No. 11 0108
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

MINISTRY OF CITIZENS' SERVICES

PETITIONER

AND:

INFORMATION AND PRIVACY COMMISSIONER OF BRITISH COLUMBIA, IBM CANADA LIMITED, and BC INFORMATION AND PRIVACY ASSOCIATION

RESPONDENTS

RESPONSE TO PETITION

Filed by: BC Information and Privacy Association (the "petition respondent")

THIS IS A RESPONSE TO the petition filed January 11, 2011.

Part 1: ORDERS CONSENTED TO

N/A

Part 2: ORDERS OPPOSED

The petition respondent opposes the granting of the orders set out in ALL paragraphs of Part 1 of the petition.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

N/A

Part 4: FACTUAL BASIS

1. This is a judicial review of a decision by a delegate of the Information and Privacy Commissioner of British Columbia ("the Adjudicator") under the *Freedom of Information and Protection of Privacy Act* R.S.B.C. 1996, c. 165 (the "*Act*"), in relation to an access request made by the Respondent B.C. Freedom of Information and Privacy Association ("FIPA"). The Ministry of Citizens' Services (the "Ministry") seeks judicial review of Adjudicator's Order F10-39, which Order requires the Ministry to disclose information consisting of lists of computer software, equipment schedules, and server names and locations.

Background

2. On or about December 9, 2004, FIPA sought access to a Workplace Support Agreement dated December 3, 2004 between the Province of British Columbia and IBM Canada Ltd. (the "Agreement"). The Agreement governs IBM's provision of computer support services to the Ministry and is part of a larger Master Services Agreement between the parties.

3. The Ministry issued a third party notice to IBM under s. 23 of the *Act*, as is required where s. 21 ("disclosure harmful to business interests of a third party") may apply. IBM took the position that s. 21 was applicable and sought a review of the Ministry's initial release of a portion of the information sought by FIPA on that basis.

4. On or about January 11, 2010, the Ministry made what it characterized as a "second and final release" of information responsive to FIPA's original request. It withheld portions of the information under sections 15, 17, 21 and 22 of the *Act*.

5. IBM continued to maintain that s. 21 prevented the release of some of the information in both the Ministry's initial and second disclosures. Meanwhile, FIPA sought a review of the Ministry's withholding of information under sections 15, 17 and 21, but accepted the Ministry's decision to withhold information under s. 22.

6. The requests for review by IBM and by FIPA were dealt with jointly. At the inquiry, the Ministry and IBM withdrew their requests for review under s. 21, and IBM took no position on s. 15. Ultimately, the Adjudicator concluded that the Ministry was required to disclose the information that had been withheld under sections 15 and 17 of the *Act*.

7. The Ministry now seeks to have the Adjudicator's order reviewed by this Court, arguing that s. 15 ought to have applied to prevent the release of some of the information (the Ministry has withdrawn its challenge to the Adjudicator's release under s. 17).

8. IBM took no position on the applicability of s. 15(1)(1) when the matter was before the Adjudicator and takes no position now. Accordingly, the one issue now under review is the applicability of s. 15(1)(1), and it is only the Ministry seeking review of the same.

9. The records in dispute are limited to portions of the following items from the Agreement:

   Schedule I: A list of software IBM agrees to use to manage the Province's computer system;

   Schedules J, K, L, and X: Server names and the locations of those servers;

   Schedule J: A list of certain IBM equipment used by IBM to carry out its obligations under the Agreement.

Part 5: LEGAL BASIS

1. The Respondent FIPA relies on the *Judicial Review Procedure Act*, R.S.B.C., 1996, c. 241, Rule 16-1 of the *Supreme Court Civil Rules*, the law on administrative standard of review and the law as developed through the Office of the Information and Privacy Commissioner and the courts on s. 15(1)(l) of the *Act*.

Standard of Review

2. *In New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 at para 62, the Supreme Court of Canada clarified the analytical framework for ascertaining the appropriate standard of review (correctness or reasonableness).

3. A two stage analysis is required. First, the court asks whether the jurisprudence has already satisfactorily determined the degree of defence appropriate for a particular category of question. It is only where this inquiry proves unfruitful that the court engages in a contextual analysis of the considerations relevant to a determination of standard of review.

4. The B.C. courts have already concluded that the applicable standard of review with respect to the category of question here at issue is reasonableness.

B.C. Freedom of Information & Privacy Association v. British Columbia (Information & Privacy Commissioner) 2010 BCSC 1162 at paras 27 and 33

5. Reasonableness is the applicable standard where the question concerns matters of fact, discretion or policy, or where the legal and factual issues cannot be easily separated. It is also the appropriate standard where the question involves the interpretation or application of legislation administered by the Commissioner and involves matters within the Commissioner's jurisdiction and expertise.

B.C. Freedom of Information & Privacy Association, supra, at paras 19, 24
Harrison v. British Columbia (Information & Privacy Commissioner), 2011 BCSC 1204, at para 49

See, too, *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61at para 42 ("true questions of jurisdiction will be exceptional")

6. *British Columbia (Ministry of Public Safety and Solicitor General) v. Stelmack* 2011 BCSC 1244 applied the reasonableness standard specifically to s. 15's discretionary harms-based disclosure exemption (at para 177).

Section 15(1)(l)

7. Section 15 allows, but does not require, the Ministry "to refuse to disclose information to an applicant if the disclosure could reasonably be expected to . . . harm the security of any property or system, including . . . a computer system or a communications system" (emphasis added).

8. Section 15(1)(l) does not allow the Ministry to refuse to disclose information if the disclosure could reasonably be expected to give rise to a risk of harm. Rather, the release must create a reasonable expectation of harm itself.

9. By operation of s. 57(1) the burden of proof is squarely on the Ministry to establish that it is authorized to withhold the information under s. 15(1)(l).

(a) The Adjudicator correctly articulated the test under s. 15(1)(l)

10. The Adjudicator understood and correctly articulated the test under s. 15(1)(l), stating as follows: "The identified harm at issue here is the unauthorized entry into the Province's computer system by hackers. Would it be reasonable to expect the release of the withheld information to lead to this harm?"(para 14, Adjudicator's Reasons).

11. The Adjudicator concluded that the Ministry had not met its burden of proving that there was a "reasonable expectation that the disclosure of the disputed information would result in the identified harm" (para 19, Adjudicator's Reasons).

(b) The Adjudicator correctly assessed the evidence against the test

12. The Adjudicator relied on Commissioner Loukidelis' characterization of the nature of the evidence required to meet a harms-based test such as the one set out in s. 15. Specifically, the Adjudicator adopted these well-accepted requirements from Order 00-01, [2000] B.C.I.P.C.D. No 1 at para 2 (cited in F11-14 [2011] B.C.I.P.C.D. No. 19 at para 10):

> (i) The public body must adduce sufficient evidence to show that a specific harm is likelier than not to flow from disclosure of the requested information;
>
> (ii) There must be evidence of a clear and direct connection between disclosure and the anticipated harm;
>
> (iii) The connection must be rational and logical;
>
> (iv) The harm feared from disclosure must not be fanciful, imaginary, contrived, speculative, or subjective.

See, too: Orders F08-03, [2008] B.C.I.P.C.D. No 6 at para 27; F10-25, [2010] B.C.I.P.C.D. No 36 at para 17; and, especially, F08-22, [2008] B.C.I.P.C.D. No 40 at paras 44-45

13. The Adjudicator assessed the evidence put forward by the Ministry and found that the Ministry had not adduced sufficient evidence to show that the specific harm was reasonably likely to result from the disclosure of the information sought.

14. The Adjudicator further found that the Ministry had failed to draw a clear connection between the requested disclosure and the potential harm, and that, instead, the connection the Ministry had attempted to make was speculative. He specifically found that he was being asked to assume that the information disclosure could lead to a series of contingent

of events, the likelihood of which was left unclear, that might, in turn, lead to an unauthorized breach of the computer system (Adjudicator's Reasons, paras 16, 18).

15. The Affidavit of David Campbell on behalf of the Ministry contains an opinion that access to the information at issue "would assist a hacker in any attempt to attack the Systems" (para 24) and increase the chances of a hacker's successfully compromising the security of the Systems (paras 34 with respect to software; para 44 with respect to server names; para 48 with respect to equipment).

16. This evidence is no different than that rejected in Order F10-25, *supra*, which also concerned information related to a computer system (the identity of a host server). In that instance, the Ministry offered evidence that disclosure of the information *would increase the risk* that someone would be able to obtain unauthorized access to the information system, and had provided evidence on the general *modus operandi* of hackers. There, the Adjudicator also concluded that the Ministry had not met its burden of proof (paras 18-20).

17. Order F11-14, [2011] B.C.I.P.C.D. No. 19 is also on point. The Adjudicator, while concluding that the Ministry was authorized to withhold some records under s. 15, considered that withholding the schedules of computer software (paras 25-26) and server names and locations (paras 19, 21-23) was not warranted. Notwithstanding the obvious similarities to the case at bar, the Ministry did not seek to review Order F11-14.

18. The law is clear that the withholding of requested information is not justified merely by the fact that any information in the hands of wrongdoers could potentially assist with the commission of crimes. Adjudicator Francis, in Order F10-25, *supra*, recognized that while it is "always theoretically possible that criminals will use all sorts of publicly available information in a dishonest fashion to illegally access confidential information," that possibility alone is "not sufficient to refuse to disclose information. There must be something more that ties a special risk to a particular context so as to meet the reasonable expectation test" (paras 18, 20).

19. The Ministry submits that the Adjudicator failed to consider the magnitude of the "harm" that could result from disclosure of the information, and, specifically, failed to consider the sensitivity of the information contained in the computer system. This is not accurate: the Adjudicator's Reasons at paragraph 10 recognized and rejected the Ministry's submissions in this regard.

20. That IBM, which has both contractual and legal obligations to keep the computer systems at issue secure, did not take a position on s. 15 before the Adjudicator, and does not take a position now, further reinforces the insufficiency of the evidence in this regard. Surely, if there were any concrete concerns, IBM would be raising them and explaining their validity with an evidentiary record.

21. Section 2(1) of the *Act* confirms its overarching objectives (emphasis added):

> **2** (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

> (a) giving the public a right of access to records,
>
> . . .
>
> (c) specifying limited exceptions to the rights of access,
>
> . . .

22. The Adjudicator's assessment of the applicability of s. 15(1)(l) (the "limited exemption" to the broader right of access mandated by the *Act*) is consistent with the *Act*'s overarching objectives. The Ministry wishes to apply the exemption in a blanket fashion and of its own accord, rather than allow the Adjudicator to decide the question of whether certain information may compromise the security of a computer system on a case by case basis.

(c) The applicable standard of review does not authorize interfering with the Adjudicator's decision

23. The Respondent FIPA submits that the Adjudicator's Order would stand even if it were to be assessed against a correctness standard.

24. However, the standard against which the Adjudicator's decision must be assessed is that of reasonableness. "Reasonableness is a deferential standard . . . under which [t]ribunals have a margin of appreciation within the range of acceptable and rational solutions": *Dunsmuir, supra,* at para 47.

25. Additionally, where, as here, the decision formulates or implements broad public policy, the "margin of appreciation" is significantly broader. This is on the basis that the Adjudicator is "required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant or others directly affected weighed against the public purpose which is sought to be advanced" (*Dunsmuir, supra,* at para 151).

The Adjudicator's Reasons are sufficient

26. In judicial review, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process." Reasons are therefore important, and the deference required calls for "respectful attention to the reasons offered or which could be offered in support of a decision": *Dunsmuir, supra,* at para 48.

27. Reasons, when assessed as a whole, must simply provide "tenable support for the decision."

> *Petro-Canada v. British Columbia (Worker's Compensation Board)* 2009 BCCA 396 at paras 55-56, citing *Law Society v. New Brunswick v. Ryan* 2003 SCC 20 at para 56 (applied in *B.C. Freedom of Information & Privacy Association, supra*, at paras 60-62)

28. The Reasons in the instant case do this and more. The Adjudicator's Reasons are sufficiently clear, precise, and intelligible to make clear why the Adjudicator decided as he did.

Brown & Evans, *Judicial Review of Administrative Action in Canada,* at 12-64, 65, 69

29. Alternatively, if this Court concludes that the Adjudicator's Reasons are inadequate, then the Respondent FIPA submits that the appropriate remedy is to remit the matter back to the Adjudicator for adequate reasons: *supra,* at 12-81.

Part 6: MATERIAL TO BE RELIED ON

The materials filed herein;

1. Such other materials as counsel may advise and this Honourable Court may allow.

The petition respondent estimates that the application will take 2 days.

Dated: February 6, 2012

Signature

☒ Lawyer for petition respondent

Sean Hern

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