Order F24-23

CITY OF PORT ALBERNI

Alexander R. Lonergan
Adjudicator

March 27, 2024

CanLII Cite: 2024 BCIPC 30
Quicklaw Cite: [2024] B.C.I.P.C.D. No. 30

Summary: An applicant requested access to reports that the City of Port Alberni (City) received from SLR Consulting (Canada) Ltd. (SLR) about land that the City sought to purchase from Western Forest Products Inc. (WFP). SLR and WFP objected to disclosure, arguing that s. 21(1) (disclosure harmful to a third party's business interests) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) applies to most of the information in the reports. After considering SLR and WFP's positions, the City released a small amount of information while severing most of the information under s. 21(1). The adjudicator determined that the City is required to refuse to disclose most, but not all, of the disputed information under s. 21(1). The adjudicator ordered the City to disclose the rest of the information in dispute to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165, ss. 2(1), 21(1), 21(1)(a), 21(1)(b), 21(1)(c)(i), 21(1)(c)(ii), 21(1)(c)(iii), 23(1), 54.

INTRODUCTION

[1] The City of Port Alberni (City) hired SLR Consulting (Canada) Ltd. (SLR), to create reports about land that the City wished to purchase from Western Forest Products Inc. (WFP). An individual (the applicant) requested that the City provide him with access to the completed reports under the *Freedom of Information and Protection of Privacy Act* (FIPPA).[1]

[2] The City identified three reports in response to the applicant's request. The City notified SLR and WFP about the information that was relevant to them

[1] All sectional references in this Order refer to FIPPA unless otherwise noted.

and sought their positions under s. 23(1).[2] SLR and WFP initially objected to the City disclosing most of the information in the records under s. 21(1) (disclosure harmful to business interests of a third party).

[3] After considering the third parties' positions, the City decided that it was required to refuse access to almost all of the information in the records under s. 21(1). The City only disclosed parts of one report to the applicant, which I understand SLR and WFP do not object to.

[4] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the City's decision. Mediation did not resolve the matter and it proceeded to inquiry.

[5] The City and the applicant provided written submissions for this inquiry. The OIPC invited SLR and WFP, under s. 54, to participate in the inquiry as appropriate persons, and they both provided written submissions. The OIPC permitted WFP to submit some of its submission *in camera* (that is, material which only the adjudicator may see).

ISSUE AND BURDEN OF PROOF

[6] The issue I must decide in this inquiry is whether s. 21(1) requires the City to refuse to disclose the information in dispute.

[7] Under s. 57(1) of FIPPA, the City has the burden of proving that the applicant has no right of access to the information withheld under s. 21(1).

DISCUSSION

Background[3]

[8] The City is a local government located in central Vancouver Island. SLR is a corporation in the business of environmental consulting and land remediation. WFP is a corporation in the business of producing and selling building materials. WFP owns real estate assets in and near the City.

[9] WFP sold a former lumber mill site (Land) to the City. Some time before the sale completed, the City retained SLR to produce the three reports at issue in this inquiry. These reports are about the environmental conditions of the Land

[2] Section 23 specifies when and how a public body *must* or *may* give notice to third parties when the public body believes the record contains information that may be excepted from disclosure under ss. 18.1, 21 or 22.

[3] This background information is based on the information provided in the City, SLR, WFP, and the applicant's submissions.

and its vicinity, the suitability of the Land for real estate development, and SLR's recommendations for environmental remediation work.

Records and Information in Dispute

[10] In response to the applicant's request, the City identified three records:

1. A report dated January 29, 2021 (the January 29 Report);
2. A report dated April 30, 2021 (the April 30 Report); and
3. A report dated August 4, 2021 (the August 4 Report).

[11] After considering the third parties' positions, the City refused access to all of the information in the January 29 Report and the August 4 Report but only refused access to some information in the April 30 Report.

[12] In his inquiry submission, the applicant says that he no longer disputes any of the severing in the April 30 Report. He also says that he no longer disputes the decision to refuse him access to the parts of the January 29 Report that WFP does not want disclosed.[4] As the applicant no longer wants that information, I conclude the City's decision to refuse him access to it under s. 21(1) is no longer in dispute and I will make no decision about it.

[13] However, the applicant is still seeking access to some other information withheld in the January 29 Report and the entire August 4 Report. Therefore, this is the only information remaining in dispute for this inquiry.

[14] In reply to the applicant's submission, WFP says that it no longer objects to the City disclosing the portions of the January 29 Report that remain in dispute. Additionally, WFP says that it takes no position on the City's decision to refuse access to the August 4 Report. WFP takes this position because the City told WFP that there is no information about WFP in the August 4 Report and did not provide a copy of it to WFP.[5] Therefore, I understand WFP's position to be that it still objects to disclosing any information in the August 4 Report that was supplied by WFP to the City, if any such information exists.

[15] SLR asserts that the City must refuse to disclose all of the information in the January 29 Report and the August 4 Report.[6]

[16] I will refer to the January 29 Report and the August 4 Report collectively as the "Reports".

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[4] Applicant's submission at pp. 2 and 4. The severing in the January 29 Report that he no longer disputes is information that WFP says must be withheld on p. 1, part of pp. 2, 3, 4, 5 and 6 and all of pp. 10, 11, 13, 15, and 17.
[5] WFP's initial submission at paras. 8 and 10; and WFP's final submission at para. 2. WFP says it has never seen that report and it was told by the City that it contains no information about WFP.
[6] SLR's initial submission at p. 3.

[17] The disputed information includes a summary of services performed by SLR, a description and analysis of the structural and environmental conditions of the Land, a discussion of possible uses for the Land, an outline of the applicable regulatory framework, possible funding sources, and recommended remediation steps. The disputed information also includes costing and scheduling projections if SLR were to perform the remediation work.

Section 21(1) - Harm to Third Party Business Interests

[18] Section 21(1) requires a public body to refuse to disclose information if disclosure could be reasonably expected to harm the business interests of a third party. In relation to an access request under FIPPA, a "third party" is any person, group of persons or organization other than the person who made the request or a public body.[7] In this matter, both WFP and SLR are third parties.

[19] The parts of s. 21(1) that are relevant to this inquiry are 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
>
> . . .
>
> (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
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> (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, . . .

[20] Past orders have established a three-part analytical framework to determine the applicability of s. 21(1), which I will adopt for this matter. The City must satisfy all three parts of the test in order for the information to be properly withheld under s. 21(1):

1. Disclosing the information at issue would reveal the type of information listed in s. 21(1)(a);
2. The information at issue was supplied, implicitly or explicitly, in confidence under s. 21(1)(b); and

[7] See Schedule 1 of FIPPA for definitions.

3. Disclosing the information at issue could reasonably be expected to cause one or more of the harms set out in s. 21(1)(c).[8]

Type of Information – s. 21(1)(a)

[21] The City and the third parties varyingly characterize the information as "financial", "commercial", "scientific" and "technical", information.[9] The applicant did not directly discuss how this information should be characterized. Although FIPPA does not define these terms, past orders have considered the meaning of most of them. I will consider each category independently.

[22] "Financial information" relates to prices charged for goods and services, assets, liabilities, expenses, cash flow, profit and loss data, operating costs, financial resources, or arrangements.[10]

[23] Some of the disputed information consists of cost estimates for SLR's recommended environmental remediation actions. This information is about the City's estimated costs if it were to specifically hire SLR to perform this work. Given that this information is specifically about the price of SLR's services, I find that it is financial information about SLR.

[24] "Commercial information" relates to a commercial enterprise but need not be proprietary in nature or have an independent market or monetary value. The information itself must be associated with the buying, selling or exchange of the entity's goods or services.[11]

[25] The records contain a description of services that SLR agreed to provide to the City. Elsewhere, there are descriptions of services that SLR offers to provide in the future. I accept that this is commercial information about SLR because it is associated with the use of SLR's goods and services. This finding is consistent with past orders that characterized lists of a third party's agreed services as its commercial information.[12]

[26] "Technical information" is information belonging to an organized field of knowledge falling under the general categories of applied science or mechanical arts. Technical information usually involves information prepared by a

[8] Order 03-02, 2003 CanLII 49166 (BC IPC); Order F17-14, 2017 BCIPC 15 (CanLII) at para. 9; and Order F22-33, 2022 BCIPC 37 (CanLII) at para. 25.
[9] SLR's initial submission at p. 6-7; WFP's initial submission at paras. 24-28; and City's submission at p. 2.
[10] Order F22-35, 2022 BCIPC 39 (CanLII) at para. 82. Order F22-63, 2022 BCIPC 71 (CanLII), at para. 33; Order F17-41, 2017 BCIPC 45 (CanLII), at para. 59.
[11] Order 01-36, 2001 CanLII 21590 (BC IPC), at para. 17; and Order F08-03, 2008 CanLII 13321 (BC IPC), at para. 63.
[12] Order 03-04, 2003 CanLII 49168 (BC IPC), at para. 22.

professional with the relevant expertise, and describes the construction, operation or maintenance of a structure, process, equipment, or entity.[13]

[27] A substantial amount of the disputed information describes applied, structural, or hydrogeological engineering problems and solutions. The Reports include many descriptions of equipment, structures, and processes jointly written by a professional agrologist and a professional engineer on behalf of SLR. Other information is about regulatory compliance processes which required agrology and engineering expertise to prepare. I am satisfied that this information is technical information of SLR.

[28] I am not satisfied that all of the disputed information can be characterized as financial, commercial, or technical information. Therefore, I must also consider whether this remaining information may be properly characterized as "scientific".

[29] I am not aware of any orders that closely considered the definition of "scientific information" in the context of FIPPA. In several matters, former Commissioner Flaherty determined that environmental sampling was both "scientific" and "technical" information.[14] Similarly, Commissioner McEvoy determined in Order F10-06 that veterinary testing of fish samples and information about related veterinary treatment programs was properly characterized as scientific or technical in nature.[15]

[30] The modern approach to statutory interpretation requires the term "scientific information" to be read in its entire context and according to its grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of the legislature.[16] The intent of FIPPA and its legislative purposes are identified in s. 2(1) which are to "make public bodies more accountable to the public" and to "protect personal privacy." Those purposes are achieved, in part, by "giving the public a right of access to records" and by "specifying limited exceptions to the right of access."[17]

[31] As a starting point, the *Canadian Oxford Dictionary* defines the adjective "scientific" as follows:

> **1 a** (of an investigation etc.) according to rules laid down in exact science for performing observations and testing the soundness of conclusions.
> **b** systematic, accurate. **2** used in, engaged in, or relating to (esp. natural)

[13] Order F10-06, 2010 BCIPC 9 (CanLII), at para. 35; Order F12-13, 2012 BCIPC 18 (CanLII), at para. 11; and Order F23-32, 2023 BCIPC 38 (CanLII), at para. 18.
[14] Order No. 56-1995, 1995 BCIPCD No. 26 at p. 5 (petition for judicial review dismissed); Order No. 57-19951995 CanLII 19204 (BC IPC), at p. 4; Order No. 67-1995, 1995 CanLII 390 (BC IPC) at p. 4; and Order No. 130-1996, 1996 CanLII 370 (BC IPC), at p. 3.
[15] Order F10-06, 2010 BCIPC 9 (CanLII), at para. 36.
[16] *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) at para. 21; and *Castillo v. Castillo*, 2005 SCC 83 (CanLII), at para. 22.
[17] *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, at ss. 2(1)(a) and (c).

> science (*scientific discoveries; scientific terminology*). **3** constituted of scientists *(the scientific community*).[18]

[32] I note that Ontario's FIPPA contains an equivalent provision to s. 21(1). The Information and Privacy Commissioner of Ontario has used the following definition of "scientific information":

> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.[19]

[33] In my view, the Ontario Commissioner's definition accords with the grammatical and ordinary use of "scientific information" and does not appear to substantially differ from the relevant dictionary definition. Therefore, I will adopt this same definition of "scientific information" for the present analysis.

[34] Most of the remaining information consists of SLR's explanations of the Land's chemical, biological, and environmental characteristics. Elsewhere, SLR recommends specific testing processes that would answer critical unknown data points. I am satisfied that this information is properly characterized as the scientific information of SLR.

[35] I can see that a very small amount of information in the August 4 Report is historical information about the biological, chemical, and structural characteristics of the Land during WFP's ownership of it. Furthermore, WFP is the party that gathered this information and shared it with the City under certain conditions. The source and nature of this information satisfy me that it is the technical and scientific information of WFP.

[36] In summary, I find that almost all of the disputed information is scientific, technical, financial, or commercial information of or about a third party, satisfying the first requirement of the s. 21(1) analysis.

[37] A small amount of the information identifies SLR as the author of the disputed records and briefly explains why the reports were written. Elsewhere, the information consists of disclaimers and boilerplate acceptable usage statements. It is not apparent to me, and the parties do not persuasively explain, how this is technical, scientific, financial, or commercial information. I find that this information is none of the types of information listed in s. 21(1)(a).

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[18] *Canadian Oxford Dictionary*, 2d ed, *sub verbo* "scientific".
[19] Order PO-4164, 2021 CanLII 63771 (ON IPC) at para. 25, citing Order PO-2010, 2002 CanLII 46412 (ON IPC) at p. 3; The New Brunswick's then-Commissioner also applied the same definition in its *Report of Findings*: 2010-105-AP-048, 2012 NBOMB 8 (CanLII), at para. 114.

Supplied in confidence – s. 21(1)(b)

[38] The second step of the analysis is to determine whether the disputed information was supplied to the City in confidence. Past orders have conducted the s. 21(1)(b) analysis by first considering whether the information was "supplied" by the third party and then whether it was supplied "in confidence", both of which are required to engage s. 21(1)(b).[20] I will apply the same two-step approach to s. 21(1)(b) in this matter.

Was the information "supplied"?

[39] Information is considered "supplied" under s. 21(1)(b) if it is "provided or furnished" to the public body.[21]

[40] It is clear from the material before me, and the parties do not dispute, that WFP originally provided some information directly to the City who in turn gave it to SLR. SLR then summarized and analyzed this information, added its own explanations and suggestions, and then provided the disputed records directly to the City. I find that all of the disputed information was supplied to the City by WFP, SLR, or both of them depending on the specific information at issue.

Was the supply of information "in confidence"?

[41] Under s. 21(1)(b), the City must show that the disputed information was supplied in confidence, either implicitly or explicitly. To do so, the City must show that the information was supplied under an objectively reasonable expectation of confidentiality, by the supplier of the information, at the time the information was supplied.[22]

[42] A reasonable expectation of confidentiality can be shown by pointing to express assurances of confidentiality or by establishing an implicit expectation after considering all of the relevant circumstances. Evidence of a party's subjective intentions with respect to confidentiality is insufficient.[23]

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[20] Order 01-39, 2001 CanLII 21593 (BC IPC), at para. 26, upheld and cited by *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner),* 2002 BCSC 603; and Order F14-28, 2014 BCIPC 31 (CanLII) at paras. 17-18.
[21] Order 01-20, 2001 CanLII 21574 (BC IPC), at para 93.
[22] Order 01-36, 2001 CanLII 21590 at para. 23.
[23] Order 01-39, 2001 CanLII 21593 (BC IPC), at para. 28, citing *Re Maislin Industries Ltd. and Minister for Industry* (1984) 1984 CanLII 5386 (FC), 10 DLR (4th) 417 (FCTD) and *Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs)* (1997) 1997 CanLII 5125 (FC), 148 DLR (4th) 356 (FCTD).

Parties' Positions, s. 21(1)(b)

[43] The City argues that a non-disclosure agreement that it previously executed with WFP (2019 NDA) extends to the Reports it received from SLR. The City says that this is because the 2019 NDA restrains disclosure of "all written information disclosed to the City".[24] I understand the City is arguing that all of the disputed information it received from SLR and WFP was supplied explicitly in confidence.

[44] The applicant says that the City now owns the Land and therefore any information about the Land belongs to the tax-paying public.[25] In essence, this is an argument that a third party cannot reasonably expect confidentiality over information about an asset if that asset was sold to a public body. I will consider this argument below when determining whether the third parties' expectations of confidentiality were objectively reasonable.

[45] Both WFP and SLR submit that they expected the City to keep the information that they supplied confidential.[26] Both provided affidavit material and other documents to support their positions.

Analysis and Findings, s. 21(1)(b)

[46] I accept that the 2019 NDA is persuasive evidence of an express, mutual, and reasonable expectation of confidentiality over the information WFP supplied to the City. WFP supplied this information before the City had purchased the Land which means that there was a risk the deal would not complete. If the deal did not complete, then I am satisfied both parties would want to keep this information confidential to prevent other prospective buyers from using it to their advantage in their efforts to buy the Land. It makes sense that WFP would make the City sign an NDA that covers this information to protect its interests as the seller of the Land. In light of those concerns, I consider WFP's expectation of confidentiality to be objectively reasonable.

[47] However, the information supplied by WFP only comprises a small amount of the information that is still in dispute. The larger question at this stage of the analysis is whether SLR reasonably expected the City to keep its scientific, technical, commercial, and financial information confidential when SLR supplied that information to the City.

[48] I am not persuaded by the City's argument that the 2019 NDA applies to everything in the Reports. WFP attached a copy of the 2019 NDA to its affidavit evidence which allows me to see what it actually says. I cannot describe what the

[24] City's submission at p. 2.
[25] Applicant's request for review at p. 1.
[26] WFP's initial submission at para. 15; and SLR's initial submission at p. 3.

2019 NDA actually says without revealing material provided to me *in camera.* In my view, neither the list of parties to the 2019 NDA, nor its definition of "Confidential Information", can possibly be interpreted as extending its effects to the whole of the Reports or to SLR. However, there is still other evidence I have to consider.

[49] The 2019 NDA was not the only agreement purportedly restraining the use of the disputed information. SLR provided affidavit evidence which refers to a contract between itself and the City named the "Agreement for Environmental Services". SLR says that this contract explicitly states that the disputed records were provided to the City in strict confidence.[27] Although a copy of the Agreement for Environmental Services is not before me, I do have a description of its effects, a reference to it in a sworn affidavit, and a reference to it in the disputed records. Based on this material, I accept that this agreement existed and that it expressly assured SLR that its supplied information would be kept confidential by the City.

[50] The disputed records provide additional evidence of SLR's expectations of confidentiality. For example, most pages of the Reports are marked with the word "confidential". Furthermore, both Reports contain a statement that "Other than by [the City] and as set out herein, copying or distribution of this report or use of or reliance on the information contained herein, in whole or in part, is not permitted unless payment for the work has been made in full and express written permission has been obtained from SLR."[28] I accept that all of this is persuasive evidence of a reasonable expectation of confidentiality on SLR's part.

[51] Past orders have considered whether a "mutuality of understanding" between a public body and a third party existed when assessing third party's expectations of confidentiality.[29] In this matter, I accept that the Agreement for Environmental Services and the confidentiality provisions in the Reports are persuasive evidence of a mutual understanding of confidentiality as between the City and SLR.

[52] Having considered the material and circumstances above, I am satisfied SLR supplied the information explicitly in confidence to the City, and that the City received it on that basis. Next, I must determine whether this expectation was reasonable.

[53] I understand one of the applicant's arguments to be that it was unreasonable for SLR to expect that information about the Land would remain

[27] SLR's initial submission at p. 3; and Affidavit #1 of D.M. at paras. 4 and 9.
[28] This excerpt was disclosed in open argument in SLR's initial submission at p. 7.
[29] Order 4-06, 2004 CanLII 34260 (BC IPC), at para. 53; and Order F19-24, 2019 BCIPC 26 (CanLII), at para. 28.

confidential considering that the City is a public body that now owns the Land.[30] I find this line of reasoning unpersuasive because it assumes that all of the disputed information is about the Land while disregarding what the disputed information reveals about SLR and WFP. The fact that the City bought the Land does not change the fact that disclosure would also reveal considerable information about the third parties.

[54] Furthermore, the 2019 NDA, the Agreement for Environmental Services, and the third parties' affidavit evidence clearly establish that the third parties expected they would suffer harm if the information were disclosed after the City bought the Land. These harms, which I will discuss in greater detail under the third step of the s. 21(1) analysis, were feared by SLR and WFP primarily because the disputed information reveals as much information about them as it does about the Land. In these circumstances, I find that the third parties' expectations of confidentiality were reasonable.

[55] In summary, I accept that all of the disputed scientific, technical, commercial, and financial information in the Reports was supplied explicitly in confidence, so s. 21(1)(b) applies.

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

[56] The last step of the s. 21(1) analysis is to determine whether disclosing the disputed information could be reasonably expected to result in any of the harms set out in s. 21(1)(c). If so, the City must refuse to disclose the disputed information. The standard of harm under s. 21(1)(c) is "a reasonable expectation of harm" which is "a middle ground between that which is probable and that which is merely possible."[31]

[57] The City does not need to prove on a balance of probabilities that the expected harms will actually happen. Instead, the City must establish that disclosure will result in a risk of harm that is well beyond the merely possible or speculative. Additionally, there must be a clear and direct connection between disclosure of the information in dispute and the harm alleged.[32] Whether this standard has been met depends on the circumstances of each matter because the unique probabilities and harms that are present will determine the type and amount of evidence that is sufficient.[33]

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[30] Applicant's request for review at p. 1.
[31] Order 10-20, 2001 CanLII 21574 (BC IPC) at para. 57; Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 38; and *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), [2012] 1 SCR 23, at para. 196; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at para. 58; and *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) [*Ontario*] at paras. 52-54.
[32] Order F07-15, 2007 CanLII 35476 (BC IPC), at para. 17.
[33] *Ontario, supra* note #31 at para. 54.

[58] In their submissions, the parties raise the harms set out under ss. 21(1)(c)(i), (ii) and (iii).[34] I will first consider s. 21(1)(c)(i) (harm to competitive or negotiating position), then, if needed, s. 21(1)(c)(iii) (undue financial loss or gain) and s. 21(1)(c)(ii) (similar information no longer being supplied to the public body).

Significant harm to competitive position or interference with negotiating position, s. 21(1)(c)(i)

[59] Section 21(1)(c)(i) says that the head of a public body must refuse to disclose the disputed information if doing so could reasonably be expected to harm significantly the competitive position, or interfere significantly with the negotiating position, of the third party.

[60] To engage s. 21(1)(c)(i), the expected harm must also be significant, because s. 21(1) does not operate to protect third parties from all negative effects that flow from their dealings with public bodies.[35] Significant harm under s. 21(1)(c)(i) is material harm looked at in light of the circumstances affecting the third party's competitive or negotiating position.[36]

Parties' Positions, s. 21(1)(c)(i)

[61] The City and SLR say that disclosing the disputed information would significantly harm SLR's competitive position and significantly interfere with SLR's negotiating position.[37]

[62] SLR explains that the City will soon need contractors to perform environmental remediation work on the Land that SLR wishes to perform. If SLR's competitors are able to access the disputed information, SLR says that those competitors could unfairly use this information while submitting competing bids for the remediation work.

[63] In response to these arguments, the applicant says that the prospective contracting work has already been awarded to SLR so there can be no harm to SLR's competitive position in respect of the Land's remediation work. The applicant points to several statements made by City employees which suggest that SLR has already been hired to complete some excavation work on the Land.[38] In reply to this argument, SLR explains that this excavation work is

[34] City's submission at p. 2; SLR's initial submission at p. 9; WFP's initial submission at para. 37; and Applicant's response submission at pp. 3 and 4.
[35] Order 00-22, 2000 CanLII 14389 (BC IPC) at p. 8; and Order F18-28, 2018 BCIPC 31 (CanLII) at para. 58.
[36] Order 00-10, 2000 CanLII 11042 (BC IPC), at p. 11.
[37] City's submission at p. 2; and SLR's initial submission at p. 3.
[38] Applicant's response submission at p. 2.

limited and distinguishable from the full range of remediation services that it recommended in the Reports.[39]

[64] Finally, the applicant argues that the sheer variety of approaches to remediation and the numerous development options for the Land means that it is too speculative to know whether the disputed information will be relevant or helpful for SLR's competitors' future bids.[40]

Analysis and Findings, s. 21(1)(c)(i)

[65] At the outset, I am satisfied by SLR's explanation that SLR has not yet secured contracts to perform all of the recommended remediation work. The fact that SLR wrote the Reports and has already performed some preliminary excavation work does not necessarily mean that SLR will be the successful proponent for most of the remediation work.

[66] The essence of the City's and SLR's argument is that disclosure would harm SLR's current competitive position by providing its competitors with the same knowledge that SLR already has. A longstanding principle under FIPPA is that disclosure to an applicant should be considered disclosure to the world,[41] so I accept that disclosure to the applicant would place this information in the hands of those competitors.

[67] Beginning with SLR's commercial and financial information, I do not consider the value of this information to be as speculative as the applicant submits. Disclosing this information would reveal SLR's costing strategies, funding sources, and its preferred approach to remediation of similar sites to the Land.[42] In my view, any sophisticated environmental remediation firm could use this information to determine the cost, speed, and methodologies used by SLR to accomplish similar remediation work while placing no reciprocal obligation on those competitors to disclose their own information.

[68] I find it reasonable to conclude that SLR's competitors could then use this information to mimic SLR's methodologies or undercut the cost of SLR's bids, whether in respect of the Land's remediation or in competitions for similar remediation work. Past orders have found that such outcomes constitute significant harm to a third party's competitive position.[43] In the circumstances of this matter, I am similarly satisfied that if SLR's competitors obtained this

[39] SLR's reply submission at p. 1; and Affidavit #2 of DM at para. 2.
[40] Applicant's submission at p. 4.
[41] Order 03-33, 2003 CanLII 49212 (BC IPC) at para. 44.
[42] Affidavit #1 of DM, at paras. 7, and 9-10.
[43] Order F09-22, 2009 CanLII 63564 (BC IPC) at para. 37; and Order F13-17, 2013 BCIPC 22 (CanLII) at paras. 35-37.

information, it could reasonably be expected to significantly harm SLR's competitive position.

[69] Turning to the disputed technical and scientific information of SLR, it is patently obvious that SLR will use this information to increase its chances of winning the remaining remediation work on the Land. SLR's competitors do not currently have access to this information, therefore, SLR's competitive position is currently one of advantage.[44] If this information is disclosed, I accept there is a reasonable expectation that SLR's competitive position could be significantly harmed because SLR's competitors would gain the same detailed knowledge of the Land that SLR currently possesses.

[70] I recognize that the City may ultimately proceed with an entirely different remediation plan than the one that SLR proposes. There is also uncertainty in the type and amount of information that the City will disclose in the competition for the remediation work. Despite this uncertainty however, I note that the scientific and technical information in this matter includes more than a suggested approach to remediation. It also describes the biochemical conditions of the Land, identifies missing information, and proposes further testing at specific locations on the Land. The extensive nature of the disputed scientific and technical information means that it can serve as a step-by-step guide as to how, where, and why the preliminary testing should be done.

[71] Therefore, given what the scientific and technical information reveals, I find disclosure of the information at issue could allow SLR's competitors to level the playing field regarding a successful bid for the Land's remediation work. This would completely eliminate SLR's existing competitive position. For these reasons, I find that disclosing the disputed scientific and technical information could reasonably be expected to significantly harm SLR's current competitive position regarding any further remediation work of the Land and its ability to compete for that work.

[72] In summary, I find that disclosing the disputed commercial, financial, scientific, or technical information could reasonably be expected to significantly harm SLR's competitive position under s. 21(1)(c)(i).

[73] I will next consider the City and SLR's arguments that disclosure would significantly interfere with SLR's negotiating position. I find their submissions generally frame the future remediation work as resulting from a competitive bidding process rather than one of negotiations between the City and its contractors. It is not apparent from the material before me who SLR must negotiate with, what their negotiating position is, and why disclosure would significantly interfere with that position. Therefore, I find that the City has not

[44] Affidavit #1 of DM at paras. 4 and 8; and Affidavit #2 of DM at para. 4.

established that disclosure of the information in dispute would significantly interfere with SLR's negotiating position.

[74] Thus far, I have only considered the impact of disclosure to SLR. However, I note that both WFP and the City argued that disclosure would harm WFP's interests under ss. 21(1)(c)(i) and (iii).[45] As discussed above, these issues are now irrelevant because the information whose disclosure WFP says would lead to these harms is no longer sought by the applicant and therefore no longer in dispute.[46]

Undue Financial Gain or Loss, s. 21(1)(c)(iii)

[75] Section 21(1)(c)(iii) says that the head of a public body must not disclose information if it could reasonably be expected to result in undue financial loss or gain to any person or organization. Undue gains or losses are excessive, disproportionate, unwarranted, inappropriate, unfair, or improper, having regard to the circumstances of each case. Undue gains include advantages received by a competitor effectively for nothing.[47]

[76] I determined that the City must refuse to disclose all of the commercial, financial, scientific, and technical information of SLR under s. 21(1)(c)(i) because disclosure can be reasonably expected to significantly harm SLR's competitive position. Therefore, it is unnecessary for me to additionally consider whether the City must refuse to disclose this information under ss. 21(1)(c)(iii) or (ii).

No longer supplied, s. 21(1)(c)(ii)

[77] Section 21(1)(c)(ii) says that the head of a public body must refuse disclosure if doing so could reasonably be expected to 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.

Parties Positions, s. 21(1)(c)(ii)

[78] There remains a small amount of technical and scientific information of WFP in the August 4 Report that I found WFP supplied in confidence to the City, who then forwarded it to SLR for analysis and recommendations.

[79] The City expects that disclosing this information will lead to the City no longer receiving similar information in other transactions.[48] The City additionally

[45] City's submission at p. 1.
[46] WFP's reply submission at para. 1.
[47] Order F14-58, 2014 BCIPC 62 (CanLII), at para. 54; and Order 00-10, 2000 CanLII 11042 (BC IPC) at pp. 17-19.
[48] City's submission at p. 3.

says that it is "inconceivable" that WFP or another sophisticated commercial entity would supply the City with similar information about their unsold assets without a reasonable expectation that the City will keep this information confidential.[49]

[80] WFP has not seen the August 4 Report, so it does not know what exactly it says. However, WFP says generally that if the City's assurances of confidentiality cannot be trusted when WFP shares its confidential information, then this would harm its relationship with the City and that WFP would be unwilling to provide such "full and frank disclosure" in the future.[50]

Analysis and Findings, s. 21(1)(c)(ii)

[81] One entity's unwillingness to supply information without assurances of confidentiality is typically not enough to establish that similar information will not be supplied to a public body under s. 21(1)(c)(ii). This is particularly the case if there are other incentives for supplying the disputed information or multiple entities who can supply similar information.[51] The fact that one third party insists on confidentiality does not mean that similar information will not be supplied by other third parties in the future. Therefore, to establish that s. 21(1)(c)(ii) applies in this matter, the City must show that disclosing the information at issue could reasonably be expected to result in other entities, and not just WFP, becoming unwilling to supply similar information.

[82] In this case, WFP held an asset that the City sought to purchase. At the time WFP supplied information to the City, the City had to weigh the time and cost savings of receiving information from WFP in confidence against the considerable cost and delay of procuring this information itself. WFP's position as a seller meant that it had little reason to supply this information, especially given that it could instead require the City to procure this information at its own cost. This context is important because, when considering whether other entities would be willing to supply similar information to the City in the future, I must recognize that those other entities are commercial real estate owners who normally would not supply this information to a prospective buyer.

[83] The *in-camera* portions of WFP's evidence explain why commercial real estate sales typically require purchasers (such as the City in this case) to undertake all of their own investigations, as opposed to the seller supplying scientific or technical information as WFP did.[52] I cannot repeat these explanations without revealing the actual content of the material received *in*

[49] City's submission at p. 2.
[50] Affidavit #1 of AS, at paras. 26 and 27.
[51] Order F20-41, 2020 BCIPC 49 (CanLII) at paras. 57-58; and Order F20-55, 2020 BCIPC 64 (CanLII) at para. 47.
[52] Affidavit #1 of AS at para. 24.

camera, but WFP's evidence satisfies me that there are universal business concerns among commercial sellers of real estate that strongly weigh against supplying similar information if those sellers cannot be certain that the information will be kept confidential. This evidence helps me to understand that those concerns are not unique to WFP and why WFP would be unwilling to supply similar information in the future.

[84] I have also considered whether WFP supplied this information under a financial incentive or a contractual obligation. Some past orders have declined to apply s. 21(1)(c)(ii) where the supply of information was made under these circumstances.[53] In this case, WFP explains that it supplied this information at the City's request in order to further its negotiations with the City.[54] There is no evidence or argument before me that WFP was statutorily required, contractually obliged, or financially incentivized to supply this information to the City when it did. The parties' evidence establishes WFP was not expected to provide this information to the City and that the City, as the potential buyer of the Land, would have ordinarily been required to do its own research and due diligence. Therefore, the whole of the material before me satisfies me that WFP supplied this information voluntarily once it had the City's assurances of confidentiality.

[85] Having considered the circumstances and submissions described above, I am persuaded that disclosing WFP's scientific and technical information, as it appears in the August 4 Report, could reasonably be expected to lead to similar information no longer being supplied to the City in the future.

[86] Next, I must determine whether it is in the public interest for similar information to continue to be supplied. Few orders have considered what kind of information is in the "public interest" under s. 21(1)(c)(ii). In Order 03-05, former Commissioner Loukidelis found that the public interest threshold under s. 21(1)(c)(ii) was met where information from similar third-party businesses was beneficial and of value to the public body, and because that kind of information was relevant to the public body's activities.[55]

[87] I can see that the technical and scientific information supplied by WFP allowed the City to begin development and remediation planning without incurring the upfront cost of testing the Land. The City argues that not receiving similar information would require it to hire consultants to complete work that was already completed by others. The City says that the cost of obtaining similar information using its own resources would be costly to the point of causing financial hardship to the City and taxpayers.[56]

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[53] See for example, Order F15-53, 2015 BCIPC 56 (CanLII), at para. 32; and Order 03-05, 2003 CanLII 49169 (BC IPC), at paras. 15-17.
[54] Affidavit #1 of AS at para. 14.
[55] Order 03-05, 2003 CanLII 49169 (BC IPC) at para. 20.
[56] City's submission at p. 3.

[88] I have also considered the large scope of the Land remediation project, the size and means of the City, and the expense of reproducing information that a seller would otherwise be willing to supply confidentially. Scientific and technical information about real estate assets that the City seeks to purchase with public funds is clearly relevant to the City's real estate development activities. Additionally, receiving such information as early and as cost-effectively as possible leads to significant time and cost savings to the City. Therefore, I find that it is in the public interest for similar information to continue to be supplied to the City.

[89] In summary, I find that disclosure of WFP's technical and scientific information in the August 4 Report could reasonably be expected to result in similar information no longer being supplied to the City when it is in the public interest that similar information continue to be supplied. Therefore, the City must refuse to disclose this information under s. 21(1)(c)(ii).

Conclusions, s. 21(1)

[90] The City has established that almost all of the information in dispute is scientific, technical, financial, or commercial information of or about a third party under s. 21(1)(a), and that this information was supplied to the City explicitly in confidence under s. 21(1)(b).

[91] I find that disclosing this information can be reasonably expected to significantly harm SLR's competitive position under s. 21(1)(c)(i). Disclosing some scientific or technical information of WFP can be reasonably expected to result in similar information no longer being supplied to the City despite it being in the public interest for similar information to continue to be supplied, which engages s. 21(1)(c)(ii). The City must refuse to disclose all of this information to the applicant under s. 21(1).

[92] A small amount of disputed information is not the financial, commercial, scientific, or technical information of or about any third parties, so s. 21(1)(a) does not apply to it. The City has not established that all three parts of s. 21(1) apply to this information so it is not required or authorized to refuse to disclose this information under s. 21(1).

CONCLUSION

[93] For the reasons given above, I make the following order under s. 58 of FIPPA:

1. Subject to item 2 below, the City is required under s. 21(1) to refuse to disclose the information in dispute to the applicant.

2. The City is not required to refuse to disclose the information I have

highlighted, in green, in the copy of the records provided to the City with this order. Therefore, the City must give the applicant access to the highlighted information.

3. When the City complies with item 2 above, it must concurrently provide the OIPC Registrar of Inquires with a copy of the records and any accompanying cover letter sent to the applicant.

[94] Under s. 59 of FIPPA, the City is required to give the applicant access to the information that it is not required to withhold by May 10, 2024.

March 27, 2024

ORIGINAL SIGNED BY

Alexander R. Lonergan, Adjudicator

OIPC File No.: F22-88646