Office of the Information & Privacy Commissioner for British Columbia

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Order F19-24

MINISTRY OF ATTORNEY GENERAL

Lisa Siew
Adjudicator

June 4, 2019

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Summary: The applicant requested access to correspondence between the Gaming Policy and Enforcement Branch of the Ministry of Attorney General and a number of online gaming companies. One gaming company argued disclosure of the information would harm its 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 Ministry to disclose the disputed information.

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

INTRODUCTION

[1] An applicant requested the Ministry of Attorney General (Ministry) provide access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to correspondence between the Gaming Policy and Enforcement Branch (Branch) and companies who operate unregulated online gambling websites within BC. The Ministry identified some responsive records, including a letter from The Stars Group, formerly Amaya Inc., to the Branch (the Letter).[1]

[1] At the time the Letter was sent to the Branch, the Branch was part of the Ministry of Finance. However, the Branch was a part of the Ministry of Attorney General at the time of the applicant's access request. Therefore, the public body for this inquiry is the Ministry of Attorney General. Throughout this inquiry, I will refer to the public body as the Ministry or the Branch where applicable.

[2] The Ministry gave notice of the access request to The Stars Group[2] (the Third Party) and sought its views on the application of s. 21(1) of FIPPA (harm to third party business interests) to the Letter. The Third Party objected to the release of some information in the Letter on the basis s. 21(1) applied.[3] After reviewing the Third Party's response, the Ministry decided s. 21(1) did not apply to the Letter and notified the Third Party that it intended to release the entire Letter to the applicant. The Ministry informed the Third Party of its right to request a review of this decision.

[3] The Third Party asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision not to withhold some information in the Letter under s. 21(1). Mediation did not resolve the matter. The Third Party requested that the matter proceed to a written inquiry. The applicant, the Third Party and the Ministry all provided submissions for this inquiry.

ISSUE

[4] The issue I must decide in this inquiry is whether the Ministry is required to refuse to disclose the disputed information to the applicant because disclosure would harm a third party's business interests as set out in s. 21(1). Where a public body has decided to give an applicant access to all or part of a record containing information that relates to a third party, the third party bears the burden of proving that the public body must refuse to disclose the disputed information under s. 21(1).[4]

DISCUSSION

Background

[5] The Branch regulates all gaming in BC. It ensures the integrity of gaming industry companies, people and equipment, and investigates allegations of wrongdoing. The Branch also has regulatory oversight of the British Columbia Lottery Corporation (BCLC).

[6] In August 2016, the Branch sent letters to 18 companies that operate at least 25 of the most prominent, unregulated, online gambling websites accessible to people in BC.

[7] The Third Party owns and operates numerous online and in person gaming and betting businesses and brands. It received one of the Branch's letters. The Branch does not have regulatory oversight over the Third Party.[5]

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[2] Notice was provided pursuant to s. 23 of FIPPA.
[3] Affidavit of Senior FOI Analyst with Information Access Operations (IAO) at para. 8.
[4] Section 57(3)(b) of FIPPA.
[5] The Third Party's initial submission at para. 18 and Ministry's submission at para. 16.

Record and information in dispute

[8] The record in dispute is the Letter, a two-page document dated September 9, 2016 from the Third Party's Vice-President of Compliance in response to the Branch's August 2016 letter.

[9] The Ministry already gave the applicant some information in the Letter since the Third Party did not object to the disclosure of this specific information.[6] However, the Third Party now argues that the entire Letter should be withheld.[7] The Third Party does not explain why it now claims the entire Letter should be withheld considering it did not previously object to the partial disclosure to the applicant.

[10] I conclude that only the four paragraphs the Ministry withheld from the Letter, due to the Third Party's objections, are in dispute in this inquiry. I will not consider whether s. 21(1) applies to the balance of the information as it was already disclosed to the applicant.

Harm to third-party business interests – s. 21

[11] 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.[8] 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
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> (a) that would reveal
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> …
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> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
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> (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,
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> …
>
> (iii) result in undue financial loss or gain to any person or organization…

[6] Affidavit of Senior FOI Analyst with IAO at para. 12.
[7] Third Party initial submission at para. 3.
[8] 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." It is not in dispute that The Stars Group is a third party under FIPPA.

[12] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies to information.[9] 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). 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): Does it reveal third party commercial information?

[13] The Third Party submits that the information at issue reveals its "commercial information" since it relates to the buying, selling or exchange of merchandise or services. It claims the Letter discloses information about its business activities, objectives and intentions and it is, therefore, commercial information.

[14] The Third Party says the withheld information refers to various meetings it had with the Branch, other gaming regulators and the BCLC regarding its online gaming businesses. It says the disputed information mentions meetings where the topics discussed include its interest in responding to a request for proposal to provide services in BC.[10]

[15] The Ministry supports the Third Party's submissions about the nature of the information. The Ministry says it is commercial information because it relates to the Third Party's business.[11] The applicant made no direct submissions on this issue.

[16] Section 21(1)(a)(ii) applies to commercial information of, or about, a third party. FIPPA does not define "commercial information." However, previous OIPC orders have determined that "commercial information" 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."[12] Some examples of "commercial information" include a price list, a list of suppliers or customers and a third-party contractor's fees, rates and the description of services to be provided.[13]

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[9] For example, see Order F17-14, 2017 BCIPC 15 at para. 9.
[10] Third Party's initial submission at para. 14.
[11] Ministry's submission at paras. 20-21.
[12] Order F09-17, 2009 CanLII 59114 at para. 17; Order F16-39, 2016 BCIPC 43 at para. 17; Order F07-06, 2007 CanLII 9597 at para. 20.
[13] Order F13-20, 2013 BCIPC 27 at para. 14.

[17] I am satisfied that some of the information in dispute reveals commercial information about the Third Party. The withheld information includes specific references to the Third Party's interest in responding to a particular request for proposal. I conclude the disclosure of this information would reveal the product or service the Third Party proposes to provide or perform in exchange for money, and as such, it qualifies as commercial information for the purposes of s. 21(1).

[18] However, I find the rest of the withheld information does not reveal commercial information of, or about, the Third Party. As noted by the Third Party, the withheld information refers to meetings it had with the Branch, other gaming regulators and BCLC. Most of this information is an explanation on how the Third Party "works closely with regulators and governments proactively and transparently in order to understand both the current and future anticipated polices, laws, regulations, standards and values that inform its business."[14]

[19] While some of this information may reveal the Third Party's business related activities, this information is not related to the buying, selling or exchange of merchandise or services carried on by the Third Party. The Third Party also withheld the closing paragraph of the Letter which does not reveal any s. 21(1)(a) information. I, therefore, conclude all of this withheld information does not reveal commercial information of, or about, the Third Party.

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

[20] 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 third party supplied the information to the public body. If so, then the next step is to determine whether the third party supplied the information, implicitly or explicitly, in confidence.[15]

[21] The Third Party claims that since it authored the Letter, there can be no question that it supplied the information. It also argues that it expected the Letter to remain confidential at the time. The Third Party says it was not subject to regulatory oversight by the Branch during that time and asserts that "it is reasonable for any commercial organization communicating with a regulatory body that may ultimately have regulatory oversight of the organization to expect that those communications will be held in confidence, particularly where the communications refer to confidential business activities, objectives and intentions."[16]

[14] Information disclosed at p. 1 of the Letter, which precedes the withheld information.
[15] See Order F15-71, 2015 BCIPC 77 at para. 11.
[16] Third Party's initial submission at para. 18.

[22] The Ministry takes no position on this issue and the applicant does not address these matters in his submission.

[23] For completeness, I will consider all the information in dispute although it is only necessary to consider whether the information I find to be "commercial information" was supplied to the Branch explicitly or implicitly in confidence.

Supplied information

[24] Previous OIPC orders have found information to be supplied under section 21(1)(b) where the information "was not Ministry-generated, -derived, -negotiated or agreed-to information."[17] Previous orders have also found information to be supplied if 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.[18]

[25] In this case, the information at issue originated from the Third Party who then provided it to the Branch in response to the Branch's August 2016 letter. This information was not part of any negotiations and there is no evidence that any of the withheld information was generated by the Branch. As a result, I conclude the information at issue was supplied to the Branch for the purposes of s. 21(1)(b).

In confidence

[26] The next step in the s. 21(1)(b) analysis requires that I consider whether the Third Party supplied the information to the public body explicitly or implicitly in confidence. The test for whether a third party supplied information 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.[19]

[27] I have reviewed the Letter to determine whether there are any explicit indicators of confidentiality.[20] There is no clause or wording in the Letter that imposes confidentiality over the information at issue. Further, none of the evidence before me shows that any of the parties asked for or received an express promise or agreement of confidentiality at the time the Letter was supplied.

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[17] Order 04-08, 2004 CanLII 34262 (BC IPC) at para. 33
[18] Order F13-01, 2013 BCIPC 1 at paras. 36-38.
[19] Order 01-36, 2001 CanLII 21590 at para. 23 and Order 01-39, 2001 CanLII 21593 (BC IPC) at para. 28.
[20] Order 04-06, 2004 CanLII 34260 at paras. 51-53 and Order 05-05, [2005] BCIPCD No. 6 at paras. 74-84.

[28] I have also considered whether any of the evidence before me shows an implied or mutual understanding between the parties that the information in the Letter was confidential.[21] However, there were no details provided from either the Third Party or the Ministry that describes the parties' understanding of confidentiality at the time the Letter was given to the Branch. Further, nothing about the circumstances indicates that the Third Party sent the Letter to the Branch on the basis its contents should be kept confidential or that the parties treated the Letter in a manner that indicates a concern for its protection from disclosure.[22]

[29] The Third Party appears to rely on the nature of the information and the relationship between the parties to establish confidentiality. However, there is nothing inherently confidential about this information. It appears to be a brief explanatory response intended to appease general regulatory concerns. I am also not satisfied that business correspondence with a potential regulator creates an expectation of confidentiality. There is nothing clearly or intrinsically privileged about these type of communications. Therefore, 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 the Branch. In conclusion, I am not persuaded that the disputed information was supplied in confidence pursuant to s. 21(1)(b).

Section 21(1)(c): Is there a reasonable expectation of probable harm?

[30] 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.

[31] 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.[23] 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."[24]

[32] 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 demonstrate that disclosure will result in a risk of harm that is well beyond the

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[21] Order 04-06, 2004 CanLII 34260 at para. 53 and Order 05-05, [2005] BCIPCD No. 6 at paras. 82-83.
[22] See Order 01-36, 2001 CanLII 21590 at para. 26, for a full list of circumstances to consider in determining whether the information at issue was implicitly supplied in confidence.
[23] Order F13-06, 2013 BCIPC 6 at para. 24.
[24] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.

merely possible or speculative.[25] It must provide evidence to establish "a direct link between the disclosure and the apprehended harm and that the harm could reasonably be expected to ensue from disclosure."[26]

[33] The Third Party submits disclosing the withheld information could reasonably be expected to significantly harm its competitive position and result in undue financial loss. 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."[27]

[34] The Third Party claims that it operates in a highly competitive and highly regulated global online gaming industry. It provided a copy of its 2018 "Annual Information Form" which summarizes its perspective on this industry and provides details about its competitors. This Annual Information Form, including the 2017 report, is available to the public and the Third Party says it is required to provide it as part of its securities filings.

[35] The Third Party describes the withheld information as revealing meetings or discussions with gaming regulators, its future business plans and business strategy and the intended markets and services it hopes to provide. It argues that its many competitors could use this information to gain a competitive advantage and result in an undue loss of its future business within British Columbia and elsewhere.

[36] I accept that the Third Party operates in a competitive environment; however, I am not satisfied that disclosing the specific information at issue could reasonably be expected to significantly harm the Third Party's competitive position or result in undue financial loss. There is no persuasive evidence that the withheld information contains any particularly sensitive or revealing details that a competitor could use to gain an advantage over the Third Party. While there is some reference to an interest in a potential government request for proposal, this information only reveals the Third Party's general interest in bidding for a particular competition. It does not reveal any details or particulars about the Third Party's future bid proposal such as the price of its services and the methods it intends to use to supply the service.

[37] I also note that more detailed information related to the Third Party's business strategies and operations is easily discernible to competitors from publicly available information such as the Third Party's Annual Information Form. Aside from its assertions, the Third Party did not provide evidence to show how disclosing the information at issue, which is less detailed than other publicly

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[25] *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3 at paras. 196 and 206.
[26] *Ibid* at para. 219.
[27] Order F16-17, 2016 BCIPC 19 at para. 33 and Order 00-10, 2000 CanLII 11042 (BC IPC).

available information, could reasonably be expected to bring about the alleged harms. The Third Party has not persuaded me that there is a reasonable expectation of probable harm or that the degree of harm could be significant or undue as required under s. 21(1)(c)(i) and (iii). Ultimately, the Third Party's assertions of harm without evidence does not meet the standard of proof required to meet the s. 21(c) harms test.

Summary of findings on s. 21(1)

[38] I find disclosing the information withheld under s. 21(1) would reveal a small amount of commercial information of, or about, the Third Party. I also find the Third Party supplied the information at issue to the Ministry, but I am unable to conclude that it was done so explicitly or implicitly in confidence as required under s. 21(1)(b). I also find the Third Party 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 Third Party has not met its burden of proving that the Ministry must refuse to disclose the information in dispute under s. 21(1).

CONCLUSION

[39] For the reasons provided above, under s. 58(2) of FIPPA, I find the Ministry is not required to refuse to disclose the information at issue to the applicant under s. 21(1) of FIPPA.

[40] The Ministry is required to give the applicant access to this information by July 17, 2019. The Ministry must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, along with a copy of the record.

June 4, 2019

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

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