OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F24-16

PROVINCIAL HEALTH SERVICES AUTHORITY

Celia Francis
Adjudicator

March 8, 2024

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Summary: An applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Provincial Health Services Authority (PHSA) for a copy of an emergency dispatch protocol. Priority Dispatch Corp., the third party which licences use of the protocol software to the PHSA, objected to the PHSA's decision to disclose the records at issue, saying that disclosure could reasonably be expected to cause it significant harm under s. 21(1) of FIPPA. The adjudicator found that s. 21(1) did not apply and ordered the PHSA to disclose the information in dispute to the applicant.

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

INTRODUCTION

[1] This case concerns an applicant's request under the *Freedom of Information and Protection of Privacy Act (FIPPA)* to the Provincial Health Services Authority (PHSA) for the "Dispatch tree, card-sets and protocol specific to code 23-D-2-A."[1] The PHSA initially disclosed the responsive records in severed form, upon which the applicant requested a review by the Office of the Information and Privacy Commissioner (OIPC).

[2] As a result of mediation by the OIPC, the PHSA decided to disclose the records in full to the applicant. This prompted the third party, Priority Dispatch Corp. (PDC), to request a review by the OIPC. Mediation did not resolve the issues and the matter proceeded to inquiry. The OIPC received submissions from the PHSA, PDC and the applicant.

[1] These records, relating to PDC's protocol 23, provide guidance and instructions to an emergency dispatcher assisting a member of the public in cases of a suspected drug overdose or poisoning.

ISSUE AND BURDEN

[3] The issue to be decided in this inquiry is whether s. 21(1) of FIPPA requires the PHSA to withhold the information in dispute.

[4] Under s. 57(3) of FIPPA, the third party has the burden of proof respecting s. 21(1).

DISCUSSION

Background

[5] PDC is the proprietor of a number of fire, medical and police dispatch systems which it licences to emergency dispatch centres around the world. The systems include key questions, pre-arrival instructions, post-dispatch instructions, determinate descriptors, diagnostic tools and emergency dispatch codes.[2]

[6] The PHSA is responsible for "the design, delivery and administration of health care services on a province-wide basis."[3] It manages, supports and oversees the British Columbia Emergency Health Services (BCEHS). The BCEHS provides ambulance services and emergency health services throughout the province. On BCEHS's behalf, the PHSA licenced PDC's emergency medical dispatch software under an agreement that began in 2018.[4]

Information in dispute

[7] The responsive records consist of 14 pages of screenshots of protocol 23. The PHSA disclosed four pages in full and 10 in severed form. The PHSA disclosed the headings on each of the ten severed pages and withheld the remainder.

[8] The withheld information, which is the information in dispute, consists of the following: questions geared to the particular emergency situation, i.e., a drug overdose; potential answers that a caller may give; guidance on instructions for the dispatcher to give, depending on the caller's answers; codes for various medical conditions; and rules and axioms for the dispatcher.

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[2] PDC's letter of May 24, 2021 to the PHSA.
[3] PHSA' response, para. 5.
[4] PHSA's response, para. 6. Affidavit of PHSA's Manager, Information Access, Education and Intake, at paras. 2-4.

Harm to third-party business interests – s. 21(1)

[9] The third party said the information in dispute should be withheld under s. 21(1).[5] The PHSA said it does not believe that the information in dispute meets the three-part test in s. 21(1).[6] The applicant agrees.

[10] The relevant parts of s. 21(1) of FIPPA read as follows:

> 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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> …
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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
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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 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] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies.[7] All three parts of the s. 21(1) test must be met in order for the information in dispute to be properly withheld. First, PDC, as the party resisting disclosure, must demonstrate the following:

- that disclosing the information at issue would reveal one or more types of information listed in s. 21(1)(a);
- that the information was supplied, implicitly or explicitly, in confidence; and
- that disclosure of the information could reasonably be expected to cause one or more of the harms set out in s. 21(1)(c).

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[5] PDC's initial submission, p. 5.
[6] PHSA's response, para. 12.
[7] See, for example, Order 03-02, 2003 CanLII 49166 (BCIPC), Order 03-15, 2003 CanLII 49185 (BCIPC), and Order 01-39, 2001 CanLII 21593 (BCIPC).

Type of information – s. 21(1)(a)(ii)

[12] PDC said that the information is commercial and technical information of or about it.[8] The PHSA did not address this aspect of s. 21(1)(a) but did not dispute that the information in dispute is commercial or technical information of or about PDC. The applicant argued that the information is not "of or about" PDC.[9]

[13] FIPPA does not define "commercial" or "technical" information. However, past orders have found that

- "commercial information" relates to commerce, or the buying, selling, exchanging or providing of goods and services; the information does not need to be proprietary in nature or have an actual or potential independent market or monetary value;[10] and

- "technical Information" is information belonging to an organized field of knowledge falling under the general categories of applied science or mechanical arts. Technical information usually involves information prepared by a professional with the relevant expertise, and describes the construction, operation or maintenance of a structure, process, equipment, or entity.[11]

Commercial or technical information of or about PDC

[14] PDC said that the proprietary information in dispute is not normally available to the public. PDC said it derives economic and commercial value by licencing its dispatch systems which it described as "key and valuable assets" that differentiate it from its competitors. PDC said it goes to great lengths to protect this information through intellectual property laws around the world. In PDC's view, the information in dispute is clearly its commercial and technical information.[12]

[15] The information in dispute consists of step-by-step instructions on how to deal with a drug overdose or poisoning, including medical information, codes and guidance taking callers through a detailed medical process on how to treat a patient. I find, therefore, that the information in dispute is "technical information" of or about PDC.

[8] PDC's initial submission, pp. 3-4.
[9] Applicant's response, para. 1, with reference to p. 1 of PDC's initial submission.
[10] See Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17, and Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62.
[11] See, for example, Order F23-86, 2023 BCIPC 102 (CanLII), at para. 25.
[12] PDC's initial submission, pp. 3-4.

[16] I also accept that the information in dispute relates to the emergency services that PDC provides and that PDC markets and licences this information to its clients for its monetary benefit. I find, therefore, that the information is also "commercial information" of or about PDC.

[17] The applicant argued the information in dispute is not "of or about" PDC, as it is derived from the standards of care and practice of the International Academies of Emergency Dispatch (IAED).[13]

[18] PDC said that IAED is the standard-setting organization for emergency dispatch and response services worldwide. PDC acknowledged that it ensures that emergency calls are handled according to IAED's standards of care and practice. However, PDC said, it developed what it described as its "intellectual property" at considerable time, effort and expense.[14]

[19] I accept that PDC developed the information in dispute in compliance with IAED standards. I do not consider that this makes it information of or about IAED. Moreover, none of the parties argued that IAED could suffer harm under s. 21(1)(c) if the information were disclosed. I therefore reject the applicant's arguments on this point.

Conclusion on s. 21(1)(a)(ii)

[20] I found above that the information in dispute consists of commercial and technical information of or about PDC for the purposes of s. 21(1)(a)(ii). I will consider next whether this information falls under s. 21(1)(b).

Supply in confidence – s. 21(1)(b)

[21] The next step is to determine whether the information I found is commercial and technical information of or about PDC was "supplied, implicitly or explicitly, in confidence". The information must be both "supplied" and supplied "in confidence".[15] The applicant and the PHSA did not address s. 21(1)(b) in their submissions.

Supply

[22] PDC said it "supplied" the information in dispute to the PHSA.[16] I can see that, under the licencing agreement (Schedules A and H to the agreement), PDC agrees to licence use of its emergency dispatch software to the PHSA. The

[13] Applicant's response, para. 1, with reference to p. 1 of PDC's initial submission.
[14] PDC's initial submission, p. 2.
[15] See, for example, Order F17-14, 2017 BCIPC 15 (CanLII) at paras. 13-21, Order 01-39, 2001 CanLII 21593 (BC IPC) at para. 26, and Order F14-28, 2014 BCIPC 31 (CanLII) at paras. 17-18.
[16] PDC's initial submission, p. 4.

PHSA did not dispute that PDC supplied the information in dispute. I am satisfied that the information in dispute was "supplied".

Supplied "in confidence"

[23] A number of orders have discussed examples of how to determine if third-party information was supplied, explicitly or implicitly, "in confidence" under s. 21(1)(b). For example, Order 01-36 says:

> An easy example of a confidential supply of information is where a business supplies sensitive confidential financial data to a public body on the public body's express agreement or promise that the information is received in confidence and will be kept confidential. A contrasting example is where a public body tells a business that information supplied to the public body will not be received or treated as confidential. The business cannot supply the information and later claim that it was supplied in confidence within the meaning of s. 21(1)(b). The supplier cannot purport to override the public body's express rejection of confidentiality.
> …
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> The cases in which confidentiality of supply is alleged to be implicit are more difficult. This is because there is, in such instances, no express promise of, or agreement to, confidentiality or any explicit rejection of confidentiality. All of the circumstances must be considered in such cases in determining if there was a reasonable expectation of confidentiality. The circumstances to be considered include whether the information was:
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> 1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
> 2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;
> 3. not otherwise disclosed or available from sources to which the public has access;
> 4. prepared for a purpose which would not entail disclosure.[17]

[24] PDC said the licence agreement provides that the information in dispute is shared under a "strict confidentiality obligation." PDC said that PHSA, as an authorized licencee, is allowed to use and access the medical dispatch system and that PHSA expressly agreed not to disclose the information.[18]

[25] PDC said that PHSA, as a party to the licencing agreement, must accept PDC's Electronic-Acceptance Software License & Service Agreement (attached as Schedule H to the licencing agreement), which includes the following confidentiality provision:

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[17] Order 01-36, 2001 CanLII 21590 (BC IPC) at paras. 24-26.
[18] PDC's initial submission, p. 4.

> 27. Confidentiality. A party during the course of this Agreement may have access to or receive information regarding personnel, materials, data, systems, proprietary information/products, software programs, trade secrets, concepts, know-how, and other information which may not be accessible or generally known to the public. Any confidential or proprietary information/products received by one party from the other party shall be kept confidential and shall not be used, published, divulged, and distributed by the receiving party to any other person or entity without the prior written approval of the disclosing party.

[26] I am satisfied that, under s. 27 of Schedule H to the agreement, PDC and the PHSA have agreed to keep each other's information confidential. The PHSA did not dispute PDC's argument on this point. I am, therefore, satisfied that the information in dispute was supplied explicitly "in confidence".

Conclusion on s. 21(1)(b)

[27] I found above that the information in dispute was both "supplied" and supplied explicitly "in confidence". I find, therefore, that s. 21(1)(b) applies to it. I will now consider whether disclosure could reasonably be expected to result in significant harm to PDC under s. 21(1)(c).

> *Could disclosure reasonably be expected to cause significant harm under s. 21(1)(c)?*

[28] PDC argued that ss. 21(1)(c)(i) and (ii) apply to the information in dispute. The PHSA said that it had concluded that s. 21(1)(c) does not apply. The applicant did not address s. 21(1)(c)(i) but did say that s. 21(1)(c)(ii) does not apply.

Standard of proof for harms-based exceptions

[29] Numerous orders have set out the standard of proof for showing that disclosure could reasonably be expected to cause harm.[19] The Supreme Court of Canada confirmed that the applicable standard of proof for harms-based exceptions is as follows:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and

[19] For example, Order 01-36, 2001 CanLII 21590 (BCIPC) at paras. 38-39.

> how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences".[20]

[30] Moreover, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*,[21] Bracken J. confirmed that it is the release of the information itself that must give rise to a reasonable expectation of harm.

[31] I have applied these principles in considering the arguments on harm under s. 21(1)(c).

[32] **Harm to competitive or negotiating position – s. 21(1)(c)(i):** PDC said that disclosure of the information in dispute "would harm its distinct business advantage and competitive position as the industry leader in emergency response and dispatch."[22] PDC said that disclosure would result in its competitors having easy access to the "detailed views and understanding" of its unique medical dispatch protocol. This would, PDC said, undermine its intellectual property rights, erode its competitive advantage and undermine the intrinsic value of its proprietary systems and assets.[23]

[33] PDC did not say who its competitors are. Nor did PDC explain the environment in which it operates or how the information in dispute is unique. PDC also did not explain how its competitive position would be undermined or harmed, still less how it would be harmed "significantly" by disclosure, as s. 21(1)(c)(i) requires. Its arguments on this point amount to little more than assertions.

Are the publicly available videos "analogous" to the information in dispute?

[34] The PHSA said that PDC posts videos on its website, which it said are "analogous" to the information in dispute, and it provided a link to the videos.[24] The PHSA also provided me with copies of these videos which it described as "video walk-throughs of the ProQA interface [software]". The PHSA said that, given that the videos are "closely analogous" to the information in dispute, its

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[20] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* [*Community Safety*], 2014 SCC 31, at para. 54 citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 94.
[21] *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875 at para. 43.
[22] PDC's initial submission, p. 5.
[23] PDC's reply, pp. 2, 4.
[24] https://prioritydispatch.net/marketing-resource/ASSETS/WEB/MEDICAL.html.

disclosure to the applicant could not reasonably be expected to cause PDC significant harm under s. 21(1)(c).[25]

[35] PDC said that making and distributing promotional videos does not constitute a waiver of its confidentiality rights. It said the "benign portions" of the public videos only give a "glimpse" of how its software works and how it would appear to a dispatcher. PDC also said the videos are ten years old and the relevant protocols have been updated since.[26]

[36] I can see that the videos cover different emergency situations from protocol 23 (e.g., stroke, childbirth). They consist of recordings of emergency calls between dispatchers and callers, with appropriate screenshots of the protocols, codes and other details. There are also separate videos of tutorials ("walk-throughs") on the same calls, in which a narrator takes the viewer through each situation and explains what the dispatcher is doing and why, again with reference to the screens showing protocols and codes.

[37] The information in dispute apparently dates to 2020 and is, I accept, more recent than the public videos. However, I can see no material difference in the character and content of the information in the public videos and the information in dispute.

[38] Although PDC argued that the public videos only provide a "glimpse" of its software, in my view, the content of the public videos is more detailed than the information in dispute. PDC did not argue that disclosure of the videos has caused it significant harm under s. 21(1)(c)(i). By the same token, I do not see how disclosure of the information in dispute, which appears to comprise straightforward medical instructions, could reasonably be expected to do so.

[39] For reasons given above, I find that s. 21(1)(c)(i) does not apply to the information in dispute.

[40] **Similar information no longer supplied – s. 21(1)(c)(ii):** PDC said that it supplied the information in dispute to the PHSA at the PHSA's request.[27] PDC added that disclosure of the information in dispute would result in a violation of the License Agreement, so that similar information would no longer be supplied to the PHSA. PDC said that this would not be in the public interest of "rendering emergency medical services" throughout British Columbia, as PHSA emergency responders and dispatchers would not be authorized to use the software and protocols, leaving "a significant void" in responding to emergencies.[28]

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[25] PHSA's email of February 13, 2024 to OIPC; PHSA's response, para. 17; Affidavit of PHSA's Manager, Information Access, Education and Intake, at paras. 17-18.
[26] PDC's letter of June 6, 2022 to the OIPC.
[27] PDC's reply, p. 2.
[28] PDC's initial submission, p. 5.

[41] The applicant said she saw no evidence that the public interest would be harmed if PDC were to withdraw the information in dispute. She suggested that PDC's withdrawal of its services would be a contractual matter between PDC and the PHSA.[29]

[42] PDC acknowledged that it gains financially by providing its protocols to the PHSA under licence but said this disclosure is provided under strict terms of confidentiality.[30] Under the three-year term of the licence agreement, the PHSA pays PDC $142,000 USD per year for PDC's services and use of its software. I do not know what proportion of PDC's total income this yearly payment constitutes.

[43] It is reasonable to conclude, however, that PDC would not lightly give up this yearly payment, on the grounds that the PHSA had supposedly breached their agreement. In any event, the licencing agreement contains dispute resolution provisions which the parties could engage, if there were a dispute flowing from disclosure of the information in dispute.

[44] PDC also said that disclosure of its information would deter its competitors from supplying emergency dispatch protocols in future.[31] It is not clear why PDC would be concerned about this possible result.

[45] The PHSA did not directly address this issue. However, significantly, in my view, the PHSA did not express any concern that PDC might withdraw its services and emergency dispatch software as a result of disclosure of the information in dispute, which is only one of a number of protocols that PDC provides to the PHSA.

[46] In conclusion, PDC has not persuaded me that disclosure of the information in dispute could reasonably be expected to result 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, for the purposes of s. 21(1(c)(ii). I find that s. 21(1)(c)(ii) does not apply to the information in dispute.

Conclusion on s. 21(1)

[47] I found above that ss. 21(1)(a)(ii) and (b) apply to the information in dispute. I also found, however, that ss. 21(1)(c)(i) and (ii) do not apply to it. PDC has not, in my view, met its burden of proof in this case. I find, therefore, that s. 21(1) does not apply to the information in dispute.

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[29] Applicant's response, para. 4.
[30] PDC's reply, p. 2.
[31] PDC's reply, p. 2.

CONCLUSION

For the reasons given above, under s. 58 of FIPPA:

1. The PHSA is required to disclose the information in dispute to the applicant.

2. The PHSA must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the information in dispute described at item 1 above.

Pursuant to s. 59(1) of FIPPA, the PHSA is required to comply with this order by April 23, 2024.

March 8, 2024

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File No.: F22-89549