



Order F20-02

INTERIOR HEALTH AUTHORITY

Laylí Antinuk
Adjudicator

January 20, 2020

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Summary: The applicant requested a specific contract between the Interior Health Authority (Interior Health) and a third party for the provision of laundry services. Interior Health responded by providing the contract with some information withheld under ss. 15(1)(l) (disclosure harmful to law enforcement), 21(1) (disclosure harmful to third party business interests) and 22(1) (disclosure an unreasonable invasion of personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant asked the OIPC to review Interior Health’s decision respecting s. 21(1). The adjudicator found that Interior Health was not required to withhold the information under s. 21(1).

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

INTRODUCTION

[1] The applicant requested a copy of a specific contract between the Interior Health Authority (Interior Health) and a third party for the provision of laundry services. Interior Health responded by providing a copy of the contract with some information withheld under ss. 15(1)(l) (disclosure harmful to law enforcement), 21(1) (disclosure harmful to third party business interests) and 22(1) (an unreasonable invasion of personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review Interior Health’s decision respecting s. 21(1). Mediation at the OIPC did not resolve the matter and the applicant requested an inquiry.

[3] The OIPC invited the third party to participate in the inquiry. It chose not to provide inquiry submissions. The applicant and Interior Health also chose not to provide submissions for the inquiry. Therefore, I must make my decision based solely on the content of the contract itself.

ISSUE

[4] In this inquiry, I will decide whether s. 21(1) requires Interior Health to withhold the information in dispute. Interior Health bears the burden of proving that the applicant has no right to access the information.¹ As noted, Interior Health chose not to provide submissions for this inquiry; as such, I presume it believes the contents of the contract itself are adequate to discharge its burden of proof.

DISCUSSION

Background

[5] In March of 2015, Interior Health sponsored the issuance of a request for solutions for the supply of linen and laundry services to various health facilities in the interior of BC. The third party submitted the winning proposal. As a result, Interior Health and the third party entered into a contract.²

Information in dispute

[6] The information in dispute appears on five pages of the 137 page contract for laundry services between Interior Health and a third party laundry services provider.³ All the withheld information is numeric and relates to dollar, percentage or calculation amounts for fees, surcharges, utilization targets or prices.

Harm to third party business interests – section 21

[7] Section 21(1) requires a public body to withhold information if its disclosure could reasonably be expected to harm the business interests of a third party. The relevant portions of s. 21(1) follow:

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

(ii) commercial, financial, labour relations, scientific or technical information of or about a third party,

¹ Section 57(1) of FIPPA.

² I gleaned the information summarized in the background section from p. 1 of the contract (which Interior Health has already disclosed to the applicant).

³ The information in dispute appears on pages 95, 96, 101, 109 and 123 of the contract.

- (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...

[8] The party that bears the burden of proof – in this case Interior Health – must prove all three parts of the following test in order to establish that s. 21(1) applies:

- 1) The information at issue qualifies as the type of information described in s. 21(1)(a).
- 2) The third party supplied the information to Interior Health in confidence as required by s. 21(1)(b).
- 3) The disclosure of the information could reasonably be expected to cause one of the harms listed in s. 21(1)(c).

Type of information – section 21(1)(a)

[9] As noted, Interior Health must establish that all the information in dispute qualifies either as the third party's trade secrets, or its commercial, financial, labour relations, scientific or technical information in order to satisfy the first part of the test. Interior Health has not provided any submissions in this case, meaning that it has not even asserted that the information withheld under s. 21(1) qualifies as the type of information described in s. 21(1)(a). Despite this, I have carefully reviewed the entire contract with particular attention to the information in dispute and will consider whether the withheld information qualifies as the type of information captured by s. 21(1)(a).

[10] For clarity and ease of reference, I have categorized the information in dispute as follows:

- Fuel and energy surcharge amounts;
- Contract rates;
- Example calculations;
- Software rates; and
- Proposed capital budget amounts.⁴

⁴ The surcharge amounts appear in table 4 and table 5 on p. 95 and 96 of the contract. The contract rates appear in table 6 on p. 96 of the contract. The example calculations appear on

For the reasons that follow, I find that all of the information in dispute qualifies as commercial information of or about the third party.

[11] FIPPA does not define the term “commercial information.” However, previous orders have found that commercial information relates to and includes the terms and conditions for the buying, selling or exchanging of goods and services.⁵ For example, a contractor’s fees or the commission rate for a contractor’s services⁶ and prices or amounts contained within a contract all qualify as commercial information.⁷

[12] In my view, all the information in dispute constitutes commercial information of or about the third party because it is all either a price or an amount in the contract at issue. All the information in dispute clearly relates to services provided by the third party in exchange for payment under the contract. Therefore, I am satisfied that the information withheld under s. 21 passes the first part of the s. 21(1) test.

Supplied in confidence – section 21(1)(b)

[13] The analysis under s. 21(1)(b) involves a two-part query.

1. Did the third party⁸ *supply* the information to a public body?
2. If so, did the third party supply the information *in confidence*?

Supplied

[14] As I have described, all the information in dispute is in a contract. Previous orders have stated that parties to a contract do not generally “supply” the information contained within a contract; rather, they negotiate the terms of the contract.⁹ Therefore, information in a contract does not generally meet the test

p. 101 of the contract. The software rates appear in Schedule I at p. 123 of the contract. The proposed capital budget amounts appear in the table in Schedule F at p. 109 of the contract.

⁵ For example, see Order F16-39, 2016 BCIPC 43 at para. 17; and Order F08-03, 2008 CanLII 13321 (BC IPC) at paras. 62-63.

⁶ Order F18-40, 2018 BCIPC 43 at para. 8.

⁷ For examples, see Order F17-50, 2017 BCIPC 55 at para. 10; Order F16-17, 2016 BCIPC 19 (CanLII) at para. 22 and Order F13-20, 2013 BCIPC 27 (CanLII) at para. 14.

⁸ I note that previous orders establish that s. 21(1)(b) is not limited to instances where the information was supplied directly by the third party opposing disclosure: Order F13-30, 2013 BCIPC 39 at para. 23; Order F13-20 *supra* note 7 at para. 20; Order 01-26, 2001 CanLII 21580 (BC IPC) at para. 29. However, given the facts involved in this particular inquiry, I need only consider whether the third party supplied the information in question to Interior Health. Nothing in the evidence before me suggests that any other parties supplied information about the third party to Interior Health.

⁹ For examples, see Order F17-44, 2017 BCIPC 48 at para. 12 and Order 01-39, 2001 CanLII 21593 (BC IPC) at para. 43.

for supplied information under s. 21(1)(b). Two exceptions to this general rule exist:¹⁰

1. If a third party provides immutable information during contract negotiation (i.e. information not susceptible to negotiation, such as fixed overhead or labour costs), it may qualify as supplied information.
2. If the information in the contract could allow someone to accurately infer underlying information that a third party supplied in confidence during negotiations with the public body, it may qualify as supplied information.

[15] I am not satisfied that either of these two exceptions apply here. Interior Health has not asserted that the exceptions apply, nor has it provided evidence or submissions respecting the exceptions. Additionally, nothing within the contract itself suggests to me that the information in dispute was either: (i) immutable information supplied by the third party; or (ii) information that would allow someone to accurately infer underlying information supplied by the third party in confidence.

[16] I have carefully considered the proposed capital budget amounts in particular because, unlike the other categories of withheld information, the contract explicitly states that the third party “proposed” these amounts. Despite this, however, I am not satisfied that this information was not susceptible to negotiation. As stated in Order 01-39:

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 of change but, fortuitously, was not changed.¹¹

[17] In this case, the proposed amounts include an amount the third party agreed to pay Interior Health for the purchase of certain pieces of laundry equipment. I find it unlikely that a purchase price for laundry equipment as between the parties to the contract would not be susceptible to change in the negotiation process. In other words, without evidence or explanation to the contrary, it seems unlikely to me that Interior Health would not have had a say in the price it would accept from the third party for the sale of equipment it owned. Therefore, I find that the parties to the contract negotiated the proposed capital budget as well as the surcharge amounts, the contract rates, the example calculations, and the software rates.

[18] Taking all this into account and given the complete absence of evidence and argument in this case, I am not satisfied that the third party supplied any of

¹⁰ Order 01-39, *ibid* at paras. 45 and 50. Upheld on judicial review in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603. For other examples see: Order F08-22, 2008 CanLII 70316 (BC IPC) at para. 60; and Order F14-28, 2014 BCIPC 31 at paras. 15-18.

¹¹ Order 01-39, *supra* note 9 at para. 46.

the information in dispute in the manner required by s. 21(1)(b). A party's failure to provide evidence to establish the application of s. 21(1) can be fatal to its case.¹² This is precisely what has occurred here. Interior Health bears the burden of proof and its decision not to provide evidence or argument to establish the application of s. 21(1) has proved fatal to its case.

[19] Given my findings with respect to the second part of the s. 21(1) test, I need not consider whether the disclosure of the information in dispute could reasonably be expected to harm the business interests of the third party.

CONCLUSION

[20] For the reasons given above, I make the following order under s. 58 of FIPPA:

1. Interior Health is not required by s. 21(1) to refuse to disclose the information in dispute.
2. Interior Health is required to give the applicant access to the information in dispute.
3. Interior Health must concurrently provide the OIPC registrar of inquiries with a copy of its cover letter and the information identified at item 2 above when it sends that information to the applicant.

[21] Pursuant to s. 59(1), Interior Health must give the applicant access to the information described in paragraph 20, item 2 no later than March 3, 2020.

January 20, 2020

ORIGINAL SIGNED BY

Laylí Antinuk, Adjudicator

OIPC File No.: F18-74207

¹² For example, see Order F17-44, *supra* note 9 at para. 23; Order F17-17, 2017 BCIPC 18 (CanLII) at para. 64; and Order 03-02, 2003 CanLII 49166 (BC IPC) at paras. 119-120; see also *Jill Schmidt v. British Columbia (Information and Privacy Commissioner), et al.*, 2001 BCSC 101 (CanLII) at paras. 37-38.