Office of the Information & Privacy Commissioner for British Columbia

Protecting privacy. Promoting transparency.

Order F12-09

MINISTRY OF TRANSPORTATION AND INFRASTRUCTURE

Jay Fedorak, Adjudicator

June 13, 2012

Quicklaw Cite: [2012] B.C.I.P.C.D. No. 13
CanLII Cite: 2012 BCIPC No. 13
Document URL: http://www.oipc.bc.ca/orders/2012/OrderF12-09.pdf

Summary: An applicant requested the traffic management plan and any permits that the Ministry issued in relation to the Whistler GranFondo 2010. The Ministry withheld the traffic management plan and other information under s. 21(1) of FIPPA, on the grounds that disclosure would harm the business interests of TOIT Events. The adjudicator found that s. 21(1) of FIPPA did not apply to the information, because TOIT had not supplied the information to the Ministry in confidence and TOIT failed to demonstrate the potential harm in disclosing it. The adjudicator ordered the Ministry to disclose all of the information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 21(1).

Authorities Considered: B.C.: *K-Bro v. British Columbia (Information and Privacy Commissioner)* 2011 BCSC 904; *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* 2002 BCSC 603.

Cases Considered: Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 03-15, [2003] B.C.I.P.C.D. No. 15; Order 00-09, [2000] B.C.I.P.C.D. No. 9; Order F10-28, [2010] B.C.I.P.C.D. No. 40; Order 01-39, [2001] B.C.I.P.C.D. No. 40; Order 04-06, [2004] B.C.I.P.C.D. No. 6; Order 00-10, [2000] B.C.I.P.C.D. No. 11.

INTRODUCTION

[1] The Whistler GranFondo is a mass participation cycling event on a route from Vancouver to Whistler BC. This case involves an individual ("applicant") challenging a decision of the Ministry of Transportation and Infrastructure ("Ministry") to withhold information in response to his request for the traffic

management plan ("TMP") for the Whistler GranFondo 2010 and any permits issued to TOIT Events ("TOIT"), the organizer of the GranFondo. The Ministry disclosed a copy of an agreement ("Agreement") between it and TOIT for the Whistler GranFondo, but withheld the TMP and some information related to the event's route. The Ministry withheld the information on the grounds that disclosure would harm the business interests of TOIT under s. 21(1) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

ISSUE

[2] The question that I must decide is whether disclosing the withheld information would harm the business interests of TOIT under s. 21(1) of FIPPA.

DISCUSSION

[3] **Background**—In 2007, TOIT approached the Ministry about staging a mass participation cycling event from Vancouver to Whistler. Before permitting the event, the Ministry asked TOIT to provide a comprehensive TMP, which included the following information: route; traffic detours; signage; intersection management; emergency response measures; public information plan; incident response planning; contact list; and operational procedures. TOIT hired an engineering contractor to develop the TMP and, when it was completed, TOIT submitted it to the Ministry. The Ministry subsequently issued the permit and the event took place in September 2010.

[4] The Ministry's initial submission stated that it was unable to make a case that s. 21(1) of FIPPA applied to the withheld information because it did not have enough evidence. It contended, however, that it would be fair and equitable to continue with the inquiry and permit TOIT to provide evidence that justified the Ministry continuing to withhold the information under s. 21(1) of FIPPA. In effect, the Ministry is relying on TOIT to make the case for the Ministry.

[5] The applicant and TOIT made initial submissions. None of the parties made a reply submission.

[6] **Records at Issue**—The information that the Ministry withheld consists of selected passages from Schedule A to the Agreement and the entire Appendix to Schedule A. The information withheld from Schedule A includes the proposed location of police officers on the route and the details of temporary traffic delays on the roads along the route. The Ministry also withheld the TMP, which is incorporated into the Agreement by reference in Schedule A. The withheld Appendix to Schedule A includes photographs of the roads along the route. Essentially, the information the Ministry withheld all relates to the TMP. Therefore, I will refer to this information collectively as "the TMP".

[7] **Harm to Third-Party Business Interests**—Numerous orders have considered the application of s. 21(1) and the principles for its application are well established.[1] They set out a three-part test for determining whether disclosure is prohibited, all three elements of which must be established before the exception to disclosure applies. Former Commissioner Loukidelis conducted a comprehensive review of the body of case decisions in several jurisdictions in Order 03-02.[2]

[8] The first part of the test requires the information to be a trade secret of a third party or the commercial, financial, labour relations, scientific or technical information of, or about, a third party. The second part of the test requires the information to have been supplied to the public body in confidence. The third part of the test requires that disclosure of the information could reasonably be expected to cause significant harm to the third party's competitive position or other types of harm as set out in s. 21(1)(c).

Commercial or financial information

[9] TOIT asserts that the TMP is proprietary. TOIT submits that it designed the TMP and paid more than $20,000 to the engineering contractor to develop it. While TOIT's submissions do not clearly establish that the TMP is commercial or financial information, it appears evident from the face of the TMP that it includes technical information about the cycling event. I am also satisfied that the TMP has financial value. Therefore, I find that the TMP constitutes commercial or technical information for the purpose of s. 21(1)(a) of FIPPA.

Supplied in confidence

[10] In order to undertake this analysis, it is necessary to separate the concept of "supplied in confidence" into two parts. The first is to determine whether the records were "supplied" to the Ministry. The second will be to determine whether TOIT supplied those records "in confidence".

[11] Previous decisions have dealt extensively with the application of s. 21(1)(b) of FIPPA with respect to determining whether information meets the criteria of being "supplied". Information that has been "negotiated" between a third party and a public body is not considered to be "supplied".[3]

---

[1] See for example, Order 03-02, [2003] B.C.I.P.C.D. No. 2 and Order 03-15, [2003] B.C.I.P.C.D. No. 15.

[2] At paras. 28-117.

[3] Order 00-09, [2009] B.C.I.P.D. No. 9. I applied this approach in Order F10-26, [2010] B.C.I.P.C.D. 38, Order F10-27, [2010] B.C.I.P.C.D. 39, Order F10-28, [2010] B.C.I.P.C.D. No. 40 and Order F11-08, [2011] B.C.I.P.C.D. No. 10. Order F10-28 was upheld on judicial review. See *K-Bro v. British Columbia (Information and Privacy Commissioner)* 2011 BCSC 904.

[12] The difficulty in analyzing this issue is that TOIT's submission is silent as to whether the information in the TMP should be considered "supplied" as opposed to "negotiated". The Ministry's submission shed little light on the matter.

[13] What TOIT did say is that it provided a copy of the TMP as part of an application to the Ministry for approval to hold the event. TOIT indicated that it was necessary for the Ministry to approve and accept the TMP before the Ministry would grant TOIT the permit it required. For its part, the Ministry did not explain how its approval process operates. For example, it did not indicate whether the TMP originally was not susceptible to change or whether it was potentially subject to further negotiations or alterations, as a result of discussions between it and the Ministry. This is important because whether the information is immutable can be determinative as to whether it meets the definition of "supplied".

[14] Adjudicator Iyer discussed this issue in Order 01-39.[4] She stated:

> Information will be found to be supplied if it is relatively "immutable" or not susceptible of change. ... A bid proposal may be "supplied" by the third party during the tender process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it.
>
> In other words, information may originate from a single party and may not change significantly – or at all – when it is incorporated into the contract, but this does not necessarily mean that the information is "supplied". The intention of s. 21(1)(b) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change, but, fortuitously, was not changed. [5]

[15] On judicial review, C. Ross J. agreed with Adjudicator Iyer:

> CPR's interpretation focuses on whether the information remained unchanged in the contract from the form in which it was originally supplied on mechanical delivery. The Delegate's interpretation focuses on the nature of the information and not solely on the question of mechanical delivery. I find that the Delegate's interpretation is consistent with the earlier jurisprudence ... .[6]

---

[4] A decision upheld by the Supreme Court of British Columbia on judicial review, see: *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* 2002 BCSC 603.
[5] Order 01-39, [2001] B.C.I.P.C.D. No. 40, paras. 45-46.
[6] *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, para. 75.

[16] In this case there is insufficient information to determine whether the TMP belongs in the category of "negotiated" or "supplied".

[17] In summary, there is insufficient evidence before me to determine whether the information meets the criteria to be supplied for the purpose of s. 21(1)(b) of FIPPA. As FIPPA places the burden of proof on the Ministry, I find that it has not met this burden, even with the assistance of the submission of TOIT. Therefore, I must find that the information does not meet the test of s. 21(1)(b) of FIPPA.

[18] As I have found that the Ministry and TOIT have failed to demonstrate that TOIT supplied the information at issue, I do not need to deal with the question of confidentiality. I note, however, that if I were obliged to do so, I would find that TOIT had failed to demonstrate the confidentiality of information.

[19] Numerous orders have dealt with the issue of whether information was supplied explicitly or implicitly, "in confidence".[7] Order 04-06 found that assertions by a third party alone, without corroboration from a public body or other objective evidence, were insufficient to establish that the information was provided "in confidence".[8] It held that there must be evidence of a "mutuality of understanding" between the public body and the third parties for the information to have been considered to have been supplied "in confidence".

[20] TOIT describes the TMP as "a confidential and proprietary document". That is not sufficient for s. 21(1)(b) of FIPPA to apply. This provision requires that the record be supplied to the Ministry "in confidence". There needs to be evidence that the Ministry undertook to receive the record in confidence. The Ministry is silent on the issue. I have reviewed the relevant provisions of the Agreement, which the Ministry submitted, in order to determine whether there were any explicit indicators of confidentiality. I can confirm that there are no explicit indicators of confidentiality.

[21] The situation in this case is similar to that in Order 04-06. Like the third party in that inquiry, TOIT makes a bald assertion that the document is "confidential" without corroboration by the public body. There being no evidence of "mutuality of understanding" respecting the confidentiality of the information, it follows that there is not a sufficient basis on which to conclude that the information was supplied implicitly in confidence either.

[22] In summary, TOIT has failed to meet the second part of the s. 21(1) test because it has not shown that the information in dispute was supplied, explicitly or implicitly, in confidence. I find that s. 21(1)(b) of FIPPA does not apply to Schedule A and the Appendix to Schedule A in the Agreement.

---

[7] See for example, Order 01-39, [2001] B.C.I.P.C.D. No. 40.
[8] [2004] B.C.I.P.C.D. No. 6, paras. 51-53.

Harm to third party interests

[23] As none of the information at issue meets the "supplied in confidence" test in s. 21(1)(b), it is not necessary for me to deal with the harms part of the analysis under s. 21(1)(c). Nevertheless, for the sake of completeness, I will.

[24] Former Commissioner Loukidelis set out the standard of proof under the reasonable expectation of harm test in Order 00-10,[9] where he said the following:

> Section 21(1)(c) requires a public body to establish that disclosure of the requested information could reasonably be expected to cause "significant harm" to the "competitive position" of a third party or that disclosure could reasonably be expected to cause one of the other harms identified in that section. There is no need to prove that harm of some kind will, with certainty, flow from disclosure; nor is it enough to rely upon speculation. Returning always to the standard set by the Act, the expectation of harm as a result of disclosure must be based on reason. ... Evidence of speculative harm will not meet the test, but it is not necessary to establish certainty of harm. The quality and cogency of the evidence must be commensurate with a reasonable person's expectation that the disclosure of the requested information could cause the harm specified in the exception. The probability of the harm occurring is relevant to assessing the risk of harm, but mathematical likelihood will not necessarily be decisive where other contextual factors are at work.

[25] TOIT has not provided any indication of the harm it envisions from the release of the TMP. TOIT's submission on this issue consists merely of pointing out that there are other mass cycling events planned in North America, and the organizers of those events would wish to be as successful as the GranFondo Whistler. TOIT states that, in order to keep its competitive advantage, it must keep its proprietary information confidential.

[26] TOIT has not established how other cycling events could use the information to TOIT's financial disadvantage. TOIT's submissions do not indicate how the success or failure of other events would affect TOIT's financial position. There is no evidence before me that there was, or is, any kind of competitive process for the right to stage the GranFondo at Whistler or that companies compete to stage these events at any other locations in North America.

[27] Moreover, it appears that much of the information that TOIT wishes to remain confidential would have been evident to the cyclists and spectators at the event. The aspects of the plan that TOIT considers unique are: unimpeded lane width; extensive lane closures; standby emergency reaction zones; alternative flow bypass strategies; and highway opening and closing. It is unlikely that TOIT

[9] [2000] B.C.I.P.C.D. No. 11, p. 10.

could have prevented observers from noticing these features of the race. This factor alone is not determinative of the issue, but does raise doubts as to whether the disclosure of the records would cause financial harm to TOIT.

[28] Based on its brief submissions, TOIT has not convinced me that disclosure of the information at issue would harm its financial interests. Therefore, I find that s. 21(1)(c) of FIPPA does not apply to the TMP.

CONCLUSION

[29] I find that s. 21(1) of FIPPA does not require the Ministry to refuse to give the applicant access to the TMP and associated information in Schedule A and the Appendix to Schedule A in the Agreement. For the reasons given above, under s. 58 of FIPPA, I require the Ministry to give the applicant access to the information it requested within 30 days of the date of this order, as FIPPA defines "day", that is, on or before, July 25, 2012 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

June 13, 2012

ORIGINAL SIGNED BY

Jay Fedorak
Adjudicator

OIPC File No.: F11-45372