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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 230-1998
April 27, 1998

INQUIRY RE: A decision of the Real Estate Council of British Columbia to withhold records from an applicant.

Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 250-387-5629
Facsimile: 250-387-1696
Web Site: http://www.oipcbc.org

1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on January 30, 1998 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of the decision of the Real Estate Council of British Columbia (the Council) to withhold from an applicant copies of Keystone Realty's annual "Accountant's Report," which had been submitted over a period of nine to ten years.

2. Documentation of the inquiry process

On August 27, 1997 the applicant requested copies of the Annual Accountant's Report for the previous 10 years. On September 18, 1997 the Council informed the applicant that the records would not be disclosed on the basis of section 21(1) of the Act.

The applicant requested a review by the Office of this decision on October 8, 1997. On December 29, 1997 the applicant requested an inquiry before the Commissioner and on January 6, 1998 a Notice of Written Inquiry was sent to the applicant, the Council, and to Keystone Realty (the third party).

3. Issue under review and the burden of proof

The issue under review is the Real Estate Council's application of section 21 of the Act to the disclosure of these records. It reads as follows:

Disclosure harmful to business interests of a third party

21(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party,

(b) that is supplied, implicitly or explicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(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, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

...

(3) Subsections (1) and (2) do not apply if

(a) the third party consents to the disclosure, or

(b) the information is in a record that is in the custody or control of the British Columbia Archives and Records Service or the archives of a public body and that has been in existence for 50 or more years.

Section 57 of the Act establishes the burden of proof in this matter. Section 57(1) of the Act provides that at an inquiry into a decision to refuse an applicant access to all or part of the record, it is up the head of the public body, in this case the Council, to prove that the applicant has no right of access to the record or part thereof.

4. The records in dispute

The records in dispute are the annual Accountant's Reports submitted by Keystone Realty for the past decade. These reports are submitted in accordance with the *Real Estate Act* and Regulations.

5. The applicant's case

The applicant is seeking the annual reports, including financial statements, filed by Keystone Realty Ltd. for the past ten years. His position is that the information is "innocuous and would not harm Keystone's business interests." (Submission of the Applicant, p. 3) He is an unemployed business executive who formerly worked for Keystone. (Affidavit of the Applicant) It would appear that he has outstanding claims against his former employer.

Keystone is a corporation and a licensed real estate agent, which under the *Real Estate Act* must nominate an individual(s), known as the nominee, to represent the corporation. The applicant worked for Keystone for ten years and for almost eight of those years occupied a full-time position as the nominee for Keystone. (Submission of the Applicant, pages 4 to 6) As nominee, he filed certain reports with the Council as required by the *Real Estate Regulations*. The main requirement is to file audited financial statements and a particular set of forms. (Submission of Applicant, pages 8 to 10) As nominee for Keystone, the applicant was required to sign the forms and "thus saw the information contained in them." (Submission of the Applicant, page 11)

I have discussed below the applicant's submissions on the application of section 21 of the Act.

6. The Real Estate Council's case

The Council acknowledges that the applicant was the representative of the third party for all purposes under the *Real Estate Act* until April 21, 1997 at which point he ceased being its legal representative:

> It is the submission of the public body that, because the applicant is no longer the nominee, he no longer had [*sic*] the right to access the financial records about the third party on file with the public body, as those records are absolutely privileged [on the basis of section 8 of the *Real Estate Act*].

I have presented below the Council's submissions on the application of section 21 of the Act.

7. The third party's case

Keystone Realty did not make an initial or reply submission in this inquiry.

8. Discussion

Section 21: Disclosure harmful to business interests of a third party

The applicant submits that the records in dispute do not meet the three-part test set out under section 21 of the Act.

Section 21(1)(a): that would reveal (i) trade secrets of a third party, or (ii) commercial, financial, labour relations, scientific or technical information of a third party,

There is no disagreement that the records constitute financial information of a third party for the purposes of section 21(1)(a) of the Act.

Section 21(1)(b) that is supplied, implicitly or explicitly, in confidence,

I do not have sufficient information to determine whether this branch of the test has been met. The Council relies solely on section 8 of the *Real Estate Act* which cloaks all "replies and communications" to the superintendent or Council with absolute privilege but does not address whether annual financial statements, which are required to be filed under the *Real Estate Act* and Regulations, constitute "communications" for the purposes of section 8 of the Act.

However, it is not necessary to decide whether the information was supplied implicitly or explicitly in confidence for the purposes of section 21(1)(b) because the Council has failed to establish the third branch of the test, namely that disclosure of the information could reasonably be expected to cause harm for the reasons outlined below.

Section 21(1)(c): the disclosure of which could reasonably be expected to (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party ... (iii) result in undue financial loss or gain to any person or organization....

Under section 21(1)(c), the applicant argues that disclosure of reports to him would not result in significant harm to Keystone's competitive or negotiating position, especially since the company is now effectively bankrupt. (Submission of the Applicant, pp. 20-22) Since the applicant anticipates that Keystone will argue that disclosure would interfere with negotiations with its creditors, the applicant submits that the financial statements are "devoid of much details, these figures have little meaning, and could not objectively interfere with creditor negotiations...." (Submission of the Applicant, page 24) According to the applicant, the potential harm would not be "significant" as required

under this subsection. See Order No. 45-1995, June 13, 1995, p. 6; Order No. 57-1995, October 4, 1995, p. 5. The applicant argues similarly that there is no risk that Keystone will suffer "an undue financial loss from disclosure" or that it creditors "would make an undue financial gain...." (Submission of the Applicant, p.8)

The Council's submission is that disclosure of the records in dispute "could reasonably be expected to interfere significantly with the third party's competitive or negotiating position." The applicant points out in reply that the Council has supplied no evidence, never mind detailed or convincing evidence, in this regard: "There is no reasonable prospect of significant harm to, or interference with, Keystone's competitive and negotiating positions."

In its own reply submission, the Council suggests that the applicant is contemplating litigation against Keystone, his former employer, which would result in undue financial loss or gain. I agree with the applicant's submission that there is no evidence to establish that disclosure of the information could reasonably be expected to cause significant harm or result in undue financial loss or gain.

It is not sufficient for the public body to submit that "disclosure of the financial information could reasonably be expected to harm the competitive position of the third party or interfere significantly with the negotiating position of the third party" without adducing some evidence to support that expectation. The evidence before me indicates that Keystone is in effect bankrupt, having "closed its doors on February 28, 1997 and abandoned its premises leaving behind all of the leasehold improvements and furniture that was the property of Keystone for the landlord." The evidence indicates that Keystone has not operated a business since that time and there is no prospect of it being revived. As at September 15, 1997, the principals of the company were trying to decide between early winding up of the company or a simple declaration of bankruptcy.

The Council submits that, while Keystone is no longer in the real estate industry, the company may have other business interests or may be winding down the company and negotiating with creditors. In the absence of evidence, from either the Council or Keystone, this is a speculative argument. I have no basis upon which to conclude that disclosure of the information could reasonably be expected to interfere significantly with Keystone's competitive or negotiating position. I find that in this inquiry the Council has not met its burden of establishing that disclosure of the records would significantly harm the negotiating position of Keystone, nor result in undue financial harm to Keystone.

9. Order

I find that the head of the Real Estate Council of British Columbia is not required to refuse access to the records under section 21 of the Act. Under section 58(2)(a) of the Act, I require the head of the Real Estate Council of British Columbia to give the applicant access to the records.

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David H. Flaherty
Commissioner

April 27, 1998