



Order F21-22

CITY OF VANCOUVER

Celia Francis
Adjudicator

June 7, 2021

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Summary: An applicant requested a copy of the Vacancy Tax Compliance Policy Manual (manual) under the *Freedom of Information and Protection of Privacy Act* (FIPPA) from the City of Vancouver (City). The City disclosed much of the manual but withheld portions under ss. 15(1)(a) (harm to law enforcement matter), 15(1)(c) (harm to investigative techniques and procedures) and 17(1) (harm to economic interests of a public body) of FIPPA. The adjudicator found that s. 15(1)(c) applied to the information in dispute. It was not necessary to consider ss. 15(1)(a) and 17(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 15(1)(c).

INTRODUCTION

[1] In April 2020, an applicant requested access under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to a copy of the “City of Vancouver Vacancy Tax Compliance Policy Manual” (manual). The City of Vancouver (City) responded by disclosing a copy of the 52-page manual, withholding some information under s. 15(1) (harm to law enforcement) and s. 17(1) (harm to financial or economic interests of public body).

[2] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the City’s decision to withhold information. The applicant agreed that s. 15(1) applied to some of the withheld information but said the rest should be disclosed. Mediation by the OIPC did not resolve the request for review and the matter proceeded to inquiry.

[3] The OIPC received submissions from the City and the applicant. In its initial inquiry submission, the City clarified that it is relying on ss. 15(1)(a), 15(1)(c) and 17(1) to refuse access to the requested information.

ISSUE

[4] The issues to be decided in this inquiry are whether the City is authorized to withhold information under ss. 15(1)(a), 15(1)(c) and 17(1).

[5] Under s. 57(1) of FIPPA, the City has the burden of proving that the applicant has no right of access to the information.

DISCUSSION

Background

[6] In 2016, the City approved a program for the taxation of vacant residential properties (Vacancy Tax) and enacted the Vacancy Tax By-law,¹ the purpose of which is to increase the pool of rental housing in Vancouver. Under the Vacancy Tax By-law, from 2017 to 2019, homes that were empty were subject to a tax of 1% of the property's assessed taxable value. The tax rose to 1.25% for 2020.

[7] The Vacancy Tax applies to Class 1 residential properties that are unoccupied for more than 180 days within a calendar year. The City requires all property owners to submit a property status declaration regarding the status of their property, for the previous calendar year. Owners may declare that their properties were occupied as a principal residence, rented for more than six months, unoccupied for more than 180 days or exempt under one of eight categories (e.g., property undergoing redevelopment or major renovations). Property owners who receive a vacancy tax notice may appeal or complain to the Vacancy Tax Review Office whose decisions may in turn be appealed to the Vacancy Tax Review Panel.

[8] The Vacancy Tax generated \$38 million in total revenue in 2017 and \$39.4 million in 2018. Funds raised from the tax are used for affordable housing and for the administration and collection of the Vacancy Tax.

[9] The City received 186,000 property status declarations in 2017 and 189,000 in 2018. The City audits a small subset of these declarations to ensure the integrity of the Vacancy Tax program and that the tax is being applied fairly. The audits consist of random audits and risk-based audits. This audit process generates additional revenue in taxes from audits of non-compliant property owners: \$6.2 million in 2018 and \$22.1 Million in 2019.²

¹ Vacancy Tax By-law No. 11674, also known as the Empty Homes Tax,

² The information in this Background section comes from the City's initial submission at paras. 6-21 and 46 and the affidavit of the City's Manager, Vacancy Tax Branch, at paras. 6-30.

Information in dispute

[10] The 52-page responsive record is the March 29, 2019 “City of Vancouver Vacancy Tax Compliance Policy Manual”. The manual gives instructions and guidance on the Vacancy Tax By-law to City staff who are responsible for auditing property status declarations. There is a section for each exemption, as well as guidance on risk factors and the review of evidence.

[11] The City disclosed much of the manual, withholding some of the instructions and guidance. The applicant has agreed to the withholding of a risk assessment table in section 1.6, so I need not consider this information.³ The applicant believes that the rest of the withheld information should be disclosed and this is the information in dispute.

Harm to investigative techniques – s. 15(1)(c)

[12] The City argued that s. 15(1)(c) applies to all of the withheld information. The applicant argued that aspects of the by-law are arbitrary and that the fairness of the vacancy tax is the issue. He said that the City has been unable to prove that the tax has resulted in an increase in rental housing. In his view, the City has, therefore, become more focused on retaining the revenue the tax generates. He believes that the citizens of Vancouver have right to know about the City’s audit activities.⁴

[13] The relevant provisions read as follows:

Disclosure harmful to law enforcement

15 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

...
 (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,
 ...

"law enforcement" means

- (a) policing, including criminal intelligence operations,
- (b) investigations that lead or could lead to a penalty or sanction being imposed, or
- (c) proceedings that lead or could lead to a penalty or sanction being imposed;

³ The City said that, in preparing for this inquiry, it decided to disclose some previously withheld information; City’s initial submission, para. 24. This information is, therefore, also not in issue.

⁴ Applicant’s response submission, p. 1.

[14] The courts have set out the standard of proof for harms-based provisions. In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, the Supreme Court of Canada said:

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”.⁵

[15] Moreover, in *British Columbia (Minister of Citizens’ Services) v. British Columbia (Information and Privacy Commissioner)*,⁶ Bracken J. confirmed 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.

[16] I have taken these approaches in considering the arguments on harm under s. 15(1)(c).

Is the City’s audit process “law enforcement”?

[17] The City argued that its audit process meets the definition of “law enforcement”, as it is an investigation that could “lead to a penalty or sanction being imposed”.

[18] Previous orders have found that, in order for a public body’s investigation to meet the definition of law enforcement in FIPPA, the public body must have a specific statutory authority or mandate to conduct the investigation and to impose sanctions or penalties.⁷

⁵ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, at para. 54, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, at para. 94.

⁶ *British Columbia (Minister of Citizens’ Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875, at para. 43.

⁷ See Order F17-11, 2017 BCIPC 12 (CanLII), at paras. 15-17; Order F16-28, 2016 BCIPC 30 (CanLII), at para. 53; Order F11-13, 2011 BCIPC 18 (CanLII), at para. 18; Order 36-1995, [1995] B.C.I.P.C.D. No. 8, at p. 14; Order 00-52, 2000 CanLII 14417 (BCIPC); Order F15-26, 2015 BCIPC 23 (CanLII).

[19] The City's evidence establishes the following:

- the City has statutory authority under the *Vancouver Charter* to do the following: impose a vacancy tax by-law (s. 616); establish a process and requirements respecting property status declarations (s. 618); and include fines and penalties in the by-law for late payment and failure to comply with the by-law (including failure to provide required information and providing false information) (ss. 616, 618 and 620);
- the City passed the Vacancy Tax By-law under this authority and, under s. 2 of the by-law, the City has the authority to impose an annual vacancy tax on taxable property;
- under s. 4 of the Vacancy Tax By-law, the City also has the authority to review and conduct audits of property tax declarations; and
- under s. 8.1 of the Vacancy Tax By-law, a person who violates the by-law is guilty of an offence, punishable on conviction by a fine of \$250-\$10,000.⁸

[20] I am satisfied from this evidence that the City has the statutory authority under the *Vancouver Charter* and the Vacancy Tax By-law to investigate property status declarations. I am also satisfied that fines and penalties under these instruments constitute penalties or sanctions for the purposes of the definition of "law enforcement". I find, therefore, that the City's process for auditing property status declarations qualifies as "law enforcement" for the purpose of s. 15(1)(c).

Harm to effectiveness of investigative techniques and procedures

[21] The City said that the information in dispute consists of investigative techniques and procedures it uses to audit property status declarations. It argued that disclosure of this information could reasonably be expected to harm the effectiveness of these techniques and procedures which would in turn harm the Vacancy Tax Program. The City noted that the Vacancy Tax is based on self-declaration by property owners and argued that a robust audit program is necessary to ensure the integrity of the program. It said that, with amounts owing of tens to thousands of dollars, there is a high risk that property owners would actively try to circumvent the tax. The City added that the Vacancy Tax "has always been considered particularly challenging making unpredictability even more important than it may be in other enforcement programs."⁹

⁸ City's initial submission, paras. 37-39; Affidavit of City's Manager, Vacancy Tax Branch, paras. 6-13; *Vancouver Charter*, ss. 618-620; Vacancy Tax By-law, ss. 2, 4 and 8.

⁹ City's initial submission, paras. 40-48; Affidavit of City's Manager, Vacancy Tax Branch, paras. 33-48.

[22] The information in dispute consists of the following: methods for reviewing the property status declarations; what supporting documents to request and under what circumstances; advice on reviewing, and the weight to be given to, certain types of evidence; and how to identify potentially fraudulent claims. I am satisfied that this information constitutes investigative techniques and procedures for the purposes of s. 15(1)(c). I also accept that the City currently uses these techniques and procedures and that they are not commonly known to the public.

[23] The City provided *in camera* evidence of examples of areas of concern and of cases where property owners had submitted evidence that appeared to be intended to mislead the City's auditors. I am satisfied from the City's evidence and from the records themselves that disclosure of the information in dispute would provide insight into what City auditors look for and how to treat evidence.

[24] I can see that knowledge of this information could enable property owners who wish to circumvent the vacancy tax to structure their property status declarations to minimize the risk of being selected for audit and tailor their evidence to avoid scrutiny or fraudulently evade the tax. Consequently, I am satisfied that disclosure of the information in dispute could reasonably be expected to harm the effectiveness of the City's investigative techniques and procedures in its vacancy tax audit process. I find, therefore, that s. 15(1)(c) applies to the information in dispute.

[25] My findings here are similar to those in previous orders which determined that s. 15(1)(c) applies to activities such as covert police surveillance techniques or coroners' investigative methods and that disclosure of information about those activities could harm their effectiveness.¹⁰

CONCLUSION

[26] I have decided that s. 15(1)(c) applies to the information in dispute. Thus, I need not consider if ss. 15(1)(a) and 17(1) also apply.

[27] For the reasons given above, under s. 58 of FIPPA, I confirm that the City is authorized to withhold the information in dispute under s. 15(1)(c).

June 7, 2021

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File No.: F20-82942

¹⁰ See, for example, Order F17-11, 2017 BCIPC 12 (CanLII); Order F11-13; Order No. 50-1995, [1995] B.C.I.P.C.D. No. 23; Order No. 125-1996, [1996] B.C.I.P.C.D. No. 52.