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Order F11-30

CITY OF VANCOUVER

Michael McEvoy, A/Senior Adjudicator

October 7, 2011

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Summary: An applicant asked the City for information related to a lease arrangement between the City and a company called Ecodrive. The City notified Ecodrive that it intended to release certain information requested by the applicant. Ecodrive sought to review that decision because it said disclosure would be harmful to its business interests. The adjudicator found the information at issue did not meet the business harms test because it related to a negotiated agreement between the parties and not supplied information as required by s. 21 of FIPPA.

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

Authorities Considered: B.C.: Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 03-15, [2003] B.C.I.P.C.D. No. 15; Order 00-09, [2000] B.C.I.P.C.D. No. 9; Order F11-08, [2011] B.C.I.P.C.D. No. 10; Order F10-28, [2010] B.C.I.P.C.D. No. 40.

Cases Considered: *K-Bro v. British Columbia (Information and Privacy Commissioner)* 2011 BCSC 904.

INTRODUCTION

[1] This case concerns an individual (“applicant”) who requested that the City of Vancouver (“City”) provide him with records of any transactions between a certain City employee and a third party company called Ecodrive Technology Group (“Ecodrive”). The City’s search for records produced a lease agreement between the City and Ecodrive and a small number of emails related to the lease. The City gave notice to

Ecodrive under s. 23 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) that the applicant was requesting information that might contain Ecodrive’s third party business information. The City also gave Ecodrive a copy of the records showing where it intended to sever parts of the documents. Ecodrive responded by informing the City that it objected to the City releasing any part of the records on the basis that release would harm its business interests. After considering Ecodrive’s response, the City informed the company it intended to release the records to the applicant, as it had originally severed them.

[2] Ecodrive asked the Office of the Information and Privacy Commissioner (“OIPC”) to review the City’s decision.

ISSUE

[3] The information at issue here concerns only records the City proposes to disclose to the applicant (“disputed information”). This inquiry will not consider the information the City says it intends to withhold from the applicant under ss. 17, 21 and 22. I must decide whether disclosure of the disputed information would harm the business interests of Ecodrive under s. 21(1) of FIPPA.

[4] In these kinds of cases, under s. 57(3)(b) of FIPPA, it is up to Ecodrive to prove that the applicant is not entitled to receive the disputed information.

DISCUSSION

[5] **Records**—The City entered into a lease with Ecodrive. The records at issue are the lease agreement and related emails between the City employee and Ecodrive.

[6] **Harm to Third-Party Business Interests**—Numerous orders have considered the application of s. 21(1) and the principles for its application are well established.¹ It sets out a three-part test for determining whether disclosure is prohibited, all three elements of which must be established before the exception to disclosure applies. Former Commissioner Loukidelis conducted a comprehensive review of the body of case decisions in several jurisdictions in Order 03-02.²

[7] The first part of the test requires the information to be a trade secret of a third party or the commercial, financial, labour relations, scientific or technical information of, or about, a third party. The second part of the test requires the information to have been supplied to the public body in confidence. The third part of the test requires that disclosure of the information could reasonably be expected to cause significant harm to the third party’s competitive position or other types of harm as set out in s. 21(1)(c).

¹ See for example, Order 03-02, [2003] B.C.I.P.C.D. No. 2 and Order 03-15, [2003] B.C.I.P.C.D. No. 15.

² At paras. 28-117.

Commercial or financial information

[8] Ecodrive says the records at issue would reveal amongst other things the financial and commercial information of Ecodrive if disclosed. The City agrees that the pricing information and other matters associated with the lease in these records constitute the commercial and financial information of Ecodrive. The OIPC invited the applicant to make submissions but he declined to do so.

[9] The lease (and related emails), to which Ecodrive is a party, is a commercial one. Therefore, I find that the records contain Ecodrive's commercial information.

Supplied in confidence

[10] I will determine first whether the records were "supplied" to the City. Second, I will determine whether the third party supplied those records "in confidence".

[11] Previous decisions have dealt extensively with the application of s. 21(1)(b) of FIPPA with respect to information in contracts between public bodies and private-sector entities. These decisions establish that, "information in an agreement negotiated between two parties does not, in the ordinary course, qualify as information that has been 'supplied' by someone to a public body."³

[12] There is nothing about the disputed information here to distinguish it from many preceding cases, where information in a contract was found to be negotiated and not supplied. Ecodrive's submission does not address this point. The City points out, correctly in my view, the disputed information consists mostly of template forms. The City says it uses these forms for most property leases and they are not unique to the Ecodrive lease. It confirms the terms of the lease were developed jointly through negotiations with Ecodrive and, therefore, were not supplied. I find Ecodrive has failed to establish it supplied the information at issue under s. 21(1)(b).

[13] I also find, for the sake of fully analyzing s. 21(1)(b), that the information at issue was not provided in confidence either explicitly or implicitly. Ecodrive describes the disputed information as confidential but does not say why this is the case. There is nothing on the face of the records that would suggest they were supplied confidentially. The City states that the records are not Ecodrive's confidential information but rather, as noted above, are template forms used for most property leases. It has been noted in numerous orders⁴ that assertions by a third party alone, without corroboration from a public body, are insufficient to establish that the information was provided "in confidence". Not only does Ecodrive's assertion lack the public body's corroboration

³ Order 00-09, [2000] B.C.I.P.C.D. No. 9, pp. 5-6. This approach has been applied in many subsequent orders including the recent Order F10-28, [2010] B.C.I.P.C.D. No. 40 that was upheld on judicial review. See *K-Bro v. British Columbia (Information and Privacy Commissioner)* 2011 BCSC 904.

⁴ Most recently Order F11-08, [2011] B.C.I.P.C.D. No. 10.

in this case but the City denies Ecodrive's claim outright. In short, there was no "mutuality of understanding" with respect to the confidentiality of the information, a factor which former Commissioner Loukidelis identified as being necessary to establish the application of s. 21(1)(b).

[14] In light of this evidence and the parties' submissions, I must conclude the information in dispute was not supplied in confidence.

[15] As none of the information at issue meets the "supplied in confidence" test in s. 21(1)(b), it is not necessary for me to deal with the harms part of the analysis under s. 21(1)(c).

CONCLUSION

[16] I find that s. 21(1) of FIPPA does not require the City to refuse to give the applicant access to the disputed information as I have defined that term in paragraph 3 above. For the reasons given above, under s. 58 of FIPPA, I require the City to give the applicant access to the information in dispute in this inquiry within 30 days of the date of this order, as FIPPA defines "day", that is, on or before November 22, 2011 and, concurrently, to copy me on its cover letter to the applicant.

October 7, 2011

ORIGINAL SIGNED BY

Michael McEvoy
A/Senior Adjudicator

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