



Order F23-46

BRITISH COLUMBIA HOUSING MANAGEMENT COMMISSION

Celia Francis
Adjudicator

June 16, 2023

CanLII Cite: 2023 BCIPC 54
Quicklaw Cite: [2023] B.C.I.P.C.D. No. 54

Summary: An applicant requested, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), the contract between the British Columbia Housing Management Commission (BC Housing) and Ideaspac Consulting Inc. (Ideaspac). BC Housing decided to disclose the records but Ideaspac objected, saying s. 21(1) (harm to third-party business interests) of FIPPA applied to the records. Ideaspac argued later that the records in dispute were not the requested contract. The adjudicator found that they were and that s. 21(1) did not apply to them. The adjudicator ordered BC Housing to disclose the records to the applicant.

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

INTRODUCTION

[1] This order concerns an applicant's request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the British Columbia Housing Management Commission (BC Housing) for a contract between BC Housing and Ideaspac Consulting Inc. (Ideaspac) for services related to a proposed supportive housing project at West 8th Avenue and Arbutus Street in Vancouver.

[2] BC Housing notified Ideaspac of the request under s. 23 of FIPPA and requested its views on disclosure of the responsive records. Ideaspac objected to disclosure on the basis that s. 21(1) of FIPPA (harm to third-party business interests) applied to the records in their entirety. BC Housing decided to disclose the records with minor severing under two other FIPPA exceptions.¹

¹ These two exceptions are not in issue here.

[3] Ideospace requested a review of that decision by the Office of the Information and Privacy Commissioner (OIPC). Mediation by the OIPC did not resolve the matter and it proceeded to inquiry. The OIPC received submissions from Ideospace, BC Housing and the applicant. The applicant has not received any records to date.

ISSUE

[4] The issue to be decided in this inquiry is whether BC Housing is required by s. 21(1) to withhold information.

[5] Under s. 57(3) of FIPPA, Ideospace has the burden of proof respecting s. 21(1).

PRELIMINARY ISSUE

What are the records in dispute?

[6] The records that BC Housing provided as the records in dispute consisted of a September 2020 proposal from Ideospace to BC Housing and three November 2020 purchase orders.

[7] In its initial submission, Ideospace said that these records were not the requested contract but rather a proposal and fee estimates. It said the proposal was “in relation to a BC Housing supportive housing project” and that the proposal contained Ideospace’s “suggestions and ideas for how services could be delivered in relation to the Project”. It said that the purchase orders were “cost projections” or “Cost Estimates”. Ideospace added that the contract itself had been “voluntarily disclosed by Ideospace” as an attachment to the affidavit of Ideospace’s president.²

[8] BC Housing did not address this issue in its response submission. I therefore asked BC Housing to clarify the nature of the responsive records. I also asked Ideospace to clarify its statement that it had already disclosed the contract, noting that the attachment to the affidavit was not a contract but a BC Housing “Request for Pre-Qualifications” (RFPQ) document.

[9] BC Housing responded that its position is that the September 16, 2020 proposal and the purchase orders are the contract between the parties.³

² Ideospace’s initial submission, para. 6; affidavit of Ideospace’s president, para. 10; Ideospace’s response, para. 5.

³ BC Housing’s email of June 1, 2023.

[10] Ideaspace disagreed these records constitute a contract between it and BC Housing.⁴

[11] For reasons that follow, I have concluded that the September 2020 proposal and the three November 2020 purchase orders comprise the responsive records and are thus the records in dispute.

BC Housing's March 2019 RFPQ

[12] I will first outline the relevant portions of BC Housing's March 1, 2019 RFPQ mentioned above:

- it is an invitation to prospective proponents to submit proposals for the provision of Community Consultation Services and/or Stakeholder Engagement Services regarding BC Housing's housing initiatives (Article 1.1);
- it invites proposals (with pricing to be submitted in accordance with Appendix C to the RFPQ) by April 11, 2019, with a roster to be drawn up in late May 2019 (Articles 1.1 and 1.3);
- the intent is to create a roster of pre-qualified consultants for four service areas (described under "Part 2, Deliverables") (Article 1.1);
- the highest ranking proponents will be invited to enter into contract negotiations for a two-year agreement with BC Housing, attached as Appendix A to the RFPQ (Article 1.3);
- if a project arises, pre-qualified vendors will be selected in rotation and, if the contacted vendor acknowledges, it will receive a service request, is to provide a written price and, after receipt of a confirmed purchase order, commence work (Article 2.8);
- the vendor's proposal, pricing schedule and statement of work are incorporated by reference and form part of the Master Purchase Agreement (Article 3 and Appendix A, Draft Sample Master Purchase Agreement);
- the Master Purchase Agreement serves as the contract between BC Housing and the vendor (supplier) and sets out the terms and conditions on which BC Housing will engage the vendor to provide goods and services to BC Housing for the duration of the agreement (para. 2 Appendix A, Draft Sample Purchase Agreement); and

⁴ Ideaspace's letter of June 8, 2023.

- “contract” means the aggregate of: master agreement, articles of agreement, the general terms and conditions, any supplemental general conditions, annexes, schedules, purchase order(s), the solicitation and any other document specified or referred to as forming part of the Contract, all as amended by agreement of the parties from time to time (Appendix A, General Terms and Conditions, Article 1).

Ideaspace’s submission

[13] Ideaspace’s arguments on this issue may be summarized as follows:

- Ideaspace has what it called a “standing offer arrangement” with BC Housing, the terms of which, it said, are “set out in a Request for Pre-Qualifications for Community Consultation Services issued in 2019 (the ‘RFPQ’ or ‘Standing Offer Arrangement’ – attached hereto as Schedule A)”;
- under the terms of the RFPQ, it has been “pre-qualified to bid on work within the scope of its expertise”;
- under the terms of the “Standing Offer Arrangement”, as a successful vendor under the RFPQ, it entered into a Master Service Agreement with BC Housing which entitled it to be placed on a roster of pre-qualified vendors;⁵
- Ideaspace may receive notice of proposed projects and the opportunity to bid, along with other pre-qualified vendors, and it may submit proposals about upcoming projects;
- if it submits a proposal and is awarded a project, the standard terms and conditions in the Master Service Agreement govern the delivery of work;
- Ideaspace was informed that “BC Housing and the City of Vancouver were seeking communications and community engagement services in relation to the Project”;
- Ideaspace prepared the September 2020 proposal in response to a request from BC Housing pursuant to the Standing Offer Arrangement;
- the proposal reflects Ideaspace’s assessment of the services and approach required to successfully complete the project;

⁵ Ideaspace variously referred to this agreement as a “standing offer arrangement”, “standing agreement”, “Master Service Agreement” and “Master Purchase Agreement”. I will use the term “Master Purchase Agreement” which is the term used in the RFPQ and in Appendix A to the RFPQ.

- the proposal at issue does not form the contractual terms for the project but rather is Ideaspaces ideas and suggestions for how it should deliver its services in relation to the project;
- the “cost estimates” [i.e., purchase orders] are also not part of the contract but were prepared in conjunction with the proposal, are cost estimates only and do not reflect the actual prices that BC Housing paid to Ideaspaces;
- the actual contract is the Master Services Agreement in Appendix A to the RFPQ; and
- Article 2 of the General Terms and conditions in the Master Purchase Agreement specifies that it “embodies the entire contract between the parties” and thus it is clear that the proposal and “cost estimates” could not be the contract.⁶

BC Housing’s submission

[14] BC Housing said the following in response to my request for clarification of the records in dispute:

Ideaspaces proposal was an offer for services that contained the deliverables, performance requirements and payment terms. BC Housing accepted that proposal for 3 sites by its Purchase Orders to Ideaspaces for those 3 sites, thereby forming a contract. All suppliers of BC Housing must agree to BC Housing’s General Terms and Conditions and Supplier Code of Conduct as part of any contract with BC Housing. The Purchase Orders expressly include by reference the General Terms and Conditions and Supplier Code of Conduct, which are publicly available online. (The Purchase Orders state that “This Contract is governed by 1. BC Housing’s General Terms and Conditions and 2. Supplier Code of Conduct. Available at <https://www.bchousing.org/about/doing-business/supplier-centre/contract-essentials>.”) As a result, it is BC Housing’s view that the proposal and the purchase orders together are responsive records that contain the information requested by the applicant.

There is no other separate contract or other documents setting out the terms and conditions for the subject project.⁷

Discussion and findings

⁶ Ideaspaces initial submission, paras. 7-16; affidavit of Ideaspaces president, paras. 12-15; Ideaspaces reply submission, paras. 5-7; Ideaspaces letter of June 8, 2023

⁷ BC Housing’s email of June 1, 2023.

[15] The March 2019 RFPQ invited proposals for services generally, not for a specific housing project. I understand that Ideaspac was a successful proponent in this process. According to the RFPQ, Ideaspac and BC Housing were to enter into a Master Purchase Agreement, under which Ideaspac might be offered the opportunity to submit bids on projects. The parties did not provide me with a copy of any such Master Purchase Agreement.

[16] In this vein, I understand Ideaspac to argue that the Master Purchase Agreement in Appendix A to the RFPQ is the requested agreement or contract. It clearly is not. Rather, it is simply a “Draft Sample Master Purchase Agreement” and, according to the RFPQ, is the “starting point for negotiations between BC Housing and the selected proponent” (Article 4.3.4, RFPQ). If Ideaspac means the actual Master Purchase Agreement that it and BC Housing entered into as a result of the RFPQ process, I conclude from the opening wording of the Appendix A that any such Master Purchase Agreement is an overarching document that is a separate document from the requested contract, which is for a particular project.

[17] Based on the parties’ submissions, I also understand that, under the Master Purchase Agreement that flowed from the March 2019 RFPQ process, BC Housing invited Ideaspac to submit a proposal for work on projects that included the housing project of interest to the applicant. The parties did not provide me with a record of any such invitation.

[18] Ideaspac said that it submitted the September 2020 proposal in question to BC Housing in response to BC Housing’s request pursuant to the Master Purchase Agreement. The proposal describes the work Ideaspac proposed to do on housing projects, together with its proposed pricing. BC Housing said it accepted this proposal for three sites. The parties did not provide me with a record of any such acceptance.

[19] According to the RFPQ, once a vendor receives a purchase order for a project, the vendor is to start work. The three purchase orders in question are BC Housing’s documents, directed at Ideaspac. They set out the addresses of three projects and pricing for each project. I take these three purchase orders to have been issued in accordance with the RFPQ and under which the vendor, Ideaspac, was to start work on housing projects at the three named addresses.

[20] As BC Housing said, the purchase orders incorporate by reference the General Terms and Conditions in the RFPQ under which the term “contract”, as noted above, means “master agreement, articles of agreement, these general terms and conditions, any supplemental general conditions, annexes, schedules, purchase order(s), the solicitation and any other document specified or referred to as forming part of the Contract, all as amended by agreement of the parties from time to time.” From this wording and BC Housing’s submission, I take a

“contract” for a particular project to include a vendor’s proposal submitted in accordance with a Master Purchase Agreement, as well as purchase orders BC Housing issues for a project.

[21] In light of the above, and despite the curious absence of supporting records, as noted above, I accept BC Housing’s submission on the nature of the responsive records and that there are no other contract records for the project of interest to the applicant. I am, therefore, satisfied that the requested contract comprises the September 2020 proposal and the three November 2020 purchase orders at issue.

[22] I find, therefore, that the responsive records, and thus the records in dispute in this case, are Ideaspace’s September 2020 proposal and the three November 2020 purchase orders.

DISCUSSION

Information in dispute

[23] The nine pages of records in dispute consist of the following:

- a September 16, 2020 proposal from Ideaspace to BCHMC; and
- the three November 2020 purchase orders.

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

[24] I will now turn to whether s. 21(1) requires BC Housing to withhold the records in dispute. BC Housing decided not to apply s. 21(1) to any of the information, whereas Ideaspace argued that s. 21(1) applies to the records in their entirety.

[25] The relevant parts of s. 21(1) of FIPPA read 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, 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, ...

[26] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies.⁸ All three parts of the s. 21(1) test must be met in order for the information in dispute to be properly withheld. First, Ideaspac, as the party resisting disclosure, must demonstrate that disclosing the information at issue would reveal one or more types of information listed in s. 21(1)(a). Next, it must demonstrate that the information was supplied, implicitly or explicitly, in confidence. Finally, it must demonstrate that disclosure of the information could reasonably be expected to cause one or more of the harms set out in s. 21(1)(c).

Type of information – s. 21(1)(a)(ii)

[27] Ideaspac said that the information in question is its financial and commercial information.⁹ BC Housing and the applicant did not address this issue.

[28] FIPPA does not define “commercial” or “financial” information. However, past orders have found that

- “commercial information” relates to commerce, or the buying, selling, exchanging or providing of goods and services; the information does not need to be proprietary in nature or have an actual or potential independent market or monetary value;¹⁰ and
- “financial information” is information about money and its uses, for instance, prices, expenses, hourly rates, contract amounts and budgets.¹¹

[29] Ideaspac said that the proposal contains its commercial information as the proposal “describes the scope, nature and particulars” of Ideaspac’s services, specific deliverables and the practices, processes and methods that Ideaspac uses to deliver those services. Ideaspac said that the proposal and purchase orders contain its financial information as they include projected cost estimates, fees, rates and costs for delivering its series.¹²

⁸ See, for example, Order 03-02, 2003 CanLII 49166 (BCIPC), Order 03-15, 2003 CanLII 49185 (BCIPC), and Order 01-39, 2001 CanLII 21593 (BCIPC).

⁹ Ideaspac’s initial submission, paras. 20-23.

¹⁰ See Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17, and Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62.

¹¹ Order F21-65, 2021 BCIPC (CanLII), at para 76.

¹² Ideaspac’s initial submission, para. 22.

[30] I agree with Ideaspaces’s description of the information. I find, therefore, that the proposal and purchase orders contain commercial and financial information of or about Ideaspaces for the purposes of s. 21(1)(a)(ii).

Supply in confidence – s. 21(1)(b)

[31] The next step is to determine whether the information I found is commercial information of or about Ideaspaces was “supplied, implicitly or explicitly, in confidence.” The information must be both “supplied” and supplied “in confidence.”¹³ Ideaspaces said the information was supplied in confidence. BC Housing and the applicant did not deal with this issue.

Supply

[32] BC orders have consistently found that information in an agreement or contract will not normally qualify as “supplied” by the third party for the purposes of s. 21(1)(b), because the information is the product of negotiations between the parties. Order 01-39 also said this about the “supply” element in contracts:

By their nature, contracts are negotiated between the contracting parties. The fact that the requested records are contracts therefore suggests that the information in them was negotiated rather than supplied. It is up to CPR, as the party resisting disclosure, to establish with evidence that all or part of the information contained in the contracts including their schedules was not negotiated, as would normally be the case, but was “supplied” within the meaning of s. 21(1)(b).¹⁴

[33] This is so, even where the information was subject to little or no back and forth negotiation. There are two exceptions to this rule:

- where the information the third party provided was “immutable” (i.e., not open or susceptible to negotiation) and was incorporated into the agreement without change; or
- where the information in the agreement could allow someone to draw an “accurate inference” about underlying information a third party had supplied in confidence but which does not expressly appear in the agreement.¹⁵

[34] Ideaspaces said that the proposal and purchase orders do not contain contractual terms but rather were “supplied”, as Ideaspaces prepared its ideas

¹³ See, for example, Order F17-14, 2017 BCIPC 15 (CanLII) at paras. 13-21, Order 01-39, 2001 CanLII 21593 (BC IPC) at para. 26, and Order F14-28, 2014 BCIPC 31 (CanLII) at paras. 17-18.

¹⁴ Order 01-39, 2001 CanLII 21593 (BCIPC), at para. 43.

¹⁵ See, for example, Order 01-39, 2001 CanLII 21593 (BC IPC) at para. 45.

and recommendations exclusively, without substantive input from BC Housing. Ideaspac said that, even if the records are “contractual in nature”, they would fall under the exceptions described above.¹⁶

[35] I reject Ideaspac’s arguments on this point. First, BC Housing said that it accepted Ideaspac’s proposal and issued the purchase orders to Ideaspac as a result. In accordance with previous orders, as noted above, this indicates that the terms of the proposal were negotiated, even though, as BC Housing submission indicates that, while it could have negotiated with Ideaspac, it simply accepted, or agreed to, Ideaspac’s proposal.

[36] Second, Ideaspac pointed to portions of its proposal that, in its view, contain “immutable” information. I can see that these portions refer to Ideaspac’s ideas and the processes and methods it proposed to use in the project but I do not agree that such information is “immutable”. This term has been interpreted, and upheld at judicial review, to refer to information such as fixed costs (such as overhead or labour costs in a collective agreement) or financial statements.¹⁷ Ideaspac did not explain how this information was “immutable”, beyond saying it was Ideaspac’s confidential business information. In any case, a vendor’s ideas on how to carry out a project would naturally be fluid and differ from project to project. I do not, therefore, accept Ideaspac’s argument that the information is immutable.

[37] Finally, I also do not accept Ideaspac’s argument that disclosure of the proposal would fall under the “accurate inference” exception. Ideaspac said that its methods and processes are not “broadly known”.¹⁸ I agree that disclosure of the proposal would reveal Ideaspac’s ideas on processes and methods it proposed for this project. However, it is not clear what “underlying confidential information” could be inferred from disclosure of the proposal. The proposal contains what I consider to be high-level promotional ideas on what Ideaspac would do to support the housing project. Although Ideaspac gave an *in camera* example of one method it uses, it is not clear if Ideaspac provided this information to BC Housing separately. It is also not clear how one could infer this information from disclosure of the records at issue in this inquiry.

[38] Ideaspac added that the purchase orders, to which it referred as “cost estimates”, were “supplied” as they are fee estimates only and do not reflect the actual amounts paid to Ideaspac.¹⁹ I noted above that BC Housing issued the purchase orders. This means that the information in these records originated with BC Housing.

¹⁶ Ideaspac’s initial submission, paras. 25-33.

¹⁷ Order 01-39 Order 01-39, 2001 CanLII 21593 (BC IPC) at para. 45

¹⁸ Ideaspac’s initial submission, para. 32; affidavit of Ideaspac’s president, paras. 17-19. Some of the affidavit evidence was accepted *in camera*.

¹⁹ Ideaspac’s initial submission, para. 33.

[39] While I agree the purchase orders list the amounts that Ideospace was to be paid for its work on the project, the amounts are taken from the proposal which BC Housing accepted, or agreed to, and which I found above was negotiated, not “supplied”. As with the proposal, therefore, this means that the amounts in the purchase orders were negotiated. I find, therefore, that the purchase orders were not “supplied” for the purposes of s. 21(1)(b).

[40] In conclusion, Ideospace has not persuaded me that the information in question provided was “supplied”. I need not, therefore, consider if it was supplied “in confidence”. This means that I find that s. 21(1)(b) does not apply to the records in dispute.

Conclusion on s. 21(1)

[41] I found above that the information is financial and commercial information of or about Ideospace. I also found that the information was not “supplied” within the meaning of s. 21(1)(b).

[42] As all three parts of the third-party test must be satisfied in order for s. 21(1) to apply, it follows that I find that s. 21(1) does not apply to the records in dispute. Given these findings, I need not deal with s. 21(1)(c).

CONCLUSION

[43] For the reasons given above, I find that Ideospace has not met its burden of proof and that s. 21(1) does not apply to the records in dispute.

[44] Under s. 58(2)(a) of FIPPA, therefore, I require BC Housing to disclose the records to the applicant, except for any information it decides to withhold under other FIPPA exceptions.

[45] BC Housing must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records it is required to disclose.

[46] Under s. 59(1), BC Housing is required to comply with this order by July 31, 2023.

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File No.: F21-86592