



Order F22-44

CITY OF BURNABY

Elizabeth Vranjkovic
Adjudicator

September 20, 2022

CanLII Cite: 2022 BCIPC 50
Quicklaw Cite: [2022] B.C.I.P.C.D. No 50

Summary: The applicant requested access under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to a list of all properties owned by the City of Burnaby (City). The City released the responsive record but withheld some information in the record under s. 17(1) (harm to financial or economic interests) of FIPPA. The adjudicator found that the City was not authorized to withhold any information under s. 17(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s. 17(1).

INTRODUCTION

[1] The applicant requested a list of all of the properties owned by the City of Burnaby (City) in the province of British Columbia. The City provided the responsive record to the applicant but withheld some information in the record under s. 17(1) (harm to financial or economic interests) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the City's decision. Mediation by the OIPC did not resolve the matter and it proceeded to inquiry.

ISSUE

[3] The issue to be decided in this inquiry is whether s. 17(1) authorizes the City to withhold the information in dispute.¹ Section 57(1) says that the City has the burden of proving that the applicant has no right to access the information withheld under s. 17(1).

¹ Whenever I refer to section numbers in this order, I am referring to sections of FIPPA.

PRELIMINARY MATTER

[4] The submissions include matters not set out in the OIPC investigator's fact report or the notice of inquiry. For example, the applicant makes submissions about the merits of the City's land assembly and acquisition program and says that the City is abusing its powers.

[5] As the Commissioner's delegate, my role is limited to determining whether the City was authorized to refuse access to the information withheld in the record. I do not have jurisdiction to decide those other matters. I have focused my discussion below only on the evidence and submissions relevant to deciding the s. 17(1) issue.

DISCUSSION

Background and information in dispute

[6] The City owns 2,735 properties.² There are properties proximate and adjacent to some of the City's properties that it has targeted for acquisition and land assembly.³ The information in dispute in this inquiry is about the City-owned properties that are proximate and adjacent to properties the City has targeted for acquisition and land assembly.

[7] The responsive record is a 66 page spreadsheet. Each row of the spreadsheet corresponds to a property owned by the City. The column headings are: *Line #, Parcel ID, Municipal Address, Redacted, and Reason for Exclusion or Reason For No Address.*

[8] Most of the information in the spreadsheet has been disclosed. However, for 421 of the properties, the City is withholding the information under the column headings *Parcel ID, Municipal Address and Redacted.*

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

[9] Section 17(1) authorizes a public body to refuse to disclose 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.

[10] 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). Past orders have said that subsections 17(1)(a) to (f) are not stand-alone provisions

² City's initial submission at para 14.

³ City's initial submission at para 2.

and even if information fits within those subsections, a public body must also prove the harm described in the opening words of s. 17(1).⁴

[11] The standard of proof required by s. 17(1) is a reasonable expectation of probable harm, which is “a middle ground between that which is probable and that which is merely possible.”⁵

[12] To meet this standard, the City must prove that disclosure of the specific information at issue will result in a risk of harm that goes “well beyond the merely possible or speculative” but it does not need to prove on a balance of probabilities that disclosure will in fact result in such harm.⁶ There needs to be a reasonable basis for believing the harm will result.⁷

[13] The determination of whether the standard of proof has been met 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 the “inherent probabilities or improbabilities or the seriousness of the allegations or consequences.”⁸ Previous OIPC orders have said general speculative or subjective evidence will not suffice.⁹

[14] Furthermore, it is the disclosure of the information in dispute which must give rise to the reasonable expectation of harm.¹⁰ The public body must provide evidence to establish “a direct link between the disclosure and the apprehended harm and that the harm could reasonably be expected to ensue from disclosure.”¹¹

[15] I have applied these principles in considering the submissions on s. 17(1). I have also considered the submissions from the point of view that disclosure of the information in dispute must be treated as if it is disclosure to the world.¹²

Public body’s submission

⁴ Order F19-03, 2019 BCIPC 4 at para 22 and Order F22-35, 2022 BCIPC 39 at para 33.

⁵ *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para 54 [*Ontario (Community Safety and Correctional Services)*].

⁶ *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3 at para 206 [*Merck Frosst*].

⁷ *Ontario (Community Safety and Correctional Services)*, *supra* note 6 at para 59 and *British Columbia Hydro and Power Authority v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 2128 at para 93.

⁸ *Ontario (Community Safety and Correctional Services)*, *supra* note 5, at para 54 citing *FH v McDougall*, 2008 SCC 53 at para 40.

⁹ For example, Order F09-03, 2008 CanLII 13321 (BC IPC) at para 27.

¹⁰ *British Columbia (Minister of Citizens’ Services) v British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875 at para 43.

¹¹ *Merck Frosst*, *supra* note 6 at para 219.

¹² See Order 03-25, 2003 CanLII 49204 (BC IPC) at para 24.

[16] The City says that it is withholding information for 421 of its properties where it has targeted adjacent or proximate properties for acquisition and land assembly with the goal of creating higher density housing or expanding existing parkland.¹³ The City says that if the information in dispute is disclosed, it can be discerned from the groupings of these properties that adjacent or proximate properties are likely targeted for acquisition and land assembly by the City.¹⁴

[17] The City says that in the past, the identification of properties targeted for acquisition as part of a planned land assembly has resulted in property owners refusing to sell or seeking purchase prices that are well beyond fair market value.¹⁵

[18] The City says that disclosure of the disputed information could reasonably be expected to cause harm in one of two ways: either it may have to pay more than fair market value for targeted properties, or it may be unable to purchase targeted properties and complete planned land assemblies.¹⁶ The City identifies a number of harms that it says can reasonably be expected to result if it is unable to purchase properties that are targeted for purchase as part of a planned land assembly for higher density housing or the expansion of parkland:

- The City may not be able to increase low-income rental housing in the City, which may cause harm to the workforce as workers may not be able to afford to live in the City.¹⁷
- The City may not be able to realize the construction jobs that would result from the construction of higher density housing on the targeted lands.¹⁸
- The City may not be able to realize the increase in its tax base that would result from higher density development.¹⁹
- The City anticipates receiving “Density Bonus funds” from developers in exchange for approving higher density developments on the land it has targeted for development. The City uses these funds for acquiring community amenities and developing affordable housing. It may not be able to realize these funds if it is unable to assemble the targeted properties.²⁰
- The City may not be able to increase parkland, which would harm its ability to develop sustainably and achieve its climate change targets.²¹

¹³ City’s initial submission at paras 2 and 17.

¹⁴ City’s initial submission at para 19.

¹⁵ City’s initial submission at para 39.

¹⁶ City’s initial submission at paras 21 – 23.

¹⁷ Public body’s initial submission at paras 24 and 25.

¹⁸ City’s initial submission at para 27.

¹⁹ Public body’s initial submission at para 26.

²⁰ Public body’s initial submission at para 26.

²¹ City’s initial submission at para 28.

[19] The City submits that its evidence demonstrates that the identified harms are inevitable and would be a direct consequence of disclosure of the information in dispute.²²

[20] The City further submits that it considered whether to exercise its discretion in favor of disclosing the information but chose not to do so because the financial consequences would “harm not just the City but its taxpayer and the City’s ability to realize on development and parkland expansion planning to benefit the entire community.”²³

Applicant’s response submission

[21] The applicant questions the City’s assertion that it offers fair market value for properties. He says that fair market value is the determined price that a property will sell for in an open market, agreed upon by a willing buyer and seller, both of whom are reasonably knowledgeable about the property in question.²⁴ The applicant says that the City is not allowing property owners to receive fair market value for their properties, in part by withholding information from property owners about its plans and future zoning changes.²⁵

[22] The applicant does not dispute the potential for harm, but says that the City put itself in economic harm’s way by acquiring properties for land assembly.²⁶ The applicant questions why the City is risking taxpayer money by purchasing properties when it may not be able to complete the planned acquisitions.²⁷ He suggest that it would be better to purchase all of the properties for a given land assembly at the same time to avoid this risk.²⁸

Public body’s reply submission

[23] The City says that the applicant has not addressed the question at issue in the inquiry in his submissions.²⁹

[24] In response to the applicant’s submissions about fair market value, the City says that when it is interested in acquiring a property, it approaches the property owner to advise them of its interest and provides a market-based offer based on direct sale comparisons in the area.³⁰

²² City’s initial submission at para 43.

²³ City’s initial submission at para 44.

²⁴ Applicant’s response submission at page 1.

²⁵ Applicant’s response submission at pages 1 and 2.

²⁶ Applicant’s response submission at page 5.

²⁷ Applicant’s response submission at page 3.

²⁸ Applicant’s response submission at page 5.

²⁹ City’s reply submission at para 16.

³⁰ City’s reply submission at para 9.

Analysis and findings

[25] The City has not said that subsections 17(1)(a) to (f) apply and I do not consider these subsections to be relevant in the circumstances of this case. My analysis will focus on the harm described in the opening words of s. 17(1).

[26] I will first consider whether s. 17(1) applies to the information in the *Redacted* column of the spreadsheet. I will then consider whether s. 17(1) applies to information in the *Municipal Address* and *Parcel ID* columns of the spreadsheet. For ease of reference, I will refer to the information in those columns as the municipal addresses and parcel ID numbers (PIDs).

Redacted column of the spreadsheet

[27] The City does not make any submissions about the information in the *Redacted* column of the spreadsheet. Having reviewed the record, I do not see how disclosure of this information could reasonably be expected to harm the City's financial or economic interests. Therefore, I conclude that s. 17(1) does not apply to the information withheld under the *Redacted* column heading.

Municipal addresses and PIDs

[28] The City relies on its past experiences as the basis for its position that disclosure of the information in dispute could reasonably be expected to harm the City's financial or economic interests. The City's evidence comprises two affidavits, sworn by the City's General Manager Community Safety and the City's General Manager Planning and Development (together, the managers).

[29] The managers provide several examples where property owners sought purchase prices above fair market value. They say this occurred when the respective property owner(s):

- “became aware that the City had targeted their property for development;”³¹
- “learned [the property] was targeted for City acquisition;”³²
- “learned of the City's plans to purchase his property;”³³ and
- “became aware that the City wanted to buy his property.”³⁴

³¹ Affidavit of the Manager of Community Safety at para 18; affidavit of the Manager of Community Planning at para 18.

³² Affidavit of the Manager of Community Safety at paras 20 and 21; affidavit of the Manager of Community Planning at paras 20 and 21.

³³ Affidavit of the Manager of Community Safety at para 22; affidavit of the Manager of Community Planning at para 22.

³⁴ Affidavit of the Manager of Community Safety at para 24; affidavit of the Manager of Community Planning at para 24.

[30] The managers describe another example where a property owner refused to consider any offers at the current fair market value but they do not explain why the owner refused to do so.³⁵ The managers say that in 22 other examples, property owners sought compensation above fair market value upon learning of the City's "acquisition objectives."³⁶

[31] The City's evidence shows that when a property owner learns that the City wants to buy their property, that knowledge can reasonably be expected to cause them to refuse to sell unless they get more than fair market value. I can also see how some property owners may simply not want to sell their property to the City regardless of the price. However, the City has not established a direct link between that kind of response by property owners and disclosure of the municipal addresses and PIDs at issue in this inquiry.

[32] Disclosing the municipal addresses and PIDs would allow a property owner advance notice of the City's interest in their property. In my view, it is reasonable to conclude that a property owner may seek prices above fair market value or refuse to sell regardless of when the property owner learns of the City's interest in their property. The City has not satisfactorily explained how the timing of when the property owner learns of the City interest would alter the property owner's refusal to sell or desire to seek more than fair market value when the negotiation actually begins. In fact, the City's evidence demonstrates that even without the kind of advance knowledge that the information in dispute conveys, property owners often demand more than fair market value once they learn of the City's interest in their property. I do not see, and the City does not explain, how advance notice of the City's interest would alter the negotiations between the City and the property owner. In my view, the risk of property owners seeking prices above fair market value or refusing to sell is inevitable and would not result from disclosure in response to the applicant's FIPPA access request.

[33] For these reasons, I find that there is not a direct link between disclosure of the municipal addresses and PIDs and property owners seeking prices above fair market value or refusing to sell. I am not persuaded that disclosing the municipal addresses and PIDs could reasonably be expected to harm the City's financial or economic interests.

[34] Therefore, I conclude that the City has not met its burden of proof and established that s. 17(1) applies to the disputed information in the *Redacted, Municipal Address* and *Parcel ID* columns in the spreadsheet.

³⁵ Affidavit of the Manager of Community Safety at para 23; affidavit of the Manager of Community Planning at para 23.

³⁶ Affidavit of the Manager of Community Safety at para 25; affidavit of the Manager of Community Planning at para 25.

CONCLUSION

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

1. I require the City to give the applicant access to the information in dispute since it is not authorized to refuse access under s. 17(1).
2. 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.

Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by November 3, 2022.

September 20, 2022

ORIGINAL SIGNED BY

Elizabeth Vranjkovic, Adjudicator

OIPC File No.: F20-82529