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Order F17-50

MINISTRY OF CITIZENS' SERVICES

Lisa Siew
Adjudicator

October 26, 2017

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Summary: Two First Nations/Bands requested a review of a decision made by the Ministry of Citizens' Services (formerly known as the Ministry of Technology, Innovation and Citizens' Services) to disclose information related to the sale and purchase of provincially owned land. The First Nations/Bands argued disclosure of the information would harm their business interests within the meaning of s. 21(1) of FIPPA. The adjudicator determined that the requirements of s. 21(1) had not been met and ordered the Ministry to disclose the disputed information to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 21.

Authorities Considered: B.C.: Order 01-36, 2001 CanLII 21590 (BC IPC); Order F01-39, 2001 CanLII 21593 (BC IPC); Order 04-06, 2004 CanLII 34260 (BC IPC); Order F10-28, 2010 BCIPC 40 (CanLII); Order F12-09, 2012 BCIPC 13 (CanLII); Order F13-20, 2013 BCIPC 27 (CanLII); Order F13-06, 2013 BCIPC 6 (CanLII); Order F15-71, 2015 BCIPC 77 (CanLII); Order 16-17, 2016 BCIPC 19 (CanLII); Order F16-39, 2016 BCIPC 43 (CanLII); Order F17-17, 2017 BCIPC 18 (CanLII); Order F17-14, 2017 BCIPC 15 (CanLII); Order F17-37, 2017 BCIPC 41.

Cases Considered: *CPR v The Information and Privacy Commissioner et al (In The Matter of the Judicial Review Procedure Act)*, 2002 BCSC 603; *K-Bro Linen Systems Inc. v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 04; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31.

INTRODUCTION

[1] The City of Burnaby (Applicant) made a request to the Ministry of Citizens' Services (formerly known as the Ministry of Technology, Innovation and Citizens' Services and hereafter referred to as the Ministry) under the *Freedom of Information and Protection of Privacy Act* (FIPPA). It asked for copies of records relating to the negotiation and sale of provincially owned lands located in Burnaby, BC (the Land) to two First Nations/Bands (the Third Parties).

[2] The Ministry located 206 pages of responsive records and gave notice of the access request under s. 23 of FIPPA to the Third Parties seeking their views on the application of s. 21 of FIPPA (harm to third party business interests).

[3] After reviewing the Third Parties' response, the Ministry informed them that it was going to withhold information under s. 13 (policy advice and recommendations), s. 16 (harm to intergovernmental relations or negotiations) and s. 17 (harm to the financial or economic interests of a public body), but not under s. 21. The Third Parties asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision to disclose information the Third Parties say should be withheld under s. 21 of FIPPA.

[4] Mediation failed to resolve the dispute regarding the application of s. 21 to the records and the Third Parties requested that it proceed to a written inquiry under Part 5 of FIPPA.¹ The Ministry, the Third Party and the Applicant all provided submissions in this inquiry.

ISSUE

[5] The issue to be decided in this inquiry is whether the Ministry is required to refuse to disclose the disputed information to the Applicant under s. 21(1) of FIPPA. Where, as in this case, a public body has decided to give an applicant access to all or part of a record containing information that relates to a third party, s. 57(3)(b) of FIPPA assigns the burden of proof to the third party to prove that the applicant has no right of access to the information.

DISCUSSION

[6] **Background** – Through a series of agreements involving corporate and limited partner entities, the Third Parties purchased the Land from the Province of British Columbia. The sales transaction included a vendor take back mortgage in partial payment of the purchase price.

[7] **Information in Dispute** – The information in dispute is contained within several documents that relate to the sale and purchase of the Land, including

¹ The Ministry's decision to refuse the Applicant access to information in the records under ss. 13, 16 and 17 is not at issue in this inquiry.

assignment, trust, lease and mortgage documents. The Third Parties object to the release of information within 42 pages of the responsive records. I have separated the information in dispute into the following two groups for ease of reference:

Group A Information

1. The name/company name, incorporation number, address, phone number and fax number for some of the parties to the agreements (e.g. purchaser, borrower/mortgagor, “Designated Company”² and purchaser’s solicitor etc.).
2. The name, title and signature of the authorized representatives for some of the parties.
3. The title of a specific document referenced in two of the agreements.³

Group B Information

1. The purchase price, the first and second deposits, the annual base rent, the principal and interest rate for the mortgage and various monetary adjustments.
2. The completion date, adjustment date, possession date, and extension terms in the lease documents.

[8] ***Harm to third-party business interests*** - Section 21 of FIPPA requires public bodies to refuse to disclose information that could reasonably be expected to harm the business interests of a third party. It states, in part, as follows:

21(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

...

(ii) commercial, financial, labour relations, scientific or technical information of or about a third party,

(b) that is supplied, implicitly or explicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

...

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

² This is a term defined under clause 18.01(g) of “Schedule D – Mortgage Terms” and clause 1.01 of the “Offer to Purchase.”

³ Located under clause B of the “Beneficial Mortgage and Charge” and under clause D of the “Assignment of Offer to Purchase.”

[9] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies to information.⁴ The party resisting disclosure, must first demonstrate that disclosing the information at issue would reveal the type of information listed in s. 21(1)(a) of, or about, a third party. Next, it must demonstrate that this information was supplied, implicitly or explicitly, in confidence to the public body under s. 21(1)(b). Finally, it must demonstrate that disclosure of the information could reasonably be expected to cause one or more of the harms set out in s. 21(1)(c). All three elements of s. 21(1) must be met in order for the information in dispute to be properly withheld.

Section 21(1)(a): Is the information commercial or financial information?

[10] Section 21(1)(a)(ii) applies to commercial or financial information of or about a third party. FIPPA does not define “commercial information” or “financial information.” However, previous OIPC orders have found information is commercial information if it relates to commerce, such as the terms and conditions for the buying or selling of goods and services.⁵ Previous OIPC orders have also found that prices charged for goods and services and other fees payable under a contract are both “commercial” and “financial” information of, or about, third parties.⁶

[11] The information in dispute relates to the sale, purchase, assignment, financing and lease of property. The parties all agree that it is commercial or financial information.⁷ This information contains the terms and conditions under which the parties to the various agreements will fulfill their obligations in relation to the Land, including any financial considerations or payments that formed part of the agreements. I am satisfied that the information in dispute is financial and commercial information as past OIPC orders have interpreted these terms. I also find that it is financial or commercial information “of or about” the Third Parties.⁸ Therefore, I find that s. 21(1)(a)(ii) applies to the information in dispute.

Section 21(1)(b): Was the information supplied, implicitly or explicitly, in confidence?

[12] Subsection 21(1)(b) requires the information to be supplied implicitly or explicitly in confidence. This involves a two-part analysis. It is first necessary to determine whether the information was supplied to the public body. If so, then the

⁴ See Order F17-14, 2017 BCIPC 15 (CanLII) and Order F15-71, 2015 BCIPC 77 (CanLII).

⁵ See Order F16-39, 2016 BCIPC 43 (CanLII) at para. 17.

⁶ See Order F16-17, 2016 BCIPC 19 (CanLII) at para. 22 and Order F13-20, 2013 BCIPC 27 (CanLII) at para. 14.

⁷ Third Parties’ Response form at para 1; Ministry’s submissions at paras. 14 – 16 and Applicant’s submissions at paras. 9-10.

⁸ Schedule 1 of FIPPA defines a “third party” as “in relation to a request for access to a record...any person, group of persons or organizations other than (a) the person who made the request, or (b) a public body.”

next step is to determine whether it was supplied, implicitly or explicitly, in confidence.⁹

Supplied information

[13] The information in dispute for this inquiry is found within several contracts dealing with the sale, purchase, assignment, financing and lease of the Land. Previous orders have stated that the terms of a contract are generally not “supplied” by the third party because they are negotiated by the parties to the contract.¹⁰ In Order 01-39, the Commissioner’s delegate said the following:

... By their nature, contracts are negotiated between the contracting parties. The fact that the requested records are contracts therefore suggests that the information in them was negotiated rather than supplied. It is up to CPR, as the party resisting disclosure, to establish with evidence that all or part of the information contained in the contracts including their schedules was not negotiated, as would normally be the case, but was “supplied” within the meaning of s. 21(1)(b).

A number of cases have addressed the difference between negotiated and supplied information (see Orders 00-09, 00-22, 00-24, 00-39, 01-20). The thrust of the reasoning in all of these decisions is that the information contained in contractual terms is generally negotiated. Information may be delivered by a single party or the contractual terms may be initially drafted by only one party, but that information or those terms are not “supplied” if the other party must agree to the information or terms in order for the agreement to proceed (see Order 01-20, paras. 81-89).¹¹

[14] However, there are two exceptions to this general rule: the first is when the information the third party provided was “immutable” (i.e., not susceptible to negotiation, such as fixed overhead or labour costs)¹² and the second is where the information in the contract could allow someone to draw an accurate inference about sensitive third-party business information that is protected under FIPPA.¹³

[15] The Third Parties state that the information in dispute was supplied in confidence, but they do not expand on this or provide any evidence in support of this position.¹⁴ The Ministry and the Applicant submit that the information in dispute is not “supplied” for the purposes of s. 21(1)(b). They both cite previous

⁹ See Order F15-71, 2015 BCIPC 77 (CanLII).

¹⁰ See Order F16-39, 2016 BCIPC 43 (CanLII) at para. 23.

¹¹ Order F01-39, 2001 CanLII 21593 (BC IPC), at paras. 43-44, upheld on judicial review in *CPR v. The Information and Privacy Commissioner et al (In The Matter of the Judicial Review Procedure Act)*, 2002 BCSC 603.

¹² *Ibid* at para 45.

¹³ Order F10-28, 2010 BCIPC 40 (CanLII) at para. 12, upheld on judicial review in *K-Bro Linen Systems Inc. v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 04.

¹⁴ Third Parties’ Response form at para. 2.

OIPC orders which have concluded that information in a contract will not normally qualify as being “supplied” by a third party.¹⁵

[16] Based on my review of the withheld information, I find the information in Group B was not supplied for the purposes of s. 21(1)(b), but was instead negotiated between the parties. In my view, information such as the purchase price, the amount of the rent, deposits, mortgage and the terms regarding the completion and possession date would ordinarily be negotiated information, and I have no evidence before me to the contrary.

[17] However, I find that the information in Group A such as the names of the various parties and the incorporation number were “supplied” to the Ministry because this information is not susceptible to negotiation.

In confidence

[18] The next step in the s. 21(1)(b) analysis is to determine whether the supplied information was provided by the third party to the public body explicitly or implicitly in confidence. For completeness, I will consider all the information in dispute although it is only necessary to consider whether the information in Group A was supplied to the Ministry explicitly or implicitly in confidence.

[19] The test for whether information was supplied, explicitly or implicitly in confidence, is objective. It must be shown that the information was supplied under an objectively reasonable expectation of confidentiality by the supplier of the information at the time the information was provided; evidence of the supplier’s subjective intentions alone with respect to confidentiality is insufficient.¹⁶

[20] The Third Parties submit that the information was supplied in confidence but they do not expand on this submission or provide evidentiary support. The Ministry says it was unable to conclude that the withheld information was supplied either implicitly or explicitly in confidence.¹⁷ The Applicant submits that the Third Parties have only made a “bald assertion” about confidentiality and “without supporting evidence of particulars,” it falls short of the evidentiary standard required to meet the test under s. 21(1)(b).¹⁸

[21] I have reviewed the various agreements to determine whether there were any explicit indicators of confidentiality.¹⁹ I conclude there is no clause or wording within these documents which provides confidentiality for any of the terms or

¹⁵ Ministry’s submission at paras. 17-20 and Applicant’s submission at paras. 11-14.

¹⁶ Order F17-37, 2017 BCIPC 41 at para. 42.

¹⁷ Ministry’s submission at para. 20.

¹⁸ Applicant’s submissions at para. 17.

¹⁹ See Order 04-06, [2004] BCIPCD No. 6 where former Commissioner Loukidelis considered the contract documents to determine whether there was an express agreement of confidentiality.

information in these agreements. Instead, the Offer to Purchase contains the following clause which expressly states that information in relation to the sale may be subject to disclosure:

[The Purchaser] is aware that this Agreement and any information regarding this Agreement or the Purchaser may be disclosed or may be required to be disclosed under the *Freedom of Information and Protection of Privacy Act*, governmental policy or otherwise;²⁰

[22] I have also considered the parties' submissions to determine whether the circumstances indicate that the information was provided implicitly in confidence.²¹ Apart from its assertions, the Third Parties have not submitted any information that suggests that there was an implicit understanding that the disputed information was confidential. Previous OIPC orders have noted that assertions by a third party alone, without corroboration from a public body of a mutual intention to keep the information confidential, are insufficient to establish that the information was provided in confidence.²² In this case, the Ministry is silent and says nothing about whether it had any understanding or expectation that the information in the various agreements was confidential.

[23] Based on the above, I am not persuaded that the disputed information was supplied implicitly or explicitly in confidence pursuant to s. 21(1)(b).

Section 21(1)(c) – Would disclosure of this information result in harm to the third party?

[24] As none of the disputed information meets the “supplied in confidence” test under s. 21(1)(b), it is not necessary for me to consider whether disclosing the information could reasonably be expected to result in harm under s. 21(1)(c). However, for completeness, I will address the Third Parties' argument regarding harm. To succeed on this part of the s. 21(1) test, the Third Party must provide evidence that one of the harms listed in s. 21(1)(c) could reasonably be expected to occur.

[25] The standard of proof applicable to harms-based exceptions like s. 21(1) is whether disclosure of the information could reasonably be expected to cause the specific harm.²³ The Supreme Court of Canada has described this standard as “a reasonable expectation of probable harm” and “a

²⁰ Offer to Purchase at clause 10.03(i).

²¹ See Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 26 for a list of circumstances that can be considered in determining whether the information was provided implicitly in confidence.

²² See Order F12-09, 2012 BCIPC 13 (CanLII) at paras. 19-22, citing Order 04-06, 2004 CanLII 34260 (BC IPC).

²³ Order F13-06, 2013 BCIPC 6 (CanLII) at para. 24.

middle ground between that which is probable and that which is merely possible.”²⁴

[26] The third party need not show on a balance of probabilities that the harm will occur if the information is disclosed, but it must nonetheless do more than show such harm is merely possible or speculative.²⁵ The third party must establish a clear and direct connection between the disclosure of the disputed information and the alleged harm.²⁶

[27] The Third Parties submit that disclosure of the information in dispute could reasonably be expected to:

1. Harm significantly their competitive position or interfere significantly with their negotiation position during ongoing negotiations with the Provincial and Federal governments regarding the proposed sale of surplus lands.
2. Interfere significantly with their ongoing negotiations with the City of Burnaby regarding rezoning and other issues.
3. Cause them undue financial loss by reducing the potential profit that may arise from the sale or leasing of this property.²⁷

[28] Other than its assertions, the Third Parties have not provided evidentiary support to establish how disclosure of the disputed information could reasonably be expected to cause the harms set out in s. 21(1)(c)(i) and (iii). A party’s failure to provide evidence to establish the application of s. 21(1) can be fatal to its case.²⁸ In my view, that is the situation here because the Third Parties’ assertions, without supporting evidence, are insufficient to demonstrate a clear and direct connection between the disclosure of the information in dispute and the alleged harm. Therefore, I find that the Third Parties have not established that 21(1)(c) applies to the disputed information.

Summary of findings on s. 21(1)

[29] In my view, disclosing the information withheld under s. 21(1) would reveal some commercial and financial information of, or about, a third party. However, the Third Parties have not persuaded me that any of the disputed information was supplied explicitly or implicitly in confidence, as required under s. 21(1)(b). Further, they have not established that disclosing the information in dispute could reasonably be expected to result in harm under s. 21(1)(c). Therefore, I find the

²⁴ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54 quoted in Order F17-37, 2017 BCIPC 41 at para. 51.

²⁵ *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 196.

²⁶ Order F13-06, 2013 BCIPC 6 (CanLII) at para. 24 quoting Order F07-15, [2007] BCIPCD No. 21 at para. 17.

²⁷ Third Parties’ Response Form at para. 3.

²⁸ See Order F17-17, 2017 BCIPC 18 (CanLII) at para. 64.

Third Parties have not met the burden of proving that the Ministry must refuse to disclose the information in dispute under s. 21(1).

CONCLUSION

[30] For the reasons provided above, under s. 58(2)(a) of FIPPA, I find that the Ministry is not required to refuse to disclose the disputed information to the Applicant under s. 21(1) of FIPPA. I require the Ministry to give the Applicant access to all of the disputed information it has withheld by December 7, 2017. The Ministry must concurrently provide the OIPC Registrar of Inquiries with a copy of its cover letter and the records sent to the Applicant.

October 26, 2017

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

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