Office of the Information & Privacy Commissioner for British Columbia

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Order F19-12

# TOWNSHIP OF LANGLEY

Celia Francis
Adjudicator

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**Summary:** An applicant requested development permit drawings for a proposed development in the Township of Langley (Langley). Langley denied access to the drawings under ss. 17(1) and 21(1) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The adjudicator found that neither exception applied and ordered Langley to disclose the drawings to the applicant.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 17(1), 21(1)(a)(ii), 21(1)(b), 21(1)(c)(i).

## INTRODUCTION

[1] In June 2017, an applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Township of Langley (Langley) for access to all development permit drawings (drawings) related to four properties on 86th Avenue in Langley. Langley gave notice of the request under s. 23 of FIPPA to the third-party developer. The developer objected to the disclosure of the drawings on the grounds that their release could cause it significant financial harm. The developer added that it would agree to the release of two sets of drawings[1] once Langley had given final approval to the development permit.[2]

[1] The landscape and "ISDC (Integrated Site Design Concept)" drawings.
[2] Developer's email of July 14, 2017.

[2] Langley then told the applicant that it had decided to withhold the drawings in their entirety under s. 21(1) (harm to third-party business interests) and ss. 17(1)(d) and (e) (harm to financial or economic interests of a public body). Langley also told the applicant and the developer that, once the development permit in question had been submitted to Langley's council for consideration and had been finalized, the drawings would be fully accessible on request.[3]

[3] The applicant requested a review of Langley's decision by the Office of the Information and Privacy Commissioner (OIPC). Mediation by the OIPC did not resolve the matter which then proceeded to inquiry.

## ISSUES

[4] The issues before me are these:

1. Whether Langley is authorized to withhold information under s. 17(1); and
2. Whether Langley is required to withhold information under s. 21(1).

[5] Under s. 57 of FIPPA, Langley has the burden of proving that the applicant has no right of access to the responsive records.

## DISCUSSION

### *Background*

[6] The developer provided the drawings to Langley in June 2017 as part of its application for a development permit regarding a development which would consist of three mixed-use buildings, six apartment buildings and three townhouse buildings. In June 2018, Langley staff prepared a report on the development which Langley's council considered at an open meeting on June 11, 2018. The report included 31 of the 122 pages of drawings at issue in this case. Langley posted the report, including the 31 pages of drawings, on its website the same day. Langley's council approved the development application on October 1, 2018.[4]

### *Records in dispute*

[7] The records in dispute are the remaining withheld 91 pages of drawings. They consist of several design and landscape drawings and one ISDC (Integrated Site Design Concept) drawing.

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[3] Langley's letter of August 9, 2017.

[4] Langley's initial submission, paras. 7, 8, 13-14; Affidavit of Langley's Supervisor, Information, Privacy and Records Management, paras. 6,12-15.

### *Standard of proof for harms-based exceptions*

[8] Numerous orders have set out the standard of proof for showing a reasonable expectation of harm.[5] 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".[6]

[9] Moreover, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*,[7] Bracken J. confirmed that it is the release of the information itself that must give rise to a reasonable expectation of harm and that the burden rests with the public body to establish that the disclosure of the information in question could reasonably be expected to result in the identified harm.

[10] I have taken these approaches in considering the arguments on harm under s. 17(1) and s. 21(1)(c).

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

[11] Langley and the developer argued that ss. 21(1)(a), (b) and (c)(i) apply to the drawings.[8] The relevant parts of s. 21(1) of FIPPA in this case read as follows:

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[5] For example, Order 01-36, 2001 CanLII 21590 (BCIPC), at paras. 38-39.

[6] *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.

[7] *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875, at para. 43.

[8] Langley's initial submission quoted ss. 21(1)(c)(i)-(iv). However, both its submission and that of the developer addressed only s. 21(1)(c)(i). I have, therefore, dealt only with that section.

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

[12] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies.[9] All three parts of the s. 21(1) test must be met in order for the information in dispute to be properly withheld. First, Langley must demonstrate that disclosing the information at issue would reveal commercial, financial, labour relations, scientific or technical information of, or about, a third party. Next, Langley must demonstrate that the information was supplied, implicitly or explicitly, in confidence. Finally, it 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). In assessing the parties' arguments on s. 21(1), I have taken the same approach.

[13] I find below that s. 21(1) does not apply. This is because, while I accept that ss. 21(1)(a) and (b) apply, Langley has not established a reasonable expectation of harm under s. 21(1)(c).

*Section 21(1)(a)(ii) – technical information*

[14] Langley and the developer argued that the records are "exclusively technical drawings" and thus "technical information" of the developer.[10] The drawings describe the proposed development and it is evident that an architect prepared them. Guided by the adjudicator's finding in Order F09-14[11], I am satisfied that they constitute the technical information of the developer. I therefore find that s. 21(1)(a)(ii) applies to the information.

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[9] 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).
[10] Langley's initial submission, para. 20; developer's initial submission, page 1.
[11] Order F09-14, 2009 CanLII 58552 (BCIPC).

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

[15] Both Langley and the developer said that the developer provided the records to Langley in confidence.[12] I accept from this evidence that the developer supplied the records, in confidence, to Langley for the purposes of s. 21(1)(b).

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

[16] Langley relied on the developer's submission regarding the harm issue.[13] The developer said that, when it supplied the drawings to Langley, it was in negotiations with Langley over density changes, land use changes and land exchanges. It added that

> Until the negotiations were finalized premature release could have caused significant harm as plans were changing continually. Until plans are finalized any public release can cause erroneous communication to the wider public by an applicant, thus significantly eroding our negotiating position with the Township.[14]

[17] I acknowledge the developer's point that, at the time of the request, it was in discussions with Langley over a number of matters connected with the development proposal and that things could change over time. However, the developer did not say what it meant by "erroneous communication." It also did not explain how changes in the development plans (which I understand to include the drawings) could cause any such "erroneous communication to the wider public" by the applicant. Langley said that its council approved the development permit in October 2018. While it appears that aspects of the proposed development may still change, the developer did not explain how the supposed "erroneous communication" could erode its current negotiating position with Langley and thus cause it "significant harm." These things are not evident from the drawings.

[18] The developer also argued that releasing the records "can allow competitors to adjust their plans to match our product. This can harm significantly our market advantages causing significant financial loss."[15] The developer did not point to aspects of the drawings which show, for example, unique, proprietary or custom-designed features which its competitors might wish to copy and thus achieve a financial benefit, to the developer's detriment. The developer also did not explain how these particular drawings could benefit another developer

[12] Langley's initial submission, para. 21; Affidavit of Langley's Supervisor, Information, Privacy and Records Management, para. 8; developer's initial submission, page 1.
[13] Langley's initial submission, para. 22.
[14] Developer's initial submission, page 1.
[15] Developer's initial submission, page 1.

developing a different proposal for a different project, which would involve different economic conditions, a different building site and different local services.

[19] Moreover, while competitors might be interested in knowing the developer's plans, the developer itself admitted that development proposals take many years to come to fruition. In any case, rather than trying to "match" the developer's product, a competitor might want to develop a different product in order to be more attractive and innovative. I do not, therefore, see how the drawings could be useful to a competitor some years after the fact.

[20] The developer added that, if the applicant is a realtor, the applicant "could use the information to premarket the product to their clients without our consent. This could cause considerable confusion in the market place and cause us financial harm. "[16] It is not clear how a realtor could attempt to do this without the developer's authorization. I also do not understand why a real estate agent would want to market a development that was not the final, approved product that the developer was actually going to build. In any event, it is in a developer's interests to sell its products. Thus, even if a realtor did want to market an unfinished, unapproved product, it is not clear how this would harm the developer's business interests.

[21] Moreover, I do not see, and again the developer did not explain, how pre-marketing the units could cause "considerable confusion in the market place." Potential buyers would presumably be aware of the addresses of the various buildings in the development and would know what units or buildings they were considering buying. I do not see, and the developer did not explain, how this supposed confusion could cause the developer significant financial harm.

[22] The developer also said that releasing the records "can be a security risk in the future."[17] It did not, however, point to portions of the drawings which might reveal a security risk and this is not obvious from their face.

[23] I also take into account that Langley has already disclosed 31 pages of drawings. These include an overall plan of the proposed development which shows the various buildings and green spaces (page 5), elevations of the various buildings (e.g., pages 28-29, 104) and most of the landscape drawings (pages 108-115). These drawings give the reader a good idea of what the proposed buildings will look like, including a general picture of their internal layouts. In light of this disclosure, Langley and the developer did not explain how disclosure of the remaining drawings, many of which are similar in character to the disclosed drawings or which include what appear to be conceptual, generic floorplans, could cause significant harm to the developer's financial interests. In addition, some of the drawings show what appear to be straightforward views

[16] Developer's initial submission, page 1.
[17] Developer's initial submission, page 1.

of the tops of the roofs and the insides of the parkades of the proposed buildings. I do not see how their disclosure could result in the anticipated harms the developer argued.

[24] Langley and the developer have not provided evidence "well beyond" or "considerably above" a mere possibility of harm. Their arguments amount to little more than assertions, in my view, and do not establish a clear and direct link between disclosure of the information in question and the reasonable expectation of harm. As noted above, the developer and Langley did not point to specific portions of the records disclosure of which could lead to the anticipated harms. I am unable to conclude that disclosure of the information contained in the drawings could reasonably be expected to cause the developer significant financial harm. I find that s. 21(1)(c)(i) does not apply to the drawings.

***Harm to public body's financial or economic interests – s. 17(1)***

[25] Langley argued that ss. 17(1)(d) and (e) apply to the withheld drawings. The relevant provisions read 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:
> ...
> (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;
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia;
> …

[26] Past orders have held that, even if information fits within subsections (a) to (f), a public body must also prove the harm described in the opening words of s. 17(1), i.e., harm to the financial or economic interests of the public body or the ability of the government to manage the economy.[18] Therefore, the overriding question is whether disclosure of the information could reasonably be expected to harm Langley's financial or economic interests.

[18] See, for example, Order F18-51, 2018 BCIPC 55 (CanLII) and Order F18-49, 2018 BCIPC 53 (CanLII).

*Discussion and findings*

[27] Langley said that it is in Langley's interests to encourage and promote development within its boundaries, "as development contributes to and is good for the local economy, brings in more families and contributes to a full community." Langley said that developers must demonstrate that their proposed developments comply with the relevant guidelines under the *Local Government Act* and that developers are often in discussions with municipal staff about the proper interpretation and application of these guidelines. Langley added that the development has not yet been built and, in its view, premature disclosure of the drawings, before the information is disclosed to the public, could reasonably be expected to harm Langley's ability to manage the information related to the development.[19]

[28] Even though Langley approved the development permit in October 2018, it appears that Langley has not yet awarded final approval to the project. I accept, therefore, that Langley and the developer may still be engaged in discussions about various aspects of the proposed development. However, Langley did not provide a copy of the guidelines it mentioned. It also did not explain how disclosure of the drawings might harm its ability to discuss the guidelines with the developer and how this might in turn harm its financial or economic interests. Langley also did not explain how the so-called "premature disclosure of the drawings" would harm its ability to "manage" information related to the development, whatever "manage" means in this context, or how this could, in turn, harm its financial or economic interests. Without more, I am unable to conclude that disclosure of the drawings could reasonably be expected to result in harm under s. 17(1) to Langley.

[29] The developer supported Langley in the application of s. 17(1), although its concerns appeared to pertain more to the disclosure of the records at the time of the request, rather than now. For example, the developer said that, at that time, it was still in negotiations with Langley over issues such as voluntary amenity contributions and land exchanges. It argued that disclosure of the "plans" at that point might have caused financial loss to Langley. The drawings do not concern discussions about amenities or land exchanges, however. Moreover, the Langley council minutes of June 2018 indicate that Langley and the developer had agreed in principle on issues such as amenity contributions.[20] It is thus not clear – and the developer did not explain – how disclosure of the drawings now could harm any future negotiations on these matters. These things are also not evident from the drawings themselves.

[19] Langley's initial submission, paras. 27-29.
[20] Exhibit C to Affidavit of Langley's Supervisor, Information, Privacy and Records Management.

[30] Langley did not provide evidence that is detailed and convincing enough to establish specific circumstances for the harm it argued could reasonably be expected to flow from disclosure of the information in question. Nor, as noted above, do the records themselves assist its position. Langley's arguments and evidence are speculative and vague and do not establish a clear and direct link between disclosure of the information in question and the reasonable expectation of harm. I find that s. 17(1) does not apply to the withheld drawings.

## CONCLUSION

[31] For reasons given above, under s. 58 of FIPPA, I find that Langley is neither authorized by s. 17(1) nor required by s. 21(1) of FIPPA to withhold the drawings. I require Langley to give the applicant access to this information by May 3, 2019. Langley must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

March 20, 2019

**ORIGINAL SIGNED BY**

Celia Francis, Adjudicator

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