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Order F13-02

FINANCIAL INSTITUTIONS COMMISSION

Jay Fedorak, Assistant Commissioner

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Summary: The ICBA requested information about union pension plans filed with FICOM, which FICOM decided to disclose. The Trustees of the pension plans requested a review of the decision of FICOM on the basis that s. 21(1) of FIPPA applied. The Assistant Commissioner found that the Trustees and the Unions had not demonstrated that disclosure would cause significant harm to their competitive position or interfere significantly in their negotiating position under s. 21(1)(c)(i) of FIPPA; or cause them undue financial loss under s. 21(1)(c)(iii). The Assistant Commissioner required FICOM to disclose the information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 21(1); *Pension Benefits Standards Act*, [RSBC 1996] Chapter 352, s. 22; *Access to Information Act*, R.S.C. 1985, c. A-1, s. 20.(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 01-39, [2001] B.C.I.P.C.D. No. 40; Order 04-06, [2004] B.C.I.P.C.D. No. 6; Order 00-10, [2000] B.C.I.P.C.D. No. 11; Order 03-33, [2003] B.C.I.P.C.D. No. 33; Order 00-41, [2000] B.C.I.P.C.D. No. 44; Order F09-22, [2009] B.C.I.P.C.D. No. 28.

Cases Considered: *British Columbia (Public Safety and Solicitor General) v.* Stelmack, 2011 BCSC 1244; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3; *Lavigne v. Canada (Office of the Commissioner of Official Languages),* 2002 SCC 53, [2002] 2 S.C.R. 773; *Information Commissioner (Can.) v. Immigration and Refugee Board (Can.)* (1997), 140 F.T.R. 140 (T.D.).

INTRODUCTION

[1] This case involves a decision of the Financial Institutions Commission ("FICOM") in response to a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The Independent Contractors and Business Association ("ICBA") requested copies of pension plan filings for 16 pension plans that trade unions had sponsored. FICOM withheld some of the information under s. 21 of FIPPA, on the grounds that disclosure would harm the business interests of the pension plans. The ICBA requested a review of this decision from the Office of the Information and Privacy Commissioner ("OIPC").

[2] FICOM subsequently, changed its decision to apply s. 21 of FIPPA and gave the trustees of the 16 pension plans formal notice under s. 23 of FIPPA that it would release the information in full. Trustees of 13 of the 16 pension plans ("Trustees") objected to the disclosure of the information about their pension plans and requested that the OIPC review the decision of FICOM to release the information. When the matter proceeded to inquiry, the 13 unions, whose pension plan information is at issue ("Unions"), requested standing at the inquiry. The OIPC approved their request for standing.

ISSUE

[3] The question that I must decide is whether s. 21(1) of FIPPA requires FICOM to withhold the pension information at issue.

DISCUSSION

[4] **Background**—The *Pension Benefits Standards Act* ("PBSA") regulates pension plans in British Columbia. It designates the Superintendent of Pensions as the chief administrative officer who is charged with responsibility for the administration and enforcement of the PBSA. The office of the Superintendent of Pensions is located at FICOM. The pension plans whose information is at issue are registered with FICOM, which keeps a file on each pension plan.

[5] The PBSA sets minimum standards in the following areas: eligibility; vesting; portability; survivor benefits; employer contributions; and disclosure to members. It also imposes restrictions on investment activities and minimum funding and solvency requirements. It also requires that employers who offer pension plans must register with FICOM and file certain financial information to confirm compliance with the solvency and administrative requirements of the PBSA.

[6] The information at issue includes average compensation for members and the actuary's opinion as to the average financial liability that the plan imposes on employers and members. This information also relates to the financial position of the pension plan.

[7] The PBSA requires that every registered pension plan have an administrator. The board of trustees for each plan is the administrator of the plan. The trustees of plans that unions have sponsored are responsible to the individual members of the plans and not to the respective unions. The plans' existence is related to the bargaining power of the unions. Through collective bargaining with employers, unions obtain the agreement of employers to contribute to the pension plans as a condition of the collective agreement.

[8] **Records at Issue**—ICBA's request relates to the following information for each of the 13 pension plans at issue: the average annual pension paid; the average accrued monthly pension; the surplus or unfunded liability from the previous valuation report; and the surplus or unfunded liability from the current valuation report for each of the pension plans. ICBA has asked for this information to be extracted from the filings made with FICOM, rather than copies of the actual documents which were filed with FICOM.

[9] **The Burden of Proof**—Section 57(3)(b) provides that where there is an inquiry into a record or part of a record containing information of a third party, where the information is not personal information, the third party bears the burden of proving that access should not be given. The Trustees state, in the course of their submissions on s. 21, that two of the items requested, despite being averages, "provide personal information about the members of the plans, being the income plan members draw in retirement and the amount Plan members accrue each year before reaching retirement." The Trustees refer to this as "sensitive personal information about its members" and state that they would "ordinarily refuse to disclose such information if requested."[1] Nevertheless, the Trustees do not make any argument that s. 22 of FIPPA, which requires that a public body refuse to disclose personal information, if to do so would constitute an unreasonable invasion of third party privacy, applies. Since s. 22 is a mandatory exemption, if the information at issue constituted third-party personal information, I would have to consider the application of s. 22, and the burden of proof would be on the party seeking disclosure to demonstrate that s. 22 did not apply.[2] I find, however, that because the information consists of only average amounts, the information at issue is not about identifiable individuals. Given the number of members of the plans, the information would

[1] Trustees' (1-12) initial submissions, para. 60. Twelve of the thirteen Trustees made a joint submission. The Trustees of the other pension plan made a separate submission.

[2] *British Columbia (Public Safety and Solicitor General) v.* Stelmack, 2011 BCSC 1244 at para. 17.

also not reveal information about identifiable individuals, and so does not constitute "personal information".

[10] The Supreme Court of Canada has recently confirmed that a third party seeking to rely on a third party business information exemption must establish that the exemption applies on the civil standard of the balance of probabilities.[3]

[11] **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.[4] Former Commissioner Loukidelis conducted a comprehensive review of the body of case law and decisions in several jurisdictions in Order 03-02.

[12] The Supreme Court of Canada has recently commented on the purpose of provisions such as s. 21 of FIPPA:

> Broad rights of access to government information serve important public purposes. They help to ensure accountability and ultimately, it is hoped, to strengthen democracy. …
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> Providing access to government information, however, also engages other public and private interests. Government, for example, collects information from third parties for regulatory purposes, information which may include trade secrets and other confidential commercial matters. Such information may be valuable to competitors and disclosing it may cause financial or other harm to the third party who had to provide it. Routine disclosure of such information might even ultimately discourage research and innovation. Thus, too single-minded a commitment to access to this sort of government information risks ignoring these interests and has the potential to inflict a lot of collateral damage. There must, therefore, be a balance between granting access to information and protecting these other interests in relation to some types of third party information.[5]

[13] Section 21(1) of FIPPA 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. 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. To meet the second part of the test the information must have been supplied to the public body in confidence. The third part of the test involves determining whether disclosure of the information could reasonably be expected to cause

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[3] *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, para. 93 ("*Merck Frosst*").
[4] 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.
[5] *Merck Frosst*, paras. 2-3.

significant harm to the third party's competitive position or other types of harm as set out in s. 21(1)(c).

Commercial or financial information

[14] The information at issue is by its description clearly financial information about the pension plans. Therefore, I find that the information constitutes financial information of the plans for the purpose of s. 21(1)(a) of FIPPA. The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local 170 ("Local 170") argues that the information also constitutes "labour relations information".[6] Because there is no doubt that the requirement of s. 21(1)(a) is satisfied, I do not have to decide whether the information is also "labour relations information".

Supplied in confidence

[15] In order to undertake this analysis, it is necessary to separate the concept of "supplied in confidence" into two parts. The first is to determine whether the Trustees supplied the information to FICOM. The second will be to determine whether the Trustees supplied those records "in confidence".

[16] With respect to whether the Trustees supplied the information, the PBSA requires the Trustees to provide certain information to FICOM. However, the Trustees submit that two of the four fields of information at issue in this inquiry (the amounts of average pensions paid and average pensions accrued) contain information that FICOM created. According to the Trustees, it is information that "requires a calculation by the Public Body to produce and is not a distinct line item found in any particular document … filed with FICOM."[7] This might suggest that the "supplied" element cannot be satisfied, since the information was "created" by FICOM.

[17] However, as the Supreme Court of Canada has recently noted, the content rather than the form of the information is the important factor. The fact that a document originates with the government is not determinative.[8] In this case, while some of the information requested involved a calculation by the public body, that calculation appears to have been simply a mathematical one based entirely on information extracted from documents which were "supplied to" the public body, and which was undertaken wholly in response to the access request. In addition, the information indicating the surplus or unfunded liability from the previous valuation report and the surplus or unfunded liability from the current valuation report is information that the Trustees had supplied directly to FICOM. I find that the "supplied" element is satisfied in this case.

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[6] Local 170's initial submission, p. 4.
[7] Trustees' (1-12) reply submission, para. 10.
[8] *Merck Frosst*, para. 157.

[18] The next step is to determine whether the information was treated in confidence. Numerous orders have dealt with the issue of whether information was supplied explicitly or implicitly, "in confidence".[9] In this case, the parties have not provided evidence that the Trustees provided the information explicitly in confidence. Rather, the Trustees argue that the information was implicitly provided in confidence. This type of situation was addressed in Order 01-36,[10] where former Commissioner Loukidelis stated:

> [26] 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:
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> 1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
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> 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;
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> 3. not otherwise disclosed or available from sources to which the public has access;
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> 4. prepared for a purpose which would not entail disclosure.

[19] The Trustees provided affidavit testimony that they considered that they had provided the information to FICOM in a confidential manner and for a purpose that would not entail further disclosure. They also indicated that it is information that they would normally refuse to disclose, if requested.

[20] Order 04-06 found that assertions by a third party alone, without corroboration from a public body or other objective evidence, were insufficient to establish that the information was provided "in confidence".[11] It held that there must be evidence of a "mutuality of understanding" between the public body and the third parties for the information to have been considered to be supplied "in confidence". FICOM does not provide any corroboration that it received the information implicitly in confidence. It states only that, after it had consulted the Trustees about responding to ICBA's request, their staff processing the request "came to the opinion that it is reasonable to expect that such sensitive information is supplied implicitly in confidence with respect to general public access."[12] However, FICOM indicates that it has disclosed similar information in the past.

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[9] See, for example, Order 01-39, [2001] B.C.I.P.C.D. No. 40.
[10] [2001] B.C.I.P.C.D. No. 36, para. 26
[11] [2004] B.C.I.P.C.D. No. 6, paras. 51-53.
[12] FICOM's initial submission, para 18.

This indicates that on occasion it does not treat the information in a confidential manner.

[21] While the question of whether the intention to keep information confidential is shared by both parties is relevant to the question of whether it was provided in confidence, it is not necessarily determinative. Ultimately, that question is to be resolved on the basis of the factors set out above. This approach is consistent with the statement in Order F05-29 that the determination of whether information is confidential depends on its contents, its purposes and the circumstances under which it was compiled.[13] The mutual intention of the parties to keep the information confidential will often shed light on those questions. However, if a government body misunderstands its obligations under s. 21 and releases information that the supplier reasonably believes will be kept confidential, the information may still have been supplied in confidence for the purposes of s. 21.

[22] ICBA argues that there could not have been any expectation that the information would be kept confidential for several reasons. It submits that s. 22(1) of the PBSA requires that "all pension plan documents filed with the Superintendent" must be made available for examination by the public.[14] The ICBA says the only exceptions to this are documents which contain information about the entitlement of a specific individual or documents which the Superintendent decides could have an adverse effect on an employer's competitive position.[15]

[23] FICOM takes the position that s. 22 of the PBSA does not apply to the documents at issue, but rather only applies to the documents which "set out the terms of the pension plans."[16] The Trustees argue that s. 22 of the PBSA should be narrowly construed, so that only the text of a plan (and not all documents filed to permit the Superintendent to perform its regulatory function) would be made available to members of the public who have no entitlement to a benefit under the plan.[17] The Trustees point out that the access right in s. 22 of the PBSA is limited, as the superintendent has the discretion to deny access where release of documents would cause harm to an employer.[18] The Trustees also note that a new *Pension Benefits Standards Act*, expected to be in force in 2013, does not carry forward s. 22 of the PBSA, "indicating a legislative intent to more carefully control access to pension plan documents."[19]

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[13] [2005] B.C.I.P.C.D. No. 29, para. 55.
[14] ICBA's initial submission, para. 60.
[15] ICBA's initial submission, para. 65.
[16] FICOM's submission on standing.
[17] Trustees' (1-12) reply submission, para. 11.
[18] Trustees' (1-12) reply submission, para. 12.
[19] Trustees' (1-12) reply submission, para. 16.

[24] It is clear from FICOM's submissions that it does not consider the valuation reports, which contain the information requested, to be "pension plan documents" for the purposes s. 22 of the PBSA. This is also consistent with FICOM's initial response to the ICBA about the scope of its request. The ICBA asked for "the most recent pension plan filings" for the various plans. FICOM wrote to the ICBA and stated that scope of the request was "quite significant" and set out the types of documents that would be included that list, "pension plan documents" and "valuation reports" were listed separately.[20] This suggests that FICOM did not consider the valuation reports to be captured within the term "pension plan documents".

[25] ICBA made it clear that it was only arguing about the scope of s. 22 insofar as it should inform a conclusion about whether the Trustees could have submitted the information in confidence. ICBA argues that, if the Trustees understood that the information would be subject to disclosure pursuant to s. 22 of the PBSA, they knew, or should have known, that it would not be kept confidential. Nevertheless, if the Trustees and FICOM were both of the view that s. 22 did not apply to the information, it would seem that it would be reasonable for the Trustees to assume that the information would not be disclosed.

[26] The ICBA also relies on s. 10(4) of the PBSA, which provides:

> (4) Within 10 working days after receipt of a written request and without charge, the administrator must permit a person entitled to a benefit, or the spouse or a designated beneficiary or agent of the person entitled to a benefit, to examine the following:
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> (a) a provision of the pension plan that was in force on any date included in a period during which that person, or the person through whom the benefit derives, was a member or, if that person is a former member, that otherwise affects the benefits;
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> (b) any document that concerns conditions of that person's employment and that contains provisions relating to the plan;
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> (c) any trust deed or agreement, insurance contract, bylaw or resolution relating to the plan;
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> (d) any agreement relating to the investment of the pension fund of the plan;
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> (d.1) the statement of investment policies and procedures respecting the plan;
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> (e) the 3 most recent returns filed with the superintendent under section 9 (3) (a);

[20] ICBA's initial submission, affidavit of the communications director, ex. "C".

> (f) the 2 most recent actuarial valuation reports filed with the superintendent under section 9 (3) (b);
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> (g) any prescribed document.

[27] I do not accept ICBA's assertion that, because the PBSA requires a plan administrator to provide certain information directly to a person entitled to a benefit under a plan, there could not be an expectation of confidentiality when they provide that same information. Disclosure to a beneficiary does not constitute general disclosure to the world.

[28] I also do not accept ICBA's arguments that there could be no expectation of confidentiality because FICOM is subject to FIPPA. FIPPA clearly makes provision for the protection of third party business information supplied in confidence.

[29] ICBA also argued that the Trustees could not have expected that the information would be held in confidence because it has previously been disclosed by FICOM to the ICBA in response to requests. It does not appear, however, that the Trustees knew that these disclosures were being made, since the Trustees were not provided notice under FIPPA on those previous occasions.

[30] I note that in *Merck Frosst*, the Supreme Court of Canada held that the Court of Appeal in that case had erred when it imposed a "heavy burden" on the third party to establish that the information at issue was supplied in confidence.[21] While the arguments on this matter are finely balanced, I find that the Trustees have established, on the balance of probabilities that the information was provided in confidence.

Harm to third party interest––the appropriate standard

[31] The third part of the test requires the person arguing for the application of the exemption to prove that disclosure of the information could reasonably be expected to result in one or more of the harms set out in s. 21(1)(c). The Trustees and Unions argue that disclosure could (a) harm significantly the competitive position or interfere significantly with the negotiating position of the third party (s. 21(c)(i)); or (b) result in undue financial loss or gain to any person or organization (s. 21(1)(c)(iii)).

[32] In *Merck Frosst*, the Court was considering s. 20 of the *Access to Information Act*,[22] which is similar, in some respects, to s. 21 of FIPPA. Section 20(1) reads, in part:

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[21] *Merck Frosst*, paras. 94-95.
[22] R.S.C. 1985, c. A-1.

> 20.(1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains
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> (a) trade secrets of a third party;
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> (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
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> (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
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> (d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

[33] The Court stated that "For about 20 years, the Federal Courts have read s. 20(1)(c) as requiring the third party to demonstrate "a reasonable expectation of probable harm". The Court noted that this test:

> is perhaps somewhat opaque because it compounds levels of uncertainty. Something that is "probable" is more likely than not to occur. A "reasonable expectation" is something that is at least foreseen and perhaps likely to occur, but not necessarily probable. When the two expressions are used in combination—"a reasonable expectation of probable harm"—the resulting standard is perhaps not immediately apparent. However, I conclude that this long-accepted formulation is intended to capture an important point: while the third party need not show on a balance of probabilities that the harm will in fact come to pass if the records are disclosed, the third party must nonetheless do more than show that such harm is simply possible. Understood in that way, I see no reason to reformulate the way the test has been expressed.[23]

[34] The Court held that there must be something more than a "mere possibility of harm" and noted that in *Lavigne v. Canada (Office of the Commissioner of Official Languages)*,[24] the Court apparently approved a statement in *Information Commissioner (Can.) v. Immigration and Refugee Board (Can.)*,[25] that the standard implies a "confident belief". The Court suggested that an appropriate standard is whether the harm is "likely" to occur, although it is not necessary to provide that it is "more likely than not." The Court held that in order to establish that s. 20(1)(c) applies, a party "must show that the risk of harm is considerably above a mere possibility, although not having to establish on the balance of

[23] *Merck Frosst*, para. 196.
[24] 2002 SCC 53, [2002] 2 S.C.R. 773, para. 58.
[25] (1997), 140 F.T.R. 140 (T.D.).

probabilities that the harm will in fact occur."[26] While "there need not be a causal relationship as in tort law, there must be proof of a "clear and direct connection between the disclosure of specific information and the injury that is alleged".[27]

[35] The Court stated:

> This interpretation also serves the purposes of the Act. A balance must be struck between the important goals of disclosure and avoiding harm to third parties resulting from disclosure. The important objective of access to information would be thwarted by a mere possibility of harm standard. Exemption from disclosure should not be granted on the basis of fear of harm that is fanciful, imaginary or contrived. Such fears of harm are not reasonable because they are not based on reason: see *Air Atonabee*, at p. 277, quoting *Re Actors' Equity Assn. of Australia and Australian Broadcasting Tribunal (No 2)* (1985), 7 A.L.D. 584 (Admin. App. Trib.), at para. 25. The words "could reasonably be expected" "refer to an expectation for which real and substantial grounds exist when looked at objectively": *Watt v. Forests*, [2007] NSWADT 197 (AustLII), at para. 120. On the other hand, what is at issue is risk of future harm that depends on how future uncertain events unfold. Thus, requiring a third party (or, in other provisions, the government) to prove that harm is more likely than not to occur would impose in many cases an impossible standard of proof.
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> Health Canada applied an unduly onerous test of probability of harm. For example, an officer at Health Canada at the relevant time deposed that, in deciding whether disclosure could be expected to be prejudicial to a third party, the financial loss or the prejudice to a third party's competitive position must be "immediate" and "clear". This approach is not, in my respectful view, consistent with the language of s. 20(1)(*c*).
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> To conclude, the accepted formulation of "reasonable expectation of probable harm" captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm.[28]

[36] The Supreme Court of Canada's analysis is consistent with former Commissioner Loukidelis' articulation of the standard of proof under the reasonable expectation of harm test in Order 00-10,[29] where he said the following:

> Section 21(1)(c) requires a public body to establish that disclosure of the requested information could reasonably be expected to cause "significant harm" to the "competitive position" of a third party or that disclosure could

[26] *Merck Frosst*, para. 199.
[27] *Merck Frosst*, para. 197.
[28] *Merck Frosst*, paras. 204-206.
[29] [2000] B.C.I.P.C.D. No. 11, p. 9.

> reasonably be expected to cause one of the other harms identified in that section. There is no need to prove that harm of some kind will, with certainty, flow from disclosure; nor is it enough to rely upon speculation. Returning always to the standard set by the Act, the expectation of harm as a result of disclosure must be based on reason. ... Evidence of speculative harm will not meet the test, but it is not necessary to establish certainty of harm. The quality and cogency of the evidence must be commensurate with a reasonable person's expectation that the disclosure of the requested information could cause the harm specified in the exception. The probability of the harm occurring is relevant to assessing the risk of harm, but mathematical likelihood will not necessarily be decisive where other contextual factors are at work.

[37] As noted at the outset, the Supreme Court of Canada confirmed in *Merck Frosst* that the onus is on a third party to demonstrate that the third party exception applies, and that they must do so on the balance of probabilities. However, the Court also noted that "what evidence will be required to reach that standard will be affected by the nature of the proposition the third party seeks to establish and the particular context of the case."[30] Where the third party is required to establish a reasonable expectation of probable harm, the onus will be met where the third party establishes that there is a reasonable basis to conclude that the harm is likely to occur. It is not necessary to demonstrate on a balance of probabilities that the harm will occur.

Harm to third party interests––the positions of the parties

[38] The Trustees argue that the ICBA's goal is to promote an "open-shop" workplace, and that the ICBA offers retirement savings plans (group RRSPs) that directly compete with the Plans. The Trustees argue that FIPPA is not intended to give a competitive advantage, and that it is relevant that the ICBA is not seeking the information in order to ensure that FICOM is accountable, but to assist its own members in their competition for labour. The Trustees say that disclosure of the requested information will allow the ICBA to gain an advantage in creating and marketing competitive retirement savings arrangements to attract union members. Registered pension plans will be at a disadvantage compared to entities, such as ICBA, who establish unregistered retirement savings plans that are not regulated by FICOM.

[39] The Trustees are of the view that "a negotiated cost defined benefit pension plan is the best way to protect retirement income of its members".[31] However, the Trustees state that as a result of market turmoil in recent years, most defined benefit pension plans are currently under funded.[32] The Trustees are concerned that the information at issue will be used to "undermine political

[30] *Merck Frosst,* para. 94.
[31] Trustees' (1-12) initial submission, para. 22.
[32] Trustees' (1-12) initial submission, para. 16.

and economic support for the pension plans" by allowing ICBA to generate a comparison between the pension benefits paid and accrued under the plans and the benefits paid under RRSP arrangements, with a focus on the percentage of each dollar contributed that is used to reduce the unfunded liability of the plan.[33]

[40] Because the plans at issue are negotiated cost plans, the obligation on the employer to fund the plan is capped under the collective agreement. As a result, if plans are wound up when there are insufficient assets to pay the benefits owing, those benefits will have to be cut.[34] The Trustees note that membership in the plan terminates, if a member ceases to belong to the union, and that a member is entitled to take with them the benefits accrued to date.[35] There is a concern that if some members leave, then others will as well, leading to a "run on the plan." Loss of members can seriously threaten the viability of a Plan.

[41] The Trustees argue:

> Assessing all of the circumstances, including, the importance of financial security on retirement, the decline in participation in and availability of registered pension plans (like the Plans) and ICBA's stated goals, the Trustees submit that disclosure of the information would reasonably result in undue financial loss to the Plans and their members and undue financial gain to the ICBA' and its employer members.
>
> Further, the Trustees submit that disclosure of the requested information would reasonably result in significant harm to the Unions' competitive position and, therefore, the plans' competitive position.[36]

[42] The Trustees also supported the view that the release of the requested information would not further the purposes of FIPPA, but rather would be used to advance the "financial, political and ideological purposes of the ICBA."[37] They argued that the legislation should not be used as "another arrow in the quiver of an organization that seeks the demise of the building trades and their pension plans."[38]

[43] The Unions also argue that disclosure would harm their financial interests in collective bargaining. The International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 97 ("Local 97") argued that, if an employer was aware of the actual status of the pension plan, this would

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[33] Trustees' (1-12) initial submission, paras. 74-75.
[34] Trustees' (1-12) initial submission, para. 72.
[35] Trustees' (1-12) initial submission, para. 68.
[36] Trustees' (1-12) initial submission, paras. 81-82.
[37] Trustees' (13) initial submission, para. 13.
[38] Trustees' (13) initial submission, para. 14.

significantly and negatively affect the bargaining position of Local 97 with respect to negotiating employer contributions to the pension plan. Local 97 states:

> When the Union bargains collective agreements with its employers, information regarding the state of the Pension Plan, liabilities or surpluses, and the amount of pensions paid to members are withheld from the employers and such information, if known by employers, would allow it to alter its bargaining position vis-à-vis pension contributions, and overall wage package proposals in response to its knowledge of the status of the Pension Plans.[39]

[44] Local 170 stated that the ICBA and Local 170 have a longstanding adversarial and competitive relationship, and that ICBA is "infamous in the labour relations community" for its vocal anti-union political stance.[40]

[45] Local 170 says that release of the information will weaken the Union's competitive position by allowing the ICBA and its members to "fine tune" or "enhance" their retirement benefits by providing information about the "target to beat". They express concern that increasingly competitive ICBA-sponsored retirement packages might draw employees to the non-union sector, thus eroding union membership and weakening their bargaining position.[41]

[46] Local 170 states that its members have an interest in defined benefit plans "because such plans are more secure and pay better retirement benefits than unregulated registered retirement savings plans."[42] It goes on to state that disclosure of the requested information would be a "disincentive for unions to sponsor regulated defined benefit plans", and that instead "construction unions will simply resort to RRSPs which are unregulated but leave members more vulnerable [with] inferior benefits and less retirement security."

[47] FICOM states that the type of information requested "could reasonably be expected to harm significantly the competitive position of the union, and interfere significantly with the negotiating position of the sponsoring union and other union and non-union employers when negotiating work rates since the financial information is key to establishing competitive wage or bid rates and securing business contracts".[43] FICOM states that it decided to release the information because "the date of the data is no longer such that it would place the union sponsors under a competitive disadvantage or interfere with labour relations to the extent that significant harm might reasonably result from the disclosure of the

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[39] Local 97's submission on standing, April 23, 2012, quoting from its submission to FICOM of June 2, 2012.
[40] Local 170's initial submission, p. 3.
[41] Local 170's initial submission, p. 4.
[42] Local 170's initial submission, p. 9.
[43] FICOM's initial submission, paras. 19 and 21.

records." However, it expressed concern that "some level of harm could reasonably be said to ensue."

[48] The ICBA argues that the Trustees and Unions have not met the onus they bear to draw a clear connection between the release of the information at issue and the harms they allege. It disagrees with the assertion of the Trustees and Unions that the release of the information will lead to the ICBA persuading plan members to leave the Unions, thus causing a run on the plans. The ICBA submits that they have failed to demonstrate "who the Applicant might intend to persuade, what they might persuade them of and how, and that the effect would be more than just heightened competition".[44] The ICBA argues that the Trustees and Unions have also failed to demonstrate that any gains in membership by the ICBA would detract from the membership in the Plans. There is no evidence about the size of the various plans or their geographical range, and no evidence that any unions have lost members as result of the ICBA's activities. The ICBA notes that many of the plans are associated with broadly based international unions. The ICBA says that even the Trustees' and Unions' "bare assertions go to establishing no more than the potential for heightened competition or lower membership, not undue harm."[45] The ICBA also notes that they have not pointed to any harm caused by previous disclosures of the same information.

[49] The ICBA asserts that the Trustees and Unions had also failed to prove that release of the information would significantly interfere with their negotiating position in collective bargaining. The ICBA states that a "key flaw" in the argument made by Local 97, and set out in para. 42 above, is that it fails to draw a connection between the ICBA and an employer with whom the union may engage in collective bargaining.[46] The ICBA submits that the Trustees and Unions have not provided sufficient detail to prove any undue interference with collective bargaining, such as when collective bargaining will be taking place. The ICBA also argues that it cannot be relevant to FIPPA if the Unions' purpose is to actually deceive the employer with respect to the state of the pension plan in the course of collective bargaining. The ICBA concludes that the real motivation for the Unions to resist release of the information is to insulate them from heightened competition. The ICBA also submits that its purposes for seeking the information are not relevant.

Harm to third party interests––analysis

[50] I agree with ICBA that its motivations in seeking release of the information cannot be relevant to the outcome of the s. 21(1) analysis. Whether the ICBA is motivated by a legitimate desire to promote government accountability or by its opposition to unions is not a matter which needs to be adjudicated. The question

[44] ICBA's reply submission, para. 28.
[45] ICBA's reply submission, para. 38.
[46] ICBA's reply submission, para. 44.

is whether the Trustees and Unions have established that the information should be exempt from disclosure because one or more of the harms set out in s. 21(1)(c) can reasonably be expected to occur. While I am prepared to accept that the loss of members would result in the harm that the Trustees and Unions identify, their submissions do not persuade me that disclosure of the information at issue could reasonably be expected to cause them to lose members.

[51] The evidence demonstrates that the concern of the Trustees and Unions that the ICBA may use the information to try to discredit the pension plans, with a view to making them less attractive to union members, is a reasonable one. The Trustees' evidence included a 2003 article which appeared in the *Vancouver Sun*, titled "*Deficits threaten trade pensions*" that listed the amount by which six union-sponsored pension plans were under-funded, and included quotes from executive vice-president of the ICBA.[47] However, there is no evidence to demonstrate that this use of the information led to any of the harms identified by the Trustees and Unions.

[52] The Trustees and Unions argue that the information will allow the ICBA to develop retirement savings arrangements that are more attractive, and thus enable the ICBA to lure members away from their union jobs. There are several problems with the argument. First, the major concern seems to be with the publication of the unfunded liability associated with the plans. Nevertheless, the evidence provided by the Trustees is that most plans of this type are currently experiencing this situation, a fact which is publicly known. There is no evidence before me that knowledge of the specifics of these particular plans would have any further impact in rendering these plans less attractive.

[53] Secondly, there is no explanation given about how the ICBA could go about developing more attractive retirement savings arrangements. If, as the Trustees suggest, the underfunded status of the plans is a result of economic conditions, there does not seem to be any way in which the ICBA could design a similar kind of plan that would not face the same difficulties. If, instead, the argument is the information would make the RRSP arrangements offered by ICBA more attractive in comparison to the plans, I note that both the Trustees and the Unions agree that a registered pension plan is a superior way of protecting retirement income. There is no explanation given as to why employees would come to a different conclusion. Indeed, the argument of the Trustees and Unions relies on the assumption that the ICBA's retirement benefits will appear so superior that employees will give up their unionized jobs, and all the various benefits those carry with them, as a result. There is simply nothing to support such an assumption.

[47] Trustees' (1-12) initial submission, affidavit of a member of the Board of Trustees, ex. G.

[54] Finally, the argument of the Trustees and Unions also fails to take into account that FICOM previously has disclosed the same information with respect to other union-sponsored pension plans, with no evidence of the harm that the union postulates. With respect to the current request, the trustees of three of the pension plans did not object to the disclosure of their information. If the fears of the Trustees and the Unions are warranted, it is reasonable to expect that evidence would exist that these disclosures resulted in the respective unions and pension plans losing a significant number of members. If the past disclosures can be distinguished from the current situation, such that it is likely that different effects would ensue, that has not been explained to me.

[55] Therefore, I find the contention of the Unions that they will lose members is merely speculative and lacks objective evidential support. As a result, it has not been established that it is reasonably likely that disclosure will result in undue financial loss or gain to either the Unions or the plans, or harm significantly the competitive position of either of these parties.

[56] In addition, I note that it is not clear how the disclosure of the information could harm the interests of the Unions, given that the Unions submit that they already openly promote the terms of these pension benefits to attract prospective employees to join their respective Unions. While I found that s. 10(4) of the PBSA did not determine whether the information was provided in confidence, the fact that the information at issue is required by the legislation to be provided to members is relevant to the assessment of harm. The fear of a "run on the plan" is based on anticipated communication by the ICBA with the current plan members about the state of the plan. But there is no question that those members are entitled to the information at issue. The Trustees and Unions did not explain how anticipated communication of the disputed information to the plan members could constitute "undue" harm.

[57] The Unions also argue that, if employers, who contribute to union pension plans, obtained information about the financial health of the plans, it would harm the negotiating position of the Unions during collective bargaining. They submit that, if the employers knew the truth about the financial health of the plans, it would be more difficult for the Unions to leverage more generous contributions from the employers.[48] I agree that, in some circumstances, it could harm the negotiating position of a union, if the employer were aware of the details of a financial plan over which the parties were negotiating. The fact that the ICBA does not engage in collective bargaining with any of the Unions directly is not determinative: once the information is disclosed, it must be considered disclosed to the world, including employers who do engage in such negotiations. But there

[48] Local 97's initial submission, para. 7.

is nothing to suggest that, in this case, the disclosure of the details of any of the plans will interfere with any specific negotiations that may be ongoing or anticipated. I note that FICOM came to the opinion that the age of the data was such that its release would not significantly interfere with labour relations. Without some more concrete evidence of how the disclosure of this particular data may affect a real set of negotiations, I find that the Trustees and Unions have not established, on the balance of probabilities, a reasonable expectation that disclosure of the information will be likely to interfere significantly with the negotiating position of any third party.

[58] In summary, while I accept that there may be some circumstances in which information about a pension plan may be appropriately withheld under s. 21(1), the arguments and evidence that the Trustees and Unions have provided in this case do not meet the required standard for establishing that disclosure of this information could be reasonably expected to cause significant harm to their competitive position; interfere significantly with their negotiating position; or cause them undue financial loss. Therefore, I find that s. 21(1)(c)(i) and (iii) do not apply to the information.

CONCLUSION

[59] I find that s. 21(1) of FIPPA does not require FICOM to refuse to give the ICBA access to the information. For the reasons given above, under s. 58 of FIPPA, I require FICOM to give the applicant access to the information it requested within 30 days of the date of this order, as FIPPA defines "day," that is, on or before March 12, 2013. I also require FICOM to copy me on its cover letter to the applicant, together with a copy of the records.

January 28, 2013

ORIGINAL SIGNED BY

Jay Fedorak
Assistant Commissioner

OIPC File No's: F12-48316, F12-48320
F12-48321, F12-48323
F12-48324, F12-48325
F12-48326, F12-48327
F12-48328, F12-48329
F12-48330, F12-48373
F12-48374