



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

Order F11-07

**BRITISH COLUMBIA ASSESSMENT AUTHORITY**

Celia Francis, Senior Adjudicator

February 18, 2011

Quicklaw Cite: [2011] B.C.I.P.C.D. No. 8

CanLII Cite: 2011 BCIPC No. 8

Document URL: <http://www.oipc.bc.ca/orders/2011/OrderF11-07.pdf>

**Summary:** CUPE requested copies of three leases for BC Assessment's offices in Penticton, Vernon and Kelowna, as well as schedules to a service agreement. BC Assessment originally applied ss. 15(1)(l), 17(1), 21(1) and 22(1) to portions of the three leases. During mediation and the early stages of the inquiry, most of the issues and records fell away, leaving only the application of s. 17(1) to the Kelowna lease. BC Assessment provided no evidentiary basis to support the application of s. 17(1). This exception is found not to apply and BC Assessment is ordered to disclose the severed information in the Kelowna lease.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, s. 17(1).

**Authorities Considered:** **B.C.:** Order 02-50, [2002] B.C.I.P.C.D. No. 51; Order F08-22, [2008] B.C.I.P.C.D. No. 40; Order 03-02, [2003] B.C.I.P.C.D. No. 2.

## 1.0 INTRODUCTION

[1] In late October 2009, the Canadian Union of Public Employees Local 1767 ("CUPE") made a request to the British Columbia Assessment Authority ("BC Assessment") under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for copies of the leases for BC Assessment's offices in Kelowna, Vernon and Penticton. BC Assessment provided copies of the leases to CUPE but severed some information under ss. 15(1)(l), 17(1) and 22(1) of FIPPA.

[2] In December 2009, CUPE also requested copies of specific schedules to a contract for professional services between BC Assessment and a business.

BC Assessment disclosed these items, severing some information under ss. 15(1) and 21(1) of FIPPA.

[3] CUPE requested reviews of both decisions by the Office of the Information and Privacy Commissioner (“OIPC”). Mediation did not resolve the issues and the two matters proceeded to a joint inquiry under Part 5 of FIPPA. The OIPC invited representations from CUPE, BC Assessment and, as third parties, the Penticton and Kelowna leaseholders and the business involved in the services agreement. BC Assessment was unable to contact the leaseholder for the Vernon office despite several attempts. The OIPC did not therefore invite this leaseholder to participate in the inquiry. CUPE and BC Assessment made submissions but the notified third parties did not.

## 2.0 ISSUE

[4] The notice for this inquiry stated that the issues were whether BC Assessment was required to withhold information under ss. 21(1) and 22(1) and authorized to withhold information under ss. 15(1)(l) and 17(1).

[5] Most of the issues and records fell away before or during the inquiry. CUPE said it was not interested in any information withheld under s. 22(1).<sup>1</sup> BC Assessment disclosed the remaining withheld information in the contract schedules.<sup>2</sup> BC Assessment also disclosed the expired Penticton and Vernon leases.<sup>3</sup> Thus ss. 15(1)(l), 21(1) and 22(1) were no longer an issue.

[6] The copy of the Kelowna lease that BC Assessment provided indicates that it originally applied s. 17(1) to the severed portions. Accordingly, the only issue I need consider is whether BC Assessment is authorized to withhold the severed information in the Kelowna lease under s. 17(1).

[7] Section 57 sets out the burden of proof in an inquiry such as this. Under s. 57(1), BC Assessment has the burden of showing that s. 17(1) applies.

## 3.0 DISCUSSION

[8] **3.1 Background**—BC Assessment leases commercial space in the course of its business. In 2009, BC Assessment decided to close its offices in Vernon and Penticton and consolidate operations in Kelowna. BC Assessment began negotiations for larger leased premises in Kelowna to accommodate the increased staff at that location. BC Assessment announced there would be

---

<sup>1</sup> Page 8, CUPE’s initial submission.

<sup>2</sup> Email of January 19, 2011 from BC Assessment’s legal counsel to the OIPC’s Registrar of Inquiries.

<sup>3</sup> Email of this office of February 11, 2011 from BC Assessment to the Registrar of Inquiries.

a savings of \$441,000 through these moves. CUPE first requested the business case supporting the move but BC Assessment told CUPE it “would not ‘willingly’ share this information”. When told that having all employees in one location would be cheaper than having three leased premises, CUPE requested copies of the leases for the three offices to verify the claimed savings.<sup>4</sup>

[9] **3.2 Record in Dispute**—BC Assessment withheld the following portions of the Kelowna lease under s. 17(1):

- “Relocation of Premises”
- Annual rent, parking and overholding amounts
- “Option to extend”
- “Landlord’s Work”
- “Tenant’s Right of First Refusal”

[10] **3.3 Section 17(1)**—This section reads as follows:

***Disclosure harmful to the financial or economic interests of a public body***

17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

- (a) trade secrets of a public body or the government of British Columbia;
- (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;
- (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
- (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
- (e) information about negotiations carried on by or for a public body or the government of British Columbia;
- (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

---

<sup>4</sup> Pages 1-2, CUPE’s initial submission. BC Assessment did not dispute CUPE’s description of the events leading to the requests.

[11] **3.4 Harms-Based Exceptions**—Past orders have set out the evidentiary requirements for the application of FIPPA’s harms-based exceptions. For example, Order 02-50<sup>5</sup> considers at some length the standards for establishing a reasonable expectation of harm regarding s. 17. Commissioner Loukidelis also said this in Order F08-22<sup>6</sup> about the basis for establishing that s. 17(1) applies:

[35] I have held in previous orders that s. 17(1) requires a confident and objective evidentiary basis for concluding that disclosure could reasonably be expected to result in harm. Referring to language used by the Supreme Court of Canada in an access to information case, I have said that “there must be a clear and direct connection between the disclosure of specific information and the harm.” The focus is on what a reasonable person would expect, based on evidence. The probability of harm occurring is relevant to the assessment, but mathematical likelihood will not be decisive when other contextual factors are at work. ... [citations omitted]

[12] In considering whether there is a reasonable expectation of harm on disclosure of the severed information in this case, I have taken the same approach as in these and other previous relevant orders, as well as the case law to which they refer.

[13] **3.5 Parties’ Arguments**—CUPE made an eight-page submission. BC Assessment provided a brief submission. The Kelowna leaseholder made no representations.

### ***CUPE***

[14] CUPE acknowledged that there might be some justification for withholding information concerning current lease negotiations. Similarly, where another party was seeking the same commercial space, there might be a need to keep certain information confidential. However, in this case, CUPE said the lease is complete and covers a number of years and there could thus be no reasonable expectation of harm if the information were disclosed. CUPE argued that this case is analogous to Order F08-22, which held that information on completed contracts should be disclosed. CUPE argued that disclosure of the severed information could not reasonably be expected to harm BC Assessment’s financial interests because:

- there are no active negotiations underway for similar leased space;

---

<sup>5</sup> [2002] B.C.I.P.C.D. No. 51, paras. 111-112 & 126-137.

<sup>6</sup> [2008] B.C.I.P.C.D. No. 40.

- lease information is not a trade secret but is typically shared among private and government fee appraisers and commercial realtors to value similar properties;
- BC Assessment announced its plan to amalgamate the three offices in 2009 and has since implemented this plan; and
- the public has a right to know how BC Assessment would realize a savings of \$441,000 through the amalgamation.<sup>7</sup>

### **BC Assessment**

[15] BC Assessment evidently decided not to argue the merits of its original decision to apply s. 17(1), as it submitted that:

After a thorough review of the recent decisions from the Commissioner's office, and having regard to the particular facts of this case, B.C. Assessment has determined that it will take no position with respect to the extant applications. This is not to be taken as a general admission that the same result will necessarily occur in future applications depending on their particular facts and the state of the law at the relevant time.

[16] That was the extent of BC Assessment's initial argument. It limited its reply to the following:

Having read the Applicant's submissions in these matters, and the third parties not having made any representations, .... With respect to the lease of the Kelowna office space, as this lease is still current, we would ask that a determination be made on the merits of the application given the current decisions and an order issued accordingly.

### **Analysis**

[17] Although the notice for this inquiry explicitly stated that the burden of proof for s. 17 was on BC Assessment as the public body, BC Assessment made no submissions on the merits of this exception. This rarely happens, as Commissioner Loukidelis noted in Order 03-02<sup>8</sup>, a case involving the application of s. 17(1) and s. 21(1) to draft marketing agreements. In that case, the burden of proof was on UBC as the public body. However, UBC and one third party made no submissions, while the other third party made only a brief submission. Commissioner Loukidelis noted that no party in the case had provided an evidentiary basis to support the application of s. 21(1). He referred to *Satanove J. in Jill Schmidt Health Services Inc. v. British Columbia (Information and Privacy Commissioner)*<sup>9</sup>, who affirmed that a public body's failure to provide

---

<sup>7</sup> Page 5, CUPE's initial submission.

<sup>8</sup> [2003] B.C.I.P.C.D. No. 2.

<sup>9</sup> [2001] B.C.J. No. 79, 2001 BCSC 101.

evidence to establish the application of s. 21(1) could be fatal to its case. He said there was no evidence before him to support a finding that s. 21(1)(c)<sup>10</sup> applied and found that s. 21(1) did not apply to the disputed information.

[18] Later in the same order, Commissioner Loukidelis noted that UBC had also not provided any affidavit or other evidence to support its contention that disclosure of any or all of the draft agreement could reasonably be expected to harm its interests within the meaning of s. 17(1)(e).<sup>11</sup> He also said that UBC had not met its burden of proof regarding s. 17(1) and found that this exception did not apply.

[19] Similarly, neither BC Assessment nor the Kelowna leaseholder provided any evidentiary support for a finding that s. 17(1) applies to the record in dispute in this case. I note BC Assessment's comment that the Kelowna lease is still current. However, as CUPE noted, there is no indication that BC Assessment is or will soon be negotiating a lease for similar space in Kelowna, such that disclosure of the withheld information could reasonably be expected to harm its negotiating position. Nor does anything on the face of the record support such a finding. One passage, "Relocation of Premises", consists of words marked with a "strikeout" feature, suggesting it is not applicable to this lease. It is difficult to understand how disclosure of inapplicable language could reasonably be expected to result in any of the s. 17(1) harms. Moreover, the withheld passages contain what appears to be standard, boilerplate language. I cannot see how their disclosure could reasonably be expected to result in undue gain or loss to a third party nor in any of the other harms set out in s. 17(1).

[20] Without more, I have no basis on which to conclude that s. 17(1) applies to any of the information in dispute. BC Assessment has not discharged its burden of proof. I therefore find that s. 17(1) does not apply to the severed portions of the Kelowna lease.

#### **4.0 CONCLUSION**

[21] For reasons given above, I make the following orders under s. 58 of FIPPA:

1. I require the head of BC Assessment to disclose the information it withheld under s. 17(1).

---

<sup>10</sup> Order 03-02, para. 120.

<sup>11</sup> At para. 144.

- 
2. I require the head of BC Assessment to give the applicant access to this information within 30 days of the date of this order, as FIPPA defines “day”, that is, on or before April 1, 2011 and, concurrently, to copy me on its cover letter to the applicant.

February 18, 2011

**ORIGINAL SIGNED BY**

---

Celia Francis  
Senior Adjudicator

OIPC File Nos.: F10-40970 and F10-40971