OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

Protecting privacy. Promoting transparency.

Order F14-36

CITY OF VANCOUVER

Caitlin Lemiski
Adjudicator

September 8, 2014

Quicklaw Cite: [2014] B.C.I.P.C.D. 39
CanLII Cite: 2014 BCIPC No. 39

Summary: The City of Vancouver awarded a contract for pay-by-phone parking services following a request for proposals. The applicant requested a list of RFP proponents, including their identities and the value of each their proposals. The City created a record in response but withheld some information related to the value of each proposal and information that disclosed the term of the previous pay-by-phone parking services contract it awarded because it believed disclosure would be harmful to the financial or economic interests of a public body (s. 17(1)(d) and (f) of FIPPA) and harmful to the business interests of a third party (s. 21(1) of FIPPA). The adjudicator determined that these sections do not apply and ordered the City to disclose the information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 17(1)(d) and (f); s. 21(1).

Authorities Considered: B.C.: Order F13-19, 2013 BCIPC 26 (CanLII); Order F12-13 2012 BCIPC 18 (CanLII); Order 02-50, 2002 CanLII 42486 (BC IPC); Order 03-02, 2003 CanLII 49166 (BC IPC); Order 03-15, 2003 CanLII 49185 (BC IPC); Order F13-20, 2013 BCIPC 27 (CanLII); Order F13-17, 2013 BCIPC 22 (CanLII); Order F13-02, 2013 BCIPC 2 (CanLII); Order F14-04, 2014 CanLII 12100 (BC IPC); Order F14-01 2014 BCIPC 1 (CanLII); Order 01-39 2001 CanLII 21593 (BC IPC); Order F11-05 2011 BCIPC 5 (CanLII); Order 01-36 2001 CanLII 21590 (BC IPC); Order 00-37 2000 CanLII 14402 (BC IPC), Order 04-06, 2004 CanLII 34260 (BC IPC; Order 00-10, 2000 CanLII 11042 (BC IPC); Order F13-07, 2013 BCIPC 8 (CanLII); Order 03-33, 2003 CanLII 49212 (BC IPC); Order 02-04 2002 CanLII 42429 (BC IPC).

INTRODUCTION

[1] This inquiry concerns the applicant's request for the names of five companies who submitted bids in response to a request for proposals ("RFP") for pay-by-phone parking services, the identity of the three shortlisted proponents ("proponents") and the dollar value of their bids.

[2] The City of Vancouver ("City") refused to provide the applicant with the requested records, citing ss. 17(1)(d) and (f) and s. 21(1) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").[1] Sections 17(1)(d) and (f) of FIPPA authorize a public body to withhold information if disclosing it would be harmful to the financial or economic interests of a public body. Section 21(1) of FIPPA requires public bodies to withhold information if disclosing it would be harmful to the business interests of a third party. The City also told the applicant that some of the information he requested had already been disclosed to him as the result of another request he had made.[2]

[3] The applicant was not satisfied with this response and requested a review from the Office of the Information and Privacy Commissioner ("OIPC"). During mediation, the City reconsidered its decision and disclosed a record to the applicant showing the names of the companies and the shortlisted proponents but the City continued to withhold information in the record about the dollar value of the shortlisted bids and the length of the term of the previous contract under ss. 17(1)(d) and (f) and 21(1) of FIPPA.[3]

[4] As mediation did not fully resolve the matters in dispute, the applicant requested that they proceed to inquiry under part 5 of FIPPA. The OIPC invited the shortlisted proponents to participate in this inquiry, but none provided submissions.

ISSUES:

1. Is the City authorized by ss. 17(1)(d) and (f) of FIPPA to refuse access to the information in dispute?
2. Is the City required by s. 21(1) of FIPPA to refuse access to the information in dispute?

[5] Section 57(1) of FIPPA provides that the City has the burden of proof on both issues.

---

[1] Public body's reply to the applicant's FOI request at tab 2.
[2] Public body's reply to the applicant's FOI request at tab 2.
[3] OIPC Fact Report at para. 4.

DISCUSSION

[6] **Information in dispute**—The information in dispute is the dollar value of the shortlisted bids and the length of the term of the previous contract.

[7] Some clarification is required here because instead of responding to the applicant's request by locating and severing records, the City created a record.[4] The applicant requested the names of companies who submitted bids, which proponents were shortlisted, and the dollar value of the shortlisted bids. The record the City created shows a list of companies at the top of the page and then a shorter table that includes the shortlisted proponents.[5] Next to each proponent in the table, the City provided a dollar amount called the "Equivalent Transaction Fee over 3-years." It is unclear whether the "Equivalent Transaction Fee over 3-years" is the same as the dollar value of each bid, which is what the applicant requested. The City also included the term length in years of the previous pay-by-phone contract and the "Equivalent Transaction Fee over 3-years" for the previous contract. The City severed the term length of the previous contract and the "Equivalent Transaction Fee over 3-years" of the shortlisted bids and the previous contract ("transaction fee amounts") under ss. 17(1)(d) and (f) and 21(1) of FIPPA.

[8] **Harm to the financial interests of a public body—**Section 17(1) of FIPPA authorizes a public body to withhold information if disclosing it could reasonably be expected to harm the financial interests of a public body. The provisions relevant in this case are as follows:

> 17 (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
>
> …
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
>
> …
>
> (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[4] Public body's reply submission at p. 3.
[5] Public body's initial submission, item 2, "Index of Records/FIPPA exceptions" under the heading "Description".

[9] Previous orders have determined that the standard of proof applicable to harms-based exceptions is whether disclosure could reasonably be expected to cause the specified harm.[6] In Order 02-50, former Commissioner Loukidelis considered whether s. 17(1) applied to records the Ministry of Attorney General withheld from the applicant First Nation. He articulated the evidentiary requirements for s. 17 as follows:

> Taking all of this into account, I have assessed the Ministry's claim under s. 17(1) by considering whether there is 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. A Ministry or government preference for keeping the disputed information under wraps in its treaty negotiations with Lheidli T'enneh will not, for example, justify non-disclosure under s. 17(1). There must be cogent, case-specific evidence of the financial or economic harm that could be expected to result.[7]

[10] I have applied the former Commissioner's reasoning regarding the standard of proof and evidentiary requirements for s. 17(1) here.

[11] **The parties' positions regarding ss. 17(1)(d) and (f)**—The City submits that disclosure of the information in dispute will negatively impact the proponents' ability to price their services competitively and that this could cause them undue financial loss.[8] The City also submits that disclosure of the disputed information could reasonably be expected to harm the City's negotiating position because it "automatically precludes the City's right and need to negotiate with a variety of commercial firms so as to obtain unbiased, fair bids from all commercial participants for other similar RFP's or for a reissued RFP."[9]

[12] The applicant's position is that the public has a right to access procurement information.[10]

---

[6] See Order F13-19, 2013 BCIPC 26 (CanLII) at para. 19, citing Order F12-13, 2012 BCIPC 18 (CanLII) at paras. 35-36.
[7] Order 02-50, 2002 CanLII 42486 (BC IPC) at para. 137.
[8] Public body's initial submission at para. 9.
[9] Public body's initial submission at para. 12.
[10] Applicant's initial submission at para. 2.

[13] **Analysis and finding regarding ss. 17(1)(d) and (f)**—Regarding the harms under s. 17(1)(d), the City's argument is speculative and unsupported by evidence. The City has not shown how disclosing the information in dispute could reasonably be expected to cause financial loss to any of the proponents, or that any financial loss would be undue, particularly in a situation where, as here, the City has already awarded a contract. The City has also not shown how any undue financial loss by the proponents could reasonably be expected to harm its own financial or economic interests in this case. The City also does not explain how disclosing the disputed information would harm the City's negotiating position "by prematurely and potentially inaccurately making this financial information public."[11] For example the City does not explain how disclosure of the information in dispute could reasonably be expected to result in the premature disclosure of a proposal or project or how this could reasonably be expected to harm the financial or economic interests of the City. Moreover, there is no evidence before me that the proposals received by the City were drafts or were otherwise incomplete, and therefore disclosing information about them would be premature. Further, the City has already selected a successful proponent and has awarded a contract,[12] therefore there is no risk that disclosure will somehow harm the selection process. In short, the City's arguments are no more than bald assertions that are not sufficient to discharge the burden of proof that it must meet.

[14] Regarding the harms under s. 17(1)(f), the City argues that if it disclosed the information, it would harm the City's negotiating position. The City submits that it discloses pricing information for completed contracts, but that bid pricing information is different because it is subject to negotiation and therefore disclosing this information prematurely could harm the City.[13] The City's submission does not provide detailed and convincing evidence or establish a clear and direct connection between the disclosure of the information withheld and the harm alleged. The City has awarded the contract and does not anticipate negotiating a new contract for three years.[14] Again, I find that the City's argument is merely an assertion without evidence to sustain it and therefore I find ss. 17(1)(d) and (f) do not apply to any of the information in dispute.

[15] I will now consider whether s. 21(1) applies.

[16] **Disclosure harmful to third party business interests**—Section 21(1) sets out a three-part test for determining whether the section applies. All three parts must be met.

---

[11] Public body's initial submission at para. 13.
[12] Public body's initial submission at para. 9.
[13] Public body's initial submission at para. 12-13.
[14] Public body's initial submission at para. 2.

[17] The relevant parts of s. 21(1) are below:

> 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,
>
> (ii) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
>
> (iii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> (iv) result in undue financial loss or gain to any person or organization, or…

[18] **Interpreting s. 21(1)**—The principles for determining whether s. 21(1) applies are well-established.[15] In order for s. 21(1) to apply, the head of a public body must show that disclosing the information would reveal trade secrets, commercial, financial, labour relations, scientific or technical information of or about a third party; that the information is supplied, implicitly or explicitly, in confidence; and that disclosing the information could reasonably be expected to cause one of four kinds of harms as listed in s. 21(1)(c)(i) to (iv).

[19] **The parties' positions regarding s. 21(1)**—The City submits that the disputed information was supplied by third parties in confidence and that disclosing this information would harm the third parties' negotiating position. The applicant argues that third parties know or ought to know that public bodies are subject to FIPPA therefore s. 21(1) does not apply.[16]

[20] **Commercial or financial information**—The information in dispute is information about the value of services the proponents have proposed to provide to the City and value and term length information related to the previous contract. In Order F13-20, Adjudicator Flanagan stated that information was commercial within the meaning of s. 21(1)(a) if it

---

[15] See, for example, Order 03-02, 2003 CanLII 49166 (BC IPC), and Order 03-15, 2003 CanLII 49185 (BC IPC).

[16] Applicant's initial submission, at para. 18.

> …relates to a commercial enterprise but need not be proprietary in nature or have an independent market or monetary value. The information itself must be associated with the buying, selling or exchange of the entity's goods or services. An example is a price list, or a list of suppliers or customers. Another example is a third-party contractor's proposed and actual fees and percentage commission rates and descriptions of the services it agreed to provide to a public body. …"[17]

[21] I find the information in this case is commercial information because it is associated with the selling of the proponents' services. In regards to whether the information is also financial information, in Order F13-20, Adjudicator Flanagan determined that "[f]inancial information often has been applied, together with commercial information, in a proposal or contract about the goods and services delivered and the prices that are charged for those goods or services.[18] As the information in dispute is about the delivery of services and the prices associated with delivering those services, I find that the information in dispute is also financial information.

[22] **Information supplied in confidence**—Determining whether information was supplied implicitly or explicitly in confidence involves a two-part analysis. The first part is to determine whether the information in dispute was "supplied" to the City. The second part is to determine whether the information was supplied, explicitly or implicitly, "in confidence".[19] I will first consider whether the information in dispute was supplied.

[23] The City submits that the disputed information was supplied to it by each proponent. I will first deal with the transaction fee amounts for each bid. Previous orders have found that a summary drafted by a public body using information derived from third parties was supplied because the third parties are the original source of the information.[20] Here, the transaction fee amounts for each bid were derived by the City from information each proponent supplied to it. Therefore, I find that this information was supplied.

[24] I will now consider whether the term length and the transaction fee amount for the previous contract agreed to between the City and the successful proponent were supplied within the meaning of s. 21(1)(b).

[25] In almost all cases, information in a contract will not be found to be "supplied" within the meaning of s. 21(1)(b) because information in a contract is

---

[17] Order F13-20, 2013 BCIPC 27 (CanLII) at para. 14.
[18] Order F13-20 at para. 14.
[19] See Order F13-17, 2013 BCIPC 22 (CanLII) at para. 14.
[20] See for example Order F13-17 at para. 16 and F13-02, 2013 BCIPC 2 (CanLII) at para. 17.

negotiated not supplied.[21] The exceptions are where information in a contract is not susceptible to change or if it would allow an individual to draw accurate inferences about information supplied by a third party.[22] The contract length and the transaction fee amount for the previous contract were plainly items negotiated between the parties and the City did not point me to any facts that would suggest otherwise. My review of the evidence itself reveals nothing about the information that is immutable or that disclosing it would allow an individual to draw accurate inferences about information supplied by a third party. Therefore I find the term length and the transaction fee amount for the previous contract were not supplied for the purposes of s. 21(1)(b).

Was the information supplied in confidence?

[26] I will now consider whether the supplied information was supplied, implicitly or explicitly, in confidence. Information will be held to have been supplied in confidence if in "all of the circumstances, it can be objectively regarded as having been provided in confidence with the intention that it be kept confidential".[23]

[27] The City submits that "the severed information is maintained at all points in the Supply Chain Management process as confidential"[24] and that "all information in the record was provided in confidence as part of the non-public, confidential RFP response by each company."[25] The City did not say whether any of the information it provides to prospective proponents states that it will maintain their bids in confidence, or whether any of the bids it received were marked as confidential. The City did not provide any sworn evidence or supporting documents for this inquiry. I do not have a copy of the RFP for pay-by-phone parking services before me, or any of the actual bid documents, policies or procedures about how the City receives and maintains bids, or other information about how bid information of the type at issue here are treated by the City. It did not point to any legislative requirement authorizing or prohibiting disclosure. Absent any evidence demonstrating an express agreement or pledge by the City to the third parties to keep the information confidential,[26] or any evidence from the third parties, I am unable to find that the proponents supplied the disputed information to the City explicitly in confidence. I will now consider whether the proponents supplied the information implicitly in confidence.

---

[21] See Order F14-04, 2014 CanLII 12100 (BC IPC) at para. 12 and F14-01 2014 BCIPC 1 (CanLII) at para.12.
[22] See Order 01-39 2001 CanLII 21593 (BC IPC) at paras. 46 to 53.
[23] Order 01-39 at para. 27.
[24] Public body's initial submission at para. 16.
[25] Public body's reply submission at p. 6.
[26] See Order F11-05 2011 BCIPC 5 (CanLII) at para. 41 citing Order 01-36 2001 CanLII 21590 (BC IPC) at para. 24.

[28] In regards to whether information was supplied implicitly in confidence, former Commissioner Loukidelis determined that:

> The cases in which confidentiality of supply is alleged to be implicit are more difficult. This is because there is, in such instances, no express promise of, or agreement to, confidentiality or any explicit rejection of confidentiality. All of the circumstances must be considered in such cases in determining if there was a reasonable expectation of confidentiality. The circumstances to be considered include whether the information was:
>
> 1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
> 2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;
> 3. not otherwise disclosed or available from sources to which the public has access;
> 4. prepared for a purpose which would not entail disclosure.[27]

[29] Applying these criteria, the City has asserted that the third parties provided the information in confidence and that it treated the information in confidence. However it has not provided any evidence in support of these assertions. Previous orders have held that "there must be evidence of a 'mutuality of understanding' between the public body and the third party for the information to have been considered to be supplied 'in confidence'".[28] I similarly have no evidence before me as to whether the information was treated consistently in a manner that indicates a concern for its protection from disclosure by the proponents prior to being communicated to the City. Once the information was supplied to the City however, the City submits that it "has not been made public to this day and none of the information has been transferred to a contract".[29] In regards to the fourth criteria, Adjudicator Flanagan determined that:

> The question of whether the intention to keep information confidential is shared by both parties is relevant, but not necessarily determinative. Ultimately, that question is to be resolved by considering the factors set out above. This approach is consistent with the statement in Order F05-29 that the determination of whether information is confidential depends on its contents, its purposes and the circumstances under which it was compiled. The mutual intention of the parties to keep the information confidential will often shed light on those questions. …[30]

---

[27] See Order F13-02 at para. 18 citing order 01-36 at para. 26. See also Order 00-37, 2000 CanLII 14402 (BC IPC) at para. 37.
[28] Order F13-20 at para. 25 citing Order 04-06, 2004 CanLII 34260 (BC IPC).
[29] Public body's reply submission at p. 6.
[30] Order F13-20 at para. 27.

[30] The contents of the information in dispute are the transaction fee amounts for each bid. Their purpose is to convey pricing information from the shortlisted proponents to the City. The applicant contends that other cities such as Surrey and Toronto disclose information about the value of proposals, and he supplied information from websites that shows this.[31] As I do not have evidence of a mutuality of understanding between the parties that they intended to keep this information confidential, and based on the evidence the applicant provided that other cities routinely disclose this information, I am not persuaded that the information was prepared for a purpose which would not entail disclosure. For all of the reasons above, I find that the transaction fee amounts for each bid were not supplied implicitly in confidence.

[31] In summary, I have determined that s. 21(1)(b) does not apply to any of the information in dispute because the term length and the transaction fee amount for the previous contract were not supplied and the transaction fee amounts for the each bid were not supplied in confidence. Therefore, it is unnecessary for me to consider whether disclosure of the information in dispute could reasonably be expected to result in any of the harms set out in s. 21(1)(c). For completeness however, I have considered that issue.

Harm to third party interests

[32] Former Commissioner Loukidelis articulated the standard of proof for s. 21(1)(c) in Order 00-10 as follows:

> Section 21(1)(c) requires a public body to establish that disclosure of the requested information could reasonably be expected to cause "significant harm" to the "competitive position" of a third party or that disclosure could reasonably be expected to cause one of the other harms identified in that section. There is no need to prove that harm of some kind will, with certainty, flow from disclosure; nor is it enough to rely upon speculation. Returning always to the standard set by the Act, the expectation of harm as a result of disclosure must be based on reason.[32]

[33] The City submits that disclosing the information in dispute would harm the "competitive and negotiating position" of the third parties for future projects.[33] I infer from this that the City is arguing that s. 21(1)(c)(i) applies, although the City makes no submissions about whether the harm it is alleging would be "significant" as set out in s. 21(1)(c)(i). The applicant submits that previous orders have held that disclosing bid information is not harmful to third parties[34] and that the City has not provided any evidence to support its claim that

[31] Applicant's initial submission at paras. 9-10 and attachments.
[32] Order 00-10, 2000 CanLII 11042 (BC IPC) at p. 9.
[33] Public body's initial submission at para. 16.
[34] Applicant's initial submission at para. 16 citing Order F13-07, 2013 BCIPC 8 (CanLII).

disclosing the information could reasonably be expected to harm the proponents.[35]

[34] In Order 03-33, former Commissioner Loukidelis determined that disclosure of a proposal for internet payment processing services could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of a third party and result in undue financial loss or gain to a third party as set out in s. 21(1)(c)(i) and (iii) of FIPPA.[36] In that case, the third party submitted that its proposal contained "sensitive" pricing information and that disclosing it would give its competitors "a competitive advantage and would result in a corresponding detriment to Global's competitive position."[37] The third party also submitted that the public body was likely to issue a new RFP for the same or similar services in the "near future".[38]

[35] In this case, none of the third parties made submissions. The City submits that:

> The RFP for Pay-By-Phone Parking Payment is reissued on a 3 year cycle. This type of RFP for services with a consistent delivery requirement that are technology-based, are deliberately reissued to the market on a specific schedule. This ensures the various technological components remain current and associated pricing remains competitive. In many instances where only a small group of companies have the ability to respond to an RFP and no one group has a specialized technological component giving them an edge, pricing is extremely competitive. Release of proponent's names and bid prices at the end of one RFP cycle, can significantly and negatively influence the competitive bidding process when the RFP is reissued to market….[39]

[36] The City does not submit whether this is an instance "where only a small group of companies have the ability to respond to an RFP and no one group has a specialized technological component giving them an edge" and therefore pricing is "extremely competitive". Even if the City had submitted that this was such a case, unlike in Order 03-33, it has not explained or supplied evidence to support these claims. In regards to reissuing the RFP, I reject the City's argument that disclosing prices in this case can negatively influence the bidding process for future RFPs, because the City submits that it only reissues RFPs for pay-by-phone parking services every three years. In a rapidly changing era of

[35] Applicant's reply submission at para. 5.
[36] Order 03-33, 2003 CanLII 49212 (BC IPC) at para. 53.
[37] Order 03-33 at para. 39.
[38] Order 03-33 at para. 41.
[39] Public body's reply submission at p. 5.

technology, I fail to see how knowing this information could materially affect bidding three years later. This is not a circumstance where there is evidence that the RFP will be reissued in the "near future" as in Order 03-33. For these reasons, I find that s. 21(1)(c)(i) and 21(1)(c)(iii) do not apply to the transaction fee amounts and the length of the term of the previous contract.

[37] In regards to s. 21(1)(c)(ii), the City adduced no argument or evidence. In Order 02-04, former Commissioner Loukidelis determined that a public body was not required under s. 21 to refuse to disclose a list of subcontractors submitted by a third-party proponent because the public body had not discharged its evidentiary burden under s. 57(1).[40] I find that that the City has not discharged their evidentiary burden under s. 57(1) with respect to this sub clause therefore it does not apply.

CONCLUSION

[38] For the above reasons, I make the following order under s. 58 of FIPPA:

- The City is not authorized under s. 17(1) or required by s. 21(1) of FIPPA to refuse to disclose the information in dispute.

- I require the City under s. 58 of FIPPA to give the applicant access to the information in dispute by **October 21, 2014,** and concurrently, to copy me on the cover letter to the applicant together with a copy of the record.

September 8, 2014

ORIGINAL SIGNED BY

Caitlin Lemiski, Adjudicator

OIPC File No.: F13-52314

[40] Order 02-04 2002 CanLII 42429 (BC IPC) at para. 7.