



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

Order F09-14

CITY OF FERNIE

Michael McEvoy, Adjudicator

August 28, 2009

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Summary: An applicant requested plans from the City of Fernie submitted by a third party to obtain a permit to build a house. The third party argued that disclosing the plans would unreasonably invade his privacy and result in harm to his business interests. Those arguments were without merit and the City was required to disclose the plans. The information in the plans, consisting primarily of external drawings of the house, was for the most part already apparent by visual observation of the property.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 21(1)(a)(ii), 21(1)(b), 21(1)(c)(i), 21(1)(c)(iii), 22(2)(e), 22(3)(f) and 22(4)(i).

Authorities Considered: **B.C.:** Order 01-53, [2001] B.C.I.P.C.D. No. 54; Order F05-16, [2005] B.C.I.P.C.D. No. 24; Order 02-50, [2002] B.C.I.P.C.D. No. 51.
Ont.: Order P-454, [1993] O.I.P.C. No. 112.

1.0 INTRODUCTION

[1] The applicant sought copies of plans (“plans”) a third party (“third party”) submitted to obtain a building and development planning permit from the City of Fernie (“City”).

[2] The City notified the third party, under s. 24 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”), that it intended to disclose the plans to the applicant.

[3] The third party seeks a review of this decision because he argues that disclosure of the requested records would be an unreasonable invasion of his personal privacy and harmful to his business interests.

2.0 ISSUE

[4] The issues identified in the Notice of Inquiry are whether:

1. Section 22(4)(i) of FIPPA applies to the records?
2. If s. 22(4)(i) does not apply, whether the public body is required to refuse access under ss. 21(1)(a)(ii), 21(1)(b), 21(1)(c)(i), 21(1)(c)(iii), 22(2)(e) and 22(3)(f) of FIPPA?

[5] Under s. 57(2) of FIPPA, the burden lies with the applicant to demonstrate that the release of the requested information is not an unreasonable invasion of the third party's privacy.

[6] Under s. 57(3)(b), the burden falls upon the third party to demonstrate that the s. 21 exception to disclosure applies.

3.0 DISCUSSION

[7] The third party is building a house near the applicant; the applicant states concern about both its appearance and its effect on the existing property grade. The latter issue relates to a concern about potential drainage problems affecting the applicant's property. The applicant requested information from the City to assess these issues. This included:

- A copy of the original design grades for at least four nearby houses on the street.
- A copy of the originally approved drawing submitted for the neighbouring house.
- A copy of the revised plans for the same house, reflecting current approval.
- A copy of all documentation related to the approvals for the neighbouring house.
- A copy of the geotechnical survey as it pertains to the applicant's property.

[8] The City responded that it did not possess the first and last items. The City forwarded several items to the applicant under the fourth request, including the application for a building permit and letters from the City to an agent for the third party.

[9] The City advised the applicant that before it could provide the original and revised building plans in the second and third request, it first had to notify the third party because the information requested might affect the third party's

interests or unreasonably invade his privacy. The third party objected to the release of the information. After reviewing the matter further, the City said it would release the requested records, which in turn caused the third party to initiate this review of the City's decision.

[10] The third party argues that releasing the requested records is both an unreasonable invasion of his personal privacy under s. 22 of FIPPA and harmful to his business interests under s. 21.

[11] **3.1 Personal Privacy**—Numerous orders have considered the application of s. 22 of FIPPA. See for example Order 01-53.¹ I have applied here, without repeating it, the approach taken in those orders. The relevant provisions of s. 22 read as follows:

- 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
- (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
 - ...
 - (e) the third party will be exposed unfairly to financial or other harm,
- (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
 - ...
 - (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,
 - ...
- (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
 - ...
 - (i) the disclosure reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a public body, not including personal information supplied in support of the application for the benefit, or

¹ [2001] B.C.I.P.C.D. No. 56.

[12] **3.2 Do the requested records contain personal information?**— Personal information is recorded information about an identifiable individual other than contact information. The records are building plans consisting of six drawings that primarily show the exterior design and dimensions of the house located at the address for which the applicant requested the information. Three of the drawings are the original plans and the other three the revised versions. From what I can discern, the original and revised plans do not differ to any significant degree as concerns the details of the exterior of the house. There are also two sketches within the plans of a “column detail” and a “soffit detail”. The plans identify the address of the house and the name of the third party and contain some information from the design company that rendered the plans including its name, address and phone number.

[13] I will begin with the latter information. Personal information does not include “contact information” which is information to enable an individual at a place of business to be contacted. Although the design company information on these plans, in my view, falls into this category and is therefore not personal information, the applicants did not request this information and it therefore should be severed as non-responsive to the request.

[14] Clearly, the name of the third party is personal information. However, because only the plans themselves were asked for, that information is not within the scope of the applicant’s request. Given that the name of the third party can be severed as non-responsive, the issue then is whether the plans, by themselves, constitute recorded information about an identifiable individual. In my view, they do not. The recorded information is about the exterior design of the house and not about an identifiable individual.

[15] **3.3 Is Disclosure of the records an unreasonable invasion of privacy?**—If I am wrong in finding the plans do not constitute personal information, it is necessary for me to consider whether the disclosure of the requested information would be an unreasonable invasion of the third party’s privacy.

[16] The applicant claims no interest in the interior details of the new home being constructed and only wants to see what the original grades of the proposed development were and what changes were made to bring about the current grade. The applicant also wants to review the revised plans to ensure the proposed methods for retaining the soil along the property line meet the building code.

[17] The applicant believes that s. 22(4)(i) applies in this case and that the disclosure of the requested information would therefore not be an unreasonable invasion of privacy.

[18] However, neither the applicant nor the other parties provide evidence demonstrating the applicability of this section. For example, the City offers no evidence concerning whether the building plans themselves constitute “details” of the permit or whether the permit is in the nature of a “discretionary benefit”. I decline to draw any conclusion concerning the applicability of s. 22(4)(i).

[19] The Notice of Inquiry notes that s. 22(3)(f) is in issue here. That provision deems as an unreasonable invasion of personal privacy the disclosure of records that describe a third party’s finances and so on. The third party does not address this contention in his submission. The only possible argument that I could envision concerning this provision, and one which I reject, is that the requested information might describe an asset of the third party. However s. 22(3)(f) is aimed at personal information describing finances. The plans, which merely describe the exterior of the house, in no way describe or imply the financial value of the structure.

[20] The third party also argues that a relevant circumstance here is that disclosure of the plans would unfairly expose him to financial or other harm. I have carefully reviewed the third party’s submissions and note that his s. 21 and s. 22 arguments are somewhat intermingled. What I glean from the third party’s initial submission is that, in his view, disclosing the plans may compromise the security of the house by showing details of the windows and doors. This is a particular concern because of what he says is a rising crime rate in Fernie. The plans, as I have noted, reflect the exterior of the house. In my view, there is nothing revealed in the building plans that could not be seen by anyone walking by the house.

[21] The third party also submits he has

already received threatening phone calls regarding the plans (personal names were given in one newspaper article) and the resulting project – it appears that solicitation has already occurred and will increase if plans released.²

[22] While I can well understand the third party’s concerns about the calls he describes, he provides no explanation as to how or why the disclosure of the plans would increase the incidence of any threats, given that the “resulting project” is well into construction.³ Without any further explanation, the third party argument is mere speculation.

[23] In all of the circumstances of this case, I am of the view that disclosure of the requested records would not be an unreasonable invasion of the third party’s privacy. The plans relate to the house’s exterior design, the details of which would be visible to any passerby. In short, even if I assume, for discussion

² Applicant’s initial submission, p. 2.

³ At the time of this inquiry a newspaper article provided by the third party featured a photo of the house which was well into the construction phase.

purposes, that personal information is involved here, there is nothing much private about the information in the plans. The only detail not visible to the eye is the smaller sketching within the plans entitled “column detail” and “soffit detail”. However, neither reveals much more than what the column is constructed of and what the pitch of the soffit is. Without deciding that the plans are or reveal personal information of the third party, I conclude that in all of these circumstances nothing about the disclosure of the plans would unreasonably invade the third party’s privacy.

[24] **3.4 Third-Party Business Interests**—Section 21(1) of FIPPA protects certain third-party business interests from harm through the disclosure of information under FIPPA. It sets out a three-part test for determining whether disclosure is prohibited, all three elements of which must be established for this disclosure exception to apply. Section 21(1) reads as follows:

- 21(1) The head of a public body must refuse to disclose to an applicant information
- (a) that would reveal
 - (i) trade secrets of a third party, or
 - (ii) commercial, financial, labour relations, scientific or technical information of a third party,
 - (b) that is supplied, implicitly or explicitly, in confidence, and
 - (c) the disclosure of which could reasonably be expected to
 - (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
 - (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
 - (iii) result in undue financial loss or gain to any person or organization, or
 - (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[25] The third party describes his business as the listing, selling and buying of homes and land and assisting others to do the same. He argues that disclosing the requested plans could potentially harm those business interests. The third party specifically submits that disclosure of the plans would reveal trade secrets. I have carefully considered this submission and I reject it. Part of the definition of trade secret is that it would be the “subject of reasonable efforts to prevent it from becoming generally known”. In my view, the requested information does not reveal anything of substance beyond what is evident from the outside appearance of the house itself, for reasons already previously noted.

[26] The third party also submits, without elaboration, that s. 21(1)(a)(ii) applies to the information. The only potentially applicable term that might apply under this provision is “technical information”.

[27] Ontario Order P-454⁴ canvassed the meaning of “technical information”, based on a provision in the Ontario legislation which is similar to our own:

[i]n my view, technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.

[28] It is not evident from the plans whether a professional such as an architect rendered them. However, I am prepared, for the purposes of discussion here, to conclude that they qualify as technical information in that they describe a structure in some detail.

[29] The third party argues that he meets the second branch of the test under s. 21(1)(b) because the plans, of which he is the owner, were supplied in confidence. The third party cites two reasons.

[30] The first is that confidentiality was “implied during a closed door meeting with city staff”.⁵ The third party offers no details about this meeting which led him to believe the plans were submitted in confidence. The City’s submission makes no reference to such a meeting. While I am satisfied the applicant supplied his plans to the City, there is not sufficient proof this occurred in confidence. Previous orders note there must be an objective basis for concluding that information is supplied in confidence.⁶ The applicant’s expressed subjective intention that the plans were submitted in confidence is, by itself, not sufficient. Therefore, I am unable to conclude the plans were supplied in confidence either explicitly or implicitly on the basis of a “closed door meeting”.

[31] The third party also asserts the confidential nature of the records is “implied by the payment of fees”. I assume that by fee, the third party means money that he may have paid to obtain the requisite permits for constructing the house. I fail to see how a fee payment could cause the plans to take on a confidential character. Therefore, I conclude that the third party has failed to demonstrate the records were supplied confidentially.

⁴ [1993] O.I.P.C. No. 112.

⁵ Applicant’s initial submission, p. 2.

⁶ See for example Order F05-16, [2005] B.C.I.P.C.D. No. 24 at para. 20.

[32] Although not technically required, for the sake of completeness I will consider the third party's argument that the disclosure of his plans could reasonably be expected to harm his competitive position and result in an economic loss.

[33] The Commissioner has set out what is required to meet the "harms test" in a number of previous orders. He has stated that general, speculative or subjective evidence is not adequate to establish that the disclosure of information could reasonably be expected to result in harm. The Commissioner also said in Order 02-50⁷ that this means

establishing a clear and direct connection between the disclosure of withheld information and the harm alleged. The evidence must be detailed and convincing enough to establish specific circumstances for the contemplated harm to be reasonably expected to result from disclosure of the information.

[34] As I noted above, the third party describes his business as the listing, selling and buying of homes and land and assisting others to do the same. He argues, without elaboration, that if his "highly customized and costly plans"⁸ were disclosed, his business would suffer economic loss.⁹

[35] The burden of proof lies with the applicant to prove the harm he alleges. It is not at all apparent on its face how disclosing the design plans would harm the third party's ability to buy, sell or build other houses or to assist others in doing so. Is the third party suggesting that the house plans are of such value and appeal that others builders within the area might replicate them, thus denying him potential business? In my view, it is unlikely the plans would reveal anything to a potential competitor that could not be determined by simply looking at the house. In short, even if the third party had proven his claim that the plans were supplied in confidence, which I find he did not, there is no evidence provided to prove that their disclosure would in any way harm the third party's business interests within the meaning of s. 21(1)(c).

[36] I note in passing that the third party questions the applicant's motive's for seeking the plans. I do not question these motives but, in any event, the third party's speculations do nothing to advance his case that disclosure of the plans would harm its business interests.

[37] Finally, the third party requests that, if I decide to order disclosure of the plans that this be done on the condition that the applicant sign a letter of confidentiality regarding the information in question. Even if I had the authority to do so, I see no basis for making such an order.

⁷ [2002] B.C.I.P.C.D. No. 51, para. 137.

⁸ Applicant's initial submission, p. 2.

⁹ He states that it "seems obvious to me that giving out any portion of our expensive plans could potentially harm our business interests". Applicant's initial submission, p. 2.

4.0 CONCLUSION

[38] For the reasons set out above, I make the following orders:

1. The City of Fernie is required to give access to the information it withheld under ss. 21 and 22 of FIPPA except for those non-responsive aspects of the request that I have identified in paragraphs 13 and 14.
2. The City of Fernie is required 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 October 14, 2009 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

August 28, 2009

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

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