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Order F19-29

MINISTRY OF TRANSPORTATION AND INFRASTRUCTURE

Celia Francis
Adjudicator

July 29, 2019

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Summary: An applicant requested records about a third party's proposed Lions Gate bridge climb. The Ministry of Transportation and Infrastructure (Ministry) decided to disclose some of the information and to withhold other information under s. 21(1) (harm to third-party business interests). The third party requested a review of the Ministry's decision, arguing that more of the information should be withheld under s. 21(1). The adjudicator found that s. 21(1) applied to all of the information in dispute, as the Ministry and third party had established a reasonable expectation of harm under s. 21(1)(c).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 21(1)(ii), 21(1)(b), 21(c)(i) and (iii).

INTRODUCTION

[1] This case concerns a proposal to establish a tourist attraction called the "Lions Gate Bridge Climb". In April 2017, the access applicant, Ziptrek Ecotours Inc. (Ziptrek), made a request to the Ministry of Transportation and Infrastructure (Ministry) under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for access to records about the relationship between the Ministry and the third party, Legendworthy Quest Inc., regarding its proposed Lions Gate Bridge Climb. The third party does business as Skyhugger.

[2] The Ministry gave Skyhugger notice of the request under s. 23 of FIPPA and, in response, Skyhugger asked that much of the information be withheld under s. 21(1) of FIPPA (harm to third-party business interests). After more

correspondence on the subject, the Ministry told Skyhugger that it had decided to disclose the records in severed form, withholding information under several sections of FIPPA, including s. 21.[1] In September 2017, Skyhugger requested a review by the Office of the Information and Privacy Commissioner (OIPC) of the Ministry's decision to disclose information.[2] Mediation did not resolve the matter and Skyhugger requested an inquiry.

[3] In April 2018, the Ministry sent a letter to Ziptrek saying it had decided to provide Ziptrek with partial access to the records, withholding some information under several sections of FIPPA.[3] Ziptrek then requested a review by the OIPC of the Ministry's decision to withhold information.[4]

[4] In January 2019, the OIPC issued a notice to the parties stating that it would hold an inquiry dealing with all the exceptions. The OIPC then granted the Ministry's request that the inquiry deal first with s. 21 and then, if necessary, the remaining exceptions. Accordingly, the OIPC issued a revised notice in March 2019, stating that the inquiry would deal with s. 21 first. The OIPC later clarified that the inquiry would consider whether s. 21 applies both to the information the Ministry had decided to withhold under that exception (and which Skyhugger agrees should be withheld) and to the additional information Skyhugger wants withheld. The OIPC received submissions on s. 21(1) from the Ministry, Skyhugger and Ziptrek.

ISSUE

[5] The issue before me is whether the Ministry is required to withhold information under s. 21(1). Under s. 57(3)(b) of FIPPA, the burden is on Skyhugger to prove that Ziptrek has no right of access under s. 21(1) to the information the Ministry has decided to disclose. Under s. 57(1), the Ministry has the burden of proof regarding the information it has decided to withhold under s. 21(1).

DISCUSSION

Background

[6] Skyhugger approached the Ministry in early 2015 with a proposal to offer guided climbing tours to the top of the Lions Gate Bridge. The Ministry and Skyhugger engaged in a series of discussions over the next two years. In

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[1] The Ministry told Skyhugger that it would also withhold some information under ss. 13(1) (advice or recommendations), 14 (solicitor client privilege), 16(1) (harm to intergovernmental relations), 17(1) (harm to economic or financial interests of the public body) and 22(1) (harm to third-party privacy).
[2] OIPC file F17-71350.
[3] The Ministry told Ziptrek that it would withhold information under the same sections as it told Skyhugger.
[4] OIPC file F18-75514.

February 2017, the Ministry issued a Notice of Intent to enter into a contract with Skyhugger. Another proponent submitted its own proposal.[5] Ultimately, after the 2017 provincial election, the incoming NDP government decided not to proceed with climbing tours to the top of the bridge.[6]

Records in dispute

[7] The Ministry retrieved 437 pages of responsive records spanning the period from April 2015 to April 2017, as follows:

- Emails on the proposal (mainly between the Ministry and Skyhugger);
- Skyhugger's proposal and business plans (including diagrams);
- A report Skyhugger commissioned and provided to the Ministry; and
- Ministry briefing notes.

[8] The Ministry has decided to disclose 196 pages and withhold all or portions of the rest. The information in dispute is the following:

- The information the Ministry decided to withhold under s. 21(1) and which Skyhugger agrees should be withheld (all or portions of approximately 214 pages), including Skyhugger's proposal and business plans, as well as some emails;[7] and
- The additional information Skyhugger wants withheld under s. 21(1).

[9] As part of its discussions with the Ministry on the processing of the request, Skyhugger provided a copy of the records, highlighting in yellow the additional information it wanted withheld. The Ministry asked Skyhugger to reconsider its request to withhold information. Skyhugger submitted a second version of the records with less information highlighted in yellow.[8]

[10] Skyhugger's request for review to the OIPC included a hard copy of the records, with the information it wanted withheld highlighted in yellow.[9] I understand this copy to be the second version of Skyhugger's proposed severing, that is, the one in which Skyhugger highlighted less information. The OIPC destroyed this copy at the end of mediation.

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[5] I understand from the material before me that this other proponent was Ziptrek.
[6] Skyhugger's initial and reply submissions; Ministry's response submission, Affidavit of Executive Director, paras. 5-7.
[7] The Ministry provided a copy of the records with the information it decided to withhold outlined in red.
[8] Email of August 9, 2017 between Skyhugger and the Ministry.
[9] Skyhugger referred to this copy as "the latest revised document v. 2"; request for review of September 5, 2017.

[11] The OIPC was, however, able to obtain a copy of Skyhugger's proposed severing from the Ministry in June 2019. Skyhugger provided another version of its proposed severing to the OIPC in July 2019. However, this version contains more highlighted information than the one the Ministry provided. I therefore take the copy that Skyhugger provided to be the earlier, more extensive version of Skyhugger's proposed severing.

[12] I also take the version that the Ministry provided in June 2019 to be the same as the one Skyhugger provided to the OIPC with its request for review, as it highlights less information for withholding. It is, therefore, the version I consider here. Skyhugger accepted that this was the appropriate version for me to consider.[10]

Preliminary matter

[13] Ziptrek said that, "during the tender process," the Ministry contacted it to say that it had the "best proposal" and that the "best proposal" would be successful. Ziptrek said that it was then surprised to learn that the Ministry would proceed with Skyhugger's proposal. Ziptrek said it does not "seek a competitive advantage" over Skyhugger. Rather, it said it wishes to know "how the decision to proceed with Skyhugger was made," particularly in light of what the Ministry told it about its proposal. Ziptrek said it was concerned that the Ministry made a decision based on other factors than whose proposal was the best.[11]

Section 21 – Third-party business interests

[14] The relevant parts of s. 21(1) of FIPPA in this case read as follows:

> 21(1) The head of a public body must refuse to disclose to an applicant information
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> (a) that would reveal
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> (i) trade secrets of a third party, or
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> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,that is supplied, implicitly or explicitly, in confidence, and
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> (b) that is supplied, implicitly or explicitly in confidence, and
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> (c) the disclosure of which could reasonably be expected to
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> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

[10] Email of July 15, 2019.
[11] Ziptrek's response submission.

> ...
> (iii) result in undue financial loss or gain to any person or organization,

[15] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies.[12] All three parts of the s. 21(1) test must be met in order for the information in dispute to be properly withheld. First, the Ministry and Skyhugger must demonstrate that disclosing the information in issue would reveal: trade secrets of a third party; or commercial, financial, labour relations, scientific or technical information of, or about, a third party. Next, they must demonstrate that the information was supplied, implicitly or explicitly, in confidence. Finally, they must demonstrate that disclosure of the information could reasonably be expected to cause one or more of the harms set out in s. 21(1)(c).

Section 21(1)(a) – type of information

[16] FIPPA does not define the terms listed in s. 21(1)(a)(ii). However, previous orders have said the following:

- "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.[13]
- "Commercial" and "financial" information of or about third parties includes hourly rates, global contract amounts, breakdowns of these figures, prices, expenses and other fees payable under contract.[14]
- "Technical information" under s. 21(1)(a)(ii) is information belonging to an organized field of knowledge falling under the general categories of applied science or mechanical arts. It 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.[15]

[17] The Ministry said that it accepted that the information in dispute is Skyhugger's commercial, financial or technical information.[16] Skyhugger did not

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[12] See, for example, Order 03-02, 2003 CanLII 49166 (BCIPC), Order 03-15, 2003 CanLII 49185 (BCIPC), and Order 01-39, 2001 CanLII 21593 (BCIPC).

[13] See Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17, and Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62.

[14] For example, Order F19-11, 2019 BCIPC 13 (CanLII) at para. 14, Order 03-15, 2003 CanLII 49185 (BC IPC) at para. 41, Order 00-22, 2000 CanLII 14389 (BC IPC) at p. 4, Order F05-05, 2005 CanLII 14303 (BC IPC) at para. 46, Order F13-06, 2013 BCIPC 6 (CanLII) at para. 16, Order F13-07, 2013 BCIPC 8 (CanLII) at para. 36, Order F15-53, 2015 BCIPC 56 (CanLII), at para. 11, and Order F16-17, 2016 BCIPC 19 (CanLII), at para. 24.

[15] See, for example, Order F13-19, 2013 BCIPC 26 (CanLII), at paras. 11-12, Order F12-13, 2012 BCIPC 18 (CanLII), at para. 11.

[16] Ministry's response submission, paras. 28, 31.

specifically address this issue but said that the information contains details of the process it undertook to create a "commercially viable tourist attraction."[17]

[18] The information in dispute consists of Skyhugger's proposal on how to set up the bridge climb as a tourist attraction, including technical, structural, engineering and safety details, the proposed process and principles for conducting a bridge climb, issues it encountered and how it resolved them, consultations it undertook, technical and engineering details connected with access to the bridge, technical diagrams of the site and the bridge, reports on analyses Skyhugger commissioned, its emergency and safety response plan, its pricing structure and estimated revenue, its ticketing and marketing plans, its progress with various stages of the proposal, its insurance coverage and its business plan. I am satisfied that the information at issue here is commercial, financial or technical information of or about Skyhugger. I find that s. 21(1)(a)(ii) applies to it.

[19] The Ministry said it also accepted that the information at issue is Skyhugger's scientific information or trade secrets.[18] Skyhugger did not address this issue.

[20] The term "trade secret" is defined in Schedule 1 of FIPPA as follows:

> "trade secret" means information, including a formula, pattern, compilation, program, device, product, method, technique or process, that
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> (a) is used, or may be used, in business or for any commercial advantage,
> (b) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use,
> (c) is the subject of reasonable efforts to prevent it from becoming generally known, and
> (d) the disclosure of which would result in harm or improper benefit.

[21] The information in dispute consists of techniques, processes and methods that Skyhugger intended to use to its commercial advantage. As I discuss below in more detail, I find that: the information has economic value in not being generally known to the public or to Skyhugger's competitors; was the subject of Skyhugger's and the Ministry's efforts to keep it from being generally known; and its disclosure would result in harm to Skyhugger and improper benefit to its competitors. I find, therefore, that the information in dispute is Skyhugger's trade secrets and that s. 21(1)(a)(i) also applies to it.

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[17] Skyhugger's initial submission, p. 2.
[18] Ministry's response submission, paras. 25, 31.

[22] Given my finding that the information at issue is trade secrets of Skyhugger and commercial, financial and technical information of or about Skyhugger, I need not decide whether it is also scientific information of or about Skyhugger.

Section 21(1)(b) – supply in confidence

[23] The next step is to determine whether the information in issue was "supplied, implicitly or explicitly, in confidence." The information must be both "supplied" and supplied "in confidence."[19]

[24] **Supplied:** The Ministry and Skyhugger both said that Skyhugger provided or supplied the Ministry with the information in dispute. The Ministry added it did not generate the information and the information does not reflect the results of its negotiations with Skyhugger.[20]

[25] It is evident from the records themselves that Skyhugger provided the information in dispute to the Ministry. I find that the information in dispute was "supplied" for the purposes of s. 21(1)(b). I include here the Ministry's own emails because they contain or refer to information that Skyhugger provided to the Ministry, such as details of Skyhugger's proposal. This finding is consistent with past orders that have considered the issue of supply in relation to records other than contracts.[21]

[26] **In confidence:** A number of orders have discussed examples of how to determine if third-party information was supplied, explicitly or implicitly, "in confidence" under s. 21(1)(b), for example, Order 01-36:[22]

> [24] An easy example of a confidential supply of information is where a business supplies sensitive confidential financial data to a public body on the public body's express agreement or promise that the information is received in confidence and will be kept confidential. A contrasting example is where a public body tells a business that information supplied to the public body will not be received or treated as confidential. The business cannot supply the information and later claim that it was supplied in confidence within the meaning of s. 21(1)(b). The supplier cannot purport to override the public body's express rejection of confidentiality.
> …
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> [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

[19] See, for example, Order F17-14, 2017 BCIPC 15 (CanLII), at paras. 13-21, Order 01-39, 2001 CanLII 21593 (BC IPC), at para. 26, and Order F14-28, 2014 BCIPC 31 (CanLII), at paras. 17-18.
[20] Skyhugger's initial submission, p. 3; Ministry's response submission, para. 37.
[21] See, for example, Order F19-23, 2019 BCIPC 25 (CanLII), Order F19-11, 2019 BCIPC 13 (CanLII), Order 01-36, 2001 CanLII 21590 (BC IPC).
[22] Order 01-36, 2001 CanLII 21590 (BC IPC).

> 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:
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> 1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
> 2. 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;
> 3. not otherwise disclosed or available from sources to which the public has access;
> 4. prepared for a purpose which would not entail disclosure.

[27] The Ministry said that Skyhugger supplied the information in dispute in confidence, on the understanding that it would remain in confidence. The Ministry said that Skyhugger worried about external competition and that it assured Skyhugger that the information would remain confidential. The Ministry added that it never shared any of Skyhugger's information with other potential proponents.[23]

[28] Skyhugger said that it sent all the emails in confidence, as indicated by the statement of confidentiality at the bottom of each email.[24]

[29] I am satisfied from the evidence that Skyhugger explicitly supplied the information in confidence to the Ministry and that the information was kept in confidence. It is clear from the submissions and the records themselves that Skyhugger was concerned about keeping the details of its proposal confidential during the early stages of the process, before it reached a final deal with the Ministry. I find that the information in dispute was supplied explicitly "in confidence" for the purposes of s. 21(1)(b).

Harm under s. 21(1)(c)

[30] I found above that ss. 21(1)(a) and (b) apply to the information in dispute. I will now consider whether disclosure of this information could reasonably be expected to result in harm under s. 21(1)(c).

Standard of proof for harms-based exceptions

[31] Numerous orders have set out the standard of proof for showing a reasonable expectation of harm.[25] The Supreme Court of Canada confirmed the applicable standard of proof for harms-based exceptions:

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[23] Ministry's response submission, para. 39; Affidavit of Executive Director, para. 7.
[24] Skyhugger's initial submission, p. 3.
[25] For example, Order 01-36, 2001 CanLII 21590 (BCIPC), at paras. 38-39.

> [54] 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: paras. 197 and 199. 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".[26]

[32] Moreover, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*,[27] Bracken J. confirmed that it is the release of the information itself that must give rise to a reasonable expectation of harm.

Discussion and findings

[33] The Ministry submitted that ss. 21(1)(c)(i) and (iii) apply to the information it decided to withhold. It said that Skyhugger undertook "significant preparatory work and incurred costs to develop [its] proposal and demonstrate the viability of the proposed project." In the Ministry's view, Skyhugger is "justifiably concerned that [its] competitive edge in the market place would be harmed" if its competitors had access to the information that Skyhugger has "invested time, effort and money in acquiring." The Ministry added that another proponent expressed interest in conducting a similar venture. Sharing Skyhugger's proposal with that proponent would, in the Ministry's view, give the other proponent a competitive advantage, as it did not incur the expense Skyhugger did to "validate" its concept regarding the bridge.[28]

[34] Skyhugger said its proposed Lions Gate Bridge Climb would be the only such tourist attraction in North America.[29] Skyhugger said it had paid "dearly" for the information in dispute over the years. It pointed to portions of the records with information on the steps and problems it had to figure out by itself throughout the proposal process.[30] Skyhugger said disclosure of these details would give a

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[26] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* [*Community Safety*], 2014 SCC 31, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, at para. 94. See also Order F13-22, 2014 BCIPC 31 (CanLII), at para. 13, and Order F14-58, 2014 BCIPC 62 (CanLII), at para. 40, on this point.

[27] *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875, at para. 43.

[28] Ministry's response submission, paras. 46-47; Affidavit of Executive Director, para. 8.

[29] Skyhugger's initial submission, p. 1.

[30] Skyhugger also said that the Ministry had severed the records inconsistently, indicating that it would disclose information in some places (e.g., in emails) that it had decided to withhold elsewhere (e.g., in Skyhugger's proposal); Skyhugger's initial submission, p. 2.

competitor an unfair advantage, thus harming Skyhugger's competitive interest. Skyhugger argued that releasing the information prior to a "potential tender situation" would be "extremely helpful to someone intending to steal the idea and potentially making a bid to [the Ministry] for offering the climb, should [the Ministry] opt for a bidding situation."[31] Skyhugger said it welcomes "healthy competition" but, in its view, it would be fair for a competitor to "start from scratch" in developing a bridge climb proposal, as Skyhugger did.[32]

[35] I accept that Skyhugger went to considerable expense, effort and time to develop its bridge climb proposal and that, on its own, it discovered and worked through a series of issues and obstacles on the way. I also accept the parties' arguments that, if the information were disclosed while a tendering process was ongoing, imminent or likely, a competitor would, at little or no cost, obtain information useful for preparing its own proposal for a bridge climb, thus giving it an unfair advantage.

[36] According to Skyhugger, the BC government decided in late 2017 not to proceed with the proposal, because the new Minister had "decided that the province would not permit a commercial operation on provincially owned assets."[33] Nevertheless, it is possible that the present government could reverse its position on this issue at some point. It is also possible that a new government would decide to proceed with a Lions Gate bridge climb proposal. In either case, Skyhugger could then pick up where it left off. If Skyhugger's competitors had received the information in dispute in the meantime, however, Skyhugger would have lost its competitive edge. This could, in my view, reasonably be expected to harm significantly Skyhugger's competitive position for the purposes of s. 21(1)(c)(i).

[37] Skyhugger could also use the information in dispute to prepare a proposal to conduct guided climbs on another bridge, either in BC or elsewhere. Skyhugger could, moreover, use the information in dispute in some other venture. For example, it could sell or licence the information or teach it to other entities or companies for use on their own bridge climb proposals. Disclosure of the information in dispute would mean Skyhugger's competitors had gained valuable commercial information for free.

[38] Previous orders have said that the ordinary meaning of "undue" financial loss or gain under s. 21(1)(c)(iii) includes excessive, disproportionate, unwarranted, inappropriate, unfair or improper, having regard for the circumstances of each case. For example, if disclosure would give a competitor an advantage – usually by acquiring competitively valuable information –

[31] Skyhugger's initial submission, pp. 2-3.
[32] Skyhugger's reply submission, p. 2.
[33] Skyhugger's reply submission, p. 1. The Ministry did not say why the proposal did not proceed.

effectively for nothing, the gain to a competitor will be "undue."[34] Disclosure of the information in dispute in this case would, in my view, result in undue financial loss to Skyhugger and undue financial gain to its competitors for the purposes of s. 21(1)(iii).

Conclusion on s. 21(1)(c)

[39] The Ministry and Skyhugger have, in my view, provided objective evidence that is well beyond or considerably above a mere possibility of harm, which is necessary to establish a reasonable expectation of harm under s. 21(1)(c).[35] Their evidence establishes a direct link between the disclosure and the apprehended harm and that the harm could reasonably be expected to ensue from disclosure. Therefore, I find that the Ministry and Skyhugger have met their burden of proof and that s. 21(1)(c) applies to the information in dispute.

CONCLUSION

[40] For reasons given above, under s. 58(2)(c) of FIPPA, I require the Ministry to refuse Ziptrek access to all of the information in dispute. For clarity, this order applies both to the information that the Ministry decided to withhold under s. 21(1) and the additional information that Skyhugger wants withheld under s. 21(1), as highlighted in yellow in the version of the records that the Ministry provided to the OIPC in June 2019.

July 29, 2019

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File Nos.: F17-71350

[34] See, for example, Order 00-10, 2000 CanLII 11042 (BC IPC) at pp. 17-19. See also Order F14-04, 2014 BCIPC 31 (CanLII) at paras. 60-63, for a discussion of undue financial loss or gain in the context of a request for a bid proposal.
[35] *Community Safety*, at para. 54.