



Order F24-87

PROVINCIAL HEALTH SERVICES AUTHORITY

Alexander Corley
Adjudicator

October 1, 2024

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Summary: A third party requested a review of the public body's decision to disclose records in response to an access request under the *Freedom of Information and Protection of Privacy Act* (FIPPA). The third party asserted the public body must refuse to disclose information in the records under s. 21(1) (harm to third party's business interests) of FIPPA. The adjudicator found that s. 21(1) did not apply to any of the information in dispute and ordered the public body to disclose the requested records to the applicant.

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

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA),¹ an applicant requested access to records about the relationship between the Provincial Health Services Authority (PHSA) and Pharmascience Inc. (Company). Specifically, the applicant requested copies of all contracts or agreements under which PHSA purchased a named pharmaceutical from the Company during a four-year period. PHSA notified the Company of the access request and sought its views under s. 23.

[2] The Company responded that some information in the records requested by the applicant must be withheld under ss. 21(1) (harm to third party's business interests) and 22(1) (harm to personal privacy). PHSA then notified the Company that it had decided to withhold some, but not all, of the information the Company identified under s. 21(1). PHSA decided it would also refuse the applicant access to some additional information in the requested records on the basis that ss. 21(1) and 15(1)(l) (harm to security of a system) applied.

¹ For the remainder of this Order, when I refer to sections of an enactment I am referring to FIPPA unless otherwise stated.

[3] The Company contacted the Office of the Information and Privacy Commissioner (OIPC) to request a review of PHSA's decision. During mediation by the OIPC, PHSA withdrew its reliance on ss. 21(1) and 15(1)(l) and decided that FIPPA required it to completely disclose the requested records to the applicant. Mediation did not resolve the issues between the Company and PHSA, and the Company requested that the matter proceed to this inquiry. PHSA, the Company, and the applicant each made written submissions in this inquiry.

[4] The Investigator's Fact Report and Notice of Inquiry say that the issues to be decided in this inquiry are whether PHSA is required to withhold information under ss. 21(1) and 22. However, PHSA and the Company did not mark the records to show what information they think must be withheld under s. 22. Their submissions also do not argue that s. 22 applies. Therefore, I find that s. 22 is not an issue to be decided in this inquiry.

ISSUE

[5] The issue to be decided in this inquiry is whether PHSA must withhold the information identified by the Company under s. 21(1).

[6] Section 57(3)(b) places the burden on the Company to prove that PHSA must withhold the disputed information under s. 21(1).

DISCUSSION

Background and information in dispute

[7] PHSA is a provincial society established under the *Societies Act*² and is responsible for the design and delivery of publicly funded and specialized health care services across British Columbia. The Company is a pharmaceuticals manufacturer based in Montreal which supplies pharmaceuticals to various public bodies across Canada, including PHSA.

[8] The information in dispute is contained in an executed contract between the Company and PHSA (Contract), a one-time purchase order a PHSA facility sent to the Company (Purchase Order) and two confirmations of received purchase orders the Company sent to PHSA (Confirmations). The parties' submissions do not differentiate between these records or treat them separately, so I will adopt that practice and refer to the Contract, Purchase Order, and Confirmations collectively as the "Agreements" through the remainder of this Order.

² SBC 2015, c. 18.

[9] Most of the information in dispute in the Agreements relates to the quantity, price, and batch size of pharmaceutical products ordered by PHSA and the minimum amount of the Company's products that PHSA agreed to purchase. Additionally, a small amount of the information includes details about delivery of the Company's products to PHSA, including the "lead time" between the Company receiving an order and delivering the ordered product to PHSA.³

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 relevant to consider in this case:

21(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

[...]

(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

(ii) ... [or]

(iii) result in undue financial loss or gain to any person or organization[.]

[11] The principles for applying s. 21(1) are well established.⁴ The Company must show that all three of the following criteria are met for s. 21(1) to apply:

- The disputed information is of a type listed in s. 21(1)(a);
- The disputed information was supplied to PHSA in confidence under s. 21(1)(b); and

³ The Company asserts that some of the information in dispute would reveal its "transportation costs." However, while I can see that such costs are referred to in the Contract, I do not see anything in the information in dispute that would reveal the costs to the Company of transporting its products and therefore I find the Company's "transportation costs" are not information in dispute in this inquiry.

⁴ Order F22-33, 2022 BCIPC 37 at para. 25.

- Disclosure of the disputed information could reasonably be expected to cause one or more of the harms listed in s. 21(1)(c).

[12] Each of the parties made submissions relevant to these criteria, which I will address as necessary below.

Type of Information – s. 21(1)(a)

[13] The Company says that the information in dispute is a combination of “commercial” and “financial” information of or about the Company. PHSA does not dispute this aspect of the Company’s submission. The applicant does not discuss whether the information in dispute is “commercial” or “financial” information of or about the Company.

[14] FIPPA does not define “commercial” or “financial” information. However, prior orders have considered these terms and discussed their meanings.

[15] “Commercial” information is information that relates to a commercial enterprise, in the sense that the information is associated with the buying, selling or exchange of goods or services. “Commercial” information may also include information about a third party’s methods of providing the services it has contracted to perform or marketed to current or prospective clients.⁵ “Financial” information is information that relates to prices charged for goods and services, assets, liabilities, expenses, cash flow, profit and loss data, operating costs, and financial resources or arrangements.⁶

[16] Applying these principles to the information in dispute, it is clear to me that all of it relates to the buying, selling, or exchange of goods between the Company and PHSA, including the prices the Company charged PHSA for those goods. In some instances, the disputed information also relates to the Company’s methods of providing goods to PHSA. Therefore, I find that the information in dispute is a combination of commercial and financial information about the Company and falls within the scope of s. 21(1)(a)(ii).

Was the information “supplied in confidence”? - s. 21(1)(b)

[17] The second step in the s. 21(1) analysis is to determine whether the information in dispute was supplied to PHSA in confidence. This analysis has two parts. First, I must determine whether the Company “supplied” the information to PHSA. If so, I must determine whether the Company supplied the information “in confidence.”⁷

⁵ See, for example, Order F05-09, 2005 CanLII 11960 (BC IPC) at para. 18.

⁶ Order F22-35, 2022 BCIPC 39 at para. 82; Order F22-63, 2022 BCIPC 71 at para. 33; Order F17-41, 2017 BCIPC 45 at para. 59.

⁷ See Order F19-39, 2019 BCIPC 44 at para. 57.

[18] In this case, the information in dispute is contained in the Agreements, which the parties acknowledge each relate to the Company contracting to provide goods to PHSA. I find that this is clearly the case regarding the Contract. Considering the Purchase Order and the Confirmations, I can see that these records were created before PHSA and the Company executed the Contract. However, I find that they are also contractual in nature given that they set out specific terms which the parties agreed to regarding PHSA ordering products from the Company and the Company providing those products to PHSA.⁸

[19] Previous OIPC orders have consistently said that information about the terms of agreements or contracts between a public body and a third party does not generally qualify as information that has been “supplied” to the public body for purposes of s. 21(1)(b).⁹ This is because while certain information may initially only be possessed by the third party or an agreement’s terms may be initially drafted by the third party alone, if the public body must agree to those terms in order for the agreement to move forward, then the information in the agreement is considered to have been negotiated between the parties as opposed to being “supplied” to the public body by the third party.¹⁰

[20] Put simply, s. 21(1)(b) does not protect information that could have been altered during negotiation but, fortuitously, was not altered because the public body agreed to the terms proposed by the third party without requesting changes.¹¹

[21] Notwithstanding this, past orders recognize two exceptions to this rule. Pursuant to those orders, information about the terms of a contract or agreement may qualify as “supplied” to the public body if the evidence establishes that:

- 1) The information was immutable or not susceptible to alteration during negotiation and it was incorporated into the agreement or contract unchanged; or
- 2) The information would allow someone to draw an accurate inference about underlying confidential information which the third party “supplied” to the public body but that is not itself contained in the agreement or contract.¹²

⁸ As noted above, the Company does not differentiate between the Contract, the Purchase Order, and the Confirmations in its submissions or evidence.

⁹ See Order F22-33, *supra* note 4 at para. 33 and the authorities cited therein at note 12.

¹⁰ See Order 01-39, 2001 CanLII 21593 (BC IPC) at para. 44, upheld on judicial review in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603.

¹¹ Order 01-39, *ibid.*

¹² *Ibid.*

Positions of the parties – “Supplied”

[22] The Company says that PHSA was not able to negotiate the information in dispute because it relates to the Company’s production capacity, the logistics of pharmaceutical manufacture, or the methods and timing for the Company to supply its products to PHSA. On this basis, the Company submits that the information in dispute was “immutable” and therefore was supplied to PHSA. The Company further submits that the information in dispute would allow an observer to infer underlying confidential information about the Company and that the information was also supplied to PHSA on that basis.

[23] In support of its position, the Company provides an affidavit from its Head of Government and Public Affairs (Head). The Head says:

During discussions surrounding the [Agreements], [PHSA] sought specific detailed information from [the Company] about the quantities and supply sizes for [Company] products, based on their capacity for production. [The Company] provided commercial information around their production and supply of the products, which was not negotiated with [PHSA]. To the best of my knowledge and belief, the commercial supply and logistical information provided by [the Company] was directly incorporated into the [Agreements].¹³

[24] PHSA takes the opposite position and says that the information in dispute was open to negotiation between itself and the Company and therefore was not supplied to PHSA by the Company. The applicant adopts PHSA’s position.

Analysis and conclusions – “Supplied”

[25] Based on the submissions and evidence provided by the parties I make the following findings. First, I find that all the information in dispute is contained in the Agreements. Further, I find that the Agreements set out the terms and conditions governing the ordering and provision of products between the Company and PHSA. Finally, I find that the Agreements contain clear language indicating that PHSA and the Company “agree” to or “accept” their terms, including the terms containing the information in dispute.

[26] Given the above, it is clear to me that all the information in dispute is caught by the general rule that information about the terms of an agreement between a public body and a third party is information that was negotiated and not “supplied” to the public body. Therefore, whether s. 21(1)(b) applies turns on whether the information in dispute comes within the exceptions to this general rule, explained above.

¹³ Head’s Affidavit at para. 9.

[27] The Company asserts that disclosing the information in dispute would allow someone to draw an accurate inference about the Company's underlying confidential information. Its direct submissions on this point are limited to the following statement:

If the [Agreements] are disclosed ... it could easily allow another party, in particular [the Company's] competitors, to draw an accurate inference about the underlying information of or about [the Company's] product, and the specific ways in which [the Company] manufactures and delivers its product.¹⁴

[28] The Company alludes to the existence of confidential information of or about the Company beyond what is contained in the Agreements, but it does not specifically identify what this information is or provide sufficient evidence or persuasive argument establishing that this additional information was supplied to PHSA. Based on this, I am not persuaded that any of the information in dispute would allow someone to draw accurate inferences about underlying confidential information the Company supplied to PHSA but that is not itself contained in the Agreements.¹⁵

[29] Considering whether any of the information in dispute is "immutable", prior orders have said the following regarding what it means for information to be "immutable",

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.¹⁶

[30] It is clear to me that the supply prices, order amounts, delivery lead times, and minimum order amounts are not immutable in the sense set out above. I accept that PHSA may not have attempted to negotiate regarding these items, but the Company's evidence and submissions do not establish these items were truly "non-negotiable." In my view, the Company has not demonstrated that it would have been unable to change any of these items even if it had been in the Company's interest to do so. Therefore, I find that the supply prices, order amounts, delivery lead times, and minimum order amounts were susceptible to negotiation between PHSA and the Company and are not information the Company "supplied" to PHSA.

¹⁴ Company's Initial Submission at para. 32.

¹⁵ Further, the Head provides evidence that the Company supplied commercial and financial information to PHSA during discussions regarding the Agreements but says they understand that all of this information was "directly incorporated" into the Agreements: Head's Affidavit at para. 9.

¹⁶ Order F23-77, 2023 BCIPC 92 at para. 26.

[31] Finally, considering the “batch sizes” of the Company’s products, I accept that batch sizes may be something that the Company does not usually negotiate with prospective customers. Notwithstanding this, in this case I can see that in the Contract the Company is granted the right to make “reasonable modifications” to the batch sizes on notice to PHSA.¹⁷ Given that the Contract contemplates the potential of the batch sizes being changed, I am satisfied that the batch sizes are not “immutable” but could have been negotiated by PHSA. Therefore, I find that information related to the batch sizes of the Company’s products was also not supplied to PHSA for purposes of s. 21(1)(b).

[32] For the foregoing reasons, I find that the Company did not supply the information in dispute to PHSA and, therefore, s. 21(1)(b) does not apply to any of that information.

Conclusion, s. 21(1)

[33] I have found above that the information in dispute is a combination of commercial and financial information about the Company. However, I have also found none of that information was “supplied” to PHSA by the Company as required under s. 21(1)(b).

[34] As noted above, the Company must establish that all of ss. 21(1)(a), (b), and (c) apply to the disputed information to show that PHSA must withhold it under s. 21(1). The Company has not met its burden to prove that s. 21(1)(b) applies to the disputed information. Therefore, it is not necessary for me to consider whether s. 21(1)(c) applies and I decline to do so.

[35] For all of these reasons, I find that s. 21(1) does not require PHSA to withhold any of the information in dispute.

¹⁷ Records at p. 23.

CONCLUSION

[36] For the reasons given above, under ss. 58 and 59 of FIPPA, I make the following Order:

PHSA must give the applicant access to all the information in the Agreements by November 14, 2024 PHSA must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of that information.

October 1, 2024

ORIGINAL SIGNED BY

Alexander Corley, Adjudicator

OIPC File No.: F23-92944