Order F23-11

FRASER HEALTH AUTHORITY

Jay Fedorak
Adjudicator

February 24, 2023

CanLII Cite: 2023 BCIPC 13
Quicklaw Cite: [2023] B.C.I.P.C.D. No. 13

Summary: An applicant requested copies of all current contracts for laundry services between K-Bro Linen Systems (K-Bro) and the Fraser Health Authority (FHA). FHA 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 FHA to disclose the information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 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 Fraser Health Authority (FHA). FHA notified K-Bro of the request and the information it was proposing to disclose to the applicant. K-Bro requested a review of FHA's decision by the Office of the Information and Privacy Commissioner (OIPC). As the result of mediation, FHA agreed to withhold some of the information under s. 21(1) of the *Freedom of Information and Protection of Privacy Act (FIPPA)* because 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 FHA to withhold information under s. 21(1). Mediation was unable to resolve the matter and the applicant requested that it proceed to an inquiry.

ISSUE

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

[4] Under s. 57(1), FHA has the burden of proving that the applicant has no right of access to the information it withheld under s. 21(1). The applicant and FHA made submissions to the inquiry. K-Bro chose not to make a submission.

DISCUSSION

[5] **Background –** This case is the latest in a series of inquiries regarding 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.[1]

[6] **Records and information at issue –** The records consist of three amendments to an agreement relating to the provision of linen services and associated documents totalling 71 pages.

[7] The information at issue includes the following: the name and description of a certain type of service; prices for blue bags and hampers; 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; the service delivery models that applied to different facilities; a statement of demand outcomes against performance measures; reasons for price adjustments; and the definition of an acronym. FHA has severed information on 29 of the 71 pages of records.

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

[8] 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

[1] Order F10-28, 2010 BCIPC 40 (CanLII), which was upheld on judicial review in *K-Bro Linen Systems Inc. v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 904; Order F22-55, 2022 BCIPC 62 (CanLII); Order F10-26, 2010 BCIPC 38 (CanLII); Order F10-26, 2010 BCIPC 38 (CanLII); Order F10-27, 2010 BCIPC 39 (CanLII); Order F11-27, 2011 BCIPC 33 (CanLII); Order F14-01, 2014 BCIPC 1 (CanLII); Order F11-08, 2011 BCIPC 10 (CanLII); Order F14-28, 2010 BCIPC 31 (CanLII).

> (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
>
> (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,

[9] 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).

Part 1: Commercial or financial information of or about a third party,

[10] 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.[3] Orders have also found that "financial" information includes prices, expenses, hourly rates, contract amounts and budgets.[4]

[11] I have described the information at issue above. It relates to the provision of goods and services by K-Bro to FHA and the costs that FHA has agreed to pay for those good and services. 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.

Part 2: supplied in confidence

[12] FHA submits that K-Bro supplied some of the information at issue in confidence, as it was not subject to negotiation. It has identified this information.[5]

---

[2] Order F22-33 2022, BCIPC 37 (CanLII), para. 25.
[3] Order 01-36, 2001 BCIPC 21590 (CanLII), para. 17; Order F20-23, 2020 BCIPC 27, para. 10; Order F19-03, 2019 BCIPC 04, para. 43.
[4] 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.
[5] FHA's initial submission, para. 16.

[13] It states that other information at issue was subject to negotiation between FHA and K-Bro. It identifies this information.[6] It argues that this latter information does not qualify as supplied for the purposes of s. 21(1)(b).

[14] The applicant points out that FHA has not provided any explanation as to why it has determined that certain information was "not subject to negotiation". The applicant submits that a bare assertion that the information was "not subject to negotiation" is insufficient to meet the test of s. 21(1)(b) with respect to whether the third party supplied the information. The applicant argues further that some of this information is clearly about prices that FHA agreed to pay and that such information was indeed subject to negotiation.[7]

[15] For s. 21(1)(b) to apply, K-Bro must have supplied, implicitly or explicitly, in confidence the information that I have found is commercial and financial information. The first consideration is whether the information was "supplied" to FHA. 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".

[16] I find that the information that FHA has withheld in this case is part of a series of 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, generally information in a contract does not constitute information that one of the parties has supplied to the other.[8]

[17] 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.[9]

---

[6] FHA's initial submission, para. 16.
[7] Applicant's response submission, paras. 11-12.
[8] 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 F10-28, upheld on judicial review in *K-Bro Linen Systems Inc. v. British Columbia (Information and Privacy Commissioner*.
[9] Order 01-39, paras. 45-50.

[18] One of the parties may propose certain terms, conditions or costs of services. However, as long as the other party had the discretion to accept, reject or negotiate modifications to those terms, conditions or costs, the information does not qualify as supplied for the purposes of s. 21(1)(b).[10] It is not enough to say that the information was not subject to negotiation. The information must be "non-negotiable" in the sense that it is inherently immutable. It is not a matter of whether the third party does or does not want to negotiate about the information. It must be the case that the third party could not change the information, even if it wanted to. Immutable information 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, s. 21(1)(b) does not apply to terms, conditions or costs that the service provider proposed, and the public body fortuitously accepted without change.[11] 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.

[19] I find that FHA has not demonstrated that any of the information at issue is indeed immutable. For the information to be immutable, it must be incapable of change. That K-Bro might have proposed terms, conditions and prices and that FHA accepted them, does not mean that FHA had no choice but to accept them exactly as K-Bro submitted them. As long as FHA had the option of rejecting the terms, conditions or prices, it means that this information was negotiated and, therefore, not supplied.

[20] Therefore, the information at issue was not supplied by K-Bro to FHA in accordance with s. 21(1)(b).

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

[22] As I have determined that the information at issue fails to meet the requirements of s. 21(1)(b), I need not determine whether disclosure of the information would harm the financial interests of K-Bro. Moreover, FHA has made no submissions with respect to the application of s. 21(1)(c) and K-Bro made no submissions at all. As FHA bears the burden of proof, 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.

[10] Order 01-39, para. 44
[11] Order 01-39, para. 44.

CONCLUSION

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

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

2. FHA is required to give the applicant access to all of the information it withheld from disclosure.

3. FHA 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.

[24] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by April 11, 2023.

February 24, 2023

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

OIPC File No.: F20-83046