



Order F20-04

CITY OF VANCOUVER

Erika Syrotuck
Adjudicator

February 3, 2020

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Summary: The applicant requested four records from the City of Vancouver (City) relating to the Brenhill Land Swap. The City said it had custody and control of one of the records but withheld it under s. 21 (harm to third party business interests) of the *Freedom of Information and Protection of Privacy Act*. The City said that it did not have custody or control of the remaining records. The adjudicator found that s. 21 did not apply and that the City had custody and control of one of the remaining records but not the other two.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 4 and 21(1).

INTRODUCTION

[1] The applicant made an access request to the City of Vancouver (City) under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for four records relating to the Brenhill Land Swap. In response, the City said that it did not have custody and control of any of the responsive records.

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the City's decision that it did not have custody and control of the records in dispute.

[3] During mediation by the OIPC, the City determined that it did have a copy of one of the records in dispute (Altus Report) but refused to disclose it under s. 13(1) (advice and recommendations), s. 17(1) (harm to a public body's financial or economic interests) and s. 21(1) (harm to a third party's business interests) of FIPPA. The City maintained that it did not have custody or control of the remaining three records.

[4] Mediation did not resolve the issues in dispute and the matter proceeded to inquiry.

[5] At the inquiry, the City said that it was no longer relying on ss. 13(1) and 17(1) to withhold information from the Altus Report. Therefore, the sole issue with regards to this record is whether s. 21 applies.

[6] The City and the applicant made submissions. The OIPC also invited several third parties to participate in this inquiry. Altus Group Limited (Altus) and Brenhill Developments Limited both chose to participate and made submissions on whether s. 21 applies to the Altus Report. Ernst & Young was invited to make submissions on the issue of custody and control, and it declined to do so.

ISSUES

[7] The issues to be decided in this inquiry are:

1. Is the City required to refuse access to the Altus Report under s. 21 of FIPPA?
2. Are the remaining records in the custody or under the control of the City for the purposes of s. 4(1) of FIPPA?

[8] Under s. 57(1), the burden is on the City to prove that the applicant has no right of access under s. 21. FIPPA does not say who has the burden in cases involving custody or control. Past orders on this issue have said that, in the absence of a statutory burden of proof regarding a given issue, as a practical matter, all the parties should provide evidence and argument to support their respective positions.¹

DISCUSSION

Background and records in dispute

[9] The City describes the Brenhill Land Swap as a strategic land swap agreement where a development company called Brenhill Developments Limited (Brenhill) agreed to construct an affordable housing development at 1099 Richards Street. In exchange for constructing the housing development, the City would then give Brenhill a property at 508 Helmcken Street. Brenhill planned to build a 36 story tower on the Helmcken property.

[10] The City says that the Brenhill Land Swap has been the subject of intense media scrutiny and litigation.

¹ See for example, Order F17-20, 2017 BCIPC 21 at para. 5.

[11] The City says it engaged Ernst & Young to perform an independent review of the Brenhill Land Swap. Ernst & Young provided a draft report called “City of Vancouver: Brenhill Land Swap.” This report was authored by Ernst & Young and was dated March 24, 2015. I will refer to this report as the Ernst & Young Report. The City says it was happy with the report in the draft version and never pursued a finalized version.

[12] The four records that are the subject of this inquiry are listed in the Ernst & Young Report as resources that Ernst & Young used to complete the review.² The applicant requested each record by name. They are:

- Altus Group cost analysis (Altus Report)
- BTY cost escalation analysis (BTY analysis)
- Burgess, Cawley, Sullivan and Associates – assessment and validation of sale price and transaction economic assumption (BCSA analysis)
- Rennie Marketing Systems- valuation analysis (Rennie analysis)

[13] The only record at issue with regards to s. 21 is the Altus Report. I will consider whether the City is required to withhold this record before turning to whether the three remaining records are in custody or control of the City.

Section 21 – business interests of a third party

[14] Section 21 requires a public body to refuse to disclose information that could reasonably be expected to harm the business interests of a third party.

[15] The Altus Report is a working draft copy of a review of construction costs of a development called the Jubilee House Affordable Housing Project.

[16] The portions of s. 21 that are relevant to this inquiry are:

21 (1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

...

(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

² See pages 17 and 27 of the Ernst & Young Report.

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

...

(iii) result in undue financial loss or gain to any person or organization,

[17] A public body must meet the requirements in ss. 21(1)(a), (b) and (c) in order to refuse to disclose information under this section.

Section 21(1)(a)

[18] The first step is to determine whether the information at issue is one of the types listed in s. 21(1)(a).

[19] Altus says that the report contains its technical information because its professional accredited cost consultants prepared the report. Altus says that the report is based on the architectural drawings and cost estimates of other third parties and so the report also contains the technical and commercial information of those parties.

[20] FIPPA does not define any of the types of information listed in s. 21(1)(a)(ii).

[21] Past orders have defined “technical information” as information belonging to an organized field of knowledge falling under the general categories of applied science or mechanical arts, usually involving information prepared by a professional with the relevant expertise and describes the construction, operation or maintenance of a structure, process, equipment or entity.³

[22] In my view, the information in the Altus Report is technical information within the meaning of s. 21(1)(a). The report contains architectural drawings of each floor of the proposed housing unit and associated statistics (i.e. square footage). The Altus report also contains a review of costs associated with the affordable housing project. I accept that the cost review was prepared by accredited consultants; in other words, professionals with relevant expertise about construction costs.

[23] Having found that the Altus Report is technical information, I turn to whether this information was supplied in confidence.

³ Order F19-11, 2019 BCIPC 3 at para. 13.

Section 21(1)(b)

[24] The second part of the analysis is to determine whether the information was supplied in confidence under s. 21(1)(b). This analysis has two parts: the information must be supplied and it must have been done so implicitly or explicitly, in confidence.

[25] In my view, all of the information in the Altus Report was supplied. It was prepared by Altus for another third party and the City. Some of the information originated from other third parties. It does not appear that any of the information originated from the City or was the product of a negotiation with the City.

[26] The test for “in confidence” is objective; evidence about the third party’s subjective intentions with respect to confidentiality is not sufficient.⁴

[27] Altus submits that it supplied the report to its client and the City in confidence. It points to language in the report that states that it was “not intended for general circulation, publication or reproduction... without express written permission in each specific instance.” Altus says that this language reflects its expectation that no other party would be provided with a copy of the Altus Report without first obtaining Altus Group’s explicit written consent in each instance.

[28] In these circumstances, I accept that the Altus Report was supplied explicitly in confidence.

Section 21(1)(c)

[29] The third step is to determine whether disclosure could reasonably be expected to cause one of the harms listed in s. 21(1)(c).

[30] The standard of proof under s. 21(1)(c) is a reasonable expectation of probable harm. This means that the evidence must show that the likelihood of the harm occurring is well beyond a mere possibility, but it does not have to reach a probability.⁵

[31] Altus submits that s. 21(1)(c)(i) applies to all of the information in the report. Section 21(1)(c)(i) applies where disclosure could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of the third party. Altus’ submissions indicate that it believes that disclosure of the information at issue would significantly harm its competitive position.

⁴ Order F17-44, 2017 BCIPC 48 at para. 18.

⁵ *Merck Frosst Canada Ltd. v. Canada (Health)* 2012 SCC 2 at para. 201.

[32] Altus says that disclosing the report will cause it harm because it reveals information that critiques another party's commercial and technical information. Altus has not provided further detail on what it means by this. I understand Altus to be saying that revealing the fact that it critiqued another third party's work product will harm Altus. It seems to me that providing feedback on the construction cost estimate was the commercial service that Altus was hired to provide. I do not see how disclosure of information confirming that it did what it was hired to do could reasonably be expected to harm its competitive position.

[33] Further, Altus submits that disclosing the information in the report could reasonably be expected to significantly harm its competitive position by disclosing its report structure and technical and commercial methodologies to its competitors.

[34] Altus has not described the commercial and technical methodologies that it is seeking to protect. There is an "approach" section of the report, but it describes Altus' approach only generally. Based on the lack of detail, I am not satisfied that disclosure could reasonably be expected to significantly harm its competitive position.

[35] Similarly, Altus has not explained what about its report form or structure, if disclosed, would harm its competitive position. Nothing about the report form or structure strikes me as unique or commercially valuable. Without more, I am not persuaded that disclosure could reasonably be expected to significantly harm its competitive position on this basis.

[36] Altus also says that disclosure will cause it harm because the report is a draft and as such, there may be mistakes or incorrect information that it later corrected. Altus says that this could harm its reputation. The applicant says that whether the report is a draft is not relevant. The applicant says that the public understands that information and conclusions in a draft document may not be the same as in the final version.

[37] With regard to the fact that the report is a draft, Altus has not pointed to any actual mistakes or incorrect information in the report that, if disclosed, could reasonably be expected to harm its competitive position. On its own, the fact that it is a draft report is not enough to support a finding of a reasonable expectation of probable harm.

[38] Finally, Altus says that disclosing the information in the report will disclose the third parties' cost estimates and drawings, which the City provided to Altus without the third parties' consent. Altus also says that disclosure will reveal to the public that the City engaged in a confidential peer review of the third parties' conclusions and work product.

[39] With regards to the harm to other third parties, Altus has only explained that disclosure would reveal the work product of the third parties. It has not explained the connection between the work product information and a reasonable expectation of harm under s. 21.

[40] Altus' submissions also seem to suggest that the disclosure will harm the City because it will reveal that the City undertook the cost review and provided other third parties' information to Altus without their consent. Harm to the City is not the issue at hand. Section 21 is about harm to a third party and the City is not a third party under FIPPA.⁶

[41] For the reasons above, I am not satisfied that disclosing the information in the Altus Report could reasonably be expected to harm significantly Altus' competitive position under s. 21(1)(c)(i).

[42] As mentioned, Brenhill also made submissions on whether s. 21 applies to the Altus Report. Brenhill submitted that disclosure of its information could reasonably be expected to cause significant harm to Brenhill by impairing its competitive position.⁷ It also argued that disclosure could reasonably be expected to result in undue financial loss to Brenhill or undue gain to its competitors under s. 21(1)(c)(iii). Brenhill did not elaborate. Without explanation or further detail, it is not evident to me how disclosure could reasonably be expected to result in harm under s. 21(1)(c)(i) or (iii).

[43] In conclusion, I am not persuaded that the City is required to refuse to disclose the Altus Report to the applicant.

Custody and Control

Records at issue

[44] At issue with respect to custody and control are the remaining three records requested by the applicant; the BTY analysis, BCSA analysis, and the Rennie analysis.

[45] As I mentioned above, Ernst & Young declined to make submissions on the issue of custody and control. However, under s. 44 of FIPPA, the OIPC ordered Ernst & Young to produce the records at issue in the inquiry.⁸ The OIPC received these records *in camera*.

⁶ "Third party" is defined in Schedule 1 of FIPPA and excludes the person who made the request and a public body. As I noted above, the City is no longer relying on s. 17, which is about harm to the public body.

⁷ Brenhill's submissions, September 5, 2019 at paras. 6 - 7.

⁸ By way of letter dated May 31, 2019.

[46] During the submission stage of the inquiry, an OIPC adjudicator decided to disclose some information to the applicant, City, Altus, Brenhill and BTY about the records under s. 47(2) of FIPPA.⁹ Section 47(2) allows the Commissioner to disclose information that is necessary to conduct an inquiry. The adjudicator decided it was necessary to provide additional information about the records in order to conduct a fair inquiry into whether the records were in the custody or under the control of the City.

[47] The adjudicator informed the parties that the BTY analysis, the BCSA analysis and the Rennie analysis were each a set of emails, and that the Rennie analysis also included some tables about the value of real estate. She included some dates and names of the people involved in each set of emails.

[48] Based on the additional information provided by the adjudicator, the City conducted another search for records. It found a set of emails matching the adjudicator's description of the BTY analysis. I compared the City's records with the records that Ernst & Young produced in response to the s.44 order and confirm that the emails provided by the City include the same emails that make up the BTY analysis. The City acknowledges that the emails it has provided are within its custody and control. Since the City has acknowledged this, I find that there is no longer a dispute with regards to whether the City has custody or control of the BTY analysis.

[49] The remaining issue is whether the records relating to the BCSA and Rennie analyses requested by the applicant are in the custody or control of the City.

Custody and Control

[50] A record is subject to FIPPA if it is either "in the custody" or "under the control" of the public body.

[51] Section 3(1) states that FIPPA applies to all records in the custody or under the control of a public body, subject to the exclusions listed in 3(1)(a) through (k). Sections 4(1) and (2) give a person a right of access to any record in the custody or under the control of a public body, subject to the exceptions to disclosure in Part 2 of FIPPA.

[52] FIPPA does not define either "custody" or "control" but there are many past orders from the OIPC that provide guidance on the meaning of these two terms.

[53] I will start by deciding if the City has custody of BCSA or Rennie analyses.

⁹ By way of letter dated August 7, 2019.

Does the City have custody of the BCSA or Rennie analyses?

[54] Custody is about more than just physical possession of the records. A public body will only have custody if it has “some right to deal with the records and some responsibility for their care and protection.”¹⁰

[55] In Order F18-45, Adjudicator Francis set out the following indicators of custody:

- Whether the public body has possession of the records,
- Whether the records are integrated with other records the public body holds; and
- Whether the public body has any rights or responsibilities for the records, including respecting their use, disclosure or destruction.¹¹

[56] The City says it does not have physical possession of the records and this is sufficient to establish that the analyses are not in its custody. The City’s Director, Access to Information says that the City did not commission these analyses. She also says that based on her investigations and discussions with City staff, it does not appear that the City ever received these analyses.¹² After receiving further information provided by the adjudicator under s. 47(2) of FIPPA, the City further searched its records, and the Director, Access to Information says that she was unable to locate any records matching the descriptions of either the BCSA or Rennie analyses.¹³

[57] In my view, the City does not have custody of the two analyses in dispute. I accept that the City does not have physical possession of these records. On my review of the evidence before me and the records themselves, there is no indication that the records are integrated with any City records or that the City has any rights or responsibilities for the records. In short, I am not satisfied that the City has any right to deal with the records or any responsibility for their care and protection.

[58] I turn to whether the City has control of the analyses.

Does the City have control of the BCSA and Rennie analyses?

[59] Control is more expansive than custody; a public body may have control over a record that is not, or has never been, in its physical possession.

¹⁰ Order F18-45, 2018 BCIPC 48 at para. 17, Order F15-65, 2015 BCIPC 71 at para. 13.

¹¹ Order F18-45, 2018 BCIPC 48 at para. 23.

¹² Director, Access to Information Affidavit, April 16, 2019, at para 29.

¹³ Director, Access to Information Affidavit September 5, 2019, at para 6.

[60] In relation to the federal *Access to Information Act*, the Supreme Court of Canada said that “control” should be given a broad and liberal interpretation in order to create a meaningful right of access to government information.¹⁴

[61] Past OIPC orders have considered several factors in determining whether a public body has control of a record. These factors are whether: the record was created by an officer or employee in the course of carrying out his or her duties; the public body has statutory or contractual control over the records; the public body has possession of the records; the public body has relied on the records; the records are integrated within the public body’s other records; the public body has the authority to regulate the use and disposition of the records; and whether the content of the record relates to the public body’s mandate and functions.¹⁵ This is not an exhaustive list of factors and not every factor will apply in every case.

[62] The City says that it does not have control of the records. In support of its position, the City says that it did not commission the analyses and had no direct contractual relationship with the third parties who drafted them. Rather, the City says that its agreement with Ernst & Young was only for the Ernst & Young Report and any materials commissioned by Ernst & Young to complete that report are the working materials of Ernst & Young.

[63] The City provided a letter it received from Ernst & Young stating that it has no legal or professional obligation to disclose its working materials to the City and, if asked, would refuse to do so.¹⁶

[64] The City says that the circumstances in the present case are similar to those in Order 04-27, where Commissioner Loukidelis found that the City did not have custody or control of the working materials of third party consultants that it hired to conduct a review of an appraisal. In particular, the City submits that it was not contractually or statutorily required to commission the review by Ernst & Young. Rather, it sought the review voluntarily – a circumstance which Commissioner Loukidelis considered in Order 04-27.¹⁷

[65] The applicant says that the request is not for “working materials”, rather the request is for the records themselves.

[66] For the reasons that follow, I find that the City does not have control of the BCSCA or Rennie analyses. The City does not have physical possession of these records. Further, these are not the kind of records that the City could expect

¹⁴ *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25 at para. 48.

¹⁵ See for example, Order F17-21, 2017 BCIPC 21 at para. 26.

¹⁶ Director, Access to Information Affidavit, April 16, 2019, Exhibit F.

¹⁷ See Order 04-27, 2004 CanLII 43759 (BC IPC) at paras.15 -26.

Ernst & Young to provide upon request. Despite being characterized in the Ernst & Young Report as “reports”, the BCSA and Rennie analyses lack the formality that one would expect from a report. Rather, the analyses are emails and documents sent back and forth between Ernst & Young and the third parties and are clearly meant to assist Ernst & Young in compiling information for its report. Neither analysis appears to be a standalone end product that Ernst & Young was retained to provide to the City. The engagement letter between Ernst & Young and the City clearly contemplated that such third party consultations could occur; however, the only work product specified is the Ernst & Young Report. Therefore, I conclude the records at issue are working materials that the City is not able to contractually obtain from Ernst & Young.

[67] I have also considered the other non-exhaustive factors for determining whether a public body has control of a record. In my view, none of these circumstances indicate the BCSA analysis or the Rennie analysis are in the City’s control. For example, there is no evidence that the public body has statutory control over the analyses. The City says it sought out the review voluntarily. The applicant did not point to a statute that would give the City control and I am not aware of any.

[68] Based on all of the above, I find that the BCSA and Rennie analyses are not under the control of the City of Vancouver.

CONCLUSION

[69] For the reasons given above, under s. 58 of FIPPA:

1. The City is not authorized or required to refuse to disclose the Altus Report under s. 21(1). It is required to give the applicant access to this record.
2. As the BTY analysis is in the custody and control of the City, I require the City to provide the applicant access to this record in accordance with Part 2 of FIPPA.
3. As the BCSA analysis and the Rennie analysis are not in the custody or under the control of the City, I confirm that the City has performed its duties under FIPPA with regards to the applicant’s request for these records.
4. When the City complies with items 1 and 2, it must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records.

[70] Under s. 59(1), the City of Vancouver must comply with the above orders by March 17, 2020.

February 3, 2020

ORIGINAL SIGNED BY

Erika Syrotuck, Adjudicator

OIPC File No.: F17-71530