



OFFICE OF THE  
INFORMATION & PRIVACY  
COMMISSIONER  
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Order F17-47

## UNIVERSITY OF BRITISH COLUMBIA

Celia Francis  
Adjudicator

October 26, 2017

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**Summary:** An unsuccessful proponent in a 2011 Request for Proposal process requested a copy of the successful bid. UBC disclosed some information but refused access to part of the bid, including the successful proponent's prices, under s. 21(1) (harm to third-party business interest) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator confirmed UBC's decision.

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

**Authorities Considered: BC:** Order 03-02, 2003 CanLII 49166 (BC IPC); Order 03-15, 2003 CanLII 49185 (BC IPC); Order 01-39, 2001 CanLII 21593 (BC IPC); Order 01-36, 2001 CanLII 21590 (BC IPC); Order F08-03, 2008 CanLII 13321 (BC IPC); Order 00-22, 2000 CanLII 14389 (BC IPC); Order F05-05, 2005 CanLII 14303 (BC IPC); Order F13-06, 2013 BCIPC 6 (CanLII); Order F13-07, 2013 BCIPC 8 (CanLII); Order F15-53, 2015 BCIPC 56 (CanLII); Order F16-17, 2016 BCIPC 19 (CanLII); Order F13-22, 2014 BCIPC 31 (CanLII); Order F14-58, 2014 BCIPC 62 (CanLII); Order 00-10, 2000 CanLII 11042 (BC IPC); Order F14-04, 2014 BCIPC 31 (CanLII).

**Cases Considered:** *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3; *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875.

## INTRODUCTION

[1] In December 2016, an applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the University of British Columbia (UBC). The applicant sought the successful bid submitted in response to a request for proposal (RFP) that UBC issued in late 2011. The applicant was an unsuccessful proponent in that RFP process. UBC notified Henry Schein Canada (HSC), the successful proponent, of the request under s. 23 of FIPPA.

[2] HSC objected to the disclosure of any part of its bid, on the grounds that disclosure could harm its competitive position. UBC then told HSC that it had decided to withhold only some of the information in the bid under s. 21(1) of FIPPA (harm to third-party business interests) but would disclose the rest. HSC requested a review of UBC's decision by the Office of the Information and Privacy Commissioner (OIPC).

[3] Mediation by the OIPC did not resolve the matter and HSC asked that it proceed to inquiry. The original applicant chose not to participate in the inquiry. Accordingly, the OIPC invited submissions from HSC and UBC. Only HSC made a submission.

## ISSUE

[4] The issue before me is whether UBC is required by s. 21(1) to refuse to disclose information in the bid to the applicant. When a public body has decided to give an applicant access to all or part of a record containing information that relates to a third party, s. 57(3)(b) of FIPPA places the burden on the third party objecting to disclosure to prove that the applicant has no right of access to the information.

## DISCUSSION

### *Information in dispute*

[5] The record at issue is HSC's bid in response to RFP # 2011010343 (to provide miscellaneous dental supplies to UBC's dental school and clinic). HSC wants its entire bid withheld under s. 21(1).

[6] The information in dispute is only a portion of the bid, specifically the information that UBC decided it will disclose to the applicant. I do not need to consider whether s. 21(1) applies to the information that UBC and HSC agree should be withheld, which includes HSC's prices.<sup>1</sup>

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<sup>1</sup> UBC agreed to withhold the information in eight columns (D, F and H-M) in Section 5, Attachment D Item Listing, Miscellaneous Dental Supplies. There is no indication that the original applicant requested a review of UBC's decision to withhold this information.

**Does s. 21(1) apply?**

[7] The relevant parts of s. 21(1) of FIPPA in this case read as follows:

- 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,
    - ...
    - (iii) result in undue financial loss or gain to any person or organization, ...

[8] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies.<sup>2</sup> All three parts of the s. 21(1) test must be met in order for the information in dispute to be properly withheld. First, HSC, as the party resisting disclosure, must demonstrate that disclosing the information in issue would reveal commercial, financial, labour relations, scientific or technical information of, or about, a third party. Next, HSC must demonstrate that the information was supplied, implicitly or explicitly, in confidence. Finally, it must demonstrate that disclosure of the information could reasonably be expected to cause one or more of the harms set out in s. 21(1)(c). In assessing HSC's arguments on s. 21(1), I have taken the same approach.

[9] I find below that s. 21(1) does not apply. This is because, while I find that s. 21(1)(a) applies to the information, HSC has not established a reasonable expectation of harm under s. 21(1)(c). In light of this finding, it was not necessary for me to consider whether s. 21(1)(b) applies as well.

**Is the information “financial or commercial information”?**

[10] FIPPA does not define “commercial” or “financial information.” However, previous orders have found the following:

- “commercial information” relates to commerce, or the buying, selling, exchange or providing of goods and services; the information does not

<sup>2</sup> See, for example, Order 03-02, 2003 CanLII 49166 (BC IPC), Order 03-15, 2003 CanLII 49185 (BC IPC), and Order 01-39, 2001 CanLII 21593 (BC IPC).

need to be proprietary in nature or have an actual or potential independent market or monetary value.<sup>3</sup>

- hourly rates, global contract amounts, breakdowns of these figures, prices, expenses and other fees payable under contract are both “commercial” and “financial” information of or about third parties.<sup>4</sup>

[11] HSC asserted that the information falls under s. 21(1)(a) but did not elaborate. The information in question consists of HSC’s prices for providing dental supplies, together with information on its experience, other clients and partners, the services it would provide and the tools it uses. I am satisfied that the disputed information is financial and commercial information of or about HSC. I therefore find that s. 21(1)(a)(ii) applies to it.

***Reasonable expectation of harm under s. 21(1)(c)***

[12] Numerous orders have set out the standard of proof for showing a reasonable expectation of harm to a third party’s interests for the purposes of s. 21(1)(c).<sup>5</sup> The Supreme Court of Canada confirmed the applicable standard of proof for harms-based exceptions:

[54] This Court in *Merck Frosst* adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”.<sup>6</sup>

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<sup>3</sup> See Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17, and Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62.

<sup>4</sup> For example, Order 03-15, 2003 CanLII 49185 (BC IPC) at para. 41, Order 00-22, 2000 CanLII 14389 (BC IPC) at p. 4, Order F05-05, 2005 CanLII 14303 (BC IPC) at para. 46, Order F13-06, 2013 BCIPC 6 (CanLII) at para. 16, Order F13-07, 2013 BCIPC 8 (CanLII) at para. 36, Order F15-53, 2015 BCIPC 56 (CanLII), at para. 11, and Order F16-17, 2016 BCIPC 19 (CanLII), at para. 24.

<sup>5</sup> For example, Order 01-36, 2001 CanLII 21590 (BC IPC), at paras. 38-39.

<sup>6</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* [Community Safety], 2014 SCC 31, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, at para. 94. See also Order F13-22, 2014 BCIPC 31 (CanLII), at para. 13, and Order F14-58, 2014 BCIPC 62 (CanLII), at para. 40, on this point.

[13] Moreover, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*,<sup>7</sup> Bracken J. confirmed that it is the release of the information itself that must give rise to a reasonable expectation of harm and that the burden rests with the public body to establish that the disclosure of the information in question could reasonably be expected to result in the identified harm.

[14] I have taken these approaches in considering the arguments on harm under s. 21(1)(c).

#### *Analysis and finding*

[15] HSC's main concern is with the disclosure of its prices.<sup>8</sup> However, UBC's decision regarding that information is not in dispute in this inquiry because UBC has decided to refuse to disclose it to the applicant under s. 21. Therefore, I have only considered the non-price information here.

[16] HSC expressed concerns about the disclosure of the non-price information as well, saying the bid was "confidential/proprietary and subjected to section 21".<sup>9</sup> It said that the tender in question would be "up for renegotiation/re-award" in July 2017. HSC said that disclosure of the bid will result in undue financial loss to HSC, as it would allow the original applicant, one of its largest competitors, to "gain a competitive edge" in the upcoming RFP process. HSC argued, for example, that the format of its bid, its "style of presentation", cover letter, corporate information and donation submission would be of value to the applicant, regarding not only UBC but also its customers across Canada.<sup>10</sup>

[17] Some of the disputed information comes directly from the publicly available RFP,<sup>11</sup> specifically the headings in HSC's bid and the non-price information in several columns of its table of supplies.<sup>12</sup> The RFP obliged all proponents to submit their prices using a UBC-created table, so there is nothing unique about HSC's table other than its prices (which are not at issue in this inquiry). Similarly, the headings in its bid exactly mirror those in the RFP. I do not see how disclosure of the headings in the bid and of the non-price information in its table of supplies, both of which were taken directly from the RFP, could give HSC's competitors an advantage. HSC does not explain.

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<sup>7</sup> *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875, at para. 43.

<sup>8</sup> That is, the information in columns D, F, and H-M of the table of dental supplies.

<sup>9</sup> Email of October 16, 2017.

<sup>10</sup> HSC's submission of July 10, 2017.

<sup>11</sup> The RFP was on the BC Bid website.

<sup>12</sup> This information is set out in columns A-C, E and G of Attachment D, Item Listing, at pages 34-43 of the RFP. It is part of the information UBC decided to disclose.

[18] The narrative portions of the bid consist primarily of high-level statements of a promotional character which respond to the RFP requirements. HSC did not explain how this information would be of value to its competitors or how they might use it to gain a competitive edge, let alone “harm significantly” its competitive position or “interfere significantly” with its negotiating position.

[19] Previous orders have said that the ordinary meaning of “undue” financial loss or gain under s. 21(1)(c)(iii) includes excessive, disproportionate, unwarranted, inappropriate, unfair or improper, having regard for the circumstances of each case.<sup>13</sup> HSC did not explain how it might suffer a financial loss from disclosure of the information in dispute, still less how any such loss would be “undue”.

[20] HSC also said that disclosure of its bid would place it in breach of contractual obligations with its suppliers, cause “irreparable damage” to its supplier relationships and possibly result in those suppliers taking legal action. HSC did not explain how these anticipated harms could reasonably be expected to flow from disclosure of the non-price information in its bid. This is also not obvious from the records themselves.

[21] HSC also said that UBC asked it to include “features or advantages” which were unique to its proposal and that these items would be damaging to its business if they were disclosed to its competition. HSC did not say what these unique features or advantages are nor how their disclosure could be damaging to its business.

[22] Finally, the information in the bid dates from 2011. HSC did not explain how disclosure of the information in dispute could reasonably be expected to harm its competitive or negotiating position in an RFP process years later.

[23] HSC’s argument and evidence do not persuade me that disclosing the information in dispute could reasonably be expected to result in any of the harms under s. 21(1)(c). HSC has not, in my view, provided objective evidence that is well beyond or considerably above a mere possibility of harm, which is necessary to establish a reasonable expectation of harm under s. 21(1)(c).<sup>14</sup> It has not demonstrated a clear and direct connection between disclosing the information in dispute and the alleged harms. Therefore, I find that HSC has not met its burden of proof and that s. 21(1)(c) does not apply to the information that UBC has

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<sup>13</sup> For example, if disclosure would give a competitor an advantage – usually by acquiring competitively valuable information – effectively for nothing, the gain to a competitor will be “undue.” See, for example, Order 00-10, 2000 CanLII 11042 (BC IPC) at pp. 17-19. See also Order F14-04, 2014 BCIPC 31 (CanLII) at paras. 60-63, for a discussion of undue financial loss or gain in the context of a request for a bid proposal.

<sup>14</sup> *Community Safety*, at para. 54.

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decided to disclose in the bid. UBC is thus not authorized to refuse the applicant access to this information under s. 21(1).

**CONCLUSION**

[24] For reasons given above, under s. 58(2)(a) of FIPPA, I require UBC to give the applicant access to the information in dispute by December 7, 2017. UBC must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records. For clarity, this order applies to the information in HSC's bid that UBC has decided to disclose, but not to the information that UBC has decided to withhold under s. 21(1).

October 26, 2017

**ORIGINAL SIGNED BY**

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Celia Francis, Adjudicator

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