



Order F23-35

## CITY OF RICHMOND

Allison J. Shamas  
Adjudicator

May 12, 2023

CanLII Cite: 2023 BCIPC 42  
Quicklaw Cite: [2023] B.C.I.P.C.D. No. 42

**Summary:** The applicant requested all contracts and service awards between the City of Richmond (the City) and the British Columbia Society for the Prevention of Cruelty to Animals for 2020 and 2021. The City identified a single agreement that was responsive to the applicant's request, but withheld it in its entirety under ss. 21(1) (harm to third party business interests) and 17(1) (harm to public body's financial or economic interests) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The adjudicator found that neither section applied, and ordered the City to disclose the agreement to the applicant.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165 ss. 17(1), 17(1)(b), 17(1)(f), 21(1)(a), and 21(1)(b).

### INTRODUCTION

[1] The applicant requested all contracts and service awards between the City of Richmond (the City) and the British Columbia Society for the Prevention of Cruelty to Animals (BC SPCA) between 2020 and 2021.

[2] The City identified a single agreement that was responsive to the applicant's request, but withheld it in its entirety under ss. 17(1) (harm to public body's financial or economic interests) and 21(1) (harm to third party business interests) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the City's decision. Mediation did not resolve the matter and it proceeded to inquiry.

[4] My review of the submissions filed by the City revealed that the business information of the BC SPCA was at issue in the inquiry. Accordingly, after the close of submissions, the OIPC invited the BC SPCA to participate. After

reviewing the other parties' submissions, the BC SPCA advised that it did not intend to file submissions, and the inquiry proceeded without further participation from the BC SPCA.

## ISSUES

[5] The issues to be decided in this inquiry are:

1. Whether the City is authorized to refuse to disclose the information at issue under s. 17(1) of FIPPA.
2. Whether the City is required to refuse to disclose the information at issue under s. 21(1) of FIPPA.

Section 57(1) of FIPPA places the burden on the City to prove that the applicant has no right of access to the information withheld under ss. 17(1) and 21(1).

## DISCUSSION

### *Background*

[6] The BC SPCA and the Regional Animal Protection Society (RAPS) are competitors in the provision of animal shelter services in the City. The applicant is an officer of a trade union that represents RAPS employees. From 2020 or 2021<sup>1</sup> until the close of submissions in this inquiry,<sup>2</sup> the BC SPCA provided animal shelter services to the City pursuant to an agreement with the City (the Agreement).

[7] In its submissions, the City stated that it may issue a request for proposals (RFP) for animal shelter services upon expiration of the Agreement. The Agreement expired after the close of submissions, and no party provided submissions as to whether or not the City did in fact issue an RFP or as to the status of the Agreement.<sup>3</sup>

[8] The applicant requested all contracts and documents between the City and the BC SPCA during the period when the BC SPCA provided the service to the City.

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<sup>1</sup> While the date the Agreement took effect is clear on the face of the Agreement, I cannot disclose this information without disclosing information that is in dispute.

<sup>2</sup> As the agreement expired after the close of submissions, in determining the matters at issue in this inquiry, I considered the facts as they were at the close of submissions (when the agreement was in effect).

<sup>3</sup> While I cannot provide specifics without disclosing information that is in dispute, I note that section 8 of the agreement raises some questions about the status of the agreement.

### ***Record in Dispute***

[9] The sole record in dispute in this inquiry is the Agreement. The Agreement is 23 pages in length and sets out the terms of the agreement for the provision of animal shelter services between the City and the BC SPCA including the fees paid by the City to the BC SPCA.<sup>4</sup> The City withheld the Agreement in its entirety.

### ***Section 17(1) - Harm to the Financial Interests of a Public Body***

[10] Section 17(1) permits a public body to withhold information that, if disclosed, could reasonably be expected to harm the financial or economic interests of the public body. The relevant provisions of s. 17(1) provide 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, ... including the following information:

...

(b) financial, commercial, scientific or technical information that belongs to a public body ... 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.

### ***Interpretation and Standard of Proof - s. 17(1)***

[11] The approach to the language of s. 17(1) has been set out in numerous OIPC orders. Subsections (a) to (f) of s. 17(1) provide a non-exhaustive list of the kinds of information that, if disclosed, could reasonably be expected to harm the financial or economic interests of a public body.<sup>5</sup> However, it is not enough that the information is captured by one of the circumstances set out in ss. 17(1)(a) – (f). In order to succeed, a public body must also demonstrate that disclosure could reasonably be expected to result in financial or economic harm to a public body.<sup>6</sup>

[12] In terms of the standard of proof for s. 17(1), it is settled law that where the phrase “could reasonably be expected to” appears in access to information statutes, a public body must establish a “reasonable expectation of probable

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<sup>4</sup> See initial submissions of the City at para. 19.

<sup>5</sup> Order F21-56, 2021 BCIPC 65 (CanLII) at para. 21, Order F14-31, 2014 BCIPC 34 (CanLII) at para. 41, Order F08-22, 2008 CanLII 70316 (BC IPC) at para. 43, and Order F10-39, 2010 CanLII 77325 (BC IPC) at para. 32.

<sup>6</sup> Order F21-56, 2021 BCIPC 65 (CanLII) at para. 23, Order F19-03, 2019 BCIPC 4 (CanLII) at para. 22.

harm.”<sup>7</sup> The Supreme Court of Canada describes the standard as “a middle ground between that which is probable and that which is merely possible.”<sup>8</sup> It “refers to an expectation for which real and substantial grounds exist when looked at objectively”<sup>9</sup> and requires a risk of harm that is “well beyond the merely possible or speculative.” However, the harm “need not be proved on the balance of probabilities.”<sup>10</sup>

[13] The determination of whether the standard of proof has been met 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.”<sup>11</sup>

[14] Furthermore, it is the release of the information itself which must give rise to a reasonable expectation of harm.<sup>12</sup> The public body must provide evidence to establish “a direct link between the disclosure and the apprehended harm and that the harm could reasonably be expected to ensue from disclosure.”<sup>13</sup>

[15] Finally, in assessing the harm that could result from disclosure of the Agreement, as in past OIPC’s decisions, my analysis proceeds on the basis that disclosure of the information to the applicant should be treated as disclosure to the world.<sup>14</sup>

### *Parties’ Submissions*

[16] The City argues that disclosing the Agreement to the applicant could reasonably be expected to harm the City’s financial or economic interests by limiting the competitive environment and, thus, the City’s ability to realize value for taxpayers in any upcoming procurement process. It also argues that as the applicant is a previous provider of animal shelter services, the applicant would be placed in an unfairly advantageous bidding position if the applicant were to tailor its bid to the current terms in the Agreement.

[17] In support of its arguments, the City relies on the evidence of a City employee who is responsible for “administer[ing] requests for information under

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<sup>7</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54 [*Ontario (Community Safety)*].

<sup>8</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 201.

<sup>9</sup> *Merck Frosst* supra note 8 at para. 204.

<sup>10</sup> *Ontario (Community Safety)* supra note 7 at para. 54.

<sup>11</sup> *Ontario (Community Safety)* supra note 7 at para. 54.

<sup>12</sup> *British Columbia (Minister of Citizens’ Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875 at para. 43.

<sup>13</sup> *Merck Frosst* supra note 8 at para. 219.

<sup>14</sup> See for example Order 03-33, 2003 CanLII 49212 (BC IPC), at para. 44, Order F11-12, 2011 BCIPC 15 at para. 73.

[FIPPA]<sup>15</sup> (the Records Employee). The Records Employee's affidavit begins with the clarification that the Records Employee has personal knowledge of the matters deposed to "except where they are stated to be based on information and belief."<sup>16</sup> The Records Employee's evidence about harm under s. 17(1) is as follows:

12. I am of the understanding that disclosing the Record to the applicant could reasonably harm the financial or economic interests of the City in any upcoming procurement process for the Services.

13. The City is committed to maintaining open, transparent and fair competitive procurement processes. The City uses its procurement processes to illicit bids that provide the best value to the City and its citizens, so preserving the competitiveness of the process is essential for ensuring that public tax dollars are put to good use.

14. I am of the understanding that if the applicant is supplied with the Record, the applicant will be placed in an unfairly advantageous bidding position when the City issues a request for proposals for the Services. Specifically, it is my understanding, the applicant may tailor its bid to the current terms in the Agreement. Therefore, it is my understanding that disclosing the Record could reasonably be expected to harm the financial or economic interests of the City within the scope of sections 17(1)(b) and (f) of the Act, as it could reasonably undermine the City's ability to conduct negotiations and preserve the competitiveness of the procurement process. This would, in turn, limit the City's ability to use the procurement process to realize best value for its taxpayers.<sup>17</sup>

[18] The applicant submits that disclosure of the Agreement will not result in harm to the City or the BC SPCA. The applicant explains that he is an officer of a trade union not a previous service provider, and therefore not in a position to bid on City contracts. On this basis the applicant rejects the City's assertion that disclosure of the Agreement would place the applicant in an advantageous bidding position.<sup>18</sup>

### *Findings and Analysis*

[19] As the City did not address the applicant's role in reply, I accept that the applicant is a union official and not a previous provider of animal welfare services to the City. However, as disclosure under FIPPA is assumed to be to the world at large, disclosure of the Agreement to the applicant could put it in the hands of

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<sup>15</sup> Affidavit of the Records Employee at para. 2.

<sup>16</sup> Affidavit of the Records Employee at para. 1.

<sup>17</sup> Affidavit of the Records Employee at paras. 12 – 14.

<sup>18</sup> The applicant also states that the annual costs of animal welfare services should be provided in the City's Annual Statement of Financial Information and to the union that represents the City's BC SPCA. However, as the relevance of these statements is not clear, I have not relied on them in deciding this inquiry. The applicant did not make any other arguments.

one of BC SPCA's competitors, namely RAPS. Accordingly, in considering the City's arguments, I will consider them through the lens of disclosure to the world at large, not just to the applicant.

[20] Considered through this lens, the City's argument is that disclosure of the Agreement could reasonably be expected to harm its financial or economic interests because it could limit competition and allow the BC SPCA's competitors to tailor bids to the current terms of the Agreement, thus harming the competitiveness of the procurement process and the City's ability to negotiate, with the result that the City could pay more in future contracts for animal shelter services.

[21] For the reasons set out below, I do not accept the City's argument.

[22] First, I find that the City's evidence is insufficient to establish harm, even on the "reasonable expectation of probable harm" standard. The totality of the City's evidence is based on the Records Employees "understanding" of what might occur if the Agreement is disclosed. However, the City provides no underlying evidence to support the Records Employee's understanding, and no evidence about the procurement or process that would allow me to assess the probability that the Record Employee's understanding is accurate.

[23] Furthermore, the Records Employee's own evidence suggests that her assertions are based entirely on hearsay or speculation. Her repeated use of the phrase "it is my understanding"<sup>19</sup> when discussing harm suggests the information is not based on "personal knowledge."<sup>20</sup> Furthermore, her role at the City in administering access to information requests does not imply familiarity with contract procurement or negotiation, and the City does not assert any relevant knowledge or experience on behalf of the Records Employee.

[24] The rules of evidence are flexible when it comes to matters before an administrative tribunal. In an administrative proceeding, hearsay evidence is admissible where it is "logically probative and may be fairly regarded as reliable."<sup>21</sup>

[25] However, in my view, the Records Employee's evidence is not reliable. The City neither explains the source of the Records Employee's understanding, nor provides any evidence that might explain how she came to the very broad understanding set out in the affidavit. Furthermore, there is no other evidence that corroborates the Records Employee's understanding. In my view, the Records Employee's evidence is either unreliable hearsay or uncorroborated

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<sup>19</sup> Affidavit of the Records Employee at paras. 12 and 14.

<sup>20</sup> At paragraph 1 of the Affidavit, the Records Employee explains that where information in the affidavit is not based on personal knowledge, it is based on "information and belief."

<sup>21</sup> *Cambie Hotel (Nanaimo) Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2006 BCCA 119 at para. 36, Order F20-48, 2020 BCIPC 57 at para. 34, Order F21-02, 2021 BCIPC 2 at para. 4, Order F22-08, 2022 BCIPC 8 (CanLII) at para. 13.

speculation. Accordingly, while I have considered the Records Employee's evidence concerning harm under s. 17, I find that it has limited evidentiary value.

[26] Compounding the problem with the City's evidence is the fact that the remaining evidence before me does not support the Records Employee's understanding. First, the City founds its arguments on the principle that preserving an "open, transparent and fair competitive procurement process"<sup>22</sup> for animal welfare services is essential to ensuring that public tax dollars are put to the best, most cost-efficient use.<sup>23</sup> However, its evidence suggests that there are two entities that compete for shelter services contracts with the City – BC SPCA and RAPS. As a party to the Agreement at issue, the BC SPCA knows the terms of the Agreement. The City's suggestion that open, transparent and fair competition is important to its ability to obtain the best value through the RFP process is, in my view, incompatible with its preference to withhold the Agreement from RAPS when the BC SPCA has the information.

[27] In addition, it is not at all clear why keeping the terms of the Agreement from RAPS (or any other potential competitors) would promote rather than reduce competition. While it is conceivable that, as the City asserts, RAPS or other competitors could tailor their bids to match the existing Agreement thus resulting in less competition, in my view it is equally plausible that disclosure of the Agreement could increase competition as all potential service providers might use the information to compete to provide the City with the best offer.

[28] The City's argument under s. 21 affirms my view that disclosure could increase, rather than decrease competition. Under s. 21 the City asserts that "disclosing the information in the [Agreement] would allow BC SPCA's competitors, including RAPS, to view the fees paid for the Services, which would result in the competitors making stronger bids for the Services"<sup>24</sup> (emphasis added). It is difficult to square the City's argument under s. 17 with its assertion that disclosure would also result in stronger bids from the BC SPCA's competitors under s. 21.

[29] Ultimately, the onus is on the City, and the evidence and argument in this case does not persuade me of the accuracy of the Records Employee's "understanding" that disclosure of the Agreement would reduce rather than increase competition.

[30] Finally, I note that my determination aligns with numerous past OIPC orders in which decision makers have rejected arguments similar to those put forward by the City, and held that public bodies were not authorized to withhold the terms of contracts under s. 17 of FIPPA.

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<sup>22</sup> Affidavit of Records Employee at para. 13.

<sup>23</sup> Affidavit of Records Employee at para. 12.

<sup>24</sup> Initial submissions of the City at para. 27.

*Conclusion – Section 17(1)*

[31] For all of the reasons set out above, I find that the City's evidence is not sufficient to establish that disclosure of the information in the Agreement could reasonably be expected to harm the City's financial or economic interests. Accordingly, the City is not authorized to withhold the information in dispute under s. 17(1).

**Section 21(1) – Harm to Third Party Business Interests**

[32] Section 21(1) requires a public body to withhold information if its disclosure could reasonably be expected to harm the business interests of a third party. The relevant sections of s. 21 are as follows:

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

- (a) that would reveal ...
  - (ii) commercial, financial, ... or technical information of or about a third party,
- (b) that is supplied, implicitly or explicitly, in confidence, and
- (c) the disclosure of which could reasonably be expected to
  - (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
  - (ii) 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.

[33] The principles for applying s. 21(1) are well established. The City must establish each of the following elements in order for s. 21(1) to apply:

- Disclosure would reveal one or more of the types of information listed in s. 21(1)(a);
- The information was supplied, implicitly or explicitly, in confidence under s. 21(1)(b); and
- Disclosure of the information could reasonably be expected to cause one or more of the harms in s. 21(1)(c).<sup>25</sup>

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<sup>25</sup> See for example Order F08-22, 2008 CanLII 70316 (BC IPC) at para. 53, Order F22-47, 2022 BCIPC 53 (CanLII) at para. 29, Order F10-24, 2010 BCIPC 35 (CanLII) at paras. 48 and 49. See also Order F22-55, 2022 BCIPC 62 (CanLII) at para. 10, Order F21-29, 2021 BCIPC 37 (CanLII) at para. 11 and Order F22-54, 2022 BCIPC 61 (CanLII) at para. 12.

Information that does not satisfy all three subsections may not be withheld under s. 21(1).

### **Type of Information – s. 21(1)(a)**

[34] The City asserts that the Agreement is financial and commercial information. While FIPPA does not define commercial or financial information, previous OIPC orders provide the following guidance:

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

“Financial information” is information about money and its uses, for instance, prices, expenses, hourly rates, contract amounts and budgets.<sup>26</sup> Financial information often has been applied, together with commercial information, in a proposal or contract about the goods and services delivered and the prices that are charged for those goods or services.<sup>27</sup>

[35] The Agreement is a contract between the City and the BC SPCA that sets out the terms and conditions for the delivery of animal shelter services including the fees for that service. I find that the information in the contract is commercial and financial information.

### **Supplied in Confidence – s. 21(1)(b)**

[36] For s. 21(1)(b) to apply, the financial and commercial information must have been supplied to the public body in confidence. There are two steps to this analysis – whether the information was “supplied,” and if so, whether the supply was “in confidence.”

#### *Was the information “supplied”?*

[37] It is well-established that information in an agreement or contract between a public body and a third party does not ordinarily satisfy the “supply” requirement in s. 21(1)(b).<sup>28</sup> As former Commissioner Loukidelis explained in Order F08-22, [t]he rationale is that “supply” is intended to capture immutable

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<sup>26</sup> See for example Order F21-65, 2021 BCIPC 76 at para. 85, Order F20-41, 2020 BCIPC 49 at paras. 21-22, Order F20-47, 2020 BCIPC 56 at paras. 100-101, Order F18-39, 2018 BCIPC 42 at para. 19.

<sup>27</sup> Order F13-20, 2013 BCIPC 27 at para 14. See also Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17, and Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62.

<sup>28</sup> See for example Order 01-20, 2001 CanLII 21574 (BC IPC) at para. 81, Order 00-22, and Order 00-09.

third-party business information, “not contract information that—by the finessing of negotiations, sheer happenstance, or mere acceptance of a proposal by a public body—is incorporated in a contract in the same form in which it was delivered by the third-party contractor.”<sup>29</sup> Indeed, numerous OIPC orders have concluded that information in a contract is normally negotiated and not supplied.<sup>30</sup>

[38] Past orders recognize two exceptions to the general rule that information in a contract is not “supplied” within the meaning of s. 21(1)(b). Information that is the subject of an agreement may qualify as “supplied” if:

1. the information is relatively immutable or not susceptible to alteration during negotiation and it was incorporated into the agreement unchanged; or
2. the information could allow an accurate inference about underlying confidential information the third party “supplied” that is not expressly contained in the contract.<sup>31</sup>

#### *City’s Submissions*

[39] The City disputes that the information in the Agreement is negotiated, and argues that if the information in the Agreement were disclosed, particularly the information relating to fee amounts, this could allow accurate inferences about the underlying confidential business and financial information of the BC SPCA.

[40] In support of this argument, the City relies on the evidence of the Records Employee. The totality of the City’s evidence regarding the “supply” requirement is as follows:

The Agreement includes financial and commercial information of the BC SPCA, such as the fixed fees paid for the Services.<sup>32</sup> If disclosed, the information in the Agreement, such as the fixed fees for the Services, could reasonably allow a person to draw an accurate inference about the underlying business and financial information of the BC SPCA.<sup>33</sup>

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<sup>29</sup> Order F08-22, 2008 CanLII 70316 (BC IPC) at para. 60.

<sup>30</sup> See for example 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, 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, 2014 BCIPC 31 at para. 20, Order F16-31, 2016 BCIPC 34 at paras. 23–26, and Order F20-46, 2020 BCIPC 55 (CanLII) at paras. 33 – 36.

<sup>31</sup> Order 01-39, 2001 CanLII 21593 (BC IPC), at paras. 45 and 50, upheld and quoted in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603.

<sup>32</sup> “Services” is defined in paragraph 4 of the City’s initial submission. It refers to “the provision of animal shelter-related services in the City.”

<sup>33</sup> Affidavit of the Records Employee at para. 16.

[41] The applicant does not address whether the information in dispute was supplied.

### *Findings and Analysis*

[42] The City does not take issue with the principle that, in general, information in the contract does not satisfy the “supply” requirement. Instead it argues that the information in dispute was nonetheless supplied because it is captured by the exceptions.

[43] While the City states that it relies on the second exception, some of the City’s evidence appears to relate to the first. Accordingly, I will consider both exceptions in assessing whether the withheld information was “supplied.”

#### Exception 1 – immutable information incorporated into agreement unchanged

[44] The Records Employee’s assertion that the agreement contains BC SPCA’s financial and commercial information relates most closely to this first exception.

[45] In order to establish that the first exception applies, the City must establish both that the withheld information is relatively immutable and that it was incorporated into the agreement unchanged. To qualify for this exception, information in a contract must be “non-negotiable” in the sense that the third-party could not agree to alter the information, even if it wanted to.<sup>34</sup> Examples include 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, or factual information or details of the service provider’s audited accounts.<sup>35</sup> It must also be incorporated into the agreement unchanged.

[46] The City does not state that any information in the Agreement is the kind of immutable information captured by the first exception. The only indication of immutability from the City is the Records Employee’s assertion that the Agreement includes “fixed fees paid for [the provision of animal shelter-related services in the City].”<sup>36</sup>

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<sup>34</sup> Order F23-11, 2023 BCIPC 13 (CanLII) at para. 18, Order F22-55, 2022 BCIPC 62 (CanLII) at para. 21, and Order F23-30, 2023 BCIPC 34 (CanLII) at para. 25.

<sup>35</sup> in *Canadian Pacific Railway v British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603, Order F23-11, 2023 BCIPC 13 (CanLII) at para. 18, Order F22-55, 2022 BCIPC 62 (CanLII) at para. 21, and Order F23-30, 2023 BCIPC 34 (CanLII) at para. 25.

<sup>36</sup> Affidavit of the Records Employee at para. 16. The “Services” referenced by the Records Employee is defined in paragraph 4 of the City’s initial submission. It refers to “the provision of animal shelter-related services in the City.”

[47] While the City uses the term “fixed fees” it does not explain what it means by the term. In past OIPC orders,<sup>37</sup> the OIPC has used the term “fixed” to refer to costs incurred by a service provider that cannot be altered – that is immutable business information. To the extent that the City’s reference to fixed fees is intended to suggest that the fee amounts in the Agreement are or relate to the BC SPCA’s fixed costs, for the reasons below, I do not accept that characterization.

[48] I examined the fee amounts in the Agreement. As the Records Employee states, they describe the amount the City pays the BC SPCA for the services provided under the terms of the Agreement. Specifically, they describe the total amount the City pays the BC SPCA for the services in the Agreement annually,<sup>38</sup> the annual total for shelter fees and animal control fees (the sum of which is the total annual amount),<sup>39</sup> and a per day fee should the BC SPCA provide the services in the Agreement outside of the term of the Agreement.<sup>40</sup> In short, they describe the amount the City pays the BC SPCA for the services in the agreement, not BC SPCA’s fixed costs. This kind of information is not the kind of “immutable business information” captured by the first exception. Furthermore, from my examination of the Agreement as a whole, I am not able to identify any other information that appears, on its face, to be BC SPCA’s immutable business information.

[49] As set out above, the first exception also requires that any immutable business information be incorporated into the agreement unchanged. The City does not assert that this requirement is met.

[50] The City has not established either requirement of the first exception. I find that the information in dispute is not captured by the first exception.

#### Exception 2 - Accurate inference about supplied information

[51] Next, I will consider the City’s argument that the information in dispute could allow accurate inferences about underlying confidential information the BC SPCA “supplied” that is not expressly contained in the Agreement.

[52] The City asserts that the information in dispute could allow accurate inferences about underlying confidential information the BC SPCA “supplied” that is not expressly contained in the Agreement, it provides no evidentiary basis to substantiate its assertion. In this regard, the City does not identify what confidential business information of the BC SPCA it seeks to protect. It does not

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<sup>37</sup> See for example Order 00-41, 2000 CanLII 14406 (BC IPC).

<sup>38</sup> Records, page 4, article 3.01.

<sup>39</sup> Records, page 4, article 3.01.

<sup>40</sup> Records, page 3, article 2.01.

connect information in the Agreement to information supplied by the BC SPCA. It does not even allege that the BC SPCA supplied it with confidential information in relation to the Agreement, let alone explain how disclosing the information in the Agreement would reveal that information. While the City identifies the fee amounts in the Agreement as particularly likely to allow accurate inferences to be drawn about BC SPCA's confidential business information, again, it does not explain how the fee amounts connect to any confidential information supplied by the BC SPCA.

[53] As the Records Employee's evidence simply repeats the City's argument, her evidence does not assist in establishing an evidentiary basis for the City's assertion.

[54] Similarly, my review of the Agreement itself does not assist the City. There is no information in the Agreement that appears, on its face, to allow accurate inferences about the BC SPCA's confidential business information.

[55] It is not enough for a public body to simply assert that information in a contract falls within one of the exceptions to the supply requirement in s. 21(1)(b). In order to succeed the party with the onus must provide some factual basis to support its assertion. The City has failed to do so. For this reason, I find that the City has not established that the withheld information falls into the second exception either.

[56] Finally, my review of the Agreement suggests that it was the product of negotiation between the City and the BC SPCA. The Agreement begins with a confirmation that it was in fact the product of an agreement between the two parties.<sup>41</sup> It sets out each parties' rights and obligations as they were incorporated into the terms of the agreement. It includes provisions that appear to be the kind of general requirements the City may impose on all of its service providers.<sup>42</sup> Overall, in my view, the contract appears to contain the kind of give and take that is typical in any negotiated agreement between two contracting parties. I see no evidence that any information in the Agreement was "supplied" to the City within the meaning of s. 21(1)(b).

#### *Conclusion – Section 21(1)*

[57] The onus is on the City to establish that the information at issue was "supplied" within the meaning of s. 21(1)(b). In general, information in a contract is not supplied. The City provided insufficient information to support its assertions that the Agreement contained immutable business information or that disclosing the withheld information could lead to an accurate inference about information supplied to the City by the BC SPCA. Accordingly, I find that the City has failed to

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<sup>41</sup> Records, page 1, clause C.

<sup>42</sup> See for example section 5 on pages 5 and 6.

establish that the information in dispute was “supplied” within the meaning of s. 21(1)(b).

[58] As the City has failed to establish s. 21(1)(b), I need not consider the remaining steps of the s. 21(1) test. The City is not required or permitted to withhold the information in dispute under s. 21 of FIPPA.

## **CONCLUSION**

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

1. The City is not authorized or required by ss. 17(1) or 21(1) to refuse access to the information in the Agreement.
2. The City is required to give the applicant access to a complete copy of the Agreement.
3. The City must concurrently copy the OIPC registrar of inquiries on its correspondence to the applicant, together with a copy of the Agreement.

Pursuant to s. 59(1) of FIPPA, the City is required to comply with this order by **June 26, 2023**.

May 12, 2023



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Allison J. Shamas, Adjudicator

OIPC File No.: F21-86290