



OFFICE OF THE
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Order F15-40

BRITISH COLUMBIA FERRY SERVICES INC.

Ross Alexander
Adjudicator

August 21, 2015

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Summary: Two third parties requested a review of a BC Ferry Services Inc. decision to disclose portions of records that are responsive to a request under FIPPA. The records relate to a BC Ferries arrangement with the third parties about a pilot project for two cable ferry routes. The third parties argued that disclosure could reasonably be expected to harm the corporate third party's business interests. The adjudicator confirmed BC Ferries' decision that s. 21 did not apply to the information it had decided to disclose, and ordered BC Ferries to disclose it to the person who had requested the records.

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

Authorities Considered: B.C.: Order F14-04, 2014 BCIPC 4 (CanLII); Order 01-39, 2001 CanLII 21593 (BC IPC); Order F10-28, 2010 BCIPC 40 (CanLII); Order F13-20, 2013 BCIPC 27 (CanLII); Order 01-36, 2001 CanLII 21590 (BC IPC).

Cases Considered: *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3; *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31.

INTRODUCTION

[1] This inquiry arises from a request by two related third parties to review a decision by British Columbia Ferry Services Inc. (“BC Ferries”) to disclose information to a person who requested records (the “original requestor”) under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”). The request is about an arrangement BC Ferries entered to consider the viability of a pilot project for two cable ferry routes.

[2] After receiving the original requestor’s request for records, and prior to making a decision regarding disclosure, BC Ferries consulted a corporate third party and its principal (the “third parties”) about disclosure of the records it had identified as responsive to the request. BC Ferries asked the third parties’ views about whether disclosure of some of this information may affect the company’s business interests under s. 21 of FIPPA (disclosure harmful to business interests of the third-party).¹

[3] The third parties responded to BC Ferries, taking the position that s. 21 of FIPPA applies to the records in their entirety. In BC Ferries’ view, s. 21 does not apply to the entirety of the responsive records, although it accepts that s. 21 applies to some of the information in the records.

[4] BC Ferries gave notice to the third parties that it had decided to provide some information to the original requester, withholding other information under s. 17 (disclosure harmful to the financial interests of BC Ferries), s. 21 (disclosure harmful to the business interests of a third party) and s. 22 (disclosure harmful to the personal privacy of a third party).²

[5] The third parties requested that the Office of the Information and Privacy Commissioner (“OIPC”) review BC Ferries’ decision to release information that they believe must be withheld under s. 21.

[6] The OIPC mediation process did not resolve the matter, and the third parties requested that it proceed to inquiry.

[7] At inquiry, the third parties and BC Ferries provided submissions.³ The original requester chose to not participate.

¹ Section 23 of FIPPA requires a public body to give written notice to third parties if it intends to give access to a record that the public body has reason to believe contains information that might be exempted from disclosure under ss. 21 or 22.

² Before the parties provided submissions in the inquiry, BC Ferries advised the third parties and the original requester that it was reconsidering its decision, and it was withdrawing its reliance on s. 17 and s. 22 (in part).

³ The third parties provided joint submissions.

[8] As part of their submissions, the third parties provided an annotated copy of the responsive records containing their views with respect to s. 21. This disclosed that their position at inquiry is that s. 21 applies to nearly all of the information. However, there is a small amount of information for which the third parties do not assert that s. 21 applies, so that information is not at issue and BC Ferries must provide this information to the original requestor.

ISSUE

[9] The Notice of Inquiry issued to the parties states that this inquiry arises out of BC Ferries' decision to release records that the third parties claim are harmful to its business interests. It states that the inquiry will consider whether BC Ferries is required to refuse access to the information under s. 21 of FIPPA.

[10] This inquiry is solely about the third parties' request for review of BC Ferries' decision to disclose information that the third parties say falls under s. 21. BC Ferries states in its submissions that the application of ss. 21 and 22 of FIPPA are at issue, which I take to mean that BC Ferries is amenable to expanding the scope of the inquiry to all of the information it is withholding since BC Ferries is currently withholding information under these two sections.⁴ However, adding these issues at this late stage (after the third parties have already provided their submissions) would result in delays or prejudice to at least some of the parties. Therefore, the only information I will consider in this inquiry is the information BC Ferries has decided to release that the third parties say falls under s. 21.

[11] As such, the issue in this inquiry is whether BC Ferries is required to refuse to disclose information to the original requester because there is a reasonable expectation that disclosure would be harmful to the business interests of a third party under s. 21 of FIPPA. The third parties have the burden to prove that the original requestor does not have the right of access to this information, pursuant to s. 57(3)(b) of FIPPA.

DISCUSSION

[12] **Background** – BC Ferries provides ferries services in British Columbia.

[13] The corporate third party has interests in cable ferries.⁵

[14] In 2007, the third parties and BC Ferries were signatories to a Memorandum of Understanding (the "MoU") regarding cable ferry development for two ferry routes.

⁴ BC Ferries' initial submissions at para. 5 and its reply submissions at para. 2.

⁵ Applicant's submissions at para. 10; Notice of Civil claim at Exhibit A to the applicant's submissions.

[15] In 2008, the MoU was terminated.

[16] In 2014, the third parties commenced action against BC Ferries in the Supreme Court of British Columbia, alleging breach of contract and breach of confidence.

[17] **Records in Dispute** – The records in dispute are:

- the MoU;
- a draft contract (the “draft contract”);
- a letter from BC Ferries to the corporate third party, and a letter from the corporate third party in response (collectively the “letters”); and
- a document of the corporate third party titled “extracts from draft response to RFP ## 2007 Routes 21 and 22 Ferry Services” (the “RFP response”).⁶

[18] While the above records are in dispute, not all of the withheld information in these records is at issue in this inquiry. BC Ferries is withholding portions of each of these records under s. 21. Of particular note, BC Ferries is withholding the financial information and projections contained in the RFP response under s. 21. As stated above, in this third party review I am only considering those portions of the records that BC Ferries is not withholding under s. 21 where the third parties assert that s. 21 applies.

Preliminary Matters

[19] A significant portion of the third parties’ submissions relate to the fact that they are currently in litigation with BC Ferries. They assert that BC Ferries is in a conflict of interest because it can choose to selectively disclose information to the original requestor. They say that this may shape public opinion with respect to the validity of the third parties’ claim. The third parties submit that they possess emails and files that are responsive to the original requestor’s claim, but that BC Ferries has not identified them as records responsive to the original requestor’s request. While the third parties do not expressly say so, in effect they are alleging that BC Ferries has not responded to the original requestor openly, accurately and completely as required under s. 6 of FIPPA.

[20] BC Ferries responds by stating that the ongoing litigation between BC Ferries and the third parties does not affect the statutory rights of the original requestor under FIPPA. On the allegation that BC Ferries has selectively disclosed records, it submits that apart from the fact that these allegations are

⁶ Based on my review of the materials before me, I note that it may be the case that the RFP response was not actually created in response to an RFP that BC Ferries had issued.

not at issue in this inquiry and that the third parties do not have standing to raise them, it objects to this allegation. BC Ferries says that it has carefully followed its disclosure obligations under FIPPA, that it has not selectively disclosed information, and that the third parties' allegations are completely unfounded and not supported by anything in the materials.

[21] I agree with BC Ferries that the third parties' allegations are not at issue in this inquiry, even if it is assumed that the third parties have standing to raise these issues. Section 6 of FIPPA is not listed in the notice of inquiry, and, in any event, there is no corroborating evidence in the inquiry materials that supports their allegations.⁷ I will not address the third parties' submissions on these issues, except to the extent that they relate to the third parties' submissions regarding s. 21 of FIPPA (*i.e.* I will address these submissions in relation to harm from disclosure under s. 21(1)(c)).

[22] The third parties also submit that they have commenced legal action against BC Ferries for breach of confidence, and state that such confidence applies to the information at issue in this inquiry. Their position is that it would constitute a breach of confidence for BC Ferries to release the information that is at issue.

[23] Even if I were to accept that BC Ferries has an obligation of confidentiality to the third parties regarding the records at issue, FIPPA applies to BC Ferries by operation of law regardless of any promises of confidentiality. Therefore, even if there was such a promise or obligation, BC Ferries would still be required to provide the information to an applicant unless one or more of the exceptions to disclosure in Division 2, Part 2 of FIPPA apply.

Section 21

[24] 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. Section 21(1), which sets out the three-part test that must be met for the section to apply, states in part:

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

⁷ I note that while the third parties allege that they possess records that are responsive to this request, they do not provide examples of these records in their materials.

- (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...

[25] The third parties submit that s. 21 applies to nearly all of the information in the responsive records. BC Ferries takes no position with respect to the information the third parties seek to have withheld under s. 21.

Commercial or financial information – s. 21(1)(a)

[26] Section 21(1)(a) applies to, among other things, commercial or financial information of or about a third party. Commercial information relates to a commercial enterprise, but it does not need to be proprietary in nature or have an independent market or monetary value. It suffices if the information is associated with the buying, selling or exchange of the entity's goods or services.⁸ In this case, the withheld information relates to potential business dealings between BC Ferries and the corporate third party, so I find that it is commercial information “of or about a third party” within the meaning of s. 21(1)(a).

Supplied in confidence – s. 21(1)(b)

[27] For s. 21(1)(b) to apply, the information must have been supplied, either implicitly or explicitly, in confidence by a third party. This is a two-part analysis. The first step is to determine whether the information was supplied to a public body. The second step is to determine whether the information was supplied “in confidence”.

“Supplied”

[28] In determining whether the information was supplied to BC Ferries, it is necessary to consider the content rather than just the form of the information.⁹

[29] Some of the records in this case are contractual in nature. Previous orders have stated that contractual terms are not usually supplied because they are “negotiated”, even when there is little or no overt negotiation giving rise to the terms in a contract. However, there are exceptions to contractual information being negotiated, which Adjudicator Iyer explained in Order 01-39 as follows:

⁸ Order F14-04, 2014 BCIPC 4 (CanLII) at para. 9 citing Order F05-09, 2005 CanLII 11960 at para. 10.

⁹ *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para 158.

Information that might otherwise be considered negotiated nonetheless may be supplied in at least two circumstances. First, the information will be found to be supplied if it is relatively “immutable” or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be “supplied” within the meaning of s. 21(1)(b). To take another example, if a third party produces its financial statements to the public body in the course of its contractual negotiations, that information may be found to be “supplied.” It is important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be “supplied” by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become “negotiated” information, since its presence in the contract signifies that the other party agreed to it.

...

The second situation in which otherwise negotiated information may be found to be supplied is where its disclosure would allow a reasonably informed observer to draw accurate inferences about underlying confidential information that was “supplied” by the third party, that is, about information not expressly contained in the contract: Order 01-20 at para. 86. Such information may be relevant to the negotiated terms but is not itself negotiated. In order to invoke this sense of “supplied”, CPR must point to specific evidence showing what accurate inferences could be drawn from which contractual terms about what underlying confidentially supplied information. Moreover, as discussed below, where information originally supplied in a bid proposal is simply accepted by the other party and incorporated into a contract, the mere fact that disclosure of the contract will allow readers to learn the terms of the original bid will not shield the contract from disclosure.¹⁰

[30] I adopt this approach from Order 01-39, which was upheld on judicial review and has been cited in numerous orders.¹¹ For the terms of a contract to be supplied within the meaning of s. 21(1)(b), the information must be immutable (*i.e.*, a fact that is not susceptible to change) or enable accurate inferences about confidential information that was supplied by a third party and is not expressly contained in the contract.¹²

[31] The third parties submit that the information BC Ferries seeks to release was supplied in confidence to BC Ferries. However, they do not address the fact that contractual information is not ordinarily supplied in confidence within the meaning of s. 21(1)(b) because it is negotiated. In fact, they state that all of the

¹⁰ Order 01-39, 2001 CanLII 21593 (BC IPC), at paras. 45 and 50, upheld and quoted in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603.

¹¹ For example, Order F10-28, 2010 BCIPC 40 (CanLII).

¹² Order 01-39, 2001 CanLII 21593 (BC IPC) at paras. 45 and 50.

records reveal “contractual elements” and that they are the corporate third party’s work product that were “produced and negotiated at some expense”.

[32] The term “memorandum of understanding” generally connotes that parties have mutual expectations about pursuing a course of action, but that it is not a legally enforceable contract.¹³ However, in my view, whether the MoU is legally enforceable does not differentiate it from other contractual agreements, since its terms were subject to negotiation. Moreover, it is not apparent that any of the MoU information falls into an exception to contractual information being negotiated. Therefore I find that the MoU was not supplied because it was negotiated.¹⁴ The third parties have not met the burden of proof on this issue. For the above reasons, I find that the MoU information was not supplied within the meaning of s. 21(1)(b).

[33] There is also a draft contract that is at issue. I do not have any background about the creation of this record, including who created it or whether it is the product of previous negotiations between the parties. The draft contract is written in a letter format that suggests it is an offer from BC Ferries that is being extended to the third parties. This suggests that this information was generated by BC Ferries. Given this, I find that the draft contract was not supplied by the third parties to BC Ferries. Moreover, even if the draft contract information originated with the third parties, I am not satisfied that the third parties supplied the draft contract information within the meaning of s. 21(1)(b), as opposed to the information being a product of negotiations between the parties.¹⁵ I therefore find that the draft contract was not supplied within the meaning of s. 21(1)(b).

[34] The letters that are at issue are not contractual in nature. The parties do not address where the information in these letters originated on a line-by-line basis, however the originating source of the information is apparent based on who wrote the letter and the actual content of the information. Some of the information in the letters originate with BC Ferries, is from the MoU, or recounts events between the parties. I find that none of this information was supplied by the third parties. However, I also find that the other information in the letters originates from the third parties, which I find to be supplied within the meaning of s. 21(1)(b).

¹³ I note that *Black’s Law Dictionary*, 8th ed., s.v. “memorandum of understanding” refers the reader to “letter of intent”, which states in part: ...a noncommittal writing preliminary to a contract....A letter of intent is not meant to be binding...”

¹⁴ Further, I note that the third parties do not directly assert, and the evidence does not satisfy me, that the MoU originated with the third parties or that they supplied it to BC Ferries. In my view, it is at least as likely that this information originated from BC Ferries as it did from the third parties.

¹⁵ I note that the third parties do not explain why any of this information would fall into an exception to contractual information being negotiated, and none is apparent to me.

[35] The last record at issue is the RFP response. Portions of this record recount actions taken by BC Ferries, which I find is not supplied by third parties. However, I find that the majority of the information at issue in this record was supplied by the corporate third party.

[36] In summary, I find that most of the RFP response and portions of the letters were supplied by third parties. However, I find that other portions of these records, plus all of the MoU and draft contracts, were not supplied to BC Ferries within the meaning of s. 21(1)(b). I therefore find that s. 21 does not apply to this information.

In Confidence

[37] For s. 21(1)(b) to apply, the information must be supplied, explicitly or implicitly, in confidence. This test for “in confidence” is objective, and the question is one of fact. Evidence of the third party’s subjective intentions with respect to confidentiality is not sufficient.¹⁶ As stated in Order F13-20, the determination of whether information is confidential depends on its contents, its purposes and the circumstances under which it was compiled.¹⁷

[38] The records in this case were provided in the context of a business relationship between BC Ferries and the third parties, for which it is clear based on materials before me that the parties were treating as a confidential business relationship. Further, the RFP response states that it is “strictly confidential”. I therefore find that those portions of the RFP response and letters that were supplied by third parties were supplied in confidence.

[39] In summary, I find that portions of the RFP response and letters were supplied in confidence within the meaning of s. 21(1)(b) of FIPPA.

Reasonable Expectation of Harm from Disclosure – Section 21(1)(c)

[40] There must be a reasonable expectation of harm from disclosure within the meaning of s. 21(1)(c) in order for s. 21 to apply. I am only considering this provision for those portions of the RFP response and letters that were supplied in confidence under s. 21(1)(b), as it is not necessary for me to consider the information for which I have already determined that s. 21 does not apply. I also reiterate that I am not considering the information BC Ferries is withholding under s. 21, including the financial information and projections contained in the RFP response.

¹⁶ F13-20, 2013 BCIPC 27 (CanLII) at para. 22.

¹⁷ Order F13-20, 2013 BCIPC 27 (CanLII) at para 27; Also see Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 27.

[41] Section 21(1)(c) states in part:

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

...

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

[42] The standard of proof under s. 21 is whether disclosure could reasonably be expected to result in the specified harm. The Supreme Court of Canada has described this standard as requiring a reasonable expectation of probable harm from disclosure of the information.¹⁸ It is a middle ground between what is probable and that which is merely possible. A public body must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach this standard. The determination of whether the standard of proof has been met is contextual, and the quantity and quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and the "inherent probabilities or improbabilities or the seriousness of the allegations or consequences".

Positions of the Parties

[43] The third parties submit that disclosure will result in harm due to ss. 21(1)(c)(i) to (iii) of FIPPA. They submit that disclosure will:

- a) result in harm, unwarranted attention and expense to the corporate third party;
- b) enable competitors to "stand on the shoulders" of the corporate third party and use its commercial information to submit their own proposals to BC Ferries;
- c) result in a financial loss to the corporate third party because it retains an ongoing interest in cable ferry development in BC and elsewhere;

¹⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54 citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 with respect to this entire paragraph.

- d) prevent the corporate third party from achieving its business development goals. They state that such loss would be unjustified because they say BC Ferries is selectively disclosing information;
- e) illuminate the difficulty in dealing with BC Ferries, which will dissuade others with good ideas from providing them to BC Ferries; and
- f) harm their negotiating position in the litigation because BC Ferries may be willing to settle the third parties' claim in order to prevent the disclosure of certain information that may harm BC Ferries' reputation. The third parties are concerned that the disclosure of information to the original requestor will decrease BC Ferry's incentive to settle, since the information that may harm BC Ferry's reputation will already be disclosed.

[44] BC Ferries takes no position regarding most of the third parties' submissions. However, it states that it is carefully following disclosure obligations under FIPPA, and that it is not selectively disclosing records or disclosing information in any way to affect the litigation between the parties.

Analysis

[45] I will first address s. 21(1)(c)(ii), before turning to ss. 21(1)(c)(i) and (iii) together.

[46] Section 21(1)(c)(ii) applies if disclosure could reasonably be expected to 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. The third parties submit that s. 21(1)(c)(ii) applies because the release of confidential information could reasonably be expected to illuminate the difficulty of dealing with BC Ferries, and it will dissuade others with good ideas from stepping forward. However, the third parties' submission under s. 21(1)(c)(ii) is not supported by evidence or a further explanation of why disclosure of the information that is at issue will result in similar information no longer being supplied to BC Ferries. I also note that BC Ferries does not identify that it has these same concerns. On the materials before me, and given the absence of evidence, I find that disclosure could not reasonably be expected to result in similar information no longer being supplied to BC Ferries within the meaning of s. 21(1)(c)(ii).

[47] Section 21(1)(c)(i) applies if disclosure could reasonably be expected to "harm significantly the competitive position or interfere significantly with the negotiating position of the third party", while s. 21(c)(iii) applies if disclosure of information could reasonably be expected to "result in undue financial loss or gain to any person or organization". The third parties' submissions that competitors will be able to use the information against the corporate third party,

and that disclosure will prevent it from achieving its business development goals, relate to both ss. 21(1)(c)(i) and (iii).

[48] The third parties, who have the burden of proof in this case, do not explain how the specific information that is at issue could result in the alleged harms. Further, it is not apparent to me how disclosure of this information could result in such harm. There is insufficient information and evidence before me to connect disclosure of the information to a reasonable expectation of harm. Based on the materials before me, including my review of the records themselves, I find that there is no reasonable expectation of harm from disclosure for these reasons.

[49] The third parties also submit that disclosure will harm their negotiating position in the litigation because BC Ferries will no longer have the incentive to settle their claim in order to keep this information private and thus preserve BC Ferries' reputation.

[50] Based on my review of the materials, I find that there is no reasonable expectation of harm to the third parties' negotiating position from disclosure of the information that is at issue. It is not apparent to me what information at issue would harm BC Ferries' reputation. I also note that a portion of this information is background information that is publicly available, and the third parties have not explained how disclosing this publicly-available information in this context could reasonably be expected to result in harm to the third parties. Further, the third parties' argument is predicated on the fact that there is value to BC Ferries to not have this information publicly disclosed. However, the materials do not suggest to me that BC Ferries places such a value on this information. This is to some extent corroborated by the fact that it is not withholding this information under s. 17 of FIPPA (disclosure harmful to the financial or economic interest of the public body).¹⁹ Moreover, it is also not apparent to me that there is a reasonable expectation of harm under ss. 21(1)(c)(i) to (iii) for any other reason. Therefore, I find that s. 21(1)(c) does not apply in this case.

[51] In summary, I find that there is no reasonable expectation of harm from disclosure under ss. 21(1)(c)(i) to (iii) for any of the information to which BC Ferries has determined s. 21 does not apply. Therefore, I confirm BC Ferries' decision to disclose this information to the applicant.

¹⁹ BC Ferries originally withheld some information in the records under s. 17 of FIPPA (which it has since withdrawn its reliance on). However, none of that information is information I am considering here.

CONCLUSION

[52] For the reasons given above, under s. 58 of FIPPA, I confirm BC Ferries' decision to disclose the information in dispute to the applicant. I require BC Ferries to give the applicant access to the information that is at issue by **October 5, 2015**. BC Ferries must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

August 21, 2015

ORIGINAL SIGNED BY

Ross Alexander, Adjudicator

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