

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2018-77

December 14, 2018

CITY OF LEDUC

Case File Numbers 002143 and 002144

Office URL: www.oipc.ab.ca

Summary: A third party, Box Clever, requested that the Commissioner review the decision of the Public Body to provide some information from its proposal to requestors.

The Adjudicator determined that the Public Body was not required to withhold the information at issue from the requestors, as it was not established that the information was supplied in confidence.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 16, 71, 72

Authorities Cited: AB: Orders 99-018, F2005-011

Cases Cited: *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 SCR 41; *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 595; *Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231; *R. v. Hundal*, 1993 CanLII 120 (SCC), [1993] 1 SCR 867

I. BACKGROUND

[para 1] On October 22, 2015, a requestor made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the City of Leduc (the Public Body). The requestor stated:

We are requesting to obtain the winning bid documentation for the bid for Content Management System (CMS) and Website Development. We wish to obtain the bid tabulation, evaluation scores, winning proposal, any shortlisted proposals and the winning contract. [case file 002144]

[para 2] On November 12, 2015, a requestor made a request for access for the following information:

[a]ll proposals, scoring matrix, decision maker notes and all other documents relating to City of Leduc's RFP for CMS & website development (AB-2015-04445)[.] [Case file 002143]

The Public Body provided notice of the access request to Box Clever. Box Clever informed the Public Body that it objected to the release of any information from its proposal.

[para 3] On December 18, 2015, the Public Body made a decision to disclose some information from Box Clever's proposal, but to apply section 16 (disclosure harmful to business interests) to the remaining information. The Public Body explained:

The decision to allow the requester access to parts of your document is partly as a result of finding information contained in the redacted document publicly available on your website.

[para 4] On January 4, 2016, Box Clever requested review by the Commissioner of the Public Body's decision to give access to some information from the proposal, rather than withholding the entire proposal from the requestors.

[para 5] On June 7, 2016, Box Clever requested an inquiry. The Commissioner agreed to conduct an inquiry and delegated her authority to conduct it to me.

[para 6] The Public Body made submissions for the inquiry; Box Clever informed this office that it would not make submissions for the inquiry, but would instead rely on the content of its requests for review and inquiry. Subsequently, Box Clever made reply submissions.

II. RECORDS AT ISSUE

[para 7] The information the Public Body decided not to sever from the proposal is at issue.

III. ISSUE: Did the Public Body properly refuse to apply section 16 of the Act (disclosure harmful to business interests of a third party) to the information in the records it proposes to disclose?

[para 8] Section 16(1) of the FOIP Act requires a public body to withhold from an applicant certain types of information. It states:

16(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, explicitly or implicitly, 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.*

[para 9] In Order F2005-011, former Commissioner Work adopted the following approach to section 16 analysis:

Order F2004-013 held that to qualify for the exception in section 16(1), a record must satisfy the following three-part test:

Part 1: Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party?

Part 2: Was the information supplied, explicitly or implicitly, in confidence?

Part 3: Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)?

[para 10] All branches of this test must be met in order for section 16 to apply. That this is so is evidenced by the Legislature’s use of the word “and” in section 16(1)(b), *supra*, to link sections 16(1)(a), (b), and (c). As the requirements of section 16 cannot be met if one of its provisions is not met, and because the Public Body’s evidence is uncontested that the confidentiality requirements of 16(1)(b) are not met, I have decided to address only this provision in the order for the sake of efficiency. However, if I am wrong in this conclusion, it would be necessary for me to address whether the

information Box Clever seeks to withhold from the requestors falls within the terms of section 16(1)(a) and (c).

[para 11] The burden of proof set out in section 71(3) of the Act applies in this case. This provision states:

71(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,

(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and

(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.

[para 12] Section 16(1) does not apply to personal information, so the Third Party has the burden, by application of section 71(3)(b), of establishing that the Requestor has no right of access to the records.

[para 13] The standard of proof imposed on a third party seeking to have section 16 applied is not the criminal standard, which requires proof beyond a reasonable doubt, but the civil standard, which requires proof on the balance of probabilities. In other words, the Third Party must establish that it is more likely than not that section 16 applies to all the information it seeks to have withheld, which, in this case, is the entire audit document.

[para 14] In *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 SCR 41, the Supreme Court of Canada described the qualities of evidence necessary to satisfy the balance of probabilities. The Court stated:

Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[para 15] From the foregoing, I conclude that Box Clever must provide sufficiently clear, convincing, and cogent evidence to discharge its burden of proving that section 16 applies to the information it seeks to have withheld. As the Third Party seeks to have section 16 applied, it must prove that sections 16(1)(a), (b), and (c) apply to the information with evidence that is sufficiently clear, convincing, and cogent to meet this burden.

[para 16] I turn now to the question of whether Box Clever has established that the Requestors have no right of access to the content of the audit.

Part 2: Was the information supplied, explicitly or implicitly, in confidence?

[para 17] To meet the terms of section 16(1)(b), it must be established that the information in question was supplied in confidence.

[para 18] The Public Body states:

1. Box Clever did not refer to any expectations of confidentiality in the information contained in its covering letter or in its proposal. By virtue of Article 6.1 of the RFP [request for proposals] Box Clever was aware that all information submitted to the City was subject to disclosure pursuant to the FOIP Act and was invited to indicate what portions of its submission it considered confidential.
2. Box Clever has not presented any evidence about its prior treatment of the information contained in the proposal. In its initial objection letter, Box Clever stated that the last names of employees were intentionally omitted from the firm's website in order to reduce the likelihood of headhunting which is common in the industry.
3. Box Clever has not presented any evidence that the information contained in its proposal is not available from other sources. The City notes that much of the information contained in the proposal is available on boxclever.ca. The Box Clever website contains the names, websites, and services provided to specific clients that were also outlined in its proposal.
4. Pursuant to Article 6.1 of the RFP, Box Clever had explicit knowledge that the City could not guarantee that any portion of its submission would be kept confidential.

Box Clever neglected or refused to identify confidential portions of its proposal in its submission and when given notice of the Information Requests. The City was thus forced to utilize its best efforts to review publically available information, including Box Clever's own website, in order to determine what information in the proposal was implicitly supplied in confidence.

The city clerk attached the web pages she consulted in making the decision that information was publicly available to her affidavit.

[para 19] The Public Body also submitted the affidavit of its city clerk who made the determination as to whether section 16 applies. The affidavit states, in part:

[...]

In reviewing the Box Clever Proposal for exceptions to disclosure under the *Freedom of Information and Protection of Privacy Act*, I considered the following:

a. the three-part test for section 16(1):

Part 1: Is the information a trade secret of a third party or commercial, financial, labour relations, scientific or technical information of a third party?

Part 2: Was the information supplied explicitly or implicitly in confidence by the third party?

Part 3: Could disclosure bring about one of the harms or outcomes set out in section 16(1)(c)?;

b. information in the Proposal that was publically available on the Box Clever's website <https://www.boxclever.ca>. Attached hereto and marked as **Exhibit "E"** this my Affidavit are copies of pages taken from Box Clever's website on June 1, 2018; June 14, 2018 and June 19, 2018 that, to the best of my recollection, are the same as that which was available in 2015;

c. article 6.1 of the RFP, being the information and disclosure and confidentiality provision that applied to all proposals;

d. the written representations of Box Clever objecting to disclosure of the Box Clever Proposal in response to the City's notices.

e. Section 17 of the Act.

[para 20] In its reply submissions, Box Clever states:

While we appreciate that the City of Leduc severed certain information from our proposal during this process, much of the information that remained is not publicly available, on our website or elsewhere, and provides an advantage to our competition in future competitive proposal processes.

We ask that this Inquiry find that our proposal should not be released to the affected parties, or only that information which can be proven to be available publicly on our website stay in the document provided to the affected parties.

[...]

[para 21] In Order 99-018, former Commissioner Clark decided that the following factors should be considered in determining whether information has been supplied in confidence:

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- (1) Communicated to the [public body] on the basis that it was confidential and that it was to be kept confidential.
- (2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the Third Party prior to being communicated to the government organization.
- (3) Not otherwise disclosed or available from sources to which the public has access.
- (4) Prepared for a purpose which would not entail disclosure.

[para 22] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 595 (CanLII), Ross J. denied judicial review of Order F2008-027, in which the four factors set out above had been applied. Ross J. stated:

The Adjudicator held that the evidence supported a subjective expectation of confidentiality on the part of the parties, while the law requires an objective determination in all of the circumstances that information was communicated on a confidential basis [...]

I am satisfied that the Adjudicator's Decision is intelligible and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." In the result, I hold

that her conclusion that the information in question was not supplied in confidence is a reasonable decision based on the law and the evidence before her.

[para 23] As the Court has considered the test adopted in Order 99-018 to be a reasonable measure in determining whether information has been supplied in confidence, I will apply this test to determine whether the information at issue was supplied in confidence.

Was the information communicated to the public body on the basis that it was confidential and that it was to be kept confidential?

[para 24] From the evidence before me, I conclude that Box Clever did not impose any express conditions of confidentiality when it provided its proposal to the Public Body.

Was the information treated consistently in a manner that indicates a concern for its protection from disclosure by the Third Party prior to being communicated to the government organization?

[para 25] The only evidence I have as to how Box Clever treated the information the Public Body has not severed is its website, which contains the information the Public Body did not sever, or enables a reader to infer the information. I am unable to find that Box Clever treated the unredacted information with a concern for its protection from disclosure.

Is the information not otherwise disclosed or available from sources to which the public has access?

[para 26] As noted above, the unsevered information is either on the Box Clever website, or can be inferred from it.

Was the information prepared for a purpose which would not entail disclosure?

[para 27] The evidence of the Public Body is that it could not guarantee that any portion of Box Clever's proposal would be kept confidential, and that Box Clever was aware of section 6.1 of the request for proposals. As Box Clever has not challenged this evidence, I answer this question in the negative.

[para 28] After considering the four factors set out in Order 99-018, I conclude that Box Clever did not supply the unsevered information in confidence.

[para 29] I note that in *Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 (CanLII) the Alberta Court of Appeal held that section 16(1)(b) refers to a *subjective* belief that information is supplied in confidence.

[para 30] In *R. v. Hundal*, 1993 CanLII 120 (SCC), [1993] 1 SCR 867 the Supreme Court of Canada described how a determination whether a party's actions are subjectively

reasonable, differs from determining whether they are objectively reasonable. The Court stated:

A truly subjective test seeks to determine what was actually in the mind of the particular accused at the moment the offence is alleged to have been committed. In his very useful text, Professor Stuart puts it in this way in *Canadian Criminal Law* (2nd ed.), at pp. 123-24 and at p. 125:

What is vital is that *this accused* given his personality, situation and circumstances, actually intended, knew or foresaw the consequence and/or circumstance as the case may be. Whether he “could”, “ought” or “should” have foreseen or whether a reasonable person would have foreseen is not the relevant criterion of liability.

In trying to ascertain what was going on in the accused’s mind, as the subjective approach demands, the trier of fact may draw reasonable inferences from the accused’s actions or words at the time of his act or in the witness box. The accused may or may not be believed. To conclude that, considering all the evidence, the Crown has proved beyond a reasonable doubt that the accused “must” have thought in the penalized way is no departure from the subjective substantive standard. Resort to an objective substantive standard would only occur if the reasoning became that the accused “must have realized it if he had thought about it”. [Emphasis in original.]

[para 31] While the foregoing is a criminal case, it sets out how a subjective test is to be applied. If section 16(1)(b) refers to a subjective belief that information has been supplied in confidence, then I must ask whether Box Clever, which is a business, believed that it was supplying its proposal in confidence. However, I may draw conclusions from Box Clever’s conduct in relation to the information at issue to arrive at this determination. In my view, the fact that the information at issue is either posted on Box Clever’s website or inferable from such information, indicates that Box Clever did not have a subjective expectation that the information at issue was confidential.

[para 32] To conclude, I find that the terms of section 16(1)(b) are not met in relation to the information the Public Body decided to disclose to the requestors. As a result, section 16(1) does not require the Public Body to withhold this information from the requestors. I make no findings in relation to the information the Public Body withheld, as the Public Body’s decisions in relation to that information are not in issue in this inquiry.

[para 33] As I find that the Public Body is not required to withhold the information it decided to disclose from the requestors, I must order the Public Body to give the requestors access to it.

IV. ORDER

[para 34] I make this order under section 72 of the Act.

[para 35] I order the Public Body to give the requestors access to the information at issue.

[para 36] I order the Public Body to inform me within 50 days of receiving this order that it has complied with it.

Teresa Cunningham
Adjudicator