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Order F17-52

MINISTRY OF CITIZENS' SERVICES

Meganne Cameron
Adjudicator

November 7, 2017

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Summary: Three First Nations/Bands requested a review of the Ministry of Citizens' Services (formerly known as the Ministry of Technology, Innovation and Citizens' Services) decision to disclose information to the Applicant related to the sale of two provincially owned properties. The First Nations/Bands argued that disclosure could reasonably be expected to harm their business interests. 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(1).

Authorities Considered: BC: Order F08-03, 2008 CanLII 13321 (BC IPC); Order 01 36, 2001 CanLII 21590 (BC IPC); Order 00-22, 2000 CanLII 14389 (BC IPC); Order F05-05, 2005 CanLII 14303 (BC IPC); Order F16-17, 2016 BCIPC 19 (CanLII); Order F16-39, 2016 BCIPC 43 (CanLII); Order 04-06, 2004 CanLII 34260 (BC IPC); Order 01 20, 2001 CanLII 21574 (BC IPC); Order F08-22, 2008 CanLII 70316 (BC IPC); Order F13-20, 2013 BCIPC 27 (CanLII); Order F13-27, 2013 BCIPC 36 (CanLII); Order F09 17, 2009 CanLII 59114 (BC IPC).

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 three requests the Applicant made to the Ministry of Citizens' Services (formerly known as the Ministry of Technology, Innovation and Citizens' Services and hereafter referred to as the Ministry) for records

relating to the sale of two provincially owned properties located in Burnaby and Vancouver (Properties) to a group of First Nations/Bands (Third Parties).

[2] The Ministry gave written notice to the Third Parties pursuant to s. 23 of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The Third Parties objected to the disclosure of some of the information in the responsive records on the basis that s. 21 (harm to third party business interests) applied to that information.

[3] The Ministry advised the Third Parties that it would not apply s. 21 to information in the records and the Third Parties asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision to disclose the information. Mediation failed to resolve the issue in dispute and it proceeded to inquiry. The Ministry, the Applicant and the Third Parties all provided inquiry submissions.

ISSUE

[4] The issue to be decided in this case is whether the Ministry is required to refuse to disclose the information at issue under s. 21 of FIPPA. When a public body decides to give an applicant access to all or part of a record containing information that relates to a third party, s. 57(3)(b) of FIPPA places the burden on the third party objecting to disclosure to prove that the applicant has no right of access to the information.

DISCUSSION

Information in dispute

[5] The Applicant requested the contracts of purchase and sale for the Properties, as well as all appendices, related agreements or leases. The records the Ministry identified as responsive to the Applicant's request are offers to purchase, amending agreements, leases, mortgage documents and an assignment. The information in dispute is in 54 pages of the responsive records.

[6] The information in dispute can be separated into two groups. Group 1 consists of:

- Purchase prices, deposit amounts and other price adjustments and payment amounts relating to the purchase of the Properties;
- Mortgage amounts and interest rates;
- Rental rates; and
- A vendor's statements of adjustments.

[7] Group 2 of the severed information relates to the following:

- The names, incorporation numbers and/or other business information of the corporations and/or partnerships (Companies) involved in the purchase of the Properties and the subsequent agreements;
- The names of the directors and/or authorized signatories for the Companies;
- Names of First Nations/Bands connected to the Companies;
- A solicitor's name, address and telephone number;
- The name and address of a business designated by one of the Companies to receive rent in relation to the leases;
- The title and date of a related agreement.

Harm to Third Party Business Interests – s. 21

[8] 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, ...

[9] 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)

[10] 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 OIPC orders have found that “commercial” information relates to a commercial enterprise, or the buying, selling or exchange of goods and services.¹ The information does not need to be

¹Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62.

proprietary in nature or have an actual or potential independent market or monetary value.”² Past orders have also concluded that contract amounts, breakdowns of these figures, prices, expenses and other fees payable under contract are both “commercial” and “financial” information.³

[11] The Ministry submits that the information in dispute is comprised of “numerous executed Offers to Purchase, Amending Agreements and Leases, as well as other various documents” and qualifies as commercial information for the purposes of FIPPA.⁴ The Applicant and Third Parties also agree that the information sought is commercial information.⁵

[12] I find that s. 21(1)(a)(ii) of FIPPA applies to all of the information in dispute. It is information that relates to the purchase of the Properties and subsequent leases, agreements and financial arrangements between the Province and the Third Parties and, as such, it is either commercial and/or financial information of or about the Third Parties.

Supplied in confidence – s. 21(1)(b)

[13] 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.”⁶

[14] The Ministry submits that it was unable to conclude the information in dispute was supplied in confidence.⁷ The Applicant supports the Ministry’s submission and also argues the information in dispute was not supplied because it was negotiated.⁸ The Third Parties submit that the information in dispute was supplied in confidence, though they have not provided any submissions or evidence to support this assertion.⁹

Supplied

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

²Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17.

³ Order 00-22, 2000 CanLII 14389 (BC IPC) at p. 4, Order F05-05, 2005 CanLII 14303 (BC IPC) at para. 46; and Order F16-17, 2016 BCIPC 19 (CanLII), at para. 24.

⁴ Ministry’s submission, paras. 15-16.

⁵ Applicant’s submission, para. 7; Third Parties submissions, paras. 1.

⁶ Order F16-39, 2016 BCIPC 43 at para. 19.

⁷ Ministry’s submission, para. 20.

⁸ Applicant’s submission, para. 7.

⁹ Third Parties’ submissions, para. 2.

information that has been “supplied” to the public body.¹⁰ In Order F08-22, former Commissioner Loukidelis said the following about the “supplied” element of s. 21 (1)(b):

...The clear and prevailing consensus—including in the courts—is that the contents of a contract between a public body and a third party will not normally qualify as having been “supplied”, even when the contract has been preceded by little or no back-and-forth negotiation. The exceptions to this are information that, although found in a contract between a public body and a third party, is not susceptible of negotiation and is likely of a truly proprietary nature. The rationale is that “supply” is intended to capture immutable third-party business information, “not contract information that—by the finessing of negotiations, sheer happenstance, or mere acceptance of a proposal by a public body—is incorporated in a contract in the same form in which it was delivered by the third-party contractor”^[45] or mutually-generated contract terms that the contracting parties themselves have labelled as proprietary.¹¹

[16] I have reviewed the information that the Third Parties argue should be withheld under s. 21. I find that the purchase prices, deposits, interest and rental rates in Group 1 is the type of information that would typically be open to negotiation. The Third Parties have not provided argument or evidence to suggest that this information was supplied and as such, I find that they have not met their burden pursuant to section 57(3)(b) of FIPPA.

[17] However, I find that the information in dispute in Group 2 is information that was supplied by the Third Parties to the Ministry. It includes details such as incorporation numbers and the names of individuals and First Nations/Bands. The Group 2 information clearly would not have been susceptible to change during the negotiations between the Ministry and the Third Parties.

In Confidence

[18] For s. 21(1)(b) to apply, the information must have been supplied, “implicitly or explicitly, in confidence.” Although I have found that only the Group 2 information was supplied to the Province, for the sake of completeness, I will consider whether all of the information in dispute meets the further requirements of s. 21.

[19] Previous BC Orders have stated that 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

¹⁰ 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.

¹¹ Order F08-22, 2008 CanLII 70316 (BC IPC) at para. 60.

confidentiality is not sufficient.¹² There must be evidence of a “mutuality of understanding” between the public body and the third party for the information to be supplied “in confidence.”¹³ The determination of whether information is confidential depends on its contents, its purposes and the circumstances under which it was compiled.¹⁴

[20] The Third Parties do not provide submissions or evidence that there was an implicit and mutual understanding with the Province that the information was supplied in confidence. The Ministry says it was unable to conclude that the information in dispute was supplied in confidence and, as such, I find that there was no mutual understanding in that regard. Therefore, I find that the information was not supplied implicitly in confidence.

[21] None of the parties offer submissions or evidence that the information in dispute was supplied explicitly in confidence. I note that the executed offers to purchase contain clauses indicating that the agreements are subject to FIPPA. Furthermore, there are no explicit statements of confidentiality in the records at issue. I find that the information was not supplied explicitly in confidence.

[22] 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). However, for completeness, I will briefly address the Third Parties’ argument regarding harm.

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

[23] 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

¹²Order 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.

¹³ Order 04-06, 2004 CanLII 34260 (BC IPC) at para. 53; Order F13-27, 2013 BCIPC 36 (CanLII) at para. 44.

¹⁴Order F13-20, 2013 BCIPC 27 (CanLII) at para 27.

improbabilities or the seriousness of the allegations or consequences”[...].¹⁵

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

- a) Harm or interfere significantly with their competitive position in relation to ongoing negotiations with the Provincial and Federal governments and cause them undue financial loss by reducing their potential profits from the sale or lease of the Properties; and
- b) Interfere significantly with their ongoing negotiations with municipal governments with regard to zoning and other issues.¹⁶

[25] The argument offered by the Third Parties does not establish a clear and direct link between disclosure of the information in question and a reasonable expectation of harm and no evidence is provided to support their assertions.¹⁷ As noted in Order F09-17, “evidence must be detailed and convincing enough to establish specific circumstances for the contemplated harm to be reasonably expected to result from disclosure of the information.”¹⁸ In this case, the Third Parties have not provided any evidence or submissions that explain how the disclosure of the information in Group 2, such as the name of a company’s lawyer or its signatories, could cause the harms referred to above. I also note that the information in dispute is in contracts and agreements dated or executed in 2014. I have received no information from the Third Parties that explains why the disclosure of the purchase price, interest rates, or any of the other information included in Group 1, could cause the harms alleged above given the amount of time that has passed.

[26] Without further supporting submissions or evidence, I am not persuaded by what the Third Parties say about harm. I find that they have 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

[27] In summary, I find that the withheld information is commercial and/or financial information of or about the Third Parties, so s. 21(1)(a)(ii) applies. While I find that some of that information was supplied, none of it was “supplied,

¹⁵ *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.

¹⁶ Third Parties’ submissions, paras. 1-3.

¹⁷ Each of the Third Parties made an identical one page submission and did not provide affidavit evidence.

¹⁸ Order F09-17, 2009 CanLII 59114 (BC IPC) at para. 38.

implicitly or explicitly, in confidence,” so s. 21(1)(b) does not apply to any of it. 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 Parties have not met their burden of proof in this case. I find that s. 21(1) does not apply to the information in dispute.

CONCLUSION

[28] 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 this information by December 20, 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.

November 7, 2017

ORIGINAL SIGNED BY

Meganne Cameron, Adjudicator

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