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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 320-1999
July 29, 1999

INQUIRY RE: A request for access to a letter of agreement between a school district and a marketing company

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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 July 5, 1999 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 a decision by School District No. 42 (Maple Ridge-Pitt Meadows) (the School District) to refuse to disclose some information in its letter of agreement with Spectrum Marketing Corporation (the third party).

2. Documentation of the inquiry process

On December 2, 1998 the applicant submitted a request to the School District for the "final contracts with Spectrum Marketing Corporation, and the possible future contracts with Coca-Cola or Pepsi companies."

On January 6, 1999, after consulting the third party and considering other relevant factors, the School District disclosed a severed copy of its letter of agreement with the third party. All information in the record was disclosed, except for the third party's confidential negotiating process and the commission rate, which were withheld under sections 17 and 21 of the Act.

The applicant submitted a request for review to this Office, dated February 1, 1999, since she did not accept that any information in a contract with a public body should be withheld.

The matter was not resolved during the mediation process. However, the parties agreed to extend the inquiry deadline to June 25, 1999 to allow the applicant more time to

consider the matter. At the request of the School District, and with the consent of the applicant, the Executive Director of my Office granted a further extension of the inquiry deadline to July 5, 1999.

3. Issue under review and the burden of proof

The issue to be reviewed in this inquiry is the School District's application of sections 17 and 21 of the Act to its letter of agreement with the third party.

The relevant provisions of the Act are:

Disclosure harmful to the financial or economic interests of a public body

17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the

government of British Columbia or the ability of that government to manage the economy, including the following information:

(a) trade secrets of a public body or the government of British Columbia;

(b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;

…

(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;

….

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

….

Section 57 of the Act establishes the burden of proof on the parties in this inquiry.

Under section 57(1), where access to information in the record has been refused under section 17 or 21, it is up to the public body to prove that the applicant has no right of access to the record or part of the record. Therefore, the School District has the burden of proof in this inquiry.

4. The record in dispute

The record in dispute is a nine-page letter of agreement between the School District and Spectrum Marketing Corporation. The entire contract, as it pertains to the School District itself, has been disclosed to the applicant, except for less than one page which describes the services that Spectrum Marketing will perform for the School District and a percentage commission rate to be paid to Spectrum Marketing for services rendered.

5. The applicant's case

The applicant wants the information that remains in dispute from the contract, because it is in the public interest:

> School District No. 42 is considering the possibility of a **ten year** exclusive contract with a cold beverage company (Coke or Pepsi). Spectrum Marketing Corporation has been hired by the school board to negotiate such a contract. The precedent that will be set by such an agreement and the ramifications of such an expansive contract will affect my children most of their school life.

The applicant contends that the concept of corporate sponsorship in provincial schools is a controversial issue and a hot topic: "I believe it is inherently wrong to protect third party interests at the expense of our public institutions."

The applicant enriched her initial argument in her reply submission:

> Controversy surrounded this partnership with Spectrum and the School District, when parents were first apprised of its initiative. The Board was questioned why it would hire Spectrum and not negotiate with Coke or Pepsi directly. The Board's position was that they were confident that they could negotiate a better deal through Spectrum. The commissions paid to Spectrum, the particulars connected to this agreement, and the very nature of the contract, should be made public to hold the School District accountable to the public interest. This agreement with Spectrum is very different from other records, with respect to its intended use. This deal opens the flood gates to corporate sponsorship in our schools. This contract will broker a multi million dollar deal that is unprecedented in School District 42. It is in the public interest to know the details of this new venture as it is setting a precedent. The effect of this particular contract is many faceted. Its scope may affect government funding to schools, our children's health with respect to caffeine and sugar consumption, and it may be responsible for compromising the integrity of the school system. The ramifications of not disclosing the contents of this entire agreement are wrong. This **is** the document that the public should see. It does not have a historical kinship to any others in our School District.

The applicant wants full transparency for School District transactions.

I have presented below the applicant's submissions on the application of various sections of the Act to the information in dispute.

6. School District No. 42's case

The School District submits that it considered the following factors in deciding not to release the information in dispute:

- the general purpose of the legislation;
- whether the request could be satisfied by severing the record and providing as much information as is reasonably practicable;
- the School Board's (the Board) historical practice with respect to the release of similar types of records;

- the nature and contents of the record and the extent to which the record is significant and/or sensitive to the Board;
- whether the disclosure of the information would increase public confidence in the operation of the Board;
- the age of the record;
- whether there was a sympathetic or compelling need to release the record;
- whether previous orders of the Information and Privacy Commissioner ("the Commissioner") have ruled that similar types of records or information should or should not be subject to disclosure;
- the actual wording of Section 21;
- the circumstances in which the information contained in the record were provided to the Board and the impact that disclosure might reasonably be expected to have on the Board and on others; and
- the representations received from the third party whose interests could be affected by the disclosure of the record.

In its reply submission, the School District emphasized that it already has cold beverage contracts for its individual schools. By a consolidated approach, it hopes to enhance the revenues available to it for the benefit of students and services. The School Board feels that Spectrum Marketing can provide it with "superior net revenues…."

I have presented below the submissions of the School District on the application of various sections of the Act.

7. Spectrum Marketing Corporation's case as a third party

The third party fully supports the submissions of the School District. The third party submits that the information in dispute constitutes a "trade secret," disclosure of which would result in financial harm.

8. Discussion

Section 17: Disclosure harmful to the financial or economic interests of the School District

The School District contends that disclosure of the information could reasonably be expected to harm its financial interests under section 17 of the Act. The only submission put forward by the School District in relation to section 17 is that it "is under increasing pressure to find new sources of funding" and it was "considered important for the Board to be able to provide the assurances of confidentiality that are typically required in private commercial contracts, or funding opportunities would be lost."

The applicant contends that the School District's reliance on section 17 circumvents the intent of the Act:

> Disclosure of this information would *serve* the public body. School boards across the province could collectively analyze and tailor the formulas used for negotiating processes. Therefore the commission paid to third parties would only be paid once, and not over and over again to secure this data. Certainly the public is ill served when each school board is paying commissions for information already purchased. By not disclosing this information, it is in fact harming the financial and economic interests of the public body when the *broader* interests are considered.
>
> The argument that the District will "lose many new funding opportunities" is pure speculation. There is no proof of monies to be lost, as the "funding" is only a forecast of estimated sales. Also, a blanket agreement, possible by full disclosure, forged with a third party, inclusive of a number of school districts might be more *lucrative*. Proof is needed to support this argument, and it is weak argument as it is all based on speculation. The bigger picture warrants disclosure.

The applicant properly points out that the refusal to disclose information under section 17 of the Act cannot be done on the basis of pure speculation. The question is whether the evidence indicates that disclosure could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia. It is not sufficient, in my view, for the School Board to simply state that it considered it important to be able to provide the assurances of confidentiality that are typically required in private commercial contracts, or funding opportunities would be lost. The School Board appears to have acted on an assumption without providing the basis for this assumption or the evidence to support it.

The third party points out that, in the soft drink industry, "response proposals to public sector clients always include a 'confidentiality clause' that requests that all information be held in confidence.... If the suppliers were to know in advance that their proposals would be for public viewing, there is a strong possibility that they [might] not bid on the proposals at all." The third party goes on to state that the refusal of suppliers to bid would constitute the loss of new funding opportunities.

In my view, the third party's submission is equally speculative. The third party does not indicate that it would refuse to bid on proposals if it knew in advance that the proposal would be open to the public; instead, it refers to the possibility of what suppliers generally might do. The third party's statement as to what suppliers generally might do is conjecture and not sufficient to discharge the School District's evidentiary burden under section 17.

Based on the submissions and my detailed review of the information in dispute, I find that its disclosure cannot reasonably be expected to harm the financial or economic interests of the School District. The textual information severed from the record is overwhelmingly descriptive of services to be performed by the third party; in my view, they are typical of any such offer of services and do not contain what could remotely be construed as proprietarial information. The public, in fact, should know what the third party is proposing to do (or has done) for the School District. None of what it actually will do is disclosed in the information in dispute in this inquiry. In fact, the third party stated in its reply submission as follows:

> Each institution / school has a different set of challenges and hurdles for which solutions are needed. In addition, School Districts do not have the expertise or resources to produce the type of analysis and research that is required.

I wish to reiterate that none of the particulars of the challenges, hurdles, analysis, or research with respect to the School District is revealed in the information in dispute.

Similarly, I find that the disclosure of the commission rate payable to the third party will not hurt the financial or economic interests of the School District. In fact, as the applicant argues, it will likely be to the financial and economic benefit of the many School Districts across the province for them to know the value of one such contract. As the applicant points out:

> It is not in the public interest to withhold the contents of this agreement when the *broader* interests of the public are considered. Failing to disclose all the elements of this contract is, in fact, harmful to the economic interests of the government of British Columbia. If school boards keep paying for the "process" used to negotiate these contracts, it is affecting the overall economy of the province. The "process" could be analyzed and ratios developed from the data for applications to other school boards. The government would not be wasting money by paying for Spectrum's "process" repeatedly.

Furthermore:

> There is no proof that the Board will miss out on future business transactions. It is also more reasonable to consider that more *lucrative* opportunities [might] be realized if these opulent sponsorship contracts were made on a bigger scale, as a result of sharing all components of the contracts with other school districts. If Coke or Pepsi will pay in the millions of dollars for exclusive rights to our 31 schools, how many more millions could be had if the client base was *broadened*, if more schools were included? Disclosure and sharing of this information among our school boards would probably generate more generous funding from Coke

> or Pepsi. Also, a one time payment of commissions would make this deal more attractive on the bottom line. Perhaps publication of these lucrative business deals will make for *more* business opportunities as more corporations come to the bargaining table. Publicly reporting these deals may be an effective advertisement for other businesses to compete. It is therefore just as rational to conclude opportunities could be gained! The bigger picture warrants disclosure.

I note that the information in dispute in this inquiry comes from a proposal for the third party to offer services, not the contents from an actual contract as in Order No. 126-1996, September 17, 1996. In comparison to the specific amounts of money at stake in that Order, this inquiry does not deal with similar data. In fact, no specific sums of money are mentioned, only a commission rate, since the record in question is essentially a contractual retainer for the services of the third party.

The third party attempts to argue that disclosure of its commission rate would harm its competitive and financial position under this section of the Act; however, section 17 only protects the financial interests of the School District.

I note from a record attached to the reply submission of the applicant, and the reply submission itself, that the Vancouver Parks Board signed a ten-year deal with Coca-Cola and subsequently disclosed the annual amount that it was receiving (not at issue in this inquiry) and the several commission rates paid to Spectrum, the third party in this inquiry. The applicant claims that Spectrum in fact uses its deal on behalf of the Vancouver Parks Board to promote further business opportunities.

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

The second issue raised in this inquiry is whether disclosure of the information would be harmful to the business interests of the third party under section 21 of the Act. The School District states that it has withheld "Spectrum's confidential negotiating process and commission rate," because the latter has persuaded the School District "that the disclosure of the obscured information would significantly harm Spectrum's competitive position."

The third party submits that the description of its processes and services contained in the record constitutes a "trade secret" under the Act. "Trade secret" is defined in Schedule 1 as follows:

> "trade secret" means information, including a formula, pattern, compilation, program, device, product, method, technique or process, that
>
> (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.

While the description contained in the record concerns the "process" which the third party intends to follow in providing services to the School District, I do not accept that there is sufficient evidence to establish that this general information derives independent economic value, actual or potential, from not being generally known. As I indicated, the services described in the record are typical of any such offer of services. The description does not contain any information that could remotely be construed as proprietary in nature. There is also insufficient evidence to establish that disclosure of this "process" would result in any harm or improper benefit. I therefore reject the third party's submission that the description of the services constitutes a "trade secret" within the meaning of the Act.

While I accept that the information in dispute meets the first branch of section 21(1)(a)(ii), insofar as it constitutes commercial or financial information of a third party and it was supplied explicitly in confidence within the meaning of section 21(1)(b), I find that the School District has failed to establish the third branch of the test. There is insufficient evidence to establish that disclosure could reasonably be expected to "harm significantly the competitive position or interfere significantly with the negotiating position of the third party" under section 21(1)(c)(i), or that it could reasonably be expected to "result in undue financial loss or gain to any person or organization" under section 21(1)(c)(iii).

I find that the School District has not met the requirements of section 21 of the Act for non-disclosure of the information in dispute.

Section 25: Information must be disclosed if in the public interest

The applicant has sought to invoke the power of section 25 to produce release of the information in dispute. In terms of my previous Orders and in light of my assessment of what is at stake in this inquiry, I find that the issues in dispute do not rise to the level necessary for the School District to be required to invoke this section.

9. Order

I find that School District No. 42 (Maple Ridge-Pitt Meadows) was not authorized to refuse access to the information in dispute under section 17 of the Act.

I find that School District No. 42 (Maple Ridge-Pitt Meadows) was not required to refuse access to the information in dispute under section 21 of the Act.

Under section 58(2)(a) of the Act, I require School District No. 42 (Maple Ridge-Pitt Meadows) to give the applicant access to the information in dispute.

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David H. Flaherty
Commissioner

July 29, 1999