Office of the Information & Privacy Commissioner for British Columbia

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Order F19-26

# CITY OF VANCOUVER

Celia Francis
Adjudicator

July 11, 2019

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**Summary:** An applicant requested invoices and payments to Ernst Young LLP (EY) for the empty home tax survey and report submitted to the City of Vancouver (City) on November 4, 2016. The City decided to disclose the only responsive record, an invoice. EY requested a review of this decision, arguing that s. 21(1) (harm to third-party business interests) applied to information in the invoice. The adjudicator confirmed the City's decision and ordered it to disclose the invoice in full to the applicant.

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

## INTRODUCTION

[1] In October 2017, an applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the City of Vancouver (City) for the invoices and payments made to Ernst & Young LLP (EY) for the empty home tax survey and report submitted to the City on November 4, 2016. The City gave EY notice of the request under s. 23 of FIPPA. EY replied by asking that much of the information in its invoice be withheld under s. 21(1) (harm to third-party business interests) and s. 22(1) (harm to third-party personal privacy).[1]

[1] EY initially asked that the fees, expenses and GST amounts be withheld, as well as the names of EY staff, their expenses, hourly rates and individual fees.

[2] The City first told EY that it would withhold only the hours and rates of EY's staff under s. 21(1). It later told EY that it had changed its mind and could not support withholding any of the information in the invoice.[2] EY requested a review by the Office of the Information and Privacy Commissioner (OIPC) of the City's decision. Mediation by the OIPC did not resolve the request for review and the matter proceeded to inquiry. The OIPC invited and received submissions from the City, EY and the original access applicant.

[3] The notice and fact report for this inquiry stated that both ss. 21(1) and 22(1) would be at issue regarding the information that EY wanted withheld. EY's submission stated that it wanted its staff's hours and hourly rates withheld under s. 21(1) only. I understand, therefore, that EY no longer relies on s. 22(1) to withhold information in the invoice.

## ISSUE

[4] The issue before me is whether the City is required by s. 21(1) to withhold information. Under s. 57(3)(b) of FIPPA, EY has the burden of proving that the applicant has no right of access to the information.

## DISCUSSION

### *Information in dispute*

[5] The City retrieved one responsive record: a December 2016 invoice from EY to the City, listing EY's fees, expenses and GST charged. The invoice includes an appendix listing the names of EY's staff, their hours worked, hourly rates, fees per person, expenses and total fees for the staff. In its submission to this inquiry, EY indicated on a copy of the invoice that it wants its staff's hours and hourly rates withheld under s. 21(1). Accordingly, this is the information in dispute. It appears that the City has yet to provide the applicant with a copy of the invoice.

### *Section 21 – Third-party business interests*

[6] The relevant parts of s. 21(1) of FIPPA in this case read as follows:

> 21(1) The head of a public body must refuse to disclose to an applicant information
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> (a) that would reveal
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> (i) trade secrets of a third party, or
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,

[2] City's email of January 19, 2018 to EY.

> (b) that is supplied, implicitly or explicitly, in confidence, and
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> (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,
> …
> (ii) result in undue financial loss or gain to any person or organization, ...

[7] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies.[3] All three parts of the s. 21(1) test must be met in order for the information in dispute to be properly withheld. First, EY must demonstrate that disclosing the information in issue would reveal: trade secrets of a third party; or commercial, financial, labour relations, scientific or technical information of, or about, a third party. Next, it must demonstrate that the information was supplied, implicitly or explicitly, in confidence. Finally, EY 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).

*Section 21(1)(a) – type of information*

[8] EY said that the information is its financial and commercial information.[4] The City and the applicant did not comment on this issue.

[9] FIPPA does not define financial and commercial information. However, previous orders have said the following:

- "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.[5]
- "Commercial" and "financial" information of or about third parties includes hourly rates, global contract amounts, breakdowns of these figures, prices, expenses and other fees payable under contract.[6]

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[3] 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).
[4] EY's initial submission, p. 1.
[5] See Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17, and Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62.
[6] For example, Order F19-11, 2019 BCIPC 13 (CanLII) at para. 14, Order 03-15, 2003 CanLII 49185 (BC IPC) at para. 41, Order 00-22, 2000 CanLII 14389 (BC IPC) at p. 4, Order F05-05, 2005 CanLII 14303 (BC IPC) at para. 46, Order F13-06, 2013 BCIPC 6 (CanLII) at para. 16,

[10] I am satisfied, guided by past orders, that the information in dispute is EY's financial information. I also accept EY's submission that the information on hours worked shows the amount of effort it put into the work and is thus EY's commercial information.[7]

*Section 21(1)(b) – supply in confidence*

[11] The next step is to determine whether the information in issue was "supplied, implicitly or explicitly, in confidence." The information must be both "supplied" and supplied "in confidence."[8]

[12] **Supplied:** BC orders have consistently found that information in an agreement or contract will not normally qualify as "supplied" by the third party for the purposes of s. 21(1)(b), because the information is the product of negotiations between the parties. This is so, even where the information was subject to little or no back and forth negotiation. There are two exceptions to this general rule:

- where the information the third party provided was "immutable" (i.e., not open or susceptible to negotiation) and was incorporated into the agreement without change; or
- where the information in the agreement could allow someone to draw an "accurate inference" about underlying information a third party had supplied in confidence but which does not expressly appear in the agreement.[9]

[13] Order 01-39 also said this about the "supply" element in contracts:

> By their nature, contracts are negotiated between the contracting parties. The fact that the requested records are contracts therefore suggests that the information in them was negotiated rather than supplied. It is up to CPR, as the party resisting disclosure, to establish with evidence that all or part of the information contained in the contracts including their schedules was

Order F13-07, 2013 BCIPC 8 (CanLII) at para. 36, Order F15-53, 2015 BCIPC 56 (CanLII), at para. 11, and Order F16-17, 2016 BCIPC 19 (CanLII), at para. 24.

[7] EY's initial submission, p. 1.

[8] 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.

[9] See, for example, Order 01-39 2001 CanLII 21593 (BC IPC) at para. 45, and Order F13-22, 2014 BCIPC No. 4 (CanLII) at para. 17. Key judicial review decisions have confirmed the reasonableness of this approach. See Order F08-22, 2008 CanLII 70316 (BC IPC), at para. 58, referring to *Jill Schmidt Health Services Inc. v. British Columbia (Information and Privacy Commissioner)*, [2001] B.C.J. No. 79, 2001 BCSC 101 *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848, 2002 BCSC 603 and *K-Bro Linen Systems Inc. v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 904.

> not negotiated, as would normally be the case, but was "supplied" within the meaning of s. 21(1)(b).[10]

[14] EY did not explicitly address the issue of "supply." The City and the applicant also made no mention of this issue in their submissions.

[15] Previous orders that have considered contract terms under s. 21(1) have usually concerned the contracts themselves.[11] By contrast, the record before me here is not the actual contract but an invoice.

[16] In its final access decision, the City told EY that previous orders have found that hours and rates should be disclosed where this information flows from negotiated contracts.[12] I infer from this that the City considers the disputed information in the invoice to reflect the results of negotiation.

[17] EY did not argue that the information in dispute was "immutable" and incorporated "without change" into the contract. It also did not argue that disclosure of the information dispute would reveal underlying confidentially supplied information. I also note that EY referred to the information as "the rates we bid," both in its request for review to the OIPC and in its initial submission to the inquiry. EY also referred to its "engagement" with the City to perform the survey work.[13] This suggests that EY submitted a bid for the survey work as part of a normal procurement process, in which a contract resulted, listing the rates EY and the City negotiated and agreed on for EY performing the work.[14] There is no evidence to the contrary. Thus, while I accept that EY supplied the invoice itself to the City, it is reasonable to conclude that EY and the City negotiated and agreed on the rates listed in the appendix. EY has not, in my view, established that the rate information was "supplied" for the purposes of s. 21(1)(b).

[18] By contrast, I accept that EY supplied the number of hours its individual staff worked. There is no evidence that the contract specified this type of information for professional services rendered.

[19] **In confidence:** 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:[15]

> [24] An easy example of a confidential supply of information is where a business supplies sensitive confidential financial data to a public body on

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[10] At para. 43.
[11] For example, Order 01-39 and Order F16-17, 2016 BCIPC 19 (CanLII).
[12] The City's email of January 19, 2018 to EY stating that it could not support withholding any of the information in the invoice under s. 21(1).
[13] EY's initial submission, p. 2.
[14] I do not have the actual contract before me.
[15] Order 01-36, 2001 CanLII 21590 (BC IPC).

> 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 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.
> …
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> [26] 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:
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> 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.

[20] EY said that all information exchanged between it and the City was consistently treated in a confidential manner.[16] It did not elaborate. The City and the applicant made no mention of this issue in their submissions.

[21] The invoice itself contains no explicit markers of confidentiality. There is also no other indication that the invoice was supplied explicitly in confidence. EY also did not explain how any of the circumstances supporting implicit confidential supply applied here. I also note that the City said nothing about the issue of confidential supply. Without more, I am unable to conclude that the information in dispute was supplied, explicitly or implicitly, in confidence.

Conclusion on s. 21(1)(b)

[22] I found above that some of the information in dispute was "supplied" but that none of it was supplied "in confidence." This means that s. 21(1)(b) does not apply to the information in dispute.

*Harm under s. 21(1)(c)*

[23] While I found above that s. 21(1)(a)(ii) applies to the information in dispute, I also found that s. 21(1)(b) does not apply. This means that s. 21(1)

[16] EY's initial submission, p. 2.

does not apply and the City is not required to withhold the information in dispute. Technically, therefore, I do not need to consider s. 21(1)(c). However, for completeness, I will consider next whether disclosure of the information could reasonably be expected to result in harm under s. 21(1)(c).

Standard of proof for harms-based exceptions

[24] Numerous orders have set out the standard of proof for showing a reasonable expectation of harm.[17] The Supreme Court of Canada confirmed the applicable standard of proof for harms-based exceptions:

> [54] 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".[18]

[25] Moreover, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*,[19] Bracken J. confirmed that it is the release of the information itself that must give rise to a reasonable expectation of harm.

[26] EY said that s. 21(1)(c) applies. The City did not address s. 21(1)(c). The applicant generally disputed EY's harm arguments, saying taxpayers have a right to know how much money was spent on the survey.[20]

[27] **Competitive position:** EY acknowledged that it has consented to the disclosure of similar information in the past related to other projects.[21] However, EY said, the subject matter of the work it performed in this case "represented a new market in Canada" and was different from other work it has performed. It said that there is thus no "existing precedent on the rates or level of effort that

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[17] For example, Order 01-36, 2001 CanLII 21590 (BCIPC), at paras. 38-39.
[18] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* [*Community Safety*], 2014 SCC 31, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, at para. 94. See also Order F13-22, 2014 BCIPC 31 (CanLII), at para. 13, and Order F14-58, 2014 BCIPC 62 (CanLII), at para. 40, on this point.
[19] *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875, at para. 43.
[20] Applicant's response submission.
[21] EY's request for review to the OIPC, February 6, 2018.

would typically be employed in similar situations available in the marketplace." EY said that, if the information in dispute were disclosed, "this would constitute key competitive information that would put EY at a disadvantage when pursuing opportunities in this new market."[22]

[28] I accept that the type of work EY did in this case was new and different. I also accept that EY may wish to participate in bidding on similar opportunities in the future in other jurisdictions. EY did not, however, explain how its rates and the level of effort it made on the work in this case may have differed from previous work it has done. EY also did not explain the significance of any such difference nor what the significance of its rates and hours might be to its competitors. EY also did not explain how a competitor could use the information in dispute to its advantage in any future bidding process nor how this, in turn, might result in significant harm to EY's competitive position. EY also did not describe the competitive nature of the environment in which it works. Nor did EY say who its competitors might be.

[29] I would add that any future bidding processes would relate to different services, conditions and other factors prevailing at the time. EY would presumably submit any future bids, including its pricing structure, tailored to those different factors, bearing in mind the nature and difficulty of the work involved.

[30] EY has not persuaded me that disclosure of the information in dispute could reasonably be expected to harm its competitive position. Its submission on these points is vague and amounts to little more than assertions. It also did not make a link between disclosure and the anticipated harm, as is required to show that s. 21(1)(c)(i) applies.

[31] **Undue loss:** EY also said that it was the first firm in Canada to consult on the subject matter and it expects other jurisdictions to "pursue similar strategies" by issuing "competitive bids." In EY's view, disclosure of the information in dispute has "the potential to result in undue financial loss" to EY "by impacting our competitive position in the market place."[23]

[32] 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.[24] EY did not explain how it might suffer a financial

[22] EY's initial submission.
[23] EY's initial submission.
[24] 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." 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.

loss from disclosure of the information in dispute, still less how any such loss would be "undue". I recognize that it is not always possible to quantify undue financial loss or gain[25] but EY has provided me with no specifics which I could use to make a finding on this point. Its arguments are speculative and vague. There is no confident and objective evidentiary basis on which I can conclude that disclosure of the information in dispute here could reasonably be expected to result in harm to EY under s. 21(1)(c)(iii).

Conclusion on s. 21(1)(c)

[33] EY 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).[26] EY's evidence does not establish a direct link between the disclosure and the apprehended harm and that the harm could reasonably be expected to ensue from disclosure. Therefore, I find that EY has not met its burden of proof and that s. 21(1)(c) does not apply to the information in dispute.

## CONCLUSION

[34] For reasons given above, under s. 58(2)(a) of FIPPA, I find that s. 21(1) does not apply to the information in dispute in the invoice.

[35] Under s. 59(1) of FIPPA, the City must give the applicant access to the invoice, including the information in dispute, as described in paragraph 34, by August 23, 2019. The City must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the record.

July 11, 2019

**ORIGINAL SIGNED BY**

Celia Francis, Adjudicator

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[25] See Order 00-10 at p. 17, on this point.
[26] *Community Safety*, at para. 54.