



Order F22-01

## CITY OF LANGFORD

Jay Fedorak  
Adjudicator

January 7, 2022

CanLII Cite: 2022 BCIPC 01  
Quicklaw Cite: [2022] B.C.I.P.C.D. No. 01

**Summary:** An applicant requested a copy of the proposal the City of Langford (City) submitted regarding Amazon’s plan to open a second headquarters in North America. The City refused to disclose information in the responsive records under s. 17(1) (harm the financial interests of a public body). The adjudicator found that s. 17(1) did not apply to the information at issue and ordered the City to disclose the information.

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

### INTRODUCTION

[1] A journalist (applicant) made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the City of Langford (City) for a copy of its proposal regarding Amazon’s plan to open a second headquarters in North America. The City responded by providing the applicant with a copy of the proposal, while withholding most of the information under s. 17(1) (harm to the financial interests of a public body) and s. 21(1) (harm to the financial interests of a third party).

[2] The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the City’s decision to withhold the information under ss. 17(1) and 21(1). The City subsequently disclosed more information to the applicant and ceased to rely on s. 21(1). It also confirmed that it was relying specifically on s. 17(1)(e).

[3] Mediation by the OIPC did not resolve the matter and the applicant requested an inquiry.

## ISSUE

[4] The issue to be decided in this inquiry is:

- Whether s. 17(1) authorizes the City to withhold information.

[5] Under s. 57(1) of FIPPA, the City has the burden of proving that s. 17(1) applies to the information withheld.

## DISCUSSION

[6] **Background** – In September 2017, the Amazon company invited local governments and states to submit proposals explaining why it should locate a second headquarters in their jurisdiction. The City, in partnership with the government of British Columbia (BC government), submitted a bid.

[7] **Information at Issue** – The information in dispute consists of short passages in the City’s bid document that relate to initiatives, proposals and offers that the BC government had implemented or was proposing to implement that were relevant to the City’s bid.

[8] **Preliminary Issue** – In its initial submission, the City said that it was refusing to disclose the information in dispute because it believed that disclosure would harm the BC government’s financial and economic interests, including its ability to conduct current and future negotiations. The City indicated that it had attempted to consult the BC government to assist in preparing the City’s submissions, but the BC government had not responded to its communications. The City said: “We are unable to confirm at this time the Province’s position with regard to the release of the information. We respectfully request that prior to a decision being made that the Province be given an opportunity to respond to this inquiry.”<sup>1</sup>

[9] It is normally the responsibility of the public body to identify any relevant third parties that may wish to participate in an inquiry prior to the OIPC issuing the Notice of Inquiry. The City did not identify the BC government as a potential third party prior to making its submissions to the inquiry. I recognized that adjourning the inquiry after the close of submissions to invite the participation of the BC government would disadvantage the applicant by causing a further delay. Nevertheless, the City implied that it was unable to provide evidence to support the application of s. 17(1) to the information about the initiatives, proposals and offers of BC government. I felt that it was necessary, in the interests of procedural fairness, to invite the BC government to participate to ensure that I heard from all interested parties.

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<sup>1</sup> The City’s initial submission, para. 27.

[10] I invited the BC government to make submissions on the application of s. 17(1) to its information in the records. The BC government declined to participate in the inquiry.

**Section 17(1) – harm to the financial interests of a public body**

[11] The relevant provision of s. 17(1) is 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.

[12] In this case, to rely on s. 17(1) the City must establish that disclosure of the information could reasonably be expected to harm the financial interests of a public body or the BC government. The “reasonable expectation of harm” standard is “a middle ground between that which is probable and that which is merely possible.”<sup>2</sup> There is no need to show, on a balance of probabilities, that the harm will occur, if the information is disclosed, but the public body must show that the risk of harm is well beyond the merely possible or speculative.<sup>3</sup>

[13] The City asserts that it is reasonable to conclude that the disclosure of the information at issue would harm the negotiating position of the BC government in accordance with s. 17(1)(f). It explains:

By releasing publicly the parameters under which these agreements and proposals are negotiated, the bargaining position of the Province is significantly weakened with respect to the expectations of the proponents and the bargaining position of other parties seeking to secure the same business opportunities for their constituents.

While the City of Langford does not have specific information about the negotiations, proposals or projects of the Province of British Columbia, the incentive information was originally withheld due to ongoing negotiations under section 17(1)(e). This inquiry is taking place four years later. Although the Amazon bid is no longer active, the actions and negotiations of the

<sup>2</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, para. 201.

<sup>3</sup> *Ibid* at para. 206. See also *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, paras. 52-54.

Government of the Province of British Columbia are not public until such deals are concluded and the release of this information may negatively impact the Government's negotiating position.<sup>4</sup>

[14] The City acknowledges that it originally withheld the information under s. 17(1)(e), on the grounds that disclosure would harm current negotiations. As those negotiations have concluded, it is now relying on s. 17(1)(f), on the grounds that disclosure would harm the position of the BC government in future negotiations.<sup>5</sup> The City said that it consulted the BC government in 2018 about the disclosure of the proposal, and the latter responded that disclosure would harm its financial interests. The City consulted the BC government again in 2021 in preparation for this inquiry and received no reply.<sup>6</sup>

[15] The applicant responds that the City's arguments about the prospect of financial harm are speculative. They cite two BC Orders that have found that s. 17(1) does not apply in cases where the public body fails to demonstrate evidence of harm.<sup>7</sup> The applicant also asserts that the information in the record is dated and the request for proposal has long been closed, which would reduce the potential for harm arising from disclosure.<sup>8</sup>

[16] The City responds that it believes that, at four years old, the information is still sensitive. It also submits that the requirement to provide sufficient evidence belongs to the party whom the information concerns. In this case, the information concerns the BC government.<sup>9</sup>

### **Analysis**

[17] The City's submissions are brief and general. The City concedes that Amazon's request for proposal process is complete and disclosure of the information at issue would not affect the City's own financial interest. Its entire case is founded on the prospect of harm to the negotiating position of the BC government, which, it submits, would be substantial. Nevertheless, it has provided no evidence about any negotiations the government may be involved in. Its submissions lack affidavit evidence or supporting documentation. The City does not explain the rationale behind its position. It has not identified other negotiations the BC government may be involved in where the information at issue would be relevant. It has not described how disclosure of this information

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<sup>4</sup> The City's initial submission, paras. 16-17.

<sup>5</sup> The City's initial submission, para. 18.

<sup>6</sup> The City's initial submission, para. 26.

<sup>7</sup> Applicant's response submission, para. 6. Order F20-36, 2020 BCIPCD (CanLII); F20-47, 2020 BCIPCD (CanLII).

<sup>8</sup> Applicant's response submission, para. 5.

<sup>9</sup> The City's reply submission, paras. 6 and 12.

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would harm the negotiating position of the BC government and it does not quantify this harm.

[18] The City acknowledges the weakness in its position and submits that it is up to the BC government, rather than the City, to make its own arguments. As the BC government has declined to participate in this inquiry, I have before me no such arguments to support the application of s. 17(1).

[19] The appropriate legal test requires evidence of a connection between the disclosure of the information and the anticipated harm and for the connection to be rational and logical. The City has not met this test.

[20] Moreover, from my review of the records at issue there is nothing apparent that is indicative of the risk of harm that the City envisages. Several passages relate to new programs and funding allocations that the BC government had already implemented or had planned to implement. These programs and funding allocations were not contingent on the success of the City's bid. In fact, there is very little information withheld that relates directly to what the BC government proposed to provide to Amazon, if it established a presence in British Columbia.

[21] Therefore, for the reasons above, I find that s. 17(1) does not apply to the information at issue.

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## CONCLUSION

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

- Under s. 58(2)(a), I require the City to give the applicant access to all the information it withheld under s. 17(1).

[23] Pursuant to s. 59(1) of FIPPA, the City must comply with this order by February 18, 2022. The City must concurrently copy the OIPC Registrar of Inquiries with the City's cover letter and the records sent to the applicant in compliance with this order.

January 7, 2022.

## ORIGINAL SIGNED BY

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Jay Fedorak, Adjudicator

OIPC File No.: F18-73042