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

Order F05-29

BRITISH COLUMBIA ASSESSMENT AUTHORITY

David Loukidelis, Acting Information and Privacy Commissioner

September 1, 2005

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Summary: Applicant retailer requested specific information relating to assessments of shopping centres where its leased stores were located. Neither s. 21(1) nor s. 21(2) requires BC Assessment to refuse disclosure.

Key Words: financial or commercial information—supplied in confidence—competitive position—negotiating position—interfere significantly with—tax liability—obtained—gathered.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 2(2), 21(1) & (2); *Assessment Act*, ss. 9, 14, 15(1)-(4), 16(1)-(6); *Dissemination of Information Regulation*, B.C. Reg. 232/78, s. 1.

Authorities Considered: B.C.: Order 04-01, [2004] B.C.I.P.C.D. No. 1; Order 00-07, [2000] B.C.I.P.C.D. No. 7; Order 01-52, [2001] B.C.I.P.C.D. No. 44; Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order 04-19, [2004] B.C.I.P.C.D. No. 19; Order 03-03, [2003] B.C.I.P.C.D. No. 3; Order 02-50, [2002] B.C.I.P.C.D. No. 51; Order 03-05, [2003] B.C.I.P.C.D. No. 5; Order No. 56-1995, [1995] B.C.I.P.C.D. No. 29; Order No. 22-1994, [1994] B.C.I.P.C.D. No. 25; Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 04-06, [2004] B.C.I.P.C.D. No. 6; Order 02-12, [2002] B.C.I.P.C.D. No. 12; Order No. 217-1998, [1998] B.C.I.P.C.D. No. 10; Investigation Report P98-11; Order 02-38, [2002] B.C.I.P.C.D. No. 38. **Ont:** Order PO-2059-I, [2002] O.I.P.C. No. 165.

Cases Considered: *Ville de Québec c. Hudson's Bay Company*, [2003] J.Q. No. 14305 (C.A); *Canada Packers Inc. v. Canada (Minister of Agriculture)* (1988), 53 D.L.R. (4th) 246; [1988] F.C.J. No. 615; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police),* [2003] 1 S.C.R. 66; *Lavigne v. Canada (Commissioner of Official Languages),* [2002] 2 S.C.R. 773; *AstraZeneca Canada Inc. v. Canada (Health)*, [2005] F.C.J. No. 789 (T.D.); *Jill Schmidt Health Services Inc. v. British Columbia (Information and Privacy*

Commissioner), [2001] B.C.J. No. 79, 2001 BCSC 101; *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner) et al.*, [2002] B.C.J. No. 848, 2002 BCSC 603; *Merck Frosst Canada & Co. v. Canada (Ministre de Santé)*, 2005 FCA 215, [2005] F.C.J. No. 1020 (C.A.); *Canada (Minister of Public Works & Government Services) v. Hi-Rise Group Inc.*, 2004 FCA 99, [2004] F.C.J. No. 468 (C.A.); *Air Atonabee Ltd. v. Canada (Minister of Transport)*, [1999] F.C.J. No. 453 (T.D.);.*Overwaitea Food Group, a Division of Great Pacific Industries Ltd. v. British Columbia (Information and Privacy Commissioner)*, [1995] B.C.J. No. 2457; *R. v. Clark*, 2005 SCC 2, [2005] S.C.J. No. 4; *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)*, [1998] O.J. No. 3485 (C.A.); *Fletcher Challenge Canada Ltd. v. British Columbia (Information and Privacy Commissioner)*, [1996] B.C.J. No. 505 (S.C.); *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)* (2004), 26 B.C.L.R. (4th) 1, [2004] B.C.J. No. 735 (C.A.); *British Columbia (Assessor of Area No. 09 - Vancouver) v. Lord Realty Holdings Ltd.,* [1996] BCJ No. 2092; *R. v. Clark*, 2005 SCC 2, [2005] S.C.J. No. 4; *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.).

1.0 INTRODUCTION

History of the access request

[1] The British Columbia Assessment Authority ("BC Assessment") is, under s. 9 of the *Assessment Authority Act*, responsible for establishing and maintaining uniform property assessments across British Columbia in accordance with the *Assessment Act*.

[2] The applicant, the Hudson's Bay Company ("HBC"), is a well-known retailer that owns some of its stores and leases others. HBC, acting through its lawyer, made a request under the *Freedom of Information and Protection of Privacy Act* ("Act") to BC Assessment, a public body under the Act, for access to information "related to the data used to derive the assessment" for its Bay, Zellers and Home Outfitters stores. The information requested was specified as follows:

> 1. the Gross Leasable [*sic*] Area ("GLA") of the Bay, Home Outfitters or Zellers store as applicable (the "demised premises");
> 2. the fair market rent applied to the demised premises;
> 3. the vacancy and expense allowances applied to the demised premises;
> 4. the capitalization rate utilized to establish shopping centre value or the value of the demised premises; and
> 5. any other information contained in the records on file that has been used for determining the income stream for the demised premises.

[3] Also included with the access request was a list of HBC store properties and a clarifying statement that HBC was "not requesting any information relating to the assessment or preparation of the assessment of other third party stores within the shopping centers where our client's stores are located".

[4] BC Assessment responded that it would provide information regarding HBC-owned properties, which it invited HBC to identify on the list, but not regarding stores that HBC leased from third parties. BC Assessment explained its rationale for making this distinction as follows:

> For those stores occupying properties leased from third parties, however, the information essentially "belongs" to the owners of those properties and, as such, is not subject to disclosure to others. To be more exact, such data are protected from disclosure under s. 17 of *FIPPA* (Disclosure harmful to the financial or economic interests of a public body); and s. 21 (1) and (2) (Disclosure harmful to business interests of a third party).

[5] HBC asked this Office to review the decision to deny access to the requested records. HBC reiterated that it did not want information related to other store properties within shopping centres, just data specific to HBC stores. The request for review added that it was not relevant whether the HBC properties were owned by HBC or leased from third parties because, under the terms of the leases, HBC was ultimately responsible for paying property taxes on its stores.

[6] During mediation, HBC provided this Office with a list of its store properties, indicating those owned and those leased, and agreed to narrow the scope of the access request to four test case leased store properties at Park Royal North Shopping Centre, Metrotown Centre, Coquitlam Centre and Scottsdale Centre. BC Assessment issued a further response disclosing severed copies of six 2003 assessment related records for those properties. Access to some information was denied under s. 21(1) and s. 21(2) of the Act. BC Assessment also referred to s. 2(2) of the Act and to provisions in the *Assessment Act* for the production and disclosure of records on the consent of a property owner or through the assessment appeal process. BC Assessment contended that "there is ample scope within existing processes and legislation to provide release of appropriate data while protecting the confidentiality concerns of the property-owning and property-leasing business sectors".

[7] Mediation was otherwise unsuccessful and I held a written inquiry under Part 5 of the Act. The notice for the written inquiry was issued to HBC, BC Assessment and the four shopping centres. HBC, BC Assessment and two of the shopping centres—Park Royal North and Scottsdale—participated in the inquiry. Following the receipt of written submissions, I convened an oral *in camera* hearing at which I asked clarifying questions of Miriam Quigley, BC Assessment Appraiser of Real Estate and Manager of its Central Market Office, about information elements in the six records that BC Assessment had identified as being responsive to HBC's access request. I also received some related supplementary *in camera* written evidence from the BC Assessment.

The information sought by HBC

[8] There was some confusion as between HBC and BC Assessment submissions about the information in issue. This was attributable, at least in part, to the fact that in the inquiry (para. 4, initial submission) HBC limited itself to the information in points 1 to 4

of its access request and no longer sought the information in point 5, being "any other information contained in the records on file that has been used for determining the income stream for the demised premises". Disclosure of the information in point 5 of the access request was of "extreme concern" to BC Assessment (para. 12, Quigley affidavit) and BC Assessment's submissions and evidence focused a lot of attention on information responsive to point 5. Although HBC's initial submission was clear that it was no longer seeking disclosure of that information, and the message was clearly understood by the shopping centre participants, it appears not to have registered with BC Assessment, even in its reply submission.

[9] HBC says BC Assessment misunderstood and mischaracterized the nature of the information it seeks, which can be found in a BC Assessment record called a Property Value Summary ("PVS"). A copy of the 2003 PVS for the Penticton shopping centre where a Zellers store is located, is attached to the affidavit of David Carefoot, HBC's Director, Real Estate Assessment, and clearly marked with the information elements that are of interest to HBC in this inquiry (para. 4, initial submission; paras. 33-34, Carefoot affidavit; para. 26, reply submission).

[10] The six records that BC Assessment identified as responsive to the access request are not PVS sheets. They contain information from various sources for BC Assessment's analysis and development of the information requested in points 1 to 4 of the access request. According to BC Assessment, a PVS would exist for each shopping centre but not for each HBC store. This is because BC Assessment assesses the value of the shopping centre, not the value of the stores in isolation from the shopping centre in which they are located. The Penticton PVS that HBC tendered in inquiry relates to that shopping centre as a whole and arrives at a capitalization rate, and indicated and estimated values, for the shopping centre as a whole. The PVS also contains, however, breakdowns of gross leaseable area ("GLA"), market rent, and vacancy and expense allowances for the anchor store, Zellers. This major tenancy breakdown information is typical for a PVS relating to a shopping centre. HBC seeks this information, for 2003, in relation to its stores, as well as the capitalization rate that BC Assessment applied for each of the shopping centres.

[11] Point 4 of HBC's access request is for the "capitalization rate utilized by BC Assessment to establish shopping centre value *or the value of the HBC leased store property*" (my emphasis). The Penticton PVS attached to the Carefoot affidavit indicates, and Miriam Quigley's *in camera* evidence confirmed, that BC Assessment applies a capitalization rate to the net income stream[1] for the shopping centre as a whole, to establish an assessed value for the shopping centre as a whole. I accept for the purposes of this inquiry that BC Assessment does not apply store-by-store capitalization rates or establish store-by-store assessed market values for stores located in shopping centres. I also accept that, as BC Assessment applies one capitalization rate and establishes one market value for each shopping centre as a whole, the capitalization rate that HBC seeks

[1] As explained later, income figures on the PVS are estimates of what the property can generate that are generated from the GLA, market rent, and vacancy and expense allowance figures.

is the capitalization rate in the 2003 PVS that BC Assessment applied for the whole of each of the shopping centres.

[12] The Penticton PVS also contains breakdowns of GLA, market rent and vacancy and expense allowances for some other identified tenants, and gross and net income figures for Zellers and those other tenants. HBC does not seek access to any of this type of information.

[13] Finally, the Penticton PVS contains the indicated market value for the shopping centre as a whole, and slightly adjusted figures for the final estimate of value and the 2003 assessment roll value (broken down between land and buildings) assigned by BC Assessment. The roll value and breakdown would be publicly available under the *Assessment Act*.

[14] HBC has access to the PVS for the shopping centre where its Penticton Zellers is located because HBC owns the shopping centre in Penticton, whereas it leases stores at the Park Royal North, Metrotown, Coquitlam and Scottsdale shopping centres from third parties. Miriam Quigley's evidence was that BC Assessment provides the property owner (or its authorized agent) with routine access to the PVS. The owner is then free to give as much information in the PVS to its tenants as the owner chooses. BC Assessment will give a tenant direct access to the PVS only with the owner's written authorization. From the perspective of an access request under the Act, BC Assessment takes the view that because HBC does not own these shopping centres, and is only a tenant, the PVS information HBC seeks constitutes sensitive third-party business information that is protected from disclosure under s. 21(1) and s. 21(2) of the Act.

Submissions of the third parties

[15] Park Royal North did not object to the HBC access request so long as it did not include information related to other third parties. It elaborated as follows (pp. 1-2):

> No. 5 [of the HBC access request] states:
>
> > "any other information contained in the records on file that has been used for determining the income stream for the demised premises."
>
> So long as this clause 5 is not intended to encompass information regarding third parties, Park Royal does not find the request objectionable.
>
> However, if the information "used for determining the income stream" includes information regarding other tenants, including rent rolls and financial information included in the leases, Park Royal is concerned. It is not appropriate that any disclosure include such information, since it is commercial and financial information supplied in confidence. If it were disclosed, it could well be that Park Royal would have concerns about supplying such information in the future and it might also affect negotiating positions.

[16] As I have already noted, HBC is not pursuing point 5 of its access request.

[17] Scottsdale said that s. 21(1) does not require BC Assessment to refuse disclosure to HBC of the information in points 1 to 4 of the access request, provided the information is limited to the Zellers store at Scottsdale and is not about other third party tenants. Scottsdale candidly said, at paras. 4 and 5 of its reply submission, that:

- BC Assessment had in fact already disclosed to HBC the GLA and proposed expense rates for its Zellers store at Scottsdale and for a number of other tenants; and
- Scottsdale already provides Zellers with regular invoices that include the GLA, market rent, vacancy and expense allowances for the Zellers store, and the capitalization rate applied by BC Assessment.

[18] Scottsdale maintained, however, that s. 21(2) does require BC Assessment to refuse to give access to the information requested by HBC.

[19] The other shopping centres—Metrotown and Coquitlam—made no submissions. The following information relating to Metrotown was put forward by BC Assessment in the Quigley affidavit, but in relation to point 5 of the access request:

> 12. The other information sought by the Bay which is "…any other information contained in the records on file that has been used for determining the income stream for the demised premises" is of extreme concern to me. As previous [*sic*] stated, it is not uncommon to use rents of other, similar properties to establish current market rent for the subject if the subject property is the subject of a long term lease negotiated many years prior to the valuation date. Of greater concern is the information used in deriving the capitalization rate. Unless the property being valued sold, the capitalization rate would have come from analyzing the sale of another property. When a property such as a shopping mall sells, the Assessment Authority sends out a questionnaire/letter to the vendor and the purchaser seeking production of information which will be used in analyzing the sale. This information is highly sensitive and is provided to the Assessor on the statutory condition that it will be kept confidential.
>
> 13. The recent sale of Metro Town mall to Ivanhoe Cambridge is a demonstration of the reluctance of owners to produce to BC Assessment what they consider to be very sensitive information. The purchaser is usually in possession of most of information [*sic*] required by the Assessor to analyse sales information. The representative of Ivanhoe Cambridge has not been willing to produce to BC Assessment any information on Metro Town Mall other than income and expense statements subsequent to the sale, but not for the year in which the sale occurred. His stated reason for not producing any information for us is that he doesn't believe that we will be able to maintain the promised confidentiality of the information he could provide us.
>
> 14. Further we were able to obtain a copy of the 10 year income projections on the Metro Town Mall sale through an agent related to the company that did the due diligence for the Metro Town sale. As soon as the representative of Ivanhoe

> Cambridge found out that we had obtained the information he demanded that the information and any and all copies be returned to his possession.

2.0 ISSUES

[20] The issues in this inquiry are whether either s. 21(1) or s. 21(2) of the Act, or both, require BC Assessment to refuse to give HBC access to the following 2003 assessment information in relation to HBC's leased stores in the four selected shopping centres:

1. GLA;
2. fair market rent applied by BC Assessment;
3. vacancy and expense allowances applied by BC Assessment; and
4. capitalization rate utilized by BC Assessment to establish shopping centre value.

[21] Under s. 57(1) of the Act, BC Assessment has the burden of proof on these issues.

[22] BC Assessment originally also denied access under s. 17 of the Act, but I need not consider this exception as, consistent with its further response to the access request, BC Assessment relied only on s. 21 in the inquiry (para. 2, initial submission).

[23] In addressing the issues, I will also discuss the relevance of the following to the issues:

1. Section 2 of the *Assessment Authority Act*, which provides that the *Assessment Authority Act* applies in the event of a conflict between it and any other Act;

2. The accessibility of information through procedures in the *Assessment Act*;

3. The accessibility of similar assessment-related information elsewhere in Canada; and

4. The relationship of HBC to the information in dispute.

3.0 DISCUSSION

[24] **3.1 Property Assessment Framework and Income Approach to Valuation**—Under the *Assessment Act*, BC Assessment must prepare an annual assessment roll, for property taxation purposes, for each assessment jurisdiction in the province. The roll must contain the name of the owner of the property, the classification of the property, its actual value (in the sense of its market value) and the split of the actual value between land and buildings. The completed roll is sent to the various taxing jurisdictions, notably local governments, which use it to determine the tax liability of the owner or occupier of the land by applying the mill rate (generally the amount of tax payable per $1,000 value of property) that the taxing authority has decided is appropriate for each class of property. Any person dissatisfied with an assessment may appeal under

the *Assessment Act*, first to the Property Assessment Review Panel then to the Property Assessment Appeal Board (paras. 10-12, BC Assessment initial submission).

[25] Various provisions in the *Assessment Act* permit BC Assessment to enter and inspect land or improvements or require the production of information for purposes relating to assessment and the administration of the legislation. The disclosure of assessment information is addressed in ss. 16(3) through (6) of the *Assessment Act*, as follows:

> (3) The [assessment] commissioner, a member of a review panel, a member of the board or any other person who has custody or control of information or records obtained or created under this Act must not disclose the information or records to any other person except
>
> (a) in the course of administering this Act or performing functions under it,
> (b) in proceedings before a review panel, the board or a court of law,
> (c) in accordance with subsection (4), or
> (d) in accordance with a regulation under subsection (6).
>
> (4) The commissioner may disclose to the agent of a property owner confidential information relating to the property if the disclosure has been authorized in the prescribed form by the owner or, if a form has not been prescribed for the property class, authorized in writing by the owner.
>
> (5) An agent must not use information disclosed under subsection (4) except for the purposes authorized by the owner in the form or writing referred to in that subsection.
>
> (6) The Lieutenant Governor in Council may make regulations respecting the disclosure of information obtained or created under this Act, including, without limitation, information respecting the declared value, financing and physical characteristics of property.

[26] Section 1 of the *Dissemination of Information Regulation*, B.C. Reg. 232/78, made under s. 16(6) of the *Assessment Act*, reads as follows:

> **Information may be made available**
>
> 1 The [assessment] commissioner may disclose and disseminate to any person information under the *Assessment Act* respecting the declared value and physical characteristics of any property.

[27] I draw the following conclusions from the parties' submissions, particularly the Quigley and Carefoot affidavits and Miriam Quigley's *in camera* evidence:

- BC Assessment's obligation is to value land and buildings based on market conditions at or around July 1 of each year.

- BC Assessment uses the income approach to valuation for properties such as large shopping centres. This involves valuing income-producing properties by determining an appropriate estimate of income that the property can generate and applying to that estimate a capitalization rate representing what a notional purchaser would pay for that income stream.
- As a basis for constructing an income approach to value, BC Assessment gathers information from the owner of the shopping centre, such as income and expense statements, rent rolls, tenant leases, appraisals, studies or estimates on remediation or repairs, and sales data.
- The owner of the shopping centre is the primary source of information respecting square footage, though land title records may also be used where there are strata plans or registered leases, and surveys may be done where renovations have changed the internal configurations of units.
- Depending on the volume and quality of information provided by the shopping centre owner, it may be necessary for BC Assessment to look at information relating to comparable properties and utilize information on a comparative basis to determine market rents, vacancy and expense allowances and capitalization rates in particular.
- BC Assessment analyzes gathered information to arrive at GLA, market rents, and vacancy and expense allowances for various parts of the shopping centre, usually broken down between the major anchor tenants (such as an HBC store), smaller commercial retail units (known as CRUs) collectively and food court tenancies collectively
- Market rent (also known as economic rent) is determined with reference to leases in the shopping centre or comparable properties, as of July for the previous year. Market rent may be quite different from the rent the property owner receives. For example, if the contract rent a tenant is paying in 2001 was agreed to in 1995, market conditions may have changed in the interim, which could mean the rent agreed to in 1995 is either above or below the current market rent.
- Sometimes different vacancy and expense allowances are made for each store type. Sometimes the same allowances are used for all stores in the shopping centre.
- Vacancies for major tenancies are sufficiently rare that determining the vacancy allowance for an HBC store is a matter of some conjecture by BC Assessment. Because there is almost never any direct experience with major vacancies at the shopping centre being valued, or other shopping centres for comparison purposes, the vacancy allowance BC Assessment arrives at has little if any direct connection to actual information gathered from any source.
- Gross and net income figures for each store type and the shopping centre as a whole are calculated from the GLA, market rent, and vacancy and expense allowance figures.
- Unless the shopping centre being valued has itself recently sold, BC Assessment must arrive at an appropriate capitalization rate with reference to sales data for other properties. This involves determining a capitalization rate for a comparable property that sold by dividing the net income for that property by its sale price. It is sometimes

also necessary to refer to due diligence reports, income and expense statements, lease summaries and other data relating to the comparable property.

- The net income of the shopping centre being valued is divided by the capitalization rate utilized by BC Assessment to arrive at an indicated value for the shopping centre, which is adjusted, if necessary, to arrive at the final estimate of value and the assigned roll value (broken down between land and buildings).
- GLA, market rent, vacancy and expense allowances, gross and net income figures for each store type (major tenants, CRUs collectively and food court tenancies collectively), and capitalization rate, indicated value and assigned market value for the shopping centre as a whole, all appear on the PVS for the shopping centre.
- From the above information, only the assigned value of the shopping centre as a whole (split between land and buildings) appears on the assessment roll that BC Assessment sends to taxing authorities and makes available to the public.
- In this inquiry, HBC seeks the following information from the PVS for each shopping centre: GLA, market rent, and vacancy and expense allowances for each HBC anchor store, and the capitalization rate utilized by BC Assessment for each shopping centre as a whole.

[28] **3.2 Section 2 of the *Assessment Authority Act*—**BC Assessment suggests (para. 8, initial submission) that s. 2 of the *Assessment Authority Act*, the legislation that establishes the BC Assessment, is relevant to this inquiry. It does not develop this point. The flavour of BC Assessment's submissions, however, is that the system for handling assessment information in the *Assessment Act* essentially forecloses HBC's right of access under the Act. I draw from this an implication by BC Assessment that the right of access under the Act to records in its custody or control as a public body is subordinate to the *Assessment Act* because of s. 2 of the *Assessment Authority Act*.

[29] Section 2 of the *Assessment Authority Act* reads as follows:

> 2 If there is a conflict between this Act and any other Act, this Act prevails.

[30] Section 79 of the Act—which is not mentioned in the BC Assessment's submissions—reads as follows:

> 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.

[31] Section 79 of the Act, including the meaning of "inconsistent or in conflict" and the range of various statutory provisions that override the Act, was discussed in Order 04-01.[2] Section 2 of the *Assessment Authority Act* refers to conflict between the

[2] [2004] B.C.I.P.C.D. No. 1.

Assessment Authority Act "and any other Act". Section 2 does not expressly refer to the *Freedom of Information and Protection of Privacy Act* and it does not refer to conflict with the *Assessment Act*. I found no provision in the *Assessment Authority Act* that might, combined with s. 2 of that Act, result in the *Assessment Act* (s. 16(3) in particular) having an overriding effect within the meaning of s. 79 of the Act. The BC Assessment referred to no such provision. I find that s. 2 of the *Assessment Authority Act* is not relevant to this inquiry.

[32] HBC says there is in any event no conflict between the Act, the *Assessment Authority Act* and the powers to disclose information in the *Assessment Act* because BC Assessment's disclosure of the information in issue is authorized by s. 16(3) of the *Assessment Act* and the *Dissemination of Information Regulation*.

[33] The focus of this inquiry is whether either s. 21(1) or s. 21(2) of the Act, or both, require BC Assessment to refuse to give access to HBC. If the *Assessment Act* requires or authorizes disclosure to HBC, that would have implications for s. 21(1)(b) (supplied in confidence) and s. 21(1)(c) (harm from disclosure). It might have implications for s. 21(2) as well. I have found, however, that the applicability of s. 21(1) or s. 21(2) may be answered without resolving whether or under what conditions the *Assessment Act* requires or authorizes BC Assessment to make disclosure to HBC of the information in issue.

[34] **3.3 Access Procedures in the *Assessment Act*—**Section 2(2) of the Act reads as follows:

> 2(2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

[35] Section 21(3)(a) of the Act also provides that the disclosure exceptions in subsections (1) and (2) do not apply if "the third party consents to the disclosure".

[36] In its further response to HBC's access request, BC Assessment said the following:

> According to this section [s. 21(3)] of the Act, and the *Assessment Act*, if an individual or group obtains the consent of the third party [the property owner, via a certified agent status] BC Assessment will release third party data to that person [agent].
>
> Also relating to s. 2(2) of *FIPPA*, ss. 39 and 46(2) & (4) of the *Assessment Act* empower the Property Assessment Review Panels and the Property Assessment Appeal Panel respectively to demand that BC Assessment release records and data to them in their determinations of the fairness or otherwise of property assessment. The *Assessment Act*, therefore, contemplates the production and release of specific information, on a case by case basis, by BC Assessment, to tribunals set up by

> these independent bodies, created especially to subject the public body to public scrutiny of its assessment decisions while limiting the sensitive information released to that necessary purpose.
>
> Our contention is, therefore, that there is ample scope within existing processes and legislation to provide release of appropriate data while protecting the confidentiality concerns of the property-owning and property-leasing business sectors.

[37] This theme—that rather than making an access request under the Act, HBC was obliged to avail itself of the appeal mechanism in the *Assessment Act*—is also sounded in the following passage from BC Assessment's submissions (para. 16, reply submission):

> While it may be more convenient for the Applicant to utilize the provisions of the *Freedom of Information and Protection of Privacy Act* to obtain the information sought, the fact that they may have leasehold interests in the properties in question is not enough to overcome the specific legislative prohibition against the production of this information. Other jurisdictions may take a different view of how such information is treated but as the law stands today in our jurisdiction, the information sought by the Applicant can only be lawfully obtained in the assessment appeal process by way of application.

[38] Section 2(2) confirms that rights of access in the Act exist alongside and do not limit other procedures for access to information that is not personal information and is available to the public. Section 2(2) does not provide in any way that the existence of other procedures for public access to non-personal information limits rights of access under the Act. I also reached this conclusion in relation to a similar argument in Order 00-07:[3]

> As I understand its argument, the Ministry is asking me to accept that the right of access to information under the Act is to be read down, or supplanted, if another avenue for access exists in a given case. Section 2(1) of the Act is against the Ministry, as is s. 2(2). The former says that the Act's purposes include making public bodies more accountable to the public, including by "giving the public a right of access to records". This right, which is found in s. 4(1), is subject to "limited exceptions" specified in the Act (s. 2(1)(c)). The Ministry wishes to effectively turn s. 2(2) on its head—in effect, to ignore ss. 2 and 4—so that existence of other actual or possible avenues of access to information renders the Act inapplicable.

[39] Section 2(2) does not mean that the existence of a possible avenue for disclosure under the *Assessment Act* limits access pursuant to a request under the Act. Therefore, assuming without deciding that HBC could have brought an appeal under the *Assessment Act* respecting the assessments for these shopping centres and could have sought disclosure of the information in issue in this inquiry as part of the appeal process,

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[3] [2000] B.C.I.P.C.D. No. 7, at p. 13.

I do not accept BC Assessment's submission that this should or does limit or foreclose HBC's right of access under the Act.

[40] **3.4 Accessibility of Similar Information Elsewhere**—HBC points out (paras. 67-71, initial submission) that in Quebec tenants are entitled to access to information used as a basis for entries in an assessment roll,[4] that in Ontario legislation provides for tenant access to assessment information (though not actual income and expense information on individual properties) and that the City of Edmonton gave HBC access to the kind of information that is in issue in this inquiry. HBC says this is clear evidence that the information it seeks is not sensitive or confidential, that no business advantage is conveyed or lost by its disclosure and that its availability "enhances the assessment process, makes it more accountable to those with vested interests and overall provides for a better system of assessment with no negative repercussions" (para. 72, initial submission).

[41] My view of the relevance of the accessibility of similar information in other jurisdictions is summarized in the following passage from Order 01-52[5], which concerned whether the disclosure of grizzly bear kill location data could reasonably be expected to result in harm within the meaning of the s. 18(b) disclosure exception in the Act:

> [89] …the fact that another jurisdiction may have a law or policy regarding the public disclosure of grizzly bear kill locations will not drive the interpretation or application of s. 18 of the Act, but concrete evidence justifying or explaining the experience of the law or policy of another jurisdiction could be pertinent….
>
> [90] In Order 01-20, [2001] B.C.I.P.C.D. No. 21, a decision concerning ss. 17 and 21 of the Act, I considered evidence of the U.S. experience relating to public disclosure of exclusive supply agreements between U.S. universities and cold beverage companies. In that case, I decided that the U.S. evidence was relevant to showing that – regardless of the similarity or dissimilarity of U.S. access to information statutes – the absence of confidentiality for 11 exclusive supply agreements provided to me in evidence had not prevented the U.S. universities and cold beverage companies from entering into exclusive sponsorship agreements. I found this was relevant to the question of whether disclosure of the exclusive agreement in question in that inquiry gave rise to a reasonable expectation of harm to the interests of the public body or of the third party under ss. 17 and 21 of the Act.
>
> [91] I also referred in Order 01-20 to the decision of the Federal Court of Appeal in *Canada Packers Inc.* v. *Canada (Minister of Agriculture)* (1988), 53 D.L.R. (4th) 246. That case involved the question of whether disclosure of government inspection reports containing negative assessments of meat-packing plants posed a sufficient risk of harm to the business interests of a third party meat-packer. Similar reports were publicly available in the U.S. and had previously also

[4] See *Ville de Québec c. Hudson's Bay Company*, [2003] J.Q. No. 14305 (C.A).
[5] [2001] B.C.I.P.C.D. No. 55.

> been available in Canada. Evidence was presented of negative publicity surrounding product safety issues discussed in U.S. government reports unrelated to meat-packing plants or their inspection. The third party meat-packer's position in *Canada Packers* was that its interests would be harmed by unfavourable press coverage if the inspection reports were disclosed. The Federal Court of Appeal found this to be the "sheerest speculation". It found that the third party's position was not established by remote evidence about experience in the U.S. with publicity surrounding product safety issues in government reports. If that evidence had any relevance, it was outweighed by the fact that meat-packing plant inspection reports were publicly disclosed in the U.S. and had until recently also been publicly disclosed in Canada, yet no evidence had been adduced of unfavourable publicity associated with those disclosure practices.

[42] The existence of assessment legislation in Quebec, Ontario and Alberta that permits tenant access to assessment information or gives assessment authorities discretion in the area cannot be used to read similar content into British Columbia legislation if the legislative language in British Columbia does not support it. Further, this inquiry under the Act is of course not a forum for legislative change, if change is necessary, to bring British Columbia closer into line with other Canadian jurisdictions in terms of access, under the *Assessment Act*, to the information that HBC seeks. The accessibility of similar information elsewhere in Canada may, however, support HBC's argument that information is not confidential (para. 15, BC Assessment reply submission) and may be relevant to whether disclosure could reasonably be expected to result in harm under access to information legislation[6], in this case under s. 21(1)(c) of the Act.

[43] **3.5 HBC's Relationship to the Information**—The identity or motives of an applicant are not generally relevant to the right of access under the Act, but an applicant's relationship to requested information can be relevant to the operation of disclosure exceptions in the Act. Accordingly, an applicant does not have to explain or justify the reasons for making an access request and the right of access under the Act is not measured by a public body's perceptions of the applicant's worthiness or of the applicant's desire for information.[7] At the same time, s. 22(1) of the Act—intended to prevent disclosures of information that would unreasonably invade third-party personal privacy—does not require a public body to withhold information from an individual who has requested personal information relating only to the applicant, because an individual cannot invade his or her own personal privacy.

[44] In a similar vein, HBC says the information in issue in this inquiry relates to it and not to others. Put another way, HBC says it has a relevant relationship to the

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[6] As it was in Order 01-52, Order 01-20, [2001] B.C.I.P.C.D. No. 21, and *Canada Packers Inc.* v. *Canada (Minister of Agriculture)* (1988), 53 D.L.R. (4th) 24 (F.C.A.).

[7] See Order 04-19, [2004] B.C.I.C.D. No. 19, citing: *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police),* [2003] 1 S.C.R. 66, para. 32; *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)*, para. 9; Order 01-52, para. 83; *Lavigne v. Canada (Commissioner of Official Languages)* (1998), 157 F.T.R. 15, (T.D.), para. 28, affirmed (2000), 261 N.R. 19 (F.C.A.) and [2002] 2 S.C.R. 773.

information and is not seeking similar information that relates to others (paras. 3 and 5, initial submission):

> The information sought by the Applicant relates only to its stores. The Applicant does not seek any actual information provided to BC Assessment by any third parties. The Applicant does not seek any information that has been prepared or utilized by BC Assessment to value any third party components of the shopping complexes in which the Applicant's stores are located.
>
> …
>
> It is the Applicant's position that the information sought is not supplied by any third party, and is not confidential. The information relates to the Applicant's stores, and as the person ultimately responsible for the payment of realty taxes on its stores the Applicant is entitled to have direct access to the information of BC Assessment.

[45] The relationship that HBC suggests exists between itself and the information it seeks is further expressed in HBC's initial submission:

> 30. The applicant seeks the GLA that the assessor has used in preparing assessments. The actual GLA of any of one [*sic*] the Applicant's stores in the province is the information of both a third party landlord and the Applicant. Likewise the contract rent is information that is within the common knowledge of both the Applicant and the landlord. The market rent ascribed by the Assessor is BC Assessment's information, and not proprietary information of the landlord. The requested vacancy and expense allowances, and capitalization rates ascribed by the Assessor are also BC Assessment's information, and not that of the landlord.
>
> 31. It would also seem that the relationship of a person seeking disclosure should have bearing on whether the information sought is the confidential information of a third party, and on the decision to disclose or not. In this case, the Applicant seeks information that can be related specifically to its stores. If a proprietary interest is a relevant consideration then the Applicant has as much of a proprietary interest in the requested information as would the landlord.

[46] **3.6 Does Section 21(1) Apply?**—The application of s. 21(1) has been considered in many orders.[8] The portions of this provision relevant to this inquiry read as follows:

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

[8] See, for example, Order 03-02, [2003] B.C.I.P.C.D. No. 2, and Order 04-06, [2004] B.C.I.P.C.D. No. 6.

> (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,…

[47] The purpose of s. 21(1) is to protect third-party business information. None of the shopping centres has advanced this disclosure exception. BC Assessment bears the burden of proving that s. 21(1) applies. Each of the elements found in ss. 21(1)(a) through (c) must be satisfied before BC Assessment must withhold information. As noted earlier, two of the shopping centres (Coquitlam and Metrotown) did not provide any submissions to the inquiry and the submissions of the other two (Park Royal North and Scottsdale) do not assist BC Assessment in discharging its burden of proof. I do not find it necessary to exhaustively analyze the operation of s. 21(1) in relation to the information in issue, as I have concluded that there are many reasons why it does not require BC Assessment to refuse access to HBC.

Scottsdale

[48] Scottsdale makes the information in issue regularly available to HBC. It therefore conceded, and I agree, that neither supply in confidence under s. 21(1)(b) nor harm under s. 21(1)(c) could be made out as regards disclosure of the Scottsdale-related information to HBC.

[49] I note also that BC Assessment has already disclosed 2003 proposed GLA and vacancy and expense allowances for the Zellers store at Scottsdale in responding to HBC's access request.

[50] Scottsdale's only concern had to do with information about tenants other than HBC, but HBC has clearly stated that it does not want information in the PVS—GLA, market rent, gross income, vacancy and expense allowances, net income—about other third-party tenants.

Park Royal North

[51] Park Royal North's only concern was as regards information about tenants other than HBC. Again, HBC is not seeking information in the PVS—GLA, market rent, gross income, vacancy and expense allowances, net income—about other third-party tenants.

[52] I note that the six severed records that BC Assessment has disclosed as responsive to HBC's request indicate that it has also already disclosed 2003 proposed GLA and vacancy and expense allowances for the HBC store at Park Royal North.

GLA

[53] I will now discuss GLA—"gross leaseable area"—and s. 21(1).

[54] In Order 01-20,[9] I found that a map of the University of British Columbia campus showing the location of cold beverage vending machines was not required to be withheld under s. 21(1) because the vending machines were highly visible (in fact, their locations were designed to advertise products and attract customers on the campus).

[55] In *AstraZeneca Canada Inc. v. Canada (Health),*[10] Phelan J. observed that a determination of whether information is confidential depends on its contents, its purposes and the circumstances under which it was compiled. Information that is readily available to companies in the same business cannot be objectively confidential—nor can information that can be obtained by observation, even where some degree of effort is required.

[56] These decisions are examples of the proposition that the repackaging of available information does not create a confidentiality cloak[11] or expectation of harm from disclosure under a disclosure exception for third-party business information.

[57] GLA for HBC stores is information that is available from direct observation and from sources that are public (land title records) or are well known to HBC (unregistered leases and survey records). As well—and not surprisingly, in my view—there is no evidence from the shopping centre owners respecting supply, confidentiality or harm from disclosure of the requested GLA for HBC stores.

[58] It is not reasonable to conclude under s. 21(1) that GLA is confidential or that GLA used or generated by BC Assessment is supplied in confidence by the shopping centre owner or anyone else. Nor could it reasonably be expected that disclosure of GLA for the HBC stores would result in harm to third parties. It also could not reasonably be expected that disclosure of the GLA information HBC seeks would result in BC Assessment no longer being able to assemble this information in the future. In fact, in addition to public sources and the shopping centre owners, HBC itself could provide square footage, lease and survey information about its stores.

Section 16(3) of the Assessment Act

[59] At paras. 19 and 20 of its initial submission, BC Assessment says s. 16(3) of the *Assessment Act* establishes confidential supply under s. 21(1)(b) of the Act because the records provided to it

[9] Para. 134.
[10] [2005] F.C.J. No. 859 (T.D.), para. 72.
[11] *AstraZeneca Canada Inc. v. Canada (Health)*, [2005] F.C.J. No. 789 (T.D.), para. 30.

> …were provided under a statutory guarantee that they would be kept confidential and only released in certain enumerated circumstances such as in assessment appeal proceedings, in court proceedings, to an authorized agent of the owner.
>
> The Assessment Act prohibits the [Assessment] Commissioner from disclosing any information to persons other than owners of property with the exception of the declared value and physical characteristics of any property. The Commissioner is not permitted to produce the information sought by the Bay as there is no declared value for the Bay in isolation from the balance of the malls in which they operate nor does the balance of the information sought by the Bay appear on the Assessment roll which is publicly available.

[60] I do not agree with BC Assessment's view of s. 16(3) of the *Assessment Act* with reference to the operation of the Act. Section 16(3) requires BC Assessment not to disclose information that it obtains from third parties, as well as information it generates, except under certain conditions specified in the section or regulations. It is not a statutory guarantee of confidentiality. It is not a prohibition on disclosure that overrides the right of access in the Act. It does not provide that information BC Assessment receives from third parties is received or supplied in confidence. In Order 02-12,[12] I made a similar observation about s. 95 of the *Workers Compensation Act*.

[61] I would add that I do not read s. 16(4) of the *Assessment Act*, which permits BC Assessment to provide confidential information about a property to its owner, to imply that all information obtained or created under the *Assessment Act* is confidential. Some may be and some may not.

Information generated by BC Assessment

[62] HBC says the information in issue was generated by BC Assessment, not "supplied" by the shopping centre owners. It gives an example of one of its stores where the rent HBC pays the owner is $8.24 per square foot, while BC Assessment applied a market rent rate of $10 per square foot. HBC says the market rent applied by BC Assessment is not supplied by anyone. It is, rather, the result of BC Assessment's own analysis of the market and the "supplied" element in s. 21(1)(b) is not satisfied.

[63] It is well established that information created or generated by a public body is not "supplied" within the meaning of s. 21(1)(b), unless it would inferentially disclose underlying information that was, in fact, supplied to the public body in confidence.[13] This interpretation of "supplied" is, as noted in Order 03-02, consistent with the interpretation elsewhere in Canada, including Alberta, Ontario, Quebec and federally.

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[12] [2002] B.C.I.P.C.D. No. 12, at paras. 56-58.

[13] For a more complete discussion of the concept of supply and derivative (or indirect) disclosure, see, for example, Order 03-02. For British Columbia court decisions on this issue, see *Jill Schmidt Health Services Inc. v. British Columbia (Information and Privacy Commissioner)*, [2001] B.C.J. No. 79, 2001 BCSC 101, and *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner) et al.*, [2002] B.C.J. No. 848, 2002 BCSC 603.

[64] HBC acknowledges that there may be circumstances where disclosure of information would permit an accurate inference to be drawn of underlying information that was "supplied" in confidence by a third party, but says that it would not be possible to draw an accurate inference of sensitive "supplied" information in this case. HBC says that I should also consider that it would already be aware of things like vacancy problems in shopping centres, of its own contract rent rates and so on. HBC insists that there is nothing confidential about the information in issue, particularly regarding the shopping centres in which its stores are located (paras. 33-44, initial submission; paras. 29-30, reply submission).

[65] I agree with HBC that the information in issue is the product of BC Assessment analysis and judgement. BC Assessment draws on information gathered from property owners, public sources and third parties and from its own observations. Information generated by BC Assessment, including the assigned value and the split between land and buildings that appears on the assessment roll, is not "supplied" information on the basis that it could not have been generated "but for" information from property owners and others.

[66] The Federal Court of Appeal has held on a number of occasions that information created or generated by a federal government institution was not "supplied" for the purposes of the federal *Access to Information Act*. This interpretation of "supplied" was established, in fact, several years before the British Columbia Act was drafted and passed. In its 1988 decision, *Canada Packers Inc. v. Canada (Minister of Agriculture),*[14] the Federal Court of Appeal held that the observations of government meat inspectors made at meat-packing plants did not qualify as information that had been "supplied" to the government within the meaning of the federal *Access to Information Act*.[15] MacGuigan J.A. said this:

> ¶12 Paragraph 20(1)(b) relates not to all confidential information but only to that which has been "supplied to a government institution by a third party". Apart from the employee and volume information which the respondent intends to withhold, none of the information contained in the reports has been supplied by the appellant. *The reports are, rather, judgments made by government inspectors on what they have themselves observed.* In my view no other reasonable interpretation is possible, either of this paragraph or of the facts, and therefore paragraph 20(1)(b) is irrelevant in the cases at bar. [italics added]

[14] (1988), 53 D.L.R. (4th) 246, [1988] F.C.J. No. 615 (F.C.A.).

[15] In addition to *Canada Packers*, also see, for example, *Merck Frosst Canada & Co. v. Canada (Ministre de Santé)*, 2005 FCA 215, [2005] F.C.J. No. 1020 (C.A.); *Canada (Minister of Public Works & Government Services) v. Hi-Rise Group Inc.*, 2004 FCA 99, [2004] F.C.J. No. 468 (C.A.); and *Air Atonabee Ltd. v. Canada (Minister of Transport)*, [1999] F.C.J. No. 453 (T.D.). In *Hi-Rise Group*, a government consultant was given information from various lease proposals and evaluated the information to arrive at net present value ("NPV") figures for the proposals. Affirming *Canada Packers*, the court held that the NPV had not been supplied to the institution. It went on to hold that, in the circumstances of that case, disclosure of the NPV could reveal underlying, supplied, third-party information.

[67] HBC's reliance on *Canada Packers* and on *Overwaitea Food Group, a Division of Great Pacific Industries Ltd. v. British Columbia (Information and Privacy Commissioner)*[16] is well placed. The latter decision upheld my predecessor's findings that an employer's workers' compensation claims cost and experience-rated assessment rate, calculated taking into account the employer's claims experience and its assessable payroll, did not qualify as information supplied to the Workers' Compensation Board under s. 21(1)(b) of the Act.

[68] Another relevant case is *Ontario (Workers' Compensation Board) v. Ontario (Information and Privacy Assistant Commissioner)*,[17] in which the Ontario Court of Appeal upheld a finding under Ontario's *Freedom of Information and Protection of Privacy Act* that penalty surcharge amounts levied on employers were not supplied under the Ontario equivalent of s. 21(1)(b) of the Act, having been generated by the workers' compensation board based on data provided by the employers. The Court of Appeal also upheld the determination that the evidentiary burden had not been discharged to establish that disclosure of the penalty surcharge calculations would reveal information supplied in confidence by employers.

[69] The evidence before me indicates that BC Assessment generates GLA, market rent and vacancy and expense allowance figures for HBC stores by analyzing and applying its judgement to information from a variety of sources, many of which will be sources known to HBC as the tenant. I find this information in issue is not supplied under s. 21(1)(b) and that BC Assessment has also not satisfied its burden of establishing that disclosure of this information would inferentially reveal underlying information that was supplied in confidence.

[70] The capitalization rate that BC Assessment uses for the shopping centres in which HBC stores are located may be arrived at with reference to sales data for other properties, but selection of an appropriate capitalization rate is an analytical exercise of professional skill and judgement. I find that the capitalization rate BC Assessment determines is appropriate for these shopping centres is not "supplied" information. It, rather, is generated by BC Assessment and, again, BC Assessment has also not satisfied its burden to establish that disclosure would inferentially reveal underlying information that was supplied in confidence.

Harm to third-party competitive or negotiating positions

[71] BC Assessment says that disclosure could reasonably be expected to harm significantly the competitive position of the shopping centre owners or interfere

[16] [1995] B.C.J. No. 2457 (S.C.).
[17] (1998), 164 D.L.R. (4th) 171 (Ont. C.A.).

significantly with their negotiating position. Order 04-06[18] summarizes the approach to be taken to measuring reasonable expectation of harm from disclosure under the Act, including under s. 21(1)(c). In a nutshell, the threshold of reasonable expectation of harm requires more than speculation or generalization. It implies confident belief founded on clear and direct connection between disclosure of specific information and the harm that is alleged.

[72] BC Assessment's concerns about harm to third-party competitive and negotiating positions are hypothetical and are, I also note, concentrated on information in point 5 of the access request, which HBC no longer seeks.[19]

[73] There is no evidence from shopping centre owners respecting BC Assessment's claim that disclosure to HBC could reasonably be expected to result in harm to their interests under s. 21(1)(c). By contrast, Scottsdale conceded no expectation of harm from disclosure because it regularly provides the information in issue to its tenants. Scottsdale and Park Royal North said they would be concerned if information was disclosed about other third-party tenants, but this is not information that HBC seeks.

[74] Although it is not decisive by any means, the fact that similar information is apparently available to commercial tenants in Quebec, Ontario and Alberta also tends to refute BC Assessment's claim that disclosure would result in harm to the competitive positions and interfere with the negotiating positions of shopping centre owners.

[75] BC Assessment has not provided evidentiary support for its claim that there is a reasonable expectation of third-party harm from disclosure, still less for how the harm or interference it envisions would be "significant" within the meaning of s. 21(1)(c)(i). Although HBC need not show that disclosure will *not* result in harm, that is what the evidence actually tends to establish.

[76] Section 21(1)(c)(i) has clearly not been satisfied with respect to the information in issue.

Similar information no longer supplied to BC Assessment

[77] BC Assessment says the *Assessment Act* mandates disclosure only in limited circumstances and property owners are "leery of providing such sensitive information in the absence of a guarantee that it will not find its way into the hands of those who could

[18] Paras. 55-58. This order refers in turn to Order 03-03, [2003] B.C.I.P.C.D. No. 3, paras. 41-43, Order 02-50, [2002] B.C.I.P.C.D. No. 51, paras. 111-112, 124-137, and to judicial consideration including *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773.

[19] For example, BC Assessment says that disclosure to HBC of information such as rent rolls, income and expense statements, cap rate analysis and lease details for these and comparable shopping centres would cause harm to the competitive position of the shopping centre owners, as HBC could use this information to its advantage in lease negotiations.

use it to their competitive advantage" (para. 22, initial submission). BC Assessment acknowledges that it has statutory power to compel production of information—with the possibility of prosecution for non-compliance—but says that it aims for voluntary compliance. According to BC Assessment, "[r]esort to prosecution should not be made the Authority's primary mode of information gathering to fulfill its statutory mandate". BC Assessment also describes problems it says that it has encountered in obtaining information about the terms of sale of the Metrotown shopping centre from the new owner (para. 22, initial submission; paras. 13-14, Quigley affidavit).

[78] Section 21(1)(c)(ii) of the Act does not apply where there is a statutory compulsion to provide information—or the prospect of compulsion exists—or where there is a financial incentive for doing so.[20] BC Assessment has broad powers to compel the production of information, records and other things it needs to carry out its duties. Property owners and others who receive such an order must comply with it or face prosecution. It is also against public policy to withhold access to records under the Act on the basis that persons will refuse to obey the law if access to records is given.[21]

[79] The problems BC Assessment describes in getting information from Metrotown's new owner relate to information in point 5 of the access request, which HBC no longer seeks. It is also possible that those problems were tied to s. 16(3)(b) of the *Assessment Act*—which authorizes information obtained or created under that legislation to be disclosed for purposes of appeal proceedings—and the case of *British Columbia (Assessor of Area No. 09 - Vancouver) v. Lord Realty Holdings Ltd.,*[22] which held that such disclosure could include sales and income information used in assessing other properties that were used as comparables for purposes of the assessment under appeal.

[80] Last, to the extent that the information in issue draws on information provided by Scottsdale and Park Royal North, and does not include information about other tenants, neither is concerned about disclosure to HBC.

[81] Section 21(1)(c)(ii) has also clearly not been satisfied with respect to the information in issue.

[82] **3.7 Does Section 21(2) Apply?**—Section 21(2) creates a separate basis on which a public body is required to refuse to disclose information. It reads as follows:

> (2) The head of a public body must refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

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[20] See Order 03-05 [2003] B.C.I.P.C.D. No. 5, for example. Also see Order No. 56-1995, [1995] B.C.I.P.C.D. No. 29, upheld on judicial review: *Fletcher Challenge Canada Ltd. v. British Columbia (Information and Privacy Commissioner)*, [1996] B.C.J. No. 505 (S.C.).

[21] Order 01-52, paras. 139-141, upheld on judicial review: *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)* (2004), 26 B.C.L.R. (4th) 1, [2004] B.C.J. No. 735 (C.A.).

[22] *British Columbia (Assessor of Area No. 09 - Vancouver) v. Lord Realty Holdings Ltd.,* [1996] B.C.J. No. 2092 (C.A.).

[83] There is no suggestion or evidence that any of the responsive information elements were "obtained on a tax return". The question, therefore, is whether this information was "gathered for the purpose of determining tax liability or collecting a tax".

[84] In 1994, my predecessor decided that workers' compensation assessment information was not protected under s. 21(2) because workers' compensation levies are not a "tax". In considering the meaning of "obtained on a tax return" he said, "The context of section 21(2) in the entire Act suggests that the drafters were thinking about corporate and personal income tax returns."[23] On judicial review, Meredith J. agreed with Commissioner Flaherty's reasons for finding that s. 21(2) did not apply.[24]

[85] Ontario's *Freedom of Information and Protection of Privacy Act* contains a provision very similar to s. 21(2). Under s. 17(2) of the Ontario Act, a public body must refuse to disclose a record that reveals information "that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax." The language just quoted is identical to that found in s. 21(2). In *Ontario (Workers' Compensation Board),*[25] the Ontario Court of Appeal also agreed that workers' compensation assessments or levies are not a tax under s. 17(2) of Ontario's *Freedom of Information and Protection of Privacy Act*.

[86] No one argued in this inquiry that property tax is not a tax under s. 21(2). I agree that personal and corporate income tax falls within the meaning of a tax in s. 21(2) but not to the exclusion of property tax, which in my view also meets that description. Order No. 217-1998[26] and Investigation Report P98-11[27] confirm that Commissioner Flaherty also considered property tax to be a tax within the meaning of s. 21(2).

[87] HBC says that the assessment of property and the taxation of property are different functions undertaken by different public bodies and, since BC Assessment is involved in assessment and not taxation, s. 21(2) has little or no application to its obtaining or gathering of information (paras. 60-66, initial submission).

[88] BC Assessment refers to its purpose in preparing the assessment roll for forwarding to taxing authorities, where it forms the basis for the calculation property tax payable by property owners. Scottsdale supports BC Assessment's view of the applicability of s. 21(2), saying that (para. 8, reply submission):

> …while B.C. Assessment Authority confidentially collects information in order to generate assessed property values, these assessments are integral to and inextricably linked with the determination of tax liability for property owners. It is

[23] Order No. 22-1994, [1994] B.C.I.P.C.D. No. 25, at p. 12.
[24] *Overwaitea Food Group, a Division of Great Pacific Industries Ltd. v. British Columbia (Information and Privacy Commissioner)*, [1995] B.C.J. No. 2457 (S.C.).
[25] See note 17.
[26] [1998] B.C.I.P.C.D. No. 10.
[27] Investigation Report P98-11, available at: www.oipc.bc.ca/investigations/reports/invrpt11.html.

> submitted that any conceivable distinction between the generation of assessed values and the determination of tax liability is semantic at best.

[89] BC Assessment is responsible for the assessment of properties, but not for their actual taxation. Nonetheless, the assessment roll is unquestionably prepared and used for the purpose of determining property tax liability and the statutory scheme for BC Assessment makes it plain that the purpose of property assessment is property taxation. I conclude that information BC Assessment gathers for the purpose of its determination of the assessment roll is information gathered for the purpose of determining tax liability.[28]

[90] That is not the end of the matter, since HBC also argues that the information it seeks is not "obtained" or "gathered". It is, rather, information developed by BC Assessment, no less than the assigned values on the assessment roll are information developed by BC Assessment.

[91] As the Supreme Court of Canada earlier this year affirmed yet again, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention" of the Legislature.[29]

[92] In my view, the purpose of s. 21(2) is to protect information that a public body obtains from a taxpayer (on the taxpayer's tax return) or otherwise gathers relating to the taxpayer for the purpose of determining tax liability or collecting a tax. The policy of this disclosure exception is to protect information obtained or gathered relating to the taxpayer for the purpose of determining tax liability or collecting a tax, without, unlike s. 21(1), requiring the establishment of confidentiality of the information or a reasonable expectation of harm to the taxpayer from its disclosure.

[93] In my view, s. 21(2) is not intended to prevent the taxpayer from getting access to information that is obtained on the taxpayer's tax return or that is gathered relating to the taxpayer for the purpose of determining a tax liability or collecting a tax. This is reinforced by s. 21(3), which says that s. 21(1) and (2) do not apply if "the third party consents to the disclosure". In the context of s. 21(2), "[t]he third party" in s. 21(3) is, in my view, the taxpayer whose return or tax liability or payment is involved.[30]

[94] Section 21(2) is also not intended to protect analysis and judgements about market value of property that BC Assessment generates from data it obtains or gathers for the purpose of determining assigned values for the assessment roll. BC Assessment's

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[28] My predecessor took the same view on this in Investigation Report P98-11.

[29] *R. v. Clark*, 2005 SCC 2, [2005] S.C.J. No. 4, para. 43. I have applied this approach to interpreting the Act in many cases. See, for example, Order 02-38, [2002] B.C.I.P.C.D. No. 38.

[30] Section 17(2) and (3) of Ontario's *Freedom of Information and Protection of Privacy Act* has also been interpreted this way: Interim Order PO-2059-I, [2002] O.I.P.C. No. 165, paras. 67-76.

determinations of market rent, of what a notional purchaser of the property would be willing to pay to acquire the income stream from the property and of the assigned values arrived at for the assessment roll, are determinations generated by BC Assessment. They are not information that is "gathered" from or relating to the taxpayer. As explained above and in connection with s. 21(1), HBC is not pursuing access to underlying gathered information (such as actual income and expense statements, rent rolls or the like). On the evidence and by the analytical and judgemental nature of the information in issue, the information is not, and does not disclose, underlying "gathered" information.

[95] I recognize that "gathered" is used in s. 21(2) whereas "supplied" is used in s. 21(1)(b). These words have similar meanings and no significance may attach to one or the other being used.[31] If, in the context of this section of the Act, there is significance in the use of different words with similar meanings, in my view, the significance is that "gathered" serves to clarify that s. 21(2) includes information relating to the taxpayer that is gathered by the public body without the taxpayer's positive or consensual involvement, or even knowledge. Those circumstances could be considered wider than what would be covered by "supplied" as it is used in s. 21(1)(b). These distinctions do not form the basis of my conclusion that the information in issue in this inquiry was not "gathered" information under s. 21(2). The word "gathered", whether or not it was used to convey wider clarifying meaning with reference to "supplied", does not capture the BC Assessment-generated information in issue here.

[96] Having regard to the context in which the word "gathered" appears, and the overall scheme and purpose of the Act, the word "gathered" does not cover information that is generated, or created, by a public body by applying skills, techniques and professional judgement to information that it has gathered (even where underlying information that is analyzed to create the disputed information has been gathered directly from a taxpayer).

[97] A public body may gather information relating to the taxpayer from a variety of sources—including sources other than tax returns and sources other than the taxpayer—and then record that information. Such information, in the state in which it was gathered or as compiled in the public body's records or files, will be information that has been "gathered" within the meaning of s. 21(2). In this inquiry, however, BC Assessment gathers information from various sources including, for comparable purposes, information relating to other properties. It analyzes and develops that material to create new information through the income-valuation approach to assessment—including the assigned value placed the assessment roll—which reflects BC Assessment's considered determinations of market value and are not, and do not disclose, information gathered by BC Assessment.[32]

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[31] *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), at paras. 64-69.

[32] BC Assessment might arrive at the same opinion of the market rent of a property as the opinion held by the property owner. BC Assessment's opinion would not disclose the property owner's opinion—they would simply be the same in that particular instance.

4.0 CONCLUSION

[98] For the reasons given above, I find that neither s. 21(1) nor s. 21(2) of the Act requires BC Assessment to withhold the requested 2003 GLA, market rent, vacancy allowance, expense allowance and capitalization rates. Under s. 58 of the Act, I require BC Assessment to give the applicant access to this information.

September 1, 2005

ORIGINAL SIGNED BY

David Loukidelis
Acting Information and Privacy Commissioner
for British Columbia

OIPC File No. 17230