



OFFICE OF THE
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Order F15-19

MINISTRY OF FINANCE

Elizabeth Barker
Senior Adjudicator

April 14, 2015

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Summary: The applicant requested the combined amount of taxes remitted in 2012 under the *Insurance Premium Tax Act* by insurance companies that provide title insurance in British Columbia. The Ministry of Finance withheld the information on the basis that it would disclose information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting tax (s. 21(2) of FIPPA). The adjudicator found that disclosure of the requested information is not prohibited by s. 21(2) of FIPPA and ordered the Ministry to disclose it.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 21(2).

Authorities Considered: B.C.: Order 00-10, 2000 CanLII 11042 (BC IPC) and Order F05-29, 2005 CanLII 32548 (BC IPC).

INTRODUCTION

[1] The applicant requested the total amount of taxes paid in 2012 under the British Columbia *Insurance Premium Tax Act*¹ (“IPTA”) by insurance companies that provide property title insurance in British Columbia. He specified that he wanted only the aggregate amount, and that he was not seeking how much was paid by each individual insurer. The Ministry of Finance (“Ministry”) refused to disclose this information on the basis that it was obtained on a tax return and it

¹ [RSBC 1996] c. 232.

was gathered for the purpose of determining tax liability or collecting a tax, so disclosure is prohibited by s. 21(2) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

[2] The applicant disagreed with the Ministry’s decision and requested that the Office of the Information and Privacy Commissioner (“OIPC”) conduct a review. Mediation did not resolve the dispute and the applicant requested that it proceed to an inquiry under Part 5 of FIPPA.

[3] During the written inquiry, both parties provided initial and reply submissions. The Ministry sought and received approval to submit parts of a supporting affidavit *in camera*.

ISSUE

[4] The issue to be determined is whether the Ministry is required to withhold the requested information under s. 21(2) of FIPPA. Section 57(1) of FIPPA places the burden on the Ministry to prove that the applicant has no right of access to the record or part of the record.

DISCUSSION

[5] **Background** --The Ministry administers the IPTA, which regulates the tax that insurance companies must pay for premiums they receive under insurance contracts provided to BC residents or for property situated in BC.

[6] The applicant requested the total dollar value of IPTA remittances by insurance companies that provide property title insurance in BC for 2012 (“Total Paid”). Title insurance is a type of property insurance that protects residential or commercial property owners and their lenders against losses related to the property’s title or ownership.

[7] The Ministry identifies by name the five insurance companies (“Insurers”) operating in BC who offer title insurance and who filed tax returns under the IPTA in 2012.² The OIPC invited the Insurers to make written representations in the inquiry, but none of them took the opportunity to do so.

Preliminary matter

[8] Based on the parties’ submissions and evidence, I understand that the Total Paid does not exist independently in its own record. According to the Ministry, the Total Paid was arrived at by adding together the tax payable

² The Ministry says it did not seek to provide these names *in camera* because they are easily ascertained using public sources of information. Ministry’s initial submission, para. 3.14.

amounts from the five Insurers' 2012 tax returns.³ The only place the Total Paid appears in the inquiry materials is in the Ministry's *in camera* submissions and affidavit evidence.⁴ If a discrete record already exists that contains the Total Paid, the Ministry has not mentioned it or provided it for the purposes of this inquiry.

[9] Section 5 of FIPPA provides for an applicant's right to access *records*. If no record exists, s. 6 of FIPPA imposes a duty on a public body to create a record if one can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and if creating the record would not unreasonably interfere with the operations of the public body.

[10] The tenor of the Ministry's submissions, along with the nature of the information in dispute, leads me to conclude that creating a record containing the Total Paid is not at issue. The Ministry has not raised an argument about that matter. Therefore, I am satisfied that for the purposes of this inquiry I have the jurisdiction to make a determination regarding the Ministry's decision to withhold information from a record under s. 21(2) of FIPPA.

[11] **Ministry's submissions**--The Ministry is refusing to disclose the information that the applicant requested, under s. 21(2), which states as follows:

The head of a public body must refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

[12] The Ministry explains that the Total Paid is the aggregate or sum total of the five Insurers' individual IPTA "tax payable" amounts on their 2012 tax returns.⁵ The Ministry acknowledges that in the past it provided the applicant with this figure for earlier tax years. However, it submits that those earlier disclosures were made in error and it did not realize that s. 21(2) precluded releasing such information until it dealt with the current request.⁶

[13] The Ministry makes two main arguments regarding disclosure of the Total Paid and why disclosure is not permitted under s. 21(2). Its primary argument is that the information in dispute could be combined with publicly available information to allow one to "ascertain, with some degree of accuracy" or arrive at "a close approximation" of information on the 2012 tax return of one of the five Insurers.⁷ The Ministry's Director of Income Tax Advisory and Intergovernmental Relations, Income Tax Branch ("Director") explains how that would occur.

³ Ministry's initial submission, para. 3.18, and in the Director's affidavit, para. 11.

⁴ Ministry's initial submission, para. 3.04, and in the Director's affidavit, para. 2.

⁵ Ministry's initial submission, para. 3.18 and 3.22. Director's affidavit, para. 11.

⁶ Ministry's reply submission, para. 2.

⁷ Ministry's initial submission para. 3.20. Director's affidavit, paras. 12.

He says that four of the Insurers that sell title insurance in BC are federally regulated by the Office of the Superintendent of Financial Institutions (“OSFI”), and the dollar value of the premiums they collect as part of their BC business is publicly reported online.⁸ By knowing the amount of their premiums received/receivable and the publicly known applicable IPTA tax rate, one could estimate the individual as well as combined IPTA tax payable amount for those four. The combined tax payable amount for the four Insurers’ could be subtracted from the Total Paid to estimate the tax payable (and net premiums) for the fifth, non-federally regulated Insurer.⁹

[14] In addition to its primary argument about the inferences one could draw regarding the non-federally regulated Insurer, the Ministry submits that given the small group size, disclosure of the Total Paid “combined with public information about the relative size” (it does not elaborate) of the Insurers would allow one to infer what portion of the Total Paid is attributable to each of the five Insurers.¹⁰ The Ministry asserts that even disclosing that an Insurers’ tax payable amounts falls somewhere between zero and the Total Paid is precluded by s. 21(2).¹¹

[15] The Ministry’s second main argument is that disclosing the Total Paid will reveal information that was obtained on a tax return and information that was gathered by the Ministry for the purpose of determining the five Insurers’ tax liability.¹² The Ministry does not elaborate. However, it provided a blank, sample *Insurance Premium Tax Return*, presumably to demonstrate the type of information that the Insurers would be obliged to report for tax purposes. The tax return has boxes for the insurer to write in the amount of gross premiums that are received or receivable for various types of insurance offered, the specified deductions claimed, the net taxable premiums and the tax payable or refund amount.¹³ As previously mentioned, the information at issue in this case is the sum of the “tax payable” amounts on the Insurers’ tax returns.

[16] **Applicant’s submissions**--The applicant submits that the Total Paid is a calculated number that was generated by the Ministry in response to his access request by adding numbers found on multiple tax returns. He says that this generated number was not supplied by the Insurers for taxation purposes nor gathered for the purpose of determining tax liability or collecting tax and it is not found on any tax return.

⁸ Director’s affidavit, para. 15-22. Ministry’s initial submissions, para. 3.29.

⁹ Ministry’s initial submission, para. 3.31 and Director’s affidavit, para. 24.

¹⁰ Ministry’s initial submissions, para. 3.38.

¹¹ Ministry’s initial submissions, paras. 3.37 and 3.38.

¹² Ministry’s initial submissions, para. 3.37 and reply submissions, para. 3.

¹³ The Tax Return provides for three categories of premiums: life and health, property and automobile, and “other”. The Tax Return also specifies the applicable tax rate for the various types of premium.

[17] Further, he submits that it does not suffice to say, as the Ministry does, that one can infer to “some degree of accuracy” information obtained on a tax return. He submits that if the Total Paid cannot be used to calculate the numbers supplied on a tax return, then s. 21(2) does not apply.

[18] The applicant also explains that the Ministry previously provided him with the requested information for the 1996 - 2011 tax years.

Analysis

[19] Section 21(2) states that the head of a public body must refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.¹⁴

[20] In Order F05-29, former Commissioner Loukidelis explained the purpose of s. 21(2) as follows:

In my view, the purpose of s. 21(2) is to protect information that a public body obtains from a taxpayer (on the taxpayer’s tax return) or otherwise gathers relating to the taxpayer for the purpose of determining tax liability or collecting a tax. The policy of this disclosure exception is to protect information obtained or gathered relating to the taxpayer for the purpose of determining tax liability or collecting a tax, without, unlike s. 21(1), requiring the establishment of confidentiality of the information or a reasonable expectation of harm to the taxpayer from its disclosure.¹⁵

[21] Keeping the above statement in mind, I will examine both elements of the section: i.e., whether the Total Paid was information obtained on a tax return, as well as whether it is information that was gathered for the purpose of determining tax liability or collecting a tax.

Obtained on a tax return

[22] In my view, the individual tax payable amount that each Insurer would have provided on its respective 2012 tax return is unmistakably information that was both obtained on a tax return and information that was gathered for the purpose of determining tax liability or collecting a tax. However, the issue in this case is whether the *aggregate* of those individual tax payable amounts is information obtained on a tax return. There are no previous BC Orders that have examined the applicability of s. 21(2) to the aggregate of taxes paid by more than

¹⁴ Section 21(3) says that s. 21(2) does not apply if the third party consents to the disclosure. There is nothing to suggest that the Ministry informed the Insurers of the applicant’s request or that the Insurers consented to disclosure.

¹⁵ Order F05-29, 2005 CanLII 32548 (BC IPC), at para. 92.

one tax payer.¹⁶ Similarly, while other provinces' information and privacy legislation contain comparable mandatory exceptions regarding disclosure of tax information, I am not aware of any orders that have addressed an analogous fact pattern.

[23] Based on the facts in this case, I am not satisfied that the Total Paid is information "obtained on a tax return". The Total Paid is information that does not exist independently on any tax return. Further, despite the Ministry's submissions regarding the relatively small size of the group of Insurers, and what one could infer based on publicly available information, at best one could only estimate what portion of the Total Paid was paid by whom and what that reveals about the information on the Insurers' 2012 tax returns. I have carefully studied the information the Ministry provided on this point, in particular the Director's affidavit evidence about how one could calculate tax payable or premium amounts that closely resemble the values on the Insurer's tax returns. In my view, such estimates or close approximations are not information obtained on the Insurers' tax returns. For the same reason, I am not persuaded by the Ministry's argument that disclosing that each Insurer's tax payable amount falls somewhere within the range of zero and the Total Paid reveals information obtained on a tax return.

Gathered for the purpose of determining tax liability or collecting a tax

[24] BC Orders 00-10 and F05-29 provide guidance about the meaning of the phrase "gathered for the purpose of determining tax liability or collecting a tax" in s. 21(2). In Order 00-10, Pacific Western Brewing Company asked the Liquor Distribution Branch ("LDB") for several years' worth of Labatt Breweries' annual BC sales amounts and the equivalent information for Molson Breweries. The amounts requested were generated from data (including container deposits and sales tax) compiled by the LDB from its operations. The information in dispute was clearly not obtained on a tax return. However, Molson and Labatt argued that one of the reasons LDB collected the information was to determine the amount of tax LDB must remit to the provincial and federal governments for liquor sales. Thus, the s. 21(2) issue in Order 00-10 was whether the information was gathered for the purpose of determining tax liability or collecting a tax. Former Commissioner Loukidelis found that information needs to be collected for the sole or primary purpose of determining tax in order for s. 21(2) to apply. He said:

The material before me establishes that the data provided to the LDB by its suppliers – and the data generated by the LDB and in dispute here – are

¹⁶ Similarly, there were no such aggregate/total tax fact scenarios in Orders regarding s. 22(3)(e), which states that a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information was obtained on a tax return or gathered for the purpose of collecting a tax.

supplied for a whole host of reasons. Judged on that material, I cannot agree that the disputed information was gathered for the purpose of determining tax liability or collecting a tax.

...The records sought by Pacific Western were created in response to its request; the lump sum figures found in the records were created by the LDB from underlying data (including, in part, data provided by Molson and Labatt). Strictly speaking, however, the information sought by Pacific Western was not, directly, “gathered” by the LDB. On that basis alone, the information is not covered by s. 21(2).¹⁷

[25] In F05-29, the Hudson’s Bay Company (“HBC”) asked BC Assessment Authority (“BCA”) to provide BCA’s calculation of the gross leasable area, fair market rent, vacancy allowances, expense allowances and the capitalization rates regarding shopping malls where HBC was a tenant. BCA refused disclosure under ss. 21(1) and 21(2). As was the case in Order 00-10, the information was clearly not obtained on a tax return, so the question under s. 21(2) was whether the information was gathered for the purpose of determining tax liability or collecting a tax. Former Commissioner Loukidelis found that s. 21(2) did not apply because the request was not for the underlying information “gathered” by BCA; rather the request was for information that was “generated” by BCA. He said:

Having regard to the context in which the word “gathered” appears, and the overall scheme and purpose of the Act, the word “gathered” does not cover information that is generated, or created, by a public body by applying skills, techniques and professional judgement to information that it has gathered (even where underlying information that is analyzed to create the disputed information has been gathered directly from a taxpayer).¹⁸

[26] I make a similar finding in this case, namely that the Total Paid was not “gathered for the purpose of determining tax liability of collecting tax.” There is nothing that suggests that the Total Paid was brought into existence for any purpose related to determining tax liability or collecting tax. Instead, all the information provided by the Ministry illustrates that the Total Paid was a number generated by the Ministry for the sole purpose of responding to the applicant’s access request.

[27] Further, as explained above, by knowing the Total Paid, even in combination with publicly available information, one could not actually discern information that was gathered for the purpose of determining tax liability or collecting tax. At best, one could only estimate such information.

¹⁷ Order 00-10, 2000 CanLII 11042 (BC IPC), p. 20-21. He found, however, that LDB must withhold the information under s. 21(1).

¹⁸ Order F05-29, 2005 CanLII 32548 (BC IPC) at para 96.

[28] While the intent of FIPPA is to make public bodies more open and accountable through disclosure of information, it also recognizes that exceptions to disclosure are desirable and necessary in certain circumstances. The tension between these dual purposes in FIPPA is plainly evident in this case. A public body's ability to disclose information like the aggregate tax information in this case encourages public accountability, while the exceptions in ss. 21(2) and 22(3)(e) recognize that taxpayers, whether individual or corporate, are entitled to privacy with respect to their tax information. Such privacy fosters the voluntary and fulsome disclosure of information necessary for governments to determine tax liability and collect tax. If individual tax payers fear disclosure of their tax information, it may result in a reluctance to share such information with the public body collecting that information for tax purposes. Based on the facts of this case, I am satisfied that the information in dispute neither directly nor indirectly discloses the tax information of the individual Insurers, and disclosure would not undermine the balance between public accountability and the protection of taxpayer privacy.

[29] In conclusion, I find that the Total Paid is not information that was "obtained on a tax return" or "gathered for the purpose of determining tax liability or collecting tax". Therefore, disclosure of the Total Paid is not prohibited by s. 21(2) of FIPPA.

CONCLUSION

[30] For the reasons stated above, pursuant to s. 58 of FIPPA, I order the Ministry give the applicant access to the requested information by May 27, 2015. The Ministry must concurrently copy the OIPC's Registrar of Inquiries on its letter to the applicant, establishing that it has disclosed the requested information.

April 14, 2015

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

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