OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order 03-05

CITY OF VANCOUVER

David Loukidelis, Information and Privacy Commissioner
February 7, 2003

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Summary: Applicant requested access to a copy of third-party records in the City's possession that set out the third party's views on and experience with certain commercial activities. The records qualify as third-party commercial information voluntarily supplied to the City in confidence and the evidence establishes that similar information would no longer continue to be supplied to the City if the records are released. The City is required to withhold the records under s. 21(1).

Key Words: trade secrets of a third party – supplied in confidence – undue financial loss or gain – competitive position – negotiating position – interfere significantly with – voluntarily supplied – no longer continue to be supplied.

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

Authorities Considered: B.C.: Order No. 56-1995, [1995] B.C.I.P.C.D. No. 29; Order No. 57-1995, [1995] B.C.I.P.C.D. No. 30; Order No. 67-1995; [1995] B.C.I.P.C.D. No. 40; Order No. 246-1998, [1998] B.C.I.P.C.D. No. 40; Order No. 288-1999, [1999] B.C.I.P.C.D. No.1; Order 03-02, [2003] B.C.I.P.C.D. No. 2. **Ontario:** Order P-576, [1993] O.I.P.C. No. 320; Order P-841, [1995] O.I.P.C. No. 20; Order PO-1599, [1998] O.I.P.C. No. 176; Order PO-1638, [1998] O.I.P.C. No. 238.

1.0 INTRODUCTION

[1] This decision arises out of a September 8, 2001 request to the City of Vancouver ("City"), under the *Freedom of Information and Protection of Privacy Act* ("Act"), for access to the agendas and minutes for all meetings of the City's Property Endowment Fund Board ("Board") from September 28, 1999 to the date of the request. On October 16, 2001, the City disclosed responsive records for four Board meetings. It withheld four pages under s. 21(1) of the Act, specifically ss. 21(1)(c)(i) and (ii).

[2] The applicant requested a review of this decision and, because the matter did not settle in mediation by this Office, a written inquiry was held under Part 5 of the Act.

[3] By a letter dated March 28, 2002, the City told the applicant that it had decided to rely on s. 17(1) and s. 21(1)(c)(iii) in addition to the grounds it had previously cited.

[4] The third party was given notice and made an *in camera* submission in this inquiry.

2.0 ISSUES

[5] The issues in this inquiry are as follows:

1. Does s. 17(1) authorize the City to refuse to disclose the disputed record?

2. Does s. 21 require the City to refuse to disclose the disputed record?

[6] Under s. 57(1) of the Act, the City has the burden of proof respecting both issues.

3.0 DISCUSSION

[7] **3.1 Applicable Section 21(1) Principles** – Section 21(1) of the Act requires a public body to refuse to disclose certain third-party information that is supplied in confidence and the disclosure of which could reasonably be expected to result in harm within the meaning of s. 21(1)(c). At the time of the applicant's request and the City's decision, s. 21(1) read 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.

[8] (Section 21(1)(a)(ii) has since been amended by adding the words "or about" after the words "information of".)

[9] The principles that apply under ss. 21(1) of the Act are clear and I will not repeat them here. See, most recently, the discussion in Order 03-02, [2003] B.C.I.P.C.D. No. 2. I specifically discuss s. 21(1)(c)(ii) below.

Do the records contain information of a third party?

[10] The first question is whether the records qualify as third-party "commercial" or "financial" information within the meaning of s. 21(1)(a). It has been said in many cases that "commercial" information includes information about the buying or selling of goods and information pertaining to commerce. The City contends, in my view with justification, that the precise nature of the records and their contents should not be made public in this case. This makes it difficult, of course, for me to give useful reasons for my decision.

[11] I can say, however, that the record consists of a letter from a third-party business to the City and an internal third-party memorandum that was enclosed with the letter. Both set out, in considerable detail, the third party's views on and experience with certain commercial activities. That information is, in my view, information that has value to the third party and to its competitors. It is, at the very least, information one would pay a consultant to prepare. I am satisfied that this information is the third party's "commercial" information under s. 21(1)(a)(ii).

Supply in confidence

[12] Section 21(1)(b) requires that the third party must have "supplied" the information to the public body in confidence. There is no doubt the information in the disputed records was supplied to the City. The City did not generate the information. The letter and memorandum were prepared by the third party and sent to the City. The information was supplied to the City.

[13] In its submission here, the third party says a specific City official gave express verbal assurances that any information the third party supplied would be received and kept in confidence. The letter itself is headed "confidential" and the enclosed memorandum is headed "strictly confidential". The letter to the City specifically stipulates confidentiality, while expressly allowing the City to share the information at an *in camera* meeting. I am satisfied that the information was supplied in confidence within the meaning of s. 21(1)(b).

Harm from disclosure

[14] Both the City and the third party argue that disclosure of the records could reasonably be expected to cause significant harm to the third party's competitive position (s. 21(1)(c)(i)) and to result in undue gain or loss (s. 21(1)(c)(iii)). The City also contends that disclosure 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 (s. 21(1(c)(ii)). I have concluded that s. 21(1)(c)(ii) applies here, so I will not consider ss. 21(1)(c)(i) or (iii).

Similar information will no longer be supplied

[15] My predecessor dealt with s. 21(1)(c)(ii) in a number of cases. A similar provision figures in many decisions under s. 17 of the Ontario *Freedom of Information and Protection of Privacy Act* and s. 10 of Ontario's *Municipal Freedom of Information and Protection of Privacy Act*. I have considered the following decisions by Commissioner Flaherty: Order No. 56-1995, [1995] B.C.I.P.C.D. No. 29; Order No. 57-1995, [1995] B.C.I.P.C.D. No. 30; Order No. 67-1995; [1995] B.C.I.P.C.D. No. 40; and Order No. 246-1998, [1998] B.C.I.P.C.D. No. 40. I have also considered Order No. 288-1999, [1999] B.C.I.P.C.D. No.1, a ruling by Lorrainne Dixon as Commissioner Flaherty's delegate. These decisions indicate that the necessary reasonable expectation under s. 21(1)(c)(ii) will be found not to exist where a third party supplies information under statutory compulsion (or in circumstances where the prospect of compulsion exists) or where there is a financial incentive for the third party to supply the information. The compulsion to supply information may also be contractual (as may a financial incentive to supply information). Similar principles have been established in decisions under the Ontario legislation. See, for example, Order P-576, [1993] O.I.P.C. No. 320; Order P-841, [1995] O.I.P.C. No. 20; and Order PO-1599, [1998] O.I.P.C. No. 176.

[16] These are not exhaustive considerations and they are not inflexible rules. After all, s. 21(1)(c)(ii) applies only where the evidence establishes a reasonable expectation that similar information will no longer be supplied to the public body, and it is in the public interest that it continue to be supplied. There may be some cases, for example, where a third party has some sort of incentive to supply the information, but there is nonetheless a reasonable expectation that its disclosure will result in similar information no longer being supplied to the public body. Financial incentives, after all, differ in nature and degree. See, for example, Ontario Order PO-1638, [1998] O.I.P.C. No. 238, where a third party industry-stakeholder had a business motivation to voluntarily supply information related to development of policies for resource-based tourism. This motivation did not prevent the comparable provision in the Ontario legislation from being triggered in that case.

[17] In this case, the evidence establishes that the third party supplied the disputed information to the City voluntarily, without any statutory obligation to do so (by City bylaw or otherwise) and with no financial or other incentive to do so. The evidence suggests, rather, that the third party was attempting to be a good corporate citizen, by assisting the City in its own endeavours. I am persuaded that the supply was voluntary.

[18] As for the consequences of disclosure, the City notes (at para. 59 of its initial submission) that the third party is of the view that disclosure would harm its financial interests. This is affirmed by the third party's submission. The City says disclosure of the information is therefore likely to cause the third party and other such businesses to lose confidence in the City's ability to keep similar information confidential. This will, the City says, lead the third party to refuse to supply similar information to the City in the future and other such businesses also could reasonably be expected to refuse to provide similar information down the road.

[19] The City acknowledges that no business can have an expectation, or impose an obligation, of confidentiality that, in and of itself, overcomes the right of access under the Act. The City acknowledges that businesses are, or should be, aware that the City is subject to the Act. Certainly, s. 21(1) contains a three-part test, each part of which must be met before information is protected. The s. 21(1) exception is not triggered by a third party supplying commercial, financial or other s. 21(1)(a) information on the basis that it is confidential. The City goes on to argue, however, that businesses such as the third party routinely and voluntarily provide the City with confidential commercial information that is of value to the City. This is attested to in para. 8 of the affidavit of Bruce Maitland, the City's Director of Real Estate Services. The third party's submission also supports this view. I am persuaded that, if this information were disclosed, there is a reasonable expectation that similar information will no longer be supplied to the City.

[20] I am also persuaded, based on Bruce Maitland's affidavit and the nature of the information in question as it relates to the City's activities, that it is in the public interest that the third party and other similarly-situated businesses continue to supply similar information to the City, since that information is of benefit to the City and there is a public interest in the City receiving such information, which is relevant to its own activities.

[21] I therefore find that s. 21(1) requires the City to refuse disclosure. After careful consideration, I consider that the disputed records cannot reasonably be severed under s. 4(2), the result being that the City is required to refuse disclosure of the entirety of the records.

4.0 CONCLUSION

[22] For the above reasons, under s. 58(3) of the Act, I require the City to refuse to disclose the disputed record to the applicant. Because I have decided that s. 21(1)(c)(iii) requires the City to refuse disclosure, I have not found it necessary to consider the City's s. 17(1) case.

February 7, 2003

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia