Office of the Information & Privacy Commissioner for British Columbia

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Order F17-45

MINISTRY OF TRANSPORTATION AND INFRASTRUCTURE

Meganne Cameron
Adjudicator

October 12, 2017

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Summary: A journalist requested access to records related to changes to a contract between the Ministry of Transportation and Infrastructure and a third party. The Ministry provided records but refused to disclose some information under ss. 17 (harm to the financial or economic interests of a public body) and 21(1) (harm to third party business interests) of the *Freedom of Information and Protection of Privacy Act.* While the inquiry was underway, the Ministry reconsidered its decision and determined that all of the information could be disclosed. The third party argued that s. 21(1) applied because disclosure could reasonably be expected to harm its business interests. The adjudicator confirmed the Ministry's decision that s. 21(1) did not apply and ordered the Ministry to disclose the information to the applicant.

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

Authorities Considered: BC: Order 01-36, 2001 CanLII 21590 (BC IPC); Order F08-03, 2008 CanLII 13321 (BC IPC); Order 00-22, 2000 CanLII 14389 (BC IPC); Order F05-05, 2005 CanLII 14303 (BC IPC); Order F15-53, 2015 BCIPC 56 (CanLII); Order F16-17, 2016 BCIPC 19 (CanLII); Order F16-39, 2016 BCIPC 43; Order 04-06, 2004 CanLII 34260 (BC IPC); Order 01-20, 2001 CanLII 21574 (BC IPC); Order 03-15, 2003 CanLII 49185 (BC IPC);Order 01-39, 2001 CanLII 21593 (BC IPC); Order F13-22, 2013 BCIPC 29; Order F17-14, 2017 BCIPC 15; Order F13-20, 2013 BCIPC 27 (CanLII).

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

INTRODUCTION

[1] This inquiry arises out of two requests made by the applicant, a journalist, for records relating to changes to a construction project contract between the Ministry of Transportation and Infrastructure (Ministry) and a third party.

[2] The Ministry disclosed the records but withheld some information pursuant to ss. 17 (harm to the financial or economic interests of a public body) and 21(1) (harm to third party business interests) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decisions to withhold the information.

[3] Mediation by the OIPC did not resolve the issues in dispute and the applicant requested that they proceed to inquiry. The OIPC gave the third party notice of the inquiry pursuant to s. 54(b) of FIPPA.

[4] While the inquiry was underway, the Ministry reconsidered its original decision. It decided that ss. 17 and 21(1) did not apply and the information could be disclosed to the applicant. The third party disagreed with the Ministry's new decision and argued that s. 21(1) applies to all of the information in dispute.

[5] The Ministry, the applicant and the third party all provided inquiry submissions.

ISSUE

[6] Given that the Ministry no longer relies on s. 17, the only issue in this case is whether the Ministry is required to refuse to disclose the information in dispute to the applicant under s. 21(1) of FIPPA. Section 57(3)(b) of FIPPA places the burden on the third party, to prove that the applicant has no right of access to the disputed information.

DISCUSSION

Information in dispute

[7] The applicant's requests relate to information about the construction of the Evergreen Line, an 11-kilometre extension of the SkyTrain in Metro Vancouver that opened in 2016. Specifically, the applicant made two requests for the "change order log" showing a description and the timing and cost of changes to the contract between the Ministry and the third party contractor for the project.

[8] In response to the requests, the Ministry provided the applicant five pages containing information in a table format with 10 columns and 81 rows. The column headings are:

- Preliminary Change Instruction;
- Description;
- Change Request Issued:
- Cost of Preparing Change Report;
- Initial Change Report Received;
- Final Change Report Received;
- Paid Evaluation;
- Change Certificate Issued;
- Extension of time days; and
- Remarks.

[9] The only information that has not already been disclosed to the applicant is most of the entries in the "Paid Evaluation" column as well as some of the entries in the "Description" and "Remarks" columns.

Harm to Third Party Business Interests – s. 21

[10] Section 21(1) of FIPPA requires public bodies to refuse to disclose information when it could reasonably be expected to harm the business interests of a third party. The portions of s. 21(1) that are relevant in this case state:

> 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, …

[11] Each of the elements set out in ss. 21(1)(a), (b) and (c) must be satisfied before a public body is required to refuse disclosure under s. 21(1). I will address ss. 21(1)(a), (b) and (c) in turn.

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

[12] Section 21(1)(a)(ii) applies to, among other things, commercial or financial information of or about a third party. FIPPA does not define "commercial" or "financial" information. However, previous orders have held that:

- "commercial information" relates to commerce, or the buying, selling, exchanging or providing of goods and services. The information does not need to be proprietary in nature or have an actual or potential independent market or monetary value.[1]

- hourly rates, global contract amounts, breakdowns of these figures, prices, expenses and other fees payable under contract are both "commercial" and "financial" information.[2]

[13] The Ministry submits that the information sought by the applicant relates to the exchange of services from the third party for payment by the Ministry.[3] The third party submits that the information withheld is pricing information.[4]

[14] I find that that s. 21(1)(a)(ii) of FIPPA applies to all of the information in dispute. It is information that relates to services that the third party provided, or would provide, in exchange for payment and as such, it is either commercial and/or financial information of or about the third party.

Supplied in confidence – s. 21(1)(b)

[15] 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"[5].

Supplied

[16] Previous BC orders have stated that information contained in an agreement negotiated between a public body and a third party will not normally

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[1] Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17; Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62.
[2] Order 00-22, 2000 CanLII 14389 (BC IPC) at p. 4, Order F05-05, 2005 CanLII 14303 (BC IPC) at para. 46; Order F15-53, 2015 BCIPC 56 (CanLII), at para. 11, and Order F16-17, 2016 BCIPC 19 (CanLII), at para. 24.
[3] Ministry's submission, para. 19.
[4] Third party initial submission, para. 1.
[5] Order F16-39, 2016 BCIPC 43 at para. 19.

qualify as information that has been "supplied" to the public body.[6] They have also said that the fact that a term from a proposal may be incorporated unchanged in a contract does not mean that the contract term is "supplied" information as opposed to "negotiated" information. For instance, former Commissioner Loukidelis said in Order 03-15:

> It would hardly be surprising that terms in a contract arrived at resemble, or are even the same as, terms in the contractor's proposal. It might well be more unusual for the contract arrived to be completely out of step with the terms of the contractor's proposal. A successful proponent on an RFP may have some or all of the terms of its proposal incorporated into a contract. As has been said in past orders, there is no inconsistency in concluding that those terms have been "negotiated" since their presence in the contract signifies that the other party agreed to them.[7]

[17] There are two exceptions to this general rule:

- Where the information the third party provided was "immutable" – and thus not open or susceptible to negotiation – and was incorporated into the agreement without change; or

- Where the information in the agreement could allow someone to draw an "accurate inference" about underlying information of, or about, a third party that had been supplied in confidence but which does not expressly appear in the agreement.[8]

[18] In its submission the Ministry says that the information the third party argues should be withheld was negotiated and shows "the change order details between the Ministry and the Third Party regarding the Evergreen Line and the original contract"[9]. The third party did not specify whether the information in question was supplied or negotiated in its submissions and it did not offer evidence to suggest one of the exceptions noted above applied.

[19] I have considered the content of the records and they support the Ministry's assertion that the information in dispute was negotiated, rather than supplied. First, there are entries in the "Remarks" column that suggest that the information in dispute was negotiated. For example, comments such as "it was agreed that inflation would not be included," "awaiting clarification," and "agreed,

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[6] Order 04-06, 2004 CanLII 34260 (BC IPC) at paras. 45-46. See also Order 01-20, 2001 CanLII 21574 (BC IPC) at para. 81.
[7] Order 03-15, 2003 CanLII 49185 (BC IPC), at para. 66.
[8] For example: Order 01-20, 2001 CanLII 21574 (BC IPC) at para. 81; Order 01-39, 2001 CanLII 21593 (BC IPC) at para. 50; Order F13-22, 2013 BCIPC 29 at para. 17; and Order F17-14, 2017 BCIPC 15 at para. 9.
[9] Ministry Submission, paras. 15 and 24.

waiting for change report" suggest that the withheld information was negotiated, or open to negotiation. Second, the dates in the columns show that while some changes were finalized quickly, for others over a year passed between the change request and the final change report. It is unlikely that there would be such large period of time between the initial request and the final report if the third party had simply provided the information to the Ministry. The passage of time suggests that there was a period of negotiation between the parties about the information in dispute.

[20] In conclusion, I find that the information in dispute was not supplied under s. 21(1)(b). Given that s. 21(1)(b) does not apply, it is not necessary for me to consider whether the information was provided in confidence. However, for the sake of completeness, I will continue.

In Confidence

[21] As previous BC Orders have stated, 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] The determination of whether information is confidential depends on its contents, its purposes and the circumstances under which it was compiled.[11]

[22] The Ministry does not make a submission regarding the confidentiality of the information at issue. In its initial submission and reply the third party argues that the information in dispute should not be disclosed because it is commercially sensitive.[12] However, the third party does not provide submissions or evidence that there was any mutual understanding or agreement with the Ministry that the information in dispute is confidential. As noted in Order F16-39, a public body's contracts are subject to FIPPA and the Ministry would not have been in a position to promise absolute confidentiality regarding the terms of its contract, or any amendments. 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).[13]

[23] As I have found that s. 21(1)(b) does not apply to any of the information in dispute, 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).

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[10]Order F16-39, 2016 BCIPC 43 (CanLII) at para. 27; Order F13-20, 2013 BCIPC 27 (CanLII) at para. 22; Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 23.
[11]Order F13-20, 2013 BCIPC 27 (CanLII) at para 27.
[12] Third Party Initial Submission.
[13] Order F16-39, 2016 BCIPC 43 (CanLII) at para. 31.

However, for completeness, I will briefly address the third party's argument regarding harm.

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

[24] 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]

The third party says the following about the harm that would result from disclosure of the information in dispute:

> 1. As a construction company, we gain most of our work through competitive bidding. Disclosure of any of our pricing information (commercially sensitive information) will inform our competitors of some of our pricing details and may compromise our competitive advantage. We are presently bidding work similar to the Evergreen Line Rapid Transit Project in at least three other active procurements within Canada.
> 2. Disclosure of pricing information within the construction industry is considered anti-competitive and may infringe on antitrust or competition laws.
> 3. The resultant erosion of competitiveness within an industry would potentially harm the procuring parties (often governments).[15]

[25] The comments above are the entirety of the third party's submissions regarding harm. I note that the third party states that the disclosure "may" compromise its competitive advantage and "would potentially" harm the procuring

[14] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* 2014 SCC 31 (CanLII) at para. 54. Reference is to *Merck Frosst Canada v. Canada (Health)*, 2012 SCC 3 (CanLII) at para. 94.
[15] Third Party Initial Submission, paras. 1-3.

parties. The argument the third party has provided is vague, speculative and unsupported by evidence. It does not establish a clear and direct link between disclosure of the information in question and a reasonable expectation of harm. Without further supporting submissions or evidence, I am not persuaded by what the third party says about harm. I find that it has not met the burden of establishing that disclosure of the information in dispute could reasonably be expected to cause any of the harms listed in s. 21(1)(c).

Summary – s. 21(1)

[26] 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. However, I find that it was not supplied, implicitly or explicitly, in confidence so s. 21(1)(b) does not apply. I also find that disclosure of the information could not reasonably be expected to cause any of the harms in s. 21(1)(c). The third party has not met its burden of proof regarding s. 21(1). I find that s. 21(1) does not apply to the information in dispute in this case.

CONCLUSION

[27] For the reasons given above, under s. 58 of FIPPA, the Ministry is not required to refuse access to the information in dispute under s. 21(1). I require the Ministry to give the applicant access to the information that is at issue by November 23, 2017. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

October 12, 2017

ORIGINAL SIGNED BY

Meganne Cameron, Adjudicator

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