



Order F23-105

CITY OF VANCOUVER

Celia Francis
Adjudicator

December 4, 2023

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Summary: A journalist requested from the City of Vancouver (City), under the *Freedom of Information and Protection of Privacy Act* (FIPPA), the bids for three requests for proposal (RFPs) for nearly 900 units of affordable housing. A third-party objected to the City's decision about how it would sever the third party's three bids. The adjudicator found that s. 21(1) did not apply to the information in dispute and ordered the City to disclose it to the journalist.

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

INTRODUCTION

[1] This order concerns a journalist's request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for bids the City of Vancouver (City) received in response to three requests for proposal (RFPs). The RFPs concern the construction of nearly 900 units of affordable housing on seven City-owned sites.

[2] The City notified a third party of the request under s. 23 of FIPPA and requested its views on disclosure of its bids. The third party said the entirety of the bids should be withheld under s. 21(1) of FIPPA (harm to third-party business interests). The City did not agree, so the third party revised its views and narrowed the scope of the proposed severing. The City told the third party it still did not support the proposed redactions.¹

¹ City's inquiry submission at paras. 6-9 and City's August 26 and October 5, 2021 emails to the third party.

[3] At this point, the third party asked the Office of the Information and Privacy Commissioner (OIPC) to review the City's decision. Mediation by the OIPC did not resolve the matter and it proceeded to inquiry. The OIPC received submissions from the third party, the City and the journalist. The journalist has not received any records to date.

ISSUE AND BURDEN

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

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

DISCUSSION

Background

[6] The City issued the RFPs in July 2017. The RFPs sought proposals for designing, building, financing and operating a new affordable housing project at seven sites the City owns. The City ultimately awarded the RFPs to the Community Land Trust.

[7] The third party is a non-profit society which is involved in activities such as housing developments and providing opportunities for people with low and moderate incomes to acquire and occupy housing.² It was not the successful bidder in the RFP process.³

[8] The journalist said that the seven sites offered for the development of social housing were a "huge investment." In her view, Vancouver taxpayers should understand some details of both the successful and unsuccessful bids and how they compared to each other.⁴

[9] The journalist's request was for all bids but this inquiry is only about the third party's bids. I do not know what happened with the balance of the records the journalist requested.

Information in dispute

[10] The 1,614 pages of records before me consist of the third party's bids on the three RFPs which relate to affordable housing projects on seven sites that the City owns.

² Third party's initial submission, para. 11.

³ Third party's reply, para. 6.

⁴ Journalist's response.

[11] The third party provided me with a copy of its bids, marked to show the information it believes must be withheld under s. 21(1). The City did not do the same and it has not clearly identified what information, if any, it believes must be withheld under s. 21(1). The City's submissions only say that it thinks the third party may be able to prove s. 21(1) applies to some, but not all, of the information the third party wants withheld.

[12] The journalist said she does not want the names of companies or people submitting the bids and that the City could black this information out. Any such information is, thus, not at issue in this inquiry.

[13] The journalist also said she is interested in the "basic financials," not "the entire *pro forma* but at least some key numbers," "completion dates" and "other promises" made "in the winning bid, along with competing bids." The journalist listed the information she thought the public ought to know. It is as follows:

- "Prepaid lease amount"
- "Development costs"
- "Funding and financing"
- "Affordability (in particular, the proposed rental prices for the units, i.e., what percentage below market and what is that pegged at, how many at market, etc., in whatever way that was expressed in the bid)"
- "Revenue model"
- "Scheduling considerations"
- "Design rationale and considerations"⁵

[14] I understand the journalist to say she is narrowing her request to these topics. I identified the following pages of the records as containing the information of interest to the journalist:

- RFP PSVAHA2017-03 (3310 Marine Way and 3183-3245 Pierview Crescent) – pages 6-8, 19-20, 23, 33;
- RFP PSVAHA2017-04 (1001 Kingsway and 3279-3297 Vanness Avenue) – pages 505-508, 518-519, 522, 534; and
- RFP PSVAHA2017-05 (1190 Burrard Street, 1210 Seymour Street and 177 West Pender Street) – pages 988-991, 1002-1003.

[15] I can see that the third party submits that all of this is information must be withheld under s. 21(1), so I will decide if s. 21(1) applies to it. I am satisfied that it is the only information in dispute in this inquiry.

⁵ Journalist's response.

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

[16] The third party wants the records withheld in full under s. 21(1) or, in the alternative, to be severed broadly under s. 21(1), in accordance with its suggestions.

[17] The City's position is that the third party did not provide sufficient evidence to support its proposed severing.⁶ The City also says that "some of the information may properly be withheld under section 21"⁷ but it did not identify the information.

[18] 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, ...

[19] 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, the third party, 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).

⁶ City's response, para. 9.

⁷ City's response, para. 30.

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).

Type of information – s. 21(1)(a)(ii)

[20] The third party said that the information in question is its financial, commercial and/or technical information.⁹ The City argued that not all of the information in dispute meets the first part of the test.¹⁰ The City did not identify which information it meant. The journalist did not directly address this issue.

[21] FIPPA does not define “commercial,” “financial” or “technical” 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;¹¹ and
- “financial information” is information about money and its uses, for instance, prices, expenses, hourly rates, contract amounts and budgets.¹²

Some information is not “of or about” the third party

[22] Some of the information the third party highlighted as falling under s. 21(1) is not information of or about the third party but rather is about the City, as follows:

- the footers which the City inserted on each page of the records (e.g., the request, document and page numbers);¹³
- the City’s RFP numbers (these are listed in the RFPs);
- the addresses and parcel numbers of the seven City-owned sites (these are listed in the RFPs);
- the City’s name and address; and
- the name of the City department responsible for overseeing the projects (this name is in the RFPs);¹⁴

[23] I find that s. 21(1)(a)(ii) does not apply to these types of information. As all three parts of s. 21(1) must apply to information, this means that s. 21(1) does not apply to these types of information and the City must disclose them.

⁹ Third party’s initial submission, paras. 16-18, 23-28.

¹⁰ City’s response, para. 30.

¹¹ See Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17, and Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62.

¹² Order F21-65, 2021 BCIPC (CanLII), at para 76.

¹³ The third party highlighted some of this footer information inconsistently.

¹⁴ The third party highlighted this information inconsistently as well.

Financial or commercial information of or about the third party

[24] However, some of information in dispute consists of details of the third party's design proposals and scheduling considerations for the projects. I find that this information is commercial information of or about the third party.

[25] Other information in dispute consists of the third party's development costs, lease amounts, financing and affordability targets. I find that this is financial information of or about the third party.

Conclusion on s. 21(1)(a)(ii)

[26] In conclusion, I found above that some information in dispute is not information of or about the third party. This means that s. 21(1) does not apply to it.

[27] I found that the remaining information in dispute consists of commercial or financial information of or about the third party for the purposes of s. 21(1)(a)(ii). I will consider next whether this information falls under s. 21(1)(b).

Supply in confidence – s. 21(1)(b)

[28] The next step is to determine whether the information I found is commercial and financial information of or about the third party was "supplied, implicitly or explicitly, in confidence." The information must be both "supplied" and supplied "in confidence."¹⁵

[29] The City and the third party both said the records were "supplied in confidence." The journalist did not comment on this issue.

[30] The third party and the City both said the information in dispute was "supplied." The City also provided evidence that the third party prepared the bids without any input from the City.¹⁶ I am satisfied that the records were "supplied."

[31] A number of orders have discussed examples of how to determine if third-party information was supplied, explicitly or implicitly, "in confidence" under s. 21(1)(b). For example, Order 01-36 says:

An easy example of a confidential supply of information is where a business supplies sensitive confidential financial data to a public body on the public body's express agreement or promise that the information is received in confidence and will be kept confidential. A contrasting example is where

¹⁵ 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.

¹⁶ Affidavit of the City's Manager, Contracts and Administration, paras. 10-13.

a public body tells a business that information supplied to the public body will not be received or treated as confidential. The business cannot supply the information and later claim that it was supplied in confidence within the meaning of s. 21(1)(b). The supplier cannot purport to override the public body's express rejection of confidentiality.

...

The cases in which confidentiality of supply is alleged to be implicit are more difficult. This is because there is, in such instances, no express promise of, or agreement to, confidentiality or any explicit rejection of confidentiality. All of the circumstances must be considered in such cases in determining if there was a reasonable expectation of confidentiality. The circumstances to be considered include whether the information was:

1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;
3. not otherwise disclosed or available from sources to which the public has access;
4. prepared for a purpose which would not entail disclosure.¹⁷

[32] The City and the third party pointed to paragraph 8.2 in the RFPs which states that the City would treat the bids in confidence. The third party said it delivered the bids in confidence to the City.¹⁸ The City also provided evidence that it treated and stored the bids confidentially.¹⁹

[33] I accept that the third party supplied its bids implicitly "in confidence" to the City.

[34] I find, therefore, that s. 21(1)(b) applies to the information in dispute.

Would disclosure cause harm under s. 21(1)(c)

[35] The third party argued that ss. 21(1)(c)(i) and (iii) apply to the information in dispute, even with the passage of time.²⁰ The City took no position on the harm issue.²¹

¹⁷ Order 01-36, 2001 CanLII 21590 (BC IPC) at paras. 24-26.

¹⁸ Third party's initial submission, paras. 32, 37. Affidavit of the City's Manager, Contracts and Administration, para. 10.

¹⁹ Affidavit of the City's Manager, Contracts and Administration, paras. 10-13.

²⁰ Third party's initial submission, paras. 43-62; Third party's reply, paras. 18, 22.

²¹ City's response, para. 25.

[36] The journalist said she understands if development companies wanted to withhold information that might benefit competitors they are currently bidding against. In her view, however, enough time has passed that “any financials” are not likely to be relevant anymore.²²

Standard of proof for harms-based exceptions

[37] Numerous orders have set out the standard of proof for showing that disclosure could reasonably be expected to cause harm.²³ The Supreme Court of Canada confirmed that the applicable standard of proof for harms-based exceptions is as follows:

This Court in *Merck Frosst* adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course 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”.²⁴

[38] Moreover, in *British Columbia (Minister of Citizens’ Services) v. British Columbia (Information and Privacy Commissioner)*,²⁵ Bracken J. confirmed that it is the release of the information itself that must give rise to a reasonable expectation of harm.

[39] I have applied these principles in considering the arguments on harm under s. 21(1)(c).

Discussion and findings

[40] **Harm to competitive or negotiating position – s. 21(1)(c)(i):** The third party said that the information in dispute is a central part of its negotiations when bidding on development projects. In the third party’s view, if others knew of this information, it would be “substantially more expensive, uncertain, and difficult” for

²² Journalist’s response.

²³ For example, Order 01-36, [2001 CanLII 21590](#) (BCIPC) at paras. [38-39](#).

²⁴ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* [Community Safety], [2014 SCC 31](#), at para. 54 citing *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012 SCC 3](#) at para. [94](#).

²⁵ *British Columbia (Minister of Citizens’ Services) v. British Columbia (Information and Privacy Commissioner)*, [2012 BCSC 875](#) at para. [43](#).

the third party to “negotiate core items.” The third party added that, if competitors knew the terms that are acceptable to such projects, it would be significantly more difficult for the third party “to push or vary those limits on other projects, or to compete on similar bids.”²⁶

[41] The third party added that it had developed and negotiated “winning strategies” over many years with its various contractors and partners. It said that opportunities for acquisition and development of affordable housing are, and will continue to be, competitive. The third party argued that disclosure of the “detailed and sensitive information respecting service offerings, pricing and strategic project approach” could therefore reasonably be expected to put its success with potential future contracts at risk. The third party said that even the loss of one future contract of a similar magnitude to this one could occur and harm its competitive position or significantly interfere with its negotiating position.

[42] The third party did not say who its competitors are. Nor did it explain how development of affordable housing is competitive. It also did not say what, if any, RFPs it has recently bid on, is currently bidding on or plans to bid on. It also did not say if it is using the six-year-old information at issue here in any such bids.

[43] In any case, even if the third party is planning on, or will be, bidding on current affordable housing RFPs, they would be new projects with new and different factors, conditions and requirements. I do not see how the dated information in dispute would be of any value in any upcoming bids. No doubt the third party’s designs, financing, scheduling and other details would also be new.

[44] I also note that the third party’s bids in this case were unsuccessful. It is not clear why competitors would want to incorporate or copy information from unsuccessful bids in their own bids on current or upcoming projects. I find that the third party has not established that disclosing the information could reasonably be expected to significantly harm its competitive position or interfere significantly with its negotiating position.

[45] **Undue financial loss – s. 21(1)(c)(iii)** – Previous orders have said that the ordinary meaning of “undue” financial loss or gain under s. 21(1)(c)(iii) includes excessive, disproportionate, unwarranted, inappropriate, unfair or improper, having regard for the circumstances of each case. For example, if disclosure would give a competitor an advantage – usually by acquiring competitively valuable information – effectively for nothing, the gain to a competitor will be “undue.”²⁷

²⁶ Third party’s initial submission, para. 44. All quotes are from this paragraph.

²⁷ See, for example, Order 00-10, [2000 CanLII 11042](#) (BC IPC) at pp. 17-19. See also Order F14-04, [2014 BCIPC 31 \(CanLII\)](#) at paras. [60-63](#), for a discussion of undue financial loss or gain in the context of a request for a bid proposal.

[46] The third party said that disclosure of its “commercially sensitive” and “highly proprietary financial” information, which the third party said it developed or acquired at “great expense,” would result in an undue gain to competitors. The third party acknowledged that the journalist is not a competitor but argued she would likely publish the information, making it widely available to the third party’s competitors, effectively for nothing.²⁸

[47] I do not accept that a competitor would want to use the information in dispute to its advantage, for reasons similar to those I gave just above. The information is outdated, comes from unsuccessful bids and pertains only to the seven sites that were the subject of the three RFPs. Any new RFPs would have different factors, conditions and requirements and, accordingly, competitors would develop their own bids with new designs, financing, scheduling and other details. I reject, therefore, the argument that competitors would realize undue gain, or that the third party would suffer undue loss, from disclosure of the information in dispute. I find that the third party has not established that disclosing the information in dispute could reasonably be expected to result in undue financial loss or gain to any person or organization.

Conclusion on s. 21(1)

[48] Based on what the parties said in their submissions, I found that the information in dispute is only on the following pages of the third party’s bids:

- RFP PSVAHA2017-03 – pages 6-8, 19-20, 23, 33;
- RFP PSVAHA2017-04 – pages 505-508, 518-519, 522, 534; and
- RFP PSVAHA2017-05 – pages 988-991, 1002-1003.

[49] The information in dispute does not include the names of the third party and its associated businesses because the journalist said she does not want those details.

[50] I found above that some of the information in dispute is not information of or about the third party. This means that s. 21(1) does not apply to it.

[51] I found that the remaining information is financial and commercial information of or about the third party. I also found that this remaining information was “supplied in confidence” within the meaning of s. 21(1)(b).

[52] However, the third party, which has the burden of proof in this case, has not persuaded me that disclosure of this information could reasonably be expected to result in harm under s. 21(1)(c)(i) or (iii). The third party’s submissions on harm amount to little more than assertions and do not persuade

²⁸ Third party’s initial submission, paras. 49-62.

me that harm under s. 21(1)(c) could reasonably be expected to result from disclosure. It is not clear, and the third party did not adequately explain, how disclosure of the information at issue, which is now many years old and concerns bids on long-since completed RFP processes, could reasonably be expected to cause the harm the third party argues.

[53] The third party has not, in my view, provided objective evidence that is well beyond or considerably above a mere possibility of harm, which is necessary to establish a reasonable expectation of harm under s. 21(1)(c).²⁹ It has not demonstrated a clear and direct connection between disclosing the information in dispute and a reasonable expectation of the alleged harms.

CONCLUSION

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

[55] Under s. 58(2)(a) of FIPPA, therefore, I require the City to disclose to the journalist the information on the following pages, with the sole exception of the names of the third party and its associated businesses:

- RFP PSVAHA2017-03 – pages 6-8, 19-20, 23, 33;
- RFP PSVAHA2017-04 – pages 505-508, 518-519, 522, 534; and
- RFP PSVAHA2017-05 – pages 988-991, 1002-1003.

[56] The City must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the journalist, together with a copy of the records it is required to disclose in accordance with paragraph 55 above.

[57] Under s. 59(1), the City is required to comply with this order by **January 18, 2024**.

December 4, 2023

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File No.: F21-87828

²⁹ *Community Safety*, at para. 54.