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(Winnipeg Centre)
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Cited as: 2022 MBQB 73

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	**APPEARANCES:**
STEVEN FLETCHER, Applicant, - and - JOSEPH BRADBURY, AS CHIEF EXECUTIVE OFFICER OF THE MANITOBA HOUSING RENEWAL CORPORATION Respondent.	Steven Fletcher acting on his own behalf Samuel Thomson for the Respondent Judgment delivered: April 8, 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] Several months ago I issued a decision respecting Mr. Steven Fletcher's 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 Manitoba Housing and Renewal Corporation ("MHRC") (***Fletcher v. Bradbury (MHRC)***, 2022 MBQB 25). The access request involved the MHRC; a third party, the Bruce Oake Foundation Realty Holding Inc. ("the Foundation"); and a local government body, the City of Winnipeg ("the City"). That decision arose from an appeal to this Court, pursuant to s. 67(1) of the *Act*. I found that MHRC had proven that a certain clause in a Ground Lease ("the Lease") between MHRC and the Foundation was exempt from disclosure by s. 18(1)(c)(i) & (ii) of the *Act*.

[2] The City also objected to certain clauses being disclosed in an Offer to Purchase ("the Offer") between it and the MHRC, which then also flowed through to the Lease. Before determining whether the MHRC was exempted from disclosing those clauses, I clarified certain matters and requested more information. That done, these reasons deal with the City's concerns.

ISSUE

[3] The remaining issue is whether Mr. Fletcher is entitled to access of those portions of the Offer or the Lease that were redacted, withheld, by the MHRC, based on s. 28(1)(c)(iii) of the *Act* - - that 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.

[4] MHRC also refused disclosure based on s. 21(1)(c) of the *Act* - - that 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). However, after the first decision, and before the final hearing, MHRC and the City withdrew this reason as a basis for nondisclosure. As such, s. 21(1)(c) is no longer relevant.

[5] I described the records and my analysis, regarding Mr. Fletcher's access request, including the legal test, in my first decision. I will not reiterate, except as necessary throughout this decision.

ANALYSIS

[6] The exception to disclosure in s. 28(1)(c)(iii) is a discretionary assessment, 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 28 focuses 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 of the City.

[7] The question remains whether the evidence led by MHRC, effectively the City's initial response to the MHRC, and its expanded response (contained in a new sealed affidavit, s. 72 of the *Act*), hits the mark of evidence "well beyond" the mere possibility of harm or interference with contractual or other negotiations with the City. I do not find it does.

[8] For convenience, I repeat the test as I set it out at para 27 of the first decision, quoting para 24 of the Supreme Court of Canada in ***Merck Frosst Canada Ltd. v.***

Canada (Health), [2012] SCC 3:

> [27] ... 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)
>
> ... 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".

[9] Respecting MHRC as a party to both the Offer and the Lease, there is nothing in the initial or latest submissions or evidence that demonstrates real or substantial grounds from which an objective assessment can be made. They failed to explain how disclosure of the redacted portions, of either the Offer or the Lease, could be expected to harm MHRC's contractual or other negotiations.

[10] As to the City's representations, as provided in the first sealed affidavit, I concluded those concerns were best characterized as conclusory opinions, devoid of any real explanation. They did not articulate a rational basis through clear and targeted justifications. There was no specificity and no context. Effectively, the representations simply parroted s. 28(1)(c)(iii); more was required to meet the test. That said, as noted, the MHRC and the City were given an opportunity to reconsider and give additional explanations in a further sealed affidavit. The result is interesting, if not surprising.

[11] First, as noted, both the City and MHRC backed away from any reliance on s. 21(1) of the *Act* as a basis for not disclosing parts of the Offer or the Lease. No explanation was provided for this shift.

[12] Second, of the specific clauses they identified as being exempt from disclosure, the City withdrew objections to many of them, thus removing any obstacle to that disclosure. Hence, the MHRC says clauses 7(2) and 7(3), the redacted words in clauses 8, 15(4), 19(6)(v) and (vi), and Schedule B of the Offer will now be disclosed to Mr. Fletcher, as will the remaining clauses of the Lease that had not been disclosed because of the City's objection, as they deal with the same content as the above mentioned clauses in the Offer.

[13] I say these matters are surprising because but for this appeal, and some limited judicial clarity and pushback in the first decision, Mr. Fletcher would be no farther ahead. Arguably this should not have been necessary. MHRC and the City have effectively conceded their initial positions were flawed in favour of non-disclosure. In other words, there was no legislative basis for not disclosing these clauses in the first place.

[14] Third, what remains objected to by the City, and found exempt from disclosure by MHRC, pursuant to s. 28(1)(c)(iii) of the *Act*, are clauses 7(1), 9, 10, 11, the second sentence of clause 15(5) and the final paragraph of clause 19, all contained in the Offer. Turning to these clauses, without revealing anything that should remain confidential in the sealed affidavit(s), the City's position, which the MHRC appears to simply be forwarding as opposed to scrutinizing, remains hinged on s. 28(1)(c)(iii). In seven concisely worded and somewhat repetitive paragraphs, the City repeats the

language or components of s. 28(1)(c)(iii) as its rational. They describe how the redacted clauses were unique to this negotiation (i.e. different from their standard Offer to Purchase template) and how the City administrators have an expectation upon them, as stewards of taxpayer dollars, to be fiscally responsible.

[15] I find the explanations are again generalizations; in essence, simply asserting non-standard, negotiated clauses could cause harm to the City if disclosed. However, changing a template cannot, by itself, mean the exemption from disclosure in s. 28(1)(c)(iii) is triggered. There must be some cogent explanation of how or why disclosure of these specific clauses might cause harm. Similar to my conclusions of their first positions, the City's, and MHRC's, explanations fail to show any clear and targeted justification, specificity or context. To the contrary, arguably, saying the clauses are circumscribed to this land deal, between these particular parties, suggests the clauses are closer to a "one-off" situation; not a precedent another party may attempt to negotiate in a different deal.

[16] Based on the submissions, I fail to see how the objections to disclosure hit the mark set in ***Merck***. In all the context or circumstances here, the City's position is not evidence well beyond, or considerably above, a mere possibility of harm (***Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)***, [2014] S.C.J. No. 31, at para 54).

[17] I reiterate the touchstones that any public servant must bear in mind when assessing whether requested records should not be disclosed, or if disclosed, the degree

of redaction, or non-disclosure, of its parts. First, the *Act* ensures citizens the right to have information to meaningfully participate in our democracy, and to hold the Government to account. 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. Lastly, the analytical approach to either objecting to disclosure or deciding whether an exemption applies supporting nondisclosure, starts from the premise that *disclosure is the rule rather than the exception*.

[18] Finally, as should be obvious, as the record holder and party determining the access request, MHRC has an independent role to assess the City's concerns and come to a reasoned decision the circumstance is such that the *Act* requires withholding disclosure of all or part of the record. They must not simply acquiesce to another public body's concerns, or those of a third party as the case may be.

CONCLUSION

[19] Pursuant to s. 73(1)(b), I do not find MHRC is authorized or required to refuse access to all or part of the Offer, or the Lease, as conceded in paragraph 11 herein and for those clauses noted in paragraph 12 herein. I order the MHRC to release such information.

[20] As Mr. Fletcher was substantially successful on his appeal, he is entitled to his reasonable disbursements, and costs which I set at $300 inclusive, as he represented

himself throughout. If there is any disagreement as to the Bill of Costs, it should be referred to me as soon as possible to settle.

Martin J.