



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

Order F10-25

MINISTRY OF HEALTH SERVICES

Celia Francis, Senior Adjudicator

June 18, 2010

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Summary: Applicants requested records related to fines imposed on Maximus. Ministry denied access to some information under ss. 15(1)(l) and 17(1)(d) and (f). Exceptions found not to apply and Ministry ordered to disclose all withheld information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 15(1)(l) and 17(1)(d) and (f).

Authorities Considered: **B.C.:** Order F10-24, [2010] B.C.I.P.C.D. No. 35; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 00-01 [2000] B.C.I.P.C.D. No. 1; Order F07-15, [2007] B.C.I.P.C.D. No. 21.

1.0 INTRODUCTION

[1] This order arises from three requests made under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Ministry of Health Services (“Ministry”). The British Columbia Government and Services Employees’ Union (“BCGEU”) made two of the requests and a private applicant made the other.

[2] These requests flow from requests for the November 4, 2004 “Health Benefits Operations Contract” that the Province of British Columbia and Maximus BC Health Incorporated (“Maximus”) entered into for the delivery of services related to the Medical Services Plan (“MSP”) and the PharmaCare Plan

("PharmaCare") for British Columbia ("the contract"). I described that contract in detail in Order F10-24.¹ I rely on but will not repeat that description here.

[3] Order F10-24 addressed specific clauses in the Master Agreement, clauses which the Ministry withheld under s. 17(1) of the *FIPPA*.

[4] The information that this Order addresses flows from one applicant's request for information regarding any fines imposed on Maximus arising from its management of the health care databases since the contract was signed, and the other applicant's request for information regarding these things:

- (a) the service level requirements of the contract;
- (b) any performance evaluations and performance audits in relation to those services;
- (c) any violations of service levels; and
- (d) any fines imposed on Maximus under the contract.

[5] The Ministry responded to the requests by providing access to some records and withholding information under ss. 15(1)(l), 17(1)(d) and (f), 21 and 22 of *FIPPA*. Both applicants were dissatisfied and requested a review of the Ministry's responses.

[6] During the course of mediation of the reviews, the Ministry released additional records and ceased to rely on s. 21 of *FIPPA*. The BCGEU also agreed to exclude from the scope of its review the personal information the Ministry withheld under s. 22. As mediation was unsuccessful in resolving matters further, the OIPC held two written inquiries for the requested reviews under Part 5 of *FIPPA*. As the individual applicant had raised the application of s. 25 of *FIPPA* in his original request and request for review, this was added as an issue for the inquiry on his review. The OIPC invited Maximus to participate as "an appropriate person" in both inquiries, along with the Ministry and the applicants.

[7] The issues were undecided when Commissioner Loukidelis left office on January 19, 2010 for appointment as the Deputy Attorney General of British Columbia, effective February 1, 2010. They were reassigned to me pursuant to a delegation of the Commissioner's powers under s. 49 of *FIPPA* and I considered and decided this matter independently. The public body is the same in each case and the records responsive to the individual applicant's request are among those responsive to the BCGEU's requests. I have therefore dealt with the two inquiries in a single order.

¹ [2010] B.C.I.P.C.D. No. 35; see paras. 8-11.

2.0 ISSUES

[8] The issues in these inquiries are these:

1. Whether the Ministry must, without delay, disclose the records to the individual applicant under s. 25 of FIPPA.
2. Whether ss. 15(1)(l) and 17(1)(d) and (f) of FIPPA authorized the Ministry to withhold certain information

[9] Under s. 57(1) of FIPPA, it is up to the head of the public body to prove that the applicants have no right of access to the information it believes must be withheld. Section 57 is silent on the burden of proof for s. 25. Past orders have said that, in such cases, as a practical matter, the parties should provide argument and evidence to justify their positions.²

3.0 DISCUSSION

[10] **3.1 Record in Dispute**—The records consist of periodic reports on the performance of Maximus with respect to the service level requirements stipulated in the contract and the financial penalties that the Ministry assessed where Maximus's performance did not meet the required levels.

[11] **3.2 Public Interest Disclosure**—I will deal with s. 25(1)(b) first because, if s. 25(1)(b) does apply in this case, it overrides any exceptions to the disclosure of the requested records. Section 25 states in relevant part:

Information must be disclosed if in the public interest

25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

...

- (b) the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.

[12] I have applied here the approach to the interpretation and application of s. 25(1)(b) taken in previous orders under FIPPA, for example, in Order 02-38,³ where Commissioner Loukidelis had this to say about the standard for showing that s. 25(1)(b) applies:

² Order 02-38, [2002] B.C.I.P.C.D. No. 38, at para. 39.

³ [2002] B.C.I.P.C.D. No. 38. The Commissioner preceded this conclusion with an extensive discussion at paras. 40-52.

[53] As the applicant notes, in Order 01-20 and other decisions, I have indicated that the disclosure duty under s. 25(1)(b) is triggered where there is an urgent and compelling need for public disclosure. The s. 25(1) requirement for disclosure “without delay”, whether or not there has been an access request, introduces an element of temporal urgency. This element must be understood in conjunction with the threshold circumstances in ss. 25(1)(a) and (b), with the result that, in my view, those circumstances are intended to be of a clear gravity and present significance which compels the need for disclosure without delay.

[13] The individual applicant provided no arguments for the application of s. 25 in his request or his request for review. He also failed to provide an initial submission to this inquiry. As a result, the OIPC did not permit him to make a reply submission in response to the submissions of the other parties. The submission of Maximus did not address s. 25.

[14] The Ministry argues that the information at issue in this request does not meet the threshold required for s. 25 to apply. It submits that there is neither urgency nor a compelling interest in the disclosure of the information.⁴ The Ministry holds that “disclosure must be, not just arguably in the public interest, but must be clearly (*i.e.*, unmistakably) in the public interest.”⁵ The Ministry cites previous orders that indicate the public interest in disclosure must be urgent and compelling.⁶ The Ministry submits that it is far from clear whether it is necessary to disclose the penalty amounts in order to further current public debate. Nor is there any evidence, according to the Ministry, that there is “an urgent or compelling need to disclose the information at issue”.⁷

[15] I do not doubt that the public would be interested in knowing the financial penalties that the Ministry imposed on Maximus for not meeting its targets. There may even be a public interest in disclosing this information. These are not the tests for s. 25 however. I agree with the Ministry that there is no temporal urgency to disclosing this information. I also see no compelling reason to disclose the information. I find that s. 25(1)(b) does not apply here.

[16] **3.2 Harm to Law Enforcement**—Section 15 of FIPPA authorizes public bodies to withhold information the disclosure of which would harm law enforcement including harming the security of a computer system. This is the relevant FIPPA provision in this case:

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

⁴ Ministry’s initial submission (OIPC F06-28084), para 4.113.

⁵ Ministry’s initial submission (OIPC F06-28084), para 4.115.

⁶ Ministry’s initial submission (OIPC F06-28084), paras 4.117-21.

⁷ Ministry’s initial submission (OIPC F06-28084), para 4.122.

- (l) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

[17] I have taken the same approach as previous orders in assessing the Ministry's application of s. 15(1). In Order 00-01,⁸ for example, Commissioner Loukidelis outlined the nature of the evidence required to meet a harms based test such as that set out in s. 15(1):

...a public body must adduce sufficient evidence to show that a specific harm is likelier than not to flow from disclosure of the requested information. There must be evidence of a connection between disclosure of the information and the anticipated harm. The connection must be rational or logical. The harm feared from disclosure must not be fanciful, imaginary or contrived.⁹

[18] The information at issue under this exception is the identity of the host server referenced in the Service Level Report. The Ministry submits that disclosure of the server's name would increase the risk that someone would be able to obtain unauthorized access to the information system. It said that knowledge of the name of the server would increase the risk that an unauthorized user, masquerading as a technician, would be able to manipulate an employee, through "social engineering", into giving access to the server, bypassing login procedures, "as they could appear to be 'legitimate' to an employee of Maximus because they know the server's name."¹⁰ The Ministry has addressed this problem for future reports by removing the server's name. The Ministry provided literature on the subject of computer hacking that indicates that such manipulation of staff is a key technique that hackers employ.¹¹

[19] Maximus's submission states that it supports the Ministry's application of s. 15(1)(l).¹² The BCGEU's initial submission notes that the Ministry has the onus to justify its application of s. 15(1)(l) and that evidence of speculative harm would not be sufficient.¹³

[20] I find the Ministry's arguments speculative and not persuasive. Disclosure of the information, by itself, could not reasonably lead to the harm the Ministry fears. While the Ministry has provided general evidence regarding the *modus operandi* of hackers, it has not provided any evidence of the risk that these techniques would be effective in relation to this particular server,

⁸ [2000] B.C.I.P.C.D. No. 1.

⁹ At p. 5.

¹⁰ Ministry's initial submission (OIPC F06-28162), para 4.18. I have also considered carefully the affidavits of Bethel, Lucas and Wolfe which the Ministry supplied with its submissions in these inquiries.

¹¹ Ministry's initial submission (OIPC F06-28162), paras. 4.05-09.

¹² Maximus's initial submission, p. 1.

¹³ BCGEU's initial submission, pp. 1-2.

particularly given the awareness of both Ministry and Maximus of these techniques. It is of course always theoretically possible that criminals will use all sorts of publicly available information in a dishonest fashion to illegally access confidential information. In my view, that possibility, by itself, is not sufficient to refuse to disclose information. There must be something more that ties a special risk to a particular context so as to meet the “reasonable expectation” test. In this case, that test has not been met. I find that s. 15(1)(l) does not apply here.

[21] **3.3 Harm to the Financial Interests of the Public Body**—Section 17 of FIPPA authorizes public bodies to withhold information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the Province of British Columbia. These are the relevant FIPPA provisions in this case:

- 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: ...
- (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.

[22] In Order F10-24, I summarized in detail the Ministry’s submission and evidence explaining why, in its view, s. 17(1) applied to the Records in Dispute in that case. Rather than repeat those arguments, I refer the reader to that decision (at paras. 18-28), as large portions of the Ministry’s submission and evidence are identical to the submissions it made in this case.

[23] The Ministry’s position regarding these particular records is that, because the subject matter of these records will likely be included in future ASD contracts, any disclosure of the records “will harm the ability of the Province to obtain more favourable service levels and penalties (namely, higher service levels and penalties) in future contract negotiations, including ASD negotiations.”¹⁴ The Ministry says the Province would be harmed because, if a future vendor, aware of these terms, insists on the same treatment, the Province will either have to capitulate (in which case it will have given something up) or not capitulate (in which case the negotiation will be prolonged and more expensive).¹⁵ Either way, it argues, the financial interests of the Province will be harmed.

¹⁴ Ministry’s Initial Submission, paras. 4.112–4.114.

¹⁵ Ministry’s Initial Submission, paras. 4.116–4.119.

[24] The BCGEU argues in reply that the Ministry's position is "entirely speculative". It also points to a paragraph in the Ministry's submission (para. 4.109), which must be read with what follows:

The Ministry committed to publicly releasing information concerning specific service levels where Maximus had failed to meet a specific service level. In other words, where Maximus had not met a service level, the Ministry committed to publicly releasing the details concerning the required and actual performance level achieved by Maximus, and subsequently did so...

The service levels that have been severed from the requested records in this case are the service levels that Maximus has not been found to have breached and which have therefore not been publicly released by the Ministry in the past.

[25] The BCGEU argues that, based on this, "the Ministry's position amounts to a position whereby disclosure of service levels sometimes does not harm the negotiating position of the province but sometimes does".¹⁶

[26] As to the harm disclosure might cause to a public body's negotiating position in future negotiations, the BCGEU cites Order F07-15,¹⁷ in which Commissioner Loukidelis rejected as "speculative, counter-intuitive and unsupported by evidence"¹⁸ similar arguments from the Vancouver Coastal Health Authority:

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

[27] The BCGEU submits that the Ministry's position is equally speculative. It states:

From a common sense point of view it is hard to understand how service levels unique to the delivery of the operation and administration of the Medical Services Plan and penalties specific to failure to meet those service levels could be of assistance in an entirely different kind of service.²⁰

¹⁶ BCGEU Reply Submission, p. 1.

¹⁷ [2007] B.C.I.P.C.D. No. 21.

¹⁸ Order F07-15, para. 24.

¹⁹ BCGEU's reply submission, p. 1; Order F07-15, para. 18.

²⁰ BCGEU's reply submission, p. 2.

[28] Maximus made only a brief initial submission in which it said it did not object to the Ministry's decision to withdraw s. 21. It was silent on the application of s. 17 of FIPPA.

Analysis

[29] As noted above, the Ministry's arguments on s. 17(1) rely on the same arguments it made in the earlier inquiry on the contract itself.²¹ I addressed those arguments extensively in Order F10-24.²² For the same reasons, which I adopt here, I do not accept its arguments.

[30] There is, in this case, an additional factor. The Ministry has publicly released the service level information where service levels have been breached. This information is now in the public domain and is available to all potential vendors in all future ASD contracts. The Ministry has not suggested that this information has adversely affected other ongoing negotiations. Nor has it suggested, beyond making theoretical arguments, what additional harms could reasonably be expected to flow from the service levels that have not been disclosed, particularly when the Province has committed to voluntarily disclosing further service levels in the event of a further breaches by Maximus.

[31] The upshot is that the Ministry has not discharged its burden of proof in this case. Having applied the test set out in Order F10-24, I find that s. 17(1) does not apply to the withheld information.

4.0 CONCLUSION

1. I require the Ministry to give the applicants access to the information it withheld under s. 15(1)(l) and s. 17(1).
2. I require the Ministry 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 August 3, 2010 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

June 18, 2010

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

OIPC File No. F06-28162, F06-29179 & F06-28084

²¹ See Order F10-24

²² See paras. 42-61.