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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	**APPEARANCES:**
STEVEN FLETCHER, Applicant,	Steven Fletcher acting on his own behalf
- and -	
JOSEPH BRADBURY, AS CHIEF EXECUTIVE OFFICER OF THE MANITOBA HOUSING RENEWAL CORPORATION Respondent.	Samuel Thomson for the Respondent
	Judgment delivered: February 11, 2022

Application under *The Freedom of Information and Protection of Privacy Act*, CCSM, c. F175, sections 67 and Queen's Bench Rule 14

MARTIN J.

INTRODUCTION

[1] Steven Fletcher is a former independent Member of the Legislative Assembly of Manitoba. He took a keen interest, initially on behalf of his constituents, in a property transfer of the old Vimy Arena site, located at 255 Hamilton Avenue in Winnipeg,

Manitoba, from the City of Winnipeg ("the City") to the Manitoba Housing Renewal Corporation ("MHRC"). In turn, the property was transferred to the Bruce Oake Foundation Realty Holding Company Inc. ("the Foundation"), which developed the property as an adult male addiction treatment centre, called Bruce Oake Recovery Centre, modelled after the Fresh Start Recovery Centre in Calgary, Alberta.

[2] On September 9, 2019, Mr. Fletcher made a request for access to certain records under *The Freedom of Information and Protection of Privacy Act*, CCSM, c. F175 ("the *Act*"), to the public body holding the records, the MHRC. By agreement, the request was subsequently narrowed to:

> Any and all agreements or memos of understanding that deal with 255 Hamilton Avenue Winnipeg MB.
>
> This includes, but is not limited to, agreements with the Bruce Oake foundation, the Bruce Oake for-profit Realty Holding Company, Fresh Start, other government agency's including Manitoba Housing and Renewal Corporation, Families and Manitoba Health.
>
> [sic]

Joseph Bradbury, Chief Executive Officer of MHRC explained in an affidavit the events that followed. For convenience, all references to a "Part" or to a "section" means of the *Act*, unless otherwise stated.

[3] Materially, four documents, or records, were provided to Mr. Fletcher, of which two, an Offer to Purchase (the "Offer") between the City and MHRC and a Ground Lease (the "Lease") between MHRC and the Foundation, are at issue in this proceeding. Before releasing those records to Mr. Fletcher, MHRC consulted the City and the Foundation because the records were thought to contain information affecting that organization's interests. Ultimately, each party responded by objecting to the disclosure of certain

clauses of the records based on confidentiality exceptions set out in Part II of the *Act*. The MHRC agreed and certain clauses were redacted as "information that is excepted from disclosure" (s. 7(2)). The responsive records were then released to Mr. Fletcher.

[4] Not satisfied with the redactions, Mr. Fletcher referred the matter to the Ombudsman for investigation and report (s. 59(1) – 66(2)). The Ombudsman agreed those redacted parts of the records, as requested by the City and the Foundation, and as determined by MHRC, should not be disclosed. Of note, the report of the Ombudsman is inadmissible in evidence in a court, except in limited circumstances which do not apply here (s. 53(1)). However, its report was put into the record before me.

[5] Further to s. 67(1), Mr. Fletcher then appealed to the Court, MHRC's decision not to disclose the redacted parts of the records.

[6] Before dealing with the substance of this appeal, it is important to recognize the key purposes, or principles, of the *Act*.

RAISON D'ETRE OF ACCESS TO INFORMATION LAWS

[7] As a reminder to those public servants who wish to object to disclosure in response to an access to information request, or those public servants charged with reviewing and deciding the scope of disclosure of such requests, I start with critically important touchstones underpinning any such request of the government by a citizen or organization.

[8] First, in the opening paragraph ***Merck Frosst Canada Ltd. v. Canada (Health)***, [2012] SCC 3, Cromwell J. wrote for the Supreme Court of Canada that "[B]road rights of access to government information ... help to ensure accountability and ultimately, it is

hoped, to strengthen democracy. "Sunlight", as Louis Brandeis put it so well, "is said to be the best of disinfectants" [citation omitted].

[9] At, para 22, the Court explained the overarching purpose of access to information legislation is to facilitate democracy:

> [22] ... the overarching purpose of the Act is to facilitate democracy and that it does this in two related ways: by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and officials may be held meaningfully to account to the public. This purpose was reiterated by the Court very recently, in the context of Ontario's access to information legislation, [citation omitted]. The Court noted, at para. 1, that access to information legislation "can increase transparency in government, contribute to an informed public, and enhance an open and democratic society". Thus, access to information legislation is intended to facilitate one of the foundations of our society, democracy. The legislation must be given a broad and purposive interpretation, ...

These aspirational words apply as well to the Manitoba *Act*, and should be borne in mind by any civil servant handling an access request.

[10] Bottom line: put another way, quoting Judge Damon Keith, of the U.S. Court of Appeals for the 6th Circuit, "democracy dies behind closed doors".

[11] Second, any access request decision must reflect the purpose of the *Act* (s. 2), which ensures a *right of access*, to any person, to public body records, *subject to limited and specific exceptions* set out in the *Act*. In this way, the *Act* balances the sometimes competing purposes of disclosure, while protecting other valid interests.

[12] Third, however, importantly, the analytical approach to either objecting to disclosure or deciding whether an exemption applies that supports nondisclosure, starts from the premise that "[D]isclosure is the rule rather than the exception ..." (***Kattenburg v. Manitoba***, [1999] M.J. No. 498, at para 5).

[13] These purposes and principles should frame every decision made by a public body in assessing whether a citizen's right of access to their government's records should be denied or restricted. I now turn to this appeal.

THE STATUTORY SCHEME

[14] Broadly, the general scheme of the *Act* starts with Part I, the introductory provisions, and includes definitions, the *Act's* purposes and scope, and the records to which it applies. Of note, "third party" is any person(s) or organization other than the applicant or a public body (which roughly means a level of government or a state agency). Part II, deals with access to information, including the right to access and the related process, mandatory exceptions to disclosure, such as s. 18, and discretionary exceptions, such as s. 21(1) and 28(1). Part III addresses protection of privacy, including collection, correction and retention of personal information. Part IV sets out the powers and duties of the Ombudsman, while Part V deals with complaints, including s. 67 appeals to court. Finally, Part VI and VII deal with general or incidental matters.

[15] Briefly, and relevant to this application, the statutory scheme for a s. 67 appeal is:

- the appeal is considered a "new matter" and affidavit evidence is permitted (s.69). Thus, the appeal is neither a true appeal nor a judicial review, with the incumbent standards of review, of the MHRC's decision. The MHRC asserts a s. 67 appeal is a *de novo* hearing. I agree. That said, its decision is informative but not owed deference. (***Adeleye-Olusae v. Manitoba***, 2011 MBQB 146, at paras 27-28).

To be clear, the Ombudsman's review is not subject to appeal, nor is it admissible, and hence, strictly speaking, it is not relevant other than as a procedural step before an appeal;

- the burden of proof is on the public body determining the request to prove an applicant has no right of access to the record, or part of the record, that was denied (s. 70(1)). This makes good sense, as practically, an applicant normally is not in a position to disprove the criteria relied upon by the public body in denying access to the record because the response and explanation for objecting to disclosure are not provided to the applicant with any level of detail. For example here, for the most part, the Foundation and the City's representations underpinned MHRC's decision to rely on certain exceptions within the *Act* to deny access to Mr. Fletcher of certain clauses in both records, yet those representations remain beyond Mr. Fletcher's knowledge.

  The burden, like in any civil proceeding, is on the civil standard of a balance of probabilities (***Kattenberg; Filippo-Bartle v. Manitoba***, 2009 MBQB 108, para 39; ***Merck***, para 94).

  The leading authority setting out the balance of probabilities standard remains ***F.H. v. McDougall***, 2008 SCC 53, [2008] 3 S.C.R. 41, where the court explained:

  > [44] ... the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.
  >
  > ...

> [46] 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. ...

Finally, I also note that the burden will be on an applicant, or third party, in certain circumstances, which do not apply here (s. 70(2) or s. 70(3) respectively);

- despite any other enactment or privilege, the court may order the production of any record at issue for examination by the court (s. 71). In so doing, the court shall take every reasonable precaution, including ex parte representations, private hearings and private examination, to avoid disclosure of the information at issue (s. 72). In this way, the court is fully armed with the full record sought, as the public body was, and can assess that information unfiltered;
- upon hearing the appeal:
    - the court may dismiss the appeal, or order the applicant have access to the record at issue, or make any other appropriate order, consistent with the court's determination of whether the public body was or was not authorized, or required, to refuse access to the record at issue (s. 73(1));
    - if the court finds the information at issue falls within an exception to disclosure under Part II, "the court shall not" order the public body to give access regardless of whether the exception requires or merely authorizes the public body to refuse access (s. 73(2)); and
- the decision of the court under s. 73 is final, there is no further appeal.

ISSUE

[16] The issue is whether Mr. Fletcher is entitled to access of those portions of the Offer or the Lease that were redacted, and/or withheld, by the MHRC, based on the articulated exceptions in Part II. MHRC frames the issue slightly differently: whether the MHRC was properly authorized to refuse access to the records it did.

[17] Of concern in this case are certain provisions in Parts I, II and V.

[18] The players include: Mr. Fletcher as the requesting person, and now applicant; MHRC as the public body with access to, or holding, the records at issue and as such, the party charged with assessing Mr. Fletcher's access request; the Foundation as the "third party" business respecting nondisclosure through s. 18(1)(c)(i) & (ii); and, the City as the "local government body" respecting nondisclosure through s. 21(1)(c) and 28(1)(c)(iii).

THE RECORDS

[19] Consistent with s. 71 and s. 72 of the appeal provisions, I ordered and reviewed the complete records, ex parte, including redactions. I have not requested the Foundation or the City to make direct representations at the hearing, as they are not participants in the appeal. Their full responses to the MHRC's inquiries are in a sealed affidavit, which I have reviewed. And, their condensed positions are referred to in the MHRC letter announcing its decision. The application was heard on December 21, 2021.

The Offer to Purchase

[20] The Offer is a 16 page document between the City and MHRC. It appears at first blush to be relatively standard, abbreviated in both form and content.

[21] The MHRC consulted the City, as the corresponding public body, or local government body to the agreement, requesting whether it had any concerns disclosing the Offer. I have reviewed the correspondence and City's response to the MHRC in the sealed affidavit. The City response cited various clauses it objected to being disclosed. While it is not clear from review of a marked-up version of the Offer, it appears the MHRC had its own concerns about certain clauses they thought should not be disclosed. Regardless, all the redactions in the Offer rely on two exceptions to disclosure in Part II:

- s. 21(1)(c) - a public body *may refuse* to disclose all or part of a record *that could reasonably be expected to harm* relations between Manitoba or its agencies (i.e. MHRC) and other governments (i.e. the City) or their agencies; and
- s. 28(1)(c)(iii) - a public body *may refuse* to disclose all or part of a record *that could reasonably be expected to harm* the economic or financial interests of a public body (i.e. the City) or Manitoba, including information that could interfere with or prejudice contractual or other negotiations of a public body or Manitoba.

(italics added)

[22] MHRC's rationale for the redaction's was explained in its November 6, 2019 letter to Mr. Fletcher:

> We have determined that disclosure of some of the conditions in the agreement would harm the contractual or other negotiations that may be entered into by one or more public bodies. We have also determined that the disclosure of that same information would be expected to harm relations between Manitoba Housing and a local public body [the City]. Therefore,

> this information is exempt from disclosure under subsections 21(1)(c) and 28(1)(c)(iii) ...

and, that they:

> ... also considered whether withholding this information would go against the purposes of FIPPA [the Act] and/or result in an inadequate response to your request. Under the circumstances we have determined the disclosure of such information is not appropriate.

The Ground Lease

[23] The Lease is a 27 page document between MHRC and the Foundation. Because it flows from the Offer to Purchase, some of the City's concerns with the Offer also flow to the Lease. In fact, most of the redactions to this record were rooted in s. 21(1)(c) and s. 28(1)(c)(iii).

[24] The Foundation's response to MHRC is part of the sealed affidavit. The Foundation expressed a concern only about clause 5.1(c)(i) of the Lease. That concern underpinned the MHRC's decision to redact the clause based on one provision in Part II:

- s. 18(1)(c)(i) and (ii) - a public body *shall not disclose* business information *that could reasonably be expected* to harm the competitive position of the third party or interfere with contractual or other negotiations of the third party.

(italics added)

[25] MHRC's rationale for this redaction was also set out in its November 6, 2019 letter to Mr. Fletcher:

> The third party [the Foundation] indicated in written representations that disclosure of certain conditions specific to this agreement would harm their competitive position with respect to fundraising and interfere with contractual or other negotiations they may enter into. Therefore we have determined that this information is exempt from disclosure under subsection 18(1)(c)(i)(ii) ...

ANALYSIS

[26] At its core, the test for determining not to disclose part or all of a record is the same for all three so-called "harm based" statutory exceptions relied on by the MHRC. As such, and given that this is the most nuanced aspect of the legal analysis, I will deal with it independently and first. Then I will apply that test to assess whether MHRC has met its burden of proof.

[27] The core test has to do with the interpretation of the phrase, "*could reasonably be expected to*" (harm, or interfere). This phrase is the same as the statutory language in the federal access to information legislation provisions considered in ***Merck*** (para 24) and as such, the test formulated by the Supreme Court applies here. The test is "a reasonable expectation of probable harm". The case headnote succinctly sets out its meaning:

> [24] ... The test to establish the degree of likelihood that harm will result from disclosure is "a reasonable expectation of probable harm". This long-accepted formulation is intended to capture that, while the third party need not show on a balance of probabilities that the harm will in fact come to pass if the records are disclosed, the third party must nonetheless do more than show that such harm is simply possible. The important objective of access to information would be thwarted by a mere possibility of harm standard. Exemption from disclosure should not be granted on the basis of fear of harm that is fanciful, imaginary or contrived. ...
>
> (emphasis added)

The Court's detailed analysis is explained at paras 192 - 206. Describing it another way, at para 204, the Court adopted the meaning used for the same test in Australian jurisprudence: "an expectation for which real and substantial grounds exist when looked at objectively".

[28] The test was reaffirmed in ***Ontario (Community safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)***, [2014] S.C.J. No. 31, at paras 52 and 54, where the Court reiterated:

> [54] ... The statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: para's 197 and 199. This inquiry of course is contextual and how much evidence and the quality of the evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences":
>
> [citation omitted].

[29] To be clear, in ***Merck*** the onus was on the third party rather than the public body, but that does not make the test any less applicable - - the test is the test regardless of who carries the evidentiary onus. The MHRC acknowledges this. However, it also asserts the evidence it can muster for the application is "more circumscribed", because it does not directly, first-hand, possess the evidence of the potential harm of disclosure; it must rely on what the third party has provided to it. MHRC says this is a relevant consideration on the application, given the context of the case. I disagree.

[30] The test I am to apply is effectively the same test the public body should be considering in its assessment. As noted earlier, a s. 67 appeal is considered as a "new matter", effectively a redo. And, in this instance as well, I am looking at the same material, or evidence, from the Foundation and the City which the MHRC considered. Nothing new was provided to me.

[31] The public body must be satisfied the material it receives from a third party (or another public body that may be affected by the request) - "the evidence" – explaining

the expectation of harm, or interference, or otherwise as the case may be, hits the mark for the reviewing public body to deny disclosure to the requestor. Here, as will be seen, I find the Foundation's representations, or evidence, hits the mark of evidence "well beyond" mere possibility of harm. On the other hand, I find the City's representations do not. As such, practically, the public body could either ask for better evidence to consider before coming to a final determination, or advise the City (or a third party as the case may be) it is prepared to release the part of the record objected to. Either way, the public body would effectively have carried out the same analysis I am, for it knows it may have to prove the test to a court on an appeal.

[32] I now apply the tests to the evidence.

Ground Lease: The Foundation and s. 18(1)(c)(i) & (ii)

[33] As noted by the Supreme Court in ***Merck***, at para 23, "... when the information at stake is third party, confidential commercial and related information, the important goal of broad disclosure must be balanced with the legitimate private interests of third parties and the public interest in promoting innovation and development." Section 18 is one way such third party interests are taken in account; by prohibiting disclosure of a third party's business information in certain, prescribed situations.

[34] The test in s. 18 (1)(c)(i) & (ii) for a public body such as the MHRC, when invoking harm to the business interests of third parties as the reason to deny, in whole or in part, a request for access is two-fold:

- first, the requested information "would reveal" "commercial, financial", or other itemized information; and,

- second, such disclosure "could reasonably be expected to":

    i. harm the competitive position, or

    ii. interfere with contractual or other negotiations,

    of the third party.

The four exceptions in s. 18(3), as to when s. 18(c)(1) does not apply, are not applicable here. Nor does s. 18(4), which allows for disclosure where the public interest clearly outweighs the private interest of the third party in nondisclosure.

[35] The first part of the test is relatively straightforward: is it more likely than not that the disclosure would reveal commercial or financial information? The itemized list of classes of information, such as commercial information, are generally to be given a broad interpretation, consistent with the dictionary meaning, ordinary use and common understanding of that term. Further, the information at issue need not have an inherent value. (***Kattenburg***, para 13; ***Merck***, paras 138 – 141). Whether the information at issue is, as here, commercial information, is most often a question of fact. I find disclosure would reveal commercial or financial information.

[36] As to the second part, the reasonable expectation of probable harm, I find that the explanation provided by the Foundation to the MHRC is sufficient to demonstrate an expectation of harm beyond a mere possibility. It is clear and cogent enough, in the context of philanthropic organizations whose fundraising endeavors are a central aspect of their operations and where, realistically, they compete in the public arena for donations with other worthy organizations.

[37] Thus, the MHRC has met its onus for both aspects of the test in s. 18(1)(c)(i) and (ii). I agree the redactions to the Lease are warranted. Before moving on though, I make one observation.

[38] The MHRC's November 6, 2019 letter to Mr. Fletcher is, in essence, generic. It really just notes s. 18 (1)(c)(i) and (ii) as the statutory exception for the redactions, regarding fundraising. I see no reason why the MHRC could not have gone further, illuminating to some extent its analysis or reasons supporting its conclusion. While it is not evidence in this hearing, I point to the Ombudsman's November 2020 letter to Mr. Fletcher as illustrative of a more comprehensible explanation of the non-disclosure. They explained it this way:

> The public body [MHRC] relied on subclauses 18(1)(c)(i) and (ii) of *FIPPA* to withhold information on page 8 of the Lease. The public body advised our office that it had consulted with the third party about release of this information and that the third party was not prepared to consent to its disclosure. BOMF [the Foundation] advised the public body that it relies on philanthropic donations in order to raise funds that it requires to fulfil its purpose. BOMF maintained that disclosure would reveal financial information which could reasonably be expected to harm its competitive position by impacting its fundraising and thereby interfere with its contractual or other negotiations.

This explanation is more fulsome than that of the MHRC's to Mr. Fletcher. It mentions the third party refused disclosure; that it relies on donations to raise funds to fulfill its purpose and disclosure would reveal financial information expected to cause harm by impacting its fundraising. While more explicit than MHRC's explanation, it is an appropriate balance explaining the reasons for the redaction and upholding the Foundation's privacy interests.

[39] I point this out because a public body's assessment, and decision, should not be a barrier to understanding if an exception to disclosure is appropriate. An opaque response or decision begs for an appeal. At its core, the *Act* is about transparency. The application of the *Act*, in response to a request, especially denying information, must be at the greatest level of transparency possible while balancing the third party's privacy interests. As exhibited by Mr. Fletcher, anything short of that can inspire distrust and a lack of confidence in the process, which is the antithesis of the objective of the *Act*.

The Offer & Lease: The City, MHRC and s. 21(1)(c) & 28(1)(c)(iii)

[40] The exception to disclosure and tests in s. 21(1)(c) and s. 28(1)(c)(iii) are discretionary tests in that the public body "may refuse" disclosure of all or part of a record if a reasonable expectation of probable harm is shown. Section 21 generally deals with disclosure that could be harmful to "relations" between Manitoba and another government, including a city government. Section 28 is focused on harm to economic and other interests of Manitoba or a public body. In this instance, that is particularized as a reasonable expectation of probable interference with contractual or other negotiations.

[41] Again, unfortunately the MHRC's explanation to Mr. Fletcher for not disclosing parts of the Offer or the Lease was generic and vague. It should look to the Ombudsman's report as an example of a more fulsome explanation, one that is slightly more detailed and hence comprehensible, fulfilling the intention of the *Act* in balancing transparency in decision making and the confidentiality attached to the reasons.

[42] Nonetheless, the question remains whether the evidence led by MHRC, effectively the City's response to the MHRC, hits the mark of evidence "well beyond" the mere possibility of harm to relations with Manitoba, or interference with contractual or other negotiations of the City or Manitoba, i.e. MHRC itself. As noted, I do not find it does.

[43] As to MHRC itself, there is nothing in the submissions or evidence that demonstrates real or substantial grounds from which an objective assessment can be made that disclosure of the redacted portions of either the Offer or the Lease could be expected to harm relations between it and the City. In other words, while MHRC says its relations with the City may be harmed, it provides no evidence, or cogent argument, of how that may be so. It appears, MHRC's position is piggy-backed on the City's position.

[44] However, as I understand it, there is no evidence or mention from the City respecting probable harm to relations under s. 21. I take it from this, that MHRC's reliance on s. 21(1) is its assumption that to release the information objected to by the City would result in harm to their relations. This is inferred but is not explicit, and it further clouds the real issue, and analysis, which is the City's objections under s. 28(1). Clarification is required.

[45] As to the City's representations as provided in the sealed affidavit, I would characterize those as conclusory opinions, devoid of any real explanation. They do not articulate a rational basis through clear and targeted justifications. There is no specificity and no context. Effectively, the representations simply parrot s. 28(1)(c)(iii). More is required to meet the test.

[46] Thus, as indicated I am not satisfied that the MHRC has demonstrated that Mr. Fletcher is not entitled to the redacted portions of the Offer or the Lease based on s. 21(1) or s. 28(1).

Next Steps

[47] While bifurcated proceedings are discouraged, in this unique instance, given the material and evidence placed before me by the MHRC, the nuances to the test that I have clarified, the relatively novel s. 21(1) issue and the lack of involvement by the City in the proceeding before me, I am prepared to agree to the MHRC's request to permit the City to reconsider the response it gave to MHRC. The City can either provide a more detailed rational for its objections, by way of a sealed affidavit to the Court and MHRC, or withdraw some, if not all, of their objections to the various provisions in the records. The City will have 20 days to provide its responsive position to MHRC, and MHRC a further 10 days to file a further sealed affidavit and a responsive submission.

[48] In the meantime, a one hour appearance should be arranged before me, with Mr. Fletcher and the MHRC, so that final submissions can be made shortly after the 30 day aggregate period has ended.

CONCLUSION

[49] Pursuant to s. 73(1)(a), Mr. Fletcher's appeal of MHRC's refusal to disclose pursuant to the s. 18(1)(c) exception, regarding the Foundation, is dismissed.

[50] Pursuant to the Court's inherent power to control its process and implicit powers under the appeal provisions of the *Act*, MHRC shall provide within 30 days a further sealed affidavit and responsive position in support of its position. Subsequent to hearing oral

submissions from MHRC and Mr. Fletcher, I will then make a final determination of Mr. Fletcher's appeal respecting the MHRC and the City's reliance on s. 21(1) and s. 28(1), respecting both the Offer and the Lease documents.

Martin J.