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INFORMATION & PRIVACY  
COMMISSIONER  
— for —  
British Columbia

Order 02-04

**BRITISH COLUMBIA HOUSING MANAGEMENT COMMISSION**

David Loukidelis, Information and Privacy Commissioner  
January 30, 2002

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**Summary:** The applicant, the president of an unsuccessful corporate bidder for a construction project, requested access to tender-related project records. BCHMC refused, under s. 21, to disclose a list of subcontractors submitted by a third-party bidder. No general rule can be laid down, on the evidence in this case certainly, about protection for tender-related information. On the evidence in this case, BCHMC is not required to refuse disclosure of the list.

**Key Words:** financial information – commercial information – supplied in confidence – competitive position – negotiating position – interfere significantly with – undue financial loss or gain.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 21(1)(a), (b) and (c).

**Authorities Considered:** B.C.: Order 00-22, [2000] B.C.I.P.C.D. No. 25; Order 01-20, [2002] B.C.I.P.C.D. No. 21; Order 01-36, [2001] B.C.I.P.C.D. No. 37.

## 1.0 INTRODUCTION

[1] The applicant in this case is the president of W.R. Knight Contracting Ltd., a construction company which submitted an unsuccessful tender for repairs to a building owned by the Victoria Senior Citizens Housing Society. The applicant's September 12, 2000 request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), was for the "complete and entire tender of Heatherbrae Construction", including bid bond, surety consent and "all notes, memos and written recommendations from all related parties" that were used to "determine, notwithstanding the Owner Privilege Clauses, that the second bidder's offer was superior to that of" the applicant's company.

[2] The applicant's access request was addressed to what is now the Ministry of Human Resources, which transferred the request to the British Columbia Housing Management Commission ("BCHMC"). Before responding to the request, BCHMC gave notice under s. 23 of the Act to the third party, Heatherbrae Construction Company Ltd., ("Heatherbrae"), thus giving it an opportunity to make representations about the request. On November 6, 2000, BCHMC disclosed some records to the applicant, but withheld information from Heatherbrae's tender and its bid submittal summary under s. 21(1) of the Act.

[3] The applicant requested a review of this decision, under Part 5 of the Act. This Office's mediation efforts resulted in disclosure of further information with Heatherbrae's consent. This included Heatherbrae's total prices tendered, proposed time to achieve substantial performance of the work, adjusted total prices and separate and alternate prices. Unit prices contained in Heatherbrae's bid, as well as a list of references, continue to be withheld and are not in dispute in this inquiry. The only remaining issue is whether Heatherbrae's list of subcontractors, which formed part of its tender, must be withheld under s. 21.

[4] I gave notice of the inquiry, under s. 54(b) of the Act, to the British Columbia Construction Association ("BCCA"), which had expressed an interest in making representations as an intervener. The BCCA says it is a province-wide association of regional construction associations. The regional associations in turn represent approximately 1,700 companies actively engaged in the British Columbia construction industry. The BCCA provided submissions in the inquiry.

## 2.0 ISSUE

[5] The only issue here is whether s. 21(1) of the Act requires BCHMC to refuse to disclose Heatherbrae's list of subcontractors. Under s. 57(1) of the Act, BCHMC bears the burden of establishing that s. 21(1) requires it to refuse disclosure.

## 3.0 DISCUSSION

[6] **3.1 Burden of Proof and Outcome** – Although BCHMC bears the burden of proof to establish that it is required under s. 21(1) to refuse disclosure of the disputed information, it took no position on the merits of the issue and presented no evidence. BCHMC's entire submissions in this inquiry – it did not deliver a reply submission – read as follows:

1. The BC Housing Management Commission (the "Public Body") accepts the facts as set out in the Portfolio Officer's fact report dated April 18, 2001.
2. At issue in this inquiry is whether the list of subcontractors provided with tendering bid document [*sic*] by Heatherbrae Construction Company (the "Third Party") to the Victoria Senior Citizen's [*sic*] Housing Society should be withheld under section 21 of the Act as harmful to the business interests of the Third party. List of subcontractors [*sic*] of the Third party came into the possession of the Public Body by virtue of the Public Body's

funding of repairs to a building for the Victoria Senior Citizen's Housing Society performed by the Third Party.

3. The Public Body takes no position in this inquiry as to whether the document at issue should be released under section 21 of the Act. The Public Body has chosen to respect the position of the Third Party regarding the harm to business interests of the Third Party from the document disclosure. The Public Body will leave it to the Third Party to provide argument and evidence to the Commissioner on the application of section 21 to the document at issue.

[7] As the last sentence of these submissions indicates, BCHMC has left it up to Heatherbrae to establish that s. 21(1) applies to the disputed information. Because BCHMC has not adopted, as its own, the evidence and argument offered by Heatherbrae, it has not discharged its burden of proof under s. 57(1). Because s. 21(1) is a mandatory exception to the right of access, however, and because the interests of a third party are potentially affected here, I have decided that I should consider the evidence and argument submitted by Heatherbrae, and the other material before me, in deciding whether s. 21(1) requires BCHMC to refuse disclosure. This approach is consistent with the approach I have taken before in cases involving personal privacy of individuals under the mandatory exception created by s. 22 of the Act.

[8] There is no evidence before me of Heatherbrae's s. 23 representations to BCHMC to support Heatherbrae's, as BCHMC puts it here, "position" regarding "the harm to business interests" of Heatherbrae flowing from disclosure of this particular record. As I have said before, a public body has a duty under the Act to make its own decision based on the relevant facts. It cannot simply allow a third party to dictate the outcome by refusing to consent to disclosure. The same thing applies, of course, in cases where third-party privacy is involved under s. 22.

[9] **3.2 Nature of Section 21(1)** – Section 21(1) is designed to protect certain third-party business interests where a public body has custody or control of records containing information the disclosure of which could reasonably be expected to, as provided in s. 21(1), harm third-party business interests. The section reads as follows:

**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
    - (i) trade secrets of a third party, or
    - (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,
- (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
- (iii) result in undue financial loss or gain to any person or organization, or
- (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[10] I have discussed the legislative purpose of s. 21(1), and the application of that provision, in numerous orders, *e.g.*, Order 00-22, [2000] B.C.I.P.C.D. No. 25, Order 01-20, [2001] B.C.I.P.C.D. No. 21, and Order 01-36, [2001] B.C.I.P.C.D. No. 37. I will, without repeating those discussions, apply the approach taken in those cases. I will repeat here, however, that a public body must refuse disclosure of information only if all three parts of the test, as set out in s. 21(1)(a) through (c), have been met.

[11] **3.3 Discussion of Section 21 Issues** – For the reasons that follow, I have decided that BCHMC is not required by s. 21(1) to refuse to disclose the disputed information.

### ***Third Party Commercial Information***

[12] I am satisfied that Heatherbrae’s list of subcontractors qualifies as “commercial ... information of a third party” for the purposes of s. 21(1)(a) of the Act. In Order 01-36, I accepted that a list of a company’s suppliers and clients qualified as third-party commercial information because it was “information that relates (by its specific nature, derivation or use) to a commercial enterprise” (para. 17). In that case, the list had been prepared for a business purpose specific to the third party. Publicly available information – the names and addresses of various generators of scrap tires – had been compiled to create a list that had business-specific uses for and by the third party. Similarly, in this case Heatherbrae compiled the list of subcontractors for the business-specific purpose of making an offer to undertake the specified construction work, using the subcontractors identified in the list to carry out that work. Although the names of the various subcontractors are otherwise publicly available, their compilation in the subcontractors list by Heatherbrae, as part of its offer to perform the work, had a business purpose sufficiently specific to Heatherbrae as to make the information “commercial information” of Heatherbrae for the purposes of s. 21(1)(a).

### ***Supplied in Confidence***

[13] The next question is whether the information was, as required by s. 21(1)(b), “supplied, implicitly or explicitly, in confidence.”

[14] The material before me indicates that the housing society, and not BCHMC, conducted the tender process. I infer that the disputed information was supplied to that society, which is not a public body under the Act. It appears that BCHMC had a role in funding the project and that it acquired copies of the tender documents in that capacity. There is no dispute that BCHMC has custody and control of those records.

[15] Contrary to the approach taken in Ontario under the supply requirement of the comparable Ontario provision, I do not read into s. 21(1)(b) a requirement that third-party information must have been supplied by the third party directly to the public body. I consider that third-party information may be supplied for the purposes of s. 21(1)(b) even if someone other than the affected third party supplied that information to the public body or the information was supplied to another person, who then supplied it to a public body.

[16] Heatherbrae supplied the list of subcontractors to the housing society as part of Heatherbrae's tender package. Heatherbrae was awarded the contract and the list became part of that contract. The housing society then delivered the records to BCHMC. In this case, therefore, it is clear that the disputed list formed part of a contract to which BCHMC was not a party. It was a term of a contract between two private parties. Where all or some of the terms of such a private contract come into the hands of a public body, as happened here, it is appropriate to treat that information as having been supplied to the public body. To take another example, if a public body obtains a copy of an agreement for the sale of a business, entered into by private parties, the entirety of that agreement will have been supplied to the public body under s. 21(1)(b). It does not matter if such an agreement contains information that is relatively unchanged from the form in which one private party provided it to the other. All of the information in the private agreement will have been supplied to the public body. I am therefore satisfied that, in this case, the information in the list was supplied within the meaning of s. 21(1)(b).

[17] I will emphasize here that this finding – that the subcontractors list was supplied to BCHMC within the meaning of s. 21(1)(b) – turns on the fact that the list was part of a private contract that came into BCHMC's hands. It does not necessarily follow that such a list, where it forms part of a construction contract between a contractor such as Heatherbrae and a public body, will have been supplied to the public body. It may or may not have been "supplied". The evidence in each case is determinative. See, for example, Order 00-22, at pp. 5-9. That issue has not arisen here.

[18] Although I consider the information was supplied to BCHMC, I am not, however, persuaded that it was supplied, "implicitly or explicitly, in confidence", as required by s. 21(1)(b). There is no indication in the copy of Heatherbrae's tender that was supplied to me for the purposes of this inquiry that the tender was submitted in confidence. Heatherbrae's tender was adjusted at some point. One of the records Heatherbrae submitted to the housing society is a Heatherbrae fax cover sheet, to which its adjusted tender was attached, and an August 15, 2000 letter addressed to the housing society on Heatherbrae letterhead. No mention is made in either document of confidentiality. None of the other tender documents expressly stipulates that the contents of the tender were

submitted in confidence. Nor is there any indication in the tender documents of an implicit expectation of confidentiality.

[19] In his request for review, the applicant argued that there

... is no reference or implication in the tender document or instructions to bidders that the information submitted, is done so in confidence.

[20] Heatherbrae, by contrast, argues that bidders' tenders were submitted in confidence in this case. It does so by distinguishing between two kinds of tender, public and private. It says that public bodies using public funds to pay for construction work generally advertise publicly for bids. In such cases, it says, tenders are opened in public and, at that time, "all information is generally available to any interested party if they so wish." It says that the housing society's tender process was a private one, which Heatherbrae says, based on its experience in the construction industry, generally entails the following steps:

- The tendering authority and/or the owner will select contractors to bid on their project
- Tenders are received and opened in private
- The tendering authority may or may not advise the bidding contractor of the prices received. We are generally only advised of the contract award and rarely given the bidding prices.
- Where the tendering authority chooses to advise the bidders of the figures submitted, only the base bid numbers are given. Other information contained in the bids i.e: unit costs, separate prices, time schedule and subcontractors are in our experience never revealed.
- Private Parties may seek the public tender process by advertising publicly for Contractors to bid. Under these circumstances they may or may not choose to make the tender result known and they may or may not open the bids with the bidders in attendance. The contractors in these cases should consider that the information may be made public and is an accepted condition when prepared such Tenders.

[21] In support of its contention that the disputed information was supplied in confidence, Heatherbrae also says the following, at p. 3 of its initial submission:

- All contractors were pre-selected and privately invited to bid on this project.
- No public advertisement was made.
- Tenders were not opened in public.
- Owner is the Victoria Senior Citizen [*sic*] Housing Society and is not a public body as compared to a School or Hospital Board, etc.

- B.C. Housing is not mentioned in any documents available to us at the time of tender and is not a third party to the contract signed between the Society and Heatherbrae Construction Co. Ltd.
- It does not state in any tender document that the tenders will be opened in public or that any of the information would be available publicly.
- Heatherbrae Construction was not made aware at the time of submission of our tender that B.C. Housing was financing this project. The Society may well have funded this project through private means, i.e.: donations, banks, mortgage company, etc. [original emphasis]

[22] At p. 4 of its initial submission, Heatherbrae says the following:

In recent conversations with B.C. housing we were advised that all projects funded by them in whole or in part are subject to the disclosure rules. Whether we should or should not have been aware of this information is immaterial as this bid was prepared for this project without the knowledge of B.C. Housing's involvement being disclosed to us and therefore we must consider that this project falls under private tender guidelines.

[23] In his reply submission, the applicant counters Heatherbrae's confidentiality arguments. Based on his 20 years' experience in the construction industry, including through his position as a director of the Construction Association of Victoria for the past 10 years, the applicant says there is no thin, bright line between public and private tenders as Heatherbrae contends. As an example, he cites a recent construction project on which his company was the successful bidder. The owner is a housing society and the project was funded by BCHMC. Tenders for that project were opened in public "and all tender information was made available." He says the tender process involved in this inquiry did, contrary to what Heatherbrae says, involve a public advertisement for pre-qualification of prospective tenderers. The applicant acknowledges that the tenders in this case were not opened publicly.

[24] I am not able, on the material before me in this case, to conclude that Heatherbrae supplied the disputed information, explicitly or implicitly, in confidence. There is no evidence of explicit confidentiality and Heatherbrae's arguments about the distinction between public and private tenders are not, in this case at least, sufficient to establish implicit confidentiality. The fact that tenders were not opened in public is not sufficient to establish implicit confidentiality of supply to the housing society. Nor is there any evidence that the tender documents were supplied to BCHMC in confidence, implicitly or explicitly.

[25] Two points arise out of this finding. First, this finding relates solely to the specific tender process in issue before me. This finding does not lay down any general rule about confidentiality of supply in the context of formal construction tender processes or request for proposal processes. Each case will have to be dealt with on its facts.

[26] Second, it may well not be possible to lay down any general rule about confidentiality of supply, for the purposes of all formal construction tenders, based on the supposed distinction between private and public tenders. The circumstances of each case

may dictate different outcomes in different situations. In raising this possibility, I have in mind the BCCA's submission about the effect of the bid depository system that it operates, which it says always requires disclosure of subcontractors. The BCCA's submission is based on its understanding that the issue here is whether a list of subcontractors "on a public tender" should be released. In taking the position that the information is not protected by s. 21(1), the BCCA says that, through the bid depository system it operates, a project owner must make available, within 48 hours after the close of tenders, the lists of subcontractors provided by the three lowest tenderers. This information is made available to any bid depository user. This practice is, the BCCA says, accepted by all parties in the construction industry. The BCCA says the practice is accepted because it enforces an owner's obligation to ensure that subcontractors have been treated fairly in the tender process, effectively by operating as a policing mechanism for the fairness of that process.

[27] Again, for the purposes of this case, I have rested my s. 21(1)(b) finding on the absence of evidence to support a finding of confidential supply, whether implicit or explicit. The general effect, if any, of the BCCA bid depository system (or of 'public' and 'private' tenders) will have to wait for another day.

[28] I find that it has not been shown that the disputed information was supplied to BCHMC in confidence, either implicitly or explicitly, as required by s. 21(1)(b).

### ***Harm to Heatherbrae***

[29] Even assuming for argument's sake that Heatherbrae's commercial information was supplied in confidence for the purposes of s. 21(1)(b), I am not persuaded that disclosure of the list of subcontractors could reasonably be expected to "harm significantly the competitive position or interfere significantly with the negotiating position" of Heatherbrae, as required by s. 21(1)(c)(i), or otherwise to cause harm under s. 21(1)(c). At p. 4 of its initial submission, Heatherbrae makes the following harm arguments for the purposes of s. 21(1)(c)(i):

This is very sensitive information to our firm as we operate in a very competitive market environment. If your competitors in the bidding process knew who we were using as subcontractors in the preparation of our tender, they could routinely request a quote from the same subcontractors so as to assist them in determining the expected quantum of our tender. This is of particular concern to us here as the Applicant is admittedly a competitive [*sic*] of ours.

As this information would be of competitive advantage to our client we believe that its disclosure to the Applicant would violate section 21(1)(c) of the *Freedom of Information and Protection of Privacy Act* in that it "could reasonably be expected to...harm significantly the competitive position or interfere significantly with the negotiating position" or our firm. Accordingly, it is our submission that the requested information must not be disclosed by virtue of section 21 of the *Act* for the reasons given.



[30] The first part of this argument addresses harm that would allegedly arise if a competitor could find out, during the tender process, whom Heatherbrae was proposing to use as subcontractors. This speaks to harm that would allegedly arise during the tender process, not after the fact. The applicant has, however, requested the information after the award of a contract to Heatherbrae, *i.e.*, after the close of the tender process and after the award of the contract. I do not see, in this light, how the list of subcontractors could reasonably be expected either to provide a competitive advantage, and thus an undue financial gain or loss within the meaning of s. 21(1)(c)(iii), or to harm significantly Heatherbrae's competitive position or interfere significantly with its negotiating position, within the meaning of s. 21(1)(c)(i).

[31] Nor has Heatherbrae persuaded me that disclosure of the list of subcontractors otherwise could reasonably be expected to cause harm within the meaning of s. 21(1)(c). Again, the construction contract in question has already been awarded to Heatherbrae. Heatherbrae has not provided any evidence that the list of subcontractors is commercial information that has subsisting value, in the sense of either being a source of undue financial gain to the applicant or another competitor or undue financial loss to Heatherbrae in the larger competitive context of Heatherbrae, the applicant's company or other construction companies.

[32] I find that disclosure of the disputed information could not reasonably be expected to cause Heatherbrae harm within the meaning of s. 21(1)(c).

#### **4.0 CONCLUSION**

[33] I find that BCHMC is not required by s. 21(1) to refuse to disclose the disputed information. For the reasons given above, under s. 58(2)(a) of the Act, I require BCHMC to give the applicant access to the list of subcontractors.

January 30, 2002

#### **ORIGINAL SIGNED BY**

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David Loukidelis  
Information and Privacy Commissioner  
for British Columbia