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Order F13-06

DISTRICT OF HOPE

Elizabeth Barker, Adjudicator

February 15, 2013

Quicklaw Cite: [2013] B.C.I.P.C.D. No. 6
CanLII Cite: 2013 BCIPC No. 6

Summary: The applicant requested a copy of the successful proposal and the signed contract issued by the District for garbage, recycling and yard waste services. The District disclosed most of the records but withheld pricing information under s. 21(1) as harmful to the business interests of the successful proponent. The adjudicator found that although the information withheld in both the contract and the proposal was commercial or financial information, only the information in the proposal was "supplied in confidence" as required by s. 21(1). The adjudicator went on to find that the District had failed to establish that disclosure of the information withheld in the proposal and the contract could reasonably be expected to result in the harms in s. 21(1)(c)(i) and (iii).

Statutes Considered: *Freedom of information and Protection of Privacy Act*, s. 21(1).

Authorities Considered: B.C.: Order No. 26-1994, [1994] B.C.I.P.C.D. No. 29; Order 00-10, [2000] B.C.I.P.C.D. No. 11; Order 01-39, [2001] B.C.I.P.C.D. No. 40; Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 03-15, [2003] B.C.I.P.C.D. No. 15; Order 04-06, [2004] B.C.I.P.C.D. No. 6; Order F07-15, [2007] B.C.I.P.C.D. No. 21.

Cases Considered: *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773; *CPR v. The Information and Privacy Commissioner et al (In The Matter of the Judicial Review Procedure Act)*, 2002 BCSC 603.

INTRODUCTION

[1] This inquiry concerns an access request made under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), to the District of Hope ("District") for a copy of the successful proposal and contract for garbage, recycling and yard waste services.

[2] In 2010, the District issued a request for proposals ("RFP") to provide residential and commercial garbage, recycling and yard waste collection services. The applicant requested a copy of all proposals submitted as well as the contract with the successful proponent, First Class Waste Services Inc. ("First Class"). The District provided the requested records but withheld some information under s. 21(1) of FIPPA on the basis that disclosure would be harmful to the business interests of third parties.

[3] The applicant requested that the Office of the Information and Privacy Commissioner ("OIPC") review the District's decision. During mediation, the applicant agreed to narrow the scope of the request to just First Class's proposal and the final contract. Mediation did not result in a resolution of all the issues, and the matter proceeded to inquiry under Part 5 of FIPPA.

[4] The District gave First Class notice of the request for review under s. 23 of FIPPA and sought its views on disclosing records relating to its business. First Class objected to disclosure on the grounds that revealing the withheld information would harm its business interests.

ISSUE

[5] The issue before me is whether the District is required to refuse access to all or portions of the two records in dispute under s. 21(1) of FIPPA. Under s. 57(1) of FIPPA, it is up to the District to prove that the applicant has no right of access to the information.

DISCUSSION

[6] **The Records**—There are two records at issue in this inquiry: First Class's successful proposal submitted in response to the District's RFP and the resulting contract between the District and First Class.

[7] The information withheld from the proposal consists of the following:

- Proposed tipping fee schedules for 2011-2015 (pp. 26-30).
- Proposed rates for commercial container rental and collection services (pp.31 and 32).

[8] The information withheld from the signed contract consists of the following:

- Amounts to be paid for the contract services (p. 18).[1]
- Cost to collect garbage from city garbage cans (Schedule B, p. 27).

[1] The page numbers refer to the typed page numbers on the contract, (*i.e.,* p. 8 of 33) not the handwritten numbers in the copy provided for this inquiry.

- Residential Disposal Rates (Schedule F, p. 31).
- Commercial Container Rates – Solid Waste (Schedule G, p. 32).
- Commercial Container Rates – Recycling (Schedule H, p. 33).

[9] **Harm to Third-Party Business Interests**—Section 21(1) of FIPPA requires public bodies to withhold information the disclosure of which would harm the business interests of a third party. It sets out a three-part test for determining whether disclosure is prohibited, all three elements of which must be established before the exception to disclosure applies. The relevant FIPPA provisions are as follows:

> **Disclosure harmful to business interests of a third party**
>
> 21(1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> …
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
>
> …
>
> (iii) result in undue financial loss or gain to any person or organization, …

[10] The principles to be considered in a s. 21(1) application are well established.[2] The first part of the test requires that the information is a trade secret of a third party or the commercial, financial, labour relations, scientific or technical information of or about a third party. The second part of the test requires that the information was supplied to the public body in confidence. The third part of the test requires that disclosure of the information could reasonably be expected to cause the types of harm set out in s. 21(1)(c).

Parties' submissions

[11] The applicant submits that accountability and transparency are necessary components of responsible governance, and that the information at issue needs to be made available to members of the public so that they can determine if tax dollars are being spent wisely.

[2] See for example, Order 03-02, [2003] B.C.I.P.C.D. No. 2 and Order 03-15, [2003] B.C.I.P.C.D. No. 15.

[12] The District's full submission regarding the matters at issue is as follows:

> In the opinion of the District, the severed information contained component costs and contractual service rates that were supplied in confidence and whose release would be expected to harm the competitive position of the third party. The District's rationale for severing the prices was based on page two of the original proposal call advertisement for *RFP # PW-2010-08 – Residential and Commercial Garbage, Recycling & Yard Waste Collection Services (October 2010). (Excerpt as follows):*
>
> > Proposals must be submitted by Proponents in a sealed package, marked "confidential" to the following specific physical location no later than 1:00 pm local time on the 8th day of November, 2010 (the "Proposal Closing") ...

[13] In its reply submission, the District adds that pricing information, although not in the format requested, is contained in three public documents, one of which has already been supplied to the applicant.[3] I examined these three documents and conclude they do not provide the requested information contained in the proposal and contract sought by the applicant. Therefore, they are not relevant to the issues in this inquiry.

[14] The District's supporting evidence consists of correspondence with First Class informing it of the applicant's information request and seeking their consent or refusal to release the pricing information. They also provide materials flowing from the OIPC mediation, but as that documentation was created on a "without prejudice" basis it is not properly before me. It has been removed from the inquiry materials, and I have not considered it.

[15] First Class provides three arguments against disclosure of the withheld information. First, it submits that disclosure "would pose a significant risk to the future operations of the Hope District"[4] but it does not elaborate. Second, it submits that the documents were given in confidence to the District. Third, it argues the disclosure would cause First Class undue financial harm and hurt its competitive position when the contract expires in 2015 and is open for bids once again.

Commercial or financial information – s. 21(1)(a)

[16] From my review of the records, I agree with the District and First Class that the withheld information in both the proposal and the contract is commercial or financial information about First Class. It consists of prices to be paid by the

[3] Report and Recommendation to Council – Residential and Commercial Garbage, Recycling and Yard Waste Collection Services (November 17, 2010); Bylaw 1302 – Fees and Charges Amendment Bylaw, 2011; District of Hope's 2010 Annual Report.
[4] First Class's submission, para. 2.

District for services provided by First Class. The applicant does not dispute that the information she seeks is financial or commercial information.

Supplied in confidence – s. 21(1)(b)

[17] I find that this "supply" element in s. 21(1)(b) has been met regarding the proposal but not regarding the contract, and my reasons are as follows.

[18] Previous decisions have stated that information contained in an agreement will not normally qualify as information that has been "supplied" by the third party because it is typically the product of a negotiation process.[5] However, there can be circumstances where this is not the case. On this point, Delegate Nitya Iyer said the following in Order 01-39:[6]

> [45] Information that might otherwise be considered negotiated nonetheless may be supplied in at least two circumstances. First, the information will be found to be supplied if it is relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of s. 21(1)(b). To take another example, if a third party produces its financial statements to the public body in the course of its contractual negotiations, that information may be found to be "supplied." It is important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it.
>
> [46] In other words, information may originate from a single party and may not change significantly - or at all – when it is incorporated into the contract, but this does not necessarily mean that the information is "supplied." The intention of s. 21(1)(b) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible of change but, fortuitously, was not changed. In Order 01-20, Commissioner Loukidelis rejected an argument that contractual information furnished or provided by a third party and accepted without significant change by the public body is necessarily "supplied" within the meaning of s. 21(1) (at para. 93).

[5] Order 04-06, [2004] B.C.I.P.C.D. No. 6 at para. 45.
[6] [2001] B.C.I.P.C.D. No. 40. Upheld on judicial review; *CPR v. The Information and Privacy Commissioner et al (In The Matter of the Judicial Review Procedure Act)*, 2002 BCSC 603. See also Order No. 26-1994, [1994] B.C.I.P.C.D. No. 29.

[19] The information withheld from the proposal originated with First Class. There is no evidence that the District had authorship or control over any of the information proponents, including First Class, provided in their proposals. Thus, I find that the information in the proposal was "supplied" by First Class for the purposes of s. 21(1).

[20] However, I find that the same is not the case regarding the information in the contract. That information was not "supplied" to the District; rather, it was the result of negotiation between the parties. Neither the District nor First Class disputes that negotiations took place before the final contract was signed. The RFP document itself stated that the preferred proponent would be selected to enter into negotiations leading to a formal contract.[7] Furthermore, in its reply submission the District quotes from the minutes of a council meeting during which the town manager was authorized to "negotiate and execute a contract substantially in the form indicated in the October 2010 Request for Proposal" with First Class. [8]

[21] I disagree with First Class's submission that the financial information in the contract should be viewed as having been supplied because it remained "relatively unchanged" from the proposal.[9] Although the pricing in the contract may be similar to that contained in the proposal, it was susceptible to change, and the fact that it was "relatively unchanged" indicates that it did change through the give and take of negotiation. From this, I conclude that it was not immutable business information. In addition, there are no explicit references in the records to matters such as fixed costs or minimum acceptable profit margins, which would indicate that negotiation was not possible. Nor, is there evidence here from which one could accurately infer information about such sensitive business matters.

[22] I have also examined the "in confidence" element of s. 21(1)(b). The only reference to confidentiality in the records is the requirement in the RFP that proposals be submitted in a sealed package marked "confidential". The proposal does not indicate on its face if this is indeed what took place. However, First Class submits that its proposal was provided on that basis, and with no evidence to the contrary, I accept that this was the case. The District and First Class assert that this confidentiality proviso also applies to the contract.[10] Yet, neither has provided evidence to support this contention or that there was a mutual agreement that the information at issue in the contract was to remain confidential. As a result, I conclude that the "in confidence" element in s. 21(1)(b) has been met with respect to the proposal but not with respect to the contract.

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[7] RFP, section 9.0 (g).
[8] District's reply submission, p. 2.
[9] First Class's submission, para. 6.
[10] District submission, para. 3 and First Class's submission, para. 8.

[23] In conclusion, I find that the information at issue in the proposal was supplied in confidence for the purposes of s. 21(1) but that the information at issue in the contract was not. Therefore, the District is not required to refuse to disclose the information in the contract under s. 21(1), and it is only necessary for me to deal with the third element or "harms" part of the analysis under s. 21(1)(c) for the information at issue in the proposal. Nevertheless, for completeness, I will also comment on the submissions regarding the information at issue in the contract.

Harm to third party interests

[24] The standard of proof applicable to harms-based exceptions like s. 21 is whether disclosure of the information could reasonably be expected to cause the specific harm. Although there is no need to establish certainty of harm, it is not sufficient to rely on speculation.[11] Previous orders have described the evidentiary requirements for the application of harms-based exceptions like s. 21. In Order F07-15, former Commissioner Loukidelis stated:

> …there must be a confident and objective evidentiary basis for concluding that disclosure of the information could reasonably be expected to result in harm… Referring to language used by the Supreme Court of Canada in an access to information case, I have said "there must be a clear and direct connection between disclosure of specific information and the harm that is alleged".[12]

[25] The District submits that the severed information contains "component costs" and "contractual service rates" that were supplied in confidence and whose release would be expected to harm the competitive position of the third party. It does not give details or explain further.

[26] First Class submits that disclosure would harm its competitive position and cause it undue financial harm. Although it does not elaborate, it says that the release of the withheld information will disclose information about its earnings, and that commonly used industry formulas could be applied to determine its profit margins. It also submits that disclosure will undermine its position in future bidding events because competitors will be able to avoid the cost of doing their own analysis when preparing a proposal and it will also allow them to under-bid First Class.

[27] The applicant disputes that First Class's future negotiations and profit margin will be negatively impacted by disclosure of the withheld information. She submits that the dollar figures are only relevant to today's business climate

[11] Order 00-10, [2000] B.C.I.P.C.D. No. 11, at p.10.
[12] [2007] B.C.I.P.C.D. No. 21, para. 17. Referring to *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773.

and there are many factors that will play a role in pricing future contracts, such as labour costs, volumes of refuse and recyclables, cost of living increases, and what the District is willing and able to pay.

[28] In considering the circumstances of this case and in reviewing previous orders and case law, I am reminded of the overarching principle here, articulated by former Commissioner Loukidelis in Order 04-06:

> When interpreting and applying the s. 21(1) disclosure exception, the stated purposes of the Act to make public bodies more accountable, by giving the public a right of access to records that is subject to specified limited exceptions, must be kept in sight. The overarching principle is that contracts with public bodies should be available to the public, subject only to specified and limited disclosure exceptions in the circumstances of each case. [13]

[29] I have considered the submissions and evidence as well as the records themselves, and I find that the District has failed to prove that there is a reasonable expectation that disclosure will result in the harm outlined in s. 21(1)(c)(ii) and (iii). The harm that the District and First Class assert will result from disclosing the withheld information is vague, speculative and lacking in evidentiary support. No details are provided about the anticipated financial loss, even in general terms, from which I could reach any conclusion about whether there would be a loss, undue or otherwise. For example, no information was provided about the marketplace and competitors or any explanation of the commonly used industry formulas that could allegedly be applied to determine First Class's profit margins and undercut it in any future bidding. Based on the material before me, it is not at all apparent how the disputed information could directly or indirectly reveal First Class's fixed costs and, potentially, its profit margin. Furthermore, I agree with the sentiment expressed by former Commissioner Loukidelis in Order F07-15[14] that the disclosure of existing contract pricing and related terms that may result in the heightening of competition for future contracts is not a significant harm or an interference with competitive or negotiating positions. Having to price services competitively is not a circumstance of unfairness or undue financial loss or gain; rather it is an inherent part of the bidding and contract negotiation process.

[30] In summary, the submissions and evidence fail to demonstrate a clear and direct connection between disclosure of the withheld information and the anticipated harm, and for this reason I find that the District has not established that disclosure could reasonably be expected to result in harm under s. 21(1)(c).

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[13] [2004] B.C.I.P.C.D. No. 6, para. 60.
[14] [2007] B.C.I.P.C.D. No. 21, para. 43.

CONCLUSION

[31] In conclusion, I find that s. 21(1) of FIPPA does not require that the District deny access to the severed information in the records at issue. Therefore, pursuant to s. 58 of FIPPA, I direct the District give the applicant access to the withheld information within 30 days of the date of this order, as FIPPA defines "day," that is, on or before March 28, 2013. I also require the District to copy me on its cover letter to the applicant, together with a copy of the records.

February 15, 2013

ORIGINAL SIGNED BY

Elizabeth Barker
Adjudicator

OIPC File No.: F11-46517