Office of the Information & Privacy Commissioner for British Columbia

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Order F17-49

MINISTRY OF CITIZENS' SERVICES

Lisa Siew
Adjudicator

October 26, 2017

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Summary: A commercial real estate services company requested a review of the Ministry of Citizens' Services (formerly known as the Ministry of Technology, Innovation and Citizens' Services) decision to disclose a part of its contract for real estate brokerage services. The company argued disclosure of the information would harm its business interests within the meaning of s. 21(1) of FIPPA. The adjudicator determined that the requirements of s. 21(1) had not been met and ordered the Ministry to disclose the disputed information.

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

Authorities Considered: BC: Order 01-36, 2001 CanLII 21590 (BC IPC); Order 04-06, [2004] BCIPCD No. 6; Order F08-22, 2008 CanLII 70316 (BC IPC); Order F10-28, 2010 BCIPC 40 (CanLII); Order 01-39, 2011 CanLII 21593 (BC IPC); Order F13-06, 2013 BCIPC 6 (CanLII); Order F13-17, 2013 BCIPC No. 22; Order F13-20, 2013 BCIPC 27 (CanLII); Order F15-71, 2015 BCIPC 77 (CanLII); Order F16-49, 2016 BCIPC 54; Order F17-37, 2017 BCIPC 41.

Cases Considered: *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3; *K-Bro Linen Systems Inc. v. British Columbia (Information and Privacy Commissioner),* 2011 BCSC 904; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31.

INTRODUCTION

[1] This order arises out of the City of Burnaby's request to the Ministry of Citizens' Services (formerly known as the Ministry of Technology, Innovation and

Citizens' Services and hereafter referred to as the Ministry) under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for copies of records relating to the negotiation and sale of provincially owned lands located in Burnaby, BC (the Land).

[2] The Ministry determined that the responsive records included a listing agreement, with schedules, between a commercial real estate services company (the Third Party) and the Province of British Columbia, as represented by the Ministry. The listing agreement sets out the terms and conditions under which the Third Party would act as the Province's agent to market and sell the Land.

[3] The Ministry gave notice of the access request under s. 23 of FIPPA to the Third Party, and sought its views on the application of s. 21 of FIPPA (harm to third party business interests) to the listing agreement and its schedules. In response, the Third Party objected to the release of the listing agreement and its schedules on the basis that s. 21 applied.

[4] After reviewing the Third Party's response, the Ministry decided s. 21 did not apply to the listing agreement and its schedules. The Ministry informed the Third Party of its right under FIPPA to request a review of this decision.

[5] The Third Party asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision not to withhold the listing agreement and its schedules under s. 21 of FIPPA. Mediation resolved some of the matters in dispute. The Third Party requested that the remaining disputed issues proceed to a written inquiry under Part 5 of FIPPA. The City of Burnaby (the Applicant), the Third Party and the Ministry all provided submissions for this inquiry.

ISSUE

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

[7] Where, as in this case, a public body has decided to give an applicant access to all or part of a record containing information that relates to a third party, s. 57(3)(b) of FIPPA assigns the burden of proof to the Third Party to prove that the Ministry must refuse to disclose the information to the Applicant under s. 21(1) of FIPPA.

DISCUSSION

[8] ***Background*** - The Ministry issued a request for proposals (RFP) for an agent to provide real estate brokerage services to market and sell the Land. The

Third Party was the successful candidate of this RFP process, which ultimately resulted in the listing agreement and its accompanying schedules.

[9] ***Information in dispute*** – The only information that remains in dispute is found within Schedule B to the listing agreement. The Third Party does not object to the release of the listing agreement or the other schedules which form part of the agreement.[1] Schedule B is a two-column, two-row table containing the fee the Third Party would be entitled to upon the successful completion of the sale of the Lands. This fee is referred to in the listing agreement as the "success fee."

[10] ***Harm to 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 and states, in part, as follows:

> 21(1) The head of a public body must refuse to disclose to an applicant information
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> (a) that would reveal
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> …
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> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
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> (b) that is supplied, implicitly or explicitly, in confidence, and
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> (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,
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> …
>
> (iii) result in undue financial loss or gain to any person or organization, or…

[11] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies to information.[2] The party resisting disclosure, must first demonstrate that disclosing the information at issue would reveal the type of information listed in s. 21(1)(a) of, or about, a third party. Next, it must demonstrate that this information was supplied, implicitly or explicitly, in confidence to the public body under s. 21(1)(b). Finally, it must demonstrate that disclosure of the information could reasonably be expected to cause one or more of the harms set out in s. 21(1)(c). All three elements of s. 21(1) must be met in order for the information in dispute to be properly withheld.

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[1] Third party's submissions at para 2. As part of the inquiry process, it was determined that only Schedules A, B and D formed part of the listing agreement. Appendix 1 to the listing agreement references a Schedule C, which dealt with subcontracting, but since no subcontracting was engaged as part of this contract, a Schedule C was not drafted or provided.

[2] See Order F17-14, 2017 BCIPC 15 (CanLII) and Order F15-71, 2015 BCIPC 77 (CanLII).

Section 21(1)(a): Is the information commercial or financial information?

[12] The Third Party submits that the information in Schedule B qualifies as commercial or financial information of or about itself as a third party.[3] Both the Ministry and the Applicant accept that the information in Schedule B qualifies as commercial information or financial information within the meaning of s. 21.[4]

[13] FIPPA does not define "commercial information" or "financial information." However, previous OIPC orders have found information to be commercial information if it relates to commerce, such as the terms and conditions for the buying or selling of goods and services, and that financial information may include fees payable under a contract.[5] In Order F13-20, Adjudicator Flanagan noted that "financial information often has been applied, together with commercial information, in a proposal or contract about the goods and services delivered and the prices that are charged for those goods or services."[6]

[14] My review of Schedule B indicates that only the success fee would qualify as commercial or financial information since it is a fee payable under a contract for real estate brokerage services. The amount of the fee would reveal the compensation that the Third Party was entitled to under the listing agreement with the Ministry. As a result, I find that this information would reveal commercial or financial information of or about the Third Party.

[15] The remaining information within Schedule B consists of headings and a description and would not qualify as commercial or financial information as previously defined nor is it information about a third party. Therefore, I conclude that s. 21(1)(a) applies only to the success fee and will now consider whether this information meets the remaining requirements.

Section 21(1)(b): Was the information supplied, implicitly or explicitly, in confidence?

[16] Subsection 21(1)(b) requires that the information be supplied implicitly or explicitly in confidence. This involves a two-part analysis. It is first necessary to determine whether the information was supplied to the public body. If so, then the next step is to determine whether it was supplied, implicitly or explicitly, in confidence.[7]

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[3] It is not in dispute that the Third Party meets the definition of a "third party" under FIPPA. Schedule 1 of FIPPA defines a "third party" as "in relation to a request for access to a record…any person, group of persons or organization other than (a) the person who made the request, or (b) a public body."
[4] Ministry's submission at paras 12-13 and Applicant's submission at paras 11-12.
[5] See Order F15-71, 2015 BCIPC 77 (CanLII) and Order F17-17, 2017 BCIPC 18 (CanLII).
[6] Order F13-20, 2013 BCIPC 27 (CanLII) at para 14.
[7] See Order F15-71, 2015 BCIPC 77 (CanLII).

Supplied information

[17] The information in dispute for this inquiry is found in the Ministry and the Third Party's listing agreement. Previous OIPC orders have found that information in a contract is typically the product of a negotiation process between two parties; therefore, this information will not usually qualify as having been "supplied" for the purposes of s. 21(1). However, there are two exceptions to this well-established principle. In Order F08-22, former Commissioner Loukidelis said as follows:

> [60] Many decisions have addressed the "supplied" element in s. 21(1)(b). The clear and prevailing consensus—including in the courts—is that the contents of a contract between a public body and a third party will not normally qualify as having been "supplied", even when the contract has been preceded by little or no back-and-forth negotiation. The exceptions to this are information that, although found in a contract between a public body and a third party, is not susceptible of negotiation and is likely of a truly proprietary nature. The rationale is that "supply" is intended to capture immutable third-party business information, "not contract information that—by the finessing of negotiations, sheer happenstance, or mere acceptance of a proposal by a public body—is incorporated in a contract in the same form in which it was delivered by the third-party contractor" or mutually-generated contract terms that the contracting parties themselves have labelled as proprietary.[8]

[18] Therefore, information in a contract or agreement will be considered "supplied" by a third party for the purposes of s. 21(1)(b) under two circumstances:

- where the information the third party provided was "immutable" – and thus not open or susceptible to negotiation – and was incorporated into the agreement without change;[9] or

- where the information in the agreement could allow someone to draw an "accurate inference" about sensitive third-party business information that is protected under FIPPA.[10]

[19] In Order 01-39, Nitya Iyer as the delegate of the former Commissioner[11] provided an example of what could be considered immutable third party business information:

> [45] …For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that

[8] Order F08-22, 2008 CanLII 70316 (BC IPC) at para 60 (references omitted).
[9] Order F16-49, 2016 BCIPC 54 at para 20.
[10] Order F10-28, 2010 BCIPC 40 (CanLII) at para 12, upheld on judicial review under *K-Bro Linen Systems Inc. v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 904.
[11] Now Madam Justice Nitya Iyer of the BC Supreme Court as of June 14, 2017.

> 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). To take another example, if a third party produces its financial statements to the public body in the course of its contractual negotiations, that information may be found to be "supplied"…[12]

[20] The Third Party in this inquiry states that the success fee was supplied within the meaning of s. 21(1)(b) because it was not a product of negotiation, but was instead supplied by it to the Ministry in response to the RFP and accepted without change by the Ministry. Further, the Third Party cites Order F13-17 to demonstrate that previous OIPC orders have concluded that RFP proposals are generally "supplied" within the meaning of s. 21(1)(b) of FIPPA and "the fact that the City drafted this document does not mean that this information was not supplied within the meaning of s. 21(1)(b)."[13]

[21] The Ministry and the Applicant submit that the information in dispute is not "supplied" for the purposes of s. 21(1). They both cite previous OIPC orders which have concluded that information in a contract will not normally qualify as being "supplied" by a third party.[14]

[22] The success fee in Schedule B is information contained within an agreement between the Ministry and the Third Party and such contractual terms are usually negotiated. This fee was incorporated into the contract and its presence in Schedule B of the listing agreement indicates that the Ministry agreed to it. This type of information will not normally qualify as being "supplied" since contractual information provided by a third party and accepted without change by a public body is still considered negotiated information for the purposes of s. 21(1)(b).

[23] Other than its assertions, the Third Party has not provided evidence to demonstrate that the success fee was not open to change by negotiation with the Ministry so as to qualify as immutable third party business information or that disclosing the success fee could allow accurate inferences about its sensitive business information. I find that the Third Party has not proven that the Ministry did not have the option to negotiate and have input into the amount of the success fee before it agreed to the terms of the listing agreement and its schedules.

[24] I have also considered Order F13-17, which the Third Party relies on to support its position that the success fee is supplied information. The Third Party cites the adjudicator's comments in Order F13-17 to prove that RFP proposals

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[12] Order 01-39, 2011 CanLII 21593 (BC IPC) at para 45, upheld on judicial review in *CPR v. The Information and Privacy Commissioner et al (In The Matter of the Judicial Review Procedure Act)*, 2002 BCSC 603.
[13] Third party's submission at para 3(a).
[14] Ministry's submission at para 16 and Applicant's submission at paras 14-16.

are generally supplied within the meaning of s. 21(1)(b).[15] However, I am not persuaded by the Third Party's argument in that regard because the records and information in dispute in Order F13-17 are not similar to what is in dispute here. In Order F13-17, the information that the adjudicator found to be supplied was contained in RFP related documents whereas the information in dispute here is in a contract/agreement which was drafted after the completion of the RFP process.

[25] Based on the above, I find the success fee in Schedule B is not "supplied" information under s. 21(1)(b). All the elements of the s. 21(1) test must be met before this exception to disclosure applies. Therefore, I do not need to consider the remaining parts of the test because the Third Party has not established that the information in dispute was "supplied" under s. 21(1)(b). However, the Third Party has made submissions with regards to the other elements of the test and, for completeness, I will address these submissions.

In confidence

[26] The next step in the s. 21(1)(b) analysis is to determine whether the success fee was provided by the Third Party to the Ministry explicitly or implicitly in confidence. It must be shown that the information was supplied under an objectively reasonable expectation of confidentiality by the supplier of the information at the time the information was provided; evidence of the supplier's subjective intentions alone with respect to confidentiality is insufficient.[16]

[27] In relation to contracts, an express agreement or promise of confidentiality may be found within the contract itself.[17] I have reviewed the listing agreement and its attachments and there is no clause or wording within these documents which provides confidentiality for any of the terms in the agreement, including the success fee. While Appendix "1" to the listing agreement contains a section on "Security and Confidentiality", this provision is not about keeping the success fee or the contractual terms confidential. Instead, it says that the Third Party must keep confidential all material it receives or obtains as a result of its work under the agreement and that it must not disclose such information except in certain specified circumstances.[18]

[28] The Third Party submits there was an explicit understanding with the Ministry that the information in dispute was provided in confidence. It says the following language in the RFP establishes that the success fee would be kept confidential:

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[15] Order F13-17, 2013 BCIPC No. 22 at para 15.
[16] Order F17-37, 2017 BCIPC 41 at para 42.
[17] See Order 04-06, [2004] BCIPCD No. 6.
[18] Listing agreement provided in Ministry's submissions at 9. See also Order 04-06, supra note 19 at paras 51-53 where former Commissioner Loukidelis found that a similar clause placed confidentiality obligations on the contractor and did not apply to the disputed information.

> *23. Ownership of Proposals*
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> All proposals submitted to the Province became the property of the Province. They will be received and held in confidence by the Province, subject to the provisions of the Freedom of Information and Protection of Privacy Act and this Request for Proposals.[19]

[29] I am unable to confirm what is in the RFP since a copy was not provided by any of the parties for this inquiry. However, if the RFP said information in the proposals would be kept confidential, this does not equate to, or persuade me of, a mutual understanding or reasonable expectation that the terms of the subsequent listing agreement will be kept confidential as well.[20] As a result, I find that the Third Party has not established that there was an explicit expectation that the success fee would be kept confidential.

[30] I will now consider whether the information was supplied implicitly in confidence. For the purposes of s. 21(1)(b), all of the circumstances must be considered including whether the information was:

1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;

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;

3. not otherwise disclosed or available from sources to which the public has access;

4. prepared for a purpose which would not entail disclosure.[21]

[31] The Third Party appears to rely on expected industry practice and says that there is "an implicit assumption of confidentiality when bidding in a commercially competitive RFP."[22] Apart from its assertions, the Third Party has not submitted sufficient evidence or information to establish that any of the above-noted or other circumstances apply. Neither the Third Party's submission nor the Ministry's submission indicates whether any of the circumstances which may be considered in the s. 21(1)(b) "confidence" analysis has arisen in this case. I do not have any evidence before me which could assist with this determination. Based on the evidence and information that is available to me in this inquiry, I am unable to conclude that the circumstances indicate that the success fee was supplied implicitly in confidence for the purposes of s. 21(1)(b).

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[19] Third party's submissions at para 3.
[20] See Order 04-06, *supra* note 17 at para 53 where similar assertions were made by the third parties and rejected by former Commissioner Loukidelis.
[21] Order 01-36, 2001 CanLII 21590 (BC IPC) at para 26.
[22] Third party's submission at para 3(b).

Section 21(1)(c) – Would disclosure of this information result in harm to the Third Party?

[32] Having found that s. 21(1)(b) does not apply to the success fee, it is not necessary for me to consider whether disclosing the information could reasonably be expected to result in harm under s. 21(1)(c). However, for completeness, I will address the Third Party's argument regarding harm. To succeed on this part of the s. 21(1) test, the Third Party must provide evidence that one of the harms listed in s. 21(1)(c) could reasonably be expected to occur.

[33] The standard of proof applicable to harms-based exceptions like s. 21(1) is whether disclosure of the information could reasonably be expected to cause the specific harm.[23] 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."[24]

[34] The third party need not show on a balance of probabilities that the harm will occur if the information is disclosed, but it must nonetheless do more than show such harm is merely possible or speculative.[25] The third party must establish a clear and direct connection between the disclosure of the success fee and the alleged harm.[26]

[35] The Third Party submits that the disclosure of the success fee could reasonably be expected to significantly harm its competitive position or interfere significantly with its negotiating position and result in undue financial loss or gain. It says that it operates in a competitive environment and the disclosure of the success fee would disadvantage it for future RFP competitions and would benefit its competitors by creating "an unfair and uneven playing field, by overtly providing sensitive financial information to a group of competitors" and would give other parties "insight…into our approach in bidding situations."[27] In relation to undue financial loss or gain, the Third Party states that "the financial consequences of such a disclosure could well cause the loss to the affected party of the next competition, causing a loss of revenue, to its significant disadvantage."[28]

[36] The Ministry says it was unable to conclude, based on the Third Party's initial views and its submission in this inquiry, that the release of the information

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[23] Order F13-06, 2013 BCIPC 6 (CanLII) at para 24.
[24] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54 quoted in Order F17-37, *supra* note 16 at para 51.
[25] *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3 at para 196.
[26] Order F13-06, 2013 BCIPC 6 (CanLII) at para 24 quoting Order F07-15, [2007] BCIPCD No. 21 at para 17.
[27] Third party's submissions at para 4.
[28] *Ibid.*

at issue would result in the harms referred to in s. 21(1)(c).[29] The Applicant submits that the Third Party has failed to provide "evidence to prove that disclosure of its fees…would be reasonably likely to cause 'significant' harm to its competitive interests and its future ability to quote competitively on similar work."[30]

[37] The success fee is a lump sum amount that the Third Party is entitled to be paid by the Ministry under the listing agreement. It is not clear, and the Third Party did not explain, how disclosing the success fee reveals anything about how they price their services. The Third Party also has not provided evidence or information about its competitors.

[38] The Third Party also cites Order F13-17 in support of its harm arguments. However, as previously noted, Order F13-17 dealt with financial information in an RFP proposal and not a subsequent contract. Further, an important factor for the adjudicator's conclusions in Order F13-17 was that the financial information in dispute in that inquiry revealed the third parties' pricing strategies and calculation methods.[31] Aside from its assertions, the Third Party has not demonstrated how the disclosure of the success fee could reasonably be expected to reveal pricing or bidding strategies which would harm its competitive or negotiating position or result in undue financial loss or gain. The Third Party's claims are vague, speculative and lack evidentiary support.

[39] At most, disclosing the success fee might heighten competition, but this is not enough to establish a significant interference with the Third Party's competitive or negotiating position. Previous OIPC Orders have said that "an obstruction in actual negotiations must be shown" since s. 21(1)(c)(i) "requires the interference with negotiating position to be significant."[32] They have also found that "simply putting contractors and potential contractors to government in the position of having to price their services to government competitively is not a circumstance of unfairness or undue financial loss or gain."[33]

[40] Based on the above, the Third Party has not provided evidentiary support to establish how the disclosure of the success fee could reasonably be expected to cause the harms set out in s. 21(1)(c)(i) and (iii). Other than its assertions, it has not demonstrated a clear and direct connection between the disclosure of the information in dispute and the alleged harm.

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[29] Ministry's submission at para 20.
[30] Applicant's submission at para 28.
[31] Order F13-17, *supra* note 15 at para 35.
[32] Order 04-06, *supra* note 17 at paras 60-61.
[33] *Ibid* at paras 60-62.

Summary of findings on s. 21(1)

[41] I find that s. 21(1)(a) only applies to a small portion of the information in dispute, specifically the success fee. It is commercial or financial information of, or about, the Third Party. However, the Third Party has not persuaded me that it supplied the information either explicitly or implicitly in confidence, as required under s. 21(1)(b). Further, it has not proven that disclosing the success fee could reasonably be expected to result in harm under s. 21(1)(c). Therefore, I find the Third Party has not proven that the Ministry must refuse to disclose the information to the Applicant under s. 21(1).

CONCLUSION

[42] For the reasons provided above, under s. 58(2)(a) of FIPPA, I find that the Ministry is not required to refuse to disclose the success fee to the Applicant under s. 21(1) of FIPPA. I require the Ministry to give the Applicant access to the success fee by December 7, 2017. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the Applicant, together with a copy of the records.

October 26, 2017

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

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