



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

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Order F14-50

CITY OF NEW WESTMINSTER

Caitlin Lemiski
Adjudicator

December 16, 2014

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Summary: The applicant requested financial records related to a building complex. During mediation and the inquiry process, the City disclosed all the information in dispute except for the proposed price for an air space parcel required to build an office tower. The City withheld this information under ss. 17(1)(b) and (f) of FIPPA on the basis that disclosure would be harmful to the financial or economic interests of the City. The proposed price was intended for a private partner who then withdrew from the project. The adjudicator determined that the City was not authorized to continue to withhold the proposed price. The evidence did not satisfy the adjudicator that the proposed price still had monetary value or that disclosing it could reasonably be expected to harm the City's negotiating position with respect to the sale of the air space parcel.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 17(1)(b) and (f).

Authorities Considered: **B.C.:** Order 02-50, 2002 CanLII 42486 (BC IPC), Order F13-02, 2013 BCIPC 2 (CanLII). **Ont:** Order PO-1894, 2001 CanLII 26094 (ON IPC).

Cases Considered: *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23.

INTRODUCTION

[1] An applicant requested information about a new building complex that included an office tower. The City of New Westminster (the “City”) responded to the applicant’s request by providing records containing severing. The applicant was not satisfied and requested a review from the Office of the Information and Privacy Commissioner (“OIPC”). The City eventually provided all of the information in dispute except for the price it once proposed to sell an air space parcel for to a private developer.¹

[2] The City is withholding the price under ss. 17(1)(b) and (f) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). Section 17(1)(b) authorizes a public body to withhold financial, commercial, scientific or technical information that belongs to a public body and that has, or is reasonably likely to have, monetary value if disclosing it could reasonably be expected to harm the financial or economic interests of a public body. Section 17(1)(f) authorizes a public body to withhold information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[3] OIPC mediation failed to resolve the matters in dispute and an inquiry was held under Part 5 of FIPPA.

ISSUE

1. Is the City authorized by ss. 17(1)(b) or 17(1)(f) of FIPPA to refuse access to the information in dispute?

[4] Section 57(1) of FIPPA provides that the City has the burden of proof in this inquiry.

DISCUSSION

[5] **Background**—The City planned to build an office tower as part of a new building complex in partnership with a private developer. Under the terms of a Memorandum of Understanding (“MOU”), the City and the developer would share the cost of building the tower.² The MOU included a price that the developer would pay the City to buy the air space where the office tower would be built. The MOU stated that it was not legally binding,³ and the parties signed it before the office tower was built. The private developer pulled out of the project. It never built the tower with the City nor did it purchase the air space

¹ May 29, 2014 letter from the City to the applicant.

² MOU between the City and UPG Property Group, disclosed to the applicant as an enclosure to the City’s May 29th, 2014 letter to the applicant, at p. 3 under “Cost Sharing and Procurement.”

³ See the MOU at p. 5.

parcel. Instead, the City built the office tower at its own cost.⁴ It sold it to a new buyer as an air space parcel. The sale has not yet closed.

[6] This inquiry is unusual in that after the parties made their submissions to this inquiry, the City sold the tower and disclosed all the remaining information in dispute except for the proposed price in the MOU. It is within this context that I consider the parties' positions.

[7] **Record in dispute**—The information in dispute is the price in the MOU with the developer that withdrew from the project. The rest of the MOU has been disclosed.

[8] **Applying s. 17**—Section 17 permits public bodies to withhold information that would be harmful to their financial or economic interests if disclosed. The portions of s. 17 relevant to this inquiry 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:
- (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;
 - ...
 - (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.

[9] Previous orders have held that to meet the evidentiary threshold for s. 17, a public body must establish “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.”⁵

[10] The Supreme Court of Canada held in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 that the proper approach to harms-based exceptions is that a party “must show that the risk of harm is considerably above

⁴ Public body's initial submission at para. 18 and see “Report of the Office of the CAO”, prepared by the City and dated March 3, 2014. The OIPC accepted a copy of the report, supplied by the applicant and with the City's knowledge, after submissions for this inquiry had closed.

⁵ Order 02-50 at para. 137.

a mere possibility, although not having to establish on the balance of probabilities that the harm will in fact occur." ⁶

[11] **Position of the parties**—The City argues that if the price in the MOU is disclosed, it could reasonably be expected to result in the City having to sell the air parcel containing the office tower at a lower price.⁷ The City also argues that buyers will not trust the City to keep its business negotiations confidential, and this will also harm the City's financial interests with respect to the sale of the office tower.⁸

[12] **Analysis and finding**— In regards to s. 17(1)(b), the City's Chief Administrative Officer deposed that the price in the MOU "is the value of the land associated with the Office Tower as negotiated by the parties, and is similar to confidential information contained in an appraisal or market study report used in property negotiations."⁹ Based on the City's evidence and the information itself, I accept that the price is financial and commercial information. The next question under s. 17(1)(b) is whether the proposed price in the MOU has, or is reasonably likely to have, monetary value.

[13] Monetary value can be established if there is evidence that disclosure of the information could reasonably be expected to result in monetary loss. In Ontario Order PO-1894¹⁰, the Ontario Realty Corporation ("ORC") argued with respect to a pending property sale that "[v]alue can reasonably be expected to be lost if potential purchasers learn of confidential information of the ORC as vendor, particularly its negotiating positions, its reserve price, its confidential appraisals or terms of agreements which did not close."¹¹ In that case, former Assistant Commissioner Mitchinson held that

... until the purchase and sale of the property has been finalized, it is possible that the sale will not take place, and that the ORC may have to find a new purchaser for the property. If that were to occur, disclosure of the terms negotiated between the ORC and the current prospective purchaser could place the ORC in a disadvantageous position with future potential purchasers. Furthermore, disclosure of prospective uses and the value placed on the property by various parties could similarly be disadvantageous.¹²

⁶ *Merck Frosst*, para. 199. As quoted by Adjudicator Fedorak in Order F13-02 at para. 34.

⁷ Public body's initial submission at para. 35.

⁸ Public body's initial submission at para. 28.

⁹ Affidavit of the City's Chief Administrative Officer at para. 23.

¹⁰ Order PO-1894 (Appeal PA-000100-2), Ontario Realty Corporation (Re), 2001 CanLII 26094 (ON IPC).

¹¹ Order PO-1894 (Appeal PA-000100-2), at para. 31.

¹² Order PO-1894 (Appeal PA-000100-2), at para. 33.

[14] In this case, the circumstances are different than those in Order PO-1894 in that the price at issue is from a now-defunct MOU, not the price the office tower has conditionally sold for, which is information the City has already disclosed. Also, unlike Order PO-1894, the property in this case has changed significantly since the price in the MOU was set, because the tower has been built in the air space parcel.

[15] In my view, given that the City has already disclosed what it has sold the office tower for,¹³ it is unreasonable to expect that disclosing the price in the now-defunct MOU that was set before the tower was built could reasonably be expected to result in financial loss to the City. The price in the MOU was set for a specific buyer who was, at the time, going to share the costs of building the tower with the City. The City acknowledges in its submission that the way the developer was going to pay for the air space parcel affects its value.¹⁴ Since the tower has now been built, and the City did not share costs with a private developer, the price in the MOU no longer accurately reflects the value of the property. For these reasons, I find that the price in the MOU does not have, or is not reasonably likely to have, monetary value. Section 17(1)(b) therefore does not apply.

[16] For s. 17(1)(f) to apply, the City must establish that disclosing the proposed price could reasonably be expected to harm its negotiating position. For the same reasons I concluded the proposed price does not have monetary value, I also find that disclosing it could not reasonably be expected to harm the City's negotiating position. I do not find the City's argument that disclosing this information "is likely to dissuade potential purchasers from negotiating with the City,"¹⁵ to be persuasive. Since the City built the tower without a partner, it is no longer possible for the City to negotiate a price that reflects building the tower with a partner. Further, I find the City's argument that purchasers will not want to engage with the City if it cannot assure them that negotiations will remain confidential to be speculative in this case. The City has already disclosed the rest of the MOU to the applicant, and I am not persuaded that disclosing the price in the MOU could reasonably be expected to dissuade potential purchasers from negotiating with the City because the price in the MOU no longer accurately reflects the value of the property. I find that s. 17(1)(f) does not apply.

¹³ "Report of the Office of the CAO", prepared by the City and dated March 3, 2014. The OIPC accepted a copy of the report, supplied by the applicant and with the City's knowledge, after submissions for this inquiry had closed.

¹⁴ Public body's initial submission at para. 39.

¹⁵ Public body's initial submissions at para. 28.

CONCLUSION

[17] In conclusion, I find that the City is not authorized under ss. 17(1)(b) and (f) of FIPPA to withhold the information. For the reasons given above, under s. 58 of FIPPA I require the City to give the applicant access to the withheld information by January 30, 2015. The City must concurrently copy the OIPC Registrar on its cover letter to the applicant, together with a copy of the records.

December 16, 2014

ORIGINAL SIGNED BY

Caitlin Lemiski, Adjudicator

OIPC File Nos.: F12-49816, F12-49995, F13-52747