



OFFICE OF THE  
INFORMATION & PRIVACY  
COMMISSIONER  
*for British Columbia*

Protecting privacy. Promoting transparency.

Order F17-44

**OFFICE OF THE PREMIER**

Carol Whittome  
Adjudicator

October 5, 2017

CanLII Cite: 2017 BCIPC 48  
Quicklaw Cite: [2017] B.C.I.P.C.D. No. 48

**Summary:** Third parties requested a review of a decision made by the Office of the Premier to disclose information related to the sale of provincially owned land. The third parties argued that disclosure could reasonably be expected to harm their business interests pursuant to s. 21 of FIPPA. The adjudicator confirmed the Office of the Premier's decision that s. 21 did not apply to the information, and ordered it to disclose the information to the applicant.

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

**Authorities Considered: B.C.:** Order F16-39, 2016 BCIPC 43 (CanLII); Order 01-36, 2001 CanLII 21590 (BC IPC); Order F08-03, 2008 CanLII 13321 (BC IPC); Order 01-39, 2001 CanLII 21593 (BC IPC); F12-09, 2012 BCIPC 13 (CanLII); Order 04-06, 2004 CanLII 34260 (BC IPC); Order F17-17, 2017 BCIPC 18 (CanLII); 03-02, 2003 CanLII 49166 (BC IPC).

**Cases Considered:** *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3; *F.H. v. McDougall*, 2008 SCC 53 (CanLII); *Jill Schmidt v. British Columbia (Information and Privacy Commissioner), et al.*, 2001 BCSC 101 (CanLII).

## INTRODUCTION

[1] The City of Burnaby (City) requested that the Office of the Premier (Premier's Office) disclose records relating to the sale of a provincially owned property in Burnaby, BC to First Nations/Bands (Third Parties).

[2] The Premier's Office consulted with the Third Parties under s. 23 of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The Third Parties objected to the disclosure of a small amount of information from four pages of the responsive records on the basis that s. 21 (harm to third party interests) applied to that information.

[3] The Premier's Office responded to the Third Parties and indicated that it would not be applying s. 21 to information in the records. The Third Parties asked the Office of the Information and Privacy Commissioner (OIPC) to review the Premier's Office's decision to disclose information they say should be withheld pursuant to s. 21.

[4] Mediation failed to resolve all of the issues in dispute and they proceeded to inquiry. The City, the Third Parties and the Premier's Office provided submissions for this inquiry.

## ISSUES

[5] The issue to be decided in this inquiry is whether the Premier's Office is required to refuse to disclose the information at issue under s. 21 of FIPPA. Section 57(3)(b) of FIPPA places the burden on the Third Parties to prove that the City has no right of access to the information withheld under s. 21.

## DISCUSSION

### ***Background and Information in Dispute***

[6] The Third Parties purchased the property from the Province of British Columbia. The Province is the mortgagee (i.e., lender) and the Third Parties are the mortgagor (i.e., borrower). The information in dispute is contained in four pages of the records that relate to the mortgage and consists of the following types of information:

1. the name and incorporation number of the mortgagor;
2. the principal amount of the mortgage; and
3. the mortgage interest rate.

## Section 21

[7] Section 21(1) requires public bodies to withhold information if its disclosure would harm the business interests of a third party. The relevant parts of s. 21(1) of FIPPA in these circumstances are as follows:

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] I will address ss. 21(1)(a), (b) and (c), in turn.

### *Commercial or financial information – s. 21(1)(a)(ii)*

[9] Section 21(1)(a)(ii) applies to, *inter alia*, commercial or financial information of or about a third party. The terms “commercial” and “financial” are not defined by FIPPA. However, previous OIPC orders have found that “commercial” information relates to a commercial enterprise, or the buying, selling or exchange of goods and services, and that the information does not need to be proprietary in nature or have an actual or potential independent market or monetary value.<sup>1</sup>

[10] The information in dispute is mortgage information and is related to the purchase of property, and the parties all agree that it is commercial or financial

<sup>1</sup> See, for example, Order F16-39, 2016 BCIPC 43 (CanLII), para. 17, citing Order 01-36, 2001 CanLII 21590 (BC IPC), para. 17 and Order F08-03, 2008 CanLII 13321 (BC IPC), paras 62 – 63.

information.<sup>2</sup> Accordingly, the third parties have satisfied the requirements of s. 21(1)(a)(ii).

*Supplied in confidence – s. 21(1)(b)*

[11] The test in s. 21(1)(b) involves a two-part analysis: the first step is to determine whether the information was “supplied” to a public body, and the second step is to determine whether the information was supplied “in confidence.” I will address the supply issue first.

*Supplied*

[12] Previous orders have stated that the terms of a contract are generally not “supplied” by the third party because they are negotiated by the parties to the contract.<sup>3</sup> There are two exceptions to this general rule: the first is when the information the third party provided was “immutable” (i.e., not susceptible to negotiation, such as fixed overhead or labour costs), and the second is when the information in the agreement could allow someone to accurately infer underlying information a third party had supplied in confidence to the public body.<sup>4</sup>

[13] The Third Parties submit that the information in dispute was supplied to the Premier’s Office, but they do not expand on this or provide any affidavit evidence in support of this position. The Premier’s Office submits that it was “unable to conclude” that the withheld information was supplied implicitly or explicitly in confidence and that is why it decided s. 21 did not apply.<sup>5</sup>

[14] The City refers to previous OIPC orders, including Order 01-39, which stated the following:

... By their nature, contracts are negotiated between the contracting parties. The fact that the requested records are contracts therefore suggests that the information in them was negotiated rather than supplied. It is up to CPR, as the party resisting disclosure, to establish with evidence that all or part of the information contained in the contracts including their schedules was not negotiated, as would normally be the case, but was “supplied” within the meaning of s. 21(1)(b).

A number of cases have addressed the difference between negotiated and supplied information (see Orders 00-09, 00-22, 00-24, 00-39, 01-20). The thrust of the reasoning in all of these decisions is that the information contained in contractual terms is generally negotiated. Information may be delivered by a single party or the contractual terms may be initially drafted by only one party, but that information or those terms are not

---

<sup>2</sup> Premier’s Office submissions, paras. 14 – 16; City’s submissions, para. 10.

<sup>3</sup> See, for example, Order F16-39, 2016 BCIPC 43 (CanLII), para. 23.

<sup>4</sup> See, for example, Order 01-39, 2001 CanLII 21593 (BC IPC), paras. 45, 46 and 50.

<sup>5</sup> Premier’s Office submissions, para. 20.

“supplied” if the other party must agree to the information or terms in order for the agreement to proceed (see Order 01-20, paras. 81-89).<sup>6</sup>

[15] Based on my review of the submissions and the withheld information pertaining to mortgage terms, I find that the information in dispute was not supplied, but rather was negotiated between the parties. In my view, information such as the principal amount and interest rate of the mortgage would ordinarily be negotiated information, and there is no evidence to the contrary.

[16] However, I find that the name and incorporation number of the mortgagor was “supplied” to a public body because this is not information that is susceptible to negotiation.

*In confidence*

[17] Although it is only necessary to consider whether the name and incorporation number of the mortgagor was supplied to the Premier’s Office in confidence, for completeness, I will consider all the information in dispute.

[18] The test for whether information was supplied, “explicitly or implicitly, in confidence” is objective, and the question is one of fact; evidence of the third party’s subjective intentions with respect to confidentiality is not sufficient.<sup>7</sup>

[19] The Third Parties submit that the information was supplied in confidence but they do not expand on this submission or provide evidence in support of it. As noted above, the Premier’s Office submits that it was “unable to conclude” that the withheld information was supplied implicitly or explicitly in confidence.<sup>8</sup> The City submits that the Third Parties have only made a bald assertion about confidentiality and, without evidence of particulars, they fall short of the evidentiary standard required to meet the test under s. 21(1)(b).<sup>9</sup>

[20] Based on my review of the withheld information and the parties’ submissions, I am unable to conclude that any of the information in dispute was supplied either implicitly or explicitly in confidence. The affidavit evidence of the Premier’s Office does not support the Third Parties’ assertion, and there is nothing in the records that suggests confidentiality was contemplated by the parties.<sup>10</sup> Previous orders have noted that assertions by a third party alone, without corroboration from a public body of a mutual intention to keep the information confidential, are insufficient to establish that the information was

<sup>6</sup> Order 01-39, 2001 CanLII 21593 (BC IPC), paras. 43 and 44.

<sup>7</sup> Order F16-39, 2016 BCIPC 43 (CanLII), para. 27.

<sup>8</sup> Premier’s Office submissions, para. 20.

<sup>9</sup> Applicant’s submissions, para. 17.

<sup>10</sup> I also note that one would not generally expect parties to treat mortgage information confidentially, as mortgages which have been registered against land are publicly available through the Land Title and Survey Authority of British Columbia.

provided “in confidence.”<sup>11</sup> Those are the circumstances in this case, and I find that none of the information in dispute was supplied to the Premier’s Office either implicitly or explicitly in confidence.

*Reasonable expectation of harm – s. 21(1)(c)*

[21] Although I have found that none of the information in dispute was supplied in confidence, I will consider, for completeness, whether the test in s. 21(1)(c) has been met. The standard of proof under s. 21(1) is whether disclosure of the information could reasonably be expected to result in the specified harm. The Supreme Court of Canada has described this standard as “a reasonable expectation of probable harm” and “a middle ground between that which is probable and that which is merely possible.”<sup>12</sup> The party who has the burden of proof must demonstrate that disclosure will result in a risk of harm that is “well beyond the merely possible or speculative.”<sup>13</sup> The determination of whether the standard of proof has been met is contextual. The amount and quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences.”<sup>14</sup>

[22] The Third Parties submit that disclosure of the information in dispute could reasonably be expected to:

1. Harm significantly the competitive position or interfere significantly with the negotiation position of the Third Parties who are in negotiation on accommodation agreements with the Provincial and Federal governments and their Crown corporations and agencies in regards to lands that are considered to be surplus and proposed to be sold. The disclosure could also significantly harm the ongoing negotiations with the municipality regarding rezoning and other issues.
2. Result in undue financial loss to the Third Parties as a result of the disclosure impairing its negotiating position with other governments, and reduce the potential profit that may arise from the sale or leasing of this property.<sup>15</sup>

[23] Other than its assertions, the Third Parties provide no evidence about how disclosure will result in the harms set out in s. 21(1)(c). A party’s failure to

---

<sup>11</sup> See, for example, F12-09, 2012 BCIPC 13 (CanLII), para. 21, citing Order 04-06, 2004 CanLII 34260 (BC IPC).

<sup>12</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, para. 54.

<sup>13</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, para. 206.

<sup>14</sup> *F.H. v. McDougall*, 2008 SCC 53 (CanLII), para. 40.

<sup>15</sup> Third Party submissions, para. 3.

provide evidence to establish the application of s. 21(1) can be fatal to its case.<sup>16</sup> These are the circumstances in this inquiry. Therefore, I find that the Third Parties have not established that 21(1)(c) applies to the information in dispute.

*Summary and conclusion – s. 21*

[24] In my view, disclosing the information withheld under s. 21(1) would reveal commercial and financial information of or about the Third Parties. However, the Third Parties have not persuaded me that it supplied the information either implicitly or explicitly in confidence, as required under s. 21(1)(b). Further, it has not established that disclosing the information in dispute could reasonably be expected to result in harm under s. 21(1)(c). Therefore, I find that the Third Parties have failed to prove that the City has no right of access to the information withheld under s. 21(1).

## **CONCLUSION**

[25] For the reasons provided above, under s. 58 of FIPPA, the Office of the Premier is not required to refuse access to the information in dispute under s. 21(1), and it must disclose it to the applicant by November 17, 2017. The Office of the Premier must concurrently provide the OIPC Registrar of Inquiries with a copy of its cover letter and the records sent to the applicant.

October 5, 2017

## **ORIGINAL SIGNED BY**

---

Carol Whittome, Adjudicator

OIPC File No.: F14-58796

---

<sup>16</sup> See, for example, Order F17-17, 2017 BCIPC 18 (CanLII), para. 64, and Order 03-02, 2003 CanLII 49166 (BC IPC), paras. 119 – 120; see also *Jill Schmidt v. British Columbia (Information and Privacy Commissioner), et al.*, 2001 BCSC 101 (CanLII), paras. 37 – 38.