



OFFICE OF THE  
INFORMATION &  
PRIVACY COMMISSIONER  
FOR BRITISH COLUMBIA

Order F24-56

## CITY OF NANAIMO

Celia Francis  
Adjudicator

June 28, 2024

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**Summary:** Davey Tree Expert Co. of Canada Limited (Davey) made a request to the City of Nanaimo (City), under the *Freedom of Information and Protection of Privacy Act*, for records related to the City's 2018 request for proposals for tree services. The City disclosed some information but withheld its evaluation records in full under s. 13(1) (advice or recommendation) and s. 17(1) (harm to financial or economic interest of public body). The adjudicator found that s. 17(1) did not apply at all. The adjudicator found that s. 13(1) applied to some of the information but also found that the City had not exercised discretion properly in deciding to withhold this information. The adjudicator therefore ordered the City to exercise its discretion regarding this information, in light of specified factors.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, [RSBC 1996] c. 165, s. 13(1), 17(1), 17(1)(e), 17(1)(f).

## INTRODUCTION

[1] Davey Tree Expert Co. of Canada Limited (Davey) made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the City of Nanaimo (City) for copies of records related to the City's "Request for Proposals (RFP) 2178 Tree Services tender".

[2] The City responded by disclosing some information but withholding its RFP evaluation documents in full under s. 13(1) (advice or recommendations), s. 17(1) (harm to financial or economic interest of public body) and s. 21(1) (harm to business interests of third party).

[3] Davey asked that the Office of the Information and Privacy Commissioner (OIPC) review the City's decision withhold the RFP evaluation records.<sup>1</sup> As a

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<sup>1</sup> Davey's request for review to the OIPC, August 26, 2021.

result of mediation by the OIPC, the City disclosed more information. Mediation did not resolve the matter which then proceeded to inquiry.

[4] The OIPC received submissions from the City and Davey. The OIPC invited submissions from a third party, an unsuccessful proponent, but this business did not participate in the inquiry.

## **PRELIMINARY MATTERS**

[5] After the OIPC issued the notice for this inquiry, the City clarified that it was relying on ss. 17(1)(e) and (f).<sup>2</sup>

[6] In addition, the City said in its initial submission that, as a result of its consultations with the other proponents in the RFP process, it was no longer relying on s. 21(1) of FIPPA.<sup>3</sup> Thus, the only issues for this inquiry are ss. 13(1) and 17(1)(e) and (f).

## **ISSUES AND BURDEN**

[7] The issues to be decided in this inquiry are whether the City is authorized by ss. 13(1) and 17(1)(e) and (f) of FIPPA to withhold the information in dispute.

[8] Under s. 57 of FIPPA, the City has the burden of proving that Davey has no right of access to the information in dispute.

## **DISCUSSION**

### **Background**

[9] The City issued RFP 2178 for tree services in 2018. Three proponents, including Davey, submitted proposals. Three City employees (evaluators) evaluated and scored each proposal. Davey was one of the unsuccessful proponents.

### **Records in Dispute**

[10] The City withheld the 25 pages of records in dispute in full. They consist mainly of templates or boilerplate forms into which the three City evaluators inserted their separate scores or evaluations of the three proposals for RFP 2178. There are also aggregated tables of the evaluators' scores and their comments on the various proposals.

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<sup>2</sup> City's email of October 27, 2023 to the OIPC.

<sup>3</sup> City's initial submission, paras. 4-5.

[11] Davey said it wants only the numerical evaluations. I have therefore excluded from my analysis the following:

- pages 17-18 and 23-25 which set out the evaluators' narrative comments on the proposals; and
- the evaluators' narrative comments and rationales on the remaining pages, which also contain forms with the numerical scores.

### **Section 13(1) – advice or recommendations**

[12] Section 13(1) says this:

13 (1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

[13] The s. 13 analysis involves two steps. First, I must determine if disclosure of the information in dispute would reveal advice or recommendations developed by or for the public body. Second, I must decide if the information that I find reveals advice or recommendations falls into any of the categories listed in s. 13(2) or s. 13(3). If it does, the public body cannot refuse to disclose it.<sup>4</sup>

[14] Section 13(2) lists categories of information that public bodies cannot withhold under s. 13(1). For example, s. 13(2)(a) says that public bodies cannot withhold factual material under s. 13(1).

[15] Section 13(3) says that public bodies cannot use s. 13(1) to withhold information in a record that has been in existence for 10 or more years.

#### *Principles for applying s. 13(1)*

[16] The courts have said that the purpose of exempting advice or recommendations from disclosure is “to preserve an effective and neutral public service so as to permit public servants to provide free and frank advice,”<sup>5</sup> recognizing that some degree of deliberative secrecy fosters the decision-making process.<sup>6</sup>

[17] In arriving at my decision on s. 13(1), I have considered the principles for applying s. 13(1) as set out in past OIPC orders and court decisions. I also note the following principles from some of those decisions:<sup>7</sup>

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<sup>4</sup> Order F21-16, 2021 BCIPC 21 (CanLII).

<sup>5</sup> *John Doe v. Ontario (Finance)*, 2014 SCC 36 [John Doe], at paras. 34, 43, 46, 47.

<sup>6</sup> *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [College], para. 105.

<sup>7</sup> I also set out these principles in Order F23-82, 2022 BCIC 98 (CanLII), in turn, drawn largely from Order F19-28, 2021 BCICPC 30 (CanLII), at para. 14.

- A public body is authorized to refuse access to information under s. 13(1), not only when the information itself directly reveals advice or recommendations, but also when disclosure of the information would enable an individual to draw accurate inferences about any advice or recommendations.<sup>8</sup>
- Recommendations include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised and can be express or implied.<sup>9</sup>
- “Advice” usually involves a communication, by an individual whose advice has been sought, to the recipient of the advice, as to which courses of action are preferred or desirable.<sup>10</sup>
- Advice includes policy options prepared in the course of the decision-making process.<sup>11</sup>
- “Advice” has a broader meaning than the term “recommendations.”<sup>12</sup> The Supreme Court of Canada found that “advice” includes a public servant’s view of policy options to be considered by a decision maker, including the considerations to take into account by the decision maker in making the decision.<sup>13</sup>
- Advice also includes an opinion that involves exercising judgement and skill to weigh the significance of matters of fact, including expert opinion on matters of fact on which a public body must make a decision for future action.<sup>14</sup>
- Section 13(1) extends to factual or background information that is a necessary and integrated part of the advice.<sup>15</sup> This includes factual information compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body.<sup>16</sup>

### *Parties’ submissions*

[18] The City said that the records contain advice or recommendations of the three evaluators, who were an Urban Forestry Coordinator, a Landscape Horticulturalist and a Horticulture Supervisor, and who are all experts in tree services. The City said that the evaluators’ “evaluations, commentary and numerical scores on proponents’ submissions in the RFP process” were provided

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<sup>8</sup> Order 02-38, 2002 CanLII 42472 at para. 135. See also Order F17-19, 2017 BCIPC 20 at para. 19.

<sup>9</sup> *John Doe supra note #* at paras. 23-24.

<sup>10</sup> Order 01-15, 2001 CanLII 21569 at para. 22.

<sup>11</sup> *John Doe, supra note #* at para. 35.

<sup>12</sup> *John Doe, supra note #* at para. 24.

<sup>13</sup> *John Doe, supra note #* at paras. 26, 34 and 47.

<sup>14</sup> *College, supra note 8* at para. 113.

<sup>15</sup> *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at paras. 52-53.

<sup>16</sup> *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94.

to the City “to provide the background analysis necessary for the City’s deliberative process of awarding the RFP to the successful proponent.”<sup>17</sup>

[19] Davey said that the successful proposal included 75% higher pricing than its own. In Davey’s view, the City ought to justify the resulting increased spending of hundreds of thousands more in taxpayer dollars from 2018 to 2023. Davey said it is not asking for advice or recommendations but simply the factual, “numerical Evaluation scores that justify this increase.”<sup>18</sup>

[20] The City responded that the evaluations are not factual but are the evaluators’ informed opinions on the proposals. It said that each evaluator scored each proposal independently and ranked the proponents from one to three. In the City’s view, these scores and ranking are a recommendation for a course of action, that is, which proponent to choose.<sup>19</sup> The City said it is not obliged to select the most affordable tender and not doing so does not impose a higher obligation on it to justify its choice.<sup>20</sup>

#### *Discussion and findings*

[21] The City withheld all of the records in dispute under s. 13(1) as advice or recommendations. It appears that the City made no attempt to sever the records.

#### Numerical scores

[22] The three evaluators’ scoring forms contain their scores for each proponent for each of the criteria, arranged in a series of columns listing the criteria, scores for each criterion, weight assigned to each criterion, total scores and comments. Several tables contain the individual evaluators’ scores for the proponents, which differ from each other. One table lists the three proponents ranked in order by total score, highest to lowest.

[23] I can see from the records that the evaluators were assessing the proponents’ proposals for RFP 2178. I am satisfied that the evaluators’ scores consist of their expert analysis of, and opinions on, the proposals. I accept that they provided their scores as part of the deliberative process of selecting the successful proponent to provide tree services to the City. The scores, in my view, consist of the evaluators’ implicit advice to the City as to which proponent to select. I find that disclosure of the evaluators’ numerical scores would reveal advice or recommendations to the City.

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<sup>17</sup> City’s initial submission, paras. 9, 12; Affidavit of Records/Information & Privacy Coordinator for the City of Nanaimo, para. 7.

<sup>18</sup> Davey’s response, pp. 1 and 2.

<sup>19</sup> City’s reply, paras. 6-7.

<sup>20</sup> City’s reply, para. 11.

[24] This finding is consistent with previous orders which found that numerical scores were advice or recommendations to a public body.<sup>21</sup>

#### Remaining information

[25] The rest of the information in the forms consists of the same boilerplate information repeated from one page to the next, for example:

- project name, respondent (proponent), evaluator, date, score range, total score, total available score, cost, criteria, comments and rationale;
- columns listing the weight assigned to each criterion;
- brief instructions on how to fill in the tables and what to do with the completed tables;
- boxes listing the numerical scoring range, with instructions on what each score means;
- footers containing the City's access request file number, name of table and in some cases the name of the evaluator; and
- columns containing the individual criteria for assessing the proposals, together with instructions on what to include for each criterion, such as "Describe your company's process for XYZ" or "Provide information on ABC". The parties did not provide me with RFP 2178 but these instructions all appear to be the kind of instructions to proponents that would have appeared in the RFP.

[26] These repetitive elements do not, in my view, contain any implicit or explicit opinions, expert analysis, recommended courses of action or background analysis. I find that disclosure of this remaining information in the tables would not reveal advice or recommendations within the meaning of s. 13(1).

*Does s. 13(2) apply?*

[27] I will now consider whether s. 13(2) applies to the information I found above reveals advice or recommendations, that is, the evaluators' numerical scores. Section 13(2) sets out types of information that a public body must not withhold under s. 13(1).

[28] The City said s. 13(2) does not apply.<sup>22</sup> Davey argued that the numerical scores are "factual" which suggests it believes that s. 13(2)(a) applies to the scores.

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<sup>21</sup> See, for example, Order F15-37, 2015 BCIPC 40 (CanLII), and Order F16-43, 2016 BCIPC 47 (CanLII).

<sup>22</sup> City's reply, para. 7.

[29] The relevant provision reads as follows:

13(2) The head of a public body must not refuse to disclose under subsection (1)

(a) any factual material

...

[30] **Factual material:** Past orders have discussed the difference between “factual material,”<sup>23</sup> to which s. 13(2)(a) applies, and factual information which may be captured by s. 13(1). For instance, in Order F16-43, the adjudicator said:

It is important to recognize that source materials accessed by the experts or background facts not necessary to the expert’s advice or the deliberative process at hand would constitute “factual material” under s. 13(2)(a) and accordingly would not be protected from disclosure. However, if the factual information is compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body, or if the expert’s advice can be inferred from the work product, it falls under s. 13(1) and not under s. 13(2)(a).<sup>24</sup>

[31] I do not consider the withheld numerical scores contain any background facts or source material, in isolation, or any other information to which s. 13(2)(a) would apply. The withheld numerical scores consist of evaluators’ expert opinions and analysis of the three proposals, assessed against set criteria. I find that s. 13(2)(a) does not apply to this information.

[32] **Rest of s. 13(2):** I also find that no other parts of s. 13(2) apply to the numerical scores. They do not, for example, consist of an economic forecast (s. 13(2)(e)) or a feasibility or technical study (s. 13(2)(i)).

*Does s. 13(3) apply?*

[33] None of the withheld information is older than 10 years, so s. 13(3) does not apply to it.

*Conclusion on s. 13(1)*

[34] I found above that disclosure of the numerical scores would reveal advice or recommendations within the meaning of s. 13(1). I also found that ss. 13(2) and 13(3) do not apply to that information. Therefore, the City is authorized to refuse to disclose the numerical scores under s. 13(1).

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<sup>23</sup> That is, “source materials” or “background facts in isolation” which has an independent prior existence and which may not be withheld under s. 13(1).

<sup>24</sup> Order F16-43, [2016] BCIPCD 47 (CanLII), at para. 25, with reference to *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 (CanLII), para 94.

[35] I also found that disclosure of remaining information would not reveal advice or recommendations within the meaning of s. 13(1). This means that the City is not authorized under s. 13(1) to refuse access to that information.

*Exercise of Discretion*

[36] Section 13 is discretionary. This means that the head of a public body must properly exercise its “discretion in deciding whether to refuse access to information, and upon proper considerations.”<sup>25</sup> If the head of the public body has failed to exercise discretion, the Commissioner can require the head to do so. The Commissioner can also order the head of the public body to reconsider the exercise of discretion where “the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations.”<sup>26</sup>

[37] The City said it exercised discretion in deciding to apply s. 13(1). In doing so, the City said, it considered “all relevant factors, and only relevant factors, in good faith.”<sup>27</sup>

[38] The City did not, however, explain what those factors were or what weight it gave them. The City also did not provide any direct evidence on the exercise of discretion from the individual who presumably made the decision to withhold the information.

[39] Past orders have said that relevant factors include the age of the records, the nature and sensitivity of the records, the public body’s past practice with similar records and the purpose of the legislation.<sup>28</sup> Other factors may also be relevant in a given case.

[40] I do not find the City’s arguments on this issue to be persuasive. In my view, the City has not demonstrated that it exercised its discretion properly. In particular, it did not show how or whether it had considered the passage of time and any changes in circumstances.

[41] Three years passed between the RFP and the City’s processing of the request. It seems to me that any sensitivity should have faded, to some degree at least, by the point the City made its decision that is under review here. However, there is no indication that the City considered this factor when it decided to withhold all 25 pages of records in dispute in 2021. There is also no indication

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<sup>25</sup> Order 02-50, 2002 CanLII 43486 (BC IPC) at para. 144.

<sup>26</sup> *John Doe*, at para. 52; see also Order 02-50, 2002 CanLII 43486 (BC IPC) at para. 144 and Order 02-38, 2002 CanLII 42472 (BCIPC) at para. 147.

<sup>27</sup> City’s response, para. 24; Affidavit of Records/Information & Privacy Coordinator for the City of Nanaimo, para. 13.

<sup>28</sup> Order F23-04, 2023 BCIPC 5 (CanLII), F21-58, 2021 BCIPC 67 (CanLII).



that it took into account any changes in circumstances between the award of the RFP in 2018 and the decision on access in 2021.

### Conclusion on exercise of discretion

[42] For the above reasons, I find that the City has not exercised its discretion properly. It must now revisit its decision to withhold the numerical scores and exercise its discretion in light of the factors I have discussed just above. I make the appropriate order below.

### ***Harm to financial or economic interest of public body – ss. 17(1)(e) and (f)***

[43] The City applied s. 17(1) to all of the records in dispute. Section 17 permits a public body to withhold information where its disclosure could reasonably be expected to harm the financial or economic interests of a public body. The relevant provisions read 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 or the government of British Columbia or the ability of that government to manage the economy, including the following information:

...

(e) information about negotiations carried on by or for a public body or the government of British Columbia;

(f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[44] In considering the parties' arguments on s. 17(1), I have applied the principles and approach set out in previous orders, for example, Order F24-40:<sup>29</sup>

[40] Subsections 17(1)(a) to (f) are examples of the types of information that, if disclosed, could reasonably be expected to cause harm under s. 17(1). Earlier OIPC decisions have determined, however, that subsections 17(1)(a) to (f) are not stand-alone provisions and that it is not enough for a public body to meet a subsection's requirements. Even if the information at issue fits under ss. 17(1)(a) to (f), a public body must also demonstrate that disclosure could reasonably be expected to result in the harms specified under s. 17(1).<sup>30</sup>

<sup>29</sup> Order F24-40, 2024 BCICP 48 (CanLII), at paras. 40-45.

<sup>30</sup> Order F19-03, 2019 BCIPC 4 (CanLII) at para. 22.

[41] However, information that does not fit under subsections 17(1)(a) to (f) may still fall under the opening language of s. 17(1) as information that, if disclosed, could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy.<sup>31</sup>

[42] In terms of the standard of proof for s. 17(1), it is well-established that the language “could reasonably be expected to” in access to information statutes means that in order to rely on the exception, a public body must establish that there is a “reasonable expectation of probable harm.”<sup>32</sup> The Supreme Court of Canada has described this standard as “a middle ground between that which is probable and that which is merely possible.”<sup>33</sup>

[43] The public body does not need to show on a balance of probabilities that harm will occur if the information is disclosed, but it must demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative.<sup>34</sup> There needs to be a reasonable basis for believing the harm will result, but the standard does not require a demonstration that harm is probable.<sup>35</sup>

[44] The determination of whether a reasonable expectation of probable harm has been established is contextual, and the amount and quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and the “inherent probabilities or improbabilities or the seriousness of the allegations or consequences.”<sup>36</sup> Previous OIPC orders have said general speculative or subjective evidence will not suffice.<sup>37</sup>

[45] Furthermore, it is the release of the information itself which must give rise to a reasonable expectation of harm.<sup>38</sup> The public body must provide evidence establishing “a direct link between the disclosure and the apprehended harm and that the harm could reasonably be expected to ensue from disclosure.”<sup>39</sup>

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<sup>31</sup> Order F14-31, 2014 BCIPC 34 (CanLII) at para. 41.

<sup>32</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 206.

<sup>35</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at para. 59 and *British Columbia Hydro and Power Authority v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 2128 (CanLII) at para. 93.

<sup>36</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.

<sup>37</sup> For example, Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 27.

<sup>38</sup> *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875 at para. 43.

<sup>39</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 219.

*Parties' submissions*

[45] The City argued that financial harm to it could reasonably be expected to flow from disclosure of the records in dispute.<sup>40</sup> Davey disputed the City's arguments and said the City would benefit economically from transparency in its bidding process.<sup>41</sup>

*Discussion and findings*Information about negotiations – s. 17(1)(e)

[46] Past orders have said that information about negotiations refers, for example, to information that reveals negotiating analysis, methodology, strategies, positions, criteria or other similar information.<sup>42</sup>

[47] The City did not explain how the records in dispute contain this type of information or any other type of information that is about negotiations. The City has also not identified what negotiations it is talking about.

[48] The RFP evaluation records do not, in my view, contain any information about negotiations. Rather, as discussed above, they contain the evaluators' analysis and opinions of three proposals. I find, therefore, that the information in the RFP evaluation records is not about negotiations under s. 17(1)(e).

Harm to City's negotiating position – s. 17(1)(f)

[49] Previous OIPC orders have found that s. 17(1)(f) applies, for example, to information that reveals valuable information or a key aspect of a public body's negotiating position that could give another party a negotiating advantage to the financial detriment of the public body or otherwise harm a public body's financial interests.<sup>43</sup>

[50] The City and its Records/Information & Privacy Coordinator expressed the opinion that prospective proponents could tailor their RFPs to the scoring criteria to artificially bolster their chance of success, even though they might not be the best candidates. The City noted that Davey was a participant both in this RFP and the more recent one which closed in November 2023, in which the other two proponents also participated. In the opinion of the City and its Records/Information & Privacy Coordinator, disclosure of the records in dispute

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<sup>40</sup> City's initial submission, paras. 19-22; Affidavit of Records/Information & Privacy Coordinator for the City of Nanaimo, paras. 9-12.

<sup>41</sup> Davey's response, p. 2.

<sup>42</sup> Order F24-40, 2024 BCIPC 48 (CanLII), at para. 51; Order 02-56, 2002 CanLII 42493 (BCIPC) at paras. 43-44 and 51, citing Order 00-39.

<sup>43</sup> Order F24-40, 2024 BCIPC 48 (CanLII), at para. 52; Order F20-38, 2020 BCIPC 44 (CanLII) at paras. 62-63 and Order F17-10, 2017 BCIPC 11 (CanLII) at para. 19 and the cases cited there.

would give Davey an unfair competitive advantage, as it could use the scoring information for its own gain in future bidding opportunities against its competitors.<sup>44</sup>

[51] The City did not explain how, even if Davey used the scoring information for its own gain in future bidding opportunities against its competitors, this could reasonably be expected to harm the City's negotiating position. I also note that the City's Records/Information & Privacy Coordinator does not explain how she is a subject matter expert and it does not appear that she is. The City also did not provide direct evidence from its procurement staff in support of this opinion. I do not find the City's evidence on this point persuasive and I give it little weight.

[52] The City said that cost is not the only factor in the City's RFP decision process and disclosure would reveal "the value it places on other factors other than price in the RFP process" and "allow proponents who have qualities that are desired by the City for tree services to place an additional premium on those services when submitting bids in the future."<sup>45</sup>

[53] However, Davey already knows that, under the City's procurement policy, the City assesses RFP proposals, not just by price, but three other criteria as well:

1. Company Profile and Experience (25%)
2. Technical, Specifications, Service, Quality (35%)
3. Proposed Rates (35%)
4. Value Added (5%)<sup>46</sup>

[54] I acknowledge that the criteria listed in the records in dispute are worded differently. Nevertheless, I do not see how disclosing the records in dispute would give Davey an advantage over its competitors, nor how this would harm the City's negotiating position. Presumably the competitors are also aware of the City's procurement policy and the fact that the City gauges proposals by several criteria, not just price, and the weight it assigns to each criterion.

#### Harm under s. 17(1)

[55] The City argued generally that disclosure would harm its relationship with current and future proponents.<sup>47</sup> It did not explain how any such harm might result.

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<sup>44</sup> City's initial submission, paras. 19-22; Affidavit of Records/Information & Privacy Coordinator for the City of Nanaimo, paras. 9-12.

<sup>45</sup> City's reply, paras. 17-19.

<sup>46</sup> Davey's response, p. 1.

<sup>47</sup> City's initial submission, paras. 19-22; Affidavit of Records/Information & Privacy Coordinator for the City of Nanaimo, paras. 9-12.

[56] The City's Records/Information & Privacy Coordinator also expressed the opinion that the proponents in this RFP are some of the only qualified tree service companies and, with the limited number of potential proponents, it is important for the City to have a fair, objective and trustworthy procurement process. In its view, disclosure would have the opposite effect.<sup>48</sup>

[57] As above, the City's Records/Information & Privacy Coordinator is apparently not a subject matter expert. I do not find the City's evidence on this point persuasive and I give it little weight. Direct evidence on this point from the City's procurement staff would have been helpful.

[58] The City also did not say how many other potential proponents might submit proposals in future or who they are. Moreover, it seems unlikely that the City's procurement process is as fragile as the City suggests.

#### Conclusion on s. 17(1)

[59] The City's submission and evidence have not persuaded me that disclosure of the information in dispute, now approximately six years old, and possibly obsolete and superseded, could reasonably be expected to result in harm to the City's financial or economic interests under s. 17(1). The City has not drawn a direct link between disclosure of the records in dispute and the financial harms under s. 17(1) it said could reasonably be expected to result.

[60] The City has not, in my view, provided evidence that is well beyond or considerably above a mere possibility of harm. It has not met its burden of proof regarding s. 17(1). I find, therefore, that s. 17(1) does not apply to the records in dispute.

## **CONCLUSION**

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

1. I confirm, in part, the City's decision to refuse to disclose information under s. 13(1). I have highlighted in yellow the information the City is authorized to refuse to disclose under s. 13(1) in a copy of the records provided to the City with this order.
2. I find that the City is not authorized to refuse to disclose the information in dispute under s. 17(1).

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<sup>48</sup> City's initial submission, paras. 19-22; Affidavit of Records/Information & Privacy Coordinator for the City of Nanaimo, paras. 9-12.

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3. I require the City to give the applicant access to the information it is not authorized to refuse to disclose under ss. 13(1) and 17(1).
  4. Under s. 58(3)(a), I require the City to reconsider its exercise of discretion to withhold the yellow highlighted information described in item 1 above, in light of the factors I discuss above at paragraphs 39-41.
  5. The public body must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records described at item 3 above and any information it decides to disclose in accordance with my order in item 4 above.

[62] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by **August 13, 2024**.

June 28, 2024

**ORIGINAL SIGNED BY**

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Celia Francis, Adjudicator

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