OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F10-34

FRASER HEALTH AUTHORITY AND PARTNERSHIPS BC

Elizabeth Denham, Information and Privacy Commissioner

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Summary: CUPE made a request to Partnerships British Columbia for all documents submitted for an independent review of the financial model of the Abbotsford Hospital Project. The request was partially transferred to the Fraser Health Authority. The public bodies withheld some information relating to the risk assessment of aspects of the project on the grounds that disclosure would damage their negotiating position on future contracts, in accordance with s. 17(1)(f). The public bodies were authorized by s. 17(1) to refuse to give access to the information at issue.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 17(1)(d) and (f).

Authorities Considered: B.C.: Order 02-50, [2002] B.C.I.P.C.D. No. 51; Order 03-15, [2003] B.C.I.P.C.D. No. 15; Order 03-35, [2003] B.C.I.P.C.D. No. 35; Order 03-25, [2003] B.C.I.P.C.D. No. 25; F05-28, [2005] B.C.I.P.C.D. No. 38; F07-15, [2007] B.C.I.P.C.D. No. 21; F08-22, [2008] B.C.I.P.C.D. No. 40.

1.0 INTRODUCTION

[1] This inquiry arises from a request from the Canadian Union of Public Employees ("CUPE") to Partnerships British Columbia ("PBC") for all documents submitted to Ernst & Young for its review of the financial model of the Abbotsford Hospital Project ("the Project"). PBC transferred a portion of the request to the Fraser Health Authority ("FHA"). PBC responded to the request by disclosing a series of records and withholding some information under s. 17 of FIPPA. The applicant requested a review of PBC's decision to withhold information under s. 17. FHA later disclosed additional records. Mediation was unsuccessful in

resolving the matter and a written inquiry was held under Part 5 of FIPPA. As both public bodies wished to retain responsibility for this request, the Office of the Information and Privacy Commissioner ("OIPC") decided that PBC and the FHA would be joint public bodies for the purpose of the inquiry.

2.0 ISSUE

[2] The issue is whether PBC and the FHA are authorized to refuse access to all or portions of the records in dispute under s. 17 of FIPPA.

[3] Under s. 57(1) of FIPPA, it is up to the heads of the public bodies to prove that CUPE has no right of access to the information it seeks to withhold.

3.0 DISCUSSION

[4] **3.1 Records in Dispute**—The records consist of a series of financial spreadsheets relating to the Project, numbering 130 pages. The spreadsheets are entitled "Spending Curve Revised", "Risk Register Summary", "Risk Register", "Summary of Building Maintenance & Repair Costs", "ASP for First Operating Period", "Equipment Procurement Team Costs", "Public Sector Comparator Assessment: Facilities Management", "Business Case Update", "Project Cost Cashflow Forecast" and a few pages that are untitled. All of these document titles have been disclosed to the applicant.

[5] The following is a more detailed description of the records and the information that has been severed:

- The probability percentage and estimated risk value in the line-by-line assessments of various risk factors at pp. 2 – 18, 31 – 46, 54 – 69, and 79 – 94 of the records in dispute.

- The risk register showing a breakdown of the project owner's retained risk, the project co's transferred risk, the shared risk on various facts at pp. 19-22, 47–51, 70–74, 77–78, and 95–97 of the records in dispute;

- A breakdown of the estimated building maintenance and repair costs at pp. 25–29, 101–103, and 123-128 of the records in dispute;

- A breakdown of the line-by-line estimated costs of the equipment procurement team over a 5 year period (PBC requires the project company to procure the equipment but exercises certain rights in relation to that process) at p. 100 of the records in dispute;

- A breakdown of the estimated facility management costs at pp. 104-108, 110–113 and 115-116 of the records in dispute;

- A breakdown of the capital infrastructure costs estimates at pp. 117-122 of the records in dispute; and

- A breakdown of the cashflow forecast at pp. 130– 132 of the records in dispute which also reveals the government's assumptions regarding life-cycle planning which can also be used by proponents on the bidding of future projects.[1]

[6] **3.2 Preliminary Issues—**In its initial submission, CUPE raised issues that were not included in the Notice of Inquiry or the Portfolio Officer's fact report relating to how the public bodies handled the requests. One was the public bodies' purported failure to indicate which provisions of s. 17 they were relying on in advance of the inquiry. Another was that the public bodies failed to meet the requirement of s. 8(1)(c)(i) of FIPPA to provide their reasons for applying s. 17 to the requested records.

[7] I agree that public bodies have a duty to provide reasons for withholding information and that it would have been helpful if they had in this case specified the provisions in s. 17(1) on which they were relying. I have decided, however, not to consider CUPE's complaints here. Although, in its initial submission, CUPE did not have an opportunity to address the reasons the public bodies gave for applying s. 17 and the specific provisions of s. 17 on which they were relying, it did in its reply submission. CUPE also had ample opportunity to raise these issues as separate complaints prior to the inquiry. The practice of this Office is to refer complainants to the public bodies first. In the event that the complainant remains unsatisfied the OIPC assigns a Portfolio Officer to the file with the authority to dispose of these issues.

[8] **3.3 Harm to the financial interests of a public body—**Section 17 of FIPPA authorizes public bodies to withhold information the disclosure of which could harm the financial interests of a public body or the provincial government. These are the relevant provisions of FIPPA in this case:

> **Disclosure harmful to the financial or economic interest of a public body**
>
> 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: ...
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
>
> ...

[1] PBC initial submission, affidavit of President and CEO, para. 25.

> (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.

[9] Commissioner Loukidelis considered the application of s. 17(1) in numerous orders and established the principles for its application in Order 02-50.[2] In Order 07-15[3], he reiterated the standard of proof required to establish the application of s. 17 as follows:

> [17] I have held that there must be a confident and objective evidentiary basis for concluding that disclosure of information could reasonably be expected to result in harm under s. 17(1). Referring to language used by the Supreme Court of Canada in an access to information case, I have said, "there must be a clear and direct connection between the disclosure of specific information and the harm that is alleged".

[10] PBC submits that it is reasonable to expect that disclosure of the information in dispute could harm the financial interests of public bodies that enter into public private partnerships because it would reveal "critical negotiating information" in accordance with s. 17(1)(f). PBC argues further that third-party bidders could receive undue financial gain in accordance with s. 17(1)(d), if they had access to this information, because it would give them "valuable insight into the province's negotiating strategy" and they could "tailor their bids accordingly".[4]

Harm to the negotiating position of public bodies

[11] The public bodies rely on s. 17(1)(d), which applies where disclosure could lead to "undue" financial loss or gain to a third party, although their submissions do not specifically address that provision. The submissions concentrate on the harm disclosure might cause to the negotiating position of public bodies. Their main concern is as follows:

> In assessing the reasonable expectation of harm from disclosure of the line-by-line risk quantifications, it is important to recognize that the Province's risk valuation and risk avoidance personality differs from the risk valuation and risk avoidance personalities of the various bidders in the private sector. But for this difference, the benefits of public private partnerships would be significantly less than what experience has shown such partnerships are in this province over the last seven years.[5]

[12] PBC submits further that, "if the line-by-line risk estimates in the PSC were made available to the bidder market, the bidders would acquire information concerning how the Province values the transfer of each type of risk".[6]

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[2] Order 02-50, [2002] B.C.I.P.C.D. No. 51, paras. 124-37.
[3] F07-15, [2007] B.C.I.P.C.D. No. 21.
[4] PBC initial submission, para. 7.
[5] PBC initial submission, para. 28.
[6] PBC initial submission, para. 30.

Affidavit evidence from PBC explains that the "PSC" is a "public sector comparator" used in a financial model:

> The PSC financial model includes the estimate of the project construction costs from a quantity survey plus estimates of life cycle, maintenance, and operation costs, plus the quantified risks (both risk retained and risk transferred) of the project as well as procurement costs. All these costs have an estimate [*sic*] value and time of occurrence. The final estimated project cost from the PSC is a discounted value.[7]

[13] The potential for harm is not restricted to public private partnerships, PBC argues. It submits that this information would assist bidders in other types of contract relationships as well.[8]

[14] PBC draws parallels between this case and the information about cost savings targets that the Commissioner agreed fell under s. 17 in Order 03-35[9]. PBC submits that the information at issue in this case is information that the public body would use to determine whether "bids represent value for money."[10] PBC provides additional arguments *in camera*.[11] As such, I am unable to reproduce them here. I can say, however, that they are similar in nature to the rest of its submission and I have considered them carefully.

[15] FHA's submission mirrors the arguments of PBC: disclosing the information at issue would reveal how FHA qualifies and quantifies risk in the context of public private partnerships. FHA says it uses this information in developing its negotiation strategy on all of its projects and, in future, a bidder could use this information for "its own gain and to the detriment of FHA and ultimately the taxpayer".[12] FHA explains:

> For example, if FHA determines that the consequences that it would suffer as the result of a particular risk materializing are significant, it might seek to transfer that particular risk to its private sector partner via the project agreement. The cost of transferring that risk, however, will also depend on the valuation that the private sector partner has assigned to the same risk. If the private sector partner has determined for itself that the consequences of the risk materializing are not particularly severe, or that the probability that the risk will materialize is remote, then it may be willing to assume the risk at a lower cost than FHA would otherwise have been willing to pay. If, however, the private sector partner were aware of FHA's risk valuation in

[7] PBC initial submission, para. 22; Affidavit of President and CEO, para. 11.
[8] PBC initial submission, para. 32.
[9] [2003] B.C.I.P.C.D. No. 35.
[10] PBC initial submission, para. 39.
[11] Section 56(4)(b) of FIPPA gives me the authority to accept representations *in camera*.
[12] FHA initial submission, para. 8.

> advance, the cost associated with transferring the risk would likely increase.[13]

[16] FHA argues further that disclosure of the information would result in higher costs. It states:

> While the disclosure of the aggregate risk estimate for a P3 project would not be likely to produce this effect, the disclosure of line-by-line of [*sic*] specific risks to be transferred to or shared by the private sector partner, or retained by FHA have [*sic*] an inherent value to the private sector, even if only for the purpose of assessing FHA's tolerance for assuming particular risks.[14]

[17] PBC provides an example of the harm that it envisions disclosure of the information at issue could cause:

> Fraser Health Authority is currently in the procurement stage of the Surrey Memorial Hospital Redevelopment and Expansion: Critical Care Tower (SMH) Project. ... If a proponent were to have access to the information in dispute and the Surrey Outpatient Facility Project [agreement] ... the proponent could calculate the Province's risk valuation and risk avoidance personality which would put the Fraser Health Authority and the Province at a significant financial disadvantage during negotiations which would result in increased project costs and decreased value for money for the public sector.[15]

[18] CUPE expresses doubts as to the real harm in disclosing the information in the records. It points out that some of the records were created as early as January 2001, which predated the creation of PBC. CUPE suggests that it is reasonable to expect that the risk profile has changed:

> To justify the refusal to release this information the public bodies must provide evidence that the probability, range and cost of risk events have not changed for any projects since the time of the Abbotsford Hospital project. I see no indication that the public bodies have provided any such evidence.[16]

[19] CUPE further argues that the affidavit evidence is insufficient:

> If release of this information will cause harm there is documentation that will demonstrate that, including documentation showing the same methodology has been used consistently over the last eight years and that the profile of risks has not changed [*sic*]. If this evidence exists it should have been

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[13] FHA initial submission, para. 16 and Affidavit of P. G., para. 10.
[14] FHA initial submission, para. 22.
[15] PBC initial submission, affidavit of President and CEO, para. 26.
[16] CUPE reply submission, para. 62.

> presented rather than simply looking to assertions in affidavits to support the claims of public bodies.[17]

[20] CUPE also draws a comparison with the Surrey Outpatient Facility project. CUPE contends that, if the risk assessment methodology was the same for both projects, the public bodies could have submitted information about the more recent project. Nevertheless, CUPE saw no indication that the public bodies submitted any information about the Surrey Outpatient Facility or any other public private partnership.[18]

Analysis

[21] I note that previous orders have generally treated information in concluded contracts (*e.g*., Order 03-15; F07-15; F08-22) differently from information in documents concerning negotiating positions that might be used in subsequent contract negotiations (*e.g*., Order 02-50; Order 03-25; Order 03-35; F05-28). Commissioner Loukidelis has found that s. 17 did not apply to the terms of completed contracts, but that it did apply to information public bodies used in negotiations. For example, in Order 03-35 and F05-28, Commissioner Loukidelis stated that the test for s. 17 was met where documents revealed negotiating positions or financial information relating to those negotiations that might influence future proponents to orient their bids to the detriment of the public body's financial interests.

[22] The present case involves background information that PBC developed for use in the negotiations of the contract for the Abbotsford Hospital. It also involves information about how the public bodies assess the risk relating to specific portions of the Project and the extent to which the risks have been transferred to or shared with the partner. I note that the contract for the Project itself has already been disclosed, as has the report of the value for money analysis based the records at issue.

[23] The test that the public bodies must meet, as I indicated above, is that there must be a strong basis, supported by objective evidence that disclosure could be reasonably expected to cause the harm that s. 17(1) contemplates. Moreover, there must be a causal connection between the disclosure of the information in the records and the harm that could occur.

[24] I am convinced that the disclosure of the information about their evaluation of risk could harm their negotiating position in future contracts. The affidavit of the President and CEO of PBC, some of it submitted *in camera*, describes plausible hypothetical outcomes. He states that disclosure of the information in the records would reveal details of their confidential PSC financial model. In essence, he says that, if potential partners knew the public bodies' evaluation of

[17] CUPE reply submission, para. 64.
[18] CUPE reply submission, para. 42.

risk and it differed from their own, the partners might change their negotiating position with respect to certain provisions of the contract. They might refuse to assume risks that they otherwise would have accepted, or they might require greater levels of compensation than they would otherwise have been willing to accept as the price of assuming the risk. Given his knowledge and experience with respect to these matters, this evidence merits considerable weight.

[25] The issues in this case were finely balanced. In the end, I conclude that, based on the evidence as a whole and the circumstances of this case, the public bodies have met the test set out in previous s. 17 cases. The public bodies have established that the disclosure of the information at issue could reasonably be expected to harm the negotiating position of the public bodies and, thus, the financial or economic interests of the province. The arguments of the public bodies (including material they provided *in camera*) combined with a review of the records establishes that there is a logical connection between the information identified and the contemplated harm that disclosure might pose. Therefore, I find that s. 17(1) authorizes PBC and FHA to withhold the information.

[26] As an aside, the public bodies have not quantified the potential harm with precision. In future, public bodies could further strengthen their cases by providing explicit measures of harm. While I realize that it can be difficult to quantify such potential harm, a rough estimate in either dollar or percentage terms, or even a range of potential costs, would be useful.

4.0 CONCLUSION

[27] For the reasons given above, under s. 58 of FIPPA, I authorize PBC and FHA to withhold the information under s. 17(1).

October 13, 2010

ORIGINAL SIGNED BY

Elizabeth Denham
Information and Privacy Commissioner
for British Columbia

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