



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F25-27

CITY OF PRINCE RUPERT

Lisa Siew
Adjudicator

March 28, 2025

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Summary: An applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records between the City of Prince Rupert (City) and a company that the City hired to replace its old water dam. The City provided the applicant with partial access to the requested records by withholding some information from those records under ss. 17(1)(d) (harm to financial or economic interests) and 21(1) (harm to a third party's business interests) of FIPPA. The applicant asked the Office of the Information and Privacy Commissioner to review the City's decision, and the matter was later forwarded to inquiry. The adjudicator determined the City was not authorized to withhold any of the information at issue under s. 17(1) and the requirements of s. 21(1) had not been met. As a result, the adjudicator ordered the City to provide the applicant with access to all the information the City had redacted in the responsive records.

Statute Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss. 17(1), 17(1)(d), 21(1)(a)(i), 21(1)(a)(ii), 21(1)(b), 21(1)(c).

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant requested the City of Prince Rupert (City) provide access to correspondence between the City and a company called Eiffage Innovative Canada Inc. (Eiffage). The City hired Eiffage to replace its old water dam.

[2] The City provided the applicant with partial access to the requested records by withholding some information from those records under ss. 17(1)(d) (harm to financial or economic interests) and 21(1) (harm to a third party's business interests) of FIPPA. The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the City's response.

[3] As a result of the OIPC's review and mediation process, the City provided the applicant with access to some information that it had previously withheld in the responsive records. However, the parties were not able to resolve the

remaining matters at issue and the applicant requested an inquiry. Both the City and the applicant provided written submissions for the inquiry.

[4] The OIPC notified Eiffage of the applicant's request for review and invited it to participate in the inquiry.¹ Eiffage declined to participate in the inquiry and provided no submissions.²

PRELIMINARY MATTER – NEW ISSUE

[5] The applicant's inquiry submission includes facts and arguments about the adequacy of the City's search for records. Under s. 6(1) of FIPPA, public bodies are required to conduct an adequate search for records upon receiving an access request. The City's duty to conduct an adequate search under s. 6(1) was not set out in the notice of inquiry or the OIPC investigator's fact report as an issue for consideration in this inquiry.

[6] When parties attempt to introduce new issues at the inquiry stage, it undermines the integrity and effectiveness of the mediation phase of FIPPA's review process.³ This process is designed to benefit the parties by clarifying and solidifying the issues and potentially resolving them and determining if they warrant proceeding to inquiry.⁴ It is also at this stage that the parties are given the opportunity to raise any additional issues for consideration at mediation or inquiry.⁵ That process and its intended benefits are bypassed when a party seeks to add a new issue at inquiry. Therefore, the OIPC's prior consent is required and there must be a valid reason to warrant introducing issues for the first time at the inquiry stage.⁶

[7] The applicant did not seek the OIPC's permission to add this additional issue to the inquiry or explain why they did not raise this issue earlier during mediation or why they should be permitted to add this additional issue at the inquiry stage. There is also no evidence the applicant informed the OIPC investigator that the fact report should be amended to include this additional issue. There is also nothing in the parties' submissions that persuades me there is a valid reason for adding this new issue at this late stage and for circumventing the OIPC's mediation and review process and its intended benefits.

¹ Under s. 54(b) of FIPPA, the OIPC has the authority to provide a copy of the applicant's request for review to any person the Commissioner considers appropriate. Under s. 56(3), that person must be given an opportunity to make representations to the Commissioner or their delegate during the inquiry.

² Eiffage's correspondence with an OIPC Investigator dated November 23, 2023.

³ Decision F08-02, 2008 CanLII 1647 (BCIPC) at para. 30.

⁴ Decision F08-02, 2008 CanLII 1647 (BCIPC) at para. 28, Order F21-21, 2021 BCIPC 26 at para. 10 and Order F20-38, 2020 BCIPC 44 at para. 7.

⁵ Decision F08-02, 2008 CanLII 1647 (BCIPC) at para. 29.

⁶ Order F20-38, 2020 BCIPC 44 at para. 7.

[8] Moreover, where an applicant complains that a public body has not performed a duty under FIPPA, the OIPC requires the complainant to first provide the public body an opportunity to respond and attempt to resolve the complaint prior to making a complaint to the OIPC. There is no evidence that the parties first attempted to resolve this matter between themselves. Additionally, once the OIPC has accepted a complaint, they are usually investigated and resolved by a case review officer or investigator and not at a formal inquiry.⁷

[9] Therefore, for all those reasons, I decline to add s. 6(1) to this inquiry. However, the applicant has the option of submitting a written complaint to the public body and allowing the public body an opportunity to resolve the complaint. If the applicant is not satisfied with the public body's response, then the applicant may seek a resolution through the OIPC's complaint process.

ISSUES AND BURDEN OF PROOF

[10] The issues I must decide in this inquiry are as follows:

1. Is the City authorized to withhold the information at issue under s. 17(1)(d)?
2. Is the City required to withhold the information at issue under s. 21(1)?

[11] Section 57 of FIPPA sets out which party bears the burden of proof in an inquiry. The City decided to refuse the applicant access to the information at issue in the responsive records. Given the City's decision, s. 57(1) places the burden on the public body to prove the applicant has no right of access to the information at issue in the disputed records under ss. 17(1)(d) and 21(1).⁸

DISCUSSION

Background

[12] The City needed to replace the aging dam located at Woodworth Lake. The City hired Eiffage to construct a new dam and decommission the old dam.

Records and information at issue

[13] The records responsive to the applicant's access request total 17 pages. The records consist of memos and letters between the City and Eiffage. The City initially withheld information on six pages of the responsive records.

⁷ Order F18-11, 2018 BCIPC 14 at para. 6.

⁸ If the City had decided to give the applicant access to all or part of the disputed records, then s. 57(3)(b) places the burden on the third party (in this case Eiffage) to prove the applicant has no right of access under s. 21(1).

[14] For some of the redacted information, the City did not identify what FIPPA exception it was relying on to refuse access.⁹ During the inquiry, I sought clarification from the City. The City responded by releasing this formerly withheld information to the applicant; therefore, I conclude that information is no longer at issue in this inquiry.¹⁰ The information at issue in this inquiry is now located on five pages of the responsive records and consists of three letters between the City and Eiffage.¹¹

Harm to financial or economic interests - s. 17(1)

[15] In response to the applicant's access request, the City refused the applicant access to the requested records by citing s. 17. As part of its inquiry submission, the City says "the only items redacted and withheld were in accordance with section 17(1)(d)."¹² However, the City did not identify in its inquiry submission or in a copy of the responsive records that it provided to the OIPC, what information it withheld under ss. 17(1) and 17(1)(d).

[16] During the inquiry, I sought clarification from the City on what information it had withheld under ss. 17(1) and 17(1)(d). Despite the OIPC giving the City several opportunities to clarify, the City did not identify what specific information it was withholding under ss. 17(1) and 17(1)(d), nor did it confirm that it was withdrawing its application of s. 17(1) to information that it had redacted in the responsive records.¹³ Given the City's lack of response and clarification, I have taken the approach that the City applied ss. 17(1) and 17(1)(d) to all of the information redacted in the responsive records.

[17] Sections 17(1) and 17(1)(d) state:

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;

⁹ Information located on p. 17 of the records.

¹⁰ City's email to the applicant dated March 20, 2025.

¹¹ Information located on pp. 8, 11, 13, 14 and 15 of the records.

¹² City's initial submission dated October 11, 2024.

¹³ Registrar's emails to the City dated February 5, 2025, March 3 and 18, 2025. Registrar's March 12, 2025 phone call with the City's representative.

[18] 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 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).¹⁴

[19] 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.¹⁵

[20] 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."¹⁶ The Supreme Court of Canada has described this standard as "a middle ground between that which is probable and that which is merely possible."¹⁷

[21] 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.¹⁸ 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.¹⁹

[22] 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."²⁰ Previous OIPC orders have said general speculative or subjective evidence will not suffice.²¹

¹⁴ Order F19-03, 2019 BCIPC 4 (CanLII) at para. 22.

¹⁵ Order F14-31, 2014 BCIPC 34 (CanLII) at para. 41.

¹⁶ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.

¹⁷ *Ibid.*

¹⁸ *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 206.

¹⁹ *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.

²⁰ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.

²¹ For example, Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 27.

[23] Furthermore, it is the release of the information itself which must give rise to a reasonable expectation of harm.²² 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.”²³

Analysis and findings on ss. 17(1) and 17(1)(d)

[24] As I will explain, I am not persuaded ss. 17(1) and 17(1)(d) apply to the information in dispute. As noted, the City says “the only items redacted and withheld were in accordance with section 17(1)(d)” of FIPPA.²⁴ However, aside from its assertions, the City does not sufficiently explain with supporting evidence how disclosing the information at issue could reasonably be expected to result in the harms specified in ss. 17(1) and 17(1)(d).

[25] Based on my review of the records, it is unclear how disclosing the information in dispute could reasonably be expected to result in the premature disclosure of a proposal or project under s. 17(1)(d), result in undue financial loss or gain to a third party under s. 17(1)(d) or how disclosure could reasonably be expected to harm the financial or economic interests of the City, of another public body or the BC government as required under s. 17(1).

[26] For example, some of the information redacted in a letter reveals what the City asked Eiffage to provide during the request for proposals (RFP) process to address the need to reduce the cost of the dam replacement project.²⁵ However, the applicant says the contract between the City and Eiffage “has long since been signed off, and the project completed.”²⁶ The City did not dispute or provide any evidence to counter the applicant’s description of the status of the contract and the project. Therefore, if the City already awarded the dam replacement contract to Eiffage and that project has been completed, it is unclear how the disclosure of this past information about the project would be a premature disclosure of a proposal or project as required under s. 17(1)(d).

[27] As another example, the City withheld information in a letter it sent to Eiffage that is about the City’s intention to make a claim against Eiffage for a credit because Eiffage had entered into an agreement with “the Christian Labour Association of Canada” and that agreement “prohibited the participation of all other unionized personnel on the project.”²⁷ It is unclear and the City does not explain how disclosing the redacted information in this letter could reasonably be

²² *British Columbia (Minister of Citizens’ Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875 at para. 43.

²³ *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3 at para. 219.

²⁴ City’s initial submission dated October 11, 2024.

²⁵ Information disclosed on p. 10 of records.

²⁶ Applicant’s submission dated October 21, 2024 at p. 1.

²⁷ Letter and redacted information located on p. 8 of the records. Description and quoted information disclosed in the letter.

expected to harm the City's financial interest or result in undue financial loss or gain to a third party under ss. 17(1) and 17(1)(d). In my view, it seems evident that any potential harm to the City's financial interests would be a result of Eiffage's actions in entering into an agreement with the Christian Labour Association of Canada rather than through the disclosure of the information at issue.

[28] Ultimately, although it bears the burden of proof, the City's submission does not provide any arguments or detailed and convincing evidence that establishes a clear and direct connection between the disclosure of the information withheld in the responsive records and the harms specified in ss. 17(1) and 17(1)(d). Therefore, without sufficient explanation or evidence, I am not satisfied ss. 17(1) and 17(1)(d) apply to any of the information in dispute.

Section 21(1) – disclosure harmful to third-party business interests

[29] Section 21(1) of FIPPA requires public bodies to refuse to disclose information that could reasonably be expected to harm the business interests of a third party. Schedule 1 of FIPPA defines a "third party" to mean "any person, group of persons or organization other than (a) the person who made the request, or (b) a public body." It is not in dispute that Eiffage is a third party under FIPPA.

[30] Past jurisprudence has established the principles and analysis for determining whether s. 21(1) applies.²⁸ The party resisting disclosure must first demonstrate that disclosing the information at issue would reveal the type of information listed in s. 21(1)(a). Next, it must show that this information was supplied in confidence to the public body under s. 21(1)(b). Finally, it must establish that disclosure of the information at issue could reasonably be expected to cause one or more of the harms set out in s. 21(1)(c). All three elements must be met to properly withhold information under s. 21(1). I will discuss these requirements and the parties' arguments below.

Section 21(1)(a): What type of information is being withheld?

[31] The City has redacted information in several letters between the City and Eiffage, citing either s. 21(1)(a)(i)²⁹ or s. 21(1)(a)(ii)³⁰ or, in some cases, not citing any s. 21(1)(a) provision.³¹ The City did not provide any explanation or evidence as to how the redacted information at issue would reveal the type of information

²⁸ For example, Order F17-14, 2017 BCIPC 15 at para. 9 and *Vancouver Whitecaps FC LP v. British Columbia (Information and Privacy Commissioner)*, 2020 BCSC 2035.

²⁹ Information located on p. 13 of the records.

³⁰ Information located on pp. 8 and 11 of the records.

³¹ The City cited s. 21(1)(b) for information withheld on pp. 14 and 15 of the records.

listed in ss. 21(1)(a)(i) or (ii).³² The City's only explanation for how the redacted information meets the s. 21(1)(a) requirement is the following statement where it says: "the only items redacted and withheld were in accordance with...section 21(1)(a)(b) & (c) of the [FIPPA]."³³

[32] Section 21(1)(a)(i) applies to information that would reveal trade secrets of a third party. The term "trade secret" is defined in Schedule 1 of FIPPA, to mean information, including a formula, pattern, compilation, program, device, product, method, technique or process, that: (a) is used, or may be used, in business or for any commercial advantage, (b) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use, (c) is the subject of reasonable efforts to prevent it from becoming generally known, (d) and the disclosure of which would result in harm or improper benefit. To qualify as a "trade secret" under FIPPA, all four elements set out in the definition must be met.

[33] Section 21(1)(a)(ii) applies to information that would reveal commercial, financial, labour relations, scientific or technical information of or about a third party. Based on my review of the records, the type of information listed under s. 21(1)(a)(ii) that may be relevant here is commercial or financial information of, or about, a third party. FIPPA does not define the terms "commercial" or "financial" information. However, previous OIPC orders have found information is commercial information if it relates to commerce and the buying and selling of goods and services, including the terms, conditions and methods that a third party proposes to supply the goods or perform the services.³⁴ Information is financial information under s. 21(1)(a)(ii) if it is about things such as prices charged for goods and services, assets, liabilities, expenses, cash flow, profit and loss data, operating costs, financial resources or arrangements.³⁵

[34] The information at issue is located in three letters between the City and Eiffage dated April 5, 2019, May 29, 2020 and June 2, 2021. I will discuss each letter below.

Letter dated April 5, 2019

[35] I can see from the records that the City was concerned about costs for the dam replacement project and, as part of the RFP process, the City requested Eiffage provide an outline of a "proposed plan for value-engineering, along with a

³² The applicant made no submissions about s. 21(1)(a).

³³ City's submission dated October 11, 2024.

³⁴ For example, Order F05-09, 2005 CanLII 11960 (BC IPC) at para. 9.

³⁵ For example, Order F17-41, 2017 BCIPC 45 (CanLII) at paras. 59-61.

timeline and cost estimate to complete the engineering work under this plan.”³⁶ Eiffage then provided its proposed plan to the City in a letter dated April 5, 2019.

[36] The City redacted the following information from the letter:

- The name of Eiffage’s “partner engineering firm”.
- Eiffage’s proposed detailed and total costs for the project.
- Eiffage’s proposed detailed and total cost savings for the project.
- Eiffage’s estimated total cost to provide the City with the engineering and project optimization phase of the project.
- The personal cell phone number of Eiffage’s project manager.³⁷

[37] I find Eiffage’s proposed costs and cost savings for the project and the total cost for the engineering and optimization phase would reveal the terms, prices and financial arrangements that Eiffage proposes to offer, forego or charge the City to complete the work for the dam replacement project. I also find the name of the engineering firm would reveal who Eiffage had chosen to do the engineering work for the project, which appears to be a condition that Eiffage required as part of its proposal to the City. Therefore, consistent with previous OIPC orders, I conclude this information qualifies as commercial and financial information about a third party under s. 21(1)(a)(ii). Having found this information is commercial and financial information under s. 21(1)(a)(ii), it is not necessary for me to also consider if this information qualifies as trade secrets of a third party under s. 21(1)(a)(i). For the s. 21(1) analysis, it is sufficient that the information at issue falls under either ss. 21(1)(a)(i) or 21(1)(a)(ii).

[38] The rest of the information at issue in the letter is the personal cell phone number of Eiffage’s project manager, which the City redacted from the signature block in the letter. The City did not identify what specific provision under s. 21(1)(a) it is relying on to withhold this information. Despite the OIPC giving the City several opportunities to clarify, the City did not explain how the s. 21(1)(a) requirement has been satisfied for this information.³⁸

[39] Based on my review of the records, it is not apparent how disclosing the phone number would reveal the type of information listed in ss. 21(1)(a)(i) or (ii). For example, the phone number does not reveal anything about the terms, conditions, methods and costs that Eiffage has offered the City to complete the dam replacement project. Therefore, I am not satisfied disclosing the phone number would reveal commercial or financial information of or about a third party as interpreted by past OIPC orders or a third party’s trade secrets as defined in

³⁶ Page 10 of the records.

³⁷ Redacted information located on pp. 11, 13 and 14 of the records. Description and quoted information disclosed in the letter.

³⁸ At my request, the Registrar sought clarification from the City about this information: Registrar’s emails to the City dated February 5, 2025, March 3 and 18, 2025.

FIPPA. Without sufficient explanation or evidence, I find the s. 21(1)(a) requirement has not been met for this information.³⁹

Letter dated May 29, 2020

[40] The City redacted information in a letter from the City to Eiffage, dated May 29, 2020. The letter is about the City's intention to make a claim against Eiffage for a credit to the contract price because Eiffage and the Christian Labour Association of Canada had entered into an agreement related to work on the dam replacement project that prohibited the participation of all other unionized personnel.⁴⁰

[41] The City redacted information in this letter citing s. 21(1)(a)(ii). However, it is not self-evident, and the City does not explain, how the disclosure of this information would reveal the type of information listed in s. 21(1)(a)(ii). For example, I can see that some of the redacted information names a third party, but it is not apparent how that information would reveal commercial or financial information of or about Eiffage or another third party. Instead, in my opinion, the redacted information is about the City and the effect of Eiffage's actions on the City rather than information of or about a third party in accordance with s. 21(1)(a)(ii). Without sufficient explanation or evidence, I find the s. 21(1)(a) requirement has not been met for any of the information withheld from the May 29, 2020 letter.

Letter dated June 2, 2021

[42] Eiffage sent the City a letter dated June 2, 2021. In this letter, the City withheld part of the subject line, an introductory statement from Eiffage's chief financial officer, a heading that describes certain information and the information under that section which the City openly describes as "banking information for the contractor."⁴¹

[43] The City did not identify what specific provision under s. 21(1)(a) it relied on to withhold all this information. Despite the OIPC giving the City several opportunities to clarify, the City did not explain how the s. 21(1)(a) requirement was satisfied for this information.⁴²

³⁹ The City did not withhold the cell phone number under s. 22(1) and I would agree with this decision because the project manager used the cell phone number to allow someone to contact them for business purposes so it would qualify as contact information under FIPPA.

⁴⁰ Letter and redacted information located on p. 8 of the records. Description and quoted information disclosed in the letter.

⁴¹ Letter and redacted information located on p. 15 of the records. Description and quoted information disclosed in the letter.

⁴² At my request, the Registrar sought clarification from the City about this information: Registrar's emails to the City dated February 5, 2025, March 3 and 18, 2025.

[44] Based on my review of the letter, I find some of the redacted information would reveal Eiffage's banking information. I am unable to describe this information in any further detail because it would reveal the information at issue; however, I am satisfied the disclosure of this banking information would reveal financial information about Eiffage in accordance with s. 21(1)(a)(ii).

[45] The rest of the information at issue in the letter is information that was redacted from the subject line, an introductory statement from Eiffage's chief financial officer and a heading that describes the banking information. It is not apparent, and the City does not explain, how any of this information would reveal the type of information listed in s. 21(1)(a). Instead, most of the redacted information is descriptive information that explains the purpose of the letter and generally describes the information provided in the letter. None of this information reveals the type of information listed in s. 21(1)(a). Without sufficient explanation or evidence, I find the s. 21(1)(a) requirement has not been met for this information.

Section 21(1)(b): Was the information supplied in confidence?

[46] I found only the following information at issue, which is in the letters dated April 5, 2019 and June 2, 2021, would reveal commercial or financial information about a third party in accordance with s. 21(1)(a)(ii):

- The name of Eiffage's partner engineering firm.
- Eiffage's proposed detailed and total costs for the project.
- Eiffage's proposed detailed and total cost savings for the project.
- Eiffage's estimated total cost to provide the City with the engineering and project optimization phase of the project.
- Eiffage's banking information.

[47] Therefore, the next step in the s. 21(1) analysis is to consider whether the s. 21(1)(b) requirement is met for the above-noted information. It is not necessary for me to consider the information withheld by the City that I found would not reveal any of the information listed in s. 21(1)(a) since all parts of the s. 21(1) test must be met to properly withhold information under s. 21(1).

[48] Section 21(1)(b) requires the information to be supplied in confidence. This step of the s. 21(1) test involves a two-part analysis. It is first necessary to determine whether a third party supplied the information at issue to the public body. If so, the second part of the analysis is to determine whether the third party supplied that information, implicitly or explicitly, in confidence.⁴³

Did the third party supply the information at issue to the City?

⁴³ Order F15-71, 2015 BCIPC 77 at para. 11.

[49] Previous OIPC orders have found information that is generated by, derived from, negotiated with, or agreed-to-by a public body is not information that was “supplied” under s. 21(1)(b).⁴⁴ In other words, information is supplied if the third party provided the information to the public body and there is no evidence the public body had modified or agreed to accept that information as part of a negotiation.⁴⁵

[50] Although it bears the burden of proof, the City did not provide sufficient explanation or evidence as to how the commercial and financial information about Eiffage was supplied for the purposes of s. 21(1)(b).

[51] The only evidence available to me in this inquiry is the records.⁴⁶ Based on my review of the records, I can see that Eiffage provided its commercial and financial information to the City; both letters were sent by Eiffage to the City. I was not provided with any evidence that shows the City created, modified or agreed to accept that information as part of a negotiation. Therefore, without any evidence to contradict the records, I conclude Eiffage supplied the information at issue to the City.

Did the third party supply the information in confidence?

[52] I found Eiffage supplied to the City the information in the letters dated April 5, 2019 and June 2, 2021 that would reveal Eiffage’s commercial and financial information. Therefore, the next step in the s. 21(1)(b) analysis requires that I consider whether Eiffage supplied that information to the public body explicitly or implicitly in confidence.

[53] The test for whether a third party supplied information in confidence is objective. It must be shown that the information was supplied under an objectively reasonable expectation of confidentiality by the supplier of the information at the time the information was provided; evidence of the supplier’s subjective intentions alone with respect to confidentiality is insufficient.⁴⁷ In other words, “the focus of the confidentiality assessment is on whether the information in the disputed records was provided in confidence and whether, assessed objectively, it can be said that there was a reasonable expectation that it be maintained in confidence.”⁴⁸

⁴⁴ Order 04-08, 2004 CanLII 34262 (BC IPC) at para. 33

⁴⁵ Order F13-01, 2013 BCIPC 1 at paras. 36-38.

⁴⁶ The applicant made no submissions about s. 21(1)(b).

⁴⁷ Order 01-36, 2001 CanLII 21590 at para. 23 and Order 01-39, 2001 CanLII 21593 (BC IPC) at para. 28.

⁴⁸ Order 01-39, 2001 CanLII 21593 (BC IPC) at para. 31.

[54] Although it bears the burden of proof, the City did not provide sufficient explanation or evidence to show how Eiffage’s commercial and financial information was supplied in confidence for the purposes of s. 21(1)(b). As well, Eiffage declined to participate in the inquiry, so I have no evidence about Eiffage’s expectations about confidentiality at the time it supplied the disputed information to the City.

[55] I have, therefore, reviewed the records to determine whether there are any explicit indicators or statements of confidentiality about the information at issue. There is no wording or statement in the June 2, 2021 letter that addresses or imposes confidentiality over the information redacted in this letter.

[56] On the other hand, the April 5, 2019 letter is marked “CONFIDENTIAL”, which suggests Eiffage expected the City to keep the contents of the letter confidential.⁴⁹ However, as noted, a third-party’s subjective expectations about confidentiality, on its own and without corroboration from a public body or from other objective evidence, is insufficient to establish that the information was provided in confidence under s. 21(1)(b).⁵⁰ The City did not provide me with any evidence that shows it agreed to receive the contents of the April 5, 2019 letter in confidence or that Eiffage’s expectations about confidentiality were objectively reasonable.

[57] Given the lack of evidence or explanation from the City, I have also considered whether Eiffage supplied the information at issue here implicitly in confidence to the City. To determine whether information was supplied implicitly in confidence, all the circumstances must be considered, including whether the information was:

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; or
4. prepared for a purpose which would not entail disclosure.⁵¹

⁴⁹ Page 11 of the records.

⁵⁰ Order F12-09, 2012 BCIPC 13 (CanLII) at paras. 19-22, citing Order 04-06, 2004 CanLII 34260 (BC IPC) at paras. 51-53.

⁵¹ Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 26.

[58] The City did not provide any explanation or sufficient evidence that assists me in understanding the circumstances under which Eiffage provided the information at issue to the City. Instead, I note the applicant says the dam replacement project “was a major publicly funded project and costs escalated into the tens of Millions [sic] of dollars, over several years.”⁵² The City did not dispute or provide any evidence to counter the applicant’s description of the project, its costs and duration. Accordingly, if the dam replacement project was a major public project for the City which extended over several years, then it is unclear how Eiffage or the City could expect to keep confidential all the details about Eiffage’s proposal to the City.

[59] In my view, the parties would have expected some of those details, such as Eiffage’s proposed costs to undertake and complete the project or the name of the engineering firm who worked on the project, to be publicly disclosed to obtain approval for funding or for work on the project to start and be completed. Therefore, I am not satisfied there was an objectively reasonable expectation between the parties that all the redacted information provided by Eiffage to the City would be received and kept in confidence. Instead, it seems to me that some of this information may have been prepared for a purpose that anticipated the disclosure of this information.

[60] For the information at issue in the letter dated June 2, 2021, I note the City decided to both disclose and withhold similar information in this letter. The City provided the applicant with access to Eiffage’s “new” banking information, which includes the name and address of the bank, the account number, transit number and bank number.⁵³ The City did not explain why it chose to disclose Eiffage’s new banking information but withhold other banking information about Eiffage in the same letter. I cannot describe this other banking information in any further detail without disclosing the information at issue; however, I find the City’s actions do not support the idea that Eiffage provided the redacted information in this letter to the City on a confidential basis and that it was to be kept confidential.

[61] To conclude, without sufficient explanation or evidence, I am unable to find there was an objectively reasonable expectation of confidentiality at the time Eiffage provided the information at issue in the letters to the City. Accordingly, I find the s. 21(1)(b) requirement is not met for the information at issue in the two letters dated April 5, 2019 and June 2, 2021.

Section 21(1)(c): Is there a reasonable expectation of probable harm?

⁵² Applicant’s submission dated October 21, 2024 at p. 1.

⁵³ Information disclosed on p. 15 of the records.

[62] As none of the disputed information meets the “supplied in confidence” test under s. 21(1)(b), it is not necessary for me to consider whether disclosing that information could reasonably be expected to result in harm under s. 21(1)(c). However, to provide the parties with a complete s. 21(1) analysis, I will consider the s. 21(1)(c) harms analysis for information that I found would reveal commercial or financial information about a third party in accordance with s. 21(1)(a)(ii).

[63] The standard of proof applicable to harms-based exceptions like s. 21(1) is the same standard as set out further above for s. 17(1). To avoid unnecessary duplication, I have not repeated here what I said above under s. 17(1), but I have adopted and applied the “reasonable expectation of probable harm” standard in my analysis under s. 21(1)(c).⁵⁴

[64] I found the following information would reveal commercial or financial information about Eiffage under s. 21(1)(a)(ii):

- The name of Eiffage’s partner engineering firm.
- Eiffage’s proposed detailed and total costs for the project.
- Eiffage’s proposed detailed and total cost savings for the project.
- Eiffage’s estimated total cost to provide the City with the engineering and project optimization phase of the project.
- Eiffage’s banking information.

[65] The City cited s. 21(1)(c)(i) as a basis to withhold the name of the engineering firm and the total cost to Eiffage for the value engineering and project optimization phase of the project. Therefore, I will consider that information below under s. 21(1)(c)(i).

[66] For the rest of the information at issue, despite the OIPC giving the City several opportunities to clarify, the City did not identify what specific provision under s. 21(1)(c) it relied on to withhold this information or explain how the s. 21(1)(c) requirement was satisfied for this information.⁵⁵ Based on my review of the records, it is not apparent how the disclosure of this information could reasonably be expected to result in any of the harms listed under s. 21(1)(c). Given the lack of explanation and supporting evidence from the City, I am unable to conclude the disclosure of this information could reasonably be expected to result in any of the specified harms under s. 21(1)(c).

Harm to competitive position or negotiating position - s. 21(1)(c)(i)

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

⁵⁵ At my request, the Registrar sought clarification from the City about this information: Registrar’s emails to the City dated February 5, 2025, March 3 and 18, 2025.

[67] Section 21(1)(c)(i) states that the head of a public body must refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of the third party. In Order 00-10, former Commissioner Loukidelis concluded that by adding the word “significantly” in s. 21(1)(c)(i), the Legislature clearly indicated that something more than “harm” is needed and that “by choosing a standard of significant harm, the Legislature clearly contemplated situations where disclosure could simply harm the interests of a private business, but still be permitted.”⁵⁶

[68] Although it bears the burden of proof under s. 21(1), the City did not provide any detailed and convincing evidence or explanation to support its claim under s. 21(1)(c)(i).⁵⁷ As previously mentioned, the City’s only explanation for how the redacted information meets the s. 21(1)(c) requirement is the following statement where it says: “the only items redacted and withheld were in accordance with...section 21(1)(a)[,] (b) & (c) of the [FIPPA].”⁵⁸ Aside from this assertion, the City did not sufficiently explain with supporting evidence how disclosing the name of the engineering firm and the total cost to Eiffage for the value engineering and project optimization phase of the project could reasonably be expected to significantly harm a third party’s competitive position or interfere significantly with a third party’s negotiating position under s. 21(1)(c)(i).

[69] Ultimately, I find the City’s assertions about harm under s. 21(1)(c)(i) are speculative and lacking in evidentiary support. The City has not established a clear and direct link between disclosure of the information in question and a reasonable expectation of probable harm to a third party’s negotiating position or competitive position under s. 21(1)(c)(i). The City also does not sufficiently explain with evidence how the level of harm would be significant as required under s. 21(1)(c)(i).

Summary of findings on s. 21(1)

[70] I find disclosing some, but not all, of the information withheld under s. 21(1) would reveal commercial and financial information about Eiffage. I also find Eiffage supplied this commercial and financial information to the City, but I am unable to conclude that this information was supplied in confidence as required under s. 21(1)(b). I am also not persuaded that disclosing this commercial and financial information could reasonably be expected to result in harm under s. 21(1)(c). The City did not establish a clear and direct link between the disclosure of this redacted information and a reasonable expectation of probable harm under s. 21(1)(c). Therefore, I conclude the City has not met its burden of proving it must refuse to disclose all the information in dispute under

⁵⁶ Order 00-10, 2000 CanLII 11042 (BC IPC) at p. 11 of pdf.

⁵⁷ The applicant made no submissions about s. 21(1)(c).

⁵⁸ City’s submission dated October 11, 2024.

s. 21(1). Ultimately, I find s. 21(1) does not apply to any of the information redacted in the disputed records.

CONCLUSION

[71] For the reasons discussed above, I find the City is not required or authorized to refuse to disclose the redacted information at issue under ss. 17(1) and 21(1) of FIPPA, and I make the following orders:

1. Under s. 58(2)(a), I require the City to give the applicant access to all the redacted information at issue in the disputed records.
2. Under s. 58(4), I require the City to provide the Registrar with proof that it has complied with this order.⁵⁹

[72] Under s. 59(1), the City is required to comply with the terms of this order by May 13, 2025.

[73] In accordance with s. 58(5)(c), the Registrar will be providing Eiffage with a copy of this order because it was an appropriate person given notice under s. 54(b).

March 28, 2025

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

OIPC File No.: F23-91897

⁵⁹ If the applicant requested a paper or electronic copy of the records, then the City must provide the Registrar with a copy of the records that it sends to the applicant and any attached or relevant correspondence.