Order F22-55

VANCOUVER COASTAL HEALTH AUTHORITY

Jay Fedorak
Adjudicator

November 8, 2022

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Summary: An applicant requested copies of all current contracts for laundry services between K-Bro Linen Systems (K-Bro) and the Vancouver Coastal Health Authority (VCHA). VCHA responded to the request by withholding some information under s. 21(1) (harm to the financial interests of a third party). The adjudicator found that s. 21(1) did not apply and ordered VCHA to disclose the information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act* RSBC 1996 ch. 165, s. 21(1).

INTRODUCTION

[1] An applicant requested copies of all current contracts for laundry services between K-Bro Linen Systems (K-Bro) and the Vancouver Coastal Health Authority (VCHA). VCHA notified K-Bro of the request and the information it was proposing to disclose to the applicant. K-Bro requested a review of VCHA's decision by the Office of the Information and Privacy Commissioner (OIPC). As the result of mediation, VCHA agreed to withhold some of the information under s. 21(1) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) on the grounds that disclosure would harm the financial interests of K-Bro. It disclosed the remaining information to the applicant.

[2] The applicant then requested the OIPC to review the decision of VCHA to withhold information under s. 21(1). Mediation was unable to resolve the matter and the applicant requested that it proceed to an inquiry.

[3] VCHA made no submissions in support of the application of s. 21(1), leaving K-Bro the responsibility to establish the application of s. 21(1) to the information at issue.

ISSUE

[4] The issue to be decided in this inquiry is whether s. 21(1) requires VCHA to withhold the information at issue.

[5] Under s. 57(1), VCHA has the burden of proving that the applicant has no right of access to the information it withheld under s. 21(1). In this case, the VCHA made no attempt to meet its burden of proof, as it made no submissions and did not even take a position as to whether s. 21(1) applied. Therefore, I will consider the submissions of K-Bro and the applicant.

DISCUSSION

[6] **Background –** This case is the latest in a series of requests for copies of contracts for support services with health authorities in British Columbia since the government of British Columbia authorized the contracting out of these services 20 years ago. There has been one previous request for copies of contracts between K-Bro and VCHA that resulted in a review by the OIPC. It was the subject of an order, and a judicial review, which both found that s. 21(1) did not apply to the information in question.[1]

[7] **Records at issue –** The records include a series of agreements, amendments to agreements, and notices of extension of agreements relating to the provision of linen services.

[8] **Information at issue –** The information at issue includes the following: the name and description of a certain type of service; prices for items; cost threshold required for certain services to be provided; circumstances that would result in a change of costs; a fixed fee for in house laundry services; baseline utilization rates determined by the parties; contract price and pricing schedule; hypothetical numerical information and projections; defined service requirements; statement of demand outcomes against performance measures; satisfaction surveys; survey methodology calculation; reasons for price adjustments; subject of discussion between the parties on contract price for an extension; what parties have agreed with respect to a contract price; agreement with respect to the minimum wage; breakdown of contract costs; agreement of both parties with respect to a business initiative fund; incentive program details for the parties to establish together; value threshold for disputes subject to arbitration; required level of insurance of different types of insurance.

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[1] Order F10-28, 2010 BCIPC 40 (CanLII); *K-Bro Linen Systems Inc. v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 904.

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

[9] 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
>
> (i) trade secrets of a third party, or
> (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
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> (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,

[10] The principles for applying s. 21(1) are well established.[2] 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).

[11] As I noted above, VCHA 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 K-Bro's submissions.

[12] K-Bro submits that the information that would be disclosed is trade secrets and financial information; the information was supplied in confidence; and disclosure could reasonably be expected to harm its competitive position or interfere significantly with its negotiating position under s. 21(1)(c)(i).

[2] Order F22-33, 2022 BCIPC 37 (CanLII), para. 25.

[13] The applicant disagrees with the application of s. 21(1) and cites Order F10-28 and the subsequent decision of the judicial review as reasons why it should not apply.[3]

> *Part 1: Trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of or about a third party,*

[14] FIPPA defines "trade secret" as:

> information, including a formula, pattern, compilation, program, device, product, method, technique or process, that
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> (a) is used, or may be used, in business or for any commercial advantage,
>
> (b) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use,
>
> (c) is the subject of reasonable efforts to prevent it from becoming generally known, and
>
> (d) the disclosure of which would result in harm or improper benefit.

[15] FIPPA does not define the terms "financial" and "commercial" information. Past orders have found that "commercial" information relates to the exchanging or providing of goods and services.[4] Orders have also found that "financial" information includes prices, expenses, hourly rates, contract amounts and budgets.[5]

[16] I have described the information at issue above. It relates to the provision of goods and services by K-Bro to VCHA and the costs that VCHA has agreed to pay for those good and services. It also includes the details of financial contributions of both parties for proposed incentive programs. I find that all of the information constitutes commercial or financial information of K-Bro in accordance with s. 21(1)(a)(ii). Therefore, the information meets the first part of the three-part test.

[17] K-Bro also insists that information concerning a certain service described in the agreements constitutes trade secrets in accordance with s. 21(1)(a)(i). As I have determined that s. 21(1)(a)(ii) applies, I do not need to determine whether

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[3] Applicant's response submission, paras. 7-13 citing Order F10-28 and *K-Bro Linen Systems Inc. v. British Columbia (Information and Privacy Commissioner)*.
[4] Order 01-36, 2001 BCIPC 21590 (CanLII), para. 17; F20-23, 2020 BCIPC 27, para. 10; F19-03, 2019 BCIPC 04, para. 43.
[5] For example: Order F20-41, 2020 BCIPC 49, paras. 21-22; Order F20-47, 2020 BCIPC 56, paras. 100-101; Order F18-39, 2018 BCIPC 42. para. 19.

s. 21(1)(a)(i) also applies. This is consistent with the findings of the judicial review, cited above, of the previous order involving an agreement between K-Bro and VCHA. Whether information constitutes a trade secret or merely commercial/financial information does not affect the application of s. 21(1). There is no additional or "special" protection for trade secrets as distinct from other commercial of financial information.

Part 2: Supplied in confidence

[18] K-Bro must have supplied, implicitly or explicitly, in confidence the information that I have found is commercial and financial information for s. 21(1)(b) to apply. The first consideration is whether the information was "supplied" to VCHA. It is only in the event that I find that the information was supplied, that I will need to determine whether it was supplied "in confidence".

[19] I find that the information that VCHA has withheld in this case is part of a series of contractual agreements and amendments to agreements. Previous BC orders have consistently found that information contained in an agreement or contract between two parties is information that has been subject to negotiation by, and agreement of, both parties. Therefore, information in a contract does not constitute information that one of the parties has supplied to the other.[6]

[20] Past orders have recognized two exceptions to this general rule. Information in an agreement or contract may qualify as supplied 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.[7]

[21] One of the parties may propose certain terms, conditions, or costs of services. However, as long as the other party has the discretion to accept, reject or modify those terms conditions or costs, the information does not qualify as supplied for the purposes of s. 21(1)(b).[8] It is not enough to say that the information was not subject to negotiation. The information must be "non-

[6] Order 01-39, 2001 BCIPC 21593 (CanLII), 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 BCIPC 34260 (CanLII), paras. 45-46; Order 01-20, 2001 BCIPC 21574 (CanLII), paras. 81-84; Order F19-03, 2019 BCIPC 04 (CanLII), para. 48; Order F15-53, 2015 BCIPC 56 (CanLII), para. 13; Order F15-10, 2015 BCIPC 10 (CanLII), paras. 22-24: Order 10-28, upheld on judicial review in *K-Bro Linen Systems Inc. v. British Columbia (Information and Privacy Commissioner*.
[7] Order 01-39.
[8] Order 01-39, para. 44

negotiable" in the sense that it is inherently immutable. It is not a matter whether the third party does or does not have the will to negotiate the information. It must be the case that the third party could not change the information, even if it wanted to. This could include reference to fixed costs that the service provider must pay to its own suppliers, or factual information, such as details of the service provider's audited accounts. It could include the educational and employment history of one of its employees. Nevertheless, this provision does not apply to terms, conditions or costs that the service provider proposed, and the public body fortuitously accepted without change.[9] Nor does it include proposed terms that the service provider chooses to refuse to negotiate, as long as the public body has the ability to reject those terms or terminate the negotiations.

[22] K-Bro submits that the information at issue does not merely constitute "negotiated contract terms" and that this case is distinguishable from other orders that have found similar information not to be subject to s. 21(1).[10] K-Bro asserts that:

> None of the information pertaining to K-Bro's informational assets, including its service delivery model, pricing and financial information, and other business information, was susceptible to change since K-Bro does not negotiate about this information.[11]

[23] K-Bro also submits that disclosure of the information at issue would enable parties to make accurate inferences about K-Bro's confidential and proprietary information.[12]

[24] The applicant submits that the submissions of K-Bro are contradictory. K-Bro admits that the terms are "negotiated documents in the sense that K-Bro and the VCH have agreed to them" but asserts that the information is not "merely" negotiated. This suggests that K-Bro contends that the same information constitutes both negotiated terms and something else. Nevertheless, the applicant asserts, for the purposes of s. 21(1)(b), as long as the terms were negotiated, no matter what else they might be, they cannot be found to be supplied.[13]

[25] In addition, the applicant points out that K-Bro argues that disclosure of the terms would result in K-Bro's other customers demanding similar terms. The applicant argues that this proves that the information is not "immutable",

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[9] Order 01-39, para. 44.
[10] K-Bro's initial submission, para. 9.
[11] K-Bro's initial submission, para 25.
[12] K-Bro's initial submission, para. 28.
[13] Applicant's response submission, para. 27, citing K-Bro's initial submission, paras. 9 and 25.

because, as K-Bro admits, it is subject to change depending on the customer it is negotiating with.[14]

[26] I find that K-Bro has not demonstrated that the information at issue is indeed immutable. For the information to be immutable, it must be incapable of change. That K-Bro might stubbornly refuse to agree to terms, conditions and prices other than its preferred ones, does not mean that change to those terms would be impossible. Theoretically, K-Bro could decide to change its position. That K-Bro might have proposed terms, conditions and prices and that VCHA accepted them, does not mean that VCHA had no choice but to accept them exactly as K-Bro submitted them. As long as VCHA had the option of rejecting the terms, conditions or prices means that this information was negotiated and, therefore, not supplied.

[27] The fact that information might be proprietary has no bearing on whether it is deemed to be supplied. Some of the information at issue relates to K-Bro's service delivery model. K-Bro proposed services to VCHA based on this model. VCHA agreed to receive the services that K-Bro proposed. Nevertheless, VCHA could have rejected that model. Therefore, this information was subject to negotiation. The information also includes prices and cost thresholds to which both parties agreed. This information was negotiated and not supplied. The agreements also include incentive programs that both parties agreed to support. This information was negotiated and not supplied. The same applies to performance measures and the contents of satisfaction surveys the parties agree to implement. All of the information before me was potentially subject to alteration if the parties agreed to alter it. Therefore, none of the information was immutable.

[28] K-Bro also argues that disclosure of the information at issue would permit parties to infer other information about K-Bro that is subject to s. 21(1). The problem with this argument is that, for this to apply, the information subject to such an inference must also have been "supplied" by K-Bro to VCHA. K-Bro has not established what this other information is or that it indeed "supplied", in the meaning of s. 21(1)(b), this other information to VCHA.

[29] Therefore, the information at issue fails to meet the second part of the three-part test because it was not supplied by K-Bro to VCHA in accordance with s. 21(1)(b).

[30] As I have found that the information was not supplied, I need not determine whether it was supplied in confidence.

[31] As I have determined that the information at issue fails the second part of the test, I need not determine whether disclosure of the information would harm

[14] Applicant's response submission, paras. 28-29, citing K-Bro's initial submission, Affidavit 1, para. 22.

the financial interests of K-Bro. Nevertheless, for the purpose of completion, I will.

Part 3: Harm the financial interests of K-Bro

[32] Section 21(1)(a) uses the language "could reasonably be expected to harm." Previous orders and court decisions have established that public bodies must prove that disclosure will result in a risk of harm that goes "well beyond the merely possible or speculative."[15] The Supreme Court of Canada describes this as "a middle ground between that which is probable and that which is merely possible."[16] There must be evidence "well beyond" or "considerably above" a mere possibility of harm in order to meet the standard.[17] The evidence must demonstrate "a clear and direct connection between the disclosure of specific information and the harm" that it alleges.[18]

[33] K-Bro's submissions repeat the arguments it presented in the inquiry for Order F10-28. These arguments concentrate on the information at issue revealing a unique service model and how disclosure would undermine its competitive advantage. As noted above, K-Bro also submits that disclosure of the terms, conditions and prices in the records at issue would lead to other of its clients demanding the same.

[34] I dismiss K-Bro's arguments for the same reasons expressed in Order F10-28. The fact that disclosure of the information at issue might heighten competition is an argument that previous orders have dismissed. The fact that other clients might demand better terms from K-Bro does not mean that K-Bro must agree to those demands. As other BC Orders have noted, each set of contract negotiations is unique and involves give and take from all parties. The fact that a party in a future negotiation may use information gained from the information at issue to take a firmer stance, does not mean, necessarily, that K-Bro will incur greater costs or be forced to agree to terms that are less advantageous to it.[19]

[35] I find K-Bro's arguments to be speculative and lacking in evidentiary support. In addition, I note that VCHA bears the burden of proof, and it has failed to meet the standard harms test for s. 21(1)(c). Therefore, I find that s. 21(1) does not apply to any information in the records, VCHA must disclose it all.

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[15] *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3, at para. 206.
[16] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC, para 54.
[17] Order F17-01, 2017 BCIPC 1 (CanLII), para. 21.
[18] Order 02-50, 2002 BCIPC 42486 (CanLII), para. 137.
[19] See, in particular, Order 10-24, 2010 BCIPC 35 (CanLii).

CONCLUSION

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

1. Section 21(1) does not require VCHA to withhold the information at issue.

2. VCHA must give the applicant access to all of the information it withheld from disclosure.

3. VCHA must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records/pages described at item 2 above.

[37] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by December 21, 2022.

November 8, 2022

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

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