ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2014-34

August 29, 2014

TOWN OF SYLVAN LAKE

Case File Number F6961

Office URL: www.oipc.ab.ca

Summary: The Applicants made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Town of Sylvan Lake (the Public Body) for records containing details regarding the purchase of specific parcels of land.

On February 15, 2013, the Public Body responded to the Applicants' access request. The Public Body provided some information, but applied section 25 (disclosure harmful to economic interests) to withhold from the Applicants copies of a Purchase and Sale Agreement and a Right of Entry and Land Purchase Agreement. It applied section 25(1)(c)(iii) to withhold the information on the basis that its negotiations would be harmed if the information in the agreements were disclosed.

The Adjudicator found that the Public Body failed to establish that its negotiations would be harmed by disclosure of the agreements. Although the Public Body inadvertently disclosed the agreements to the Applicants during the inquiry, the Adjudicator determined that the issue of the application of section 25 was not moot. She decided this on the basis that inadvertent disclosure did not dispose of the issue of whether the Public Body was authorized to withhold the agreements. The Adjudicator determined that the Public Body was not authorized to refuse access to the information it had withheld from the Applicants and ordered disclosure.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 12, 25, 72; *Municipal Government Act,* R.S.A. 2000, M-26, s. 181

Authorities Cited: AB: Orders 96-016, 99-005

Cases Cited: *Borowski v. Canada (Attorney General)* [1989] 1 SCR 342*; Edmonton (City) v. Grimble*, 1996 ABCA 45

I. BACKGROUND

[para 1] On January 26, 2013, the Applicants made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Town of Sylvan Lake (the Public Body) for records containing details regarding the purchase by the Public Body of specific parcels of land.

[para 2] On February 15, 2013, the Public Body responded to the Applicants' access request. The Public Body provided some information, but applied section 25 (disclosure harmful to economic interests) to withhold copies of a Purchase and Sale Agreement and a Right of Entry and Land Purchase Agreement from the Applicants.

[para 3] The Applicants requested review by the Commissioner of the Public Body's response. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

II. RECORDS AT ISSUE

[para 4] A Right of Entry and Land Purchase Agreement and a Purchase and Sale Agreement are at issue.

III. ISSUES

Issue A: Did the Public Body comply with its duty under section 12 of the FOIP Act (contents of response)?

Issue B: Did the Public Body properly apply section 25(1) of the Act (disclosure harmful to economic and other interests of a public body) to the information it withheld from the Applicants?

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body comply with its duty under section 12 of the FOIP Act (contents of response)?

[para 5] Neither party made submissions in relation to section 12. Section 12 states, in part:

> *12(1) In a response under section 11, the applicant must be told*

(a) whether access to the record or part of it is granted or refused,

(b) if access to the record or part of it is granted, where, when and how access will be given, and

(c) if access to the record or to part of it is refused,

(i) the reasons for the refusal and the provision of this Act on which the refusal is based,

(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and

(iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.

[para 6] In its response to the Applicants, the Public Body stated:

> Access to all the other records has been denied under [section] 25(1)(c)(iii) of the *Freedom of Information and Protection of Privacy Act*.

The Public Body's response does not meet the requirements of section 12(1)(c)(i) as it does not provide the reasons for its decision to refuse to provide the records or parts of them to the Applicants. The Public Body cited the section of the FOIP Act on which it was relying, but not its reasons for refusing access under this provision. Although I find that the Public Body did not meet its duty under section 12, I do not intend to require it to comply with this duty, as I find below in my analysis of section 25 that the Public Body is not authorized to refuse access to the records in any event.

Issue B: Did the Public Body properly apply section 25(1) of the Act (disclosure harmful to economic and other interests of a public body) to the information it withheld from the Applicants?

[para 7] Section 25(1)(c) states:

25(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy, including the following information:

(c) information the disclosure of which could reasonably be expected to

(i) result in financial loss to,

(ii) prejudice the competitive position of, or

(iii) interfere with contractual or other negotiations of,

the Government of Alberta or a public body;

[para 8] In Order 96-016, former Commissioner Clark considered section 25(1)(c), (then section 24(1)(c). He said:

> The public body claims that section [25(1)] should be interpreted so that the harm to a public body does not have to result directly from disclosing the specific information, but can be "harm at large" or "indirect harm" (my interpretation of the public body's claim). The essence of the public body's argument is this: The information in the record was produced under a contract between a division of a public body and an organization independent of government. There was a confidentiality clause in that contract, which restricts publication of the information. Releasing this information under the Act, contrary to the confidentiality clause, will affect AEC's and, consequently, ARC's contracts with this and other organizations, thereby causing harm to both AEC and ARC. Harm will result from cancelled contracts, and from other organizations bypassing AEC and ARC, knowing they are subject to the Act. That harm is quantifiable.
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> However reasonable the public body's argument sounds, I do not think that section [25(1)] can or should be interpreted as the public body claims. Section [25(1)] focuses on the harm resulting from the disclosure of that specific information (my emphasis). The wording of section [25(1)] implies that it is the specific information itself that must be capable of causing the harm, if that information is disclosed. When I look at the kinds of information listed in section [25(1)(a)-(d)], two things are clear to me: (i) the legislature had very specific kinds of information in mind when it was contemplating what information had the potential to cause harm if disclosed; and (ii) there must be a direct link between disclosure of that specific information and the harm resulting from disclosure; in other words, there must be something in the information itself capable of causing the harm.

[para 9] Section 25(1) recognizes that there is a public interest in withholding information that could reasonably be expected to harm the economic interests of the Government of Alberta or a public body, or the Government of Alberta's ability to manage the economy, if disclosed. Sections 25(1)(a) – (d) contain a non-exhaustive list of the kinds of information, the disclosure of which could be reasonably expected to harm the economic interests of the Government of Alberta or a public body, or the Government of Alberta's ability to manage the economy.

[para 10] A public body seeking to withhold information under section 25 must establish a direct link between the disclosure of information and a reasonable expectation of harm to the Government of Alberta's or its own economic interests.

[para 11] The Public Body applied section 25(1)(c)(iii) to withhold two agreements from the Applicants. It states:

> It is the Town's position that since no agreement has yet to be entered into with the Applicants regarding the acquisition of lands for Memorial Trail that the disclosure of the two Purchase and Sale Agreements for other lands required for Memorial Trail could interfere with future negotiations even though all properties involved are valued in a different manner. In addition, the Town was protecting the third parties involved as it is the Town's position that their land agreement should be protected. Further, the Town anticipates that it will be required at some time in the future to negotiate a land purchase agreement for a portion of the Applicants' lands

> for the purposes of Memorial Trail. However, at this time, the Town is not in any discussions with the Applicants regarding the acquisition of lands for road improvement purposes.

[para 12] The Public Body argues that disclosure of the agreements will result in harm to negotiations in which it may engage in the future with the Applicants for their land. However, it does not explain how any of the information in the records could be expected to harm those negotiations if disclosed.

[para 13] Possibly, the Public Body means that if the Applicants were to learn the amounts for which it purchased the lands of other landowners, that they would demand similar amounts. However, as the Public Body points out in its submissions, the properties in question are valued in a different manner. Moreover, it is also possible that when the Public Body negotiates with the Applicants to purchase their land, market conditions may have changed.

[para 14] I am unable to find that disclosure of the information in the records could result in interference to the negotiations of the Public Body, particularly as the Public Body has not described the information it projects will result in interference, or explained why it believes that interference will result from disclosure of the information.

[para 15] The Public Body also argues that it has elected to "protect the third parties" with whom it has completed agreements. The Public Body does not explain how withholding the agreements would serve to protect these parties or how disclosure of the information could be expected to harm them. The records themselves do not contain information that would allow me to infer that harm would be reasonably likely to result to third parties if the records were disclosed.

[para 16] The agreements do not contain any provisions regarding confidentiality. It therefore does not appear that the parties to the agreements had any concerns regarding keeping the information in the agreement confidential. On the contrary, both agreements contain clauses that establish that a resolution by the Public Body's council is a condition precedent before the Public Body may enter the agreement. Under section 181 of the *Municipal Government Act*, a resolution is not valid unless it is passed at a meeting held in public. It therefore appears that the parties to the agreements contemplated that the agreements would be made public at the time the Public Body's council passed a resolution authorizing the Public Body to enter the agreements. Given that the agreements were (or are) to be the subject of a resolution at a meeting held in public, I am unable to accept the Public Body's argument that harm to third parties would necessarily result from disclosure of the agreements.

[para 17] In its rebuttal submissions, the Public Body noted that it had inadvertently provided the Applicants with the records at issue when it was exchanging its submissions. The Public Body suggested that the issue of section 25(1)(c)(iii) is moot on this basis. In Order 99-005, the former Commissioner considered the case law regarding mootness, and stated:

> The Supreme Court of Canada discusses "mootness" in *Borowski v. Canada (Attorney General),* (1989), 57 D.L.R. (4th) 231 (S.C.C.). In that case, Justice Sopinka stated:
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> > The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.
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> In *Grimble v. Edmonton (City)* (February 26, 1996), Edmonton Appeal No. 9403-0661-AC (Alta. C.A.), the Alberta Court of Appeal said that a case is moot if some event occurs after proceedings were commenced, which eliminates the controversy between the parties. The Court of Appeal then followed the two-step analysis in *Borowski v.Canada (Attorney General)* in considering (i) whether the dispute had disappeared and the issues had become academic (moot), and (ii) whether the court should nevertheless exercise its discretion to hear the case even if the issue had become moot.
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> As discussed in *Borowski v. Canada (Attorney General),* I accept that an issue is "moot" when no present live controversy exists, which affects the rights of the parties.

[para 18] Applying the principles set out in *Borowski v. Canada (Attorney General)* [1989] 1 SCR 342 and *Edmonton (City) v. Grimble*, 1996 ABCA 45, referred to in the excerpt cited above, I find that the issue in this inquiry is not moot. The Public Body's position in the inquiry is that the Applicants are not entitled to obtain the records, while the Applicants' position is that they are. The fact that records were provided inadvertently to the Applicants does not answer the question of whether the FOIP Act authorizes or requires the Public Body to withhold the records.

[para 19] As section 25 is the only provision the Public body applied to the records, my decision that section 25(1)(c)(iii) does not apply to the records disposes of the issue as to whether the Public Body is authorized or required to withhold them.

[para 20] The only order I may make once I find that a public body is not authorized to refuse access to information is to require the public body to give the applicant access to the information under section 72(2)(a) of the FOIP Act. Even though the Applicants have already received the records, as a result of my finding that the Public Body is not authorized to withhold them under section 25, I must order the Public Body to give the Applicants access to the records.

V. ORDER

[para 21] I make this Order under section 72 of the Act.

[para 22] I order the Public Body to disclose the records at issue to the Applicants in their entirety.

[para 23] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Teresa Cunningham
Adjudicator