Order F07-15

VANCOUVER COASTAL HEALTH AUTHORITY

David Loukidelis, Information and Privacy Commissioner

July 30, 2007

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Summary: VCHA was not authorized by s. 17(1) or required by s. 21(1) to refuse to give access to the price schedule or the penalty provision in a contract for cleaning services in health care facilities. It is ordered to provide access to the entire contract, a presentation to its board of directors and its business case for the privatization of cleaning services.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 17(1) and 21(1).

Authorities Considered: B.C.: Order 00-22, [2000] B.C.I.P.C.D. No. 25; Order 00-47, [2000] B.C.I.P.C.D. No. 51; Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order 01-39, [2001] B.C.I.P.C.D. No. 40; Order 02-50, [2002] B.C.I.P.C.D. No. 51; Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 03-03, [2003] B.C.I.P.C.D. No. 3; Order 03-15, [2003] B.C.I.P.C.D. No. 15; Order 04-06, [2004] B.C.I.P.C.D. No. 6; Order F05-05, [2005] B.C.I.P.C.D. No. 6; Order F06-01, [2006] B.C.I.P.C.D. No. 2; Order F06-20, [2006] B.C.I.P.C.D. No. 36. **Ont.:** Order MO-1706, [2003] O.I.P.C. No. 238; Order PO-2435, [2005] O.I.P.C. No. 207; Order PO-2467, [2006] O.I.P.C. No. 65.

Cases Considered: SCC: *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773. **B.C.:** *Jill Schmidt Health Services Inc. v. British Columbia (Information and Privacy Commissioner)*, [2001] B.C.J. No. 79, 2001 BCSC 101; *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848, 2002 BCSC 603. **Ont.:** *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.).

1.0 INTRODUCTION

[1] This decision concerns an access request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for:

1. Contracts between Vancouver Coastal Health Authority ("VCHA") and Aramark Canada Ltd. ("Aramark") for the performance of housekeeping services in various health care facilities;

2. VCHA's business case for the privatization of housekeeping services; and

3. All documents provided to the board of directors of VCHA in regards to its decisions to privatize housekeeping services and select Aramark as the contractor.

[2] The applicant is a union representing Aramark employees ("Union").

[3] VCHA denied access under s. 21(1) of FIPPA to parts of its cleaning services contract with Aramark dated July 25, 2003 ("Contract") and the Union requested a review of VCHA's application of s. 21(1) to the Contract. VCHA continued to search for responsive records and eventually also partially disclosed a presentation to its board of directors ("Presentation") and its business case for the privatization of cleaning services ("Business Case"). In disclosing only portions of these records, VHCA relied on s. 13(1), s. 17(1)(a) and (b) and s. 21(1). The Union's request for review went forward in relation to all three records and VCHA later added s. 17(1) to its decision to withhold information from the Contract. Because the matter did not settle in mediation, a written inquiry was held under Part 5 of FIPPA.

2.0 ISSUES

[4] The notice of inquiry identified the issues as VCHA's application of ss. 13, 17 and 21 to the requested records. For each of these exceptions, VCHA had the burden of proof under s. 57(2). However, because of the involvement of s. 21—which protects third-party business interests—Aramark was notified under s. 54(b) of FIPPA and given an opportunity to participate in the inquiry, which it did.

[5] In their inquiry submissions, VCHA and Aramark addressed Schedule 9 of the Contract ("Schedule 9") but made no submissions about other parts of the Contract or about the Presentation, the Business Case or the applicability of s. 13(1) to any of the requested records. When I asked the parties for clarification about the issues in the inquiry, the Union confirmed that it sought all information withheld from all three records. VCHA responded by saying that it was putting in issue the applicability of s. 17(1) and s. 21(1) to the following parts of the Contract: Schedule 9, Article 2.1(e) and (f), Article 3.3, Article 3.5, Article 13.4(1) and Article 15.1(1)(k). Its submissions, however, only addressed Schedule 9. Aramark said that the subject matter of the inquiry was Schedule 9, which it continued to maintain should not be disclosed to the Union.

[6] I informed the parties that the order under s. 58 would address the Union's right of access to all information that VCHA had not already disclosed in the three records. I reiterated that VCHA had the burden of proof under s. 57 for all of the disclosure exceptions in issue, but that submissions from Aramark on the applicability of s. 21(1) would obviously also be relevant. I gave VCHA and Aramark a further opportunity to make submissions on the applicability of the disclosure exceptions to records or parts of records they had not addressed in their original submissions, *i.e.*, the Contract apart from Schedule 9, the Presentation and the Business Case.

[7] VCHA and Aramark responded by submitting that "Article 5.4.2 under the heading of 'Penalties' of the Cleaning Services Agreement"[1] should also be withheld under s. 17(1) and s. 21(1), for the same reasons as Schedule 9. The Union responded to VCHA's and Aramark's further submissions. Because there is no Article 5.4.2 in the body of the Contract, I interpreted the parties' references to Article 5.4.2 of the Contract to mean Article 5.4.2 of Schedule 5 of the Contract, which is entitled "Penalties" ("Penalty Provision").

[8] This order resolves the applicability of s. 17(1) and s. 21(1) to Schedule 9 and the Penalty Provision. It confirms as well that VCHA is also required to disclose the remainder of the Contract and all of the Presentation and the Business Case because VCHA (or Aramark with respect to s. 21(1)) did not justify, or attempt to justify, refusing access to that information.

3.0 DISCUSSION

[9] **3.1 Description of the Disputed Information**—The Contract has a six-year term and a multimillion-dollar value. The affidavit of Karen Wetselaar, Aramark Vice-President Finance and Chief Financial Officer, provided evidence about the request for proposal ("RPF") process relating to the Contract and about the contract discussions between VCHA and Aramark. She deposed that VCHA issued an RFP for cleaning services for its facilities. The RFP provided Aramark and other proponents with voluminous information, referred to as "Clinical Data",[2] about the cleaning requirements for each facility. The Clinical Data included group area definitions, cleaning frequency rates, cleaning response times, cleaning requirements and standards, bed counts, occupancy rates, emergency visits, operating room cases, separations, cleaning level and square footage.

[10] The RFP required proponents to submit a table breaking down the bid price by facility site, contract year and level of service (described as Group 1, 2, 3, 4 or Additional Services) and it included the following further instruction:

> It is understood that the Authority has not and does not intend to amend or direct the vendor's identified levels of service; and that the requirement to provide them, as part of the response to the RFP, is solely for the purpose of comparative analysis in the bidding process. The Vendor should provide any variance to the Site Pricing should the required actual level of Service be lower or higher than

[1] Aramark and VCHA submissions dated February 22, 2007.
[2] Affidavit of Karen Wetselaar, para. 12.

> estimated in the risk assessment. If no such variance is provided, VCHA assumes that any changes to Site Costs will proportionately decrease or increase based on the service level. VCHA will make calculations based on this assumption and the information provided for the purpose of comparative analysis of Vendor submissions.

[11] Proponents used the Clinical Data, as modified in the RFP process, to cost the RFP and generate their proposals.

[12] VCHA was not satisfied with the proposals and asked proponents to resubmit with revised pricing. Aramark reduced its margins and costs and resubmitted its proposal. VCHA then entered into discussions with Aramark with a view to agreeing on a contract.

[13] VCHA continued to be unhappy about the cost of services and discussed with Aramark how they could be reduced. Aramark submitted more detailed pricing charts and VCHA asked it to reconsider "certain assumptions that Aramark had used in building its costing model".[3] Karen Wetselaar described how adjustments were made on both sides:

> 22. …In some cases, where service assumptions used by Aramark were adjusted by VCHA, Aramark adjusted its pricing model to reflect the adjusted assumptions and generated new price schedules. Also, as VCHA reviewed the service requirements with Aramark, it found that some of the service inputs it provided in the RFP were incorrect.
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> 23. When VCHA determined that it was necessary to revise service inputs that had been established in the RFP, it asked Aramark to change the service level assumptions or factors, such as square footage, activity levels, number of visits and frequency of services, in Aramark's proposal. Using its pricing model, Aramark adjusted its figures in accordance with the change in service inputs and delivered new schedules showing the adjusted prices for the adjusted services. So, for example, instead of having 10,000 square feet of Group 1 space costing $X per square foot and 20,000 square feet of Group 4 space costing $Y, the inputs became 15,000 square feet at $X and 15,000 square feet at $Y, which then had a corresponding impact on the price schedules. This also happened in respect of other inputs.

[14] Schedule 9 is entitled "Financial Submission". It is 33 pages long. Eleven pages are pricing tables for each facility for each contract year, in three cost categories: pre-service costs, investment costs and service costs. The prices are based on the size and type of facility. The pricing is also broken down for each building into service levels for the degree and frequency of cleaning necessary in different operations. One page contains hourly rates if VCHA requires additional hours of service. The remaining 21 pages, called Schedule 5 of Schedule 9, describe the facilities and buildings and provide breakdowns by indicators such as the number of beds and the square feet of each service level that is required per building.

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[3] Affidavit of Karen Wetselaar, para. 22.

[15] The Penalty Provision sets formulas for determining contractor performance audit failures and prescribes the related monetary penalties and action plan obligations.

[16] **3.2 Harm to VCHA?**—Section 17(1) read as follows at the time of BCHA's decision:

> **Disclosure harmful to the financial or economic interests of a public body**
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> 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:
>
> (a) trade secrets of a public body or the government of British Columbia;
>
> (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;
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia.

[17] I have held that there must be a confident and objective evidentiary basis for concluding that disclosure of information could reasonably be expected to result in harm under s. 17(1).[4] Referring to language used by the Supreme Court of Canada in an access to information case, I have said, "there must be a clear and direct connection between the disclosure of specific information and the harm that is alleged".[5]

[18] The essence of VCHA's case for the application of s. 17(1) is that disclosure of the purchase price for Aramark's services and the penalty terms for its non-performance of those services would harm VCHA's ability to obtain low pricing and stringent penalty provisions from vendors in the future. The rationale offered is that it is in VCHA's interest to obtain from vendors, where it can, pricing that is below what they may charge to other buyers and penalty terms that they may not be willing to offer to other buyers. VCHA says that if vendors even perceive that contract information will be routinely disclosed, they will be discouraged from offering uncommonly low pricing or favourable penalty terms.

[19] VCHA asserts that maintaining the confidentiality of pricing of, and penalty terms accepted by, competing vendors encourages them to be most competitive. It says that

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[4] Order 02-50, [2002] B.C.I.P.C.D. No. 51, paras. 124 to 137.

[5] Order 04-06, [2004] B.C.I.P.C.D. No. 6, para. 58, referring to *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773.

the effectiveness of this process—which I take to mean the process for arriving at contracts for the outsourcing of public services to private sector vendors—will be irreparably destroyed if Schedule 9 and the Penalty Provision are disclosed. Vendors will, VCHA contends, only offer prices that are slightly lower than the disclosed contract pricing, rather than the best and most competitive pricing. It also argues that vendors typically do not want to be subject to penalty terms and they will not want to agree to a penalty structure that might be disclosed to their future customers. VCHA goes so far as to say that "there is no doubt that any knowledge by other vendors of Aramark's prices could result in a significantly higher bid from such other vendors than what they might otherwise offer".[6]

[20] VCHA's submissions consist of written argument only, asserting that knowledge of Schedule 9 and the Penalty Provision information would cause other vendors to offer only slightly better price terms and no penalty structure at all—as opposed, presumably, to other vendors offering terms and services that beat all others even in a small pool of competing vendors. VCHA's submission is, to say the least, counterintuitive. Certainly, its validity is, at the least, not apparent without proof, yet there is no evidence, sworn or otherwise, to establish it.

[21] Aramark's endorsement does not improve VCHA's application of s. 17(1) as the argument is circular and driven by their joint opposition to disclosure, rather than by an evidentiary and objective basis for a reasonable expectation of harm. I agree with the following submission by the Union:

> Contractors don't want to be subject to penalty clauses. If anyone knows that a contractor has agreed to be subject to a penalty clause, it will be expected to do so again. As a result, if penalty clauses are made public, contractors will refuse to agree to penalty clauses, because they don't want to be subject to them. This argument simply leads to where it begins – contractors would rather avoid penalty clauses. However, in this contract, as in others, they do agree to them, simply because that is what [VCHA] requires. If vendors could simply refuse to agree to penalty clauses, presumably they would be doing so right now. The situation will be no different if the penalty clauses are made public.
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> …On the one hand, [Aramark] asserts that pricing and penalty information must not be disclosed because it will mean that [Aramark's] competitiveness will be compromised, in that others will seek to underbid it, and will know what [Aramark's] starting prices might be. At the same time, it argues that this will be bad for [VCHA], because it will somehow lessen competitive pricing. However, there is nothing to prevent [Aramark] from bidding on the next contract at a lower price, if it wishes to do so. If, as [VCHA] suggests, it is in its interest to have service delivered at the lowest price, it is clearly in [VCHA's] interest to keep the various companies bidding against each other. Whether [Aramark] chooses to enter that bidding at the current price or a lower price is up to [Aramark], however, this will not determine the overall competitiveness of the pricing process.[7]

[22] In Order 01-20, I found that a public body's and a vendor's mutual resistance to the disclosure of a contract for services—in that case a multi-year contract between

[6] VCHA submission dated October 3, 2005, p. 3.
[7] Union submission dated March 1, 2007, pp. 3-4.

a university and cold beverage distributor—did not amount to harm under s. 17(1) or s. 21(1):

> [112] I should add that I do not think it lies for UBC [the public body] and CCB [the vendor] to say that, because CCB insisted that UBC contract on confidential terms and said or suggested that it would not deal with UBC in any other way, there is a reasonable expectation of harm to either or both of them under s. 17(1) or s. 21(1). First, it remains to be seen whether that would in fact be the case. It is apparently not the case in the U.S. Second, and perhaps even more fundamentally, in the context of this inquiry – where UBC and CCB were jointly represented and made joint submissions in all respects – and this agreement and its confidentiality clause, such an argument amounts to CCB defining a reasonable expectation of harm under s. 17(1) and s. 21(1) on the basis of its own resistance to the public accessibility of its negotiations and contracts with UBC. This stands the reasonable expectation of harm requirement on its head. In my view, the reasonable expectation of harm must flow from disclosure of the information in question, not solely from the public body's or third party's opposition to disclosure.[8]

[23] One of FIPPA's twin purposes under s. 2(1) is "to make public bodies more accountable to the public" by "giving the public a right of access to records." Section 2(1) goes on to say that FIPPA advances this goal, and the goal of protecting individual privacy, by "specifying limited exceptions to the rights of access" to information conferred by FIPPA. As s. 4 affirms, the presumptive touchstone under FIPPA is that records in the custody or control of public bodies, including contracts with public bodies, are accessible by the public under FIPPA, subject only to specified limited exceptions. It is doubtful that the right of access to information is more critical and compelling for the accountability of public bodies to the public than it is in relation to large-scale outsourcing to private enterprise of the delivery of public services, of which the Contract is an example.

[24] I conclude that VCHA's application of s. 17(1) is speculative, counter-intuitive and unsupported by evidence. Its reasoning around s. 17(1) also lacks the necessary orientation to FIPPA's stated purpose of giving the public a right of access to records subject only to limited exceptions. VCHA has not met its burden of proving that s. 17(1) authorizes it to refuse to disclose information.

[25] **3.3 Harm to Aramark?**—Section 21(1) creates a three-part test, each element of which must be satisfied before a public body is required to refuse to disclose information. It reads as follows:

> **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
>
> (i) trade secrets of a third party, or

[8] Order 01-20, [2001] B.C.I.P.C.D. No. 21, para. 112.

> (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,
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> (iii) result in undue financial loss or gain to any person or organization, or
>
> (iv) reveal information supplied to, or in the report of an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquiry into a labour relations dispute.

[26] I have already referred to the purposes of FIPPA in s. 2(1). At this point, over 13 years since FIPPA came into force, the s. 21(1) exception to the right of access has been analyzed and applied in many, many orders. The result, the reasonableness of which has been confirmed in key judicial review decisions,[9] is that s. 21(1) does not require access to be denied to mutually-generated contents of contracts between public bodies and third parties. Orders and case law respecting very similar provisions in Ontario's access and privacy laws have yielded much the same result.[10]

Third party commercial or financial information or trade secret

[27] Karen Wetselaar gave the following evidence about what Schedule 9, in combination with other information, discloses about Aramark:

> 10. Schedule 9 of the Agreement (the "Schedule") contains the financial cost of the services being provided to VCHA by ARAMARK for the duration of the current term of the Agreement. All of the financial information in the Schedule was created and submitted by ARAMARK. The information was generated by proprietary pricing models used by ARAMARK for costing projects for bids and for customers. The pricing models used by ARAMARK have been developed over time using years of ARAMARK's experience in the cleaning services business. As such, ARAMARK considers its pricing models, and the information it generates using them, its trade secrets.

[9] See *Jill Schmidt Health Services Inc. v. British Columbia (Information and Privacy Commissioner)*, [2001] B.C.J. No. 79, 2001 BCSC 101, and *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848, 2002 BCSC 603.

[10] See, for example, Order MO-1706, [2003] O.I.P.C. No. 238; Order PO-2435, [2005] O.I.P.C. No. 207; Order PO-2467, [2006] O.I.P.C. No. 65, paras. 101 to 103, and *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.).

[28] Consistent with other orders about similar information,[11] I agree that the pricing information in Schedule 9 and the terms of the Penalty Provision are commercial or financial information about Aramark within the meaning of s. 21(1)(a)(ii) of FIPPA.

[29] I do not agree that Schedule 9 or the Penalty Provision is a trade secret of Aramark under s. 21(1)(a)(i) or of VCHA under s. 17(1)(a). The term "trade secret" is defined in Schedule 1 of FIPPA, as follows:

> "trade secret" means information, including a formula, pattern, compilation, program, device, product, method, technique or process, that
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> (a) is used, or may be used, in business or for any commercial advantage,
>
> (b) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use,
>
> (c) is the subject of reasonable efforts to prevent it from becoming generally known, and
>
> (d) the disclosure of which would result in harm or improper benefit.

[30] This definition is exhaustive and all four of its elements must be made out. It is also necessary to consider the element of ownership of the trade secret by a public body or the provincial government (for s. 17(1)(a)) or by a third party (for s. 21(1)(a)(i)).[12]

[31] VCHA provided proponents with extensive Clinical Data about its facilities and the cleaning requirements for operations in those facilities. It required detailed pricing for the Contract, for which it provided a format. Before the Contract was finalized, VCHA and its preferred proponent, Aramark, further discussed, adjusted and corrected cleaning requirements and prices. I fail to see how the pricing in Schedule 9, the facility descriptions and cleaning level indicators in Schedule 9, or the Penalty Provision, have independent economic value in any sense intended in paragraph (b) of the definition of "trade secret". In my view, even if it could be shown that Aramark may be harmed if the disputed information were disclosed, or that others could benefit from its disclosure, this would not establish independent economic value in the secrecy of the information or proprietary ownership of the information in issue.

[32] I say this having regard to Article 9.2(b) of the Contract, under which VCHA agreed to the characterization of the entire Contract as proprietary and confidential to Aramark:

> While the Health Authority acknowledges that this Agreement, its Schedules, and the pricing information in the Agreement, is considered to be proprietary and confidential to the Contractor, the Health Authority is a 'public body' under the *Freedom of Information and Protection of Privacy Act* and, as such, may be

[11] See Order F06-20, [2006] B.C.I.P.C.D. No. 36; Order 00-22, [2002] B.C.I.P.C.D. No. 25; and, Order 03-15, [2003] B.C.I.P.C.D. No. 15, paras, 40 to 41.
[12] Order 01-20, [2001] B.C.I.P.C.D. No. 21, para. 74.

> required by law to disclose contents of this Agreement and other Contractor confidential information. The Health Authority will advise the Contractor on a timely basis of any request made to it in accordance with the *Freedom of Information and Protection of Privacy Act* for information relating to this Agreement and will provide the Contractor with an opportunity, prior to the Health Authority's legal deadline for response to the inquiry, to comment on the request for information and proposed response by the Health Authority.

[33] Contractual arrangements can be relevant to an element of a FIPPA disclosure exception—*e.g.*, a confidentiality provision may be evidence of the parties' mutual intention to maintain information in confidence under s. 21(1)(b). A public body may not contract out of its obligations under FIPPA, however, and access under FIPPA cannot be dictated by the application of labels to information.[13] There is more than an air of unreality to the blanket acknowledgement in Article 9.2(b) that the entire Contract—including all the financial and service delivery terms agreed to by the parties and many pages of descriptive information (including the Clinical Data provided by VCHA) and other data about VCHA's facilities and operations—is proprietary to Aramark. This is a label that is not, objectively viewed, tenable or relevant to the question of whether information in the Contract is in fact a "trade secret".

Supplied in confidence

[34] The next question is whether Schedule 9 and the Penalty Provision were "supplied in confidence" within the meaning of s. 21(1)(b) of FIPPA.

[35] VCHA submitted that Article 9.2(b) of the Contract was a complete answer to the requirements of s. 21(1)(b). Karen Wetselaar deposed that Aramark's proposal was submitted in confidence and that on numerous occasions during the ensuing negotiations of the Contract, the representatives of VCHA and Aramark verbally agreed that the negotiations and the terms of the Contract were confidential and would not be disclosed without mutual consent.[14] I have already set out her account of how the pricing in Schedule 9 was reached. Aramark submits that it "supplied" the prices because they were generated by its pricing model, on the basis of VCHA service inputs and assumptions. Aramark also says that its competitors, clients and prospective clients, and the Union "will be able to determine Aramark's cost and pricing strategy" by combining the Clinical Data, Aramark's wage rates (from publicly available collective agreements) and Schedule 9.[15]

[36] Article 9.2(b) of the Contract does not fulfill the requirements of s. 21(1)(b) for the same reasons that it does not make the entire Contract a "trade secret". Article 9.2(b), and verbal assurances of confidentiality that VCHA representatives may have given Aramark, may be evidence of the parties' mutual intention and desire to keep the entire

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[13] See Order 01-20, [2001] B.C.I.P.C.D. No. 21, para. 80; Order 01-39, [2001] B.C.I.P.C.D. No. 40, paras. 27 to 42; Order F06-01, [2006] B.C.I.P.C.D. No. 2, para. 84; Order 00-47, [2000] B.C.I.P.C.D. No. 51, paras. 10 to 45.

[14] Affidavit of Karen Wetselaar, paras. 13 to 25.

[15] Affidavit of Karen Wetselaar, para. 12.

Contract confidential, but they do not dictate supply or accessibility under FIPPA. As I said in Order 01-20:

> [80] It must be said, however, that the fact the parties intended the entire agreement to remain confidential does not establish the "supply" element necessary under s. 21(1)(b) or a reasonable expectation of harm under s. 21(1)(c) if the agreement is disclosed. This is a point I also made in Order 00-09, [2000] B.C.I.P.C.D. No. 9. I also agree with applicant that CCB's wish to keep information confidential does not establish risk of harm to UBC under s. 17(1). A third party that contracts with a public body may prefer that the terms of the contract not be publicly disclosed. Yet even if the third party obtains a contractual commitment of confidentiality, as CCB did here, that commitment cannot dictate whether the contract, or part of it, is accessible under the Act. Nor is the application of s. 17 dictated by a third party contractor maintaining that it prefers or insists on confidentiality as a condition of its doing business with a public body. As I found in Order 00-47, [2000] B.C.I.P.C.D. No. 51, any attempt to contract out of the Act is void as against public policy.

[37] Many decisions have addressed the "supplied" element.[16] The clear and prevailing consensus is that the contents of a contract between a public body and a third party will not normally qualify as having been "supplied", even when there was little or no back-and-forth negotiation. The exceptions are information that, although found in a contract between a public body and a third party, is not susceptible of negotiation and is likely of a truly proprietary nature.

[38] The concept of information that is "supplied" is intended to capture immutable third-party business information, "not contract information that—by the finessing of negotiations, sheer happenstance, or mere acceptance of a proposal by a public body—is incorporated in a contract in the same form in which it was delivered by the third-party contractor"[17] or mutually generated contract terms that are labelled proprietary.

[39] This case is in the mould of orders in which a contractor has maintained that it "supplied" prices that were incorporated into its contract with a public body because the contractor applied experience and ingenuity in the form of a so-called pricing or strategic service delivery model, method or alliance to generate terms that the contractor would agree to on the basis of information 'inputs' about the service needs of the public body.[18] As I said in Order F06-20,[19] with reference to other orders, the fact that the public body may have accepted a price or price breakdown that the contractor

[16] Order 01-39, [2001] B.C.I.P.C.D. No. 40, paras. 44 to 50; Order 03-02, [2003] B.C.I.P.C.D. No. 2, para. 60; Order 03-03, [2003] B.C.I.P.C.D. No. 3, paras. 17 to 35; Order 03-15, [2003] B.C.I.P.C.D. No. 15, paras. 57-65; Order 04-06, [2004] B.C.I.P.C.D. No. 6, paras. 44 to 50; Order F05-05, [2005] B.C.I.P.C.D. No. 6, paras. 58 to 72.
[17] Order F06-20, [2006] B.C.I.P.C.D. No. 36, para. 11.
[18] See Order 03-03; Order 03-15 and Order F06-20.
[19] At para. 15.

generated does not make those terms information that is proprietary to the contractor. Nor does it mean that the price bargain struck by the parties constitutes immutable or underlying confidential information supplied by the contractor.

[40] Schedule 9 consists of prices negotiated between VCHA and Aramark as well as pages of data generated by VCHA about its facilities. The Penalty Provision is also a negotiated term of the Contract. This case falls squarely within the orders holding that the pricing and related terms of a contract with a public body are not "supplied" information within the meaning of s. 21(1)(b).

Reasonable expectation of harm

[41] Because none of the disputed information meets the "supplied" test in s. 21(1)(b), it is not necessary to conduct the harms part of the analysis under s. 21(1)(c). I will nonetheless comment on the submissions made on this issue. Aramark submitted, with VCHA's endorsement, that disclosure of Schedule 9 and the Penalty Provision could reasonably be expected to result in harm within the meaning of ss. 21(1)(c)(i), (ii) and (iii). The final paragraph of Karen Wetselaar's affidavit summarized this part of its case as follows:

> 35. If the financial information is available to the public, Aramark reasonably expects the following consequences:
>
> (a) Its competitors will have an unfair advantage in bidding for future contracts and competing for the VCHA contract, and it is more likely to suffer contractual and financial losses as a result;
>
> (b) The [Union] will have access to confidential information which will give it an unfair advantage at the bargaining table with Aramark; and
>
> (c) Future clients and contracts will be at risk because of the client expectations and because competitors will be armed with Aramark's proprietary and confidential information.

[42] I addressed similar arguments recently in Order F06-20, a case involving a contract between a health authority and a service provider.

[43] As to ss. 21(1)(c)(i) and (iii), 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. Simply putting contractors and potential contractors in a position of having to price their services competitively is not a circumstance of unfairness or undue financial loss or gain. I extend this to disclosure of existing contract pricing and related terms when the contractor has an organized work force, in this case organized by the Union. As to s. 21(1)(c)(ii), since Schedule 9 and the Penalty Provision were not "supplied", the risk of Aramark choosing not to supply similar information does not arise. Finally, Aramark's clients and competitors will not be armed with Aramark's secrets because this information is not a "trade secret", of Aramark or VCHA. I would find that a reasonable expectation of harm under s. 21(1)(c) is not established.

4.0 CONCLUSION

[44] I find that s. 17(1) does not authorize and s. 21(1) does not require VCHA to refuse to give the Union access to the requested records. Under s. 58 of FIPPA, I require VCHA to give the Union access to the entirety of the Contract, Presentation and Business Case.

July 30, 2007

ORIGINAL SIGNED BY

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David Loukidelis
Information and Privacy Commissioner
for British Columbia

OIPC File No. F04-22698