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Order F18-40

CITY OF COQUITLAM

Chelsea Lott
Adjudicator

October 2, 2018

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Summary: The applicant requested a copy of a contract between a towing company and the City for towing and storage services. The City disclosed the contract but withheld revenue sharing fees under s. 21(1) of FIPPA (harm to the business interests of the towing company). The adjudicator found that the withheld information was not “supplied in confidence” as required by s. 21(1) and the City was required to disclose the entire contract.

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

INTRODUCTION

[1] An applicant asked the City of Coquitlam (City) for a copy of its contract with Coquitlam Towing & Storage Co Ltd (Coquitlam Towing). The City disclosed most of the contract but withheld the monthly revenue sharing amounts paid by Coquitlam Towing to the City under ss. 17 (harm to financial or economic interests) and 21 (harm to third party business interests) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the City’s decision. In the course of mediation, the City withdrew its reliance on s. 17. Mediation did not resolve the dispute and the applicant requested that it proceed to inquiry. The applicant did not provide an inquiry submission. Coquitlam Towing was provided notice of the inquiry and invited to participate but did not respond.

ISSUE

[2] The sole issue is whether the City is required by s. 21(1) of FIPPA to refuse to disclose the information in dispute to the applicant. The City has the burden of proving that the applicant has no right of access to the information withheld under s. 21(1).¹

DISCUSSION

Background

[3] In 2013, the City on behalf of itself, as well as the City of Port Coquitlam and the City of Port Moody, issued a public request for proposals to provide towing and storage services (RFP).² The RFP invited proponents to submit a revenue sharing formula or fee, and this was one of the factors the City considered in awarding the contract.³ The applicant and Coquitlam Towing both submitted proposals.⁴ The City selected Coquitlam Towing as the successful proponent and entered into a contract for the provision of towing and storage services for five years (Towing Contract). The Towing Contract requires Coquitlam Towing to pay the City a pre-determined revenue sharing fee each month (Revenue Fees).⁵

[4] The Towing Contract is the only record in dispute. The City has withheld the Revenue Fees for each year of the contract.

Harm to Third Party Business Interests

[5] Section 21(1) requires a public body to withhold information the disclosure of which would harm the business interests of a third party. The portions of s. 21(1) that are relevant in this case state:

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

(a) that would reveal

...

(ii) commercial, financial, labour relations, scientific or technical information of or about a third party,

(b) that is supplied, implicitly or explicitly, in confidence, and

¹ Section 57(1).

² Request for Proposals No. 13-01-01 (RFP), exhibit A to the affidavit of the City's Purchasing Manager (manager's affidavit).

³ Manager's affidavit at para. 4.

⁴ *Ibid* at para. 5.

⁵ Towing Contract, ss. 4 and 9.

- (c) the disclosure of which could reasonably be expected to
- (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
 - (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
 - (iii) result in undue financial loss or gain to any person or organization, or

...

[6] The principles for applying s. 21(1) are well established.⁶ The party with the burden of proof must establish the following three elements:

1. Disclosure would reveal the type of information listed in s. 21(1)(a);
2. The information was supplied, implicitly or explicitly, in confidence; and
3. Disclosure of the information could reasonably be expected to cause one or more of the harms in s. 21(1)(c).

Type of information – s. 21(1)(a)

[7] Section 21(1)(a) captures information that would reveal commercial, financial, labour relations, scientific or technical information of or about a third party. The City submits that the Revenue Fees are clearly commercial or financial information of or about a third party.

[8] “Commercial” information under s. 21(1)(a) is information that relates to a commercial enterprise. The information does not have to be proprietary or have an independent market value. Rather, the information just has to be associated with the buying, selling or exchange of an entity’s goods or services.⁷ An example of commercial information is a contractor’s fees or commission rate for its services.⁸ Past orders have also held that fees payable under a contract are both “commercial” and “financial” information.⁹

[9] The entire Towing Contract relates to a commercial arrangement between Coquitlam Towing and the City for the provision of towing services. The only information at issue concerns revenue sharing amounts. I find that this

⁶ Order F17-37, 2017 BCIPC 41 at para. 11.

⁷ Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17; Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 63.

⁸ Order 03-04, 2003 CanLII 49168 at para. 32.

⁹ Order 00-22, 2000 CanLII 14389 (BC IPC) at pp. 2–4 upheld on judicial review in *Jill Schmidt v British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 101; Order F13-06, 2013 BCIPC 6 at para. 16; Order F15-53, 2015 BCIPC 56 at para. 11.

information is properly characterized as the commercial and/or financial information of Coquitlam Towing.

Supplied in confidence – s. 21(1)(b)

[10] Section 21(1)(b) applies to information which was supplied either implicitly or explicitly, in confidence. This requires a two-step analysis. The first step is to determine whether the information was “supplied.” The second step is to determine whether the information was supplied “in confidence.”¹⁰

Supplied

[11] The terms of a contract are generally the result of negotiations between the contracting parties. As a result, the information in a contract is mutually agreed to in the course of negotiations and not “supplied” within the meaning of s. 21(1)(b).¹¹ Even where a contract’s terms are the same as those in the proponent’s RFP proposal, the terms of the resulting contract are still “negotiated” and not “supplied” because the other party had to agree to them.¹² As explained in in Order 01-39, the purpose of s. 21(1)(b), “is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible of [sic] change but, fortuitously, was not changed.”¹³

[12] Despite the general rule that contract terms are negotiated and not supplied, past orders have established two exceptions.¹⁴ First, information in a contract may be “supplied” if it was not susceptible to change during negotiation, such as a contractor’s fixed costs like overhead or labour costs for subcontractors. The second circumstance where information in a contract may be “supplied” occurs where information would enable accurate inferences about underlying confidentially supplied information.

Analysis

[13] The City argues that the Revenue Fees were “supplied.” According to the City’s purchasing manager, “[t]he evaluation and award process was not set up for, and did not include, negotiation of any business terms, including the revenue

¹⁰ See for example: Order F15-71, 2015 BCIPC 77 at para. 11; Order F17-49, 2017 BCIPC 54 at para. 16.

¹¹ Order 01-39, 2001 CanLII 21593 (BC IPC) at paras. 43–44, upheld on judicial review in *Canadian Pacific Railway v British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603 [*Canadian Pacific Railway*]. See also: Order F10-28, 2010 BCIPC 40 at para. 12 upheld on judicial review in *K-Bro Linen Systems Inc v British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 904.

¹² See for example: Order 03-15, 2003 CanLII 49185 at para. 66; Order F14-28, 2014 BCIPC 31 at para. 20.

¹³ Order 01-39, *supra* note 11 at para. 46.

¹⁴ *Ibid* at paras. 45–50.

sharing information.”¹⁵ The City says that the Revenue Fees proposed by Coquitlam Towing in response to the RFP were simply accepted by the City and incorporated into the template contract which had been appended to the RFP. This became the Towing Contract.¹⁶

[14] The fact that the Revenue Fees were incorporated unchanged from Coquitlam Towing’s proposal into the Towing Contract does not mean they were “supplied” under s. 21(1)(b). The key question is whether the Revenue Fees were susceptible to negotiation and change. The language of the RFP demonstrates that the City retained the right to negotiate the terms of the eventual contract. For instance, the RFP expressly reserved the City’s right “to negotiate changes to the scope of the services or to the Contract documents (including price) with the Proponent...” prior to awarding the contract.¹⁷ In addition, the somewhat cumbersome definition of “Agreement” and “Contract” in the RFP also suggests that negotiations were contemplated. “Agreement” and “Contract” are defined jointly in the RFP as:

the written agreement that may result from the Request for Proposals ... that will be issued to formalize with the successful Proponent through the negotiation process with the cities, based on the proposal submitted...the Contractor’s response and acceptance by any of all of the Cities.

[emphasis added]

[15] Based on the terms of the RFP, it is evident that the Revenue Fees were susceptible to negotiation prior to finalizing the Towing Contract. It is also clear on the face of the Towing Contract that the Revenue Fees were not supplied within the meaning of s. 21(1)(b). The Revenue Fees were negotiated because the City and Coquitlam Towing agreed to them. Further, there is no evidence to suggest that the Revenue Fees disclose immutable information or would enable accurate inferences about confidential information that was supplied by a third party and is not expressly contained in the contract.

[16] The City relies on Order F15-44, however, in my view, that order does not support the City’s argument that information in the Towing Contract, namely the Revenue Fees, was supplied as opposed to negotiated information.¹⁸ In Order F15-44, the adjudicator dealt with two types of information that were not contained in a contract (i.e., they were not physically part of the contract). He said that bid prices sent in response to a tendering process were clearly supplied. However, he concluded that fee information in other documents was negotiated and not supplied because it was based on the agreed pricing in the contract. The Revenue Fees here are contained in the Towing Contract, and

¹⁵ Manager’s affidavit at para. 6.

¹⁶ *Ibid.*

¹⁷ RFP, s. 1.10, manager’s affidavit, exhibit A.

¹⁸ Order F15-44, 2015 BCIPC 47 at para. 57.

following the reasoning in Order F15-44, I find they are negotiated not supplied information. Numerous OIPC orders have similarly concluded that information in a contract is negotiated and not supplied.¹⁹

[17] In summary, I find that the Revenue Fees were not supplied within the meaning of s. 21(1)(b) of FIPPA. Therefore, s. 21(1)(b) does not apply and it is not necessary to consider the “in confidence” requirement of s. 21(1)(b) or the harms part of the analysis under s. 21(1)(c). In conclusion, I find that the City is not required to refuse to give the applicant access to the information under s. 21(1).

CONCLUSION

[18] For the reasons given above, under s. 58 of FIPPA, I require the City to give the applicant access to the entire Towing Contract by November 15, 2018. The City must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

October 2, 2018

ORIGINAL SIGNED BY

Chelsea Lott, Adjudicator

OIPC File No.: F17-71463

¹⁹Order 01-39, *supra* note 11; Order F13-06, 2013 BCIPC 6 at paras. 19–21; Order F14-01, 2014 BCIPC 1; Order F14-04, 2014 BCIPC 4; Order F14-28, *supra* note 12; Order F16-31, 2016 BCIPC 34 at paras. 23–26.