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Order F15-03

TRANSPORTATION INVESTMENT CORPORATION

Ross Alexander
Adjudicator

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Summary: A journalist requested records relating to tolling operations services for the Port Mann Bridge. Transportation Investment Corporation released most of the responsive information, but withheld portions of one contract on the basis that disclosure would harm the security of TI Corp's computer network and firewall (s. 15(1)(l)), harm the business interests of a third party (s. 21), or be an unreasonable invasion of the personal privacy of third parties (s. 22). The adjudicator determined that TI Corp was authorized to withhold all of the information withheld under s. 15(1)(l). It was also required to withhold some of the information withheld under s. 21 and all of the information withheld under s. 22.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 15(1)(l), 21 and 22.

Authorities Considered: B.C.: Order F14-12, 2014 BCIPC 15 (CanLII); Order F11-14, 2011 BCIPC 19 (CanLII); Order F12-13, 2012 BCIPC 18 (CanLII); Order F13-17, 2013 BCIPC 22 (CanLII); Order 01-39, [2001] B.C.I.P.C.D. No. 40; Order 14-01, 2014 BCIPC 1 (CanLII); Order F10-34, 2010 BCIPC 50 (CanLII); Order F09-22, 2009 CanLII 63564 (BC IPC); Order F09-24, 2009 CanLII 66956 (BC IPC).

Cases Considered: *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; *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603.

INTRODUCTION

[1] This inquiry relates to an applicant journalist's request to the Transportation Investment Corporation ("TI Corp") regarding tolling operations services for the Port Mann Bridge.¹ The applicant requested two tolling contracts, as well as the shortlist of companies that bid for those contracts and the value of those bids.

[2] TI Corp disclosed to the applicant portions of the two contracts and the names of proponents who bid for the contracts, but it withheld other parts of the contracts and the amounts of the proponents' bids.

[3] The applicant requested that the Office of the Information and Privacy Commissioner ("OIPC") review TI Corp's decision to withhold information from the applicant. TI Corp reconsidered its decision during the review process, disclosing the proponents' bid amounts and the entirety of one of the contracts. However, TI Corp continues to withhold part of the remaining contract, and the applicant requested that the matter proceed to inquiry under Part 5 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

[4] The information that remains in dispute consists of portions of a contract between TI Corp and Trans-Canada Flow Tolling Inc. ("T-C Flow") regarding tolling operations services for the Port Mann Bridge. It is withheld on the basis that disclosure would harm the security of property or a system (s. 15(1)(l) of FIPPA), harm the business interests of T-C Flow (s. 21), or be an unreasonable invasion of the personal privacy of third parties (s. 22).

[5] In addition to the applicant and TI Corp, T-C Flow participated in this inquiry. TI Corp provided initial submissions, reply submissions and affidavit evidence. The applicant only provided initial submissions. T-C Flow provided initial submissions, reply submissions and affidavit evidence only relating to the s. 21 issue. Some of TI Corp's and T-C Flow's materials were provided *in camera*.

ISSUES

[6] The issues for this inquiry are:

- 1) Is TI Corp authorized to withhold information under s. 15(1)(l) of FIPPA?
- 2) Is TI Corp required to withhold information under s. 21 of FIPPA?

¹ For simplicity, this order refers to the Port Mann Bridge. However, the tolling agreement is formally described as relating to tolling operations services for the Port Mann/Highway 1 Improvement Project.

3) Is TI Corp required to withhold information under s. 22 of FIPPA?

[7] TI Corp has the burden of proof for the information withheld under ss. 15(1)(l) and 21 pursuant to s. 57(1) of FIPPA. However, the applicant has the burden of proof for the information withheld under s. 22 pursuant to s. 57(2) of FIPPA.

DISCUSSION

[8] **Background**—TI Corp is a corporation established under the *Transportation Investment Act*. Its purposes are to engage in and conduct businesses related to delivering, managing, operating, tolling or funding transportation projects.² It is a public body pursuant to Schedule 2 of FIPPA.

[9] In 2011, TI Corp issued a request for proposals (“RFP”) for a company to provide tolling operations services for the Port Mann Bridge. There were two steps to the RFP process. The first step was for proponents to submit technical proposals to TI Corp. TI Corp then evaluated the technical proposals, and invited some proponents to submit financial proposals.

[10] T-C Flow and its parent company are in the business of providing tolling operations services. It was the successful proponent of this RFP process, which resulted in the contract that is the subject of this inquiry.

[11] **Information in Dispute**—The information in dispute is contained in a contract between TI Corp and T-C Flow regarding tolling operations services for the Port Mann Bridge. Most of the information in this contract has already been disclosed to the applicant, so only the following portions of the contract are in dispute:

- Portions of a 49 page Information Management Plan relating to TI Corp’s software applications and network configurations.³ TI Corp is withholding approximately one page of information in the plan – spread out over multiple pages – under s. 15(1)(l) of FIPPA. The withheld information has been severed on a line-by-line basis.
- An entire appendix to a schedule of the contract. The appendix is entitled “Financial Model”,⁴ and is withheld under s. 21 of FIPPA. I will refer to this information as the “Appendix”.
- The resumes of seven individuals on T-C Flow’s proposed senior management team, and brief descriptions of their experience or

² Section 24.22 of the *Transportation Investment Act*.

³ Appendix 1E of Schedule C of the contract.

⁴ Appendix 3 of Schedule H of the contract.

attributes.⁵ This information includes their employment histories, educational backgrounds, and client references. It is withheld under s. 22 of FIPPA.

[12] **Harm to law enforcement - Section 15(1)(l)**—TI Corp is relying on s. 15(1)(l) of FIPPA to withhold relatively small portions of an Information Management Plan that is appended to its contract with T-C Flow. The withheld information is technical information about TI Corp's computer network and firewall.

[13] Section 15(1)(l) states:

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

[14] The standard of proof for s. 15(1)(l) is whether there is a reasonable expectation of probable harm from disclosure of the withheld information.⁶ Adjudicator Flanagan said the following in Order F14-12 with respect to this evidentiary requirement for s. 15(1)(l):

...Although there is no need to establish certainty of harm, it is not sufficient to rely on speculation. 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 direct connection between disclosure of specific information and the harm that is alleged'.⁷

[15] The applicant submits that s. 15 does not apply. In support of this position, he quotes passages from previous orders that are similar to the above quote about the evidentiary requirements for s. 15 to apply. He does not elaborate on or explain this argument in further detail.

[16] A significant portion of TI Corp's submissions and evidence regarding s. 15(1)(l) was provided *in camera*, including specific explanations of how disclosing each of the withheld excerpts would result in harm to the security of

⁵ Appendix 2 of Schedule C of the contract. TI Corp has already disclosed the identities of these people to the applicant.

⁶ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.

⁷ Order F14-12, 2014 BCIPC 15 (CanLII), [2014] B.C.I.P.C.D. No. 15 (QL) at para. 15.

TI Corp's computer system. While I cannot disclose the contents of this *in camera* evidence and submissions, TI Corp summarizes its position by stating:

In short, the release of the information that has been severed would give rise to a significant risk of harm to the security of TI Corp's computer system because it represents operational information concerning the public body's network configuration, its security settings, and protocols for internal and remote communications. This information would enable a hacker to understand how TI Corp's computer system is set up and operates and would therefore increase the risk for unauthorized access to, or attacks on, its network.⁸

[17] The issue of whether disputed information falls under s. 15(1)(l) because it would help a potential computer hacker attack a computer system was previously addressed in Order F11-14. In that order, Adjudicator McEvoy stated with respect to some of the disputed information in that case:

What I am able to say about the withheld information under Schedule 20, without revealing the substance of it, is that it describes how certain software applications "interact and interface" with one another. This information relates to matters "within the System exchange information." Assuming a hacker was able to breach the firewall, the Ministry's evidence, including how the information would assist a hacker's targeted attack, persuades me that disclosure of this information would be particularly valuable to hackers. The withheld information in Schedule 20 provides a "road map" for a hacker to attack desired targets once inside the government's security perimeter. I have no difficulty concluding that disclosure of the withheld information could reasonably be expected to expose the electronically stored personal information of many citizens if hackers were able to breach the government's security firewall. The Ministry is therefore authorized to withhold it under s. 15(1)(l) of FIPPA.⁹

[18] In my view, much of the same reasoning from Order F11-14 applies here. While I cannot say much without revealing the substance of the withheld information, TI Corp's evidence persuades me that there is a reasonable expectation of probable harm related to disclosing the information withheld under s. 15 because it would assist a computer hacker in attacking and gaining access to TI Corp's computer network, which contains sensitive information. I also note that TI Corp has already disclosed those portions of the technical information that are universal to all such systems, and that it has taken the care to only withhold those excerpts that may be relatively unique or differentiate this computer system from other computer systems. For the above reasons, I find that s. 15(1)(l) applies to the information withheld under this section.

⁸ TI Corp's initial submissions at para. 16.

⁹ Order F11-14, 2011 BCIPC 19 (CanLII) at para. 20.

[19] **Harm to business interests of a third party - Section 21**—TI Corp is withholding the entire Appendix entitled “Financial Model” under s. 21 of FIPPA. Section 21 requires public bodies to refuse to disclose information that could reasonably be expected to harm the business interests of a third party. It states in part:

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, or...

[20] Numerous orders have considered the principles for applying s. 21(1). The first part of the test requires the information to be 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 the information to have been 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 significant harm to the third party’s competitive position, or the other types of harm set out in s. 21(1)(c).¹⁰

[21] The Appendix is comprised of information originating from each of TI Corp and T-C Flow. TI Corp and T-C Flow explain that TI Corp first provided a “template” to proponents for them to input their financial proposal information. This “template” was an electronic document in Excel format. T-C Flow then filled out this document with its financial information, and submitted it to TI Corp as part of the RFP process.

[22] T-C Flow’s CEO deposed an affidavit for this inquiry, in which he gives a detailed account of the Appendix.¹¹ He identifies what information TI Corp provided T-C Flow, what information is pricing information T-C Flow was charging TI Corp, and what information relates to T-C Flow’s estimates of tolling operations requirements. He also identifies what information represents certain

¹⁰ Order F12-13, 2012 BCIPC 18 (CanLII).

¹¹ The CEO provided this account by explaining the different types of information that are part of the Appendix, and identifying what information falls under what category of information.

expenses to be incurred by T-C Flow, such as T-C Flow's average hourly cost for employing its customer service representatives, various types of overhead and other fixed costs that are based on contracts between T-C Flow and other third parties, or information the CEO says was determined based on T-C Flow's knowledge, experience and market research.¹² Further, the CEO identifies what information was calculated based on T-C Flow's pricing, expense or operations information. He explains that these values inputted by T-C Flow are the product of a proprietary T-C Flow financial model. TI Corp's vice president of tolling operations agrees with T-C Flow's CEO's categorizations.¹³

[23] TI Corp provided an electronic version of the Appendix in Excel format for this inquiry. This enabled me to review the instructions TI Corp provided to proponents and the formulae that underlie the information in the Appendix, and to independently consider whether the information originated from T-C Flow or TI Corp.¹⁴ I accept T-C Flow's CEO characterization of the vast majority of the information he identified. However, while T-C Flow suggests that the Appendix was designed by T-C Flow,¹⁵ based on my review of the Excel document and the remainder of the contract, it appears that some of the information the CEO states was provided by T-C Flow actually originated with TI Corp.¹⁶ Absent an explanation from T-C Flow or TI Corp as to why information that clearly appears to originate from TI Corp based on review the Excel document actually originated from T-C Flow, I find that the this information originated from TI Corp.¹⁷

[24] T-C Flow and TI Corp refer to the information TI Corp provided to proponents as a "template". In my view, the use of the term "template" likely understates the scope and complexity of the document TI Corp provided to proponents. This is because the initial electronic document TI Corp provided to proponents contained a number of formulas and fields that make a number of automated calculations – such as net present value calculations – when the proponents inputted information into the template (the "TI Corp Calculations"). However, having said this, for simplicity I will hereafter refer to the information TI Corp provided to proponents as "template" information. The information

¹² Affidavit of R. Lengrand.

¹³ Affidavit of M. Arefi #2 at para. 7.

¹⁴ The instructions provided by TI Corp to proponents, which is part of the Appendix, states that TI Corp is providing a financial model to proponents for them to fill out and that proponents cannot modify the calculations in the financial model provided by TI Corp. The Excel document contains colour shading of certain fields that – pursuant to the instructions – denote the fields in which proponents are supposed to fill out. This information, combined with the underlying formulas contained in the Excel document, enable independent consideration of what information was inputted by TI Corp or was populated based on information TI Corp inputted.

¹⁵ Affidavit of R. Lengrand at para. 6.

¹⁶ Section 2.10(d) of the contract between TI Corp and T-C Flow refers to the template document that TI Corp provided to proponents as the financial model.

¹⁷ All of the information I find to originate with TI Corp is highlighted in pink in a copy of the Appendix that will be sent to the T-C Flow and TI Corp along with a copy of this order. Further, in any event, I also note that some of this information is also an agreed term in the contract.

T-C Flow entered into the Excel document, which later became the Appendix, is the following:

- T-C Flow’s pricing information;
- traffic volumes breakdowns, staffing requirements, etc. that T-C Flow anticipated it would require to fulfill the tolling services agreement (“operations assumptions”); and
- anticipated expenses to be incurred by T-C Flow in fulfilling the tolling services agreement, including specific types and amounts of expenses (“T-C Flow expenses”).

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

[25] Previous orders have stated that information is commercial information if it relates to the terms and conditions for buying or selling goods or services.¹⁸ The withheld information in this case is the Appendix, which is part of a contract. Further, most of the information is financial information. I therefore find that the withheld information is commercial or financial information of a third party pursuant to s. 21(1)(a).

Supplied in confidence – s. 21(1)(b)

[26] For s. 21(1)(b) to apply, the information must have been supplied, either implicitly or explicitly, in confidence by a third party. This is a two-part analysis. The first step is to determine whether the information was supplied to a public body. The second step is to determine whether the information was supplied “in confidence”.

Supplied

[27] The Appendix in its current form was provided by T-C Flow to TI Corp as part of its bid for tolling operations services for the Port Mann Bridge. It was then appended to the resulting contract between the parties.

[28] The Supreme Court of Canada has stated that when determining whether information was supplied to a public body, it is necessary to consider the content rather than the form of the information.¹⁹ In this case, as stated above, TI Corp provided the template information to proponents such as T-C Flow. I find that this template information originated from TI Corp, so it was not supplied by a third party pursuant to s. 21(1)(b) of FIPPA. Therefore, I find that this information cannot be withheld under s. 21.

¹⁸ For example Order F13-17, 2013 BCIPC 22 (CanLII) at para. 13.

¹⁹ *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3.

[29] There is also information that T-C Flow added to the template information and provided to TI Corp. However, this does not necessarily mean that it was “supplied” within the meaning of s. 21(1)(b). The information at issue here is part of a contract, and previous orders have stated that contractual terms are not usually supplied within the meaning of s. 21(1)(b) because the terms are negotiated even when the contract has been preceded by little or no back-and-forth negotiation. The applicant in this case submits that the withheld information is not supplied for this reason.

[30] There are exceptions to the general rule that the terms of a contract are not “supplied” within the meaning of s. 21(1)(b), and T-C Flow submits that the withheld information falls under those exceptions. TI Corp agrees, and adopts T-C Flow’s submissions with respect to s. 21.

[31] Contractual information is usually negotiated rather than supplied because the other party agreed to its inclusion in the contract. However, there are exceptions to this. As Adjudicator Iyer stated in Order 01-39:

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.

...

The second situation in which otherwise negotiated information may be found to be supplied is where its disclosure would allow a reasonably informed observer to draw accurate inferences about underlying confidential information that was “supplied” by the third party, that is, about information not expressly contained in the contract: Order 01-20 at para. 86. Such information may be relevant to the negotiated terms but is not itself negotiated. In order to invoke this sense of “supplied”, CPR must point to specific evidence showing what accurate inferences could be drawn from which contractual terms about what underlying confidentially supplied information. Moreover, as discussed below, where information originally supplied in a bid proposal is simply accepted by the other party and incorporated into a contract, the mere fact that disclosure of the

contract will allow readers to learn the terms of the original bid will not shield the contract from disclosure.²⁰

[32] I adopt this approach from Order 01-39, which was upheld on judicial review and has been cited in numerous orders.²¹

[33] The remaining information for me to consider is the information T-C Flow inputted into the Excel document that became the Appendix. This is T-C Flow's expenses, operations assumptions and pricing information.²² T-C Flow does not expressly state in its submissions that it opposes disclosure of the pricing information. In fact, it notes that this information is also contained elsewhere in the contract where it has already been disclosed to the applicant. However, T-C Flow also does not expressly consent to disclosure of the pricing information in the Appendix, so I will briefly address it.

[34] I find that the pricing information is negotiated rather than supplied because T-C Flow and TI Corp agreed to its inclusion in the contract. Moreover, this information is not immutable and it does not enable accurate inferences about confidential information that was supplied by a third party and is not expressly contained in the contract. The finding that pricing information is not supplied also applies to the information that was automatically calculated by the Excel document using the TI Corp Calculations and other template information as a result of T-C Flow inputting its pricing information into the financial model. Since this information is calculated using negotiated pricing information and information that originated with TI Corp, it does not enable accurate inferences of information that T-C Flow (ie. the third party) supplied in confidence. Therefore, I find that the information described in this paragraph was not supplied within the meaning of s. 21(1)(b), and that TI Corp cannot withhold it under s. 21.

[35] Turning to the T-C Flow expenses and operations assumptions, this information relates to T-C Flow's anticipated expenses and operation assumptions for fulfilling its obligations to provide tolling operations services. These are different amounts than the prices TI Corp agreed to pay T-C Flow for goods and services. They include items such as the staff wages and related costs T-C Flow pays in relation to its customer service representative employees, and various overhead and other fixed costs of T-C Flow that are based on contracts between T-C Flow and other third parties.²³ In my view, the fact that these expenses are relatively fixed because, for example, they were already set

²⁰ Order 01-39, [2001] B.C.I.P.C.D. No. 40 at paras. 45 and 50.

²¹ Order 01-39 was upheld and quoted in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603. For example, see Order F14-01, 2014 BCIPC 1 (CanLII).

²² There is also the information in the Appendix that was derived from this information (ie. information that was automatically calculated when T-C Flow inputted information into the Appendix).

²³ Affidavit of R. Lengrand.

out in third party contracts, distinguishes this information from other orders, such as Order F14-01, where there was no suggestion that third party expenses listed in the contract reflected previously purchased items or disclosed pre-existing obligations for the third party to purchase the listed items at those specific prices.²⁴ Therefore, in my view, this information is supplied by T-C Flow within the meaning of s. 21(1)(b) because it is relatively immutable.

[36] In addition to the information that was directly inputted by T-C Flow, the Appendix contains simple calculations using the inputted information, such as the cost per transaction. I find that this information is also supplied within the meaning of s. 21(1)(b) because it would enable a reasonably informed observer to draw accurate inferences about the underlying expense information.

[37] The Appendix contains T-C Flow's operations assumptions for the tolling services work, such as traffic volumes breakdowns and staffing requirements. This information is the basis for T-C Flow's anticipated expenses, since it combined the information from these operations assumptions with its underlying fixed costs (ie., for example, the fixed sum per hour per employee it costs T-C Flow to employ its customer service representatives) to determine its anticipated costs for the Port Mann Bridge project. T-C Flow's CEO deposed that this is based on a proprietary tool T-C Flow has designed that:

...allows T-C Flow to enter values for various components of a project (such as underlying fixed costs of T-C Flow, assumptions and estimates developed by T-C Flow, [TI Corp] volume requirements, dates, time periods, agreed prices, etc.) and which then generates additional values and information by performing calculations based on underlying formulae which are developed by T-C Flow, based on its knowledge and experience in the area of tolling operations. Accordingly, the Financial Model itself is not something which could be the subject of any negotiation or agreement between T-C Flow and [TI Corp].²⁵

[38] In addition to the evidence quoted in the paragraph above, T-C Flow's CEO also provided *in camera* explanations about how a competitor of T-C Flow who obtained T-C Flow's operations assumptions could derive the various formulae and ratios T-C Flow uses to project its staffing requirements and expenses.

[39] Based on the materials before me, including the CEO's *in camera* explanations and my review of the electronic document, I find that T-C Flow supplied its operations assumptions within the meaning of s. 21(1)(b) because disclosure would enable a reasonably informed observer to draw accurate inferences about formulae and ratios T-C Flow has developed and uses to project its staffing requirements and expenses.

²⁴ Order F14-01, 2014 BCIPC 1 (CanLII) at paras. 24 to 28.

²⁵ Affidavit of the Chief Executive Officer at paras. 5 and 6.

[40] Having determined that T-C Flow's expenses and operations assumptions were supplied within the meaning of s. 21(1)(b) of FIPPA, I will now consider whether this information was supplied in confidence.

In Confidence

[41] For s. 21(1)(b) to apply, the information must not just be supplied by a third party. It must be supplied, explicitly or implicitly, "in confidence". This test for "in confidence" is objective, and the question is one of fact.

[42] TI Corp and T-C Flow representatives each deposed that T-C Flow submitted the information in the Appendix to TI Corp with the expectation that it would remain confidential, and on the understanding that TI Corp would not disclose this information unless T-C Flow agrees to the disclosure or if disclosure is required under FIPPA.²⁶ They also both state that these expectations are consistent with provisions in the contract itself, and TI Corp's vice president of tolling operations states that this expectation of confidentiality was reflected in the RFP.²⁷ The applicant does not address the issue of whether the information was supplied in confidence.

[43] Based on the materials before me, including the evidence from TI Corp and T-C Flow representatives and the contractual provisions regarding confidentiality, I find that T-C Flow's expenses and operations assumptions were supplied in confidence within the meaning of s. 21(1)(b).

[44] In summary, I find that T-C Flow's expenses and operations assumptions were supplied in confidence within the meaning of s. 21(1)(b) of FIPPA. However, the template information was not supplied by T-C Flow because it originated with TI Corp, and the pricing information was not supplied within the meaning of s. 21(1)(b) because this information was negotiated.

[45] I will now turn to the to the issue of harm to third party interests under s. 21(1)(c) for T-C Flow's expenses and operations assumptions.

Harm to third party interests – s. 21(1)(c)

[46] Sections 21(1)(c)(i) and (iii) state:

- (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,

²⁶ Affidavit of M. Arefi #2 at para. 6; Affidavit of R. Lengrand at para.17.

²⁷ Section 5.2 of the RFP: Affidavit of M. Arefi #2 at para. 6.

...

- (iii) result in undue financial loss or gain to any person or organization, or...

[47] T-C Flow submits that disclosure of the withheld information falls within the meaning of ss. 21(1)(c)(i) and (iii) of FIPPA. TI Corp adopts and supports T-C Flow's submissions.

[48] The applicant submits that s. 21 does not apply. In support of this position, he quotes passages from previous orders about accountability and the evidence required to meet the harms requirement.²⁸ He does not elaborate on or explain this argument in further detail.

[49] The standard of proof for harm for s. 21 is whether disclosure could reasonably be expected to result in the specified harm. The Supreme Court of Canada has described this standard as requiring a reasonable expectation of probable harm from disclosure of the information.²⁹ It is a middle ground between what is probable and that which is merely possible.³⁰ A public body must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach this standard.³¹ The determination of whether the standard of proof has been met is contextual, and the quantity and 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".³²

[50] T-C Flow submits that releasing the information at issue would disclose the proprietary financial model that it uses to determine project tolling operations and its expenses on projects. It states this would reveal immutable and underlying commercial information to potential competitors who are likely to use that information to T-C Flow's detriment in future bidding situations.³³

[51] T-C Flow's CEO deposes that the tolling operations contract related to the Port Mann Bridge reflects a process of "all electronic tolling", which is expanding significantly in North America and is a "very competitive business".³⁴ T-C Flow submits that its competitors could use its proprietary financial model to strategically undercut T-C Flow's bids. It further submits that inexperienced competitors could use the information in T-C Flow's financial model – such as the

²⁸ Some of these orders quoted by the applicant relate to s. 17, not s. 21.

²⁹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54 citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ T-C Flow's CEO identified a number of future projects T-C Flow in his *in camera* materials.

³⁴ Affidavit of R. Lengrand at para.14.

detailed cost breakdowns and operational components such as estimated volumes, tasks required and how those components relate to one another – as a “blueprint” to develop their own financial models without having to invest the amount of time and money that T-C Flow has had to invest in order to build up the experience and expertise necessary to develop its financial model for tolling operations.³⁵

[52] The information at issue involves T-C Flow’s expenses and operating assumptions for the Port Mann Bridge. However, in my view, disclosure of this information in this case is not merely limited to the Port Mann Bridge project, as it would also disclose information about T-C Flow’s general expenses and operations. Based on my review of the record at issue and T-C Flow’s CEO’s evidence (including his *in camera* evidence), I accept that disclosure of this information would disclose T-C Flow’s financial model for tolling operations of this nature and enable T-C Flow’s competitors to replicate its estimated tolling registration volumes and staffing requirements with respect to other future projects. Further, it would disclose T-C Flow fixed expenses to competitors. I also find that it would provide inexperienced competitors with detailed breakdowns of the types of costs incurred in all electronic tolling operations, and also enable them to determine a general approximation of the amount of expenses for each of the types of costs.

[53] In Order F10-34, Commissioner Denham determined that a public body was authorized to withhold a financial model related to projected construction costs and risks (among other topics) under s. 17 of FIPPA,³⁶ primarily because disclosure of the information about the public body’s evaluation of risk could harm their negotiating position in future contracts.³⁷ In my view, T-C Flow’s assumptions regarding tolling registrations and types of traffic with related expenses is analogous to the financial model in Order F10-34 in many respects, since disclosure of this information about operating assumptions and expenses may in both cases provide business competitors (or contractors, in the case of Order F10-34) with a more accurate assessment of potential risks or expenses, and may change the financial terms a proponent would be willing to bid on in providing the specified goods and services.

[54] Further, as stated in Order F09-22, a case in which Adjudicator Fedorak determined that s. 21(1)(c)(i) and (iii) applied to a proponent’s winning proposal in an RFP competition for vending machine services:

As the Commissioner has noted in Order 00-10; “if disclosure would give a competitor an advantage, usually by acquiring competitively valuable information, effectively for nothing, the gain to the competitor will be undue.” I am

³⁵ T-C Flow’s initial submissions at para. 15; Affidavit of R. Lengrand at para.16.

³⁶ Section 17 of FIPPA relates to disclosure harmful to the financial or economic interests of a public body.

³⁷ Order F10-34, 2010 BCIPC 50 (CanLII).

also persuaded on the particular facts of this case that, by acquiring competitively valuable information for nothing, Fraser Valley Vending's competitors would receive undue financial gain.³⁸

[55] In this case, disclosure of the information in dispute would allow accurate inferences about the formulae and calculations for how T-C Flow projects tolling registration volumes and staffing requirements. It would also disclose T-C Flow's operations costs, and how these expenses are related to registration volumes and staffing requirements. In my view, this is competitively valuable information, the disclosure of which could reasonably be expected to result in competitors using this information to their advantage to bid against T-C Flow for future contracts. I also find that it would result in undue financial gain to T-C Flow's competitors if they receive this information, as they would receive this information without having to invest the time and money that T-C Flow (and its parent company) had to invest in order to build up the experience and expertise necessary to develop its financial model for tolling operations.³⁹

[56] For the reasons above, I find that disclosure of T-C Flow's expenses and operations assumptions could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of T-C Flow, result in undue financial loss to T-C Flow, and result in undue financial gain to T-C Flow's competitors. I therefore find that ss. 21(1)(c)(i) and (iii) apply to this information.

[57] **Section 22**—TI Corp is withholding the resumes of T-C Flow's proposed senior management team, and brief descriptions of their experience or attributes, under s. 22 of FIPPA. In his submissions under s. 22, the applicant quotes a previous order in relation to bonuses or financial details of the contract. However, I have reviewed the information severed under s. 22, and I confirm that it does not contain this type of information.

[58] Numerous orders have considered the approach to s. 22 of FIPPA, which states that a "public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy." This section only applies to "personal information" as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.

³⁸ Order F09-22, 2009 CanLII 63564 (BC IPC) at para 37.

³⁹ Affidavit of R. Lengrand at para. 16.

[59] The applicant's position is that disclosure of the withheld information is not an unreasonable invasion of personal privacy. In support of this position, he submits that research and the gathering, analysis and presentation of statistics is an inherent purpose of any journalist. This is a reference to s. 22(4)(d) of FIPPA, which states that disclosure is not an unreasonable invasion of a third party's personal privacy if the disclosure is for a research or statistical purpose and is in accordance with s. 35 of FIPPA.⁴⁰

[60] TI Corp submits that s. 22 applies to the withheld information. It submits that none of this information falls under s. 22(4), and that there is a presumption that disclosure would be an unreasonable invasion of third party personal privacy under s. 22(3)(d) because the information relates to the workplace activities, employment histories and educational backgrounds of identifiable individuals. It also submits that s. 22(3)(h) is relevant with respect to some of the information because the disclosure could reasonably be expected to reveal the content of a personal recommendation or character reference, and the applicant could reasonably be expected to know the identity of the third party.

Personal Information

[61] FIPPA defines "personal information" as "recorded information about an identifiable individual other than contact information".⁴¹ The term "contact information" is defined under FIPPA defines as:

...information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual;

[62] Based on my review of the withheld information, I find that all of it is about identifiable individuals. Some of this information is the names and methods of how to contact people who are providing references for T-C Flow's proposed senior management. While this information enables these people to be contacted at their place of work, I find that it is not contact information as defined by FIPPA in this specific context because it also reveals that the T-C Flow's proposed senior management completed work for these clients. I therefore find that the withheld information is their personal information.

⁴⁰ Section 35 of FIPPA states that a public body may disclose personal information in its custody or under its control for a research purpose, including statistical research, if a list of preconditions are met.

⁴¹ Schedule 1 of FIPPA.

Section 22(4)

[63] Subsection 22(4) specifies circumstances where disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. My understanding of the applicant's position is that s. 22(4)(d) applies in this case because "the disclosure is for a research or statistical purpose and is in accordance with section 35" of FIPPA, and, in his view, the research, gathering, analysis and presentation of statistics is an inherent purpose of any journalist.

[64] For s. 22(4)(d) to apply, research of statistical purpose for disclosure must be in accordance with s. 35 of FIPPA. That section authorizes – but does not require – public bodies to disclose personal information in certain circumstances. However, in this case, the public body does not seek to disclose the personal information and the specified criteria under s. 35 have not been met. I therefore find that s. 22(4)(d) does not apply in this case. Moreover, based on my review of the materials, I find that none of the provisions in s. 22(4) apply.

Section 22(3)

[65] Section 22(3) provides that disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if one or more of the circumstances specified in s. 22(3) apply. In this case, TI Corp submits that ss. 22(3)(d) and (h) are relevant to at least some of the withheld information. These provisions state:

A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(d) the personal information relates to employment, occupational or educational history,

...

(h) the disclosure could reasonably be expected to reveal the content of a personal recommendation or evaluation, a character reference or a personnel evaluation supplied by the third party in confidence and the applicant could reasonably be expected to know the identity of the third party,

[66] Previous orders have determined that that resumes consist of educational and employment history in accordance with s. 22(3)(d) of FIPPA.⁴² I agree, and find that s. 22(3)(d) of FIPPA applies to the withheld information in this case. This includes the client reference information, since it reveals previous work

⁴² Order F09-24, 2009 CanLII 66956 (BC IPC) at para. 9.

information in its context and thus relates to the employment histories of T-C Flow's proposed senior management.

[67] TI Corp submits that s. 22(3)(h) is relevant to the extent that there are names of individuals who are listed as client references for T-C Flow's proposed senior management team. It submits that s. 22(3)(h) applies because it discloses the fact that the references hold opinions about the proposed members of T-C Flow's senior management team.

[68] In my view, s. 22(3)(h) does not apply to this information because for this provision to apply it must "reveal the content" of a personal recommendation or evaluation, a character reference or a personnel evaluation. The information at issue in this case does not reveal the contents of the opinions the previous clients have about T-C Flow's proposed senior management members.

[69] In summary, I find there is a presumption that disclosure of the withheld information would be an unreasonable invasion of the personal privacy of third parties because it relates to their employment, occupational or educational histories under s. 22(3)(d) of FIPPA. I find that s. 22(3)(h) does not apply.

Section 22(2) and conclusion for section 22

[70] Section 22(2) states that all relevant circumstances, including those listed in s. 22(2), must be considered. None of the parties submit that there are any provisions in s. 22(2) that apply to the withheld information. In my view, there are no circumstances in this case that are sufficient to rebut the presumption that disclosure would be an unreasonable invasion of the personal privacy of third parties. I therefore find that TI Corp is required to refuse to disclose the information it withheld under s. 22 of FIPPA.

CONCLUSION

[71] For the reasons given above, under s. 58 of FIPPA, I order that TI Corp is:

- a) authorized to withhold the information withheld under s. 15(1)(l) of FIPPA;
- b) required to refuse access to the information withheld under s. 21(1) of FIPPA, subject to paragraph (d) below;

-
- c) required to refuse to disclose to the applicant the information withheld under s. 22 of FIPPA; and
 - d) required to give the applicant access to the information I have highlighted in a copy of the record that will be sent to TI Corp and T-C Flow along with this decision, by **February 25, 2015**, pursuant to s. 59 of FIPPA. TI Corp must copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records it provides to the applicant.

January 13, 2015

ORIGINAL SIGNED BY

Ross Alexander, Adjudicator

OIPC File No.: F13-52025