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Order F13-20

CITY OF ABBOTSFORD

Hamish Flanagan, Adjudicator

October 2, 2013

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Summary: The City of Abbotsford identified email correspondence between it and Jack's Towing as being responsive to an applicant's request for information. The City notified Jack's of its intention to disclose the emails to the applicant. Jack's requested a review of the City's decision on the grounds that disclosure would harm its interests under s. 21 and would be an unreasonable invasion of privacy under s. 22 of FIPPA. The adjudicator found s. 21 did not apply to any of the records, but ordered the City to withhold a small amount of third-party personal information that if released would be an unreasonable invasion of privacy under s. 22 of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* ss. 21 and 22.

Authorities Considered: B.C.: Order 01-26, 2001 CanLII 21580; Order 03-02, 2003 CanLII 49166; Order 03-15, 2003 CanLII 49185; Order F12-13, 2012 BCIPC 18; Order F10-06, 2010 BCIPC 9; Order F08-03, 2008 CanLII 13321; Order F13-19, 2013 BCIPC 26; Order F05-09, 2005 CanLII 11960; Order 03-04, 2003 CanLII 49168; Order F13-06, 2013 BCIPC 6; Order F13-02, 2013 BCIPC 2; Order F11-08, [2011] B.C.I.P.C.D. No. 10; Order 01-39 [2001] B.C.I.P.C.D. No. 40; Order 01-36, 2001 CanLII 21590; Order F05-29, 2005 CanLII 32548; Order F04-06, 2004 CanLII 34260; Order F07-15, 2007 CanLII 35476.

Cases Considered: *Jill Schmidt Health Services Inc.* v. *British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 101 (CanLII); *Merck Frosst Canada v. Canada (Health)*, 2012 SCC 3; *Re Maislin Industries Ltd. and Minister for Industry* (1984) 10 DLR (4th) 417 (FCTD); *Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs)* (1997) 148 DLR (4th) 356 (FCTD).

INTRODUCTION

[1] The applicant in this case is a towing company that requested information from the City of Abbotsford ("City") about a competitor, Jack's Towing (2010) Limited ("Jack's"). Jack's provides towing services under contract to the City.

[2] The City identified a series of emails as being responsive to the request and sought Jack's views on disclosing them. Jack's objected, claiming disclosure of the records would harm its business interests under s. 21 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The City considered Jack's objections and decided to release some of the records Jack's wanted withheld. Jack's then requested that the Office of the Information and Privacy Commissioner ("OIPC") review the City's decision. Mediation did not resolve the matter and it was referred to inquiry.

ISSUES

[3] The issues in this inquiry are whether the City is required to withhold parts of emails it plans to give the applicant access to because:

1) disclosure of the information would be harmful to the business interests of Jack's under s. 21 of FIPPA.

2) disclosure would be an unreasonable invasion of third parties' personal privacy under s. 22 of FIPPA.

DISCUSSION

[4] **Records in Issue**—The records in issue in this inquiry are emails[1] about a Request For Proposals ("RFP") for towing services issued by the City and a contract for towing services between the City and Jack's.[2]

[1] An initial set of emails were identified by the City as responsive to the applicant's request and supplied to Jack's for review. On two subsequent occasions the City identified further emails as responsive and also supplied those emails to Jack's for review. Each of the three sets of responsive emails are separately numbered starting at 1, so references in this inquiry to emails specify which set of records they are from, as well as the page number(s) of the email. Jack's submits that s. 21 or s. 22 apply to all three sets of emails.

[2] Jack's response to the City's RFP for towing services and the resulting contract between the City and Jack's are not in issue.

[5] The emails can be further categorized as:

- internal City emails;
- emails between the City and another public body;
- emails between the City and Jack's, including some copied to other public bodies; or
- emails between third parties (other than Jack's) and the City.

[6] **Harm to Third-Party Business Interests: s. 21**—Section 21(1) of FIPPA requires public bodies to withhold information that would harm the business interests of a third party if disclosed. It sets out a three-part test for determining whether disclosure is prohibited, all three parts of which must be established before the exception to disclosure applies. These are the relevant FIPPA provisions:

> **Disclosure harmful to business interests of a third party**
>
> 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, …

[7] The principles for applying s. 21 are well established.[3] The first part of the test requires the information to be a trade secret of a third party or the commercial, financial, labour relations, scientific or technical information of or about a third party. The second part of the test requires the information to have been supplied to the public body in confidence. The third part of the test requires that disclosure of the information could reasonably be expected to cause significant harm to the third party's competitive position or other types of harm as set out in s. 21(1)(c).

[3] See for example, Order 03-02, 2003 CanLII 49166 and Order 03-15, 2003 CanLII 49185.

[8] Jack's argues that disclosure could harm their business interests in two of the ways listed in s. 21:

> a) by harming significantly their competitive position or negotiating position with the City or other potential customers; or
>
> b) by resulting in undue financial loss to it, or undue financial gain to the applicant, a competitor.

[9] Section 57 of FIPPA establishes the burden of proof on the parties in the inquiry. In the case of information that is not personal information, it is up to Jack's to prove that the applicant has no right of access to the record or part.[4] For information in the emails that is personal information, the applicant has the burden of proving that the disclosure of information would not be an unreasonable invasion of privacy.[5] The City did not take a position at the inquiry.

[10] I will now consider the requirements of s. 21 in turn.

> *Commercial, financial and/or technical information of or about a third party: s. 21(1)(a)*

[11] Jack's says the emails are commercial, financial and/or technical information under s. 21(1)(a)(ii). It says that the emails are in connection with contracted services.

Technical information

[12] Previous orders have defined "technical information" under s. 21(1)(a)(ii) as information belonging to an organized field of knowledge falling under the general categories of applied science or mechanical arts, such as architecture, engineering or electronics.[6] This usually involves information prepared by a professional with the relevant expertise, and describes the construction, operation or maintenance of a structure, process, equipment or entity.[7] No submission points to any technical information in the emails, and none is evident from my review of the information.

Commercial or financial information

[13] In the context of FIPPA, examples of financial information include such things as cost accounting methods, pricing policies, profit and loss data, overhead and operating costs, and the amount of insurance coverage obtained.[8]

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[4] Section 57(3)(b) FIPPA.
[5] Section 57(3)(a) FIPPA.
[6] See, for example, Order F12-13, 2012 BCIPC 18, or Order F10-06, 2010 BCIPC 9.
[7] Order F13-19, 2013 BCIPC 26.
[8] Order F08-03, 2008 CanLII 13321 at para. 65.

[14] "Commercial information" relates to a commercial enterprise but need not be proprietary in nature or have an independent market or monetary value.[9] The information itself must be associated with the buying, selling or exchange of the entity's goods or services. An example is a price list, or a list of suppliers or customers. Another example is a third-party contractor's proposed and actual fees and percentage commission rates and descriptions of the services it agreed to provide to a public body.[10] Financial information often has been applied, together with commercial information, in a proposal or contract about the goods and services delivered and the prices that are charged for those goods or services.[11]

[15] Some of the emails in issue contain commercial or financial information as described above, including terms and conditions under which services are to be supplied, details about financial arrangements of Jack's and methods of operation. However not all of the records do. Some of the emails are merely administrative in nature, for example arranging meeting times between City employees or between the City and a third party. Some pages of the printed emails contain only email signature blocks or other non-commercial information. Some emails were created by the City and do not include any commercial or financial information of or about Jack's. Given my findings below on the second and third parts of the s. 21 test, it is not necessary to identify with precision all the information that contains commercial or financial information.

[16] I will now apply the second stage of the s. 21 analysis to the emails that contain commercial or financial information.

Supplied in confidence - s. 21(1)(b)

[17] The second part of the test in s. 21(1) requires that the information was "supplied", either implicitly or explicitly, "in confidence". This is a two-step analysis. The first is to determine whether the information was supplied to the City. The second will be to determine whether those records were supplied "in confidence".

"Supplied"

[18] There are no submissions from the parties on whether the information was "supplied". As noted above, the records include internal City emails, emails between the City and another public body, emails from Jack's to the City that are

[9] Order F05-09, 2005 CanLII 11960 at para 10, citing Order 01-36, 2001 CanLII 21590.
[10] Order 03-04, 2003 CanLII 49168.
[11] See, for example, Order 03-15, 2003 CanLII 49185, citing Order 00-22 (upheld on judicial review: *Jill Schmidt Health Services Inc.* v. *British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 101 (CanLII), [2001] B.C.J. No. 79, 2001 BCSC 101).

sometimes copied to other public bodies, and emails written by other third parties to the City.

[19] The emails written by Jack's are clearly supplied to the City.

[20] As for emails created by other third parties, as former Commissioner Loukidelis noted in Order 01-26,[12] it does not make any difference to the question of supply that the third party did not supply the information of or about it to the public body. Nothing in the language of s. 21(1)(b) limits it to instances where the information has been supplied by the third party whose information it is.[13] From my review of the records I have found that all the information of or about Jack's in emails from third parties other than Jack's is supplied.

[21] The other types of emails are internal City emails, and emails between the City and another public body. The emails can still be "supplied" even though they originate with the City. The information in those City emails can contain (or repeat) information extracted from documents which were "supplied to" the public body by a third party. As the Supreme Court of Canada has recently noted, the content rather than the form of the information is the important factor.[14] Despite this, some pages of the records contain no supplied information, because the information was entirely created by the City or other public bodies.[15] Some of these emails comprise extracts of the City's contract with Jack's, which previous orders have established is information that is negotiated not supplied.[16]

"In Confidence"

[22] Numerous orders have dealt with the issue of whether information was supplied explicitly or implicitly, "in confidence". The test is objective and the question is one of fact; evidence of the third party's subjective intentions with respect to confidentiality is not sufficient.[17]

[23] Jack's initial submission states that while it expected that "certain contractual and policy documents [would be] available on the City's website",

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[12] Order 01-26, 2001 CanLII 21580.
[13] Order 01-26, 2001 CanLII 21580 at para. 29.
[14] *Merck Frosst Canada v. Canada (Health)*, 2012 SCC 3 at para. 157.
[15] I note that other emails in the records contain some material that does not contain supplied information but also fail to satisfy other elements of the s. 21 test, so for simplicity I will not identify this material line by line. Document Set 1 pages, where the entire page contains no supplied information, are pp. 4, 10 and 72. Document Set 2 pages, where the entire page contain no supplied information, are pp. 34-36, 55-56, 57-58, 60, 62 and 69-72.
[16] See for example, Order F13-06, 2013 BCIPC 6.
[17] F13-02, 2013 BCIPC 2 para. 18 from Order F11-08, [2011] B.C.I.P.C.D. No. 10 at para. 24 citing Order 01-39 [2001] B.C.I.P.C.D. No. 40 citing *Re Maislin Industries Ltd. and Minister for Industry* (1984) 10 DLR (4th) 417 (FCTD); see also *Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs)* (1997) 148 DLR (4th) 356 (FCTD).

they did not expect email communications to be publicly available. Jack's says the email exchanges occurred in the context of a commercial arrangement, so the emails were confidential.

[24] Jack's has not provided evidence that they provided the information explicitly in confidence. Rather, the nature of their submission amounts to an argument that it is implicit that the information was provided in confidence. The argument that information was implicitly in confidence was addressed in Order 01-36,[18] where former Commissioner Loukidelis stated:

> [26] The cases in which confidentiality of supply is alleged to be implicit are more difficult. This is because there is, in such instances, no express promise of, or agreement to, confidentiality or any explicit rejection of confidentiality. All of the circumstances must be considered in such cases in determining if there was a reasonable expectation of confidentiality. The circumstances to be considered include whether the information was:
>
> - communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
> - treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;
> - not otherwise disclosed or available from sources to which the public has access;
> - prepared for a purpose which would not entail disclosure.

[25] Order 04-06 found that assertions by a third party alone, without corroboration from a public body or other objective evidence, were insufficient to establish that the information was provided "in confidence".[19] It held that there must be evidence of a "mutuality of understanding" between the public body and the third party for the information to have been considered to be supplied "in confidence".

[26] The City chose not to provide a substantive submission on the issues in this inquiry and consequently does not corroborate Jack's contention that it received the information implicitly in confidence. That it was willing to release the emails in issue suggests that it does not treat the information as confidential.[20]

[27] The question of whether the intention to keep information confidential is shared by both parties is relevant, but not necessarily determinative. Ultimately, that question is to be resolved by considering the factors set out above. This approach is consistent with the statement in Order F05-29[21] that the

[18] 2001 CanLII 21590.
[19] 2004 CanLII 34260.
[20] This point was also made in Order F13-02, 2013 BCIPC 2 at para 20.
[21] 2005 CanLII 32548.

determination of whether information is confidential depends on its contents, its purposes and the circumstances under which it was compiled. The mutual intention of the parties to keep the information confidential will often shed light on those questions. However, if a government body misunderstands its obligations under s. 21 and intends to release information that the supplier reasonably believes will be kept confidential, the information may still have been supplied in confidence for the purposes of s. 21.[22]

[28] It is convenient to deal with the emails in three groups in analyzing whether they were supplied in confidence.

Emails between Jack's, the City and other public bodies

[29] Considering all the factors, including those outlined in Order 01-36,[23] I conclude that these emails were not supplied in confidence. None of them contain any reference to confidentiality in relation to the specific content or in relation to email exchanges generally. There is no evidence that they were treated in confidence by either party. As noted above, the bare submissions of Jack's, without further evidence, is not persuasive given the requirement of objective evidence. I do not have any direct evidence that the City gave assurances to Jack's about confidentiality. Further, on many occasions, emails were forwarded to additional recipients or copied to individuals in other public bodies. This suggests that emails were not treated in confidence.

Internal City emails and emails between the City and other public bodies

[30] There is no evidence that the public body treated internal emails or emails between it and other public bodies as confidential. Therefore, in those instances where internal emails and emails between the City and other public bodies contain material that met the first stage of the s. 21 test and the "supplied" step, they fail at the "in confidence" step.

Emails between the City and other third parties

[31] Some of the emails between third parties and the City are complaints to the City about Jack's and/or the applicant. One third party complainant explicitly states that they want their name kept confidential, but does not seek confidentiality for the substance of their complaint. The City has already applied s. 22 to sever information that could identify the complainant in these emails. There is no evidence the substance of the emails were intended to be in

[22] Order F13-02, 2013 BCIPC 2 at para 21. For example, the public body may intend to release the information because they don't think that the s. 21(1)(c) harm requirements have been met, not because the information was not supplied "in confidence".
[23] 2001 CanLII 21590.

confidence. In fact, many of the third parties' emails were forwarded multiple times by the City, and, in the case of complaint emails, ultimately shared (in some cases after severing information that might identify the complainant) with Jack's. Therefore, I conclude that the information at issue in the emails between the City and other third parties were not supplied in confidence.

[32] In summary, I conclude that none of the emails in issue were supplied "in confidence" under s. 21.

[33] **Harm to Jack's Interests**—Given my findings that the emails were not supplied in confidence, it is not necessary to consider the harm requirement in s. 21, but for completeness I will do so, because the fear of harm motivated Jack's application for review.

[34] Jack's submits that disclosure of the emails can reasonably be expected to harm their competitive position or interfere with their negotiating position, and could reasonably be expected to result in undue gain to a competitor such as the applicant.

[35] As noted in Order F13-02,[24] the Supreme Court of Canada in *Merck Frosst*[25] has confirmed that the onus is on a third party to demonstrate that the third party exception applies, and that they must do so on the balance of probabilities. The Court also noted that "what evidence will be required to reach that standard will be affected by the nature of the proposition the third party seeks to establish and the particular context of the case."[26] Where the third party is required to establish a reasonable expectation of probable harm, the onus will be met where the third party establishes that there is a reasonable basis to conclude that the harm is *likely* to occur. The Court noted that it is not necessary to demonstrate on a balance of probabilities that the harm *will* occur.

[36] Previous orders have also described the evidentiary requirements for the application of harms-based exceptions like s. 21. In Order F07-15, former Commissioner Loukidelis stated:

> …there must be a confident and objective evidentiary basis for concluding that disclosure of the information could reasonably be expected to result in harm… Referring to language used by the Supreme Court of Canada in an access to information case, I have said "there must be a clear and direct connection between disclosure of specific information and the harm that is alleged".[27]

[24] Order F13-02, 2013 BCIPC 2 at para 37.
[25] *Merck Frosst Canada v. Canada (Health)*, 2012 SCC 3.
[26] *Merck Frosst Canada v. Canada (Health)*, 2012 SCC 3 at para. 94.
[27] 2007 CanLII 35476.

[37] Jack's submissions on harm are brief. They say that releasing the emails could reasonably be expected to harm their competitive position or interfere with their negotiating position with the City or with other potential customers. They also say that the emails could reasonably be expected to result in undue gain for a competitor, namely the applicant. This amounts to no more than an assertion that Jack's meets the s. 21 test. Without evidence in support of the assertion, Jack's falls well short of proving its case.

[38] As to Jack's argument that revealing contract terms would affect its competitive position, this issue has been dealt with in numerous previous orders. It is clear that the disclosure of existing contract pricing and related terms that may result in the heightening of competition for future contracts is not a significant harm or an interference with competitive or negotiating positions. Having to price services competitively is not a circumstance of unfairness or undue financial loss or gain; rather it is an inherent part of the bidding and contract negotiation process.[28]

[39] Without direct evidence from Jack's about how the various alleged harms could occur, I am left to speculate from the records themselves. I do not see how disclosing some of the emails documenting performance issues or complaints about Jack's could impact their re-negotiation of the existing contract with the City because the City already has the records. I also note previous orders have made it clear that unsubstantiated complaints are not enough to cause significant harm for the purposes of s. 21.[29]

[40] Jack's submissions reveal a concern the competitor applicant could obtain insights into some of the issues that have arisen between Jack's and the City under the contract. In particular, Jack's fears that other competitors could use knowledge of complaint-type emails to press for an end to the contract or to enhance their own proposal relative to Jack's in future RFPs with the City or others. There is little evidence in this inquiry to support that contention. If anything, the emails reveal that Jack's seeks to be responsive to concerns as they are raised and to build its relationship with the City. I am not convinced, absent supporting evidence, that these concerns are sufficient to meet the standard required for either of the kinds of harm under s. 21.

[41] In summary, even if I were required to determine whether the s. 21(1)(c) harm requirements were met for any of the emails I would find that they are not.

[42] **Third-Party Personal Information: s. 22**—Section 22 was neither raised by Jack's in its request to review the City's decision to release the information nor was it noted as an issue in the OIPC investigator's fact report. However, it was raised in Jack's initial submissions. Jack's suggests certain phone numbers for

[28] Order F07-15, 2007 CanLII 35476.
[29] See Order 01-26, 2001 CanLII 21580.

Jack's staff should be withheld under s. 22 because they are home telephone and personal cell phone numbers. Jack's also suggests other records should be withheld under s. 22 because they are personal opinions or statements.[30]

[43] Section 22 is a mandatory exception, which means that information must be withheld when s. 22 applies. I have therefore considered the application of s. 22 to all the information in the records the City intends to release. I will first address the applicant's s. 22 arguments about the telephone numbers, then consider whether s. 22 applies to any of the other information, including the information specifically mentioned in Jack's submissions.

[44] The proper approach to s. 22 involves four steps:[31]

1. Is the information personal information?

2. If it is personal information, does it meet any of the criteria identified in s. 22(4), where disclosure would not be an unreasonable invasion of third-party personal privacy?

3. If none of the s. 22(4) criteria apply, would disclosure of the information fall within any of the criteria in s. 22(3), whereby it would be presumed to be an unreasonable invasion of third-party privacy?

4. If s. 22(3) criteria apply, after considering all relevant circumstances, including those listed in s. 22(2), is any presumption rebutted?

[45] Jack's suggests certain phone numbers should be withheld under s. 22 because they are home telephone and personal cell phone numbers. However the emails show that these phone numbers were provided by Jack's to the City to allow the City to contact Jack's for service under their contract. The emails also show the contact information was circulated amongst City employees who might need to contact Jack's in the course of their employment duties. Section 22 of FIPPA applies only to "personal information", "which is recorded information about an identifiable individual other than contact information". Contact information that enables an individual to be contacted at a place of business is specifically excluded from this definition. I find that the phone numbers are contact information. Therefore, the phone numbers are not personal information under FIPPA and s. 22 does not apply.

[46] Some other information in the emails is about identifiable individuals such as names, occupations, comments and opinions, and therefore is personal information.

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[30] The examples are portions of Document Set 1 at pp. 2-3 (repeated on pp. 34-35), 26, 28, 45, 59 and 86.
[31] Order F12-08, 2012 BCIPC 12; Order 01-53, 2001 CanLII 21607.

[47] None of the exceptions in s. 22(4) apply to the personal information.

[48] Some of the information is presumed to be an unreasonable invasion of a third-party's personal privacy because it either:

a) relates to a third party's medical history under s. 22(3)(a);[32]

b) comprises personal information that relates to employment or occupational history about a third party under s. 22(3)(d);[33] or

c) comprises personal evaluations about a third party under s. 22(3)(g).[34]

[49] For the information to which s. 22(3) applies, there are no other factors that apply in the circumstances, so I find that the information should be withheld under s. 22.

[50] Some other personal information is not presumed to be an unreasonable invasion of a third-party's personal privacy under s. 22(3). In these cases, weighing all the factors, including those in s. 22(2), some of the information should be withheld.[35] In one case the information reveals the identity and some personal information of an individual involved in a motor vehicle accident. Some other personal information, if disclosed, could damage the reputation of a third party by revealing particular opinions they expressed. In another case, the information reveals details of an individual's family relationships. However, disclosure of the remaining personal information would not unreasonably invade the privacy of third parties. That personal information was not supplied in confidence, it is not sensitive and is only about a person's work activities at a point in time.[36]

CONCLUSION

[51] For the reasons given above, under s. 58 of FIPPA, I make the following orders:

1. Subject to para. 2 below, the City is authorized to disclose the requested information.

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[32] Information highlighted in Document Set 1 at p. 59.
[33] Information highlighted in Document Set 1 at p. 86 and in Document Set 2 at pp. 19, 27, 29, 37, 42, 55-56, 68.
[34] Information highlighted in Document Set 1 at pp. 2-3, 34, 86, and in Document Set 2 at p. 14.
[35] Information highlighted in Document Set 1 at 26, Document Set 2 at pp. 28, 37, 42 and in Document Set 3 at p. 9.
[36] Some information in Document Set 1 at pp. 44-45.

2. I require the City to withhold under s. 22 of FIPPA the information highlighted in Document Set 1 at pp. 2-3, 26, 34, 59, and 86, in Document Set 2 at pp. 14, 19, 27-29, 37, 42, 55-56, 68 and in Document Set 3 at p. 9, which accompany the City's copy of this decision, on or before **November 15, 2013**, pursuant to s. 59 of FIPPA. The City must concurrently copy me on its cover letter to the applicant, together with a copy of the records.

October 2, 2013

ORIGINAL SIGNED BY

Hamish Flanagan, Adjudicator

OIPC File No.: F12-49096