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Order F16-39

MINISTRY OF ADVANCED EDUCATION

Elizabeth Barker
Senior Adjudicator

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Summary: A third party requested a review of three decisions made by the Ministry of Advanced Education to disclose information related to advertising work the third party did for the Ministry. The third party argued that disclosure could reasonably be expected to harm its business interests and the business interests of several other third parties. The adjudicator confirmed the Ministry's decision that s. 21 did not apply to the information, and ordered the Ministry to disclose it 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 01-39, 2001 CanLII 21593 (BC IPC); Order F08-03, 2008 CanLII 13321 (BC IPC); Order F13-20, 2013 BCIPC 27 (CanLII); Order F14-58, 2014 BCIPC 62 (CanLII).

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* 2014 SCC 31;

INTRODUCTION

[1] This inquiry flows from a request made by KIMBO Design Inc. ("Kimbo") for a review of three decisions made by the Ministry of Advanced Education ("Ministry") to disclose information related to work Kimbo completed for the Ministry. An applicant asked the Ministry for access to this information under the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

[2] The Ministry is responsible for Government Communications and Public Engagement (“GCPE”), the British Columbia Government central agency whose mandate includes informing the public about government programs and services. The applicant requested records related to design and advertising services that Kimbo provided GCPE under a standing offer arrangement. Specifically, the applicant requested records related to three work orders: Family Day Facebook advertisements, the Teachers’ Strike Online, and LNG Awareness.

[3] For each request, the Ministry notified Kimbo pursuant to s. 23 of FIPPA and sought its representations regarding disclosure. After Kimbo’s time for response had lapsed, the Ministry notified Kimbo and the applicant that it had decided to grant access to the requested information, except for bank account numbers. Kimbo then opposed the release of some information in the responsive records on the basis that disclosure would harm the business interests of Kimbo and other third parties (with whom Kimbo does business) within the meaning of s. 21 of FIPPA.

[4] Kimbo requested that the Office of the Information and Privacy Commissioner (“OIPC”) review the Ministry’s three decisions not to withhold the requested information under s. 21 of FIPPA. Mediation by the OIPC did not resolve the matter, and Kimbo requested that it proceed to inquiry. At inquiry, Kimbo provided initial submissions and the Ministry provided response submissions. The applicant who requested the records chose to not participate in the inquiry.

[5] The Ministry noted in its submissions that the information in dispute includes information from a number of third parties. The OIPC notified six third parties (“vendors”) and provided them an opportunity to make inquiry submissions. None chose to participate in the inquiry.¹

ISSUE

[6] The issue in this case is whether the Ministry is required to refuse to disclose the information in dispute to the applicant under s. 21 of FIPPA. Section 57(3)(b) of FIPPA, places the burden on Kimbo, as the third party, to prove that the applicant has no right of access to the disputed information.

DISCUSSION

[7] **Information in Dispute** – During the inquiry, Kimbo clarified what information remains in dispute. A copy of the records, which Kimbo has severed to show what information it believes must be withheld under s. 21, is located in

¹ One of the third parties responded by stating that it takes no issue with its information being released.

the Ministry's affidavit evidence at exhibits E, J and O.² Therefore, I have only considered the application of s. 21 to the information that Kimbo has indicated remains in dispute. It is as follows:

[8] Family Day Facebook records – The information in dispute is contained in four pages of invoices Kimbo submitted to the Ministry. Specifically, Kimbo objects to disclosure of the name of its government client (but not in all instances where the name appears), the name of the advertising campaign and the work order number. It also objects to disclosure of some details of the services provided, number of billable hours, rates, amounts billed and taxes.

[9] Teachers' Strike Online records – The information in dispute is contained in three pages of invoices Kimbo submitted to the Ministry. Kimbo objects to disclosure of the number of hours worked, rates, amounts billed (including tax amounts), name of the advertising campaign, work order and standing offer numbers and the name of its government client (but not in all instances where the name appears).

[10] There is also some information in dispute in a written agreement between Kimbo and a vendor, specifically the price, description and date of services and the name of the advertising campaign.

[11] LNG Awareness records – The information in dispute is contained in two pages of invoices from Kimbo to the Ministry, specifically the number of hours worked, rates, amounts billed (including tax amounts), name of the advertising campaign, work order and STOB numbers,³ some descriptions of the work and services provided, and the name of its government client (but not in all instances where the name appears).

[12] Kimbo also objects to disclosure of parts of four invoices it received from its vendors, specifically some of the vendors' names and business addresses, detail about the services and products those businesses provided and the amounts they billed Kimbo.

[13] In addition, Kimbo objects to disclosure of part of an email Kimbo sent to GCPE, specifically the name and contact information of the Kimbo employee who sent the email and a work order number.

Harm to Third Party Business Interests – s. 21

[14] Section 21 of FIPPA requires public bodies to refuse to disclose information when it could reasonably be expected to harm the business interests

² Kimbo confirmed in a May 19, 2016 email to the OIPC Registrar that this is the information in dispute.

³ STOB is an acronym for "standard objects of expense" a financial accounting term.

of a third party. Section 21(1), which sets out three elements that must be met for the section to apply, states in part:

- 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,
 - (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, ...

[15] I will address ss. 21(1)(a),(b) and (c) in turn.

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

[16] Section 21(1)(a)(ii) applies to, among other things, commercial or financial information of or about a third party. The terms “commercial” and “financial” are not defined by FIPPA. However, I have considered the ordinary meaning of these words, which are defined in the *Oxford English Dictionary*⁴ as follows:

- “Commercial...Having reference to, or bearing on commerce...Of or pertaining to commerce or trade.” “Commerce...buying and selling together; trading; exchange of merchandise...”
- “Financial...Of, pertaining, or relating to finance or money matters.” “Finance...Supply (of goods); stock of money; ...The management of money...; the science which concerns itself with the levying and application of revenue in a state, corporation, etc.”

[17] In addition, past orders have found that “commercial” information relates to a commercial enterprise, or the buying, selling or exchange of goods and services, and that the information does not need to be proprietary in nature or have an actual or potential independent market or monetary value.⁵ Previous orders have also held that invoicing information about amounts billed, services

⁴ *Oxford English Dictionary*, online version.

⁵ Order 01-36, 2001 CanLII 21590 at para. 17; Order F08-03, 2008 CanLII 13321 (BC IPC) at paras 62-63.

and products provided, hourly rates and the number of hours needed to perform services is both “commercial” and “financial” information of, or about, third parties.⁶

[18] In this case, some of the information relates to goods and services that Kimbo provided to the Ministry in exchange for money, and the rest relates to goods and services that Kimbo purchased from vendors. I find that all of the information in dispute is either the commercial and/or the financial information of or about Kimbo and/or the vendors. Therefore, s. 21(1)(a)(ii) of FIPPA applies to all of it.

Supplied in confidence – s. 21(1)(b)

[19] For s. 21(1)(b) to apply, the information must have been supplied, either implicitly or explicitly, in confidence. 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”.

[20] Kimbo submits, “As previously indicated, my Government company rates are confidential. They are part of a signed Government contract with the understanding they will not be released.”⁷

[21] The Ministry submits that, even considering Kimbo’s representations opposing disclosure, it was unable to conclude that the withheld information was supplied, implicitly or explicitly, in confidence by Kimbo to the Ministry.

Supplied

[22] In this case, most of the information at issue is contained in invoices that Kimbo submitted to the Ministry. It is invoicing information such as details of the services, number of hours worked, rates, and the amount payable. The invoices, and the invoicing information they contain, clearly arose from services and products provided under the terms Kimbo and the Ministry negotiated and agreed to by way of their contract.

[23] Previous orders have stated that the terms of a contract are not “supplied” because they are “negotiated”.⁸ In Order F14-58,⁹ Adjudicator Francis determined that invoicing information from a third party that flows from the

⁶ Order F14-58, 2014 BCIPC 62 (CanLII) at para. 19.

⁷ Kimbo’s submissions.

⁸ There are two exceptions to this general rule. The first is when the information the third party provided was “immutable” (i.e., it is not susceptible to negotiation). The second occurs when the information in the agreement could allow someone to accurately infer underlying information a third party had supplied in confidence to the public body. See, for example, Order 01-39, 2001 CanLII 21593 (BC IPC) at paras. 45 and 50.

⁹ Order F14-58, 2014 BCIPC 62 (CanLII).

agreed terms of a contract between the third party and the public body is negotiated information. I reach the same conclusion in this case. I find that invoicing information about the number of hours worked, rates, amounts billed (including tax amounts) and descriptions of the work is not supplied information within the meaning of s. 21(1)(b). It is negotiated information because it flows from, and is an expression of, the terms of their negotiated agreement.

[24] Further, Kimbo also objects to the disclosure of invoicing information submitted to the Ministry that reveals the name of Kimbo's client (i.e., the specific government agency), the name of the advertising campaign, standing offer numbers, work order numbers and the government STOB numbers. It seems to me that this information originated from the Ministry and was provided to Kimbo when the Ministry issued the standing work offer and entered into an agreement with Kimbo. Therefore, I find that such information was not "supplied" by Kimbo to the Ministry under s. 21(1)(b).

[25] However, there is some information in dispute in invoices that Kimbo received from the vendors. This information emanates from agreements between Kimbo and these vendors, and there is no suggestion that this information was subject to change through negotiation or agreement with the Ministry. Therefore, the information was immutable when it was provided by Kimbo to the Ministry. For that reason when Kimbo provided it to the Ministry, it "supplied" that information under s. 21(1)(b).

In Confidence

[26] For s. 21(1)(b) to apply, the information must also have been supplied, "implicitly or explicitly, in confidence". It is only necessary to consider the information that I found was "supplied" information, namely the information in the invoices that Kimbo received from the vendors. However, for completeness, I have considered all of the information in dispute, and for the reasons that follow, I find that none of it was supplied, "implicitly or explicitly, in confidence".

[27] The test for whether information was supplied, "explicitly or implicitly, 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.¹⁰

[28] In this case, Kimbo asserts that the information in dispute is its "confidential company financial information". When it informed the Ministry of its objection to disclosure Kimbo wrote:

The Government is not transparent in its position to publicize confidential business intelligence and information at the outset of the contract and I would

¹⁰ Order F13-20, 2013 BCIPC 27 at para. 22; Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 23.

never have agreed to the terms of such a contract. It was my expectation upon entering in to a contract with the Government that none of these rates and pricing structures would be made public.¹¹

[29] Kimbo's only other submission regarding the confidentiality of the information in dispute relates to its employees and to the vendors with whom it does business. Kimbo states:

All the third party vendors I do business with who are indicated on the documents you are planning to release have confidentiality agreements with me and I am not able to legally release their names, contact information and rates. My employees also have legal agreements with me that do not allow me to release their personal information and rates.

[30] Kimbo did not provide the contracts and confidentiality agreements it references, or any other evidence, to support its assertions that the information in dispute was supplied in confidence or that Kimbo has legal obligations with respect to confidentiality.

[31] In my view, Kimbo's unsupported assertions about contractual terms promising confidentiality are not persuasive, particularly given the context of the information. Much of the information in dispute is invoicing information that flows from the terms of its contract with the Ministry. I found that this was not "supplied" information. There is no evidence that the Ministry informed Kimbo that the information provided under the terms of their contract would be kept confidential. Further, a public body's contracts are subject to FIPPA, so the Ministry would not have been in a position to promise absolute confidentiality regarding the terms of its contract with Kimbo. Moreover, the Ministry states that it is not satisfied that any of the information in dispute was supplied in confidence.

[32] Kimbo's submissions about confidentiality also seem to suggest that when it sent its invoices to the Ministry (and one email), Kimbo's employees' names and business contact information,¹² were supplied in confidence. Kimbo says that it has agreements with its employees to keep such information confidential. However, Kimbo provides no supporting evidence or a copy of the legal agreements where it supposedly agreed to keep its employees' names and business contact information confidential. Nor is there any evidence that Kimbo told the Ministry about any such agreement. Further, I note that the invoicing information that Kimbo refers to as its employee's "rates" is the rate that Kimbo is charging the Ministry. It is not evident how these rates would reveal what Kimbo pays its employees, and Kimbo does not explain.¹³

¹¹ Kimbo's December 5, 2014 letter to the Ministry, located in the Ministry's affidavit at exhibit E.

¹² It is patently obvious that the contact information is business, as opposed to personal or home, contact information.

¹³ It seems reasonable to conclude here that the rates Kimbo bills the Ministry reflect a profit margin above the cost of employee's hourly pay. There is no information to suggest otherwise.

In summary, I am not persuaded by Kimbo's argument that the information in dispute in its invoices to the Ministry – specifically the names and business contact information of its employees and the rates it is charging the Ministry – was information supplied, implicitly or explicitly, in confidence.

[33] As for the information that I found was supplied, (i.e., the information in the invoices that Kimbo received from the vendors), Kimbo says that it entered into agreements with the vendors to keep their names, contact information and rates confidential. Kimbo did not provide the agreements it mentions, and there is nothing on the vendors' invoices that indicates that they were sent to Kimbo in confidence or with an expectation that the invoicing information, including the rate information, was to be kept confidential. To my mind, it is improbable that the vendors would sell advertising space in their magazines and on their websites, and insist that their name and contact information - and that of their advertising sales representatives – remain confidential. In addition, I note that these vendors were invited by the OIPC to participate in this inquiry and they declined, which suggests a lack of concern about disclosure of the information in the invoices they sent to Kimbo. Further, Kimbo provides no evidence that indicates that when it subsequently forwarded copies of these vendors' invoices to the Ministry that it did so in confidence. Therefore, I am not satisfied that when the vendors provided this information to Kimbo, and when Kimbo subsequently supplied it to the Ministry, that this was done, implicitly or explicitly, in confidence.

[34] In conclusion, I am not persuaded that any of the information in dispute was supplied, implicitly or explicitly, in confidence under s. 21(1)(b).

Reasonable Expectation of Harm – s. 21(1)(c)

[35] I have found that s. 21(1)(b) does not apply to any of the information in dispute, so it is not strictly necessary for me to consider whether disclosing the information could reasonably be expected to result in the harm under s. 21(1)(c). However, for completeness, I will briefly address Kimbo's arguments regarding harm.

[36] The Supreme Court of Canada said the following about the standard of proof for exceptions that use the language "reasonably be expected to harm" and the type of evidence required to meet that standard:

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... 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”.¹⁴

[37] Kimbo says the following about the harm that would result from disclosure of the information in dispute:

This release of confidential information will do irreparable damage to my company as well as all our dedicated employees and hardworking vendors. No company is able to survive the release of such detailed and confidential financial information.”¹⁵

...

The release of these rates would cause me to lose valued clients and in turn become unsuccessful with ongoing business. It is a legal obligation that these confidential rates are not to be released by the Government. As noted earlier, my preferred rates and pricing for the Government do not necessarily represent rates and pricing in the current marketplace and thus would damage ongoing client relationships. I could potentially lose my everyday clients and face legal ramifications if these clients saw such rates. I would also be guaranteed to lose future work and would be unable to price my services in the marketplace making my ability to do business next to impossible.¹⁶

[38] The comments above are the entirety of Kimbo’s submissions regarding harm. It does not explain why the disclosure of the information in dispute would harm or damage the company, its employees or the vendors. In particular, Kimbo does not explain how disclosing the identities and business contact details of the vendors and the vendors’ sales representatives could result in harm. This information is already in the public domain to some extent, given that the vendors have already published the advertising Kimbo purchased. Further, disclosure arguably benefits rather than harms the vendors by increasing their profile and letting the public know that they are open to selling advertising space.

[39] As for Kimbo’s and the vendors’ rate and pricing information, it is not apparent how disclosure of such detail could damage Kimbo’s ongoing client relationships or result in Kimbo losing clients and becoming unsuccessful. Kimbo does not explain the connection between disclosure of this information and these alleged harms. In particular, Kimbo does not explain how the 2014 rates and prices relate to current and/or future rates and prices. Further, Kimbo also does not elaborate on its assertion that disclosure of the information in dispute would cause “legal ramifications”.

¹⁴ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* 2014 SCC 31 at para. 54. Reference is to *Merck Frosst Canada v. Canada (Health)*, 2012 SCC 3 at para. 94.

¹⁵ Kimbo’s inquiry submissions.

¹⁶ Kimbo’s December 5, 2104 letter to Ministry, located in the Ministry’s affidavit at exhibit E.

[40] I also note that there is nothing in the materials suggesting that the vendors whose information is subject to disclosure in this case raised any objection. None of them chose to participate in the inquiry, and one specifically said that it had no issue with release of its information. The vendors' lack of opposition to disclosure of their rate and pricing information is inconsistent with Kimbo's arguments regarding harm.

[41] In my view, Kimbo has not established that disclosure of any of the information in dispute could reasonably be expected to cause harm under s. 21(1)(c).

Summary - s. 21

[42] In summary, I find that the withheld information is commercial and/or financial information of or about a third party, so s. 21(1)(a)(ii) applies. While I find that some of that information was supplied, none of it was supplied "in confidence", so s. 21(1)(b) does not apply to any of it. Further, I conclude that disclosure of the information in dispute could not reasonably be expected to cause harm under s. 21(1)(c). Therefore, I find that Kimbo has not met its burden of proof in this case and s. 21 does not apply to the information in dispute.

CONCLUSION

[43] For the reasons given above, under s. 58 of FIPPA, I confirm the Ministry's decision to disclose the information in dispute to the applicant. I require the Ministry to give the applicant access to the information that is at issue by October 10, 2016. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

August 26, 2016

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

OIPC Files: F15-60547; F15-60548; F15-60549