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Order F14-37

CITY OF VANCOUVER

Hamish Flanagan, Adjudicator

September 12, 2014

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Summary: The applicant requested information relating to the Burrard Street Bridge. The City released some routine inspection records but withheld portions of eleven engineering reports about different aspects of the bridge, citing ss. 13, 15, 17, 19 and 21 of FIPPA. The Adjudicator ordered the records disclosed because none of the exceptions to disclosure in FIPPA applied.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13, 15, 17, 19 and 21

Authorities Considered: B.C.: Order F12-03, 2012 BCIPC 3 (CanLII); Order F13-07, 2013 BCIPC 8 (CanLII); Order 00-10, 2000 CanLII 11042 (BC IPC); Order F07-15, 2007 CanLII 35476 (BC IPC); Order 02-50, 2002 CanLII 42486 (BC IPC); Order 01-15, 2001 CanLII 21569 (BC IPC); Order F12-02, 2012 BCIPC 2 (CanLII); Order F10-15, 2010 BCIPC 24 (CanLII); Order F06-14, 2006 CanLII 25576 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC); Order F13-19, 2013 BCIPC 26 (CanLII); Order F12-13, 2012 BCIPC. 18 (CanLII); Order F10-06, 2010 BCIPC 28 (CanLII); Order F12-14, 2012 BCIPC 20 (CanLII); Investigation Report F13-05 www.oipc.bc.ca/investigation-reports/1588; Order F13-08, 2013 BCIPC 9 (CanLII); Order F13-02, 2013 BCIPC 2 (CanLII); Order F11-08, 2011 BCIPC 10 (CanLII); Order 03-02, 2003 CanLII 49166 (BC IPC); Order 03-15, 2003 CanLII 49185 (BC IPC); Order 01-01, 2001 CanLII 21555 (BC IPC); Order 00-02, 2000 CanLII 8819 (BC IPC); Order 01-20, 2001 CanLII 21574 (BC IPC). **NS:** Order 01-39, 2001 CanLII 3388 (NS FOIPOP); Order 00-37, 2000 CanLII 3620 (NS FOIPOP).

Cases Considered: *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)* 2012 BCSC 875*; College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665; *John Doe v. Ontario (Finance)*, 2014 SCC 36; *Lavigne* v. *Canada (Office of the Commissioner of Official Languages) 2002 SCC 53*; *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner),* 1998 CanLII 6444 (BC CA); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Merck Frosst Canada Ltd. v. Canada (Health),*2012 SCC 3; *F.H. v. McDougall*, 2008 SCC 53.

INTRODUCTION

[1] The applicant, a journalist, requested information from the City of Vancouver ("City") about the Burrard Street Bridge ("the bridge"). The City disclosed some information but withheld portions of eleven engineering reports ("reports") about different aspects of the bridge citing ss. 13, 15, 17, 19 and 21 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The eleven reports were authored by the following third party companies:

1) Trans Canada Coating Consultants Ltd. (one report);

2) Associated Engineering (B.C.) Ltd (seven reports);

3) Buckland & Taylor Ltd (two reports); and

4) Levelton Consultants Ltd. (one report, which states it was prepared for Associated Engineering Ltd).

[2] The applicant requested that the Office of the Information and Privacy Commissioner ("OIPC") review the City's decision. During the review, the City disclosed some additional information; however not all of the issues in dispute were resolved and the applicant requested that this matter proceed to an inquiry under Part 5 of FIPPA.

[3] None of the third parties provided submissions to this inquiry.

[4] In submissions to the inquiry the applicant raised a new argument that the records should be disclosed because it was in the public interest under s. 25 of FIPPA.

ISSUES

[5] This inquiry will consider whether the City must, without delay, disclose to the applicant the requested records under s. 25 of FIPPA. If the answer is no, it will consider whether the City must or may refuse to disclose the withheld information because disclosure would:

1) harm the security of property under s. 15(1)(l) of FIPPA;

2) disclose information which could reasonably be expected to harm the financial or economic interests of the City or a third party under s. 17 of FIPPA;

3) disclose information which could reasonably be expected to harm public safety under s.19(1)(b) of FIPPA;

4) harm the business interests of a third party under s. 21 of FIPPA; and

5) reveal advice or recommendations under s. 13 of FIPPA.

DISCUSSION

[6] **Records in issue**—The records in issue are eleven reports, on various aspects of the condition of Burrard Street Bridge, written by the following companies:

1) Trans Canada Coating Consultants Ltd. (one report);

2) Associated Engineering (B.C.) Ltd. (seven reports);

3) Buckland & Taylor Ltd. (two reports); and

4) Levelton Consultants Ltd. (one report, which states it was prepared for Associated Engineering Ltd).

[7] The reports include photographs of various parts of the bridge and drawings of proposed modifications to the bridge. The reports contain options and recommendations for work to the bridge, including some cost estimates of various options including the recommended work.

Preliminary matter- objection to applicant's reply submission

[8] The City objected to the applicant's reply submission because it says it contains several attachments which should not have been entered at the reply stage of the inquiry and which are not relevant to the inquiry. The attachments contain the results of previous freedom of information requests by the applicant to the City. The attachments purportedly support a statement the applicant makes in his reply submission that the City is not transparent in responding to

freedom of information requests that relate to a particular political party. However, if there is any connection between this point and the attachments and the issues in this inquiry it is not apparent, and the applicant does not explain it. In any event, I conclude the point itself is not relevant to the proceedings and accordingly, I do not need to consider whether the attachments were appropriately submitted at the reply stage.

[9] **Public Interest Disclosure–– s. 25––**Section 25 was not identified in the OIPC investigators fact report or notice of inquiry issued to the parties as an issue for this inquiry but was raised by the applicant in his initial submission.

Past orders and decisions of the OIPC have said parties may raise new issues at the inquiry stage, only if they request and receive permission to do so.[1] The applicant had an opportunity during OIPC mediation in which to raise s. 25 of FIPPA. He did not explain why he did not raise the issue prior to his initial submission or why he should be permitted to raise s. 25 at this late stage.

[10] Despite it not being raised earlier, I will consider whether s. 25 applies here, and will consider the potential application of s. 25 first because if s. 25 does apply, it would override any other exceptions to the disclosure of the requested records at issue in the inquiry.

[11] The portions of Section 25 relevant to this inquiry state:

> 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
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> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.

[12] The applicant's submission regarding s. 25 is brief so I will reproduce it in full:

> Citizens have a right to know the condition of the bridge they use to walk, cycle or drive across, particularly whether it is safe for humans or a hazard to the environment. City of Vancouver owes citizens a duty of transparency, so that citizens can decide whether the bridge is being kept well and whether it is in need of replacement sooner or later.

[13] The City submits that s. 25 does not apply to the records.

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[1] Order F12-03, 2012 BCIPC 3 (CanLII) at para 6.

[14] Previous orders have discussed the application of s. 25,[2] and it was recently analyzed in an Investigation Report by Commissioner Denham.[3]

[15] The reports are about the condition of the bridge and recommendations for maintenance and other work to the bridge. None of the reports reveal on their face a risk of significant harm to the environment or to the health or safety of the public or any group of people, as is required under s. 25(1)(a). Nor do they reveal that disclosure is clearly in the public interest as is required under s. 25(1)(b). The fact that the public may be interested in a record does not mean that it is "clearly in the public interest" to disclose it without delay

[16] I also note that the applicant offers no explanation as to why he believes there is a temporal urgency or a compelling need for disclosure of the reports, as required by s. 25.[4] Section 25 does not apply to the records, so I will proceed to consider the exceptions to disclosure applied to the withheld information.

[17] **Harm the security of property–– s. 15(1)(l)**—The City submits that s. 15(1)(l) applies to information in the reports about the structure of the bridge, including photos of the bridge.

[18] The relevant portions of s. 15(1)(l) of FIPPA read as follows:

> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
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> …
>
> (l) harm the security of any property or system, including a building...

[19] The standard of proof applicable to harms-based exceptions like s. 15 is whether disclosure of the information could reasonably be expected to cause the specific harm.[5] Although there is no need to establish certainty of harm, it is not sufficient to rely on speculation.[6] In Order F07-15, former Commissioner Loukidelis outlined the evidentiary requirements to establish a reasonable expectation of harm:

> …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

[2] See, for example, Order F12-14, 2012 BCIPC 20 (CanLII); Order 01-20, 2001 CanLII 21574 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC), Order F06-14, 2006 CanLII 25574 (BC IPC).
[3] Investigation Report F13-05, www.oipc.bc.ca/investgation-reports/1588.
[4] Investigation Report F13-05.
[5] Order F13-07, 2013 BCIPC 8 (CanLII).
[6] Order 00-10, 2000 CanLII 11042 (BC IPC), at p.10.

> direct connection between disclosure of specific information and the harm that is alleged'.[7]

[20] This approach to harms-based exceptions, which are found in federal and provincial access to information statutes across Canada was applied by the Supreme Court of Canada in two recent decisions.[8] In those decisions the Court described the exception as requiring a reasonable expectation of probable harm from disclosure of the information.[9] As the Court noted, the wording of the section requiring a reasonable expectation of harm tries to mark out a middle ground between that which is probable and that which is merely possible.[10] An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground.[11] The inquiry is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences."[12]

[21] In *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner),*[13] Bracken, J., noting the *Merck Frosst* decision confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm, and that the burden rests with the public body to establish that the disclosure of the information in question could result in the identified harm.

[22] The City argues s. 15(1)(l) applies because the bridge is an attractive terrorist target. It refers to previous incidents of terrorism, including an attempted bombing at the BC Legislature, the Boston Marathon bombing in 2013 and the bombing of an Air India flight in 1985 to support its argument.

[23] The applicant submits that the City has no history of terrorist attacks and no known threat to its bridges in particular. The applicant also argues that access

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[7] Order F07-15, 2007 CanLII 35476 (BC IPC) at para. 17, referring to *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53.

[8] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 and *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3.

[9] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para 54 citing *Merck Frosst.*

[10] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para 54 citing *Merck Frosst.*

[11] Ontario (Community Safety and Correctional Services) *v.* Ontario (Information and Privacy Commissioner), 2014 SCC 31 at para 54 citing *Merck Frosst* at paras. 197 and 199.

[12] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54 citing *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), at para. 40.

[13] 2012 BCSC 875, at para. 43.

to the records is not required for an act of terrorism against the bridge and cites Order F13-07 in support.[14]

[24] In Order F13-07, the public body's argument that the architectural drawings of a prominent Victoria building should be withheld because the information could be used for a terrorist plot was found not to satisfy the likelihood of harm test. The City attempts to distinguish Order F13-07. It says that the bridge is more critical infrastructure than the building in issue in Order F13-07 and that therefore, if damaged, the harm would be greater. Even if this is true, this argument and the City's submissions in general do not address or establish the necessary clear and direct evidentiary link between release of the information and the likelihood of the harm occurring to the standard required for s. 15(1)(l). I cannot see how the information could aid any potential terrorist attack on the bridge, particularly in light of the information about the bridge that is already available simply via a visual inspection of it.

[25] In summary, I find the City has not established that s. 15(1)(l) applies to any of the information withheld from the records.

[26] **Harm to the financial or economic interests of the City or a third party––Section 17**—Section 17(1) states in part:

> The head of a public body may refuse to disclose to 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.

[27] In Order 02-50, former Commissioner Loukidelis set out the threshold to be met by a public body in order to refuse disclosure under s. 17, of FIPPA:

> 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

[14] Order F13-07, 2013 BCIPC 8 (CanLII).

> 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.[15]

[28] In relation to s. 17(1)(d), the City says disclosure of the withheld information would cause undue financial loss to the third party firms that authored the reports about the bridge. It says release of the reports would impact the third party firms' ability to bid on the project outlined in the reports if a Request for Proposal ("RFP") process was initiated by the City. They say that release of the cost estimates for work and the options for remedial work outlined in the reports would preclude the firms' ability to adapt and negotiate their pricing in any future RFP.

[29] I do not accept that disclosure of the reports would fetter the report authors in any way regarding the pricing or other content of any potential RFP bid. As the City's initial submission states with respect to the cost estimates in the reports, "this information is only indirectly related to final project bids or dollars spent by the City…"[16] In my view, any cost estimates in the reports are general estimates only and may differ from pricing in an RFP bid. Actual bids would reflect the scope of the work, an assessment of risk, desired profit margins, the perceived competitiveness of the RFP process and other factors at the actual time of the bid. There is no evidence from the City that the report authors are fettered in a potential RFP bid as a consequence of producing the reports in question. In particular if the City were to issue an RFP and receive an RFP bid from the report authors, they already have the cost estimate information in the report which they could use to compare against that future RFP bid. Release of these reports to the applicant would not make any difference to the City's ability to use the reports in this way. Therefore I fail to see how disclosure to the applicant would fetter the firms in any future RFP bid. Further, in the absence of evidence of an RFP and any intention by the engineering firm to bid on an RFP, the suggested harm is too speculative to meet the required threshold.

[30] The City also says release of the records will impact the ability of the firms who authored reports to bid on projects in a fair and equitable manner with firms who did not author these reports, and that this will cause them undue loss. I suggest the opposite is true. If other potential bidders do not have access to relevant information for bidding on an RFP, that could unfairly give the report authors an advantage in any RFP process. Further, any loss of advantage that may occur from release of the reports is also not undue, because the report authors have been compensated by the City for producing the reports. Subsequent use of the information in those reports by the City for its own interests, including to issue an RFP, does not cause undue loss.

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[15] Order 02-50, 2002 CanLII 42486 (BC IPC) at para. 137.
[16] City's initial submission at p. 5.

[31] In relation to s. 17(1)(f), the City says that releasing the reports reveals cost estimates and recommendations for future work, which would provide potential bidders with pricing estimates and preclude unbiased and fair bids in any RFP, ultimately harming the City. I do not accept this argument. First, any RFP process is inherently a competitive process, so cost estimate information does not preclude bidders from submitting a bid that gives them the best chance of being the successful proponent. As noted above, many factors influence proponents' bids and the overall competitiveness of an RFP process. Arguably, the release of the reports will assist in obtaining fair bids, because having multiple informed bidders is the best way to assure the competiveness of the RFP bid process. The competiveness of the bid process for the City will certainly not be assisted by having one or more bidders who have greater knowledge than all other bidders.

[32] In summary, disclosure of the information withheld under s. 17 could not reasonably be expected to harm the financial or economic interests of the City.

[33] **Harm to public safety–– s. 19(1)(b)**––Section 19(1)(b) states:

> The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to
>
> …
>
> (b) interfere with public safety.

[34] Where the City relied on s. 19)(1)(b) to withhold information, it did so using essentially the same rationale as it withheld information under s. 15(1)(l). Specifically the City argues the bridge is a critical infrastructure for the City and damage to the bridge could result in a large loss of life. Therefore, the City says release of information in the reports will harm the City's ability to ensure public safety.

[35] The City must provide sufficient evidence to support the conclusion that disclosure of the information could reasonably be expected to cause a threat to one of the interests identified in s. 19. There must be a rational connection between the disclosure and the threat, and evidence of speculative harm will not suffice.[17]

[36] The City's argument fails to satisfy s. 19(1)(b) for substantially the same reasons as it failed to satisfy s. 15 above. The City's argument is speculative

[17] Order 01-01, 2001 CanLII 21555 (BC IPC); Order 00-02, 2000 CanLII 8819 (BC IPC).

and it has not established a satisfactory link between release of the information and the specific harm identified.

[37] **Disclosure harmful to third party business interests—Section 21**— Section 21(1) contains three parts which must all be met for s. 21 to apply. The relevant parts of s. 21(1) are:

> **21**(1) The head of a public body must refuse to disclose to an applicant information
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> (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,

*Interpreting s. 21(1***)**

[38] The principles for determining whether s. 21(1) applies are well-established.[18] 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 listed in s. 21(1)(c).

The parties' positions regarding s. 21(1)

[39] The applicant submits that s. 21 does not apply to the records. The City's submissions state that they do not rely on s. 21, but support the position of the third party Associated Engineering where they assert s. 21 applies. Associated Engineering were provided with notice of this inquiry but did not make a submission. However as the City does make brief submissions on why they believe s. 21 applies to the withheld information, I will proceed to consider the City's submission on s. 21.

Commercial, financial, labour relations, scientific or technical information of or about a third party

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

[40] The City says the reports contain technical information including options with pros and cons for remedial or upgrade work.

[41] Previous orders have defined "technical information" under s. 21(1)(a)(ii) as information belonging to an organized field of knowledge falling under the general categories of applied science or mechanical arts, such as architecture, engineering or electronics.[19] This usually involves information prepared by a professional with the relevant expertise, and describes the construction, operation or maintenance of a structure, process, equipment or entity.[20]

[42] I agree that the reports, being detailed reports relating to various aspects of the conditions of the bridge, contain information that qualifies as technical information for the purposes of s. 21(1)(a).

Was the information supplied in confidence?

[43] Determining whether information was supplied implicitly or explicitly in confidence is 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."[21] I will first consider whether the information in dispute was supplied.

[44] While the City does not directly address whether the information was supplied, it is obvious on the face of the records that the reports were supplied to the City, and many of the reports are specifically addressed to the City by the third parties.

[45] I will now consider whether the information was supplied, implicitly or explicitly, in confidence. The test for whether information was supplied explicitly or implicitly, "in confidence" is objective and the question is one of fact; evidence of the third party's subjective intentions with respect to confidentiality is not sufficient.[22]

[46] The City did not provide any evidence that the third parties supplied the reports explicitly in confidence. However, Associated Engineering's reports contain a statement that the reports contain proprietary information and are

[19] See, for example, Order F12-13, 2012 BCIPC 18, and Order F10-06, 2010 BCIPC 9.
[20] Order F13-19, 2013 BCIPC 26 (CanLII).
[21] See Order F13-17 at para.14.
[22] Order F13-02, 2013 BCIPC 2 (CanLII), at para. 18 from Order F11-08, 2011 BCIPC 10 (CanLII), at para. 24, citing Order 01-39, 2001 CanLII 3388 (NS FOIPOP) citing Re Maislin Industries Ltd. and Minister for Industry (1984) 10 DLR (4th) 417 (FCTD); see also Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs) (1997) 148 DLR (4th) 356 (FCTD).

confidential. The reports authored by the other third parties do not contain such a statement.

[47] The City does not provide any evidence that suggests that the reports were received explicitly in confidence. However it says that the reports are only given to City staff to whom the reports are relevant and that they are not treated as public documents, though they may be cited in City reports to City meetings that are public. I accept this submission as evidence that the City treated the Associated Engineering reports consistent with the explicit assertion of confidentiality in those reports. I also consider the City's submission to be an assertion that the City has treated the reports prepared by the third party firms other than Associated Engineering as having been implicitly supplied in confidence.

[48] In regards to whether the reports prepared by the third party firms other than Associated Engineering were supplied implicitly in confidence, I have considered Order F13-02 where former Commissioner Loukidelis stated 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.[23]

[49] I have no evidence on the first three factors, except that the City mentions that it is possible that some parts of the third parties' reports may become publicly available by being cited in public reports prepared by City staff for City meetings. Regarding the fourth factor, the City's submission makes clear that the information was supplied to the City in order to enable it to know what work might be required on the bridge. Therefore, when they issue an RFP for the work as they suggest they will, it will reflect the scope of work the various reports suggested be undertaken. The reports were a necessary precursor to, and shape

[23] See Order F13-02, 2013 BCIPC 2 (CanLII) at para.18 citing Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 26. See also Order 00-37, 2000 CanLII 3620 (NS FOIPOP) at para. 37.

the scope of the work that will occur following an RFP process.[24] Any such RFP process will therefore require disclosure of at least some of the contents of the reports to enable the City to describe the scope of the work required and the basis for it. In summary, given that the purpose of the reports was to help make decisions on future work, and that at least some of the report contents would need to be used for issuing the RFP for that work, this suggests that the reports were not intended to be held entirely in confidence.

[50] In light of the evidence before me, I am not satisfied that the reports prepared by the third party firms other than Associated Engineering were supplied implicitly in confidence.

[51] Despite my finding that some of the reports were not supplied in confidence, I will proceed to consider the City's arguments regarding harm under s. 21(1)(c) for all of the reports.

[52] **Harm to third party interests––s.21**—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.[25]

[53] The City's submissions do not explicitly refer to any of the harm provisions in s. 21(1)(c), but they refer to potential harm to the negotiating position and competitive position of the third parties, which falls within s. 21(1)(c)(i). The City alleges these harms will arise from releasing pricing and project options along with recommendations prior to any RFP being issued. The City makes no submissions about whether the harm it alleges would be "significant" as required by s. 21(1)(c)(i).

[54] Also, in order to proceed with an RFP, the City will have to release certain information about the nature of the requested work to provide potential proponents with the necessary information to place their bids. Further, as the City itself has noted, the cost estimates contained in the reports are quite different from RFP bids. As noted above, an RFP bid process is inherently competitive and multiple factors may cause a bid to differ from a cost estimate. Any competing bidder would tailor their bid on the assumption that the cost estimates

[24] City's initial submission at p. 6.
[25] Order 00-10, 2000 CanLII 11042 (BC IPC) at p. 9.

in the reports indicate a successful RFP bid at their own risk, especially because the third parties are not precluded from providing RFP bids quite different in cost and scope from those contained in the reports. I do not accept the release of the information withheld under s. 21 meets the threshold for significant harm.

[55] **Advice or recommendations–– s. 13**—The City submits that some of the withheld information including options for rehabilitation work, and recommendations for maintenance and future additional review work comprises advice or recommendations under s. 13(1). The relevant parts of s. 13 for this inquiry are:

> **Policy advice, recommendations or draft regulations**
>
> 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
>
> 13(2) The head of a public body must not refuse to disclose under subsection (1)
>
> (a) any factual material,
>
> …
>
> (i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,
>
> …
>
> (m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy

[56] The process for determining whether s. 13 of FIPPA applies to information involves two stages. The first stage is to determine whether the disclosure of the information "would reveal advice or recommendations developed by or for a public body or a minister" in accordance with s. 13(1). If it does, it is necessary to consider whether the information at issue falls within any of the categories of information listed in s. 13(2) of FIPPA.

[57] **The Purpose and Scope of s. 13(1)**—The purpose of s. 13(1) is to allow full and frank discussion of advice or recommendations on a proposed course of action within a public body, preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny. The principle underlying this exception has been the subject of many orders, including Order 01-15 where former Commissioner Loukidelis said:

> This exception is designed, in my view, to protect a public body's internal decision-making and policy-making processes, in particular while the public

> body is considering a given issue, by encouraging the free and frank flow of advice and recommendations.

[58] The British Columbia Court of Appeal stated in *College of Physicians of B.C. v. British Columbia* that "advice" is not necessarily limited to words offered as a recommendation about future action. As Levine J.A. states in *College of Physicians* "advice" includes "expert opinion on matters of fact on which a public body must make a decision for future action."[26]

[59] Previous orders have also found that a public body is authorized to refuse access to information that would allow an individual to draw accurate inferences about advice or recommendations.[27] This can include policy issues, possible options for changes to the policy and considerations for these various options, including a discussion of implications and possible impacts of the options.[28] Further, in *John Doe v. Ministry of Finance*[29] the Supreme Court of Canada found the word "advice" in s. 13(1) of the Ontario FIPPA includes policy options, whether communicated to anyone or not.

[60] I am satisfied that the information withheld under s. 13(1) in the reports contains advice or recommendations. The reports were prepared for the City and contain a mix of expert opinions, rehabilitation and maintenance options, advice and recommendations relating to the bridge.

[61] **Section 13(2)**—The applicant submits that s. 13(2)(a), s13(2)(i) and s. 13(2)(m) apply to the reports, but does not provide any explanation to support his assertions. The City submits that s. 13(2) does not apply and does not address the specific s. 13(2) exceptions raised by the applicant.

[62] Section 13(2)(i) provides that a public body must not refuse to disclose under s. 13(1) a feasibility or technical study, including a cost estimate, relating to a project or policy of a public body. The scope of section 13(2)(i) has not been discussed in previous orders in BC, except in Order F13-08 where Adjudicator Barker commented that "A study implies that a decision still needs to be made about whether to proceed with a course of action,…"[30]

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[26] 2002 BBCA 665 at para 113.
[27] This was also at the heart of the concern in the recent decision in *Insurance Corporation of British Columbia v. Automotive Retailers Association, 2013 BCSC 2025* – see paras. 52 and 66.
[28] See Order F12-02, 2012 BCIPC 2 (CanLII); Order F10-15, 2010 BCIPC 24 (CanLII) at para. 23; Order 02-38, 2002 CanLII 42472 (BC IPC) at paras. 102-127; Order F06-16, 2006 CanLII 25576 at para. 48; *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665; and *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner),* 1998 CanLII 6444 (BC CA).
[29] 2014 SCC 36.
[30] Order F13-08, 2013 BCIPC 9 (CanLII) at para 65.

[63] While not binding on me, I adopt the following interpretation note on s. 13(2)(i) in relation to the scope of the phrase "technical study" in the BC Government Office of the Chief Information Officer's[31] FIPPA manual:

> A "**technical study**" is a study involving or concerned with the mechanical arts and applied sciences; of or relating to a particular craft or subject or its techniques [OED]. A technical study can involve an application of some form of specialized knowledge to a subject (e.g., where an engineer studies a plan to build a road on a particular site) and can include a cost estimate.

[64] In my view this definition is accurate, consistent with the meaning of the related phrase "technical information" in s. 21 of FIPPA[32] and describes the reports in issue. They record the application of specialized engineering and related scientific expertise to study the condition of the bridge. The City's submissions stress that the reports are technical in nature.[33] Some of the reports contain cost estimates, as referenced in 13(2)(i). Further, as the City's submission makes clear, the reports are designed to inform the City's future projects, namely to maintain and rehabilitate the bridge. I note that while the withheld records are generally referred to as reports not studies,[34] which is the language of s. 13(2)(i), the reports contain the results of the third parties' studies of the bridge, so I do not put any weight on this distinction in language in this case.

[65] Because I find that s. 13(2)(i) applies to the information withheld under s. 13, I do not need to consider ss. 13(2)(a) and (m), which the applicant submits also apply to the records.

[66] In summary, while I find that s. 13(1) applies to the information withheld under s. 13, the information cannot be withheld because it is part of a technical study for the purposes of s. 13(2)(i) of FIPPA.

CONCLUSION

[67] I find that the City is neither authorized to withhold the reports under ss. 13, 15, 17 and 19 of FIPPA, nor required to withhold the reports under s. 21 of FIPPA.

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[31] Part of the Ministry of Technology, Innovation and Citizens' Services.

[32] See, for example F13-19, 2013 BCIPC 26 (CanLII) at para 11, Order F12-13, 2012 BCIPC 18 (CanLII) at para 11, and Order F10-06, 2010 BCIPC 9 (CanLII) at para 35.

[33] For example, City reply submission at para 2 bullet points 2, 3 and 4, reply submission at p. 5.

[34] The City's initial submission at p. 2 describes the records in dispute as "highly technical and specific engineering studies" and the reply submission also refers to the reports as the products of study at para. 2 bullet points 2 and 4.

[68] For the reasons given above, under s. 58 of FIPPA, I require the City to give the applicant access to the withheld information by October 27, 2014. The City must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

September 12, 2014

ORIGINAL SIGNED BY

Hamish Flanagan, Adjudicator

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