



OFFICE OF THE  
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Order F18-20

## TOWN OF GIBSONS

Lisa Siew  
Adjudicator

June 6, 2018

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**Summary:** An applicant requested a review of a decision made by the Town of Gibsons to refuse access to information in a record involving the Gibsons Public Market. The Town of Gibsons argued disclosure of the information would harm a third party's business interests within the meaning of s. 21(1) of FIPPA. The adjudicator determined that the requirements of s. 21(1) had not been met and ordered the Town of Gibsons to disclose the withheld information to the applicant.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss. 21 & 22.

## INTRODUCTION

[1] An applicant, who is a journalist, requested the Town of Gibsons (the Town) provide access to all contracts and legal agreements relating to the Town and the Gibsons Public Market, including all agreements between a third party company (Company) and a third party organization (Organization) involved in the Market. The Town identified several responsive records and gave notice of the access request under s. 23 of the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Organization and a third party financial institution (Financial Institution) seeking their views on the application of s. 21 of FIPPA (disclosure harmful to third party business interests). Both third parties objected to the release of a copy of a letter that contains the terms of a proposed financial arrangement (the Letter). The Town provided the applicant with some responsive records, but withheld the Letter on the basis s. 21 of FIPPA applied.

[2] The applicant was dissatisfied with the Town's response and its decision to withhold information and asked the Office of the Information and Privacy Commissioner (OIPC) to review the matter. Mediation resolved some issues, but it failed to resolve the dispute regarding the application of s. 21 to the Letter.<sup>1</sup> The applicant requested that this matter proceed to a written inquiry under Part 5 of FIPPA. The Town, the applicant and the Organization provided submissions in this inquiry. The Financial Institution did not provide an inquiry submission.<sup>2</sup>

[3] During the inquiry process, the OIPC gave notice of the request for review and inquiry to the Company, as an appropriate person under s. 54(b) of FIPPA. The Company was invited to make submissions in this inquiry and it did so by including pre-approved *in camera* materials.

### PRELIMINARY MATTER

[4] In its inquiry submission, both the Organization and the Company advance s. 22 of FIPPA (disclosure harmful to personal privacy) as another basis for the Town to withhold the disputed record. The Organization says the information at issue is its personal information and releasing this information would be an unreasonable invasion of its personal privacy. The Company says s. 22 applies because the Company and its shareholders would be "exposed unfairly to financial or other harm to business and community interest objectives."<sup>3</sup>

[5] Section 22 of FIPPA was not set out in the Notice of Inquiry or the OIPC investigator's fact report as an issue for consideration in this inquiry. It was also not mentioned in the Town's decision as a ground for refusing the applicant access to the records. Past OIPC orders and decisions have said parties may raise new issues at the inquiry stage only if permitted to do so. No one sought permission to add this issue to the inquiry or explained why they should be permitted to do so now.

[6] However, s. 22 is a mandatory exception to the right of access under FIPPA which requires a public body to refuse to disclose personal information if the disclosure would constitute an unreasonable invasion of a third party's personal privacy. Therefore, if I find that any of the disputed information is not properly withheld under s. 21 and it is third party personal information,

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<sup>1</sup> The Town initially argued that it did not have custody and control of several documents, but mediation resolved this issue.

<sup>2</sup> The Town's submission includes an email it received from the Financial Institution regarding the s. 21 issues, identified as Exhibit "G". The Town says it told the Financial Institution that it would include this email with its inquiry submission.

<sup>3</sup> Company's submission at para. 9.

I would have to consider whether its disclosure would be an unreasonable invasion of third party personal privacy.<sup>4</sup>

[7] In this case, none of the information at issue is third party personal information. “Personal information” is defined under Schedule 1 of FIPPA as “recorded information about an identifiable individual other than contact information.” Contact information is defined as “information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.”<sup>5</sup>

[8] Except for the names of the Organization’s two directors,<sup>6</sup> the information at issue is not about an identifiable *individual* since it is information about an organization or a company. Corporations and organizations do not have personal privacy rights under s. 22 of FIPPA.<sup>7</sup> Where the names of the directors of the Organization appear, it is being used in the Letter for business contact purposes. I therefore find these names qualify as “contact information” under FIPPA. As a result, I conclude that none of the information in dispute meets the definition of “personal information.” For that reason, I find s. 22 does not apply and will not consider it any further in this inquiry.

## ISSUE

[9] The issue I must decide in this inquiry is whether the Town is required to refuse to disclose the disputed information to the applicant under s. 21(1) of FIPPA. Section 57(1) of FIPPA assigns the burden to the public body to prove the applicant has no right of access to the information.

## DISCUSSION

### *Background*

[10] The Gibsons Public Market (the Market) provides space for community activities, including a seasonal farmers’ and artisans’ market, workshops, a marine education centre, a community kitchen and a bistro. The Market opened to the public in 2017 and it is operated by the Organization. The Market was

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<sup>4</sup> The burden of proof would be on the party seeking disclosure to demonstrate that s. 22 did not apply: see s. 57(3)(a) of FIPPA and *British Columbia (Public Safety and Solicitor General) v. Steelmack*, 2011 BCSC 1244 at para. 17.

<sup>5</sup> See Schedule 1 of FIPPA for this definition.

<sup>6</sup> The list of directors for the Organization is identified in the BC Registry Services summary located at supporting evidence #21 of the applicant’s submission.

<sup>7</sup> Order F17-39, 2017 BCIPC 43 at para. 75.

completed through the efforts of several parties, including the Town. As a part of those efforts, several agreements were entered into by various parties.

[11] In 2013, through community fundraising and support, the Town acquired funds to contribute to the purchase of land which would serve as the future site of the Market (the Property). The Company also contributed funds to the purchase and it took out a mortgage to cover the remainder of the purchase price. As a result of this arrangement, the Town and the Company co-own the Property, with the majority of the interest going to the Company.<sup>8</sup> The Town and the Company then entered into an agreement which appoints the Company as the Town's "nominee, agent and bare trustee" to hold and manage the Town's interest in the Property (the Bare Trust and Agency Agreement).<sup>9</sup> As a result of this agreement, the Company is listed on title as the registered owner of the Property, but the Town retains its beneficial interest in the Property.<sup>10</sup> Under the terms of this agreement, the Company is required to obtain the consent or direction of the Town to any encumbrance affecting the Town's portion of the Property.<sup>11</sup>

[12] In 2015, the Company leased the Property to the Organization for the purpose of operating the public market (the Lease). Under the Lease, the Organization was required to obtain the Company's prior written approval for any mortgage or other security interest granted over the Organization's leasehold interest.<sup>12</sup>

[13] In 2016, the Organization sought a loan from the Financial Institution to facilitate the construction of the Market.<sup>13</sup> The Letter was drafted by the Financial

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<sup>8</sup> These facts are gathered from the terms of the amended Bare Trust and Agency Agreement provided by the Town in its initial submission (Exhibit "C" of the affidavit of the Town's corporate officer) and the "Report to Town Council" for June 20, 2017, by Councillor Silas White (located in applicant's submission as supporting evidence #4).

<sup>9</sup> Amended Bare Trust and Agency Agreement identified as Exhibit "C" in the affidavit of the Town's corporate officer. There was apparently an earlier version of this agreement, but the only copy provided for this inquiry was the amended version dated February 19, 2016. I have assumed the terms and conditions of this agreement represent the terms and conditions in force between the parties at the relevant time and have no evidence or submissions that this is not the case. See also note in applicant's response submission identifying the same issue and assumption.

<sup>10</sup> See *Csak v. Aumon*, 1990 CanLII 8070 (ON SC) at para. 8 which says, "A beneficial owner is one who is the real owner of property even though it is in someone else's name. The nominal owner has legal title to the property but the real owner can require the nominal owner to convey the property to him and transfer legal title to him."

<sup>11</sup> Affidavit of Town's corporate officer at para. 7 and para. 2(h) of the Amended Bare Trust and Agency Agreement in Town's initial submission.

<sup>12</sup> Affidavit of Town's corporate officer at para. 6 and para. 33 of the Lease (Exhibit "B") in the Town's initial submission.

<sup>13</sup> Affidavit of Town's corporate officer at para. 3 and redacted copy of record at issue.

Institution, and addressed to the Organization, to record their understanding of their communications regarding the financial arrangements.<sup>14</sup>

[14] The Town considered the Letter at an April 2016 *in camera* council meeting.<sup>15</sup> The Town says the Company sought the Town's consent to the terms and conditions outlined in the Letter, as it was required to do under the amended Bare Trust and Agency Agreement.<sup>16</sup> A few months later, the Town received the applicant's request for access to records.<sup>17</sup>

***Record and information in dispute***

[15] The record in dispute for this inquiry is the Letter. I have reviewed the Letter and it is a proposal for financing and contains the terms and conditions for which the Organization and the Financial Institution are willing to lend and borrow. The Town provided a redacted copy of the Letter to the applicant, disclosing the date of the Letter, the header which contains the name of the Organization, and the name, logo and contact/branch information for the Financial Institution. The Town also disclosed the signature block which contains the name, title and signature of the Financial Institution's authorized representative. The space for the Organization's authorized representatives to date and sign is blank.

[16] The Town relies on s. 21 to withhold the balance of the information in the Letter, including the salutation, the name and address of the recipient and the introductory and closing paragraphs. As correctly noted by the Town, this withheld information also includes "the amount and purpose of financial borrowing, interest rates, repayments, security, fees and other terms and conditions related to the financing."<sup>18</sup>

***Harm to third-party business interests – s. 21***

[17] 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. For this inquiry, the relevant parts of s. 21 are as follows:

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

(a) that would reveal

...

<sup>14</sup> Redacted copy of record at issue.

<sup>15</sup> Affidavit of Town's corporate officer at paras. 8 and 10.

<sup>16</sup> Affidavit of Town's corporate officer at paras. 8 and 10. None of the parties discussed whether the Town approved the contents of the Letter.

<sup>17</sup> Affidavit of Town's corporate officer at para. 2.

<sup>18</sup> Town's initial submission at para. 9.

- (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,
  - (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...

[18] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies to information.<sup>19</sup> The party resisting disclosure must first demonstrate that disclosing the information at issue would reveal the type of information listed in s. 21(1)(a) of, or about, a third party. Next, it must demonstrate that this information was supplied, implicitly or explicitly, in confidence to the public body under s. 21(1)(b). Finally, it must demonstrate that disclosure of the information could reasonably be expected to cause one or more of the harms set out in s. 21(1)(c). All three elements of s. 21(1) must be met in order for the information in dispute to be properly withheld.

*Section 21(1)(a): Is the information commercial or financial information?*

[19] Section 21(1)(a)(ii) applies to commercial or financial information of, or about, a third party. FIPPA does not define “commercial information” or “financial information.” However, previous OIPC orders have found information is “commercial information” if it relates to a commercial enterprise such as the “offers of products and services a third party business proposes to supply or perform” and the “methods a third party business proposes to use to supply goods and services.”<sup>20</sup> Further, “financial information often has been applied, together with commercial information, in a proposal or contract about the goods and services delivered and the prices that are charged for those goods or services.”<sup>21</sup>

[20] The Town cites a number of previous OIPC orders to demonstrate that the information in dispute is the commercial and financial information of the

<sup>19</sup> See Order F17-14, 2017 BCIPC 15. I have also considered s. 21 in Order F17-50, 2017 BCIPC 55 and Order F17-49, 2017 BCIPC 54.

<sup>20</sup> Order F09-17, [2009] BCIPCD No. 23 at para. 17. See also Order F16-39, 2016 BCIPC 43 at para 17 and Order F07-06 [2007] BCIPCD No. 8 at para. 20 (cited in Town’s submission).

<sup>21</sup> Order F13-20, 2013 BCIPC 27 at para. 14.

Organization and the Financial Institution. It says the Letter is a “loan agreement” between the third parties “relating to financial services and/or financial lending products, and contains terms and conditions to be expected in a commercial loan agreement.”<sup>22</sup> The Organization states that the record at issue contains financial information relating to the banking relationship between it and the Financial Institution.<sup>23</sup>

[21] The disputed information sets out the terms and conditions for which the two third parties would be willing to lend and borrow. This information relates to a proposal for commercial financing and, as noted by the Town, it includes details about the amount of the proposed loan, including the proposed interest rate, repayment terms and security for the loan. Therefore, I am satisfied that the information in dispute is financial and/or commercial information of, or about, several third parties.<sup>24</sup>

*Section 21(1)(b): Was the information supplied, implicitly or explicitly, in confidence?*

[22] Section 21(1)(b) requires the information to be supplied implicitly or explicitly in confidence. This involves a two-part analysis. It is first necessary to determine whether the information was supplied to the public body by a third party. If so, then the next step is to determine whether it was supplied, implicitly or explicitly, to the public body in confidence.<sup>25</sup>

### Supplied information

[23] I note there is some inconsistency in the evidence before me as to who physically provided the disputed information to the Town. The Town’s corporate officer deposes that the Company provided the Letter to the Town.<sup>26</sup> Whereas, the Organization says that it forwarded the Letter to the Town.<sup>27</sup> However, nothing hinges on this question at this point in the analysis since the issue is not *who* supplied the information in dispute, but rather, whether the information was *supplied* to the Town as the public body in this inquiry.<sup>28</sup>

<sup>22</sup> Town’s initial submission at para. 9.

<sup>23</sup> Organization’s submission at para. 4.

<sup>24</sup> Schedule 1 of FIPPA defines a “third party” to mean “any person, group of persons or organization other than (a) the person who made the request, or (b) a public body.” There was no objection that the Organization, the Company and the Financial Institution qualify as third parties under FIPPA.

<sup>25</sup> See Order F15-71, 2015 BCIPC 77.

<sup>26</sup> Affidavit of corporate officer at para. 8.

<sup>27</sup> Organization’s submission at para. 5.

<sup>28</sup> See also Order 02-04, [2002] BCIPCD No. 4 at para. 15 where former Commissioner Loukidelis stated that “third party information may be supplied for the purposes of s. 21(1)(b) even if someone other than the affected third party supplied that information to the public body or the information was supplied to another person, who then supplied it to a public body.”

[24] The Town submits that the information at issue was supplied to it within the meaning of s. 21(1)(b) since it was not a party to the loan terms contained in the Letter and it was not involved in any of the negotiations.<sup>29</sup> It says that the disputed information was provided to it for a specific limited purpose, to give its consent to the Company.<sup>30</sup> I understand the Town to be saying that the Letter is a record of the third parties' communications and agreement, but it is not information that the Town itself negotiated or created.

[25] The applicant says the information in dispute was not supplied to the Town since the Bare Trust and Agency Agreement requires the Town to give consent before any instrument, document or encumbrance relating to the Property is executed.<sup>31</sup> She submits that requiring the Town's consent for the Letter affects the negotiation process since the Town can give or withhold its consent and has the power to request changes to the Letter.<sup>32</sup> I understand the applicant to be arguing that this means that the terms of any agreement between the third parties would be subject to negotiation and change by the Town; therefore, the information is not supplied for the purposes of s. 21(1)(b).<sup>33</sup>

[26] I have reviewed how other OIPC decisions have interpreted and applied the supplied requirement under s. 21(1)(b). In general, information that has been "negotiated" between a third party and a public body is not considered to be "supplied."<sup>34</sup> In Order 04-08, former Commissioner Loukidelis found information was supplied since it "was not Ministry-generated, -derived, -negotiated or agreed-to information."<sup>35</sup> In Order F05-29, he noted that information will *not* be supplied when it is created or generated by a public body.<sup>36</sup> In Order F13-22, the adjudicator determined information was supplied since it was not a signed agreement, but the document had been created by the third party who then shared it with the public body.<sup>37</sup> In Order F13-01, information was found to be supplied since the third party provided the information and there was no evidence that the public body had modified or agreed to accept the information as part of a negotiation.<sup>38</sup>

[27] In this case, there is no evidence before me to show the Town had any input into the Letter's contents. In my view, the information in the Letter resulted from discussions between the third parties and after it was written, the Letter was then forwarded on to the Town for approval. There is nothing in the materials

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<sup>29</sup> Town's initial submission at para. 13.

<sup>30</sup> *Ibid* at para. 15.

<sup>31</sup> Applicant's submission at para. 14.

<sup>32</sup> *Ibid* at paras. 18-21.

<sup>33</sup> *Ibid*.

<sup>34</sup> Order 01-39, 2001 CanLII 21593 (BC IPC) at paras. 43-46.

<sup>35</sup> Order 04-08, 2004 CanLII 34262 (BC IPC) at para. 33.

<sup>36</sup> Order F05-29, 2005 CanLII 32548 (BC IPC) at paras. 63-69.

<sup>37</sup> Order F13-22, 2013 BCIPC 29 at paras. 33-36.

<sup>38</sup> Order F13-01, 2013 BCIPC 1 at paras. 36-38.



before me which shows the information in the Letter records the Town's interactions and communications with the third parties in relation to the proposed financing. As a result, I conclude the information at issue was supplied to the Town for the purposes of s. 21(1)(b).

In confidence

[28] The next step in the s. 21(1)(b) analysis is to determine whether the supplied information was provided by a third party to the public body explicitly or implicitly in confidence. The test for whether information was supplied, explicitly or implicitly in confidence, is objective. It must be shown that the information was supplied under an objectively reasonable expectation of confidentiality by the supplier of the information at the time the information was provided; evidence of the supplier's subjective intentions alone with respect to confidentiality is insufficient.<sup>39</sup>

The parties' position – confidentiality

[29] The Town submits the Letter was supplied to it in confidence and it has consistently treated the information as having been confidentially supplied. To establish confidentiality, the Town relies on the fact it considered the Letter at a council meeting that was closed to the public.<sup>40</sup> The Town submits this *in camera* meeting is proof that it treated the information as having been confidentially supplied and has maintained that confidentiality by refusing access to most of the information in the record.<sup>41</sup> The Town also says that its current and former council members are under a duty to respect and maintain confidentiality as required under s. 117 of the *Community Charter*.<sup>42</sup> Further, the Town relies on an email from an officer of the Financial Institution which says the Financial Institution is "by law...regulated to keep member records confidential and private."<sup>43</sup>

[30] To establish confidentiality of supply, the Organization submits that the "nature of the information" in the Letter is clearly/inherently confidential. It also says the Letter "was a confidential agreement between third parties supplied to the Town in confidence."<sup>44</sup> The Company provided *in camera* submissions on this issue so I am limited in what I can say, but I can confirm that I have taken into account the Company's position on confidentiality.

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<sup>39</sup> Order 01-36, 2001 CanLII 21590 at para. 23 and Order 01-39, 2001 CanLII 21593 (BC IPC) at para. 28.

<sup>40</sup> Affidavit of corporate officer at paras. 8 and 10.

<sup>41</sup> Town's initial submission at para. 17 and affidavit of Town's corporate officer at paras. 8-9.

<sup>42</sup> Town's initial submission at para. 21.

<sup>43</sup> Email identified as Exhibit "G" in the affidavit of the Town's corporate officer.

<sup>44</sup> Organization's submission at para. 6.

[31] The applicant disputes the Town's claim of confidentiality and notes that some of the information at issue may already be published in other places.<sup>45</sup> In a public report to Town council, a Town councillor notes that there is still a mortgage to be paid off for the original purchase of the Property and he says the following:

The current arrangement has been that the [Organization] has been paying off the interest on this mortgage in lieu of rent. A development in the accounting of this arrangement with the [Financial Institution] is that the \$400,000 mortgage has been transferred from [the Company] to [the Organization] in its status as lessee.<sup>46</sup>

[32] In response, the Town says this limited disclosure "does not negate [its] obligations under Section 21(1)," but aside from this assertion, it does not explain how a subsequent disclosure of information that is already public affects the confidentiality analysis under s. 21(1)(b).<sup>47</sup>

#### Analysis and findings – confidentiality

[33] I have reviewed the Letter to determine whether there are any explicit indicators of confidentiality.<sup>48</sup> There is no clause or wording in the Letter which imposes confidentiality over the information at issue. There is also no evidence provided to show that any of the third parties asked for or received an express promise or agreement of confidentiality from the Town at the time the Letter was supplied.

[34] I have also considered whether, at the time the information was provided to the Town, there is evidence of an implied or mutual understanding between the parties that the information should be kept confidential.<sup>49</sup> Neither the Company nor the Organization provided evidentiary support for their assertions and claims of confidentiality. For example, there is no persuasive evidence that the Letter was provided to the Town on the basis its contents should be kept confidential or that the third parties treated the Letter in a manner that indicates a concern for its protection from disclosure prior to being communicated to the Town.<sup>50</sup> There were no details provided which describes the circumstances around the delivery of the Letter, such as the individuals involved and what they

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<sup>45</sup> Applicant's submission at paras. 48-50.

<sup>46</sup> Councillor Silas White's report to Town council dated June 20, 2017, located in applicant's submission under supporting evidence #4.

<sup>47</sup> Town's reply submission at para. 15.

<sup>48</sup> See Order 04-06, [2004] BCIPCD No. 6 at paras. 51-53 and Order 05-05, [2005] BCIPCD No. 6 at paras. 74-84.

<sup>49</sup> Order 04-06, [2004] BCIPCD No. 6 at para. 53 and Order 05-05, [2005] BCIPCD No. 6 at paras. 82-83.

<sup>50</sup> See Order 01-36, [2001] BCIPCD No. 37 at para. 26, for a full list of circumstances to consider in determining whether the information at issue was implicitly supplied in confidence.

said and did, and the parties' understanding of confidentiality at the time the Letter was given to the Town.

[35] Further, the fact the Town considered the Letter at an *in camera* meeting does not mean a third party supplied the Letter to the Town in confidence for the purposes of s. 21(1)(b). In my view, not every document considered by a public body at an *in camera* meeting is provided in confidence. It is evident that a public body can consider non-confidential documents at an *in camera* meeting. A third party can provide a record to a public body with no expectation or agreement of confidentiality. The public body can then decide to consider and discuss this document in private, but that alone is not sufficient to satisfy the "in confidence" element under s. 21(1)(b). As noted, there has to be evidence of a mutual understanding between the parties that the information was supplied in confidence, which I find lacking in this case.

[36] With regards to the Town's submission about the legal requirements imposed on Financial Institutions to keep member records confidential, no one explained those legal requirements or how they apply to the Letter and the Town's receipt of this document.

[37] Further, there is no explanation provided for why some of the information at issue was then subsequently publicly disclosed by a Town councillor.<sup>51</sup> Without an explanation, the public disclosure of some of the disputed information does not support an expectation or understanding of confidentiality between the parties in terms of this information.

[38] As previously noted, there is also conflicting evidence as to who physically provided the information at issue to the Town. The Organization submits that it was the one that "forwarded the document at issue to the Town of Gibsons...under terms of express or implied confidentiality."<sup>52</sup> The Town's corporate officer deposes that the Company provided the Letter to the Town and it was "received by the Town in confidence at the in-camera meeting."<sup>53</sup> In its submission, the Town's legal counsel says it was the Organization who forwarded the record at issue to the Town in confidence.<sup>54</sup> The Company's *in camera* submission does not settle this issue. This lack of consistency undermines the parties' assertion that the information was supplied in confidence.

[39] For the reasons given, I am unable to find that there was an objectively reasonable expectation of confidentiality at the time the Letter was provided to

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<sup>51</sup> Councillor Silas White's report to Town council dated June 20, 2017, located in applicant's submission under supporting evidence #4.

<sup>52</sup> Organization's submission at para. 5.

<sup>53</sup> Affidavit of corporate officer at paras. 8 and 10.

<sup>54</sup> Town's initial submission at paras. 18 and 21.

the Town. In conclusion, I am not persuaded that the disputed information was supplied in confidence pursuant to s. 21(1)(b).

*Section 21(1)(c) – Would disclosure of this information result in harm to a third party?*

[40] As none of the disputed information meets the “supplied in confidence” test under s. 21(1)(b), it is not necessary for me to consider whether disclosing the information could reasonably be expected to result in harm under s. 21(1)(c). However, for completeness, I will address the parties’ arguments regarding harm. The Company provided *in camera* submissions on this issue so I am limited in what I can say, but I can confirm that I have taken into account the Company’s position on harm.

[41] The standard of proof applicable to harms-based exceptions like s. 21(1) is whether disclosure of the information could reasonably be expected to cause the specific harm.<sup>55</sup> The Supreme Court of Canada has described this standard as “a reasonable expectation of probable harm” and “a middle ground between that which is probable and that which is merely possible.”<sup>56</sup>

[42] The party who has the burden of proof need not show on a balance of probabilities that the harm will occur if the information is disclosed, but it must nonetheless do more than show such harm is merely possible or speculative.<sup>57</sup> It must establish a clear and direct connection between the disclosure of the disputed information and the alleged harm.<sup>58</sup>

Harm to competitive position or negotiating position - s. 21(1)(c)(i)

[43] Section 21(1)(c)(i) states that the head of a public body must refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of the third party.

[44] The Town and the Organization submit that disclosure of the withheld information would “seriously damage” or “could harm or interfere significantly with” the ability of both the Organization and the Financial Institution to negotiate with other local parties for “similar financial products.”<sup>59</sup> In support, the Town’s corporate officer notes there are only four banks in Gibsons which she says

<sup>55</sup> Order F13-06, 2013 BCIPC 6 at para. 24.

<sup>56</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.

<sup>57</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 196.

<sup>58</sup> Order F13-06, 2013 BCIPC 6 at para. 24, quoting Order F07-15, [2007] BCIPCD No. 21 at para. 17.

<sup>59</sup> Town’s initial submission at para. 25 and Organization’s submission at para. 5.

creates a competitive lending environment.<sup>60</sup> However, the applicant says the Town “does not describe the damage in any detail or explain why it would affect the ability to negotiate with others.”<sup>61</sup>

[45] I find the Town and the third parties’ arguments and assertions on harm to the third parties’ negotiating positions to be speculative and lacking in evidentiary support. Previous OIPC orders have said that s. 21(1)(c)(i) “requires the interference with negotiating position to be significant.”<sup>62</sup> However, aside from the third parties’ assertions, no evidence was provided as to what negotiations are ongoing or anticipated with existing or potential lenders and borrowers or how disclosing the information at issue could reasonably be expected to interfere significantly with current or future negotiations. The Town and the third parties do not establish a clear and direct link between disclosure of the information in question and a reasonable expectation of harm to the Organization or the Financial Institution’s negotiating position.

[46] The Town also says disclosure would negatively affect the competitiveness of the Financial Institution by providing its competitors with commercial and financial information, including pricing information (such as interest rates, fees and charges) that could be used by the Financial Institution’s competitors to better attract potential customers.<sup>63</sup> However, no evidence was provided as to how disclosing information for a specific lending situation (i.e. the construction of the Market) could reasonably be expected to reduce the Financial Institution’s ability to compete for future business, especially where market conditions and the parties and projects involved will affect any financing terms and conditions. I note that previous OIPC orders have also found that heightened competition is not usually a circumstance that qualifies as significant harm to a third party’s competitive or negotiating position.<sup>64</sup>

[47] The Town and the Financial Institution also state that disclosure of the withheld information would negatively impact the Financial Institution’s competitiveness because its brand and reputation would be negatively impacted by members not fully understanding the reasons for the disclosure which would cause them to worry that their information would be disclosed as well.<sup>65</sup> The Town says “it is generally well understood that brand and reputation is a key aspect in the success or failure of a business, and this is acutely so in the case of a bank or financial institution that holds and manages people’s money and

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<sup>60</sup> Affidavit of corporate officer at para. 13(iii).

<sup>61</sup> Applicant’s submission at para. 32.

<sup>62</sup> Order 04-06, [2004] BCIPCD No. 6 at paras. 60-61.

<sup>63</sup> Town’s initial submission at para. 25.

<sup>64</sup> See Order F17-14, 2017 BCIPC 15 at para. 29; Order F15-53, 2015 BCIPC 56 at para. 28; Order F07-15, 2007 CanLII 35476 (BC IPC) at para. 38; Order 05-05 [2005] BCIPCD No.6 at para. 96.

<sup>65</sup> Town’s initial submission at para. 26 and affidavit of Town’s corporate officer at Exhibit “G”.

confidential financial information.”<sup>66</sup> The Financial Institution also says the OIPC “should be well aware” of why a financial institution would “object to the release of a member document to the public and what negative effects could rise [sic].”<sup>67</sup>

[48] However, the applicant notes that the Financial Institution’s website contains a brochure titled “Protecting Your Privacy” which “reassures members that their personal information will not be shared without a member’s consent, unless required or authorized by law.”<sup>68</sup> Taking this into account, it is unclear how the Financial Institution’s brand or reputation would be negatively impacted since compliance with FIPPA or an OIPC disclosure order would be required by law. Further, neither the Town nor any of the third parties sufficiently explained or provided persuasive evidence to show that existing or potential members/customers would think negatively of the Financial Institution for legally complying with FIPPA, let alone to such a degree that it could reasonably be expected to significantly harm the Financial Institution’s competitive position.

[49] Moreover, it is not clear to me, and it is not appropriate for me to guess, what the Financial Institution means when it says the OIPC should be “well aware” of the Financial Institution’s objections and the “negative effects” that could arise. Instead, “establishing a reasonable expectation of harm requires more than speculation or generalization.”<sup>69</sup> What is required is detailed and convincing evidence “to establish specific circumstances for the contemplated harm to be reasonably expected to result from disclosure of the information.”<sup>70</sup> I find that kind of evidence is lacking in this case.

Result in similar information no longer being supplied – s. 21(1)(c)(ii)

[50] Section 21(1)(c)(ii) states that the head of a public body must refuse to disclose to an applicant information the disclosure of which could reasonably be expected to 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.

[51] The Town submits disclosure of the Letter will likely cause third parties to be reluctant, in the future, to provide the Town with “confidential information.”<sup>71</sup> As an example, the Town claims when the Organization undertakes future improvements to the Market, the Organization may not provide it with detailed financial information when there is a risk this information will be disclosed.<sup>72</sup> The Town says it is in the public interest that the Town receive as much information

<sup>66</sup> Town’s initial submission at para. 26.

<sup>67</sup> Affidavit of Town’s corporate officer at Exhibit “G”.

<sup>68</sup> Applicant’s submission at para. 45 (emphasis added by applicant).

<sup>69</sup> Order F09-17, [2009] BCIPCD No. 23 at para. 38.

<sup>70</sup> *Ibid.*

<sup>71</sup> Town’s initial submission at para. 28.

<sup>72</sup> *Ibid.*

as possible relating to the Property in order to make properly informed decisions since it has a “significant beneficial interest” in the Property.<sup>73</sup>

[52] The Organization says “the Privacy Commissioner must take into account the reasonable expectations of third parties to proceedings and that if express or implied confidentiality cannot be protected, then their [sic] parties will be reluctant in future to provide information to public bodies in the absence of guarantees of privacy.”<sup>74</sup>

[53] The applicant questions the Town’s assertion that the Organization would be reluctant to provide similar information knowing that there may not be a guarantee of privacy.<sup>75</sup> She says the Organization enjoys many benefits from the Town in relation to the Market and describes several examples of how the Town provides financial support to the Organization in relation to the Market.<sup>76</sup> She also submits that the third parties must have known of the Town’s involvement because of media coverage on the Market project and they must be familiar with the disclosure requirements required of public bodies.<sup>77</sup>

[54] Aside from their assertions, neither the Town nor the third parties provided detailed and convincing evidence to support their claims. Past OIPC orders have also established that s. 21(1)(c)(ii) does not apply where there is a statutory or contractual compulsion for a third party to provide similar information (or the prospect of compulsion exists) or where there is a financial or other incentive for doing so.<sup>78</sup> As noted by the applicant, it is reasonable to conclude that the Organization is not likely to resist providing the Town with similar information in the future when it is in the Organization’s financial and business interests to continue working with the Town. I also note that in its submission, the Organization does not actually say it will stop providing similar information to the Town if the Letter is disclosed.<sup>79</sup>

[55] The Organization says it provided the Letter to the Town for “information purposes.”<sup>80</sup> However, the Town says the information was provided to it “solely for purposes of the Town granting consent” to the Company (as it was required to do under the Bare Trust and Agency Agreement) which, in turn, would allow the Company to give its consent to the Organization under the Lease.<sup>81</sup> I have reviewed the Lease and the Bare Trust and Agency Agreement and I am not convinced that the Organization provided the Letter to the Town for “information

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<sup>73</sup> Town’s initial submission at para. 28.

<sup>74</sup> Organization’s submission at para. 7.

<sup>75</sup> Applicant’s submission at paras. 38-39.

<sup>76</sup> *Ibid* at para. 38-39 and para. 75 (Note 5).

<sup>77</sup> *Ibid* at para. 47.

<sup>78</sup> See for example Order 03-05, [2003] BCIPCD No. 5 at paras. 15-17.

<sup>79</sup> Organization’s submission at para. 7.

<sup>80</sup> *Ibid* at para. 5.

<sup>81</sup> Town’s initial submission at para. 15.

purposes.” The Organization did not sign the Letter in the place allotted for it to indicate approval of the contents before this information was given to the Town. Instead, based on the materials before me, it is reasonable to conclude that the Organization needed approval before it could agree and sign off on the Letter and it was aware of the Town’s involvement in this approval process.<sup>82</sup>

[56] Therefore, the evidence establishes that the Organization was motivated by self-interest and a contractual requirement to provide the disputed information to the Company and the Town and it is reasonable to conclude that it will continue to provide similar information to the Town in the future.

[57] For the reasons provided, I am not satisfied that disclosure of the commercial and financing information at issue in this inquiry could reasonably be expected to result in similar information no longer being supplied to the Town. I therefore find s. 21(1)(c)(ii) does not apply to the information at issue.

Result in undue financial loss or gain - s. 21(1)(c)(iii)

[58] Section 21(1)(c)(iii) states that the head of a public body must refuse to disclose to an applicant information the disclosure of which could reasonably be expected to result in undue financial loss or gain to any person or organization. Previous orders have said that the ordinary meaning of “undue” financial loss or gain under s. 21(1)(c)(iii) includes loss that is “excessive, disproportionate, unwarranted, inappropriate, unfair or improper, having regard for the circumstances of each case.”<sup>83</sup>

[59] The Town says disclosing the information at issue could reasonably be expected to result in undue financial loss to the Financial Institution because “damage to its competitive position will cause a loss of revenue.”<sup>84</sup> The Town’s corporate officer deposes that this harm could occur since the disputed information “reveals the details of the [Financial Institution’s] offering to their competitors, thereby reducing their competitiveness.”<sup>85</sup>

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<sup>82</sup> Councilor Silas White’s report dated June 20, 2017 (located in applicant’s submission under supporting evidence #4) which says the Company is “made up of” several entities, including the Organization. The Town also states (at para. 5 of its reply submission) that the Organization is a “shareholder” in the Company. See also the BC Registry Company summaries (located under supporting evidence #21 of applicant’s submission) which show an overlap between the directors of the Company and the Organization. The Town’s corporate officer also states (at para. 15 of her affidavit) that the Town “currently has one non-voting representative” on the Organization’s board of directors. Given its involvement with the Company and the Town, it is unlikely the Organization would not have known of the need to obtain the Town’s approval.

<sup>83</sup> Order F16-17, 2016 BCIPC 19 at para. 33 and Order 00-10, 2000 CanLII 11042 (BC IPC).

<sup>84</sup> Town’s initial submission at para. 29.

<sup>85</sup> Affidavit of Town’s corporate officer at para. 13(iii).



[60] However, there is no explanation or evidentiary support provided for the Town's assertions and arguments. Simply providing an affidavit which asserts that the harm could occur does not constitute sufficient evidence under s. 21(1)(c) of FIPPA.<sup>86</sup> The Financial Institution also does not directly address this issue or provide persuasive evidence or explanation for how the disclosure of the proposed terms and conditions for one specific loan can reasonably be expected to result in undue financial loss for the Financial Institution.

[61] The Town also says the applicant will probably publish the information and this disclosure will result in undue financial gain to the Financial Institution's competitors.<sup>87</sup> The Town relies on Order 00-10 to argue that the disclosure of the withheld information "would undoubtedly give the other banks in Gibsons 'valuable competitive information for free and that information could then be used to make inroads into the market share of' [the Financial Institution]".<sup>88</sup> However, aside from its assertions, the Town did not explain or provide evidence which satisfactorily demonstrates how the withheld information is "valuable competitive information"<sup>89</sup> or how another financial institution could rely on the particular information at issue to obtain a financial gain.

[62] For example, it is unclear how disclosing the proposed loan recipients' name and business address and the opening and closing paragraphs of the Letter and what appear to be standard terms and conditions expected in a loan offer could reasonably be expected to result in undue financial gain to a competitor. As previously noted, some of this information has already been disclosed or published, including the name of the intended borrower and the purpose of the loan.<sup>90</sup> The Town does not explain how disclosing this information a second time could reasonably be expected to result in the alleged harm.

[63] Considering the materials before me, I am not persuaded that disclosure of the withheld information could reasonably be expected to harm the Financial Institution's competitive position to such a degree that it would result in undue financial loss or that disclosure could reasonably be expected to result in undue financial gain to any of the Financial Institution's competitors.

*Summary of findings on s. 21(1)*

[64] I find disclosing the information withheld under s. 21(1) would reveal commercial and financial information of, or about, several third parties. I also find that the information at issue was supplied to the Town, but I am unable to conclude that it was done so explicitly or implicitly in confidence as required

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<sup>86</sup> Order 01-20, 2001 CanLII 21574 (BC IPC) at paras. 59-60.

<sup>87</sup> Town's initial submission at para. 29.

<sup>88</sup> *Ibid* at para. 30.

<sup>89</sup> Which was found to be the case in Order 00-10, 2000 CanLII 11042 (BC IPC).

<sup>90</sup> See also applicant's submission at paras. 48-50 about financial information publicly disclosed about the Market.

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under s. 21(1)(b). I also find the Town has not established that disclosing the information in dispute could reasonably be expected to result in harm under s. 21(1)(c). Therefore, I conclude the Town has not met the burden of proving it must refuse to disclose the information in dispute under s. 21(1) of FIPPA.

## **CONCLUSION**

[65] For the reasons provided above, under s. 58(2) of FIPPA, I find the Town is not authorized to refuse to disclose the information at issue to the applicant under s. 21(1) of FIPPA. I require the Town to give the applicant access to this information by July 19, 2018. The Town must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant together with an un-redacted copy of the record.

June 6, 2018

## **ORIGINAL SIGNED BY**

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Lisa Siew, Adjudicator

OIPC File No.: F16-67450