



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

Order F10-40

VANCOUVER ISLAND HEALTH AUTHORITY

Jay Fedorak, Adjudicator

November 25, 2010

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Summary: The HEU requested access to contracts and documents related to the provision of dietary and housekeeping services between the public body and Compass Canada. 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 remaining schedules of the contracts.

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

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 F10-26, [2010] B.C.I.P.C.D. No. 38; 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.

1.0 INTRODUCTION

[1] This order arises from a request by an applicant, the Hospital Employees Union ("HEU"), for copies of the contracts and documents related to the provision of dietary and housekeeping services between the Vancouver Island Health Authority ("VIHA") and Compass Canada ("Compass").

[2] VIHA responded to the request by providing the HEU with copies of the records, while withholding some of the information under ss. 12, 15, 17, and 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, VIHA changed its position and decided that it would release the information that it had withheld under s. 21, which consisted of some of the schedules to the two contracts. It gave notice to Compass as a third party under s. 24 of FIPPA that it intended to disclose all of the requested contract information. Compass requested a review of VIHA’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 VIHA, Compass and the HEU regarding Compass’s request for review of the decision not to apply s. 21 to the contract items. VIHA’s application of ss. 12, 15 and 17 to related documents will be the subject of a separate inquiry.

2.0 ISSUE

[4] The issue before me is whether VIHA is required to refuse access to portions of the contract schedules 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 VIHA had made a decision to release.

3.0 DISCUSSION

[6] **3.1 Record in Dispute**—The records at issue in this inquiry consist of some of the schedules to the two contracts. VIHA has posted on its website unsevered copies of the body of the contracts and most of the schedules to those contracts.¹ The schedules that remain in dispute are:

Environmental Services Contract Schedules

- D - Contract Price and Pricing
- E - Penalty and Bonus Incentive Program
- F - Capital Investment and VIHA Equipment to be purchased by Contractor
- H - Statement of Financial Adjustments

Food Services Contract Schedules

- D - Contract Price
- E - Penalty and Bonus Incentive Program

¹ In the cover letter to its initial response to the applicant’s request, VIHA informed the HEU that it had posted the contract and some of the schedules on its website at the following link http://www.viha.ca/business_centre/purchasing_services/service_contracts.htm.

- F - Capital Investment
- G - Statement of Financial Adjustments

[7] Compass argues that s. 21 of FIPPA applies to these schedules in their entirety, with the exception of Schedules E of both contracts, of which only portions of E1 and E2 are at issue.²

[8] **3.2 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
 - (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
- ...

[9] 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 dealt with the application of s. 21(1) to a similar contract for cleaning services between Compass and the Vancouver Coastal Health Authority in Order F10-26.⁵ I have applied those principles here without repeating them.

² In addition to the listed schedules, Compass also argued that s. 21 of FIPPA applied to Schedules H1-H6 of the Food Services Contract, but I have confirmed that VIHA has already disclosed those schedules in their entirety.

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 [2010] B.C.I.P.C.D. No. 38.

Commercial or financial information

[10] Compass submits that the information at issue in the records is its commercial and financial information but does not provide argument in support.⁶ Neither VIHA nor the HEU disputes, however, that the information is the commercial information of Compass. It is worth noting that the HEU states that it does not dispute whether the information is commercial because it has not seen the information and is unable to determine the issue.⁷

[11] The titles of the schedules noted above indicate that they relate to pricing, performance incentives, capital investment and other financial details, all of which are either financial in nature or relate to assets. From my review of the records, I can confirm that the titles of the schedules are an accurate reflection of the information that they contain. The information is that of Compass and VIHA. Therefore, I find that the information at issue is the commercial and financial information of Compass, as previous orders have interpreted these terms.⁸

Supplied in confidence

[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 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."⁹ In Order F10-26, I reviewed the comments of Commissioner Flaherty in Order No. 26-1994¹⁰ and Adjudicator Iyer in Order 01-39¹¹ with respect to information a third party might introduce as part of contract negotiations and whether it could be considered as having been supplied for the purpose of s. 21(1)(b). The key point is that the inclusion of the information in the contract usually indicates that the information was "negotiated" rather than "supplied" because the other party agreed to its inclusion in the contract. This could apply equally to a situation where the information in the contract was identical to the information that the third party disclosed during the negotiations.

⁶ Third party's initial submission, para. 4.

⁷ HEU's initial submission, para. 8.

⁸ 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).

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

¹⁰ [1994] B.C.I.P.C.D. No. 29, p. 7.

¹¹ Order 01-39, [2001] B.C.I.P.C.D. No. 40, paras. 45-46.

[13] As in Order F10-26, Compass asserts “it is clear that the information was ‘supplied’ by the Third Party to the Public Body in confidence, and that the 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 through the give and take of negotiations”.¹³ It is not apparent from the face of the records that the information is “immutable” and Compass offered nothing in terms of an explanation.

[14] As I concluded in Order F10-26, given that VIHA had the option of whether to agree to terms of the contract, I find the terms of the contract must be considered to have been “negotiated”, not “supplied”. Moreover, as was the case with Order F10-26, 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 provided the information in confidence in accordance with s. 21(1)(b).

[15] I disagree with Compass that an examination of the schedules clearly shows that the information was supplied by Compass. The information at issue outlines services the public body agreed that it will receive from Compass; the prices that it agreed to pay using public funds; penalties that the parties agreed Compass would pay and bonuses it would receive based on performance measurement; and equipment that Compass agreed to purchase from VIHA. There is no information that appears, on the face of it, to have been submitted directly by the third party and over which it is clear there was no negotiation.

[16] Compass submits that the wording of s. 21.2 of the Environmental Services Contract states that Schedules D, E-2 and H were supplied explicitly in confidence to VIHA and that s. 21.2 of the Food Services Contract indicates the same with respect to Schedules D-1, D-2, E-1 and G.¹⁴ I note, however, that the actual wording of the contracts is as follows:

As a “public body” under the Act, VIHA may be requested to disclose the contents of this Agreement or the Contractor’s Proposal or other Confidential Information of the Contractor. For the purposes of Section 21.1 of the Act, VIHA specifically acknowledges having been advised by the Contractor that the Capital Investment and information in Schedules D, E-2 and H are:

- (a) commercial, financial and/or technical information of the Contractor;

¹² Third party’s reply submission, para. 7.

¹³ Third party’s reply submission, para. 4.

¹⁴ Third party’s reply submission, para. 5-6.

- (b) supplied explicitly in confidence by the Contractor; and
- (c) would harm significantly the Contractor's competitive position or interfere significantly with the Contractor's negotiating position.

[17] These provisions merely indicate recognition by VIHA that Compass holds the opinion that the information meets the three-part test, rather than VIHA's agreement with Compass's opinion.

[18] In fact, VIHA disagrees with Compass's account of the extent to which the terms of the contract were negotiated or supplied, which I consider significant. VIHA 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.¹⁵ 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 disclosed to VIHA, the information in the contract had not been "supplied".¹⁶ This supports the conclusion that the information in question in this case was not "supplied" but "negotiated".

[19] The HEU submits that Compass's case consists merely of bare assertions.¹⁷ I agree. Compass has not provided sufficient explanation or evidence to justify how the particular information in each schedule meets the test of having been "supplied". I find that Compass has not demonstrated that it had "supplied" the information to VIHA in accordance with s. 21(b) of FIPPA.

Harm to third party interests

[20] 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.

[21] As Compass had argued in Order F10-26, it 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.¹⁸ It submits that disclosure of the severed information to its competitors would seriously erode its "ability to bid effectively and with confidence".¹⁹ Nevertheless, as the HEU points out, Compass does not explain

¹⁵ VIHA's initial submission, para. 8; Order F08-22, [2008] B.C.I.P.C.D. No. 40.

¹⁶ Order F08-22, paras. 61-65.

¹⁷ HEU's supplementary reply submission, para. 2.

¹⁸ Third party's initial submission, para. 2.

¹⁹ Third party's initial submission, para. 3.

“how the release of this information would have this effect”.²⁰ This is also not apparent from the records.

[22] As in Order F10-26, Compass is also concerned about the implications of disclosure on its labour relations. Compass states that the applicant is the union it employs to deliver the contracted services to VIHA. It submits, with affidavit support from one of its employees, that

if the Applicant union obtains specific contractual terms, it would be detrimental to the Third Party’s negotiating position with the Applicant union. If the Applicant union understands the terms and conditions under which the Third Party operates, they will have a substantial advantage in future negotiations, and cause the Third Party’s labour costs to go up.²¹

[23] The HEU counters that Compass has not explained how the HEU could use the information to increase labour costs. The HEU also submits that previous cases have established that “putting contractors in a position where they have to deal with costs pressures from their unionized work force does not constitute harm under s. 21(1)(c)(i) or (iii).²² I agree with the HEU that the same applies in this case.

[24] As was the case in Order F10-26, 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.

4.0 CONCLUSION

[25] I find that s. 21(1) of FIPPA does not require VIHA to refuse to give the HEU access to the following schedules of the contracts that VIHA withheld in their entirety:

Environmental Services Contract Schedules

D - Contract Price and Pricing

F - Capital Investment and VIHA Equipment to be purchased by Contractor

H - Statement of Financial Adjustments

Food Services Contract Schedules

D - Contract Price

F - Capital Investment

G - Statement of Financial Adjustments.

²⁰ HEU’s reply submission, para. 7.

²¹ Third party’s initial submission, para. 8.

²² HEU’s reply submission, para. 8.

[26] I also find that s. 21(1) of FIPPA does not require VIHA to refuse to give the HEU access to the information severed from Schedules E1 and E2 (Penalty and Bonus Incentive Program) of both contracts.

[27] For the reasons given above, under s. 58 of FIPPA, I require VIHA 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 January 11, 2011 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

November 25, 2010

ORIGINAL SIGNED BY

Jay Fedorak
Adjudicator

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