



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
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Order F15-71

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

Caitlin Lemiski
Adjudicator

December 22, 2015

CanLII Cite: 2015 BCIPC 77

Quicklaw Cite: [2015] B.C.I.P.C.D. No. 77

Summary: Dynasty Plus Ltd. 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 contract amendments between the Government of British Columbia and Dynasty. Dynasty argued disclosure of the two 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. 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 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 current contracts (including amendments) between the Ministry and Dynasty Plus Ltd. (“Dynasty”).¹

[2] The Ministry gave notice of the request under s. 23 of FIPPA to Dynasty, as the third party, stating that it was not going to withhold any information from the two contract amendments it located in response to the applicant’s request under s. 21(1) of FIPPA.² Dynasty objected to the Ministry’s decision on the basis that disclosure of any of the information in the two contract amendments could reasonably be expected to harm its business interests under s. 21(1) of FIPPA.

[3] Dynasty asked the Office of the Information and Privacy Commissioner (“OIPC”) to review the Ministry’s decision not to withhold information under s. 21(1) of FIPPA. The matter proceeded to inquiry. The OIPC received submissions from the Ministry and from Dynasty.³

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, Dynasty has the burden of proving that the applicant has no right of access to the information in the records.

DISCUSSION

[6] **Information in dispute** — There are two contract amendments in dispute as follows:

1. Amendment 002 (3 pages);
2. Amendment 003 (2 pages).

[7] **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:

¹ Orders F15-69 and F15-71 both arise out of separate requests made by the same applicant for contracts the Ministry has with Dynasty, but for different time periods.

² The Ministry advised Dynasty it intends to sever parts of the contract amendments under other exceptions to FIPPA. Those parts of the contract amendments are not in dispute at this inquiry.

³ 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.

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

[8] **Commercial Information** – The disputed information is contained in two contract amendments. 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.⁴

[9] The Ministry submits that it concluded that most of the disputed information in this case contains commercial information.⁵ Dynasty submits that the two contract amendments contain information that “uniquely defines our business relationship with [the Ministry].”⁶

[10] 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.⁷ 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 Dynasty, a commercial enterprise. For this reason, I find that all of the disputed records contain information that is both commercial and financial information of or about a third party.

[11] **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

⁴ Order F15-03, 2015 BCIPC 3 (CanLII) at para. 25.

⁵ The Ministry did not specify what information it concluded was commercial information, public body’s submission at para. 4.07.

⁶ Dynasty’s submission at p. 1.

⁷ See Order F13-20, 2013 BCIPC 27 (CanLII) at para. 14.

information was supplied, and, if it was, then determine if it was supplied in confidence.

Supplied

[12] Previous orders have determined that information in a contract is normally not supplied because it is the product of negotiations.⁸ This includes terms that are proposed by one party and accepted as received by another party. As stated in Order 01-39:

... 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.⁹

[13] 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)."¹⁰

[14] 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.¹¹ 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.¹²

[15] Dynasty did not explain why the disputed information, despite appearing in contract amendments, was supplied rather than negotiated. Dynasty's assertion that it provided information to the Ministry in confidence¹³ 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

⁸ Order 01-39, 2001 CanLII 21593 (BC IPC) at para. 44 and Order F15-53, 2015 BCIPC 56 (CanLII) at para. 9.

⁹ Order 01-39, supra at para. 46.

¹⁰ Order 01-39, supra at para. 45.

¹¹ 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.

¹² Order 01-20, 2001 CanLII 21574 (BC IPC), at para. 86.

¹³ Dynasty's submission, pp. 1-2.

informed observer to make accurate inferences about underlying confidential information supplied by the third party.

[16] In reviewing the contents of the contract amendments, I find that the information they contain is negotiated information. It is the sort of detail about contractual arrangements that would clearly have been susceptible to change through negotiation, and it is evident that an agreement was reached between the parties to amend certain obligations of an existing contract. 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.

CONCLUSION

[17] 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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