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Order F19-16

METRO VANCOUVER REGIONAL DISTRICT

Chelsea Lott
Adjudicator

March 29, 2019

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Summary: An applicant requested records related to Metro Vancouver's permit authorizing emission from a steel galvanizing plant. Order F18-07 held that Metro Vancouver was required to withhold the information under s. 21(1) (harm to third party business interests) of the *Freedom of Information and Protection of Privacy Act*. The applicant subsequently claimed the records should be disclosed under s. 25 (disclosure in the public interest). The adjudicator found that s. 25 did not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 25, 25(1)(a), 25(1)(b).

INTRODUCTION

[1] The applicant requested records from Metro Vancouver Regional District (Metro Vancouver) related to a steel galvanizing plant operated by EBCO Metal Finishing LP (EBCO) in the City of Surrey.[1] This was not his first request on the subject matter. Another one of those requests ultimately resulted in Order F18-07.[2] In that order, the adjudicator confirmed that Metro Vancouver was required to refuse to disclose 16 pages of records in whole or in part, pursuant to s. 21 (harm to third party business interests) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[1] Division Manager Affidavit at para. 2.
[2] 2018 BCIPC 9.

[2] The records in dispute in the present inquiry are the same 16 pages dealt with in Order F18-07. In the present inquiry, the applicant argues s. 25 of FIPPA applies because disclosure of the records is in the public interest.[3] Mediation did not resolve the s. 25 matter and the applicant requested it proceed to an inquiry.

ISSUE

[3] The issue in this inquiry is whether Metro Vancouver is required by s. 25 to disclose information.

[4] FIPPA does not define the burden of proof for s. 25. However, Commissioner Loukidelis stated that where an applicant has raised s. 25:

> it will be in the applicant's interest, in practical terms, to identify information in support of that contention. For example, although an applicant will not know the contents of requested records, she or he may well be in a position to establish that there is a clear public interest in the matter generally.[4]

[5] With respect to the public body, the former Commissioner also stated that although the public body bears no statutory burden, "it is obliged to respond to the commissioner's inquiry into the issue and it has a practical incentive to assist with the s. 25(1) determination to the extent it can."[5] Ultimately, the Commissioner will decide, on all of the evidence, whether or not s. 25 applies to particular information.[6]

DISCUSSION

Background

[6] EBCO operated a galvanizing plant in Richmond, BC for about 30 years.[7] In 2016, EBCO began transferring its galvanizing operations to a new plant in Surrey, BC (the Surrey Facility). On March 1, 2016, Metro Vancouver issued EBCO a short term approval to discharge contaminants into the air under the *Environmental Management Act* and the *Greater Vancouver Regional District Air Quality Management Bylaw* No. 1082.

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[3] At the inquiry for F18-07, the applicant had also argued that s. 25 of FIPPA applied, but the adjudicator declined to consider that issue because the applicant raised it too late.
[4] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 37.
[5] *Ibid* at para. 39.
[6] *Ibid*.
[7] Factual background is taken from Decision Nos. 2016-EMA-107(a) to 2016-EMA-119(a) (May 26, 2016); and Decision Nos. 2018-EMA-003(a), 004(a) and 012(a) to 016(a) (August 20, 2018). Both decisions can be found on the Environmental Appeal Board website at http://www.eab.gov.bc.ca/ema/index.html.

[7] Fourteen appellants appealed the approval to the Environmental Appeal Board. The Board stayed the approval pending EBCO's completion of plans and reports required by Metro Vancouver.

[8] In early 2017, EBCO applied for a permit to discharge air emissions from its Surrey Facility. In March 2018, Metro Vancouver issued EBCO a 15-year permit authorizing EBCO to discharge air contaminants from three specific emission sources at the facility. The permit restricts the number of vents which can operate, the emission flow rate and the maximum amount of sulphuric acid that emissions can contain. The permit also contains numerous monitoring and reporting requirements.

[9] Thirteen appellants appealed EBCO's permit to the Environmental Appeal Board. The Environmental Appeal Board summarily dismissed one of the appeals and will hear the remaining appeals in April 2019.[8]

Information in dispute

[10] The information in dispute relates to the chemistry of the galvanizing process and one aspect of the operation in particular: the pre-treatment and cleaning process.[9] Steel is galvanized by dipping it into a zinc bath. Before this occurs, the steel is cleaned through a series of chemical solutions. The chemical solutions are situated in a row of tanks heated by steam generated by a low pressure boiler. Water is lost through evaporation during the process and replaced by city water.

[11] The records contain a two page narrative describing the pre-treatment procedure and its chemistry. Metro Vancouver has withheld the expected lifespan and concentrations of the acids used in the process, as well as the temperatures the solutions are heated to. The procedure uses seven chemicals. Metro Vancouver has withheld the names of two of the chemicals. The balance of the records are the chemical companies' brochures and safety data sheets for these two chemicals.

Public interest – s. 25

[12] Section 25 provides that a public body must disclose information when disclosure is in the public interest. Section 25 overrides all of the Act's categories of exempted information, including s. 21. As a result, there is a high threshold for disclosure under s. 25.[10]

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[8] Metro Vancouver amended the permit on March 26, 2019. Despite any amendments, as of the date of this order, hearings regarding the permit remained scheduled for April 2019 according to the Environmental Appeal Board's website.

[9] I based my description of the process on information disclosed in the records.

[10] Investigation Report F16-02 at p. 22 [IR F16-02]. Available on the OIPC website at https://www.oipc.bc.ca/investigation-reports/1972.

[13] The relevant portions of s. 25 read:

> 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.

Section 25(1)(a)

[14] Section 25(1)(a) applies to information about a risk of significant harm to the environment or to human health or safety. Commissioner Denham described the nature of a "risk of significant harm" as follows.

> The "risk" described by s. 25(1)(a) must be a prospective one. That is, disclosure under this subsection cannot be triggered by a risk that has already been realized. However, the risk may nevertheless relate to an event which has occurred in the past, but from which a risk may still arise.
>
> Therefore, in order for the Ministry to have been in contravention of s. 25(1)(a), it must have had information about the risk of significant present or future harm, before the harm occurred. I also note that this is not a question of whether the Ministry should have had information about such a risk, but whether it actually had such information.[11]

[15] Commissioner Loukidelis said that while each determination will be contextual, some examples of information that may trigger disclosure under s. 25(1)(a) include:

- Information that discloses the existence of the risk;
- Information that describes the nature of the risk and the nature and extent of any harm; and
- Information that allows the public to take action necessary to meet the risk or mitigate or avoid harm.[12]

Parties' positions

[16] The applicant does not distinguish between section 25(1)(a) and (b) as they relate to the records. The applicant says that Metro Vancouver has failed to

[11] *Ibid* at p. 23.
[12] Order 02-38, *supra* note 4 at para. 56.

adequately consider the purpose of s. 25 in deciding to withhold information. He also says Metro Vancouver failed to explain how it reviewed the withheld materials and acted to "balance the interests" given the community's "strongly held concerns regarding the toxic nature of the industrial emissions into the local ecosystems and aquifer."[13] The applicant suggests that Metro Vancouver and EBCO improperly claimed that s. 21 prohibits disclosure in order to prevent the public from knowing about the chemicals involved in the process.

[17] Based on the materials submitted by the applicant, the applicant's contention with Metro Vancouver granting the permit appears to be that Metro Vancouver failed to consider, or to adequately consider, the impact that emissions from the Surrey Facility would have on human health and the environment. In particular, the applicant contends that Metro Vancouver failed to consider the Brookswood aquifer, which is below the Surrey Facility. In addition, the applicant says that Metro Vancouver did not consider the impact of emissions on a creek, an elementary school and local farm operations.

[18] Metro Vancouver says that the applicant has not provided any evidence or argument that establishes that the withheld information is about a risk of significant harm to the environment or the health and safety of the public. Metro Vancouver says that there is no danger to the environment or public health and safety and that EBCO's description of the pre-treatment process as a closed-loop system with minimal waste demonstrates this.[14]

Analysis

[19] I accept that the galvanizing process has the potential to have a negative impact on the environment because it is regulated under the *Environmental Management Act.* However, none of the evidence before me suggests that emissions from the Surrey Facility pose a risk of significant harm to the environment or to the health or safety of the public.

[20] The applicant has characterized the chemicals used in the facility as "toxic" and environments close to the facility as sensitive. There is no evidence about the amount of chemicals released in the facility's emissions, or evidence of a link between their emission and a risk to the environment or the population. I have been given no evidence, for example, of the galvanizing process causing environmental problems near other facilities or scientific articles on the issue. I also have no evidence about the impact of the Surrey Facility's past emissions on the surrounding population or ecosystem.

[21] The mere fact that the industrial process at the heart of this case uses hazardous chemicals is not sufficient to establish that the information in dispute

[13] Applicant December 18, 2018 submission at pp. 1-2.
[14] Metro Vancouver submission at para. 19.

is about a risk of significant harm to human health or the environment under s. 25(1)(a). Given this lack of evidence, I am not satisfied that the information in dispute – which discloses the chemistry of the process – meets the threshold for s. 25(1)(a) to apply.

Section 25(1)(b)

[22] A public body must disclose information under s. 25(1)(b) if disclosure is "clearly in the public interest." Commissioner Denham held that "clearly means something more than a 'possibility' or 'likelihood' that disclosure is in the public interest."[15] She added that s. 25(1)(b) "requires disclosure where a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest."[16]

[23] Commissioner Denham has provided a non-exhaustive list of factors public bodies should consider in determining whether s. 25(1)(b) applies to information. These factors include whether the information would contribute to educating the public about the matter, would contribute in a substantive way to the body of information already available about the matter, or would contribute in a meaningful way to holding a public body accountable for its actions or decisions.[17] Public bodies may also weigh the interests protected by any applicable exceptions to disclosure in ss. 12 to 21 when considering if disclosure is in the public interest.[18]

Parties' positions

[24] Metro Vancouver says that it has disclosed a substantial amount of information regarding the metal finishing operation, both as part of the process of issuing air quality permits and in responding to the applicant's FIPPA requests. Metro Vancouver advises that the applicant has received over 2500 pages of records related to the metal finishing operation and the application for an air quality permit, the implication being that the information in dispute would not contribute in a substantive way to the body of information already available.

[25] Metro Vancouver points out that an OIPC adjudicator already found that s. 21, which protects the business interests of third parties, applies to the information at issue. They cite the following finding from Order F18-07 regarding the harm which might flow from disclosure of the information:

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[15] Investigation Report F15-02 at p. 28 [IR F15-02]. Available on the OIPC website at https://www.oipc.bc.ca/investigation-reports/1814.
[16] *Ibid* at p. 29.
[17] IR F16-02, *supra* note 10 at p. 27.
[18] *Ibid* at p. 38.

> I am satisfied that disclosure of the information that I found was supplied in confidence could undermine the third party's competitive advantage by allowing competitors access to its Processes and enabling them to compete in the same industry.[19]

[26] Metro Vancouver says that the applicant has not established that the records would meet the "high bar" for the application of s. 25(1)(b) to displace EBCO's interests protected by s. 21.

[27] The applicant did not make any argument specific to s. 25(1)(b).

Analysis

[28] Section 25(1)(b) captures information which does not fall within s. 25(1)(a), i.e. it is not about a risk to the environment or health, but which disclosure is, for any other reason, clearly in the public interest. I interpret the applicant's submissions as arguing that there is a public interest in scrutinizing Metro Vancouver's decision to issue EBCO a permit to discharge air contaminants.

[29] The applicant contends that Metro Vancouver failed to consider the emissions' impacts on an aquifer, creek, school and farming. His argument is not that Metro Vancouver failed to consider the nature of the chemicals, rather his concern is that Metro Vancouver failed to consider the emissions' impact on specific things which are geographically close to the Surrey Facility, like the aquifer. If that is the concern, as opposed to the particular chemical mix, then knowing more details about the chemistry of the galvanizing process would not particularly assist in challenging the permit.

[30] The applicant has also not suggested what use he or others intend to make of the withheld information. He has not suggested, for example, that it is needed for the Environmental Appeal Board proceedings, or that he or others intend to do their own environmental testing. It is also significant that the Environmental Appeal Board will hold a hearing regarding the permit. This proceeding will require disclosure of relevant documents and hold Metro Vancouver accountable for its decision. I am not convinced that disclosing the information in dispute will meaningfully contribute to elucidating Metro Vancouver's decision making process or hold Metro Vancouver accountable for its decision to grant the permit.

[31] I agree that the public has an interest in knowing how Metro Vancouver arrived at its decision to issue the permit to EBCO. I also accept that the chemistry involved in the galvanizing process is information which Metro Vancouver likely considered in issuing its permit. Further, not knowing all of the

[19] Order F18-07, *supra* note 3 at para. 46.

chemistry involved in the process will limit the public's ability to scrutinize Metro Vancouver's decision to some degree. However, based on the evidence before me, I am not satisfied that the information in dispute meets the high threshold for disclosure under s. 25(1)(b). Section 25(1)(b) will not be triggered every time a group of people suspects that a public body is not adequately carrying out its functions.[20] Section 25(1)(b) requires that disclosure be "clearly" in the public interest and there is simply not enough on the record to persuade me that this standard has been met.

CONCLUSION

[32] For the reasons given above, under s. 58 of FIPPA, I confirm Metro Vancouver's decision that s. 25 does not apply to the information.

March 29, 2019

ORIGINAL SIGNED BY

Chelsea Lott, Adjudicator

OIPC File No.: F17-71053

[20] IR F16-02, *supra* note 10 at p. 36.