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

Order F10-28

VANCOUVER COASTAL HEALTH AUTHORITY

Jay Fedorak, Adjudicator

August 16, 2010

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Summary: The HEU requested access to a contract and subsequent amendments for laundry and linen services between the public body and K-Bro Linens Systems. K-Bro asked for a review of the public body's decision to give access to portions of the contract relating to service delivery options, performance management provisions, and base pricing. The information was found to be commercial and financial information of K-Bro, but the information in the contract was found to be negotiated and not supplied. K-Bro also failed to substantiate that disclosure would cause economic harm. The three-part test of s. 21(1) of FIPPA was not met. Public body ordered to disclose the rest of the contract.

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

Authorities Considered: B.C.: Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 03-15, [2003] B.C.I.P.C.D. No. 15; Order F05-05, [2005] B.C.I.P.C.D. No. 6, Order F07-07, [2007] B.C.I.P.C.D. No. 9; Order 00-09, [2000] B.C.I.P.C.D. No. 9; Order No. 25-1994, [1994] B.C.I.P.C.D. No. 29; Order 01-39, [2001] B.C.I.P.C.D. No. 40; Order F08-22, [2008] B.C.I.P.C.D. No. 40; Order F07-15, [2007] B.C.I.P.C.D. No. 2; Order F09-22, [2009] B.C.I.P.C.D No. 28.

Cases Considered: *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* 2002 BCSC 603.

1.0 INTRODUCTION

[1] This order arises from a request by an applicant, the Hospital Employees Union ("HEU"), for a copy of the commercial laundry and linen services contract

("the contract") between the Vancouver Coastal Health Authority ("VCHA") and K-Bro Linen Systems Inc. ("K-Bro") and subsequent amendments to the contract.

[2] The VCHA responded to the request by providing the HEU with copies of the records, while withholding some of the information under s. 21(1) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The HEU was not satisfied and requested a review of this decision by the Office of the Information and Privacy Commissioner ("OIPC"). During mediation of the request for review, the VCHA changed its position and decided that it would release the remaining information. It gave notice to K-Bro, as a third party, under s. 24 of FIPPA, that it intended to disclose all of the requested information. K-Bro requested a review of VCHA's decision to disclose the remaining information.

[3] Mediation did not resolve the matter, and the OIPC held a written inquiry and issued a notice to the VCHA, K-Bro and the HEU.

2.0 ISSUE

[4] The issue before me is whether the VCHA is required to refuse access to portions of the record in dispute under s. 21(1) of FIPPA.

[5] Under s. 57(3)(b) of FIPPA, it is up to K-Bro to prove that the HEU has no right of access to the portion of records that the VCHA had made a decision to release.

3.0 DISCUSSION

[6] **3.1 Record in Dispute**—The records consist of the complete contract between K-Bro and the VCHA for commercial laundry and linen services and subsequent amendments to the contract in a series of five letters between parties from January 2003 to September 2005. The information at issue is information that the VCHA originally withheld from its response to the HEU. This consists of all or part of seven of 76 articles of the contract and seven of the 14 Schedules. The VCHA has also withheld parts of four of the five letters.

[7] **3.2 Harm to Business Interest—**Section 21(1) of FIPPA requires public bodies to withhold information the disclosure of which would harm the business interests of a third party. It sets out a three-part test for determining whether disclosure is prohibited, all three elements of which must be established before the exception to disclosure applies. These are the relevant FIPPA provisions in this case:

> **Disclosure harmful to business interests of a third party**
>
> 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
>
> (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, …

[8] Numerous orders have considered the application of s. 21(1) and the principles for its application are well established.[1] Commissioner Loukidelis conducted a comprehensive review of the body of case decisions in several jurisdictions in Order 03-02.[2] I have applied those principles here without repeating them.

Commercial or Financial Information

[9] K-Bro submits that the information at issue in the records is its commercial, financial or labour relations information. It relies on Order F05-05, Order 00-22, Order 03-15 and Order 04-06 in support of the position that fees and charges payable under a contract are considered commercial information.[3] K-Bro does not argue these points at length, seemingly taking for granted that it is obvious that the information is its commercial or financial information. Neither the VCHA nor the HEU disputes, however, that the information is the commercial information of K-Bro.

[10] From my review of the records, I find that the information at issue in this inquiry, which consists of service delivery options, performance management provisions, and base pricing, constitute the commercial and financial information of K-Bro, as previous orders have interpreted these terms.[4]

Supplied in Confidence

[11] With respect to the second part of the test, K-Bro argues that the contract and amendment were supplied and received in confidence. K-Bro submits that it has taken great care to ensure that the information it has supplied to the VCHA

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[1] See for example Order 03-02, [2003] B.C.I.P.C.D. No. 2 and Order 03-15, [2003] B.C.I.P.C.D. No. 15.

[2] At paras. 28-117.

[3] Third party's initial submission, paras. 24-26.

[4] For example, Order F05-05, [2005] B.C.I.P.C.D. No. 6, found that commercial information included terms and conditions for providing services and products by a third party. In addition, Order F07-07, [2007] B.C.I.P.C.D. No. 9 found that information relating to the buying or selling of goods or services qualified as commercial information for the purpose of s. 17(1)(b).

remains confidential. It cites Article 7.1(5) of the contract, in which the VCHA agrees not to disclose confidential information about K-Bro to any third party and to restrict disclosure within VCHA to employees and other officials who require it for the purpose of delivering laundry and linen services.[5] K-Bro asserts that access to this information is restricted within its own organization to "senior managers who are bound by non-compete, non-disclosure and non-solicitation agreements with K-Bro."[6] It states further that it does not discuss this information in public forums or allow its competitors to tour its plants. An affidavit from the President and Chief Executive Officer of K-Bro submits that this information is "specifically kept confidential whenever K-Bro responds to a tender."[7] The HEU does not take issue with whether K-Bro and the VCHA intended that they would treat the information as confidential. The fundamental issue is whether K-Bro "supplied" this information in accordance with s. 21(1)(b) of FIPPA.

[12] As noted above, previous decisions have dealt extensively with the application of s. 21(1)(b) of FIPPA with respect to information in contracts between public bodies and private-sector service providers, like K-Bro. These decisions have established clearly, in the words of Commissioner Loukidelis, "Information in an agreement negotiated between two parties does not, in the ordinary course, qualify as information that has been 'supplied' by someone to a public body."[8] He held that there might be rare circumstances where this would not be the case. Commissioner Flaherty in Order No. 26-1994[9] had suggested that examples would be:

> 1. Where the third party has provided original or proprietary information that remains relatively unchanged in the contract; and
>
> 2. Where disclosure of the information in the contract would permit an applicant to make an "accurate inference" of sensitive third-party business information that would not in itself be disclosed under the Act.

[13] Adjudicator Iyer clarified the issue of "supplied" versus "negotiated" in Order 01-39 a decision upheld by the Supreme Court of British Columbia on judicial review.[10] The adjudicator stated:

> Information will be found to be supplied if it is relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead costs may be found to be "supplied" within the meaning of s. 21(1)(b). To take another example, if a third party

[5] Third party's initial submission, paras. 30-34.
[6] Third party's initial submission, para. 35.
[7] Third party's initial submission, Affidavit of K-Bro President and CEO, para. 14.
[8] Order 00-09, [2000] B.C.I.P.C.D. No. 9, pp. 5-6.
[9] [1994] B.C.I.P.C.D No. 29, p. 7.
[10] *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* 2002 BCSC 603.

> produces its financial statements to the public body in the course of its contractual negotiations, that information may be found to be "supplied". It is important to consider the context with which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tender process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it.
>
> In other words, information may originate from a single party and may not change significantly – or at all – when it is incorporated into the contract, but this does not necessarily mean that the information is "supplied". The intention of s. 21(1)(b) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change, but, fortuitously, was not changed. [11]

[14] On judicial review, C. Ross J. agreed with Adjudicator Iyer:

> CPR's interpretation focuses on whether the information remained unchanged in the contract from the form in which it was originally supplied on mechanical delivery. The Delegate's interpretation focuses on the nature of the information and not solely on the question of mechanical delivery. I find that the Delegate's interpretation is consistent with the earlier jurisprudence ... .[12]

[15] K-Bro describes the process of formulating the terms of the contract with VCHA in the following way:

> All of the Protected Information meets the "supplied" test. None of the information pertaining to K-Bro's informational assets, including its service delivery model, pricing, and financial information, and other business information, was susceptible to change since K-Bro does not negotiate about this information.
>
> Terms relating to K-Bro's information assets were incorporated into the Agreement form the Proposal without change. There were no "give and take" negotiations on these issues.[13]

[16] Evaluating the validity of K-Bro's arguments requires an examination of the information at issue. For obvious reasons, I am unable to describe the relevant provisions of the contract. Nevertheless, I can say that they amount to service delivery options and performance management provisions. K-Bro claims that these are unique. It submits that its competitors do not provide similar options or provisions. Nevertheless, as VCHA had the option of agreeing to the bid, in whole, or in part, I find the terms of the contract must be considered to

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[11] Order 01-39, [2001] B.C.I.P.C.D. No. 40, paras. 45-46.
[12] *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner* 2002 BCSC 603, para. 75.
[13] Third party's initial submission, paras. 39-40.

have been "negotiated", not "supplied". The contract outlines the services a public body agreed that it will receive and the prices that it agreed to pay using public funds. There are no financial statements, fixed costs, or any other information over which I could conclude there was no negotiation.

[17] Moreover there is no evidence that K-Bro "supplied" the information at issue. The only evidence in support of its submission is one affidavit from K-Bro's President and CEO. While the affidavit attests to the nature of the commercial information in the contract, steps taken to ensure confidentiality and concerns about the harm K-Bro might suffer from the disclosure of the information, the affidavit is silent on the issue of whether K-Bro had supplied the information in accordance with s. 21(1)(b). The HEU submits that there is nothing in the affidavit evidence to support K-Bro's assertion it never negotiates the information at issue.[14]

[18] In fact, the HEU points out, one of the arguments that K-Bro submits in support of its claim that disclosure would harm its business interests contradicts the assertion that information about the service delivery model and the associated rate was not negotiable. K-Bro submits that disclosure of this information: "would cause harm to the Third Party because other customers would demand equivalent rates and services, even though different rates currently reflect the particular circumstances applicable to those contracts in specific geographic locations".[15]

[19] The HEU replies that this argument: "demonstrates that the information at issue is not truly proprietary, or immutable, such that it is never the subject of negotiation, as the Third Party had suggested in 38-41 of its initial submission".[16] I agree with the HEU on this point.

[20] I also find that it is significant that the other party in the contract, the VCHA, does not corroborate K-Bro's account of the extent to which the terms of the contract were negotiated or supplied. In fact, the VCHA submits that it has concluded that it must release the information in light of previous Orders on the subject of s. 21, particularly Order F08-22, which involved a request from the union of a third party service provider for a contract for housekeeping services with the Fraser Health Authority. [17] In that decision, Commissioner Loukidelis found that, even thought the terms of the contract might have been based on information that the third party had supplied in its bid, the information in the contract had not been "supplied".[18] This supports the conclusion that the information in question in this case was not "supplied" but "negotiated".

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[14] HEU's reply submission, para. 5.
[15] VCHA's initial submission, para. 53.
[16] HEU's reply submission, part 2, para. 5.
[17] VCHA's initial submission, p. 1, Order F08-22, [2008] B.C.I.P.C.D. No 40.
[18] Order F08-22, [2008] B.C.I.P.C.D. No 40, paras. 61-65.

[21] K-Bro also submits that the information meets the criterion of "supplied" because disclosure would allow readers to draw accurate inferences about its confidential and proprietary information.[19] I agree that the information in the contract might enable an informed reader to reach conclusions about how K-Bro operates. Nevertheless, it is important to clarify that, for s. 21 to apply to the information in the record, disclosure would have to enable a reader to infer other information to which the three-part test of s. 21 would also apply. That means that the information that the informed reader could infer must also be information that K-Bro had "supplied" to the VCHA.

[22] I find that K-Bro has not demonstrated that it "supplied" the information to the VCHA in accordance with s. 21(b) of FIPPA. While it has made assertions to this effect, it has not supported those assertions with any evidence or corroboration.

Harm to third party interests

[23] As none of the information at issue meets the "supplied" test in s. 21(1)(b), it is not necessary for me to consider the third part of the analysis under s. 21(1)(c). Nevertheless, for completeness, I will consider the submissions made on this issue.

[24] With respect to the third part of the test, K-Bro submits that disclosure of the requested records would significantly harm its competitive position. K-Bro submits that it has developed a unique service delivery model. It fears that, if its competitors discovered details of the model, they would duplicate the model and compromise the ability of K-Bro to win future contracts, not only in British Columbia, but also across Canada.[20] K-Bro explains, "Obtaining service delivery model options and details on how the model operates would allow K-Bro's competitors to know exactly how they should frame their own bids in the future so as to be able to be more successful as against K-Bro's bids."[21]

[25] K-Bro states that there are three main laundry competitors in the Greater Vancouver Area, but does not identify who they are, other than mentioning that Kimberly-Clarke and Allegiance as providing disposable operating room linen products.[22] K-Bro also submits that its competitors are so keen to learn its business secrets that they have solicited members of K-Bro's management team and have sent some of their staff to drive around the parking lots of K-Bro's plant and looked through the plant's windows.[23]

[26] The HEU disagrees that disclosure would cause K-Bro undue harm. It cites the comments of Commissioner Loukidelis, in Order F07-15, that dealt

[19] Third party's initial submission, para. 42.
[20] Third party's initial submission, Affidavit of K-Bro President and CEO, para. 23.
[21] Third party's initial submission, Affidavit of K-Bro President and CEO, para. 30.
[22] Third party's initial submission, Affidavit of K-Bro President and CEO, paras. 27-28.
[23] Third party's initial submission, para. 49.

with a similar case regarding a request for the contract between the VCHA and a third party for cleaning services. The HEU quoted him, as follows: "the disclosure of existing contract pricing and related terms that results in mere heightening of competition for future contracts is not significant harm or significant interference with competitive or negotiating positions".[24]

[27] The HEU concludes that the present case should not be distinguished from previous cases dealing with contracts by public bodies for the provision of public services, in which the terms of the contract were disclosed.[25] I agree with the HEU that the same applies in this case.

[28] The harm K-Bro has outlined as a result of disclosing the terms of the contract is vague, merely speculative and lacking in evidentiary support. Its arguments regarding the harm of disclosure of information in the contract are similar to those that previous orders have dismissed.

[29] Taking a different perspective, in Order F09-22, I found that disclosure of part of the third parties bid met the test of s. 21(1)(c) because the third party had demonstrated that the market was highly competitive and the loss of even one contract for a firm of its size would cause significant harm.[26] K-Bro in contrast has provided little information about its marketplace and has not quantified, even in general terms, the putative financial harm it fears that disclosure of the information would cause it. Moreover, in the present case it is the contract, not K-Bro's bid, that the HEU has requested. I find that K-Bro has failed to establish that it would suffer a reasonable prospect of harm from the disclosure of the terms of the contract and that s. 21(1)(c)(i), therefore, does not apply.

4.0 CONCLUSION

[30] I find that s. 21(1) of FIPPA does not require the VCHA to refuse to give the HEU access to the records. For the reasons given above, under s. 58 of FIPPA, I make the following order:

1. I require the VCHA to give the applicant access to this information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before September 28, 2010 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

August 16, 2010

ORIGINAL SIGNED BY

Jay Fedorak
Adjudicator

OIPC File No. F09-37929

[24] Order F07-15, [2007] B.C.I.P.C.D. No. 2, para. 43, quoted in HEU's initial submission, para. 10.
[25] HEU's initial submission, para. 11.
[26] Order F09-22, [2009] B.C.I.P.C.D. No. 28, para. 37.