



OFFICE OF THE  
INFORMATION & PRIVACY  
COMMISSIONER  
*for British Columbia*

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Order F17-10

**THE BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 40  
(NEW WESTMINSTER)**

Celia Francis  
Adjudicator

March 20, 2017

CanLII Cite: 2017 BCIPC 11

Quicklaw Cite: [2017] B.C.I.P.C.D. No. 11

**Summary:** An applicant requested a copy of a report on options for replacing New Westminster Secondary School. The School District disclosed the report in severed form, withholding information under s. 17(1) (harm to public body's financial interests). The adjudicator confirmed the School District's decision to withhold the information on the grounds that potential bid proponents could use the information in preparing their bids, to the detriment of the School District's financial interests.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, 17(1), 17(1)(f).

**Authorities Considered: B.C.:** Order F08-22, 2008 CanLII 70316 (BC IPC); Order 02-50, 2002 CanLII 42486 (BC IPC); Order F10-34, 2010 BCIPC 50 (CanLII); Order 03-35, 2003 CanLII 49214 (BC IPC); Order F05-28, 2005 CanLII 30678 (BC IPC); Order 03-25, 2003 CanLII 49204 (BC IPC).

**Cases Considered:** *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3; *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875.

## INTRODUCTION

[1] In early 2016, an applicant made two requests under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to The Board of Education

of School District No. 40 (New Westminster) (“School District”) for access to the following records:

- New Westminster Secondary School (“NWSS”) Replacement Project Definition Report submitted to Ministry of Education (“report”); and
- NWSS burial lists and plans for reinterment/funding requested for any and all human remains found during construction.

[2] The School District withheld the report under s. 13(1) (advice or recommendations) and s. 17(1) (harm to financial interests of public body) of FIPPA. Respecting the second request, the School District told him that it had no responsive records.

[3] The applicant requested a review by the Office of the Information and Privacy Commissioner (“OIPC”) of the School District’s severing of the report.<sup>1</sup> During mediation by the OIPC of the applicant’s request for review, the School District disclosed some information from the report. It also said it no longer relied on s. 13 but maintained that s. 17 still applied.

[4] Mediation did not otherwise resolve the request for review of the severing under s. 17(1) and the matter proceeded to inquiry. After the OIPC issued the notice of inquiry, the School District disclosed more information but continued to withhold some information under s. 17(1).

## **ISSUE**

[5] The issue before me is whether the School District is authorized by s. 17(1) to refuse the applicant access to information in the report. Under s. 57(1) of FIPPA, the School District has the burden of proof.

## **DISCUSSION**

### ***Preliminary issue – adequacy of search***

[6] When he submitted his request for review, the applicant also complained that the School District’s search for records responsive to his second request was inadequate.<sup>2</sup> The applicant’s inquiry submission indicates that he is still troubled by this. The applicant’s complaint (*i.e.*, that the School District did not comply with its duty to assist under s. 6 of FIPPA) was not included in the Notice of Inquiry as an issue to be determined in this inquiry.

[7] The OIPC’s usual practice when there is an allegation of an inadequate search is to refer the complainant to the public body to see if the public body can

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<sup>1</sup> OIPC F16-65254.

<sup>2</sup> OIPC F16-65255.

resolve the complaint directly. In the event that a complainant remains dissatisfied, the OIPC assigns an investigator to look into the matter and decide whether there was an adequate search. There is no indication that this process was not followed with the applicant's complaint.

[8] I will not expand the inquiry to consider whether the School District complied in its duty under s. 6 of FIPPA to conduct an adequate search for records.

### ***Background***

[9] NWSS was built in 1949. The project to replace it has an anticipated budget of \$106.5 million. The School District obtained approval for the replacement project from the Ministry of Education in June 2016. The School District intends to proceed soon with a competitive bid (procurement) process for the design and construction of the new school which, it said, will be one of the largest undertakings of its kind in BC. The School District anticipates that the new school will be completed in 2019.

### ***Information in dispute***

[10] The report at issue, prepared by the consultants Alkins Project Services Inc., contains the consultants' analysis of options, cost considerations and risks for replacing NWSS. The School District has disclosed most of the report, including the following: project rationale, scope and schedule; site and program considerations; procurement options; history of the project; and some information on design options and cost estimates.

[11] The information in dispute is that which the School District withheld, principally the following: detailed cost estimates; projected budgets and cash flows; analysis of project risks; enrolment projections; specific features of the site; and some information on design options.

### ***Harm to financial interests – s. 17(1)***

[12] The School District said that it has withheld only those portions of the report that it believes would interfere with the fairness and effectiveness of the upcoming procurement process and harm its negotiating position with prospective proponents in that process. The School District relied generally on s. 17(1) and also argued that ss. 17(1)(b), (c), (d) and (f) apply to the information in dispute. These provisions read as follows:

**Disclosure harmful to the financial or economic interests of a public body**

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:

...

(b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;

(c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;

(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;

...

(f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[13] Previous orders have noted that ss. 17(1)(a) to (f) are examples of information the disclosure of which may result in harm under s. 17(1). Information that does not fit in the listed paragraphs may still fall under the opening clause of s. 17(1).<sup>3</sup>

*Standard of proof for s. 17(1)*

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

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 ... This inquiry of course is contextual and how much

<sup>3</sup> See, for example, Order F08-22, 2008 CanLII 70316 (BC IPC), at para. 43.

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” ...<sup>4</sup>

[15] Moreover, in *British Columbia (Minister of Citizens’ Services) v. British Columbia (Information and Privacy Commissioner)*,<sup>5</sup> 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.

[16] I have taken these approaches in considering the arguments on harm under s. 17(1). I have also considered this case from the point of view that disclosure of the information in dispute must be treated as if it is disclosure to the world.<sup>6</sup>

*Would disclosure result in harm under s. 17(1)?*

[17] The School District said that it is preparing the request for proposal documentation for the school replacement project and that the procurement process and resulting negotiations are imminent. The School District argued that disclosure of the information in dispute, immediately prior to the beginning of the procurement process, could harm its ability to negotiate competitive pricing with the successful proponent, causing it harm under s. 17(1)(f). This is because, the School District argued, potential proponents might be influenced by the withheld information in preparing their bids, including by inflating their prices.

[18] The School District said it also wishes to encourage independent, innovative and creative ideas from potential proponents on the costs, options and risks of the project, as well as creative design and construction ideas for dealing with the project costs, challenges of the site and other aspects of the project. The School District said it is concerned that proponents might tailor their bids to the information in the report, rather than submitting their own ideas. The School District added that disclosure would also undermine its ability to use the report as a planning document and as a benchmark against which it could compare and evaluate proponents’ bids. The School District’s ss. 17(1)(b)-(d) arguments were similar.<sup>7</sup> The applicant did not address s. 17(1) specifically but

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<sup>4</sup> *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.

<sup>5</sup> *British Columbia (Minister of Citizens’ Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875, at para. 43.

<sup>6</sup> See Order 03-25, 2003 CanLII 49204 (BC IPC), at para. 24.

<sup>7</sup> School District’s initial submission, paras. 15-51; Affidavit of Kevin Lorenz, Secretary Treasurer, School District 40, paras. 6-40.

argued generally that the School District had no “legal right” to sever the report and that it should be “made public”.<sup>8</sup>

[19] Previous orders have found that s. 17(1) applies to information about the allocation of risk, cost projections, land appraisals or financial information to be used in, or relating to negotiations. That is because it might influence proponents to orient their bids to the detriment of the public body’s financial interests or otherwise harm a public body’s financial interests.<sup>9</sup> In my view, the information in this case is similar.

[20] I accept the School District’s evidence that the consultants’ preliminary assessments of projected costs, options, challenges, complexities and risks associated with the project may be inaccurate or unreliable. I also accept the School District’s evidence that it does not necessarily agree with the consultants’ assessments and that there are some aspects of the project and the procurement process on which it has not yet made a decision. I can also see from the severed information itself that potential proponents could use the information to tailor their bids, for example, by submitting proposed costs similar to the severed information, rather than proposing their own independent, possibly lower, cost estimates. As another example, I can see that, if potential proponents knew the consultants’ advice on allocation of various risks, they might propose different ways of dealing with those risks that were not to the School District’s financial benefit.

[21] In this light, the School District has persuaded me that potential proponents could hinder the School District’s ability to negotiate competitive pricing on the project, as they could use the withheld information to tailor, and possibly inflate, their bids. I am also persuaded that disclosure of the information at issue might influence proponents in crafting their proposals, potentially harming the School District’s ability to attract innovative and creative ideas for dealing with the design, construction, costs, risks, challenges and other issues associated with this project, to the detriment of the School District’s financial interests.

[22] I find that disclosure of the withheld information, at this time, could reasonably be expected to harm the School District’s negotiating position for the purposes of s. 17(1)(f), as well as more generally under s. 17(1). I am also satisfied that the School District has exercised its discretion properly in this case, given the timing of the upcoming procurement process and the potential negative effect disclosure could have on that process.

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<sup>8</sup> Applicant’s response submission and email of February 23, 2017.

<sup>9</sup> See, for example, Order 02-50, 2002 CanLII 42486 (BC IPC), Order F10-34, 2010 BCIPC 50 (CanLII), Order 03-35, 2003 CanLII 49214 (BC IPC), Order F05-28, 2005 CanLII 30678 (BC IPC), Order 03-25.

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**CONCLUSION**

[23] Under s. 58(2)(b) of FIPPA, I confirm that the School District is authorized to deny the applicant access to the information it withheld under s. 17(1).

March 20, 2017

**ORIGINAL SIGNED BY**

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Celia Francis, Adjudicator

OIPC File No.: F16-65254