



OFFICE OF THE
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Order F16-43

CITY OF VANCOUVER

Carol Whittome
Adjudicator

September 21, 2016

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Summary: An applicant requested records regarding the City of Vancouver Bid Committee, which makes decisions about the City's procurement of goods and services. The City identified reports that were prepared by City staff for the Bid Committee. It disclosed portions of these reports but withheld some information under ss. 13 and 15 of FIPPA. The adjudicator determined that the City is authorized to refuse to disclose the majority of the information withheld under s. 13 (policy advice or recommendations) and all of the information withheld under s. 15 (disclosure harmful to law enforcement).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13 and 15.

Authorities Considered: B.C.: Order F14-57, 2014 BCIPC No. 61 (CanLII); Order F15-37, 2015 BCIPC 40 (CanLII); Order F14-41, 2014 BCIPC 44 (CanLII); Order F15-47, 2015 BCIPC 50 (CanLII); Order F14-17, 2014 BCIPC No. 20; Order 02-38, 2002 CanLII 42472 (BC IPC); Order F07-15, 2007 CanLII 35476 (BC IPC).

Cases Considered: *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII); *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 (CanLII); *Cooper v. Canada (Human Rights Commission)*, 1996 CanLII 152 (SCC); *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 (CanLII); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII); *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875 (CanLII).

INTRODUCTION

[1] This inquiry involves three separate requests made by the applicant relating to City of Vancouver Bid Committee reports for specific date ranges. The City of Vancouver (the “City”) disclosed some records to the applicant after severing information from them under sections 13 (policy advice), 15 (harm to law enforcement), 17 (harm to public body financial interests) and 21 (harm to third party business interests) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

[2] The applicant requested that the Office of the Information and Privacy Commissioner (“OIPC”) review the City’s decisions to withhold information from the records. Mediation did not resolve the issues and the applicant requested to proceed to a written inquiry.

[3] Prior to inquiry, the City reconsidered its severing decisions, withdrew its application of sections 17 and 21, and then disclosed further information to the applicant.¹ Therefore, this inquiry only concerns information withheld under sections 13 and 15.

[4] Since the records in all three of the request files involve the same requests (except for the different date ranges) and similar records, the parties have agreed that it is appropriate to consolidate them into one inquiry.²

ISSUES

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

1. Is the City authorized to refuse to disclose the information at issue under section 13 of FIPPA because disclosure would reveal advice or recommendations?
2. Is the City authorized to refuse to disclose the information at issue under section 15 of FIPPA because disclosure could be reasonably expected to harm law enforcement?

[6] Pursuant to section 57 of FIPPA, the City has the burden of proving that the applicant has no right of access to the information it is refusing to disclose under ss. 13 and 15.

¹ Investigators’ Fact Reports, para. 6 (F13-55630 and F13-55631) and para. 4 (F14-57341).

² The parties filed comprehensive submissions for files F13-55630 and F13-55631 and briefer submissions for file F14-57341. Unless otherwise noted, when I refer to a party’s submissions I am referring to the F13-55630 and F13-55631 submissions.

DISCUSSION

Background

[7] The applicant is a journalist who requested “Bid Committee reports” for three separate date ranges.

[8] The City has an internal Bid Committee that makes decisions regarding the City’s procurement of goods and services. The Bid Committee reviews bids and proposals and is authorized to award contracts for amounts up to \$2,000,000.³ For contracts that exceed \$2,000,000, the Bid Committee reviews a report and determines whether to take the recommendations contained within the report to City Council, which then has the sole authority to approve such contracts.⁴

[9] Procurement staff, as well as other City professionals and officials, provide advice and recommendations to the Bid Committee.⁵ When a proposed contract exceeds \$500,000, City staff members prepare Bid Committee reports (the “Reports”) for the Bid Committee.⁶ The purpose of the Reports is to provide information, advice and recommendations to the Bid Committee regarding the assessment of the procurement and to seek approval, rejection or further direction from the Bid Committee.⁷

Records in Dispute

[10] The records in dispute in this inquiry are the Reports from the following three date ranges: January 1, 2012 – September 30, 2012; June 22, 2013 to “present day” [September 9, 2013]; and September 10, 2013 – December 3, 2013. The City has already disclosed most of the information in these Reports to the applicant.

[11] The type of information the City is withholding is bid proposal analysis (including City staff’s risk analysis), City budget information and the evaluation scores of bid proponents.

³ City submissions, para. 13; Kassam affidavit, paras. 8 and 10.

⁴ City submissions, para. 13; Kassam affidavit, paras. 8 and 10.

⁵ City submissions, para. 14; Kassam affidavit, para. 11.

⁶ City submissions, para. 15; Kassam affidavit, para. 12. I note that there is no evidence before me regarding the process for proposed contracts less than \$500,000, although nothing in this decision turns on this.

⁷ City submissions, para. 15; Kassam affidavit, para. 12.

Policy Advice and Recommendations (s. 13)

[12] Of the small amount of information the City is withholding, almost all of it is withheld under s. 13 of FIPPA. Section 13 authorizes public bodies to refuse to disclose advice or recommendations, subject to specified exceptions in s. 13(2). It states in part that:

(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.

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

(a) any factual material,

...

[13] In *John Doe v. Ontario (Finance)*, the Supreme Court of Canada stated that the purpose of exempting advice or recommendations within public bodies from disclosure “is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice.”⁸ The BC Court of Appeal similarly stated in *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)* that s. 13 “recognizes that some degree of deliberative secrecy fosters the decision-making process.”⁹

[14] Previous orders and court decisions have stated that s. 13(1) applies to information that directly reveals advice or recommendations, as well as information that would enable an individual to draw accurate inferences about advice or recommendations.¹⁰ Furthermore, the BC Court of Appeal has held that the word “advice” should be interpreted to include “an opinion that involves exercising judgment and skill to weigh the significance of matters of fact.”¹¹

[15] In determining whether s. 13 applies, the first consideration is whether disclosing the information “would reveal advice or recommendations developed by or for a public body or a minister”. If it would, the second consideration is whether the information is excluded from s. 13(1) because it falls within a category listed in s. 13(2) of FIPPA.

⁸ *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII), para. 43.

⁹ *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII), para. 105.

¹⁰ For example, Order F14-57, 2014 BCIPC No. 61 (CanLII), para. 14; *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 (CanLII), para. 52.

¹¹ *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII), para. 113.

Parties' Positions

[16] The City submits that the information it is withholding under s. 13 is either advice or recommendations developed by City staff about preferred courses of action, or information that would allow accurate inferences to be drawn about advice or recommendations.¹² The City further submits that it exercised its discretion in determining what information it would withhold under s. 13, as demonstrated by the fact that it has disclosed some advice or recommendations to the applicant that it could have withheld under s. 13.¹³

[17] The applicant submits that s. 13 does not apply because the information the City is withholding under s. 13 involves “public contracting and spending” and is thus “factual material” within the meaning of s. 13(2)(a) of FIPPA.”¹⁴ He further submits that the City has not properly exercised its discretion in deciding whether to disclose the information at issue.¹⁵

Section 13(1)

[18] The records at issue in this inquiry are the Reports relating to the selection of proponents for various City contracts through a bidding process. The information being withheld is about the City’s bid proposal analysis, budget information and the evaluation scores of bid proponents. As noted above, the City states that the purpose of these Reports is to provide information, advice and recommendations to the Bid Committee. The applicant does not make any submissions on this point.

[19] In my view, the majority of the severed information is clearly advice or recommendations within the meaning of s. 13(1). There is no question that this information is meant to serve as advice or recommendations to the Bid Committee regarding how the City should proceed with procuring certain goods or services. For example, there is information severed under the disclosed subheading “Recommendation” which clearly sets out City staff’s evaluation and recommendation regarding various bid proposals.

[20] Some of the severed information is not advice or recommendations but, given its context and content, it would allow an individual to draw accurate inferences about advice or recommendations. For example, some of the severed information refers to risks and other considerations which would enable the reader to make accurate inferences about the advice and recommendations contained in the Reports. Therefore, I find that this information is advice and recommendations as contemplated in s. 13(1).

¹² City submissions, paras. 32 and 33.

¹³ City submissions, para. 40.

¹⁴ Applicant submissions, paras. 20 and 22.

¹⁵ Applicant submissions, para. 20.

[21] However, there is some severed information which, in my view, neither directly reveals advice or recommendations nor enables accurate inferences to be drawn about the advice or recommendations. This information includes some titles and other information which, even read in the context of the Reports, would not reveal any underlying advice or recommendations if it was disclosed.¹⁶ I have highlighted this information in the copy of records that I am providing to the City with this order.

[22] The above findings are consistent with Order F15-37, which involved the City and the same applicant, as well as similar issues and records.¹⁷ In that case, the adjudicator concluded that most of the information the City withheld from Bid Committee Reports created during a particular time period constituted advice and recommendations under s. 13 of FIPPA.

[23] In summary, with the exceptions mentioned above, I find that disclosure of the information withheld under s. 13(1) would reveal advice or recommendations developed by or for the City.

Section 13(2)

[24] Section 13(2) sets out various exceptions where a public body cannot apply s. 13(1) to withhold information. As set out above, s. 13(2)(a) states that a public body may not refuse to disclose “factual material” under s. 13(1). In *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, Dardi, J. stated: “The structure and wording of s. 13 mandate an interpretation whereby ‘factual material’ is distinct from factual ‘information’. Section 13(2)(a) is a narrow exemption from what is included in s. 13(1).”¹⁸

[25] 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).¹⁹

[26] While I find that some of the withheld information is factual in nature, none of it is “factual material” under s. 13(2)(a) of FIPPA. Rather, this is information

¹⁶ See Order F15-47, 2015 BCIPC 50 (CanLII), para. 25. Note that the titles, headings and basic topic information at issue in that case was withheld under s. 12 but the same analysis applies.

¹⁷ Order F15-37, 2015 BCIPC 40 (CanLII).

¹⁸ 2013 BCSC 2322 (CanLII), para 91.

¹⁹ *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 (CanLII), para 94.

compiled by City staff for the express purpose of giving advice and recommendations to the Bid Committee and is integral to the analysis and advice expressed in the Reports.

Exercise of Discretion (s. 13)

[27] Section 13(1) is a discretionary exception to disclosure, so a public body must properly exercise its discretion when refusing to give access to information under it. A public body must not exercise its discretion in bad faith or for an improper purpose, and it cannot take into account irrelevant considerations or ignore relevant considerations.²⁰ If the public body has not exercised its discretion properly, it can be ordered to reconsider its exercise of discretion.²¹

[28] The City submits that it exercised its discretion in determining what information it would withhold under s. 13, as demonstrated by the fact that it has disclosed some advice or recommendations to the applicant that it could have withheld under s. 13.²² The City also states that it considered the following factors in exercising its discretion: the nature of the advice and recommendations in each report, the current state of the procurement process and whether the information was highly confidential.²³ Furthermore, the City submits that it reviewed its severing on at least two occasions after its original response and released further information to the applicant based on those reviews.²⁴

[29] The applicant submits that the City has not properly exercised its discretion in deciding whether to disclose the information at issue but he does not elaborate.²⁵

[30] In this case, I am satisfied based on the evidence before me that the City exercised its discretion before applying s. 13(1). There is affidavit evidence outlining the factors the City considered when making its decision and there is no evidence before me that it exercised it in bad faith or that the City considered irrelevant or extraneous grounds (or failed to consider relevant grounds) when deciding what to sever from the Reports.

[31] In conclusion, I find that the City is authorized to withhold the majority of the information it is withholding under s. 13(1). I have highlighted the information that may not be withheld under s. 13(1) in the copy of records that I am providing to the City with this order.

²⁰ *John Doe v. Ontario (Finance)*, 2014 SCC 36, para. 52.

²¹ Order 02-38, 2002 CanLII 42472 (BC IPC), para. 147.

²² City submissions, para. 40.

²³ Kassam affidavit, para. 17.

²⁴ Kassam affidavit, paras. 18 and 19.

²⁵ Applicant submissions, para. 20.

Disclosure Harmful to the Security of any Property or System (s. 15(1)(l))

[32] The City is also withholding a small amount of information in one Report pursuant to s. 15(1)(l). Section 15(1)(l) states that:

15 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

...

(l) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

[33] The standard of proof that applies to s. 15 of FIPPA is set out by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, which said the following about the standard of proof for exceptions that use the language “reasonably be expected to harm”:

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... 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”: *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.²⁶

[34] In Order F07-15, former Commissioner Loukidelis outlined the evidentiary requirements to establish a reasonable expectation of harm:

...there must be a confident and objective evidentiary basis for concluding that disclosure of the information could reasonably be expected to result in harm... 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 disclosure of specific information and the harm that is alleged’.²⁷

[35] Further, the BC Supreme Court has confirmed that it is the release of the information itself that must give rise to a reasonable expectation of harm, and

²⁶ 2014 SCC 31, para. 54.

²⁷ 2007 CanLII 35476 (BC IPC), para. 17.

that the burden rests with the public body to establish that the disclosure of the information in question could result in the identified harm.²⁸

Parties' Positions

[36] The City submits that the severing is “extremely limited... to information for which the VPD [Vancouver Police Department] has real safety and security concerns.”²⁹ The City provides an affidavit that is signed by VPD’s Senior Director of Information Services which sets out the VPD’s concern about the harm to the security of property should the severed information be disclosed.

[37] I am limited in what I can disclose of the City’s s. 15(1)(l) argument since much of it is provided, properly, through *in camera* affidavit evidence.³⁰ However, I can state that, in the City’s view, disclosing the severed information could “jeopardize the security” of the facility in question and “increase the risk of it being a target of criminal activity.”³¹

[38] The applicant submits that the City does not operate a transparent procurement process and cites a number of previous OIPC orders regarding the application of s. 15. He does not explain how these previous orders apply in this case so his submissions on s. 15(1)(l) are limited. While I have considered the cases referred to by the applicant and agree with the general legal principles they set out, I find their facts are not analogous to those in this case so they are therefore of limited value to my analysis.

Section 15(1)(l)

[39] The information that the City is withholding under s. 15(1)(l) consists of four words in a six-page document, from which no other information was severed. The withheld information is specific to a VPD facility and I find that it is related to a “building” under s. 15(1)(l).

[40] The remaining question is whether the City has provided a sufficient evidentiary basis upon which to conclude that disclosure of the information could reasonably be expected to result in the harm asserted. The City’s *in camera* affidavit evidence outlines the anticipated harm to the security of the building should the information be disclosed.

[41] After reviewing the affidavit, the submissions and the severed information, I find that the City’s concerns are not mere speculation. Rather, there is

²⁸ *British Columbia (Minister of Citizens’ Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875, para. 43.

²⁹ City submissions, para. 46.

³⁰ Marshall-Cope affidavit, paras. 3 and 4.

³¹ Marshall-Cope affidavit, para. 4.

a sufficient, objective evidentiary basis for concluding that the disclosure of the severed information could reasonably be expected to result in harm to the security of a VPD building.

[42] In light of the above, I find that the City is authorized to withhold the severed information pursuant to s. 15(1)(l).

CONCLUSION

[43] For the reasons above, under s. 58 of FIPPA, I order that the City is:

- a) authorized to refuse to disclose the information withheld under s. 13 of FIPPA, subject to paragraph c below;
- b) authorized to refuse to disclose all of the information withheld under s. 15 of FIPPA; and
- c) required to give the applicant access to the information I have highlighted in the excerpted pages of the records that will be sent to the City along with this decision, by November 3, 2016, pursuant to s. 59 of FIPPA. The City must copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records it provides to the applicant.

September 21, 2016

ORIGINAL SIGNED BY

Carol Whittome, Adjudicator

OIPC File Nos.: F13-55630, F13-55631 and F14-57341