



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
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Order F15-69

**MINISTRY OF INTERNATIONAL TRADE AND MINISTRY RESPONSIBLE FOR
ASIA PACIFIC STRATEGY AND MULTICULTURALISM**

Caitlin Lemiski
Adjudicator

December 22, 2015

CanLII Cite: 2015 BCIPC 75

Quicklaw Cite: [2015] B.C.I.P.C.D. No. 75

Summary: Dynasty Plus Ltd. requested a third party review of the Ministry of International Trade and Ministry Responsible for Asia Pacific Strategy and Multiculturalism's decision to disclose a contract and its amendments between the Government of British Columbia and Dynasty. Dynasty argued disclosure of the contract and its amendments would harm its business interests within the meaning of s. 21(1) of FIPPA. The adjudicator confirmed the Ministry's decision that s. 21(1) did not apply to the information it had decided to disclose because the information in the records was not supplied within the meaning of s. 21(1)(b) nor could disclosure of the records reasonably be expected to result in one of the harms set out in s. 21(1)(c) of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 21(1), 22, and 23.

Authorities Considered: B.C.: Order 01-20, 2001 CanLII 21574 (BC IPC); Order 01-39, 2001 CanLII 21593 (BC IPC); Order 03-15 2003 CanLII 49185 (BC IPC); Order F05-05, 2005 CanLII 14303 (BC IPC); F08-22, 2008 CanLII 70316 (BC IPC); Order F13-20, 2013 BCIPC 27 (CanLII); Order F14-04, 2014 BCIPC 4 (CanLII); Order F15-03, 2015 BCIPC 3 (CanLII); Order F15-40 2015 BCIPC 43 (CanLII); Order F15-53, 2015 BCIPC 56 (CanLII).

Cases Considered: *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848, 2002 BCSC 603.

INTRODUCTION

[1] This order arises out of an applicant's request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to the Ministry of International Trade and Ministry Responsible for Asia Pacific Strategy and Multiculturalism ("Ministry") for copies of records about the British Columbia Trade and Investment Representative office in Hong Kong.¹

[2] The Ministry gave notice of the request under s. 23 of FIPPA to Dynasty Plus Ltd. ("Dynasty"), as the third party, saying it was considering disclosing a contract and two amendments between the Ministry and Dynasty. Dynasty objected to the disclosure of this information. The Ministry then informed Dynasty that it had decided that it was not required to withhold any information from the records on the basis that s. 21(1) applied.²

[3] Dynasty asked the Office of the Information and Privacy Commissioner ("OIPC") to review the Ministry's decision not to withhold information under s. 21(1). Mediation did not resolve Dynasty's request for review, and the matter proceeded to inquiry. The OIPC received submissions from the Ministry and from Dynasty.³

ISSUE

[4] The issue in this inquiry is whether the Ministry is required to refuse to disclose information contained in the records because disclosure would be harmful to third party business interests as set out in s. 21(1) of FIPPA.

[5] Under s. 57(3)(b) of FIPPA, Dynasty has the burden of proving that the applicant has no right of access to the information in the records.

DISCUSSION

[6] **Information in dispute** — There are three records in dispute as follows:

1. Contract (55 pages);
2. Amendment 001(1 page); and
3. Amendment 005 (3 pages).

¹ Orders F15-69 and F15-71 both arise out of separate requests made for the same records (contracts the Ministry has with Dynasty) but for different time periods.

² The Ministry advised Dynasty it intends to sever parts of the contract and two amendments to it under other exceptions to FIPPA. Those parts of the contract and two amendments to it are not in dispute at this inquiry.

³ The applicant was not invited to make a submission at this inquiry as he indicated to the OIPC Registrar that he did not want to participate.

[7] **Third party business interests** – Section 21 of FIPPA requires public bodies to refuse to disclose information that could reasonably be expected to harm the business interests of a third party. Section 21(1), all three parts of which must be met for that section to apply, states:

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

[8] **Commercial, financial, or technical information** – The disputed information is contained in a contract and two amendments to it between the Government of British Columbia and Dynasty. FIPPA does not define “commercial” information. Previous orders have stated that information is commercial information if it relates to the terms and conditions for buying or selling goods or services.⁴

[9] The Ministry submits that it concluded that most of the disputed information in this case contains commercial information.⁵ Dynasty submits that the contract and two amendments to it contain information that “uniquely defines our business relationship with [the Ministry].”⁶

[10] Previous orders have determined that “commercial information” must relate to a commercial enterprise and “financial information” can include information about services delivered to a public body including hourly rates, global contract amounts, breakdowns of these figures, prices, expenses and other fees payable under contract.⁷ Based on my review of the disputed records in this case, I find that they contain precisely this type of information, such as

⁴ Order F15-03, 2015 BCIPC 3 (CanLII) at para. 25.

⁵ The Ministry did not specify what information it concluded was commercial information, (para. 4.07 of the Ministry’s submission).

⁶ Dynasty’s submission at p. 1.

⁷ See Order F13-20, 2013 BCIPC 27 (CanLII) at para. 14.

expenses and other fees payable, related to Dynasty, a commercial enterprise. For this reason, I find that all of the disputed records contain information that is both commercial and financial information of or about a third party.

[11] **Supply of information** – Section 21(1)(b) requires that the information be supplied implicitly or explicitly in confidence. To determine whether the requirement in s. 21(1)(b) is met, it is first necessary to determine whether the information was supplied, and, if it was, then determine if it was supplied in confidence.

Supplied

[12] Previous orders have determined that information in a contract is normally not supplied because it is the product of negotiations.⁸ This includes terms that are proposed by one party and accepted as received by another party. As stated in Order 01-39:

... information may originate from a single party and may not change significantly - or at all – when it is incorporated into the contract, but this does not necessarily mean that the information is "supplied." The intention of s. 21(1)(b) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible of change but, fortuitously, was not changed.⁹

[13] However, there are two exceptions to information in a contract being negotiated rather than supplied. One exception is when the information in a contract is immutable. For example, delegate Nitya Iyer stated in Order 01-39 that "if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of s. 21(1)(b)."¹⁰

[14] A second exception is when disclosing the information would allow a reasonably informed observer to make accurate inferences about underlying confidential information supplied by the third party.¹¹ This could occur, for example, if disclosure of information in a contract would allow one to accurately infer the contractor's actual costs for materials, labour, or administration.¹²

⁸ Order 01-39, 2001 CanLII 21593 (BC IPC) at para. 44 and Order F15-53, 2015 BCIPC 56 (CanLII) at para. 9.

⁹ Order 01-39, supra at para. 46.

¹⁰ Order 01-39, supra at para. 45.

¹¹ For a detailed explanation of the exceptions, see Order 01-39, supra at paras. 45 and 50, upheld and quoted in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603.

¹² Order 01-20, 2001 CanLII 21574 (BC IPC), at para. 86.

[15] Dynasty did not explain why the disputed information, despite appearing in a contract and contract amendments, was supplied rather than negotiated. Dynasty's assertion that it provided information to the Ministry in confidence¹³ is distinct from and falls short of what is required to establish that the information was supplied. It also did not explain why the disputed information might fall under one of the two exceptions – that it is immutable or that disclosing it would allow a reasonably informed observer to make accurate inferences about underlying confidential information supplied by the third party.

[16] Based on my detailed review of the disputed contract and two amendments, I find that most of the information in dispute was negotiated rather than supplied. The disputed contract and two amendments contain details about the services that Dynasty will provide the Ministry and for how long Dynasty will provide them. This is precisely the sort of information that would be subject to negotiation leading to an agreement between the parties.

[17] However, there is one portion of the contract that warrants further consideration. Appendix 4 of the contract is a copy of Dynasty's proposal to the Ministry ("proposal").¹⁴

[18] In reviewing the proposal's contents, I find that most of it is negotiated information because it is the sort of detail of the contractual arrangement that would clearly have been susceptible to change through negotiation (*i.e.* Dynasty's proposed work plan). However, I find that one section of the proposal is not negotiated because it is not information that would have been susceptible to change. It is the section of the proposal (at pages 12 to 15) containing information about the work experience of a Dynasty employee. Even though the parties agreed to include this information in Appendix 4 of the contract, this information is different than other information in the proposal because an employee's previous work experience cannot be changed by way of negotiation or agreement in the way the other information in the proposal could. For this reason, I find that the information at pages 12 to 15 of the proposal detailing the employee's work experience was supplied information.

[19] As I have determined that the contractor's work experience information at pages 12 to 15 of the proposal was supplied, I will next decide whether it was supplied in confidence.

¹³ Dynasty's submission, pp. 1-2.

¹⁴ The opening words of the contract state that the parties "agree on the terms...hereinafter set out as follows" with Appendix 4 included directly below. (p. 54 of the disputed records). I therefore conclude that the proposal forms part of the contract in this case.

In Confidence

[20] Information may either be supplied implicitly or explicitly in confidence. The test for "in confidence" under s. 21(1)(b) is objective, and the question is one of fact. Evidence of the third party's subjective intentions with respect to confidentiality is not sufficient.¹⁵ The determination of whether information is confidential depends on its contents, its purposes and the circumstances under which it was compiled.¹⁶

[21] Dynasty's evidence is that it expected that the disputed information would be kept confidential.¹⁷ The Ministry's evidence is that it was "unable to conclude that the information at issue in [this inquiry] was supplied, implicitly or explicitly, in confidence by [Dynasty] to the Ministry."¹⁸

[22] Dynasty's proposal at Appendix 4 of the contract (where the contractor's work experience is located) was not marked confidential. I do not have a copy of the Ministry's Request for Proposals before me, therefore I do not know (and the parties do not say in their submissions) if any express promises of confidentiality were made. I conclude that the work experience information was not supplied explicitly in confidence as there is no evidence suggesting that it was.

[23] In regards to whether information was supplied implicitly in confidence, former Commissioner Loukidelis determined that:

The cases in which confidentiality of supply is alleged to be implicit are more difficult. This is because there is, in such instances, no express promise of, or agreement to, confidentiality or any explicit rejection of confidentiality. All of the circumstances must be considered in such cases in determining if there was a reasonable expectation of confidentiality. The circumstances to be considered include whether the information was:

1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;
3. not otherwise disclosed or available from sources to which the public has access;
4. prepared for a purpose which would not entail disclosure.¹⁹

¹⁵ See Order F15-40, 2015 BCIPC 43 (CanLII) at para. 37.

¹⁶ Order F13-20, 2013 BCIPC 27 (CanLII) at para. 27, as cited in Order F15-40 supra at para. 40.

¹⁷ Dynasty's submission, pp. 1-2.

¹⁸ Public body's submission at para. 4.10.

¹⁹ See Order F13-02, at para. 18 citing order 01-36 at para. 26. See also Order 00-37, 2000 CanLII 14402 (BC IPC) at para. 37.

[24] Applying these criteria, Dynasty's proposal contains detailed information about how it would provide services to the Ministry if it was selected as the successful proponent, including Dynasty's proposed budgets and detailed work plans. The evidence before me is that the Ministry has not made the proposal publicly available. Given the contents of the proposal, I am satisfied that Dynasty prepared it for the Ministry only, and not for a purpose that would entail disclosure to others. In summary, viewed objectively, given the information it contains, I conclude that the proposal (and therefore the contractor's work experience information contained therein) was submitted implicitly in confidence for the purpose of s. 21(1)(b).

Harm under s. 21(1)(c)

[25] There must be a reasonable expectation of harm from disclosure within the meaning of s. 21(1)(c) in order for s. 21(1) to apply. I am only considering this provision for the information that I have determined was supplied in confidence, namely the contractor's work experience information. It is not necessary for me to consider whether there is a reasonable expectation of harm under s. 21(1)(c) if the rest of the disputed information was disclosed, as I have already determined that s. 21(1) does not apply to that information because it was not supplied.

[26] The types of harm that Dynasty is arguing in this case are the harms set out in s. 21(1)(c)(i) and (c)(iii):

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

...

(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, or...

[27] The Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, has determined that the standard of proof and the evidence required to meet that standard for harms-based exceptions such as s. 21(1)(c) is as follows:

This Court in *Merck Frosst* adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”: *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.²⁰

[28] In summary, Dynasty must prove that there is a reasonable expectation of probable harm to a third party’s business interests if the disputed information is disclosed. The quality of Dynasty’s evidence must demonstrate that there is more than a mere possibility of probable harm.

[29] In this case, Dynasty’s arguments about the harm to Dynasty if the disputed contract and two amendments to it were disclosed relate to the “specific service conditions” in those records and their terms, not to disclosure of the employee’s work experience.²¹ The Ministry’s position is that s. 21(1)(c) does not apply to any of the information in dispute.²²

[30] In considering the supplied information, namely the contractor’s work experience, I find that Dynasty has not met its burden to demonstrate that s. 21(1)(c) applies. The work experience information is the type of information provided during a job interview (*i.e.*, details of involvement in previous projects). It is not apparent how disclosing this information could reasonably be expected to result in the s. 21(1)(c) harms Dynasty fears, and Dynasty did not explain. I therefore find that s. 21(1) does not apply to this information.

CONCLUSION

[31] For the reasons given above, under s. 58 of FIPPA, I confirm the Ministry’s decision that it is not required under s. 21(1) of FIPPA to refuse to disclose the information requested by the access applicant. I require the Ministry

²⁰ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at para. 54.

²¹ Dynasty’s submission at p. 2.

²² Ministry’s response submission at para. 4.11.

to finish processing the applicant's access request as required under Part 2 of FIPPA and respond to the applicant by February 5, 2016. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

December 22, 2015

ORIGINAL SIGNED BY

Caitlin Lemiski, Adjudicator

OIPC File No.: F14-5715