OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order F05-09

FINANCIAL INSTITUTIONS COMMISSION

Celia Francis, Adjudicator
April 6, 2005

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Summary: Applicant requested copy of insurance company's response to his complaint. FICOM withheld it under s. 21. Section 21 does not require FICOM to withhold response.

Key Words: commercial information of or about a third party – supplied in confidence – competitive position – negotiating position – interfere significantly with – would no longer be supplied.

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

Authorities Considered: B.C.: Order 00-10, [2000] B.C.I.P.C.D. No. 11; Order 00-22, [2000] B.C.I.P.C.D. No. 25; Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order 01-36, [2001] B.C.I.P.C.D. No. 37; Order 01-39, [2001] B.C.I.P.C.D. No. 40; Order 03-05, [2003] B.C.I.P.C.D. No. 5; Order 03-33, [2003] B.C.I.P.C.D. No. 33; Order F05-01, [2005] B.C.I.P.C.D. No. 1; Order F05-05, [2005] B.C.I.P.C.D. No. 5.

1.0 INTRODUCTION

[1] In the course of attempting to settle his insurance claim with his insurance company, the applicant complained to the Insurance Council of British Columbia about, among other things, the company's alleged tardiness in supplying him with a blank "Proof of Loss Form". The Insurance Council referred the complaint to the Financial Institutions Commission ("FICOM") which, in a letter of December 5, 2003, requested the insurance company's comments on the complaint. In a separate letter of December 5, 2003, FICOM wrote to the applicant about his complaint. The insurance company provided FICOM with its response to the complaint in a letter of December 19, 2003.

[2] The applicant requested a copy of the insurance company's response of December 19, 2003 under the *Freedom of Information and Protection of Privacy Act* ("Act"), access to which FICOM refused under ss. 15 and 21 of the Act. The applicant requested a review of that decision.

[3] During mediation on the request for review, FICOM abandoned its position on s. 15 of the Act but maintained that s. 21 still applies. Because the matter did not settle in mediation, a written inquiry was held under Part 5 of the Act. I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act. The Office invited and received representations from the applicant, FICOM and the insurance company as third party.

[4] The applicant included with his request for review a complaint that FICOM had provided the insurance company with a copy of its letter of December 5, 2003 to him. According to the portfolio officer's fact report that accompanied the notice for this inquiry, the Office handled this complaint as a separate matter and found it unsubstantiated. It is not in issue here.

2.0 ISSUE

[5] The issue before me in this case is whether s. 21 requires FICOM to refuse access to a letter to FICOM from the third party insurance company.

[6] Under s. 57(1) of the Act, FICOM has the burden of proof regarding s. 21.

3.0 DISCUSSION

[7] **3.1 Application of s. 21** – Many orders have addressed s. 21 and the principles for its application are well-established. See, for example, Order 00-10, [2000] B.C.I.P.C.D. No. 11, Order 00-22, [2000] B.C.I.P.C.D. No. 25, Order 01-20, [2001] B.C.I.P.C.D. No. 21, Order 01-36, [2001] B.C.I.P.C.D. No. 37, Order 01-39, [2001] B.C.I.P.C.D. No. 40, Order 03-05, [2003] B.C.I.P.C.D. No. 5, Order 03-33, [2003] B.C.I.P.C.D. No. 33, Order F05-01, [2005] B.C.I.P.C.D. No. 1, and Order F05-05, [2005] B.C.I.P.C.D. No. 5. I have applied here, without repeating them, the principles established in those orders.

[8] Section 21 contains a three-part test, all three parts of which must be satisfied before a public body is required by s. 21 to withhold information. The relevant parts of s. 21 read 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 …

> (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,
>
> (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, ….

Commercial information

[9] Orders looking at the interpretation of "commercial information of or about a third party" have found it to relate to commerce or the buying and selling of goods and services, including the following types of information:

- Offers of products and services a third-party business proposes to supply or perform
- A third-party business's experiences in commercial activities where this information has commercial value
- Terms and conditions for providing services and products by a third party
- Lists of customers, suppliers or sub-contractors compiled by a third-party business for its use in its commercial activities or enterprises; such lists may take time and effort to compile, if not skill
- Methods a third-party business proposes to use to supply goods and services
- Number of hours a third-party business proposes to take to complete contracted work or tasks

[10] The Information and Privacy Commissioner has said that "commercial information" relates to a commercial enterprise but need not be proprietary in nature or have an independent market or monetary value (Order 01-36).

[11] FICOM says that the record in dispute

> … contains information on the Insurance Company's legal argument regarding the Applicant's complaint, as well as internal corporate policy and practice information on processing various types of claims, including those of the Applicant's type.

[12] FICOM is of the view that the letter contains commercial information in that it would disclose the third party's "claims processing policies and the legal argument supporting those policies" (para. 33, initial submission).

[13] The third party acknowledges that the letter has to do with its "practices with reference to the provision of a blank Proof of Loss form to its claimants" and says that its practices, "particularly how it handles Proof of Loss forms", constitute its "commercial information" (paras. 5-7, initial submission).

[14] The applicant disagrees with the characterization of the letter as "commercial information", saying it contains information relating to the delivery of blank Proof of Loss forms, "a legal requirement" (reply submission).

[15] FICOM and the third party have provided accurate summaries of the letter's contents. The question is whether the third party's "legal argument" and information on its "claims processing policies and practices" are "commercial information of or about" the third party for the purposes of s. 21(1)(a)(ii).

[16] The letter in dispute is two pages long and has a one-page attachment. The first half of the letter sets out the third party's technical discussion or interpretation of certain sections of the *Insurance Act*, which relate to the requirement to provide documentation to insureds. Then comes a description of the third party's own practices with regard to providing Proof of Loss forms, with a comment on industry practice, while the final part comments on the applicant's complaint. The attachment appears to be an extract from the third party's procedures manual and sets out at item 4 conditions under which it provides Proof of Loss forms. The upper part of this extract (items 1-3) relates to other matters.

[17] The "legal argument" part of the letter is simply the third party's views on, or interpretation of, the interplay between certain sections of the *Insurance Act*. The third party has apparently relied on this interpretation in developing its policies and practices. While the interpretation may be information "of" the third party, it does not relate to the buying and selling of goods and services or other matters related to commerce. I find that the "legal argument" portions of the record in dispute are not "commercial information of or about" the third party for the purposes of s. 21(1)(a)(ii).

[18] The parts of the letter and of the attachment that deal with the third party's own policies and practices for providing Proof of Loss forms relate to its methods of providing services to its clients. I am satisfied these parts constitute "commercial information of or about" the third party s. 21(1)(a)(ii).

[19] The portions of the letter that relate to the applicant's complaint are his personal information and are not "commercial information of or about" the third party. The other portions of the letter (*e.g.*, opening and closing remarks and portions related to industry practice) also do not contain "commercial information of or about" the third party.

Supply in confidence

[20] The third party wrote and sent the letter in dispute in response to a request from FICOM. There is thus no doubt that the third party "supplied" the letter to FICOM. I must, however, also determine if it supplied the letter explicitly or implicitly "in confidence" for the purposes of s. 21(1)(b). As the Commissioner said in Order 01-36:

> [23] … To establish confidentiality of supply, a party must show that information was supplied under an objectively reasonable expectation of confidentiality, by the supplier of the information, at the time the information was provided.
>
> [24] An easy example of a confidential supply of information is where a business supplies sensitive confidential financial data to a public body on the public body's express agreement or promise that the information is received in confidence and will be kept confidential. A contrasting example is where a public body tells a business that information supplied to the public body will not be received or treated as confidential. The business cannot supply the information and later claim that it was supplied in confidence within the meaning of s. 21(1)(b). The supplier cannot purport to override the public body's express rejection of confidentiality.
>
> …
>
> [26] The cases in which confidentiality of supply is alleged to be implicit are more difficult. This is because there is, in such instances, no express promise of, or agreement to, confidentiality or any explicit rejection of confidentiality. All of the circumstances must be considered in such cases in determining if there was a reasonable expectation of confidentiality. The circumstances to be considered include 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] The applicant argues that the third party provided the letter "in compliance with the lawful demand of the Public Body" and says that FICOM is not bound by the third party's internal policies.

[22] FICOM says that the third party supplied the letter explicitly or implicitly in confidence, in accordance with s. 218 of the *Financial Institutions Act* ("FIA") and that it

treats such material as being submitted in confidence (paras. 34-36, initial submission; para. 6, Grist affidavit). This section reads as follows:

> **Confidential information**
>
> 218 An individual or entity who, under this Act or the regulations, obtains
>
> (a) information, or
>
> (b) records
>
> that are submitted in accordance with a request that is made or an obligation that is imposed under this Act or the regulations must not disclose the information or records to any individual or entity other than for the purposes of administering this Act and the regulations, for the purposes of a prosecution or if required by law.

[23] FICOM also referred to s. 79 of the Act which reads as follows:

> **Relationship of Act to other Acts**
>
> 79 If a provision of this Act is inconsistent or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act.

[24] FICOM acknowledged that there is no override provision in the FIA but said that s. 218 of the FIA should nevertheless be considered. I agree that it is a consideration but, in the absence of an override clause in the FIA, s. 218 does not carry the day.

[25] FICOM also says that the insurance company told it in a letter of May 7, 2004 that it "considered the documents as confidential information which disclosed the company's internal processes, and did not consent to Ficom's disclosure [*sic*] to the Applicant". (FICOM did not provide me with a copy of this letter.) FICOM went on to say that, even if the letter in dispute was not supplied explicitly in confidence, it was submitted in response to a written inquiry of the Superintendent of Financial Institutions. The Superintendent's authority to request information from a financial institution flows from s. 213 of the FIA, it said, and

> 35. … information so tendered is deemed confidential pursuant to s. 218 of the ***FIA***. As described above, the ***FIA*** itself establishes the principle of confidentiality of information relative to financial institutions, their agents and their clients.

[26] FICOM did not provide me with any of its own policies regarding confidentiality of complaint investigations and its treatment of information it receives pursuant to inquiries made under the FIA. It simply said it regarded the letter as submitted in confidence in accordance with s. 218 of the FIA. I note, however, that FICOM provided the third party with copies of the applicant's complaint and copied the applicant on its own letters to the third party. In its letter of January 19, 2004, FICOM also provided the applicant with a summary of the third party's response to the applicant's complaint,

including the gist of the third party's "legal argument" on the provision of Proof of Loss forms. I am therefore unable to conclude that FICOM consistently treats complaint information confidentially.

[27] The third party provides similar arguments on this point and says that it understood that FICOM would keep its letter confidential (paras. 8-12, initial submission; paras. 6-11, Muto affidavit). It also says that, in view of the fact that it was in the midst of negotiations with the applicant on his insurance claim and the applicant had threatened litigation, it was reasonable for the third party to conclude that the information it provided in response to FICOM's request was provided in confidence. The third party says that it protects as confidential its practices, including those regarding the provision of Proof of Loss forms, and that it does not share its practices with its competitors, customers or the general public. It quotes from s. 9. 2 of its Personal and Business Conduct Policy (a copy of which it did not provide, saying that the policy is itself confidential), as follows:

> … all Bank policies, procedures, systems, software programs (purchased from vendors or internally developed), manuals, information and records are the strict property of the Bank [which includes the third party], are confidential and are not to be reproduced for and/or communicated to any party without Bank approval.

[28] The third party states that it provided the letter in dispute to FICOM in an expectation of confidence, based on s. 218 of the FIA. (The third party did not provide evidence that its relevant employees were aware of s. 218 at the relevant times.) It also asserts that it had an "understanding" of some sort, the particulars of which were not provided, that FICOM would keep any response confidential.

[29] This does not suffice to establish confidentiality of supply (see Order 01-39). The letter itself contains no explicit markers or text indicating that the third party was submitting its response to FICOM in confidence. Nor does FICOM's letter requesting the third party's comments on the applicant's complaint indicate that it would receive the response in confidence. The third party also has not shown that it has a policy or practice of responding to inquiries from FICOM only on the understanding that FICOM will keep the information in confidence from the complainant.

[30] Nor does the third party's contention that, because it was negotiating with the applicant on his claim and he had threatened litigation, it was "reasonable" for it to conclude that FICOM would receive its letter in confidence, assist in establishing confidentiality of supply. I do not see how either factor leads to the conclusion that the third party was providing what appears to be straightforward procedural information in confidence to FICOM.

[31] The evidence of FICOM and the third party establishes that the third party considers its policy information and its letter to be confidential information. This does not however establish that the third party provided the letter in dispute to FICOM in confidence either explicitly or implicitly. In any case, regardless of whether or not the third party provided its response in confidence, s. 218 of the FIA would, in my view,

allow FICOM to disclose that response to the applicant "for the purpose of administering [the FIA]", including, as here, as part of its complaint investigation process. Indeed, one might think that such a practice would promote public confidence in the fairness and transparency of FICOM's complaint investigation process. It would also assist complainants to understand how FICOM arrives at its findings.

[32] I find that s. 21(1)(b) does not apply here.

Harm to third party's competitive or negotiating position and undue loss

[33] I have found that s. 21(1)(a) applies to only parts of the letter in dispute, and that s. 21(1)(b) does not apply at all to the letter, and therefore need take the matter no further. I will, however, also consider whether s. 21(1)(c) has been met. I will assume for the purposes of this discussion that the entire letter, including its attachment, consists of "commercial information of or about" the third party within the meaning of s. 21(1)(a) and that the information was supplied in confidence within the meaning of s. 21(1)(b).

[34] FICOM says that the information on claims processing and methods in the letter is of the type that businesses monitor for their own purposes and will pay for. It says it is being cautious but believes that harm or improper benefit is likely on disclosure. It goes on as follows:

> 38. … Given the competitive nature of the industry, the Financial Institutions Commission believes that such information could easily be used to the benefit of this Insurance Company's competing firms which would place it at a disadvantage. One may reasonably expect a company's market share to be undermined and thus, in the language of the ***FOI Act***, it's [*sic*] competitive position to be harmed and financial losses to accrue.
>
> 39. Disclosure of documents requested by Ficom, where no wrong doing, investigation or public hearing takes pace, would reduce the financial industry's confidence not just in the regulator, but in the regulatory framework within which we require the financial services industry to operate in this province.
>
> 40. As noted above, we submit that this information is akin to market intelligence information for which industry players pay substantial sums. The information can provide competitive advantages. Ficom submits that there is every reason to believe that the policy information can contribute to changes in economic competitiveness.

[35] FICOM concludes by arguing that release of claims negotiation policies and procedures, and the legal argument in support of them, would interfere significantly with the third party's negotiating position with respect to the applicant's claim (still active at that time) and future claims (paras. 37-44, initial submission; paras. 9-16, Grist affidavit).

[36] The third party argues that, if information on its practices were disclosed, parties with whom it is negotiating would know its practices, its negotiation position would be significantly interfered with and it would be more difficult to resolve claims, including

with the applicant. If it became more difficult to resolve claims, the third party would experience an undue financial loss, the third party argues, and its competitive position in the market would also be significantly affected (paras. 13-21, initial submission). It concludes, at paras. 20 and 21 of its initial submission:

> 20. Disclosure of [the third party's] response to FICOM's letter of December 5, 2003 would introduce irrelevant issues into [the third party's] negotiation of the Applicant's insurance claim and increase costs.
>
> 21. The Applicant would in effect have used the complaint to FICOM to gain a form of discovery of [the third party]. The applicant may be entitled to complain to FICOM and receive a reply, but if information provided to FICOM must now be disclosed pursuant to a request under FOIPPA, the complaint process is being used to interfere with the negotiation.

[37] The applicant suggests that FICOM has interfered with his negotiating position in disclosing to the third party its letter of December 5, 2003 to him. He believes that the disclosure encouraged the third party to take a stronger position in its negotiations with him (initial submission).

[38] It is clear from previous orders that assertions of harm and speculative arguments will not suffice to support the application of s. 21(1)(c)(i). Parties must provide proof that there is a reasonable expectation of "significant harm" (see Order 01-39, upheld on judicial review).

[39] In this case, FICOM does not provide any detail on the "competitive nature of the industry". Nor do FICOM and the third party explain how any of the harms to the third party's competitive or negotiating position they described could reasonably be expected to occur on disclosure of the letter, much less how they would be "significant". The third party also did not explain how the "introduction of irrelevant issues" (apparently the complaint) could interfere with its claims negotiations with the applicant nor how this could increase its costs. It is not clear why the third party would treat the applicant differently or why its settlement costs would increase simply because the applicant made a complaint about it to FICOM. The applicant's principal dispute with the third party over his insurance claim (a disagreement over the value of a stolen car stereo) seems to have been a separate matter from his complaint that the third party failed to provide the Proof of Loss form in a timely manner.

[40] As noted above, the letter contains, on its face, straightforward procedural or administrative information on providing Proof of Loss forms to insurance claimants and the technical legal basis for when the third party considers this should occur, hardly the stuff of industrial espionage. I am not persuaded that there is a reasonable expectation of harm from a competitor making use of the letter, either to its own advantage or to the disadvantage of the third party. Furthermore, as noted above, FICOM has already provided the applicant with a summary of the third party's "legal argument" in its letter of January 19, 2004 to the third party, which it copied to the applicant. No one has suggested that any significant harm to the third party has arisen from disclosure of that summary. It is also not clear how the comments on the applicant's complaint and other

information in the letter could reasonably be expected to lead to significant harms, or undue loss, as argued by FICOM and the third party.

[41] For all these reasons, I am not persuaded that disclosure of the entire letter and relevant parts of the attachment could reasonably be expected to cause the third party any of the harms argued by FICOM or the third party. I find that ss. 21(1)(c)(i) and (iii) do not apply to the record in dispute.

Similar information would no longer be supplied

[42] FICOM says that, if information provided in response to requests made under s. 213 of the FIA were subject to public disclosure, financial institutions would be less willing to disclose their internal policies and practices and to provide complete responses to FICOM. The flow of information might slow or even stop in these cases, FICOM argued. Disclosure where no wrongdoing, investigation or public hearing had taken place would reduce the financial industry's confidence in FICOM and the regulatory framework, FICOM continued. Being the subject of an order could be seen as detrimental to a financial institution, as orders are public documents. FICOM does not wish to resort to being heavy-handed by issuing orders on a routine basis for information like policies. It might however have to choose between receiving incomplete information and issuing orders if financial institutions did not co-operate. It says an order would not have been appropriate in this case as there had been no investigation (paras. 45-49, initial submission; paras. 11-18, Grist affidavit). I gather that FICOM is referring here to its power under s. 211 of the FIA to order a financial institution to provide information or records.

[43] The third party says it prefers to provide comprehensive and candid responses to inquiries from regulators. If doing so complicates the settlement of claims, because the information might be disclosed to claimants, the third party says it must be more circumspect in future in the information it provides voluntarily to FICOM, even though, in doing so, there is a risk of more complex administrative proceedings which it does not see as in the public interest. A corporate entity in this position might insist on a hearing or an order to ensure its interests are properly protected, it concluded (paras. 22-23, initial submission).

[44] Previous orders have established that s. 21(1)(c)(ii) will not apply where there is a statutory compulsion for providing information (or where the prospect of compulsion exists) or where there is a financial incentive for doing so (see Order 03-05, for example). FICOM mentions that it requested the policy information from the third party under s. 213 of the FIA but neither it nor the third party discusses an institution's obligation under the same section to comply with such a request. Section 213 of the FIA reads as follows:

> **Inquiries**
>
> 213(1) The superintendent may address a written inquiry to a financial institution or its subsidiary or to any officer of the financial institution or its subsidiary or to the agent of either of them

> (a) for the purpose of ascertaining the condition and ability of the financial institution or its subsidiary to meet its obligations when they become due,
>
> (b) as to the conduct of the business of the financial institution or its subsidiary, or
>
> (c) as to complaints made by insureds, depositors or borrowers of the financial institution or by persons for whom the financial institution or its subsidiary acts in a fiduciary capacity or other interested parties,
>
> and the financial institution, subsidiary, officer or agent so addressed must reply promptly in writing with information or records that the superintendent requests.

[45] Despite the submissions on this point from FICOM and the third party, there is no question here of "voluntary supply" of information by the third party. Section 213 of the FIA required the third party to provide the requested information to FICOM. Presumably, there was also the prospect of a s. 211 order, if necessary. I also consider that it was in the third party's interest to provide the requested information promptly and comprehensively, precisely in order to avoid the costly administrative proceedings and public orders that it suggests could otherwise ensue. Moreover, given the routine administrative nature of the complaint and of the request, it is not clear to me why the third party would be reluctant to comply with FICOM's request. I find that s. 21(1)(c)(ii) does not apply to the letter.

[46] To summarize my findings on s. 21, even if I were to find that ss. 21(1)(a) and (b) have been met—and I have found they have not—I find in any case that s. 21(1)(c) has not been met and on this basis alone would find that s. 21(1) does not apply.

4.0 CONCLUSION

[47] For the reasons given above, under s. 58 of the Act, I find that s. 21(1) does not require FICOM to refuse access to the letter in dispute, including the relevant parts of the attachment. Under s. 58 of the Act, I require FICOM to give the applicant access to the letter and the relevant parts of the attachment.

April 6, 2005

ORIGINAL SIGNED BY

Celia Francis
Adjudicator