Order F22-33

VANCOUVER ISLAND HEALTH AUTHORITY

Elizabeth Barker
Director of Adjudication

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Summary: A third-party requested a review of the public body's decision regarding what information in their contract must not be disclosed under s. 21(1) (harm to third party's business interests) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator expanded the scope of the inquiry to decide about all of the information the public body and the third party said must be withheld under s. 21(1), not just the severing in dispute between them. The adjudicator found that the public body was not required to refuse access to any part of the contract under s. 21(1) and ordered the public body to disclose it to the access applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 7(1), 7(6), 8, 9, 21(1), 21(1)(a), 21(1)(b), 21(1)(c)(i), 23, 24, 52(1), 52(2), 57(1), 57(3)(b), 58(2) and 58(4).

INTRODUCTION

[1] An applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to the parking management contract between Vancouver Island Health Authority (Island Health) and Robbins Parking Service Ltd. (Robbins). Island Health notified Robbins and sought its views under s. 23 of FIPPA. Robbins consented to disclosure of only some parts of the contract. After considering Robbins' representations, Island Health informed Robbins that it had decided to give the applicant access to parts of the contract, but withhold other parts under s. 21(1) (harm to third party business interests) of FIPPA.[1]

[1] In relation to an access request under FIPPA, a "third party" is any person, group of persons or organization other than the person who made the request or a public body. See Schedule 1 of FIPPA for definitions.

[2] Robbins did not completely agree with how Island Health had decided to sever the contract and requested the Office of the Information and Privacy Commissioner (OIPC) conduct a review.

[3] OIPC mediation did not resolve the dispute between Island Health and Robbins, and Robbins requested the matter proceed to inquiry under s. 56 of FIPPA. The OIPC notified the applicant of Robbins' request for review and invited him to provide submissions in the inquiry.

[4] Robbins and the applicant provided submissions in the inquiry. Island Health did not provide a submission, other than to say, "Island Health has decided to remain neutral in this matter and do [*sic*] not have a position with regards to the section 21 severing at issue."[2]

The Record

[5] The record at issue is a 75-page agreement (Contract) between Island Health and Robbins dated August 17, 2016. Under the Contract, Robbins agrees to operate and administer pay parking at hospitals, medical centers and regional mental health facilities managed by Island Health.

[6] For the purposes of the inquiry, Island Health and Robbins each provided me with their own version of how the Contract should be severed under s. 21(1). They have both partially severed the record and their severing is almost identical.[3]

Preliminary Matter

[7] Island Health and Robbins agree on most of the s. 21(1) severing and only a small amount of information is in dispute between them in this inquiry. The sole issue in Robbins' request for review is whether s. 21(1) applies to that small amount of information in dispute between it and Island Health.

[8] However, after reviewing the parties' submissions and the severing in the Contract, I informed the parties that I proposed to expand the scope of the inquiry to decide about all of the information that Island Health and Robbins say must be withheld under s. 21(1), even where they agree. Robbins and the applicant did not object. Island Health objected because the expanded scope places a burden on it to justify its application of s. 21(1) to the Contract and because the applicant did not request a review under s. 52.[4]

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[2] Island Health's May 9, 2022 letter to OIPC registrar of inquiries.
[3] The severing is on nine pages of the Contract: pp. 29-34, 40, 46 and 51. They disagree about the severing on pp. 32, 33, 34, 40 and 46.
[4] I wrote to the parties on June 9, 16 and 27, 2022. Only Island Health replied: on June 15, 20 and 27, 2022.

[9] For the reasons which I will set out below, I resolved to proceed with the expanded scope. I gave Island Health an opportunity to provide an additional submission about its application of s. 21(1) to the Contract but it declined to do so. It said, "We have decided not to provide a submission nor take a formal position in this inquiry."[5]

[10] In order to explain my reasons for expanding the scope of this inquiry, it is necessary to first give some background about what FIPPA requires in cases involving a third-party request for review under s. 52(2).

[11] When an applicant requests access to a record under s. 5(1) of FIPPA, and the public body has cause to believe the record contains information that engages a third party's interests, the notification provisions in ss. 23 and 24 apply.

> **Notifying the third party**
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> 23 (1) If the head of a public body intends to give access to a record that the head has reason to believe contains information that might be excepted from disclosure under section 18.1, 21 or 22, the head must give the third party a written notice under subsection (3).
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> (2) If the head of a public body does not intend to give access to a record that contains information excepted from disclosure under section 18.1, 21 or 22, the head may give the third party a written notice under subsection (3).
>
> (3) The notice must
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> (a) state that a request has been made by an applicant for access to a record containing information the disclosure of which may affect the interests or invade the personal privacy of the third party,
> (b) describe the contents of the record, and
> (c) state that, within 20 days after the notice is given, the third party may, in writing, consent to the disclosure or may make written representations to the public body explaining why the information should not be disclosed.
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> (4) When notice is given under subsection (1), the head of the public body must also give the applicant a notice stating that
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> (a) the record requested by the applicant contains information the disclosure of which may affect the interests or invade the personal privacy of a third party,
> (b) the third party is being given an opportunity to make representations concerning disclosure, and

[5] Island Health's June 27, 2022 letter to OIPC. Given that response, I concluded it was not necessary to seek a reply from the applicant or Robbins.

> (c) a decision will be made within 30 days about whether or not to give the applicant access to the record.
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> **Time limit and notice of decision**
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> 24 (1) Within 30 days after notice is given under section 23 (1) or (2), the head of the public body must decide whether or not to give access to the record or to part of the record, but no decision may be made before the earlier of
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> (a) 21 days after the day notice is given, or
> (b) the day a response is received from the third party.
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> (2) On reaching a decision under subsection (1), the head of the public body must give written notice of the decision to
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> (a) the applicant, and
> (b) the third party.
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> (3) If the head of the public body decides to give access to the record or to part of the record, the notice must state that the applicant will be given access unless the third party asks for a review under section 53 or 63 within 20 days after the day notice is given under subsection (2).

[12] Section 7 provides timelines for the public body's response. Sections 7(1) and (6) are relevant in this case.

> **Time limit for responding**
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> 7 (1) Subject to this section and sections 23 and 24 (1), the head of a public body must respond not later than 30 days after receiving a request described in section 5 (1).
> …
> (6) If a third party asks under section 52 (2) that the commissioner review a decision of the head of a public body, the 30 days referred to in subsection (1) do not include the period from the start of the day the written request for review is delivered to the commissioner to the end of the day the commissioner makes a decision with respect to the review requested.

[13] Section 8 says that in a response under s. 7, the public body must tell the applicant whether or not access will be given and if access is denied, the reasons for the refusal and the provisions of FIPPA on which the refusal is based. Section 9 says how a public body must give access to the applicant if it decides to give access.

[14] Section 52 provides applicants and third parties the right to request the commissioner review a public body's decision.

> **Right to ask for a review**
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> 52 (1) A person who makes a request to the head of a public body, other than the commissioner or the registrar under the *Lobbyists Transparency Act*, for access to a record or for correction of personal information may ask the commissioner to review any decision, act or failure to act, other than to require an application fee, of the head that relates to that request, including any matter that could be the subject of a complaint under section 42 (2).
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> (2) A third party notified under section 24 of a decision to give access may ask the commissioner to review any decision made about the request by the head of a public body, other than the commissioner or the registrar under the *Lobbyists Transparency Act*.

[15] In Decision F08-07, former Commissioner Loukidelis said that s. 7(6) does not suspend a public body's obligation to respond to an access request pending a third-party request for review process under s. 52(2). A public body should not delay giving the applicant a decision along with the undisputed parts of the records. He said:

> On this interpretation a public body would still be required to make a decision and provide a response to the applicant about application of other disclosure exceptions, such as ss. 15, 17 and 22. Even where a third party and public body disagree on s. 21 in part, such a response to the applicant would cover the application of s. 21 where both the public body and third party agree. In such a case, the public body would not release portions of the requested records that are the subject of a third-party notice and any third-party requested review. These decisions by the public body would trigger both the applicant's right to request a review under s. 52(1) and the third party's right to request a review under s. 52(2) so that, in the event reviews are sought by both, all of the issues relating to proposed severing or release could be dealt with in one inquiry.
> …
> Section 7(6) is, as noted, triggered only when a third party requests a review. The decision to which s. 7(6) refers is the public body's decision under s. 24 to disclose information that the third party asserts should be withheld under s. 22 or s. 21. Setting aside applicant-initiated fee-related reviews under s. 7(5), the public body's s. 7(1) obligation to respond to an applicant is only limited by ss. 23 and 24 of FIPPA. The public body must, in other words, respond to an applicant by providing access to those parts of the requested records that are neither excepted from disclosure nor the subject of a third-party request for review flowing from the ss. 23 and 24 process. Put another way, the portion of the requested records to which the ss. 23 and 24 process applies is effectively carved out from the other responsive information until the third-party notice obligations are spent and, where a third-party review is requested, until mediation resolves the issue or an order is made under s. 58 in respect of that review. In such a case, the public body is telling the third party that it has decided to release that

> information, but it cannot do so until these processes are spent without rendering ss. 23 and 24 meaningless.[6]

[16] Decision F08-07 was judicially reviewed and the Supreme Court of British Columbia found that the commissioner's interpretation of s. 7(6) was reasonable. Justice Grauer said:

> Reading these subsections together, it is reasonable to conclude that those records or parts of a record that are not subject to sections 23 and 24(1) remain subject to the 30 day response provision with which s. 7 opens. Further, it is reasonable to conclude that where the records or parts of a record are subject to sections 23 and 24(1), then once the process contemplated by those sections is complete, those portions as to which there is no dispute to be resolved by mediation or inquiry should then be produced. Those records or parts of a record that are the subject of the third party review contemplated by subsection (6) will attract that subsection's further extension.
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> …
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> Although the public body may be required to respond more than once, this avoids the risk of bifurcated inquiries and lengthy delays that flows from postponing the whole of the response until the s. 52(2) inquiry is complete. As noted by the Commissioner, once the public body responds following completion of the s. 52(2) inquiry, the applicant may well request a s. 52(1) inquiry, preventing the Commissioner from disposing of all of the issues under s. 58.
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> The fact is that on either interpretation, there arises some risk of the process being extended. All else being equal, the interpretation that would allow for prompt access to uncontroversial information should be preferred over the interpretation that would delay all access to the very end of the process.[7]

[17] I agree with the above interpretation of s. 7(6). Consequently, the process that a public body must follow in a case such as the present one is as follows:

- When an applicant requests access to a record and the public body has cause to believe the record contains information that engages a third party's interests, the public body must comply with the notification provisions in s. 23.

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[6] Decision F08-07, https://www.oipc.bc.ca/decisions/148, at paras. 32 and 41. Decision upheld by *British Columbia (Labour and Cititzens' Services) v. British Columbia (Information and Privacy Commissioner)* 2009 BCSC 1700.

[7] *British Columbia (Labour and Cititzens' Services) v. British Columbia (Information and Privacy Commissioner)* 2009 BCSC 1700 at paras. 40 and 43-44.

- Within 30 days after notice is given under s. 23, the public body is required to decide, under s. 24(1), whether or not to give access to the record or to part of the record.
- Section 24(2) requires the public body give both the applicant and the third party written notice of the decision made under s. 24(1).
- If the third party requests a review of the s. 24(1) decision, under s. 52(2), then s. 7(6) is triggered.
- Section 7(6) suspends the usual 30-day timeline under s. 7(1) to respond to the applicant's request – but only for the parts of the responsive records that are the subject of the s. 24(1) decision and the third party's s. 52(2) request for review. The public body still must comply with ss. 7(1) and 8 by responding to the applicant's request regarding the other parts of the responsive records within 30 days (unless the time for responding is otherwise suspended under ss. 7(2) - (5)). Thus, the public body must give the applicant a decision about which parts of the records the public body is refusing to disclose and why, as well as provide the applicant with access to the parts of the records that the public body has decided are not excepted from disclosure or the subject of the third-party request for review flowing from the ss. 23 and 24 process.
- When the public body gives the applicant a decision and the partially severed records as required by ss. 7(1), 8 and 9, it triggers the applicant's right to request a review under s. 52(1).
- In the event that reviews are requested by both the third party and the applicant, the reviews can be dealt with in tandem.

[18] In the present case, Island Health notified the applicant of the outcome of its s. 23 consultation with Robbins on November 13, 2019. It told him that it had decided to give him partial access to the Contract and it also said, "We will respond to you on December 12, 2019 unless the Third Party has requested a review with the OIPC."[8] Robbins, of course, requested a review under s. 52(2) which led to the present inquiry. It is almost three years since the applicant made his request, and Island Health has not yet provided him a response under s. 8.

[19] Island Health was required, back in 2019, to give the applicant a response under s. 8 and a copy of the parts of the Contract that are not in dispute between Island Health and Robbins or otherwise being withheld under FIPPA exceptions. To date, the applicant does not have a decision from Island Health that could trigger his right to request a review under s. 52(1). In my view, the way Island Health proceeded deprived the applicant of the opportunity to request a timely review under s. 52(1) and to have it decided at the same time as Robbins' request for review.

[8] Island Health's November 13, 2019 letter to applicant.

[20] Based on how Island Health has severed the Contract, it is clear that Island Health intends to refuse the applicant access to parts of the Contract under s. 21(1).[9] It is also clear from the applicant's submission that he does not think s. 21(1) applies at all. Therefore, it is reasonable to conclude that Island Health's response to the applicant's access request – when it is eventually sent - will likely trigger a request for review under s. 52(1). In my view, given the time that has passed since the applicant was entitled to a response from Island Health, it is not fair or a good use of resources to put-off deciding if s. 21(1) also applies to the parts of the Contract that Island Health says it applies to.

[21] For those reasons, I have decided that the information in dispute in this inquiry is the information that Island Health and Robbins have indicated by their respective severing of the Contract must be withheld under s. 21(1). I will make a decision about whether s. 21(1) applies to all of that information.

ISSUE

[22] The issue to be decided in this inquiry is whether the information in dispute must be withheld under s. 21(1) of FIPPA.

[23] Sections 57(1) and 57(3)(b) say which party has the burden of proof in this inquiry. Robbins has to prove that s. 21(1) applies to the small amount of information that Island Health does not agree with Robbins should be withheld under s. 21(1). Island Health must prove that s. 21(1) applies to the information it thinks should not be disclosed to the applicant under that exception.

DISCUSSION

Harm to Third Party Business Interests, s. 21(1)

[24] 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 following parts of s. 21(1) are engaged in this case:

> 21(1) The head of a public body must refuse to disclose to an applicant information
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> (a) that would reveal
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> …
>
> (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

[9] There is no indication in any of Island Health's communications before me that it has any intention to refuse access to the Contract under any FIPPA exceptions other than s. 21(1).

> (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,
>
> …

[25] The principles for applying s. 21(1) are well established. All three of the following criteria must be met in order for s. 21(1) to apply:

- Disclosure would reveal one or more of the types of information listed in s. 21(1)(a);
- The information was supplied, implicitly or explicitly, in confidence under s. 21(1)(b); and
- Disclosure of the information could reasonably be expected to cause one or more of the harms in s. 21(1)(c).

[26] As previously identified, Island Health makes no submission about how s. 21(1) applies other than to say that it does not have a position with regards to the s. 21(1) severing at issue. It does not say if it agrees with or adopts Robbins' submissions.

[27] Robbins submits that the information that would be disclosed is financial information, the information was supplied in confidence and disclosure could reasonably be expected to harm Robbins' competitive position or interfere significantly with its negotiating position under s. 21(1)(c)(i).

[28] The applicant says he is not satisfied that s. 21(1) applies. He submits that taxpayers have a right to know the details of how tax dollars are paid out to corporations that provide goods and services to government. He also says the information is not trade secrets.

Type of information, s. 21(1)(a)

[29] FIPPA does not define the terms "financial" and "commercial" information. However, past orders have said that "commercial" information relates to commerce, or the buying, selling, exchanging or providing of goods and services, but the information does not need to be proprietary in nature or have an independent monetary or marketable value.[10] Orders have also said that "financial" information includes information about money and its uses, for instance, prices, expenses, hourly rates, contract amounts and budgets.[11]

[10] Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17; F20-23, 2020 BCIPC 27 at para. 10; F19-03, 2019 BCIPC 04 at para. 43.
[11] For example: Order F20-41, 2020 BCIPC 49 at paras. 21-22; Order F20-47, 2020 BCIPC 56 at paras. 100-101; Order F18-39, 2018 BCIPC 42 at para. 19.

[30] The information Island Health and Robbins withheld is exclusively in the Contract's Appendix A (Contract Price) and Appendix C (Scope of Services). Most of the withheld information is dollar amounts Island Health will pay Robbins as well as the details of their exchange of money for goods and services. Specifically, the information is as follows:

- Management fees and enforcement fees per hospital site;
- Cost of optional future services (e.g., five-shift permit books for staff);
- Estimated additional operating costs for services that are not included in management and enforcement fees (e.g., floor de-icing);
- Maximum purchase price for required parking equipment (e.g., ticket meters);
- Hourly charge for parking ambassador service and abandoned bicycle and lock removal service;
- Approximate total management fee for Royal Jubilee Hospital's parking services and the approximate capital expenditure required to convert its parking from staffed to automated;
- A list of prices for consumable items, including volume discounts.
- How violation ticket revenue will be split between Island Health and Robbins (i.e., the percentage split);
- How many times per day parking enforcement staff will visit each site and the estimated hours they will spend at each site.

[31] I find that all of the severed information is a mix of commercial and financial information of or about Robbins, so s. 21(1)(a)(ii) applies.

Supplied in confidence, s. 21(1)(b)

[32] The information that I have found is commercial and financial information must have been supplied, implicitly or explicitly, in confidence in order for s. 21(1)(b) to apply. The first thing to consider is whether the information was "supplied" to Island Health. Only if it qualifies as information that was supplied, is it necessary to decide if it was supplied "in confidence".

[33] I find that the information that has been severed in this case is in a contract. Previous BC orders have consistently said that information in an agreement or contract between two parties is ordinarily negotiated and does not qualify as information that has been supplied to the public body.[12] Information

[12] Order 01-39, 2001 CanLII 21593 (BC IPC) at paras. 43-50, upheld on judicial review in *Canadian Pacific Railway v British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603. See also, Order 04-06, 2004 CanLII 34260 (BC IPC) at paras. 45-46; Order 01-20, 2001 CanLII 21574 (BC IPC) at paras. 81-84; Order F19-03, 2019 BCIPC 04 at para. 48; Order F15-53, 2015 BCIPC 56 at para. 13; Order F15-10, 2015 BCIPC 10, at paras. 22-24.

may be delivered by a single party or the contractual terms may be initially drafted by only one party, but that information or those terms are negotiated and not "supplied" if the other party must agree to them in order for the agreement to proceed.[13] The intention of s. 21(1)(b) is to protect a third party's information that is not susceptible to change during the give and take of negotiation. It does not protect information and terms in an agreement that could have been altered during negotiation but, fortuitously, were not because the other party agreed to them.[14]

[34] Past orders have recognized two exceptions to this general rule. Information in an agreement or contract may qualify as supplied information if:

1. the information is relatively immutable or not susceptible to alteration during negotiation and it was incorporated into the agreement unchanged; or

2. the information would allow an accurate inference about underlying confidential information the third party "supplied" that is not expressly contained in the contract.[15]

[35] Robbins submits the information was implicitly supplied in confidence because it came from Robbins' proposal and the request for proposal (RFP) process. Robbins says that the information "cannot be taken from one confidential document (the winning proposal) and be entered into another document (the Agreement) and be deemed no longer confidential."[16]

[36] Robbins quotes an excerpt from Island Health's RFP, which says that if a proponent, when preparing its proposal, possesses or has access to information that is confidential to Island Health and is not available to other proponents it is a conflict of interest. Robbins argues that if the information in dispute in this case were disclosed, it would be available to all proponents who engage in the next RFP process and they would all be in a conflict of interest. This would violate the terms of, and entirely undermine, Island Health's RFP process.

[37] What Robbins says about how the information in dispute came from its proposal is not supported by a copy of its proposal (Robbins did not provide a copy). However, even if there were that kind of evidence and it showed that the terms of the proposal were the same as or similar to the Contract more explanation would be needed to establish the terms were not susceptible to

[13] Order 01-39, *Ibid* at para. 44.
[14] Order 01-39, *supra* note 12.
[15] Order 01-39, *Ibid*.
[16] Robbins' initial submission at p. 2.

change during negotiation of the Contract. I find the following statement by former Commissioner Loukidelis in Order 03-15 applies here:

> It would hardly be surprising that terms in a contract arrived at resemble, or are even the same as, terms in the contractor's proposal. It might well be more unusual for the contract arrived to be completely out of step with the terms of the contractor's proposal. A successful proponent on an RFP may have some or all of the terms of its proposal incorporated into a contract. As has been said in past orders, there is no inconsistency in concluding that those terms have been "negotiated" since their presence in the contract signifies that the other party agreed to them.[17]

[38] I have also considered whether any of the withheld information is the type of information that was relatively immutable or not susceptible to alteration during negotiation and was incorporated into the agreement unchanged. For instance, Robbins says, "Regarding equipment and consumable costs, Robbins has negotiated and secured preferential pricing from our suppliers. These prices are negotiated with our suppliers' understanding that these prices are kept confidential."[18]

[39] Robbins does not explain where exactly the preferential pricing it pays its suppliers for equipment and consumable costs is revealed. I can see nothing in the Contract that shows what prices Robbins pays its suppliers or even who those suppliers are. I can only see the prices that Island Health agreed to pay Robbins. There is one severed chart that shows a "List Price" for consumable items next to a lower volume price called the "Island Health Price", but it is not apparent that the Island Health price is the same as, or would reveal, the price Robbins pays its suppliers. Robbins does not satisfactorily explain. Also, it provides no evidence about how, or if, profit margins were factored into the Contract pricing.

[40] While Robbins also says the withheld information includes its hourly labour rates and its employee benefit burden rate, it does not specify where that information is in the Contract. Based on my review of the Contract, none of the severed information fits that description. I can see no information that could properly be characterized as "supplied" information because it reveals Robbins' fixed cost that were not subject to discussion, negotiation and possible change before they were included in the Contract.

[41] Robbins also says that access to the severed enforcement fee information would allow one to do simple calculations that would reveal information about Robbins' expenses. Robbins explains:

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[17] Order 03-15, 2003 CanLII 49182 (BC IPC) at para. 66.
[18] Robbins' initial submission at p. 3.

> Enforcement Fees are collected to cover our expenses related to enforcement (patrol labour, vehicle supply and costs, violation issuance equipment and software and systems, supplies, etc.). These fees ought to be redacted as they are based on the number of hours which are spent monitoring the particular Island Health facilities. Our patrol hours are known and unredacted.[19]

[42] There is a redacted table in the Contract that shows how many enforcement visits the parties agreed Robbins will make and how many hours it will spend, enforcing parking at each site.[20] I can appreciate how one could divide the annual dollar amount of the enforcement fee per site by the number of hours Robbins spends enforcing parking at that site to calculate a dollar per hour figure. However, I cannot see how that figure would reveal Robbins underlying fixed cost for labour, supplies and the other things Robbins says. That is because there is no information about what profit-margin Robbins may have built into the pricing agreed to in the Contract. One would need to know that before one could calculate fixed labour and other costs based on the fee Island Health agreed to pay Robbins for parking enforcement services.

[43] I also thought about whether the severed information would allow for accurate inferences about underlying confidential information that Robbins may have supplied that is not expressly contained in the Contract. If Robbins felt that was a possibility, it has not adequately explained. I cannot see how such inferences could be drawn based on the information in the Contract.

[44] In conclusion, after having considered the Contract and the parties' submissions and evidence, I am not persuaded that the severed information was "supplied" to Island Health. For that reason, s. 21(1)(b) does not apply and there is no need to decide if the information was supplied "in confidence".

[45] As explained above, all three elements of s. 21(1) must be met in order to refuse access under s. 21(1). Island Health and Robbins have established that s. 21(1)(a) applies, but not s. 21(1)(b), so technically that is the end of the matter. Nonetheless, I will consider Robbin's arguments about s. 21(1)(c) for the sake of completeness.

Reasonable Expectation of Harm, s. 21(1)(c)

[46] Deciding if s. 21(1)(c) applies requires deciding if disclosure of the information in dispute "could reasonably be expected to" cause the type of harm listed in s. 21(1)(c). While Island Health and Robbins do not need to prove on a balance of probabilities that the harm will occur, they must establish that

[19] Robbins' reply submission at p. 1.
[20] In their respective copies of the Contract they provided for my review Island Health has completely withheld the table, which is on p. 46 of the Contract, but Robbins did not sever it at all.

disclosure will result in a risk of harm that is well beyond the merely possible or speculative.[21]

[47] Robbins submits that s. 21(1)(c)(i) applies because disclosure of the withheld information would harm Robbins' competitive position and interfere significantly with its negotiating position with Island Health and also "other unrelated parties".[22] It explains as follows:

> Competing parking management service companies could use this information to gain a significant advantage in future responses to Island Health RFPs and any other institutions seeking similar parking management services.
>
> If a competitor of Robbins knew our proposed management fee, they could bid lower to win the contract. If this information were released, Robbins would be forced to bid lower than the last proposal, damaging our financial opportunities.
>
> Revealing this information would not only hurt Robbins' competitive and negotiating position with Island Health but also with other parking facilities of similar scope. If our competitors knew our financial information supplied to Island Health, they could use this information when bidding on contracts for parking management services on other properties. This information includes our proposed management fees, enforcement fees, services fees, operating costs, and violation fees.[23]

[48] For the reasons already provided, I do not accept that disclosing the disputed information would reveal Robbins "proposed" management fee. The record at issue here is a negotiated contract – it is not the proposal Robbins submitted in response to the RFP. Robbins has not provided a copy of its RFP proposal or similar evidence to show what it actually proposed.

[49] Furthermore, the Contract is dated August 2016 and the negotiated terms reflect the market prices and conditions of that time. Robbins did not say how current or future costs and market conditions for parking management services compare to what they were six years ago. There was also no information about how likely it is that the scope of future RFPs will be the same as the scope of the RFP that resulted in the Contract. It does not seem reasonable to expect Robbins's competitors will submit proposals that reflect 2016 market conditions rather than the scope of the project and the market conditions and costs at the relevant future point in time. What Robbins says simply does not satisfactorily explain why a competitor would choose to provide parking management services at 2016 rates without any concern for the relevant current conditions.

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[21] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.
[22] Robbins' initial submission at p. 3.
[23] Robbins' initial submission at p. 3.

[50] I recognize that access to the withheld information would shed light on what Island Health and Robbins were prepared to accept in order to reach mutually agreeable terms back in 2016. While that may heighten competition in future RFPs, I do not find that to be harm under s. 21(1)(c)(i). I agree with the many previous BC orders that have said the disclosure of existing contract pricing and related terms that results in mere heightening of competition for future contracts is not significant harm or significant interference with competitive or negotiating positions under s. 21(1)(c)(i).[24]

[51] Robbins also submits that revealing the preferential pricing it pays its suppliers for equipment and consumable items would damage its relationship with those suppliers because it would reveal that Robbins "cannot maintain this important confidentiality."[25] However, as previously stated above, I am not persuaded the withheld information reveals this kind of fixed cost information. Further, what Robbins says about this is not sufficiently detailed to explain how there is a clear and direct connection between disclosure of the information and the harm Robbins alleges.

[52] In conclusion, I find that there is no objective evidentiary basis for concluding that disclosure of the withheld information could reasonably be expected to harm significantly Robbins' competitive position or interfere significantly with its negotiating position under s. 21(1)(c)(i).

Summary

[53] In summary, I find that the information in dispute is financial and commercial information of or about Robbins and s. 21(1)(a) applies. However, Island Health and Robbins have not satisfactorily established that the information was supplied to Island Health under s. 21(1)(b) or that disclosing the information could reasonably be expected to cause harm under s. 21(1)(c) as alleged.

CONCLUSION

[54] For the reasons given above, under ss. 58(2) and 58(4) of FIPPA, I make the following order:

1. Island Health is not required to refuse access to the Contract under s. 21(1) of FIPPA.

[24] For example: Order F06-20, 2006 CanLII 37940 (BC IPC) at para. 20; Order F07-15, 2007 CanLII 35476 (BC IPC) at para 43; Order F15-53, 2015 BCIPC 56 at para. 28; Order F17-41, 2017 BCIPC 45 at para. 74.
[25] Robbins' initial submission at p. 3.

2. Island Health is required to give the applicant access to all of the Contract.

3. When Island Health complies with item 2 above, it is must concurrently provide the OIPC registrar of inquiries with a copy of the Contract and any accompanying cover letter sent to the applicant.

[55] Pursuant to s. 59(1) of FIPPA, Island Health is required to comply with this order by **August 19, 2022**.

July 7, 2022

ORIGINAL SIGNED BY

Elizabeth Barker, Director of Adjudication

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