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Order F11-35

## CITY OF VANCOUVER

Jay Fedorak, Adjudicator

December 20, 2011

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**Summary:** An applicant requested from the City a copy of an operational review report written by Sierra, a third-party service provider. The City withheld portions of the Report under ss. 17(1) and 21(1) arguing that disclosure would reasonably be expected to cause financial harm to the City and Sierra. Neither exception applies. In its submission, Sierra consented to the disclosure of the information in accordance with s. 21(3)(a). The City had failed to establish that disclosure would be reasonably expected to cause it financial or economic harm under s. 17(1). The Report does not constitute a plan relating to the management of personnel or administration of the City under s. 17(1)(c). The City had failed to establish that disclosure would harm its negotiating position under s. 17(1)(f). The City must disclose the entire report.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 17(1), 17(1)(c), 17(1)(f), 21(1), 21(3)(a).

**Authorities Considered: B.C.:** Order 02-50, [2002] B.C.I.P.C.D. No. 51; Order F07-15, [2007] B.C.I.P.C.D. No. 21; Order F11-23, [2011] B.C.I.P.C.D. No. 29; Order No. 326-1999, [1999] B.C.I.P.C.D. No. 23; Order F11-11, [2011] B.C.I.P.C.D. No. 14.

## INTRODUCTION

[1] This case involves an applicant challenging a decision of the City of Vancouver (“City”) to withhold some information from an operational review report (“Report”) written by Sierra Systems Consulting (“Sierra”). The City withheld the information on the grounds that disclosure would be reasonably expected to harm the economic interests of the City under s. 17(1) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”). Originally, the City also withheld information on the grounds that it would reveal advice or

recommendations under s. 13(1) of FIPPA and harm the business interests of Sierra under s. 21(1). Prior to the inquiry, the City ceased to rely on s. 13(1) of FIPPA. In its initial submission, Sierra indicated that it no longer objected to the disclosure of any of its business information. This means that, in accordance with s. 21(3) of FIPPA, s. 21(1) is no longer at issue.

## ISSUE

[2] The question I must decide is whether disclosure of the Report could reasonably be expected to harm the financial or economic interests of the City under s. 17(1). In support of its application of s. 17(1) of FIPPA, the City has cited that disclosure would reveal plans relating to its administration that have not been implemented under s. 17(1)(c) and would harm its negotiating position under s. 17(1)(f).

## DISCUSSION

[3] **Background**—The City undertook a comprehensive review of all of its boards and departments in order to develop recommendations for improving the efficiency of its operations. To do so, it appointed a team of employees and outside consultants from Sierra to conduct the Vancouver Services Review (“Review”). Sierra then drafted the Report that documented the findings and outlined options and recommendations for improving efficiency as well as cost savings and service improvements.

[4] **Would Disclosure Result in Financial Harm to the City?**—Previous orders have considered the application of s. 17(1). Former Commissioner Loukidelis established the principles for its application in Order 02-50. He found there must be

a confident, objective basis for concluding that disclosure of the disputed information could reasonably be expected to harm British Columbia’s financial or economic interests. General, speculative or subjective evidence is not adequate to establish that disclosure could reasonably be expected to result in harm under s. 17(1). That exception must be applied on the basis of real grounds that are connected to the specific case. This means establishing a clear and direct connection between the disclosure of withheld information and the harm alleged. The evidence must be detailed and convincing enough to establish specific circumstances for the contemplated harm to be reasonably expected to result from disclosure of the information.<sup>1</sup>

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<sup>1</sup> Order 02-50, [2002] B.C.I.P.C.D. No. 51, para. 137.

[5] The City is concerned that harm would result from the disclosure of information about the recommended changes to how it operates and delivers services, particularly with respect to potential staff reductions and costs savings. The General Manager describes this expectation of harm as follows:

I expect that release of the severed information will create misplaced concern on the part of City employees and poses a material financial risk to the City. Despite the fact that the City has not yet decided to proceed with the changes described in the severed content, and may never do so, release of the information will create uncertainty for staff performing certain functions and will inevitably cause some individuals to pursue other employment opportunities. Particularly as those most likely to seek and find alternate employment are individuals with talent and skills in demand in the market, the potential for increased turnover represents a material financial risk in terms of recruitment and training costs, as well as productivity losses associated with replacement of experienced employees.<sup>2</sup>

[6] The suggestion that employees would somehow misinterpret the information is conjectural. I observe that the Report was written by a contracted service provider and makes general recommendations for the City to consider with a view to improving services and reducing costs. It does not document the views of City management. I see no evidence to indicate whether the City would be inclined to accept or reject any of these recommendations. The Report does not indicate any intent on the part of the City.

[7] Previous orders have found that fears that potential readers might misinterpret or otherwise fail to understand information, if disclosed, are not a proper basis for withholding the information. As Adjudicator McEvoy observed in Order F11-23:

As I noted in Order F10-06, it is always possible that any member of the public could take out of context any information disclosed under FIPPA. Were this a basis for withholding records, one could easily envision very little information being disclosed by public bodies concerned about how information might be used or viewed by members of the public.<sup>3</sup>

[8] It is further conjecture to suggest that, if some employees did misinterpret the Report, they would seek other employment. The City provided no evidence to corroborate the testimony of the General Manager. I remain unconvinced that it would be reasonable to conclude that there would be an exodus of the City's best employees to the extent that it would meet the threshold for financial harm, as required by s. 17(1) of FIPPA.

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<sup>2</sup> City's initial submission, Affidavit of General Manager, para. 9.

<sup>3</sup> [2011] B.C.I.P.C.D. No. 29, para. 40. See also Order F10-06, [2010] B.C.I.P.C.D. No. 9, Para. 129.

***Would disclosure reveal plans relating to the administration of the City that have not yet been implemented?***

[9] The City submits that the Report contains plans relating to the administration of the City. Former Commissioner Loukidelis dealt with the definition of “plan” for the purpose of this section in Order No. 326-1999, where he stated:

On this point, I agree with the approach taken in Ontario decisions under that province's freedom of information legislation. In Order P-603 (December 21, 1993), the word “plans” in s. 18 of the Ontario legislation - which is similar to s. 17 of our Act - was interpreted to exclude a report containing recommendations that would form the basis for the development of a ‘plan’. It was held that a plan, for the purposes of the section, is something that sets out detailed methods and action required to implement a policy. This decision built upon the approach taken earlier in Ontario, in Order P-229 (May 6, 1991). In that decision, the word ‘plan’ was given its dictionary meaning, as set out in the Concise Oxford Dictionary, 8th ed., i.e., “a formulated and detailed method by which a thing is to be done, a design or scheme”.

It should be noted in passing that this interpretation of the word “plans” is also consistent with the approach taken in the Policy and Procedures Manual issued by what was then the Ministry of Government Services. At p. 14 of Section C.4.8 of that document, the same interpretation is given to the word “plans”.<sup>4</sup>

[10] The Report is a product of a contracted service provider that makes a series of general recommendations for the City to consider individually with a view to improving services and reducing costs. There is no integrated plan. The City may have developed a formal plan for implementing all or part of these recommendations, but the record at issue is not such a plan.

[11] I find that s. 17(1)(c) of FIPPA does not apply to the Report.

***Would disclosure harm the negotiating position of the City?***

[12] The City’s General Manager deposes that disclosure of the information at issue will harm the City’s negotiating position. He does not provide any evidence or argument in support. It is not obvious to me why this would be the case. The City has already disclosed that the information at issue consists largely of recommendations by a contracted service provider concerning staff reductions and service improvements.

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<sup>4</sup> [1999] B.C.I.P.C.D. No. 23, para. 39.

[13] I fail to see how disclosure of the opinions of a third party would influence the conduct of the negotiations between the City and its union to the point where the City would suffer financial harm. This is especially the case because it is not clear whether the City is even going to implement those recommendations. It is speculative to assume that the union would base its negotiating strategy on the premise that the City would necessarily implement the recommendations of Sierra. It is also speculative to assume that knowing the details of the recommendations would give the union greater bargaining leverage to the point where the City would have to accept less advantageous terms or pay some other price than it would have, if the severed information remained confidential.

[14] I find that s. 17(1)(f) does not apply to the Report.

### **Conclusion**

[15] The City's arguments and evidence do not meet the required threshold to establish that disclosure would be likely to cause it to suffer financial harm. The City's case is speculative. The Report consists merely of recommendations that a third-party service provider made two years ago and that the City has the discretion to accept or reject. As I noted above, whether the City accepted or rejected any of those recommendations is not evident from the Report.

[16] Therefore, I find that s. 17(1) does not apply to the Report.

### **CONCLUSION**

[17] For the reasons mentioned above, I make the following orders:

1. Sections 17(1) and 21(1) of FIPPA do not authorize the City to withhold any information.
2. I require the City to give the applicant access to this information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before February 1, 2012 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

December 20, 2011

### **ORIGINAL SIGNED BY**

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Jay Fedorak  
Adjudicator