



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

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Order F15-70

**MINISTRY OF INTERNATIONAL TRADE AND MINISTRY RESPONSIBLE FOR
ASIA PACIFIC STRATEGY AND MULTICULTURALISM**

Caitlin Lemiski
Adjudicator

December 22, 2015

CanLII Cite: 2015 BCIPC 76
Quicklaw Cite: [2015] B.C.I.P.C.D. No. 76

Summary: Keemax Asia requested a third party review of the Ministry of International Trade and Ministry Responsible for Asia Pacific Strategy and Multiculturalism's decision to disclose two contracts and six contract amendments with the Government of British Columbia. Keemax argued disclosure of the two contracts and six contract amendments would harm its business interests within the meaning of s. 21(1) of FIPPA. The adjudicator confirmed the Ministry's decision that s. 21(1) did not apply to the information it had decided to disclose because the information in the records was not supplied within the meaning of s. 21(1)(b) of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss.6, 21(1), and 23.

Authorities Considered: B.C.: Order 01-20, 2001 CanLII 21574 (BC IPC); Order 01-39, 2001 CanLII 21593 (BC IPC); Order F08-22, 2008 CanLII 70316 (BC IPC); Order F13-20, 2013 BCIPC 27 (CanLII); Order F15-53, 2015 BCIPC 56 (CanLII).

Cases Considered: *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848, 2002 BCSC 603.

INTRODUCTION

[1] This order arises out of an applicant's request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to the Ministry of International Trade and Ministry Responsible for Asia Pacific Strategy and Multiculturalism ("Ministry") for copies of records about the British Columbia Trade and Investment Representative office in Shanghai.

[2] The Ministry gave notice of the request under s. 23 of FIPPA to Keemax Asia ("Keemax"), as the third party, saying it was considering disclosing two contracts and six contract amendments between the Ministry and Keemax. Keemax objected to the disclosure of the two contracts and six contract amendments. The Ministry then informed Keemax that it would not be withholding any information on the basis that s. 21(1) applied.¹

[3] Keemax asked the Office of the Information and Privacy Commissioner ("OIPC") to review the Ministry's decision not to withhold information under s. 21(1). Mediation did not resolve Keemax's request for review and the matter proceeded to inquiry. The OIPC received submissions from the Ministry and Keemax.²

ISSUE

[4] The issue in this inquiry is whether the Ministry is required to refuse to disclose information contained in the records because disclosure would be harmful to third party business interests as set out in s. 21(1) of FIPPA.

[5] Under s. 57(3)(b) of FIPPA, Keemax has the burden of proving that the applicant has no right of access to the information in the records.

DISCUSSION

[6] **Information in dispute** — The following two contracts and six contract amendments are in dispute:

1. Original contract, signed April 2007;
2. Renewal contract, signed April 2009;
3. Amendment 007, signed October 2009;
4. Amendment 008, signed April 2010;

¹ The Ministry advised Keemax that it intends to sever parts of the two contracts and six contract amendments under other exceptions to FIPPA. Those parts of the two contracts and six contract amendments are not in dispute at this inquiry.

² The applicant was not invited to make a submission at this inquiry as he indicated to the OIPC Registrar that he did not want to participate.

5. Amendment 009, signed March 2011;
6. Amendment 010, signed January/February 2012;
7. Amendment 011, signed March 2012; and
8. Amendment 012, signed December 2012/January 2013.

[7] **Are the records responsive to the applicant's request?** – In his request, the applicant specified that he wanted a copy of any contracts, service agreements or “any other fiscal arrangements” between the government of British Columbia and Keemax between April 1 - December 20, 2013.³ Keemax objects to disclosure of the disputed information on the basis that the two contracts and six contract amendments fall outside of this timeframe. The Ministry did not make submissions regarding Keemax's objection.

[8] The original contract was signed in 2007. Amendment 011, which applies to the original contract and to amendments that precede it, extends the terms of the original contract to 2014.⁴ Amendment 012 modifies a term in the original contract but does not change the provision in Amendment 011 that extends the term of the original contract to 2014. I therefore find that the two contracts and six contract amendments fall within the timeframe of the applicant's request because as a result of Amendment 011, they were all in force during the timeframe the applicant specified in his request (April 1 – December 20, 2013).

[9] **Third party business interests** – 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. Section 21(1), all three parts of which must be met for that section to apply, states:

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

(a) that would reveal

...

(ii) commercial, financial, labour relations, scientific or technical information of or about a third party,

(b) that is supplied, implicitly or explicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

...

³ He also requested other information about Keemax that is not in dispute in this inquiry.

⁴ The renewal contract does not extend the term of the original contract.

- (iii) result in undue financial loss or gain to any person or organization, or...

[10] **Commercial Information** – The disputed information is contained in two contracts and six contract amendments between the Government of British Columbia and Keemax. FIPPA does not define “commercial” information. Previous orders have stated that information is commercial information if it relates to the terms and conditions for buying or selling goods or services.⁵

[11] The Ministry submits that it concluded that most of the disputed information in this case contains commercial information.⁶ Keemax submits that all the information in dispute is its commercial information.⁷

[12] Previous orders have determined that "commercial information" must relate to a commercial enterprise and "financial information" can include information about services delivered to a public body including hourly rates, global contract amounts, breakdowns of these figures, prices, expenses and other fees payable under contract.⁸ Based on my review of the disputed records in this case, I find that they contain precisely this type of information, such as expenses and other fees payable, related to Keemax, a commercial enterprise. For this reason, I find that all of the disputed information is both commercial and financial information of or about a third party.

[13] **Supply of information** – Section 21(1)(b) requires that the information be supplied implicitly or explicitly in confidence. To determine whether the requirement in s. 21(1)(b) is met, it is first necessary to determine whether the information was supplied, and, if it was, then determine if it was supplied in confidence.

Supplied

[14] Previous orders have determined that information in a contract is normally not supplied because it is the product of negotiations.⁹ This includes terms that are proposed by one party and accepted as received by another party. As stated in Order 01-39:

⁵ Order F15-03, 2015 BCIPC 3 (CanLII) at para. 25.

⁶ The Ministry did not specify what information it concluded was commercial information, public body's submission at para. 4.07.

⁷ Keemax's submission at p. 2.

⁸ See Order F13-20, 2013 BCIPC 27 (CanLII) at para. 14.

⁹ Order 01-39, 2001 CanLII 21593 (BC IPC) at para. 44 and Order F15-53, 2015 BCIPC 56 (CanLII) at para. 9.

... information may originate from a single party and may not change significantly - or at all – when it is incorporated into the contract, but this does not necessarily mean that the information is "supplied." The intention of s. 21(1)(b) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible of change but, fortuitously, was not changed.¹⁰

[15] However, there are two exceptions to information in a contract being negotiated rather than supplied. One exception is when the information in a contract is immutable. For example, delegate Nitya Iyer stated in Order 01-39 that "if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of s. 21(1)(b)."¹¹

[16] A second exception is when disclosing the information would allow a reasonably informed observer to make accurate inferences about underlying confidential information supplied by the third party.¹² This could occur, for example, if disclosure of information in a contract would allow one to accurately infer the contractor's actual costs for materials, labour, or administration.¹³

[17] Keemax did not explain why any of the disputed information, despite appearing in contracts and contract amendments, was supplied rather than negotiated. Keemax's assertion that it provided information to the Ministry in confidence is distinct from and falls short of what is required to establish that the information was supplied. It also did not explain why the disputed information might fall under one of the two exceptions – that it is immutable or that disclosing it would allow a reasonably informed observer to make accurate inferences about underlying confidential information supplied by the third party.

[18] In reviewing the two disputed contracts and six contract amendments, I find that they contain negotiated information. That is because it is the sort of detail of contractual arrangements that would clearly have been susceptible to change through negotiation (i.e. service requirements and terms). In conclusion, I find that none of the disputed information was "supplied" for the purposes of s. 21(1)(b). Section 21(1), therefore, does not apply.

¹⁰ Order 01-39, supra at para. 46.

¹¹ Order 01-39, supra at para. 45.

¹² For a detailed explanation of the exceptions, see Order 01-39, supra at paras. 45 and 50, upheld and quoted in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603.

¹³ Order 01-20, 2001 CanLII 21574 (BC IPC), at para. 86.

CONCLUSION

[19] For the reasons given above, under s. 58 of FIPPA, I confirm the Ministry's decision that it is not required under s. 21(1) of FIPPA to refuse to disclose the information requested by the access applicant. I require the Ministry to finish processing the applicant's access request as required under Part 2 of FIPPA and respond to the applicant by February 5, 2016. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

December 22, 2015

ORIGINAL SIGNED BY

Caitlin Lemiski, Adjudicator

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