows:

> 21(1) The head of a public body must refuse to disclose to an applicant information
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> (a) that would reveal
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> (i) trade secrets of a third party, or
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> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
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> (b) that is supplied, implicitly or explicitly, in confidence, and
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> (c) the disclosure of which could reasonably be expected to
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> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
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> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

[3] Public body's submission at para. 14.

(iii) result in undue financial loss or gain to any person or organization, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

Standard of proof and evidentiary burden for s. 21(1)

[11] The Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, has determined that the standard of proof and the evidence required to meet that standard for harms-based exceptions such as s. 21 is as follows:

> [54] 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": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40.[4]

[12] In summary, the City must prove that there is a reasonable expectation of probable harm to a third party's business interests if the disputed information is disclosed. The quality of the City's evidence must demonstrate that there is more than a mere possibility of probable harm.

[13] All the parts of s. 21(1) must be met in order for the section to apply. I will now consider each part of s. 21(1) in turn.

[14] **Commercial, Financial, or Technical information—**The disputed information includes payment information, invoice details, and information about fees and expenses. Previous orders have determined that "commercial information" must relate to a commercial enterprise, and "financial information" can include information about services delivered to a public body, including

[4] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner*), 2014 SCC 31 at para. 54.

pricing.[5] In this case, on the basis of the information itself, I find that the disputed information is both commercial and financial information of or about a third party.[6]

[15] **Supply of information––**Section 21(1)(b) requires that the information falling within the categories of information enumerated in s. 21(1)(a) be supplied implicitly or explicitly in confidence. To determine whether the requirement in s. 21(1)(b) is met, I must first decide if the information was supplied, and if it was, then I must decide if it was supplied in confidence.

[16] Although the contract between the City and the Bureau itself is not a record in dispute and it is not before me, the City's arguments hinge on whether disclosing the disputed information would reveal the terms of the City's contract with the Bureau. Previous orders have determined that information in a contract is normally not supplied because it is the product of negotiations.[7] One exception is when the information the third party provided was "immutable" or not susceptible to change, so was incorporated into the agreement unaltered. In Order 01-39, delegate Iyer observed that generally terms that are proposed by one party and accepted as received by another party are still terms that are susceptible of negotiation:

> [46] … information may originate from a single party and may not change significantly - or at all – when it is incorporated into the contract, but this does not necessarily mean that the information is "supplied." The intention of s. 21(1)(b) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible of change but, fortuitously, was not changed.[8]

[17] A second exception to the principle that information in a contract is normally negotiated and not supplied occurs when disclosing the information would allow someone to make accurate inferences about underlying confidential information supplied by a third party.[9]

Position of the parties

[18] The City describes the disputed information as information in its contract with the Bureau. It submits that the information in its contract with the Bureau was "supplied" information rather than "negotiated" information because the City

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[5] See Order F13-20 2013 BCIPC 27 (CanLII) at para. 14.
[6] None of the parties to this inquiry disputed that the information was commercial and financial information.
[7] See Order 01-39 2001 CanLII 21593 (BC IPC) at para. 44, citing Orders 00-09, 00-22, 00-24, 00-39, and 01-20.
[8] Order 01-39, supra at para. 46.
[9] For a detailed explanation of the exceptions, see Order 01-39, [2001] B.C.I.P.C.D. No. 40 at paras. 45 and 50, upheld and quoted in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603.

did not negotiate with the Bureau.[10] It explains that the contract "originated exclusively from the Bureau, which created it in response to the City's precise requirements and specifications."[11] It adds that the contract in its entirety was supplied to the City and its choice was whether to execute it in its supplied form or reject it in its entirety.[12] The City is effectively arguing that the City's contract with the Bureau was immutable because according to the City, its only choice was to accept or reject the terms the Bureau proposed.

[19] The applicant maintains that the City must disclose the disputed information.[13]

Analysis

[20] The City submits that the information in dispute directly and/or indirectly reveals the information in its contract with the Bureau. I do not have a copy of the City's contract with the Bureau before me, so I am unable to independently verify that this is the case. However, given my review of the records at issue, I accept the City's submission in that regard. In particular, the Schedule appears in all respects to be a schedule to a contract. Further, the information in the Chart, which lists payments made by the City to the Bureau for the speaker's appearance, would easily allow one to infer the terms of the contract. Regarding the Invoices, I am satisfied that this information is also information that is either in the City's contract with the Bureau or would allow one to make accurate inferences about the contents of that contract. Yet this does not advance the City's case because it simply begs the question as to whether these contract terms were supplied or negotiated.

[21] The City submits that all of the disputed information is immutable, yet in this case, the City's own evidence is that it chose to accept the Bureau's terms after the Bureau drafted contracts to meet the City's precise requirements.[14] This act of agreeing to terms is clear evidence of negotiated information.

[22] With one exception, all of the information at issue falls into this category of being negotiated. The exception is the Bureau's bank account information, such as bank names and transfer codes, as well as the Bureau's registration numbers for taxation purposes. This type of information would not be susceptible to change during the negotiation of a contract, and therefore falls within the immutable exception to the principle that information in a contract is normally

[10] Public body's submission at para. 18.
[11] Public body's submission at para. 14.
[12] Public body's submission at para. 18.
[13] Applicant's submission at para. 23.
[14] See the City's submission at paras. 14 and 18.

negotiated.[15] Therefore, with the exception of the bank account information, I find that the information in dispute was negotiated and not supplied.

In confidence

[23] I must next determine whether the Bureau's bank account information was supplied implicitly or explicitly in confidence.

[24] The City submits that all the disputed information was supplied by the Bureau explicitly in confidence.[16] In support, it relies on a sworn statement by the City's Manager of Economic Development that the contract between the City and the Bureau contains a clause that the contents of the contract will remain strictly confidential. [17] A copy of the confidentiality clause was not provided. The City also submits that it has kept all of the terms of its contract with the Bureau confidential.[18] Although a copy of the confidentiality clause was not provided, I accept the sworn affidavit evidence of the City's Manager of Economic Development that the City's contract with the Bureau contains a confidentiality clause. [19]

[25] Previous orders have stated that confidentiality clauses assist, but are not determinative, of whether information was supplied explicitly in confidence.[20] In this case, the existence of a confidentiality clause in combination with the City's affidavit evidence that it kept the terms of the contract confidential satisfies me that the Bureau supplied its bank account information (which I have already determined is information in the contract) to the City explicitly in confidence.

[26] As I have determined the Bureau's bank account information was supplied explicitly in confidence, I will now consider whether disclosing that information could reasonably be expected to result in harm to a third party.

[27] **Harm to third party interests—**Section 21(1)(c) is a harms-based exception. The City must prove that there is a reasonable expectation of probable harm to a third party's business interests if the information that was supplied in confidence is disclosed. The City must provide evidence "well beyond" or "considerably above" a mere possibility of harm to reach that middle ground between that which is probable and that which is merely possible.[21]

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[15] This information appears on the Schedule and the Invoices.
[16] Submission of the public body at para. 21.
[17] See the Affidavit of the City's Manager of Economic Development at para. 14.
[18] See the public body's submission at para. 21 and the Affidavit of the City's Manager of Economic Development at paras. 14 and 16.
[19] See the Affidavit of the City's Manager of Economic Development at paras. 9 and 10.
[20] See Order 03-02, 2003 CanLII 49166 (BC IPC); at para. 62.
[21] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner*), 2014 SCC 31 at para. 54.

[28] In this case, there are no submissions that disclosing any of the information in dispute could reasonably be expected to harm the Bureau in one of the ways set out in s. 21(1)(c). This is because the City submits that it relies entirely on the Bureau to present argument and evidence to support the City's position that disclosure could reasonably be expected to harm the Bureau,[22] and the Bureau, who was invited to participate in this inquiry, made no submissions.

[29] In addition, there is nothing within the disputed records themselves that suggests that s. 21(1)(c) applies. I therefore find that s. 21(1)(c) does not apply to any of the information that I found was supplied in confidence (i.e., the bank account information) because the City has not provided any evidence of harm, let alone evidence of harm that is "well beyond" or "considerably above" a mere possibility. I note that in a similar case, Alberta Order F2007-032, Adjudicator Cunningham determined that Alberta's equivalent to s. 21 of FIPPA did not apply to a corporation's banking information because the third party corporation in that case had not provided evidence to establish that disclosing the banking information could reasonably be expected to result in harm. She ordered the banking information disclosed.[23]

[30] In summary, I find that all of the information in dispute is commercial or financial information of or about the Bureau. I find that all of the disputed information either directly or indirectly reveals information that is in the City's contract with the Bureau. I find that the disputed information is negotiated and not supplied, except for the Bureau's bank account information, which is supplied explicitly in confidence. I find that disclosing the bank account information could not reasonably be expected to harm the business interests of a third party. For these reasons I find that s. 21 does not apply to any of the information in dispute.

[31] I will next consider whether the City is required to withhold information under s. 22(1).

[32] **Unreasonable invasion of personal privacy (s. 22)—**Section 22(1) requires public bodies to withhold information that would constitute an unreasonable invasion of personal privacy. As stated earlier, neither party raised s. 22, but due to the contents of the records I have determined that it is necessary to consider whether this section applies.

[33] The approach to s. 22 has been established in previous orders.[24] The first step is to determine whether any of the disputed information is "personal information." Schedule 1 of FIPPA states that personal information "means recorded information about an identifiable individual other than contact

[22] Public body's submission at para. 33.
[23] See Alberta Order F2007-032, 2008 CanLII 88777 (AB OIPC), at para. 45.
[24] See for example, Order F13-09, 2013 BCIPC 10 (CanLII) at para. 18 and Order F12-08, 2012 BCIPC 12 (CanLII) at para. 12.

information."[25] Schedule 1 of FIPPA states that contact information means "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."

[34] In this case, I have determined that some of the information in dispute is the speaker's personal information because it discloses how much the Bureau charged - and the City paid - in fees and travel expenses for the speaker's appearance at the Summit. Although these dollar amounts do not reveal what portion of the money that changed hands between the City and the Bureau was paid to the speaker, it is still about the speaker, so it is personal information. There is also a dollar figure associated with the entry on the Chart for "Withholding tax on Speaker Fees 15%". The City provides no explanation or submission regarding this amount. One would only be able to speculate as to which portion of this 15% actually reflects the money earned by the speaker (assuming it was even intended to relate to his earnings). However, it does allow one to make inferences about the speaker's earnings, so I find that it is personal information.

[35] The next step in a s. 22 analysis is to determine whether the personal information falls into any of the categories listed in s. 22(4). Section 22(4) sets out when information will not be subject to s. 22(1). The relevant portions of s. 22(4) in this case are as follows:

> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
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> …
>
> (f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,
>
> (g) public access to the information is provided under the *Financial Information Act*,
>
> (h) the information is about expenses incurred by the third party while travelling at the expense of a public body
>
> …

[36] One of the amounts that I found was personal information is the total dollar amount the City has already disclosed on the Statement of Financial Information pursuant to the *Financial Information Act*.[26] Section 22(4)(g) applies to this information so it may not be withheld under s. 22. Other personal information discloses the amount of travel expenses the City paid the Bureau for the speaker's appearance. I find that s. 22(4)(h) applies to this information.

[25] Schedule 1 of FIPPA.
[26] This amount is the total of the amounts the City paid the Bureau and the CRA in relation to the speaker's appearance at the Summit.

The remaining personal information, including the withholding tax amount, reveals how much the City paid the Bureau pursuant to the City's contract with the Bureau. These are details of a contract for the supply of services, therefore I find that s. 22(4)(f) applies to this information.

[37] In summary, I have determined that s. 22(1) does not require the City to withhold any of the information in dispute. The bank account information and the amount of and type of tax the Bureau charged the City is not personal information, and the rest of the information is not subject to s. 22(1) because ss. 22(4)(f), (g), and (h) apply.

CONCLUSION

[38] For the reasons stated above, pursuant to s. 58 of FIPPA, I require the City to give the applicant access to the disputed information by September 25, 2015 because s. 21 and s. 22(1) do not apply. The City must concurrently copy the OIPC's Registrar of Inquiries on its letter to the applicant, establishing that it has disclosed the disputed information.

August 13, 2015

ORIGINAL SIGNED BY

Caitlin Lemiski, Adjudicator

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