OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER

British Columbia
Canada

Order 00-09

INQUIRY REGARDING DELTA FRASER PROPERTIES PARTNERSHIP

David Loukidelis, Information and Privacy Commissioner
March 31, 2000

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Summary: The BC Liberal Caucus, Vancouver Television and The Leader newspaper made requests for records relating to an agreement between the Province and Delta Fraser Properties about Burns Bog. Ministries decided that information in the responsive records could be released without harming Delta Fraser's interests under s. 21. Delta Fraser sought review. Ministries' decision correct. Ministries to continue processing requests.

Key Words: Commercial or financial information – supplied in confidence – competitive position – significant harm – negotiating position – interfere significantly with.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 21(1) and 57(3)(b).

Authorities Considered: B.C.: Order No. 26-1994, Order No. 45-1995, Order No. 315-1999. **Ontario:** Order P-263 and Order P-609.

1.0 INTRODUCTION

Background to This Inquiry

In February 1999, the BC Liberal Caucus, 'The Leader' (a Surrey/North Delta newspaper) and Vancouver Television each submitted requests under the *Freedom of Information and Protection of Privacy Act* ("Act") for various records related to the proposed development of Burns Bog. The requests were made for records held by the Province of British Columbia ("Province"). They were responded to by the Ministry of Small Business, Tourism and Culture ("Small Business") and the Ministry of Employment and Investment ("E&I") (which are referred to collectively here as the "Ministry"). The first two applicants later agreed to refine their requests to records

related to the financial arrangements for the proposed development. The refined requests also encompassed records requested by Vancouver Television.

The Ministry notified the third party, Delta Fraser Properties Partnership ("Delta Fraser"), of the requests and asked for its representations on possible disclosure of the requested records. Delta Fraser told the Ministry that it did not consent to the disclosure of any of the records, arguing that they contained confidential commercial information, the disclosure of which would significantly harm Delta Fraser's then "current" negotiating and competitive positions.

In May 1999, after considering the third party's comments, Small Business – replying on behalf of itself and E&I – told Delta Fraser it had decided to disclose the records, but with some information severed. Delta Fraser then asked for a review, under s. 52 of the Act, of that decision. This inquiry flows from that request for review.

Representations From an Individual Third Party

One of the disputed records is an agreement between the Province and an individual ("Individual Third Party") who appears, from the material before me, to be a principal of one of the corporate partners of Delta Fraser. The Individual Third Party is not, it appears, directly a partner of that partnership. The Province-Individual Third Party agreement contains information that is, in line with what I said above, in dispute under s. 21.

There was no indication in the parties' initial submissions that the Ministry had consulted with the Individual Third Party under s. 23. I also could not determine whether the law firm that made submissions in this inquiry against disclosure represented only Delta Fraser and its partners or whether it also represented the Individual Third Party. I therefore wrote to counsel for Delta Fraser and asked if counsel's submissions on Delta Fraser's behalf were also to be taken as submissions on behalf of the Individual Third Party.

Another law firm responded to my letter and confirmed that it represented the Individual Third Party. Counsel for the Individual Third Party was provided with copies of the inquiry materials and was given an opportunity to make submissions on the s. 21 issue. The other parties were given an opportunity to reply to those submissions.

The Individual Third Party's position is that "section 21 of the Act requires the public bodies to refuse to disclose the records in dispute". The Individual Third Party also wishes to be notified by the Ministry if it is determined that other sections do not apply, such that the information will be disclosed. The Individual Third Party explicitly reserved the right to request a review in the event of such a decision by the Ministry.

In a reply submission, the Ministry maintained that the notice which it issued to a consultant for Delta Fraser was in relation to s. 21 and s. 22 and also constituted notice to the Individual Third Party. It has now become apparent that the Individual Third Party

was not represented in Delta Fraser's submissions in this inquiry. The Ministry nonetheless submitted that I should analyze whether its s. 23 notice constituted notice to the Individual Third Party and then, if necessary, adjourn this inquiry to permit further notification and argument with respect to the applicability of s. 22.

I have decided not to follow the course requested by the Ministry. I see little point in drawing out this inquiry at this stage with more submissions and an exploration of the propriety or adequacy of the notice procedure followed by the Ministry. This inquiry commenced and proceeded on the basis of the applicability of s. 21 of the Act. Late in the day it has become apparent that the Individual Third Party is represented by separate counsel and has concerns about another exception, namely s. 22. According to the Ministry's reply to the Individual Third Party's submission, the Ministry was of the view that s. 22 did not require the withholding of information, but this was influenced by the fact that counsel for Delta Fraser had not raised any personal privacy concerns. Section 22 is a mandatory exception. It is now clear that it is a live issue for the Individual Third Party. I think it ought to be sorted out by a fully considered decision at the Ministry level before it becomes the subject of a review and inquiry. I say this without judgement or criticism of the notice procedure followed by the Ministry. As I see it, even if further submissions in this inquiry could cause me to conclude that the Ministry had complied with s. 23 in relation to the Individual Third Party and s. 22 of the Act, I should still also have before me a proper decision by the Ministry on the applicability of s. 22, a request for review by someone of that decision, and submissions from the relevant parties on s. 22. The desirability of these steps reinforces my view that the best course is not to adjourn this inquiry to deal with s. 22, but rather to conclude it now on the basis upon which it was conducted, the applicability of s. 21, and leave s. 22 (and other exceptions, if any) for another review and inquiry, should that be necessary.

Clarification of Which Records Are in Issue Here

It should be noted that the three applicants have yet to receive any records. After Delta Fraser's request for review, this office granted an extension of time to the Ministry to respond to the requests. This means the Ministry has not issued a decision, under s. 8 of the Act, as to whether any of the Act's other exceptions apply to the records.

The Ministry told the BC Liberal Caucus, on May 12, 1999, that "partial access" to the records would be given on June 1, 1999, if Delta Fraser did not seek a review of the Ministry's s. 21 decision within the time set by the Act. The Ministry did not clarify what it meant when it said "partial access" would be given if Delta Fraser lodged no request for review.

By a letter to me dated February 7, 2000, the Ministry's lawyer confirmed that the portions of the records before me shown in red ink are *not* before me in this inquiry. Accordingly, this inquiry relates only to the application of s. 21 to those portions of the records that are not shown in red ink. The Ministry has yet to issue a decision about disclosure of the portions of the records shown in red ink, so I do not deal with them in this order. The only issue before me is whether s. 21 requires the Ministry to refuse to

disclose information to the applicants. In the case of the Province-Individual Third Party agreement, it remains to be seen whether the Ministry will apply exceptions other than s. 21 to any part or all of that record.

Reference below to instruments between the Province and Delta Fraser includes a reference to the agreement between the Province and the Individual Third Party. For convenience, I refer below to Delta Fraser and the Individual Third Party, collectively, as the "third parties". To be clear, I have analyzed this case on the basis of the evidence and material placed before me by the Ministry, Delta Fraser and the Individual Third Party.

2.0 ISSUE

In this inquiry, I must decide whether the Ministry was correct in deciding that s. 21(1) did not apply to most of the requested records. Under s. 57(3)(b) of the Act, Delta Fraser and the Individual Third Party must "prove that the applicant has no right of access to the record" or part of the record in respect of which they invoke s. 21(1) of the Act.

3.0 DISCUSSION

3.1 Third Party Business Interests Under the Act – Section 21 of the Act protects, in certain cases, the commercial interests of third parties whose confidential information is in the custody or under the control of a public body. A public body has no choice but to refuse to disclose any information in a record that is covered by the section, but may disclose information in the record that is not subject to s. 21. This is what happened here.

This inquiry deals with s. 21(1), which reads as follows:

> 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
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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, 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.

Section 21(1) creates a three-part test, each element of which must be satisfied before the public body is required to refuse disclosure of the information. The party resisting disclosure must establish that all three elements of the s. 21(1) test apply in the circumstances. Section 21(3) says that information covered by s. 21(1) can be released if the third party "consents to the disclosure". That has not happened here in the case of any third party.

3.2 The Records in Dispute – The records in dispute consist of instruments entered into between the Province and Delta Fraser relating to the partial preservation and partial development of a large tract of land commonly known as Burns Bog. The Ministry has disclosed the names of those documents to the applicants in its submissions in this inquiry. The records include an agreement regarding the overall proposed project, a loan agreement, a security agreement, and other commercial agreements and instruments collateral to those just mentioned. One of the agreements is between the Province and the Individual Third Party. They also include three appraisals of parcels of land comprised in the project lands.

3.3 Commercial Information – By virtue of s. 21(1)(a), s. 21(1) protects only "trade secrets" (a term defined in Schedule 1 to the Act) or "commercial, financial, labour relations, scientific or technical information of a third party".

Delta Fraser argued that the records qualify under s. 21(1)(a) because they "relate to the commercial and financial interests" of Delta Fraser. This is not surprising, since most commercial agreements entered into by a business entity will "relate to" its commercial and financial interests. There is little doubt that much of the disputed information is commercial or financial information.

Whether it is commercial or financial information "of" the third parties is another question. In light of my findings about the two other aspects of the s. 21(1) test – especially on the issue of supply – I do not find it necessary to reach a conclusion on this point.

3.4 Supplied in Confidence – The second part of the s. 21 test is that the information must have been supplied by the third party to the public body. That supply of information must have been, "implicitly or explicitly", in confidence. Information in an agreement negotiated between two parties does not, in the ordinary course, qualify as information that has been "supplied" by someone to a public body. See, for example, Order No. 26-1994, Order No. 45-1995 and Order No. 315-1999. See, also, Ontario Order P-263 (January 24, 1992), and Order P-609 (January 12, 1994).

There will be exceptions to this rule, although none exists in this case. For example, it may be possible for someone to draw an accurate inference, from a negotiated agreement, of underlying confidential information that was, effectively, supplied by the third party to the public body during negotiations. In such cases, the criterion of supply to the public body will have been satisfied. See the orders cited in the preceding paragraph.

Delta Fraser's argument here is that

> … [t]he nature of the proposed development is inherently confidential. This is reflected in the documents themselves are contained in the record in dispute [*sic*]. This discloses that these documents were provided, both explicitly and implicitly, in confidence.

The material before me does not support a finding that confidential commercial or financial information of the third parties was "supplied" to the Province. Delta Fraser says the "documents" were supplied to the Province, yet the material before me establishes that the agreements included in the records were negotiated between the Province and the third parties. The parties in effect, jointly created the records.

Some of the records use, in part, forms prescribed by legislation, although those instruments include some modified standard charge terms. Those records – which one can reasonably conclude were negotiated between the parties – appear to have been registered in a public registry in accordance with relevant legislation. Copies of these records can be obtained under that legislation by anyone who pays the prescribed fees. These instruments were, I find, created by the parties, and do not contain information that was "supplied" by Delta Fraser to the Province.

Another instrument is of a kind of which lenders ordinarily register notice under another statute. One of the records indicates that notice of this agreement has been registered, under that other legislation, in the relevant registry. Again, this record was, I conclude, negotiated, and therefore created jointly, by the parties to it. It was not "supplied" to the Province.

Some of these records refer, by legal description, to various parcels of land. Three of the disputed records are appraisals of various parcels of land covered by the agreements. The earliest appraisal, dated January 12, 1999, is addressed jointly to the Province and to a company. The appraisal is said to have been carried out "[a]t your request", as an update of an earlier appraisal. It says the report was prepared "exclusively" for the named company *and* "the Province of British Columbia".

The second appraisal, dated January 15, 1999, is addressed only to the Province. It says the appraisal was undertaken "[i]n response to your request" and "exclusively for the Province of British Columbia". The third appraisal, dated January 14, 1999, also says it was prepared at the request of the Province and was prepared exclusively for the Province.

None of these records contains information "supplied" in confidence by Delta Fraser to the Province. The second and third appraisals contain information about the value of lands in which Delta Fraser was interested at the time, but that information was obtained by the Province through its own devices. In no sense did Delta Fraser provide that information to the Province. The fact that the first appraisal was carried out jointly for the Province and a company that may be affiliated, or related in some sense, with one of Delta Fraser's partners does not mean the information in it was supplied by Delta Fraser to the Province. Among other things, there is no evidence that these appraisals required, or proceeded only because of, the co-operation or consent of Delta Fraser or any other third party.

Delta Fraser did not say that any of the records would allow accurate inferences to be drawn about underlying protected information of Delta Fraser or anyone else. Delta Fraser did argue, however, that confidentiality clauses found in some of the records mean that information in them was supplied in confidence. The discussion above indicates why I have concluded Delta Fraser did not supply confidential financial or commercial information – or other information described in s. 21(1)(a) – to the Province in these records (including the negotiated agreements and instruments). The fact that some of the records contain confidentiality clauses does not get around this. The parties' agreement to keep negotiated terms and conditions confidential does not avoid the supply issue.

I note, in any case, that the confidentiality clauses are not found in all of the records – *e.g.*, the appraisals – and that they are also limited. Two of the cited clauses expressly contemplate disclosure of the terms of the agreement "as required by law". The third clause says "certain documents and information provided by the Partnership Affiliates to the Province *may* be of a confidential nature" (emphasis added). First, this does not mean such information as may have been provided to the Province was, in fact, supplied in confidence. Second, this clause refers to "documents and information" that may have been collaterally supplied to the Province; it does not refer to the agreement itself or information contained in it.

For these reasons, I find that the third parties have not established that either of them supplied commercial or financial information to the Province, explicitly or implicitly, in confidence. On this ground alone, the third parties have failed to establish that s. 21(1) applies to information in the disputed records.

3.5 Reasonable Expectation of Harm – I also find that the third parties have failed to establish that disclosure of information in the records could reasonably be expected to "harm significantly the competitive position" of the third parties or to "interfere significantly with the negotiating position" of the third parties. In order to make its case that there is a reasonable expectation of harm or interference under s. 21(1), a party must provide clear and specific evidence that establishes, on a balance of probabilities, the requisite reasonable expectation harm or interference from disclosure.

The third parties did not provide any evidence on this issue. Delta Fraser did make arguments on the point in its initial submission. Those arguments follow:

> The underlying properties and partnership to which these matters relate is currently a matter of litigation in a number of actions. There is litigation between the members of the third party [Delta Fraser] being Action No.: C993740 and there are two foreclosure actions, Action No. H990913 and Action No.: H991093. It is believed that disclosure of the record in dispute at this time would hamper negotiations significantly between the members of the third party and between the partnership [Delta Fraser] and the other litigants.
> ...
> In addition, this matter may lead to expropriation proceedings, and in this event, any resolution of the underlying matter would be hampered. Furthermore, the disclosure of the record in dispute, which was prepared with an understanding of confidentiality, could result in undue financial loss for the third party.
>
> Public disclosure will expose possible negotiating positions resulting in an unwillingness of the parties to resolve this on equitable terms and likely expose the third party to loss it otherwise would not face.
>
> Currently, there is an outstanding application for rezoning of the subject property. Disclosure of the record in dispute will likely affect this process and this would lead to potential financial loss of the third party.

I will deal first with Delta Fraser's argument that disclosure could reasonably be expected to interfere significantly with its negotiating position. No evidence was provided that there are any settlements or other negotiations under way in relation to those actions or that any are in reasonable prospect. The fact that a legal dispute exists between the two partners may be sufficient to permit one to conclude that the negotiating positions of Delta Fraser's partners – not Delta Fraser itself – may be in issue. It does not appear that Delta Fraser's partners were consulted as third parties for the purposes of s. 21(1). Counsel for Delta Fraser did, however, refer to the possible impact on the negotiating position of the partners themselves.

Referring to the interests of Delta Fraser's partners, I do not see how disclosure of the same information to each of the partners – or to the Individual Third Party – would affect their negotiating positions as between them. Absent evidence to the contrary, it is reasonable to conclude that each of Delta Fraser's two partners would have full knowledge of all agreements to which Delta Fraser itself is a party. I would also have thought Delta Fraser's partners each would have knowledge of the collateral agreements and instruments to which Delta Fraser is a party. Disclosure through the Act would not affect this.

Nor can I conclude that disclosure to the public of these records could reasonably be expected to interfere significantly with the negotiating position of the partners as between themselves, including due to any attendant publicity. I find that disclosure of the requested records would not, for the purposes of s. 21(1)(c)(i), interfere significantly with the negotiating position of Delta Fraser, or either of its partners, in relation to the litigation between them.

As for litigation instituted by other parties against Delta Fraser and its two partners, Delta Fraser did not elaborate on how disclosure of its agreements with the Province, or disclosure of the other records, could hamper negotiations with those parties. Delta Fraser did not say how knowledge, by parties opposed in interest, of the terms of its arrangement with the Province could affect any such negotiations. I cannot, on the material before me, conclude that Delta Fraser has established that disclosure of the records could reasonably be expected to interfere significantly with Delta Fraser's negotiating position in respect of the matters dealt with in those proceedings. I make the same finding respecting the Individual Third Party.

Delta Fraser argued "this matter may lead to expropriation proceedings" and, "in this event, any resolution of the underlying matter would be hampered". This argument is not entirely clear. Delta Fraser did not explain how there might be a connection between disclosure, expropriation, and harm or interference. Nor did Delta Fraser say which body might initiate such proceedings or provide evidence to support its contention that "this matter" – presumably, the arrangement with the Province – "may" lead to expropriation proceedings. If the Province were to expropriate the property, Delta Fraser did not say how disclosure of the records through the Act would harm its interests within the meaning of s. 21. The Province already has the records; its custody of the records is a pre-condition to the holding of this inquiry. Even if one assumes that another body may expropriate the property, Delta Fraser has not said how disclosure at this time could reasonably be expected to lead to any harm, to Delta Fraser or any other third party, in the context of an expropriation.

Delta Fraser also argued that disclosure of the records could reasonably be expected to "result in undue financial loss" to Delta Fraser. It was said there is "an outstanding application for rezoning of the subject property", and that disclosure of the records "will likely affect this process and this would lead to potential financial loss" to Delta Fraser. The connection between disclosure, the progress or outcome of any rezoning, and loss to Delta Fraser is not further elaborated on or supported by evidence. (Nor did Delta Fraser provide any evidence to show which authority it had applied to for rezoning or about the nature or status of any such rezoning.) I conclude Delta Fraser has not established a reasonable expectation of harm on this point, or that any such loss would be "undue", as required by s. 21(1)(c)(iii).

No argument was advanced by Delta Fraser under s. 21(1)(c)(ii) or (iv). Based on the material before me, I see no grounds for applying either of those provisions in this case.

For the above reasons, I find that the third parties have not established a reasonable expectation of harm for the purpose of s. 21(1)(c).

4.0 CONCLUSION

For the reasons given above, I find that the Ministry of Small Business, Tourism and Culture and the Ministry of Employment and Investment are not required by s. 21(1) of the Act to refuse to disclose the information not marked in red ink in the disputed records and therefore, under s. 58(2)(a) of the Act, I require the Ministry of Small Business, Tourism and Culture and the Ministry of Employment and Investment to give the applicants access to that information, subject to the possible application of other exceptions under the Act by the Ministry. For clarity, the Ministries have yet to issue a decision as to whether other exceptions in the Act, including s. 22, apply to information in the records.

I encourage the Ministry to process the requests and make its decision at the earliest practicable opportunity.

March 30, 2000

David Loukidelis
Information and Privacy Commissioner
for British Columbia