Order F23-30

# FRASER HEALTH AUTHORITY

Jay Fedorak
Adjudicator

April 14, 2023

CanLII Cite: 2023 BCIPC 34
Quicklaw Cite: [2023] B.C.I.P.C.D. No. 34

**Summary:** A third party requested a review of the decision of the Fraser Health Authority (FHA) to disclose, in response to a request under the *Freedom of Information and Protection of Privacy Act*, a record containing information about services that the third party was providing to FHA. The third party asserted that FHA must withhold the record under s. 21(1) (financial harm to a third party). The adjudicator found that s. 21(1) did not apply and ordered FHA to disclose the record.

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

## INTRODUCTION

[1] This order arises from a request by the Hospital Employees Union (applicant) to the Fraser Health Authority (FHA) for information about assisted living sites owned by the health authority and contracted sites. FHA gave notice to a third party under s. 24 of the *Freedom of Information and Protection of Privacy Act* (FIPPA) that it intended to disclose all of the requested information, including a record containing terms of an agreement between FHA and the third party governing an assisted living site.

[2] The third party requested that the Office of the Information and Privacy Commissioner (OIPC) review of FHA's decision to disclose the agreement. Mediation failed to resolve the remaining issue and the matter proceeded to an inquiry.

## ISSUE

[3] The issue to be decided in this inquiry is whether FHA is required to refuse access to the information in dispute under s. 21(1) of FIPPA.

[4] Under s. 57(3)(b) of FIPPA, it is up to the third party to prove that the applicant has no right of access to information in dispute that FHA decided to release.

## DISCUSSION

[5] **Background –** This case is the latest in a series of inquiries regarding records relating to the provision of support services to health authorities in British Columbia since the government of British Columbia authorized the contracting out of these services 20 years ago.[1]

[6] All three parties made submissions in this inquiry. The OIPC gave the third party permission to remain anonymous and to provide parts of its submissions on an *in-camera* basis. However, I note that the third party's own inquiry submission openly discloses the name of the assisted living site to which the record relates.[2]

[7] **Record at issue –** The record is an agreement regarding assisted living services that the third party provided to FHA. There is one record of 45 pages at issue. The third party describes the record as containing its "internal commercial and financial information" provided to FHA, including "specific services provided to the residents, designated minimum number of direct care hours to which each type of resident and the number of residents being funded" by FHA.[3]

### *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
>
> (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] 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 (*K-Bro v. OIPC*) ; Order F22-55, 2022 BCIPC 62 (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).

[2] While I conclude the applicant knows to which site the requested record relates, I will not use the site's name in these reasons.

[3] Third party's initial submission, para. 27.

> (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,

[9] The principles for applying s. 21(1) are well established.[4] 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.[5] Orders have also found that "financial" information includes prices, expenses, hourly rates, contract amounts and budgets.[6]

[11] The third party submits that the information at issue constitutes its commercial and financial information. FHA states that it accepts that the record "constitutes commercial or financial information under s. 21(1)(a) of FIPPA as it relates to the provision of contractual services for assisted living services".[7] The applicant rejects the arguments of the third party and FHA. It submits that because FHA requires the services, number of direct care hours and number of residents, this information cannot be considered the commercial or financial information of the third party.[8]

---

[4] Order F22-33 2022, BCIPC 37 (CanLII), para. 25.
[5] 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.
[6] 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.
[7] FHA's initial submission, para. 13.
[8] Applicant's response submission, para. 21.

[12] It is clear that, regardless of which party stipulated the terms of the services, the information in dispute relates to the provision of services by the third party to FHA. I find that this information constitutes commercial or financial information of the third party in accordance with s. 21(1)(a)(ii). Therefore, this information meets the first part of the three-part test.

*Part 2: supplied in confidence*

[13] For s. 21(1)(b) to apply, the third party must have supplied the information, implicitly or explicitly, in confidence. 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".

Was the information supplied?

[14] Past orders have recognized the general rule that information contained in an agreement between two parties is information that has been subject to negotiation by and agreement of both parties. Generally, information subject to negotiation does not constitute information that one of the parties has supplied to the other.[9] Information in an agreement 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.[10]

[15] The third party submits that it supplied the entire contents of the record to the FHA. It argues:

> The information in the records was not information that was "negotiated" with the Public Body, as the contracting language was non-negotiable and no changes were made to it and therefore it qualifies for either one of the two above noted exceptions.[11]

[9] 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 v. OIPC*.
[10] Order 01-39, supra note 10 paras. 45-50.
[11] Third party's initial submission, para. 29.

[16] The third party argues further that it supplied information that FHA incorporated without change, which makes this information immutable and not subject to negotiation.[12]

[17] The third party submits in the alternative that the information in the record would enable another party to draw accurate inferences about underlying information about the third party, including the specific ways in which it operates. According to the third party, as this underlying information was not negotiated, it meets the test of being supplied.[13]

[18] FHA refutes the third party's assertion that the information was "supplied". It submits:

> Assisted Living Agreements used by Fraser Health generally contain standard template language. Fraser Health contracts for a specific number of assisted living units at each facility and the number will vary by site. The number of units is determined from previous agreements or determined on the basis of a Request for Proposal – it is not an arbitrary number determined or supplied by service providers. The identification of the specific assisted living services to be provided are derived from provincial legislation and are not determined or dictated by service providers. Under the standard template, the minimum number of direct care hours are standard across all sites based on the category of assisted living tenant: the minimum direct care hours were not determined or supplied by service providers. In 2017, the only portion of an Assisted Living Agreement which was negotiated was the base rent set out is Section 6.2(b), which was determined by Fraser Health in conjunction with BC Housing Corporation and the service provider.
>
> The body of the Agreement which is the subject of this inquiry is virtually identical to the body of the standard template, subject only to the insertion of the Fraser Health determined number of units in recital E, the negotiated base rent in Section 6, and amendments to reflect the unique corporate structure of the Third Party.
>
> …
>
> In summary the Agreement contained the language of the standard form template used by Fraser health for assisting living agreements at the time but was amended to reflect the structure of the Third Party and was provided to the representatives of the Third Party for execution. While Fraser Health agreed to adjust certain of the standard form provisions in the Agreement to address the Third Party's organization status, those adjustments were negotiated. The Agreement does not contain information "supplied" by the Third Party.[14]

[12] Third party's initial submission, para. 30.
[13] Third party's initial submission, para. 31.
[14] FHA's initial submission, paras. 16, 17 and 22.

[19] FHA supports its arguments with affidavit evidence of its Director, Assisted Living and its external legal counsel responsible for the development of the record at issue.[15]

[20] The applicant agrees with FHA that the third party did not supply the information at issue because that information was subject to negotiation.[16]

[21] The third party counters the arguments of FHA with an assertion that the record at issue includes services that it provides above and beyond the requirements of FHA or provincial legislation. It submits that it provided the information about those services and FHA incorporated them into the agreement. This, the third party contends, is information that qualifies as being "supplied for the purposes of s. 21(1)(b)". It explicitly refrains from identifying these additional services, as it claims that so doing would disclose information at issue.[17]

[22] The third party argues further that all of the information it provided to FHA about the services that it would perform, which FHA accepted for inclusion in the agreement, was not negotiated, but rather factual and unchangeable.[18]

[23] With respect to FHA's assertion that the record contains largely template information, the third party comments:

> If such Assisted Living Agreements are as boilerplate as the Public Body asserts they are, then one must ask why is there a need to disclose specific agreements with specific service providers, and why simply providing the Applicant, or any other person requesting access to such information, with the "standard template language" would not be sufficient. If only the "standard template language" was being disclosed, then it would certainly avoid the Public Body having to notify third parties, and having such third parties object to the disclosure and thereby getting the Office of the Information and Privacy Commissioner involved.[19]

*Analysis*

[24] I find that the information that FHA has withheld is the terms of an agreement between it and the third party. As noted above, previous 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 an agreement does not

[15] FHA's initial submission, first and second affidavits.
[16] Applicant's response submission, para. 22.
[17] Third party's reply submission, paras. 3-4.
[18] Third party's reply submission, para. 5.
[19] Third party's reply submission, para. 7.

generally constitute information that one of the parties has supplied to the other.[20]

[25] The fact that one of the parties may propose certain terms, conditions or costs of services does not render those terms immutable. As long as the other party had the discretion to accept, reject or negotiate modifications to the proposed terms, conditions or costs, the information does not qualify as supplied for the purposes of s. 21(1)(b).[21] It is not sufficient to argue 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 an issue of whether the third party does or does not want to negotiate about the information. It must be that the third party could not change the information, even if it wanted to. Examples of 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 also include the educational and employment history of one of its employees.

[26] The crux of the matter is that 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.[22] Nor does it apply to terms that the service provider refuses to negotiate.

[27] I find that the third party 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 the third party might have proposed terms and that FHA accepted them, does not mean that FHA had no choice but to accept them exactly as the third party submitted them. As long as FHA had the option of rejecting the terms, this information was negotiated and, therefore, not supplied. Moreover, FHA submits that this information was negotiated.

[28] The third party has not distinguished this case from other similar cases involving agreements or contracts between health authorities and service providers. The fact that the agreement may include services in addition to those stipulated in the template agreement does not render information about those services immutable. The third party has not demonstrated that FHA had no choice but to include information about those services in the agreement.

---

[20] 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 v. OIPC.*

[21] Order 01-39, para. 44

[22] Order 01-39, para. 44.

[29] The third party's argument that FHA could have provided a copy of a template agreement, instead of the record at issue, is not relevant to a determination of the application of s. 21(1)(b). The record at issue fell within the scope of the request. FIPPA required FHA to disclose it subject to the applications of exceptions to disclosure. FHA did not have the option of disclosing another record in the place of the record subject to the request.

[30] I now turn to the third party's assertion that disclosure of the record would enable another party to infer information about how it operates and that this satisfies the requirements for being "supplied" for the purposes of s. 21(1)(b). The third party has misconstrued the exception to the principle previous orders have established that information in an agreement is considered to have been negotiated. The exception at issue reads: "the information would allow an accurate inference about underlying confidential information the third party "supplied" that is not expressly contained in the contract".

[31] This means that the information subject to being inferred must be other information that the third party "supplied" to the public body, within the meaning of s. 21(1)(b), but was not included in the contract. The third party has not identified the particular information in the record that would reveal other information that it supplied to FHA. The third party has not explained how any information in the record at issue would enable another party to infer commercial or financial information that the third party had supplied to FHA. Consequently, I find that none of the information in the record at issue qualifies as having been supplied.

[32] Therefore, I find that the information at issue was not supplied by the third party to FHA in accordance with s. 21(1)(b).

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

[34] 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 competitive position or interfere significantly with the negotiating position of the third party or result in undue financial loss or gain to any third party in accordance with s. 21(c).

[35] Therefore, I find that s. 21(1) does not apply to any information in the record.

## CONCLUSION

[36] 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.

[37] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by May 29, 2023.

April 14, 2023

**ORIGINAL SIGNED BY**

Jay Fedorak, Adjudicator

OIPC File No.: F21-85220