Order F10-26

VANCOUVER COASTAL HEALTH AUTHORITY

Jay Fedorak, Adjudicator

August 16, 2010

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Summary: The HEU requested access to the original cleaning services contract between the public body and Compass Canada and a copy of the contract as it was subsequently amended. Compass asked for a review of the public body's decision to give access to portions of the contract relating to the financial amounts and the timelines of some of the terms of the contract. The information was found to be commercial and financial information of Compass, but the information in the contract was found to be negotiated and not supplied. Compass 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 F05-02, [2005] B.C.I.P.C.D. No. 2; Order 04-04, [2004] B.C.I.P.C.D. No. 4; 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. 26-1994, [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 original cleaning services contract ("the contract") between the Vancouver Coastal Health Authority (VCHA") and Compass Canada ("Compass") and a copy of the contract as it was subsequently amended.

[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 Compass as a third party under s. 24 of FIPPA that it intended to disclose all of the requested information. Compass 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, Compass and the HEU.

2.0 ISSUE

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

[5] Under s. 57(3)(b) of FIPPA, it is up to Compass 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 requested records consist of the original contract between Compass and the VCHA for cleaning services and an amended contract. The HEU has received 57 of the 65 paragraphs of the contract and 59 of the 60 paragraphs in the amended contract. The severed information at issue concerns financial amounts and the timelines of some of the terms of the contract.

[7] **3.2 Preliminary Issue**—Compass attempted to raise a new exception to disclosure in its request for review: s. 17. The VCHA did not apply this exception in its initial decision and takes the position that all of the information in the requested records should be disclosed. Past orders and decisions of the OIPC state that, while third parties have the right to assert the application of mandatory exceptions (*i.e.*, ss. 21 and 22) where their own information and

interests are involved, public bodies have unfettered authority to decline to apply discretionary exceptions. Neither third parties nor the OIPC have the authority to compel a public body to exercise its discretion in a particular way. For example, in Order F05-02, Adjudicator Francis found that:

> A third party may not, ... as a means of advancing its own interests or taking up the public body's interests, challenge a public body's assessment that facts or other circumstances do not permit or justify the application, in the public body's interests, of s. 13(1) to requested records.[1]

[8] In Order 04-04, she declined to consider the application of s. 12(3)(b), at the request of the third party, because the public body had declined to apply it. She wrote:

> The purpose of s. 12(3)(b), a discretionary exception, is to protect a local public body's ability to engage in certain types of discussions in the absence of the public. It is thus up to the School District to address its own interests in this case and to exercise discretion in claiming s. 12(3)(b) as it sees fit. I do not consider that the third party can argue the application of an exception where his interests are not engaged, *e.g.*, under s. 22. I therefore decline to consider the third party's arguments on s. 12(3)(b) in relation to the three records to which the School District has not argued it applies, that is, the meeting notes, the e-mail and the investigator's report.[2]

[9] The present case is similar in that the VCHA has declined to apply s. 17. For the same reasons as those set out above, I decline to consider the application of s. 17 here.

[10] **3.3 Harm to Third-Party Business Interests—**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:

> **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

[1] Order F05-02, [2005] B.C.I.P.C.D. No. 2, para. 87.
[2] Order 04-04, [2004] B.C.I.P.C.D. No. 4, para. 72.

(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, …

[11] Numerous orders have considered the application of s. 21(1) and the principles for its application are well established.[3] Commissioner Loukidelis conducted a comprehensive review of the body of case decisions in several jurisdictions in Order 03-02.[4] I have applied those principles here without repeating them.

Commercial or Financial Information

[12] Compass submits that the information at issue in the records is its commercial and financial information but does not provide argument in support.[5] Neither the VCHA nor the HEU disputes, however, that the information is the commercial information of Compass.

[13] From my review of the records, I find that the financial amounts, timelines of certain provisions and other terms of the contracts at issue in this inquiry constitute the commercial and financial information of Compass, as previous orders have interpreted these terms.[6]

Supplied in Confidence

[14] 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 Compass. These decisions have established clearly that, 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."[7] He held that there might be rare circumstances where this would not be the case. Commissioner Flaherty in Order No. 26-1994[8] suggested that examples would be:

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[3] 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.

[4] At paras. 28-117.

[5] Third party's initial submission, para. 4.

[6] 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).

[7] Order 00-09, [2000] B.C.I.P.C.D. No. 9, pp. 5-6.

[8] [1994] B.C.I.P.C.D. No. 29, p. 7.

> 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.

[15] 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.[9] 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 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. [10]

[16] 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 ... .[11]

[17] In the present case, Compass asserts "it is clear that the information was 'supplied' by the Third Party to the Public Body in confidence, and that the

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[9] *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* 2002 BCSC 603.
[10] Order 01-39, [2001] B.C.I.P.C.D. No. 40, paras. 45-46.
[11] *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* 2002 BCSC 603, para. 75.

second part of the test is fulfilled."[12] Compass submits that the information at issue "is immutable business information concerning the Third Party and not subject to change though the give and take of negotiations".[13] It asserts that it submitted a bid as part of a competitive contract procurement process and the public body agreed to accept it. However, as VCHA had the option of whether to agree to the bid in whole, or in part, I find the terms of the contract must be considered to have been "negotiated", not "supplied". Moreover there is no evidence that Compass "supplied" the information at issue. The only evidence that Compass provided in support of its submission is one affidavit from an employee of Compass. While the affidavit attests to the nature of the harm Compass might suffer from the disclosure of the information, the affidavit is silent on the issue of whether Compass supplied the information in confidence in accordance with s. 21(1)(b).

[18] I disagree with Compass that an examination of the contracts clearly shows that the information was supplied by Compass. For obvious reasons, I am unable to describe the relevant provisions of the contract. Nevertheless, I can say that the information at issue in the contract outlines the services the public body agreed that it will receive from Compass and the prices that it agreed to pay using public funds. There are no financial statements, explicit citing of third party fixed costs or any other information over which I could conclude there was no negotiation.

[19] I also find it significant that the other party to the contract, the VCHA, does not corroborate Compass'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 similar request from the union of a third party service provider for a contract for housekeeping services with the Fraser Health Authority.[14] In that decision, Commissioner Loukidelis found that, even though the terms of the contract might have been based on information that the third party had included in its bid, the information in the contract had not been "supplied".[15] This supports the conclusion that the information in question in this case was not "supplied" but "negotiated".

[20] In addition to failing to establish that it "supplied" the information at issue, Compass has also failed to establish that the communication of the information was confidential. It asserts that the negotiation of the contract was done "on a strictly confidential basis" but provides no corroboration.[16] There is no confidentiality provision in the contracts and Compass has provided no other documentation (such as the original Request for Proposal) that might have

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[12] Third party's reply submission, para. 7.
[13] Third party's reply submission, para. 4.
[14] VCHA's initial submission, p. 1; Order F08-22, [2008] B.C.I.P.C.D. No.40.
[15] Order F08-22, paras. 61-65.
[16] Third party's initial submission, para. 6.

attested to the confidentiality of the information at issue. The only confidentiality provisions of the contracts relate to patient and other information that VCHA will provide to Compass during the course of the contract.

[21] I find that Compass has not demonstrated that it "supplied" the information "in confidence" to the VCHA in accordance with s. 21(b) of FIPPA.

Harm to third party interests

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

[23] With respect to the third part of the test, Compass submits that disclosure of the requested records would significantly harm its competitive position. Compass states that there are only a few competitors in the marketplace but it does not indicate how many.[17] It submits that disclosure of the severed information to its competitors would seriously erode its "ability to bid effectively and with confidence".[18] Nevertheless, as the HEU points out, Compass does not explain how this information could give a competitor such an advantage.[19] This is also not apparent from the records.

[24] The HEU also disagrees that disclosure would cause Compass undue harm. It cites the comments of Commissioner Loukidelis in Order F07-15 that dealt 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.[20]

[25] Compass is also concerned about the implications of disclosure on its labour relations. Compass submits in its affidavit that:

> The Third Party has a collective agreement with the Steelworkers Union for the employees working on the services with the Authority. We expect to commence bargaining shortly. It is public knowledge that the [HEU] and the Steelworkers Union have been actively competing for the "business" of representing the workers at the Authority. If they obtain this information, the [HEU] could use it to their advantage to replace the Steelworkers Union

[17] Third party's initial submission, para. 6.
[18] Third party's initial submission, para. 7.
[19] HEU's reply submission, para. 7.
[20] Order F07-15, [2007] B.C.I.P.C.D. No. 2, para. 43, quoted in HEU's initial submission, para. 15.

as the bargaining agent, and cause the Third Party's labour costs to go up.[21]

[26] The HEU counters that Compass has not explained how the HEU could use the information to replace the Steelworkers Union as the bargaining agent for Compass's employees. The HEU points out that the Steelworkers Union would also be able to obtain any information disclosed to the HEU.[22] The HEU also notes that previous cases, including Order F08-22, have established that "putting contractors in a position where they have to deal with cost pressures from their unionized work force does not constitute harm under s. 21(1)(c)(i) or (iii)".[23] I agree with the HEU that the same applies in this case. Moreover, even if I were to accept, which I do not, that disclosure might assist the HEU in replacing the current bargaining agent, Compass has not indicated how this change would cause it financial harm.

[27] The harm Compass has outlined it expects would result from 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.

[28] Taking a different perspective, in Order F09-22, I found that disclosure of part of the third party's 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 it significant harm.[24] Compass, 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 Compass's bid, that the HEU has requested. Compass has the burden of proof in this case and it has not met this burden. Consequently, I find that Compass 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) and (iii), therefore, do not apply.

[21] Third party's initial submission, affidavit of S.S, para. 7.
[22] HEU's reply submission, para. 9.
[23] HEU's initial submission, para. 15.
[24] Order F09-22, [2009] B.C.I.P.C.D. No. 28, para. 37.

4.0 CONCLUSION

[29] I find that s. 21(1) of FIPPA does not require the VCHA to refuse to give the HEU access to the severed information in the disputed records. For the reasons given above, under s. 58 of FIPPA, 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

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Jay Fedorak
Adjudicator

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