

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 77-1996
January 8, 1996**

INQUIRY RE: A decision by the Town of Smithers to refuse media access to financial statements for the Smithers Ski Corporation

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1. Introduction

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner in Victoria on October 25, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of the applicant's request for review of the decision of the Town of Smithers to refuse access, under section 21 of the Act, to financial statements of the third party, Smithers Ski Corporation. The applicant is The Interior News, Smithers, represented by editor John C. Young. It is a community newspaper serving the Bulkley Valley.

2. Documentation of the inquiry process

The applicant submitted a request on June 15, 1995 for access to "financial statements for the 94/95 year from the Smithers Ski Corporation." The Town wrote to the applicant on July 13, 1995 to refuse access to the record. The applicant then wrote to ask the Commissioner to review the Town's decision. His undated letter was received on July 26, 1995.

3. Issues under review at the inquiry and the burden of proof

The issue in this inquiry is whether, under section 21 of the Act, the Town of Smithers must refuse to disclose financial records of a third party, the Smithers Ski Corporation, in which it has a financial interest.

Section 21 provides in part:

Disclosure harmful to business interests of a third party

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 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
....

Under section 57(1) of the Act, at an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the public body to prove that the applicant has no right of access to the record or part thereof. In this case, the Town of Smithers has to prove that The Interior News has no right of access under section 21.

4. The records in dispute

The Interior News wants access to the 1994/1995 audited financial statements for the Smithers Ski Corporation, which are dated May 31, 1995 and which became available to the Corporation in August 1995. The Town of Smithers has custody of the records in its capacity as a shareholder in the Smithers Ski Corporation.

5. The Interior News's case as the applicant

The newspaper's main interest is the involvement of taxpayers' dollars in the local ski hill, which is managed by the Smithers Ski Corporation: "The town has invested a substantial amount of public money and in order to determine the status of that investment, we need the financial statements. In this case, we believe the public has a right to know."

The newspaper argues that section 21 of the Act has no application in this case, because it refers to the business interests of third parties. It questions whether the Smithers Ski Corporation is a third party, because it is essentially controlled and dominated by the Town Council: "The corporation is a fuzzy thing, part public, part club, part private."

According to the newspaper, the current share structure features Class C shares, held entirely by the Ski Club, worth approximately \$560,000. The Town holds \$200,000 worth of non-voting Class B shares and \$900 in class A shares.

Furthermore, the applicant argues, the Mayor of Smithers appoints five of seven directors of the Ski Corporation with no fixed terms of office. One of these directors is a paid employee of the town, another is an appointed town councillor, and a third is the husband of the Mayor. The meetings of the Ski Corporation take place in Town Council chambers, and “council does receive and discuss ski hill matters on a regular basis. But all matters are discussed *in camera* and no documents are released.”

Even if it is established that the Ski Corporation is a third party, the newspaper questions whether release of the financial statements would cause harm, such as having an impact on the number of skiers or hurting the negotiating position of the Ski Corporation:

This is a small town and it’s no secret that the ski hill has been having financial trouble for the last while. Suppliers and people contracted to work at the hill all ... have an interest in seeing it survive. Rather than harming the corporation, opening up and discussing its financial situation would help local residents better understand their ski hill and what they might do to help.

With respect to information being supplied in confidence, the newspaper argues, on the basis of its own experience, that “managers and directors of the ski corporation have in the past spoken openly with reporters about the financial results, including providing figures from financial statements. This is inconsistent with an expectation of confidentiality on the part of the ski corporation.”

6. The Town of Smithers’s case

The Town submitted that the definition of local government bodies in the Act does not cover the Ski Corporation, since only five of the seven board members were appointed by the Town at the time of the application.

With respect to section 21 of the Act, the Town believes that disclosure of the Ski Club’s financial statements “could harm its competitive position” and have “serious effects” on its operations, especially since Shames Mountain, another ski hill, is located only a short distance away in Terrace. Disclosure could reasonably be expected “to make it more difficult for the Company to obtain credit and to make the sales required for the Smithers Ski Corporation to stay in business,” thus causing undue financial loss.

7. The Smithers Ski Corporation’s case as a third party

The Ski Corporation essentially opposes the release of its financial statements, because to do so would be to cause financial harm to its operations as a corporation in a competitive environment. In particular, it fears that a tailored marketing program from Shames Mountain ski hill could reduce its customer base. It also fears that any negative publicity about its financial situation could put pressure on its line of credit with a bank and reduce sales of season tickets.

The Board of Directors and Management of the Ski Corporation are of the “opinion that having the private financial affairs of this company made subject to public discussion will be detrimental to the well being of the Smithers Ski Corporation.”

8. Discussion

The status of the Smithers Ski Corporation as a third party

The applicant questions whether the Smithers Ski Corporation is a third party, since the Town of Smithers holds a financial interest and elected councillors are on the board of directors.

Under the Act, I have authority over public bodies, local public bodies, and local government bodies as defined in Schedule 1. A “local government body” includes the following:

- (a) a municipality as defined in the *Municipal Act*
...
- (n) any board, committee, commission, panel, agency or corporation that is created or owned by a body referred to in (a) to (m) and all of the members or officers of which are appointed or chosen by or under the authority of that body...
....

While the Town of Smithers is a local government body under paragraph (a), the Smithers Ski Corporation is not a local government body, because it does not meet the definition in paragraph (n). The Town does not own the Corporation in its entirety, nor does it appoint all of its members or officers.

Although the applicant questioned whether the Ski Corporation is really a third party, it is my view that the Ski Corporation is indeed a third party for the purposes of this inquiry.

Section 21: Disclosure harmful to business interests of a third party

The reality of the present inquiry is that the requested financial statements of the Ski Corporation are in the custody and control of the Town of Smithers, because it has a significant financial interest in its ownership and becomes regularly involved, through its Council and appointed Directors, in its operations.

With respect to the application of section 21(1)(a), I agree that the information in dispute is financial information of a third party.

With respect to the application of section 21(1)(b), the Town has custody of the financial statements in its capacity as a shareholder. In these circumstance, there is some question whether the information was “supplied” to the Town within the meaning of this section. In any event, there is evidence that the affairs of the Ski Corporation have been handled during *in camera* meetings of the Town Council, which clearly implies an expectation of confidentiality,

and the Town has refused to disclose the financial statements to The Interior News. Therefore I find that the Ski Corporation “supplied” the requested information to the Town in confidence.

Despite the Town’s ownership share, the financial statements of the Ski Corporation are prepared by chartered accountants in a format appropriate to the operations of a company in the private sector. They are so detailed with respect to such matters as gross margins and expenses, as set out in the schedules to the financial statements, that their disclosure would considerably benefit a competitor in establishing a competitive marketing policy concerning various aspects of the Ski Corporation’s operations.

With respect to the application of section 21(1)(c), I accept the representations of the Town of Smithers and the Smithers Ski Corporation that disclosure of the financial statements in dispute “could reasonably be expected to (i) harm significantly the competitive position ... of the third party, ... [and] (iii) result in undue financial loss or gain to any person or organization.....” As I noted in Order No. 19-1994, July 26, 1994, the harms test is met where there is a reasonable expectation of significant harm, not a certainty that harm will follow from disclosure. (See Order No. 19-1994, July 26, 1994, p. 5.)

Public Accountability under the Act

Although I accept that the Town of Smithers must withhold the financial statements of the Smithers Ski Corporation under section 21 of the Act, I would urge it to be more forthcoming to the public in terms of reporting the actual financial condition of the ski hill. A summary of the financial statement could likely be released without doing serious harm to the financial interests of the Ski Corporation.

9. Order

I find that the head of the Town of Smithers is required, under section 21 of the Act, to refuse access to the record requested by the applicant. Under section 58(2)(c), I require the head of the Town of Smithers to refuse to give the applicant access to the record.

David H. Flaherty
Commissioner

January 8, 1996