Order F23-77

PROVINCIAL HEALTH SERVICES AUTHORITY

Jay Fedorak
Adjudicator

September 20, 2023

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Summary: Both an applicant and a third party requested a review of the decision of the Provincial Health Services Authority (PHSA) to disclose in part, in response to a request under the *Freedom of Information and Protection of Privacy Act*, an agreement for the provision of information technology services by the third party to PHSA. The third party asserted that PHSA must withhold additional information under s. 21(1) (financial harm to a third party). The applicant asserted that the PHSA must disclose all of the information. The adjudicator found that s. 21(1) did not apply to any information and ordered PHSA to disclose the record in its entirety.

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

INTRODUCTION

[1] This order arises from a request by an applicant to the Provincial Health Services Authority (PHSA) for a copy of an agreement between it and NTT Data Inc., a third-party service provider (third party). The agreement was for information technology services. PHSA gave notice to the third party under s. 24 of FIPPA that it intended to withhold some of the requested information under s. 21(1), but it would release the rest of the agreement.

[2] The third party believed that s. 21(1) applied to more information than PHSA decided to withhold. It requested that the Office of the Information and Privacy Commissioner (OIPC) review PHSA's decision. Mediation failed to resolve the issue and the matter proceeded to an inquiry.

[3] In the meantime, PHSA disclosed a copy of the agreement to the applicant, but it withheld the information it had decided to refuse access to under s. 21(1) and the additional information that the third party also wanted withheld

under s. 21(1). The applicant requested that the OIPC review the decision of PHSA to withhold information under s. 21(1). Mediation failed to resolve this matter, and it also proceeded to an inquiry.

[4] In short, the third party challenges PHSA's decision that s. 21(1) does not apply to some additional information, to which the third party asserts it does apply (file F21-86505). The applicant challenges the application of s. 21(1) to withhold any part of the agreement (file F21-91711). This inquiry will decide both matters.

ISSUE

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

[6] Under s. 57(1), PHSA has the burden of proving that the applicant has no right of access to the information it decided it must withhold under s. 21(1). 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 the information that it asserts PHSA must also refuse to disclose under s. 21(1).

DISCUSSION

[7] **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.[1] In this case, the third party and PHSA entered into an agreement for the third party to supply several health authorities with information technology services.

[8] All three parties made written submissions in this inquiry.

[9] **Record at issue –** The record at issue is a 456-page document titled "Workplace Evolving Services & Technologies (WEST) Services Agreement." The information in dispute is on 113 pages. PHSA describes the record as containing "the delivery of contracted services, the performance outcomes and measures and the method of calculating fees."[2]

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[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] PHSA's initial submission, para. 2.

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

[10] 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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> (i) trade secrets of a third party, or
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
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> (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,
> (ii) result in 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

[11] The principles for applying s. 21(1) are well established.[3] 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,

[12] FIPPA does not define the terms "financial" or "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]

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[3] Order F22-33 2022, BCIPC 37 (CanLII), para. 25.
[4] 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.
[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.

[13] The third party submits that the information at issue constitutes its commercial and financial information. PHSA states that it accepts that the record "constitutes commercial or financial information under s. 21(1)(a) of FIPPA."[6] The applicant makes no arguments regarding the application of s. 21(1)(a).

[14] It is clear that the information in dispute relates to the provision of services by the third party to PHSA in exchange for payment. 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

[15] 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 PHSA. 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?

[16] 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.[7] However, 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.[8]

[17] The third party submits that there are three types of information in the agreement that are "immutable" for the purposes of s. 21(1)(b). The first is the cost categories that are excluded from the "Cost Past Through" compensation. The third party argues that these cost items are fixed and immutable and could

[6] PHSA's initial submission, para. 13.
[7] 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*.
[8] Order 01-39, supra note 7 paras. 45-50.

not be the subject of negotiation. The second is a list of contractors who provide data services to the third party for the purposes of the agreement. The third is a list of the technologies that the third party would use to deliver services under the agreement.[9]

[18] PHSA agrees that any of the third party's costs, expenses, fixed prices or technical information that is not subject to negotiation or change would constitute "immutable" information. In particular, it identifies Exhibit X2 in Schedule X as including the third party's electronic systems, technology and processes.[10]

[19] The applicant does not make submissions regarding whether any of the information at issue is immutable.

[20] The third party also submits that other information, if disclosed, would enable an informed reader to infer other confidential commercial or financial information that it had supplied to PHSA. It argues that the detailed performance measures included in the agreement would enable an informed reader to infer the levels of human and other resources necessary to meet those targets.

[21] The third party makes particular reference to the "Cost Pass Through" compensation. It asserts that disclosure of this information would reveal what these costs include and how they are calculated. This would allow competitors to calculate the third party's profit margins, according to the third party.

[22] The third party submits that the disclosure of other passages would permit an informed reader to glean the following:

- Insight into where the third party focuses resources and performance efforts.
- Intelligence regarding the resources required to meet performance measures.
- Intelligence as to when the third party would receive additional compensation.
- Intelligence as to how the third party's margins are calculated.[11]

[23] Rather than submitting its own arguments with respect to this information, PHSA relies on the submissions of the third party. It attests that it agrees that the disclosure of unspecified information was generated from, or could enable a competitor to infer, the third party's business processes, its general approach to structuring projects, and margins and fixed costs.[12]

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[9] Third party's initial submission, para. 39.
[10] PHSA's initial submission, paras. 32-3.
[11] Third party's initial submission, paras. 40-46.
[12] PHSA's initial submission, para. 31.

[24] The applicant makes no submission regarding whether the information was supplied in confidence.

Analysis

[25] I find that the information at issue consists of the terms of an agreement between the PHSA 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 generally constitute information that one of the parties has supplied to the other.

[26] 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).[13] 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.

[27] 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.[14] Nor does it apply to terms that the service provider refuses to negotiate. As long as PHSA had the option of rejecting the terms, this information was negotiated and, therefore, not supplied.

[28] Regarding whether some of the information was immutable, I will deal in turn with the three passages the third party identified. The first is a list of categories of costs for which the agreement stipulated explicitly that third party would not receive compensation. While these may refer to real categories of costs that the third party will incur, the context is that the parties have negotiated which categories of costs will be subject to compensation through the agreement and which will not. This information is included in the agreement as the result of negotiation. PHSA has agreed to compensate the third party for some types of costs but not others. It is reasonable to conclude that the excluded costs have

[13] Order 01-39, para. 44.
[14] Order 01-39, para. 44.

been stipulated for purposes of clarity and to avoid future disputes over payment. The third party did not unilaterally insert this information into the agreement.

[29] Those costs could have been subject to compensation, if PHSA had agreed. There is nothing before me to suggest that, if PHSA changed its position and agreed to compensate the third party for those costs, that it would be impossible to amend the agreement to include any of these categories of costs. Therefore, this information is not immutable.

[30] The second passage is a list of subcontractors including the addresses of their facilities. This is a factual list of the locations where the subcontractors will process information on behalf of PHSA. While the addresses of the facilities cannot be changed in the sense that the buildings cannot be moved, their inclusion in the agreement is not "immutable.". This is not a list of established subcontractors to the third party that it provided to PHSA merely for information and over which the PHSA had no interest to control. In fact, ss. 12.1(b) and 12.10(a) of the agreement specifies that PHSA retains the authority approve the use of subcontractors.[15] Moreover, PHSA also retains the authority to terminate a subcontractor, in accordance with s. 12.12(c)(ii) and terminate a supplier, in accordance with s. 12.14(e).[16]

[31] PHSA approved the use of these facilities. PHSA had the authority to reject the use of any or all of these facilities. This is evident in s. 6.2 of the agreement, which stipulates that the third party may not store personal information, except in these locations, without the prior approval of PHSA. Section 6.3(b) of the agreement states clearly that the agreement places restrictions on the service locations and remote access. The inclusion of these addresses in the agreement was subject to negotiation and continues to be subject to change.[17] Therefore, while the physical addresses may be relatively immutable, the list is not.

[32] I note that PHSA had determined that s. 21(1) did not apply to these lists of addresses, but it does not explain why. This forms part of the information in dispute between PHSA and the third party. I also note that the third party has raised no concerns about the disclosure of a list of the addresses of material subcontractors in Schedule S of the agreement.[18] The third party has not explained why it asserts that it supplied one of the lists of addresses of contractors but did not supply the other.

[33] The third passage is a table titled Exhibit X2, NTT Technology Platform which contains a list of technologies that the third party would use in fulfilling the

[15] Responsive records, pp. 26 and 29.
[16] Responsive records, pp. 31-2.
[17] Responsive records, pp. 17-18.
[18] Responsive records, pp. 399-400.

terms of the agreement. While the agreement gives PHSA some control over the third party's use of suppliers and subcontractors, it does not give PHSA the same control over the selection of software and other information technology supplies. Provided that the third party meets existing PHSA technical architectural standards and guidelines in accordance with s. 18.1, the agreement gives considerable latitude to the third party in selecting the products that it will use.[19] Therefore, the list of technologies in Exhibit X2 consists of information that the third party supplied and over which PHSA had no authority to approve or otherwise control. Therefore, I find that the information in Exhibit X2 constitutes information that the third party supplied to PHSA.[20]

[34] I now turn to the third party's assertion that disclosure of the information in dispute would allow an accurate inference about underlying confidential information not contained in the agreement that the third party "supplied" to the PHSA about how it operates. The third party submits that disclosure of the information at issue would enable prospective competitors and clients to infer valuable information about how it allocates its resources and what its profit margins are. Nevertheless, it does not identify precisely what that valuable information is. It does not explain how the knowledgeable reader could derive accurate calculations. The third party's arguments are vague. It does not provide specific rationale for its claims. For example, it does not explain how disclosure of a particular performance measure would reveal the resources necessary to achieve it and what those resources would be. It provides only vague assertions. While it supports these assertions with affidavits, the affidavits are equally vague. The affidavits do not outline exactly how a competitor would come to the conclusions the affiants suggest. It is not obvious on the face of the record what these conclusions would be and whether they would be accurate.

[35] Neither the submissions of the third party nor the records themselves indicate the scale of resources or margins to which the third party is referring. It is certainly not evident to me. The onus is on the third party to demonstrate what knowledge a competitor or client would possess and how they could combine the different elements of information to reach a firm conclusion as to these resources or margins and what these margins would be. The third party has not done so.

[36] Moreover, it is important to note that the third party must also demonstrate that it has supplied the specific identifiable information about resources and margins (not included in the records at issue) to the PHSA. The third party submits that the procurement model used in this case involves the sharing of confidential information between the parties. It has not demonstrated, however, that it has disclosed to PHSA the exact information on resources and margins as

[19] Responsive records, p. 43.
[20] Responsive records, p. 412.

part of that procurement process or otherwise. I also note that with respect to the information that PHSA withheld under s. 21(1), it has the burden of proving that the exception applies. While PHSA's submissions support, in part, the submissions of the third party, its arguments are vague. The PHSA states that there are terms in the agreement that could enable other parties to infer information that the third party provided during the negotiation process, but it does not describe the specific information to which it is referring.

[37] For each passage that PHSA has withheld under s. 21(1) on these grounds, it must identify precisely what information about the third party's resource allocations, margins and fixed costs that those passages would reveal. It must also demonstrate that the third party supplied the identical information during the procurement or negotiation processes. PHSA had the option to provide this information on an *in-camera* basis, if necessary, but it did not do so.

Conclusion on "supplied"

[38] I find that the information in Exhibit X2 of the agreement constitutes technical information of the third party that it supplied to PHSA, as it meets the criteria for being "immutable."

[39] I find that the PHSA and the third party have failed to meet their burden of proving that the remaining information at issue was supplied for the purposes of s. 21(1)(b). This information was negotiated and does not meet the criteria for being "immutable." Nor have these parties established that disclosure of any of the information would enable a knowledgeable reader to infer any particular commercial, financial or technical information, not included in the agreement, that the third party had supplied to PHSA. Therefore, s. 21(1) does not apply to this information.

[40] I must now determine whether the third party supplied the information in Exhibit X2 of the agreement in confidence.

Was the information supplied "in confidence"?

[41] This analysis pertains only to Exhibit X2 of the agreement.

[42] The application of s. 21(1)(b) requires that the information at issue be supplied, implicitly or explicitly, "in confidence." Past orders have said that this requires establishing that there was an "objectively reasonable expectation of confidentiality" at the time the information was supplied.[21]

[21] Order F18-28, 2018 BCIPC 31 (CanLII), para. 41; Order 01-36, 2001 BCIPC 21590 (CanLII), para. 23.

[43] The third party submits that the document inviting the original requests for proposal stated explicitly that the PHSA would treat confidentially all information that proponents supplied with their proposals. It submits further that during the contract negotiations, both parties signed a confidentiality agreement. Finally, the third party references the specific terms of the agreement that confirm the commitment of both parties to keep this information confidential.[22]

[44] The PHSA supports the submissions of the third party regarding the expectations of confidentiality and adds that it is PHSA's standard practice to receive and hold in confidence all business information shared during procurement and negotiating processes.[23]

[45] The applicant does not make a submission regarding whether the third party supplied the information in confidence.

Analysis

[46] PHSA and the third party have established clearly with direct evidence that there was a mutual agreement to keep all business information in confidence from the time of the initial submission through the signing of the agreement. Therefore, I find that the third party supplied the information in Exhibit X2 to PHSA in confidence.

Part 3: harm to business interests

[47] The only information at issue in this part of the analysis is Exhibit X2.

[48] **Section 21(1)(c)(i) (harm significantly the competitive position or interfere significantly with the negotiating position of the third party)** – The standard of proof for s. 21(1)(c) is whether disclosure of the information at issue could reasonably be expected to result in the specified harm. Meeting this standard requires demonstrating that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but it need not be proved on the balance of probabilities that disclosure will in fact result in such harm.[24]

[49] The third party submits that disclosure of the information in dispute would result in the type of harm described in s. 21(1)(c)(i). Specifically, it submits disclosure could harm its competitive position with respect to its competitors and interfere with future negotiations with prospective clients because it would reveal information about the third party's operations and costs. The third party provides affidavit evidence that disclosure of this information to its competitors would harm

[22] Third party's initial submission, paras. 24-27.
[23] PHSA's initial submission, paras. 34-37.
[24] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, para. 54.

its competitive position because it would enable those competitors to know which technologies it used to perform the services and how it used them.[25]

[50] As noted above, instead of making submissions to demonstrate the harm that would result from disclosure, PHSA relies on the submissions of the third party.

[51] The applicant makes no submissions regarding the harm that may result from the disclosure of Exhibit X2 of the agreement.

Analysis

[52] The third party's concern with respect to the harm of disclosure of Exhibit X2 is that it will reveal to its competitors the technologies it uses to perform the service required in the agreement and how it uses those technologies. The affidavit evidence on this point consists of only one sentence that states this concern without further explanation. The third party has not indicated why information about these technologies is significant or how competitors could use that information in a way that would damage the third party's competitive position. For example, it has not demonstrated what role the selection of this particular suite of technologies played in winning the contract with PHSA. It merely makes brief assertions of speculative harm without explanation. It is not obvious on the face of the record that disclosure of this information would harm the third party's competitive or negotiating position. The third party has not provided objective evidence that is well beyond or considerably above a mere possibility of harm, which is necessary to establish a reasonable expectation of harm under s. 21(1)(c).

[53] **Section 21(1)(c)(ii) (similar information no longer being supplied)** – The third party submits further that disclosure of this information could result in harm under s. 21(1)(c)(ii) because it would deter it and other service providers from participating in procurement with PHSA in future. It submits that it and other service providers would become reluctant to participate in PHSA's Vested Outsourcing process in future.

Analysis

[54] I am also not persuaded by the third party's claim that disclosure of the information at issue would lead to similar information no longer being supplied to PHSA. This is an argument that, in the context of procurement, previous orders have dismissed.[26] The procurement process gives proponents the financial

[25] Third party's initial submission, Affidavit of Senior Vice-President, Healthcare Provider Division, para. 10.
[26] See for example, Order F10-24, 2010 BCIPC 35 (CanLII), paras. 54-58.

incentive to provide the information necessary to demonstrate how they meet the necessary criteria. Increasing the chance of winning a lucrative contract is a significant incentive to the third party and its competitors to provide the necessary information.

[55] As the PHSA decided to apply s. 21(1) to this information, it bears the burden of proving the reasonable expectation of harm that would result from disclosure. It merely relies on the submissions of the third party, which have not demonstrated a clear and direct connection between disclosing the information in dispute and a reasonable expectation of the alleged harms.

[56] In summary, I find that the information in the agreement is commercial and financial information of the third party in accordance with s. 21(1)(a). I find that the third party supplied the information in Exhibit X2 in confidence to PHSA in accordance with s. 21(1)(b). I find that it did not supply the remaining information in dispute in accordance with s. 21(1)(b). Finally, I find that the PHSA has failed to establish that disclosure of the information in Exhibit X2 would harm the third party's competitive or negotiating position in accordance with s. 21(1)(c)(i) or would result in similar information no longer being supplied in accordance with s. 21(1)(c)(ii).

[57] Therefore, I find that s. 21(1) does not apply to any of the information at issue.

CONCLUSION

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

1. Section 21(1) does not require PHSA to withhold the information at issue.
2. PHSA is required to give the applicant access to all of the information it withheld from disclosure.
3. PHSA 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.

[59] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by **November 3, 2023**.

September 20, 2023

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator