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Order F11-27

NORTHERN HEALTH AUTHORITY

Jay Fedorak, Adjudicator

September 14, 2011

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Summary: The union representing the employees of Domcor requested a copy of the contract between the company and the health authority for the provision of security services. Domcor asked for a review of the decision of the health authority to disclose the contract to the union, on the basis that release would harm its business interests. The information was found to be the commercial and financial information of Domcor, but Domcor failed to demonstrate that it had supplied the information in confidence. The adjudicator ordered the health authority to disclose the contract.

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

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. 38; Order F10-27, [2010] B.C.I.P.C.D. 39; Order F10-28, [2010] B.C.I.P.C.D. No. 40; Order F11-08, [2011] B.C.I.P.C.D. No. 10; Order 00-09, [2000] B.C.I.P.C.D. No. 9; 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 27; Order 04-06, [2004] B.C.I.P.C.D. No. 6.

Cases Considered: *K-Bro v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 904; *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603.

INTRODUCTION

[1] This case involves a public-sector service provider challenging a decision of a health authority to disclose a copy of its contract for security services to the union representing the service provider's employees. The Hospital Employees Union ("union") requested a copy of the security services contract between the Northern Health Authority ("health authority") and Domcor Health, Safety and

Security Ltd. (“Domcor”). The health authority decided to disclose the contract in its entirety to the union and informed Domcor of its decision. Domcor requested a review from the Office of the Information and Privacy Commissioner (“OIPC”), on the grounds that disclosure would harm its business interests.

ISSUE

[2] The question that I must decide is whether disclosure of the requested information would harm the business interests of Domcor under s. 21(1) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

DISCUSSION

[3] **Background**—Domcor is a company that provides safety and security services to public-sector and private-sector clients. Domcor presented a proposal to the health authority in an attempt to win a contract to provide security services and training for the health authority. The health authority subsequently signed a contract with Domcor to provide these services.

[4] The union represents the employees of Domcor and is responsible for negotiating a collective agreement with the company. The union requested a copy of the contract from the health authority.

[5] The health authority gave Domcor formal notice under s. 23 of FIPPA that it had received a request for the contract and invited comment. Domcor responded by objecting to the disclosure of any part of the contract, on the grounds that disclosure would harm its business interests. The health authority made a decision to release the contract to the union and informed Domcor formally of this under s. 24 of FIPPA. Domcor requested a review of this decision by the OIPC prior to the disclosure of the contract.

[6] **Records at Issue**—The records consist of a contract for the provision of security services, a series of schedules to the contract and an amendment to the contract.

[7] **Harm to Third-Party Business Interests**—Numerous orders have considered the application of s. 21(1) and the principles for its application are well established.¹ 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. Former Commissioner Loukidelis conducted a comprehensive review of the body of case decisions in several jurisdictions in Order 03-02.²

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

² At paras. 28-117.

[8] The first part of the test requires the information to be a trade secret of a third party or the commercial, financial, labour relations, scientific or technical information of, or about, a third party. The second part of the test requires the information to have been supplied to the public body in confidence. The third part of the test requires that disclosure of the information could reasonably be expected to cause significant harm to the third party's competitive position or other types of harm as set out in s. 21(1)(c).

Commercial or financial information

[9] Domcor submits that the information at issue in the records is its commercial and financial information, because its disclosure would reveal information about the services that it delivers and the prices that it charges for those services.

[10] The records are about the services that Domcor provides to the health authority and the fees that it receives. This constitutes commercial information of Domcor, as previous orders have interpreted these terms. I found that the terms relating to the provision of services in contracts were the commercial and financial information of the service provider in Order F10-26, Order F10-27, Order F10-28 and Order F11-08.³ I find that the information at issue here is the commercial information of Domcor.

Supplied in confidence

[11] I will separate the concept of "supplied in confidence" into two parts. The first will be to determine whether the records were "supplied" to the health authority. The second will be to determine whether the third party supplied those records "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 Domcor. These decisions clearly establish that, "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."⁴ I applied this approach in Order F10-26, Order F10-27, Order F10-28 and Order F11-08.⁵

³ [2010] B.C.I.P.C.D. 38; [2010] B.C.I.P.C.D. 39; [2010] B.C.I.P.C.D. No. 40 and [2011] B.C.I.P.C.D. No. 10.

⁴ Order 00-09, [2000] B.C.I.P.C.D. No. 9, pp. 5-6.

⁵ Order F10-28 was upheld on judicial review. See *K-Bro v. British Columbia (Information and Privacy Commissioner)* 2011 BCSC 904.

[13] The more specific issue here regarding the “supplied” versus “negotiated” test concerns whether the disputed information is immutable. Adjudicator Iyer discussed this issue in Order 01-39, a decision upheld by the Supreme Court of British Columbia on judicial review.⁶ She stated:

Information will be found to be supplied if it is relatively “immutable” or not susceptible of change. ... 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.⁷

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

CPR’s interpretation focuses on whether the information remained unchanged in the contract from the form in which it was originally supplied on mechanical delivery. The Delegate’s interpretation focuses on the nature of the information and not solely on the question of mechanical delivery. I find that the Delegate’s interpretation is consistent with the earlier jurisprudence ...⁸

[15] Domcor states that the information in the pricing schedule is “completely identical” to the pricing information that it says it supplied in its original proposal. It also states that there were no communications between it and the health authority from the time it presented the proposal until the letter of agreement it signed. It says that it submitted its proposal with the intent that the financial and other terms would be accepted without negotiation. Its prices were not susceptible to change, it submits, because it could not generate a profit and remain competitive if it agreed to change the prices.

[16] Domcor’s argument is not persuasive. As noted above, previous orders have found that, where the public body, as here, had the option of whether to agree to the third party’s bid in whole, or in part, terms of the contract must be considered to have been “negotiated”, not “supplied”. Again, this applies even in

⁶ *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* 2002 BCSC 603.

⁷ Order 01-39, [2001] B.C.I.P.C.D. No. 40, paras. 45-46.

⁸ *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, para. 75.

cases where the terms of the contract are identical to information that the third party had supplied in its bid, which Domcor submits is the case here.⁹

[17] I also consider it significant that the health authority disagrees with Domcor as to whether the terms of the contract were negotiated or supplied and it believes that it must release the information. The health authority cites Order F07-15, which held:

the fact that the public body may have accepted a price or price breakdown that the contractor 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.¹⁰

[18] I find, consistent with Order 01-39, that the information at issue was susceptible to change, even if, in the end, it was not changed. Therefore, Domcor has not demonstrated that it supplied the information to the health authority in accordance with s. 21(b) of FIPPA.

[19] As I have found that the information was negotiated and not supplied, I do not need to deal with the question of confidentiality. I note, however, that if I were obliged to do so, I would find that Domcor had failed to demonstrate the confidentiality of information.

[20] Numerous orders have dealt with the issue of whether information was supplied “explicitly or implicitly”, in confidence.¹¹ Order 04-06 found that assertions by a third party alone, without corroboration from a public body or other objective evidence, were insufficient to establish that the information was provided “in confidence”.¹² It held that there must be evidence of a “mutuality of understanding” between the public body and the contractors for the information to have been considered to have been supplied in confidence.

[21] Domcor asserts that it supplied the records to the health authority in confidence. The submissions of the health authority are silent on the issue. I have reviewed the relevant provisions of the contract, which the health authority submitted as an exhibit to its initial submission, in order to determine whether there were any explicit indicators of confidentiality. I can confirm that there are no explicit indicators of confidentiality.

⁹See also Order F08-22, [2008] B.C.I.P.C.D. No 40, paras. 61-65; Order F10-26, para. 17; Order F10-27, para. 19; and Order F10-28, para. 20.

¹⁰Order F07-15, [2007] B.C.I.P.C.D. No 27, para. 39.

¹¹See for example, Order 01-39, [2001] B.C.I.P.C.D. No. 40.

¹²[2004] B.C.I.P.C.D. No. 6, paras. 51-53.

[22] The situation in this case is similar to that in Order 04-06. Domcor makes a bald assertion in its submission to this inquiry, without corroboration, that it originally supplied the information to the health authority implicitly in confidence. There is no evidence of “mutuality of understanding” with respect to the confidentiality of the information. This is not a sufficient basis on which to conclude that the information was supplied “implicitly in confidence” as past orders have interpreted this term. Therefore, I find that Domcor did not supply the information implicitly in confidence.

[23] In summary, Domcor has failed to meet the second part of the s. 21 test because it has not shown that the information in dispute was supplied, explicitly or implicitly, in confidence. I find that s. 21(1)(b) of FIPPA does not apply to the records.

Harm to third party interests

[24] As none of the information at issue meets the “supplied in confidence” 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).

CONCLUSION

[25] I find that s. 21(1) of FIPPA does not require the health authority to refuse to give the union access to the records. For the reasons given above, under s. 58 of FIPPA, I require the health authority to give the union access to the information it requested within 30 days of the date of this order, as FIPPA defines “day”, that is, on or before, October 27, 2011 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

September 14, 2011

ORIGINAL SIGNED BY

Jay Fedorak
Adjudicator

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