



[2022] 3 F.C.R. D-13

## ACCESS TO INFORMATION

Application for judicial review under *Access to Information Act*, R.S.C., 1985, c. A-1 (Act), s. 44(1) of Saint John Port Authority's (respondent or Port Saint John) decision to disclose portions of 2011 lease agreement (Lease), 2017 lease renewal and amending agreement (Lease Amendment) entered into between applicant, respondent — Decision made further to request by Canadian Broadcasting Corporation (CBC) under Act, s. 6 — While respondent determined that certain information was exempt from disclosure under Act, it concluded that remainder of two documents should be disclosed to CBC — Applicant disagreed, sought to exempt large portions of documents from disclosure under Act, ss. 20(1)(b),(c), and/or (d) — Respondent is port authority constituted under *Canada Marine Act*, S.C. 1998, c. 10, manages 297 acres of land on behalf of Government of Canada; offering both short, long term leases of its facilities — Applicant is scrap metal recycler, with operations in over ninety locations in Canada, other countries — Has lease, service and/or supply agreements with various municipalities, waste management authorities, business entities — Applicant obtained right to a lease agreement with Port Saint John in February 2008 — Applicant, respondent discussing applicant's expansion of business at Port Saint John — Reaching agreement, signing Lease in March 2011 — Later, applicant, respondent signing Lease Amendment in July 2017 — Respondent is "government institution" for purposes of Act — In July 2022, received request from CBC producer seeking copy of property lease agreement between respondent, applicant — Respondent determined that Lease, Lease Amendment were responsive to CBC's access request; concluded that certain redactions were required under Act but that remainder of two documents should be disclosed — In accordance with Act, s. 27(1), respondent notified applicant of access request; that it intended to disclose Lease, Lease Amendment in part — Applicant agreed with Port Saint John's redactions but proposed numerous additional redactions pursuant to Act, s. 20(1) — Respondent later informed applicant of its decision to provide documents to requester with original redactions applied by respondent — Applicant subsequently filed notice of application pursuant to Act, s. 44 seeking review of Port Saint John's decision to disclose portions of Lease, Lease Amendment — Sought order under Act, s. 51 directing respondent not to disclose certain information in two documents because constituting third party information that is exempt from disclosure under Act, ss. 20(1)(b),(c),(d) — Applicant asserted that its proposed redactions were required in particular to protect confidential financial, commercial information— CBC filed notice of appearance, made party to proceeding — Preliminary issue arising regarding scope of Court's *de novo* review under Act, s. 44 — More specifically, whether Court's review was restricted to information respondent intended to disclose, being challenged by applicant in application or whether Court's review was broader, included review of information which respondent was refusing to disclose to CBC— Main issue was whether information in Lease, Lease Amendment that applicant sought to protect was exempt from disclosure under Act, ss. 20(1)(b),(c), and/or (d) — Scope of Court's *de novo* review under s. 44 limited to information respondent, as government institution, decided to disclose, which applicant, as third party, challenged — Application under Act, s. 44 is *de novo* review to be heard, determined as new proceeding in accordance with Act, s. 44.1 — Federal Court of Appeal recently held that "matter" under review in Act, s. 44 application is whether information requested should be disclosed — Reference to "information requested" means information requested that is at issue in s. 44 application — In other words, information requested that government institution decided to disclose to requestor that is challenged by third party — Finding that scope of Court's *de novo*

review under s. 44 extends to consideration of information to which government institution is refusing access would circumvent applicable legislated process — Wholesale review by reviewing court of all information responsive to access request would be onerous task; such approach would be wholly inconsistent with Act, s. 45, which provides that application is “to be heard and determined in a summary way” — Party seeking to resist disclosure under s. 20(1)(b) must demonstrate that information is: (i) financial, commercial, scientific, or technical information; (ii) confidential information; (iii) supplied to government institution by third party; (iv) consistently treated in confidential manner by third party — All four of these requirements must be met before information is exempted from disclosure — Information in Lease, Lease Amendment was not exempt from disclosure under Act, s. 20(1)(b) because it was not “supplied” by applicant to respondent — Rather, information constitutes terms, conditions that were negotiated as between parties — Negotiated terms of lease not constituting “supplied information” — Given that requirements under s. 20(1)(b) conjunctive, finding that applicant did not “supply” information in question to respondent was sufficient to dispose of applicant’s reliance on such exemption — Act, ss. 20(1)(c),(d) are harm-based exemptions — Onus is on party invoking either exemption to establish reasonable expectation of probable harm arising from disclosure of information — To satisfy this burden, party must demonstrate clear, direct linkage between disclosure, alleged harm — In present case, applicant relied on affidavit evidence couched in generalities — Applicant’s evidence fell significantly short of establishing reasonable expectation of probable harm as required under Act, ss. 20(1)(c), (d) — Considering expansive scope, nature of information it sought to protect, was incumbent on applicant to tender evidence establishing how exemptions claimed applied to specific information at issue; however, it failed to do so — Types of harm enumerated in s. 20(1)(c) disjunctive — Applicant must establish that disclosure of information will either result in material financial loss or prejudice its competitive position — Applicant not submitting any evidence to substantiate claim that CBC would use information to continue campaign of negative media coverage of it — Applicant’s concerns about possibility of future negative media coverage were insufficient to justify redaction of information it sought to protect in Lease, Lease Amendment — Applicant also failing to show how disclosure of specific information in two agreements would prejudice applicant’s competitive position — Therefore, applicant failed to establish that information should be exempted pursuant to Act, s. 20(1)(c) — With respect to s. 20(1)(d), provision provides mandatory exemption for information that “could reasonably be expected to interfere with contractual or other negotiations of a third party” — Applicant not meeting required burden since not demonstrating proof of reasonable expectation that actual contractual negotiations would be obstructed by disclosure — At best, raised evidence of increased competitive pressure but this not sufficient to establish necessary harm — Applicant not demonstrating that disclosure of this information would obstruct or prejudice contractual or other negotiations; therefore exemption in s. 20(1)(d) could not be relied upon — Application dismissed.

AMERICAN IRON & METAL COMPANY INC. V. SAINT JOHN PORT AUTHORITY (T-1747-22, 2023 FC 1267, Turley J., reasons for judgment dated September 21, 2023, 25 pp.)