OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 03-35

FRASER HEALTH AUTHORITY

David Loukidelis, Information and Privacy Commissioner
October 7, 2003

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Summary: In response to its access request to the FHA, the HEU received electronic copies of two consultants' reports respecting possible private development of a new health centre. The HEU was able to uncover information the FHA believed it had severed from the electronic copies under s. 17(1). The HEU posted on its website copies of the consultant's reports with instructions enabling viewers to recover information the FHA believed had been severed. The HEU requested a review of the FHA decision to refuse access to information in the consultant's reports. The FHA was authorized to refuse access under s. 17(1) and its decision to do so is confirmed. After the FHA's faulty severing of information, there is risk of harm under s. 17(1) against which the FHA is authorized to protect itself by refusing access to the disputed information.

Key Words: commercial information – trade secrets – financial information – priority of publication – research information – monetary value.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 2(1), 14, 17(1)(c) and (d), 25(1)(a) and (b), 53(2)(a), (b) and (c), 54(b), 56.

Authorities Considered: B.C.: Order 01-52, [2001] B.C.I.P.C.D. No. 55; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 02-50, [2002] B.C.I.P.C.D. No. 51. **Ont**.: Order P-901, [1995] O.I.P.C. No. 148.

Cases Considered: *J. Doe* v. *British Columbia (Information and Privacy Commissioner)*, [1996] B.C.J. No. 1950 (S.C.)

1.0 INTRODUCTION

[1] On December 10, 2001, the Hospital Employees' Union ("HEU") made a request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), to the Fraser Health Authority ("FHA"), for access to all records relating to a report prepared for the FHA by consultants, PricewaterhouseCoopers ("PWC"). The HEU's request described the report as PWC's "Report on Private Financing Initiative for the new MSA Hospital". The HEU's access request added the following:

> Without limiting the generality of this request, we are seeking access to all reports and records, including any in electronic or digital format, with respect to the Price-Waterhouse Coopers Consultant Report on the Private Financing Initiative. We request the following:
>
> 1. All memoranda, directives, policies, procedures or correspondence
> 2. All Minutes or notes of meetings, discussions or conversations
> 3. All e-mail messages
> 4. A copy of the Report or any drafts
>
> As you are aware, the Board Chair at the Fraser Valley Health Board publicly stated at a meeting on Wednesday, November 7, 2001 that the Board would make the Report available as soon as it was tabled. We anticipate that you will fulfil that commitment**.** [original underlining]

[2] The HEU made a second access request, on January 30, 2002, for a copy of the PWC report, along with "any other material pertaining to the aforementioned facility [the proposed new health centre] including draft plans, descriptive documents, reports and recommendations." The FHA combined the HEU's two access requests and levied a fee, which the HEU paid. A series of communications then ensued respecting fee-related matters.

[3] Two records, PWC reports dated December 2001 and February 2002, respectively, responded to the HEU's requests. I will describe them below. On March 18, 2002, the FHA disclosed those records, but withheld information from them under ss. 17(1)(c) and (d) of the Act. The FHA also severed some information under s. 14 of the Act, but later disclosed it. Section 14 is therefore not in issue in this order.

[4] On March 20, 2002, the HEU requested a review of the FHA's decision to withhold information under s. 17(1). The HEU, in its request for review, asserted it was in the public interest for the unsevered PWC reports to be made available. It also requested a review of the $998 total fee the FHA levied, on the basis that HEU believed that it "is in the public interest that these interrelated supporting documents be made available without charge". As a result of mediation by this office, the fee issue fell away.

[5] Because the s. 17(1) issue was not resolved during mediation, an inquiry was held under Part 5 of the Act, which I decided would be held in writing. I also decided that it had not been shown that proposed interveners identified by the HEU would bring

a broader perspective to the inquiry than the parties and I therefore declined to invite them to intervene.

[6] After the close of the inquiry, my review of the PWC reports and other material submitted to me disclosed that the approval for construction of the new health care facility, which is the subject of the reports, had been given jointly by the FHA and the British Columbia Cancer Agency ("BCCA"). The BCCA is part of the public body now called the Provincial Health Services Authority ("PHSA"). Under s. 54(b) of the Act, I gave notice of the inquiry to the PHSA and BCCA and invited their submissions on the issues in this inquiry.

2.0 ISSUES

[7] This is an inquiry into a decision to refuse access to parts of two records. The HEU contends that the FHA's failure to effectively sever the disputed information from the copies of the PWC reports that it disclosed to the HEU negated any risk of harm under s. 17(1) that might otherwise have been expected to flow from disclosure of the disputed information. Section 57(1) puts the burden on the FHA to establish that the HEU has no right of access under the Act to the disputed information because of s. 17(1).

[8] I also address below whether, under s. 25(1), the public interest requires disclosure of the disputed information. Section 57 is silent as to the burden of proof respecting s. 25. No formal burden of proof lies on the HEU or the FHA. As I observed in Order 02-38, [2002] B.C.I.P.C.D. No. 38, at para. 29:

> Section 25(1) either applies or it does not and in a Part 5 inquiry it is ultimately up to the commissioner to decide, in all the circumstances and on all of the evidence, whether or not it applies to particular information. Again, where an applicant argues that s. 25(1) applies, it will be in the applicant's interest, as a practical matter, to provide whatever evidence the applicant can that s. 25(1) applies. While there is no statutory burden on the public body to establish that s. 25(1) does *not* apply, it is obliged to respond to the commissioner's inquiry into the issue and it also has a practical incentive to assist with the s. 25(1) determination to the extent that it can.

[9] See, also, Order 02-50, [2002] B.C.I.P.C.D. No. 51, at paras. 85-86.

3.0 DISCUSSION

[10] **3.1 Background** – The FHA and the BCCA at some time in recent years received approval to build a new health care facility in Abbotsford. At the provincial government's request, these public bodies undertook a review of the proposed project, a review described at para. 4 of the FHA's initial submission as a "Public-Private Partnership and Alternative Service Delivery Review". This review apparently was undertaken to "explore ways in which private sector involvement may reduce capital outlay and overall costs, as well as share risks, by taking advantage of core competencies in the private sector" (para. 4, FHA's initial submission).

[11] PWC was retained to "identify, analyze, evaluate, and prepare a range of options and implementation strategies" for using opportunities to engage the private sector in developing or operating, or developing and operating, the new health care facility (para. 5, FHA's initial submission). According to the FHA, any public-private project would entail "selection of bid proponents through a competitive process" (para. 6, FHA's initial submission).

[12] The December 2001 PWC report is entitled "Public-Private Partnership Options Review". It is some 94 single-spaced pages long (including title page and table of contents). The February 2002 PWC report is entitled "Public-Private Partnership Review". It is approximately 61 single-spaced pages (including title page and table of contents). The FHA disclosed much of both versions to the HEU.

[13] PWC's analysis of the efficiency and productivity of the proposed health centre is reflected in its reports. PWC used, as benchmarks, a group of community hospitals in Canada. It analyzed the question of whether a pre-construction operating estimate for the proposed facility was reasonable and efficient and then proceeded to analyze a series of alternative service delivery options. PWC concluded that, based on its preliminary analysis, it was reasonable to expect that a public-private partnership involving a private sector partner in designing, building, financing and operating the health centre, over a long-term concession period, will provide savings over a public sector solution.

[14] Both versions of the PWC work-product contain discussions of various aspects of PWC's analysis and conclusions. They also contain numerous charts, tables and graphs setting out financial assumptions and other data relating to the possible alternative service delivery options. For example, p. 33 of the February 2002 report sets out a dollar figure by which PWC's preliminary analysis concluded a public sector solution would exceed the cost of the "base case PPP option." Exhibit 5.3, on the same page, sets out an assumed percentage "real discount rate" that PWC had used to derive certain conclusions.

[15] **3.2 Harm to Financial Interests** – Section 17(1) of the Act authorizes a public body to refuse to disclose information the disclosure of which could reasonably be expected to harm its financial or economic interests. The FHA cited ss. 17(1)(c) and (d) as the specific grounds for its decision to refuse access. The relevant parts of s. 17(1) read as follows:

> **Disclosure harmful to the financial or economic interests of a public body**
>
> 17 (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
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> …
>
> (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;

> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party; … .

[16] As the FHA notes, at para. 9 of its initial submission, the standard of proof applicable in determining whether the necessary reasonable expectation of harm has been established under s. 17(1) was recently addressed in Order 02-50, [2002] B.C.I.P.C.D. No. 51. In dealing with this case, I have applied the principles set out at para. 137 of that decision, also bearing in mind the discussion at paras. 124-136.

[17] The FHA supports the applicability of s. 17(1) to the disputed information with two affidavits sworn by Michael Marasco, one of which is an open affidavit and the other of which has been submitted – properly, in my view – on an *in camera* basis. Michael Marasco is the FHA's Chief Project Officer. His open affidavit speaks to the harm issue, as does the FHA's initial submission, as follows:

> 7. Both Public-Private Partnerships and Alternative Service Delivery options will involve the selection of bid proponents through a competitive process. As healthcare Public-Private Partnerships of this magnitude and nature are unprecedented in British Columbia, I believe that the number of qualified bid respondents could be small, which heightens the need to protect the ability to maximize competition.
>
> 8. The PricewaterhouseCoopers reports that are the subject of this Inquiry contain very sensitive financial and commercial information of the Fraser Health Authority that, if disclosed, would cause severe financial harm to the Public Body. The Fraser Health Authority has released the vast majority of these documents to the Applicant, severing only those critical financial assumptions as well as the possible anticipated savings in order to fully preserve market-place competition. Disclosure of this information would be expected to temper the aggressiveness of Public-Private Partnership proponents' bids, since they would know these targets. In addition, information was also severed from the released documents that relates to the management of personnel and the administration of the Fraser Health Authority that have not yet been implemented or made public.

[18] Michael Marasco's *in camera* affidavit elaborates on the specific elements of information that the FHA severed from the PWC reports under s. 17(1). A consistent thread of this evidence consists of explanations of how disclosure could reasonably be expected to dampen the competitive bidding environment for the new health care facility, by causing proponents to orient their bids to assumptions and savings targets in the PWC reports, which may well be conservative, rather than to exploring and offering more aggressive cost-saving opportunities.

[19] Tendering for any public-private partnerships respecting the proposed new health care facility could be well down the road from the HEU's access request for the PWC reports. This is a factor to consider in assessing the risk of harm from disclosure identified by the FHA. A tendering or request for proposal process would, no doubt, itself require some level of disclosure of FHA requirements and expectations, so that

proponents could make adequately responsive bids or proposals. It would not necessitate, however, disclosure of the specific kinds of assumptions and savings targets in the disputed information.

[20] I am persuaded by the logic, specificity and materiality of the FHA's evidence about risk of harm under s. 17(1) as a result of disclosure of the disputed information and find that the FHA was authorized by s. 17(1) to refuse access to the disputed information. There may come a time when the significance of the disputed information is superseded by revised plans for this proposed health facility or by other developments, but I am not satisfied that time has been reached yet.

[21] I will add one observation about the fact that the FHA's decision to refuse access to the disputed information was obviously taken without consideration of the mistake it was about to make, *i.e.*, of ineffectively severing disputed information from the electronic copies of the requested records that it delivered to the HEU. Paragraphs 6, 26 and 50 of Michael Marasco's *in camera* affidavit acknowledge some overenthusiastic severing of information in several charts in the requested records. Ordinarily, the FHA would be required to disclose further information from those charts. However, because of the advantage that the HEU took of the FHA's severing mistake, disclosure in fully decipherable form of any further information from those charts would significantly increase the risk that information the FHA was properly authorized to sever under s. 17(1), and which is only partly decipherable as a result of the FHA's severing mistake, would become more, or completely, decipherable. As a result, there is some information in those charts that the FHA would otherwise be entitled to receive but cannot now be disclosed because of risk of harm under s. 17(1).

[22] **3.3 Discussion of Faulty Severing** – As noted above, the HEU's access requests were for records in electronic or digital format. When the FHA responded on March 18, 2002, it believed the s. 17(1) information that is now in dispute had been severed from the electronic records it was disclosing. The HEU was also well aware that the FHA intended to sever information under s. 17(1). This was clearly indicated in the FHA's response letter and there was obvious blacking out of portions of text in the electronic records produced.

[23] The HEU was, nonetheless, able to recover, or reveal, some of the disputed information. The HEU did this knowing that the FHA maintained that the HEU had no right of access under the Act to the disputed information and had intended to sever that information from the records it provided to the HEU. The HEU proceeded to post the PWC reports on its website, with instructions to viewers on how to electronically "uncloak" the disputed information. The FHA's reply submission explains what happened as follows (at para. 2):

> 2. The Public Body had previously provided the Applicant with electronic copies of the two reports of PricewaterhouseCoopers dated December, 2001 and February, 2002. Those electronic copies omitted certain sensitive information which had been severed under sections 14 and 17 of the *Act*. The Public Body was later informed by the Applicant that it attempted to recover or "uncloak" all of the severed information and were able to recover some, but not all, of the severed

> information. Due to a formatting error on the initial electronic version of the report, it was possible for the Applicant to "cut and paste" blacked out text into a word processing program and recover information which had been severed under the *Act*. The extent of the "uncloaked" information is appended to the Applicant's initial submission of November 12, 2002.

[24] For the disputed information set out in tabular or graph form in the reports, the "uncloaking" process discovered by the HEU does not, in fact, reproduce the organization, order or arrangement of the recovered data elements. The result is that this information is jumbled; while it may be partially comprehensible, depending on the entry involved, there is also some incomprehensibility and also some doubt as to the meaning of and relationship between the jumbled data elements. For at least one graph, as well, the severed data is not retrievable at all using the uncloaking process.

[25] According to the HEU, the FHA's ineffective severance of the disputed information from the electronic copies of the requested records means that there could not, or could no longer, be a reasonable expectation of harm from disclosure under s. 17(1). The HEU's initial submission puts it this way (at pp. 1 and 2):

> The issues in this matter are really quite straightforward. They concern the impact of the circumstance that the Public Body has already, if inadvertently, apparently made the document public.
>
> …
>
> The consequence of this circumstance is that none of the reasons for the Public Body to withhold the severed information are applicable: if any damage could be done through disclosure, that damage has already been done. None of the harm referenced in section 17(1) can arise from disclosure at this point. The proverbial horse has left the barn.

[26] The FHA argues that, because the disclosure was inadvertent, the FHA having taken steps to protect the information from disclosure, "the circumstances are analogous to a 'leak' of sensitive information made without the consent of the FHA" (para. 3, FHA's reply submission). It relies on a decision of Assistant Commissioner Irwin Glasberg under Ontario's *Freedom of Information and Protection of Privacy Act*, Order P-901, [1995] O.I.P.C. No. 148. The applicant in that case argued that the Cabinet confidences exception in Ontario's access legislation could not be invoked because all or parts of the Cabinet submission in question had been disclosed to Ontario Hydro, which amounted to public disclosure for the purposes of that legislation. The applicant also argued that certain of the other disputed records had also been disclosed to the public "unofficially – ostensibly through information 'leaks'" (p. 7). At p. 7, Assistant Commissioner Glasberg said the following in relation to the Cabinet material:

> The appellant's first submission in this regard is that, since the Ministry has already released all or parts of the Cabinet Submission to one third party (Hydro), this amounts to public disclosure for the purposes of the Act.

> I am unable to accept this proposition. I believe that, in developing the new PNEP, the provincial government had the right to obtain input from third parties on the technical issues to be addressed in the materials prepared for Cabinet. I also find that, in sharing excerpts from its Cabinet Submission and related documents with Hydro, the Ministry had no intention of placing these records in the public domain. On this basis, I cannot conclude that the Ministry's decision to share certain written materials with Hydro has made these documents publicly available.

[27] Also at p. 7, he went on to say the following about the alleged leak of other records:

> For the purposes of this discussion, I will accept the appellant's claim that some of the records at issue have been disclosed to individuals or groups without the consent of Hydro. As a matter of principle, I consider it to be unfair to preclude an institution from relying on a mandatory exemption for records that have been released without its knowledge. On this basis, I am not prepared to support the appellant's argument that Hydro should be barred from claiming the Cabinet records exemption for the documents in question.

[28] I have some difficulty with the proposition – if it was being endorsed by Assistant Commissioner Glasberg – that the prevention of unfairness can be read into a disclosure exception when that consideration is not implicitly or explicitly present in the wording of the exception or another relevant provision in the Act. Certainly, in *J. Doe* v. *British Columbia (Information and Privacy Commissioner)*, [1996] B.C.J. No. 1950 (S.C.), Esson C.J.S.C. held that the applicability of a disclosure exception, in that case the mandatory exception in 22, could not be denied by the purported exercise of a general equitable jurisdiction to do justice between applicants and informants. Such a proposition was not, in his judgement, supported by the language of the Act. It seems to me that there would be a parallel problem of statutory interpretation with a finding that an exception applies – in this case s. 17(1) – for reasons of general fairness that are not found in the language of the Act.

[29] Further, unlike the exception for Cabinet deliberations, which was the object of Assistant Commissioner Glasberg's decision, s. 17(1) is a discretionary harm-based exception. The applicability of s. 17(1) requires the establishment of risk of harm from disclosure as defined in the section. If the risk of harm has already been realized by disclosure of the disputed information, even if inadvertently, how can the exception be applicable? That is the HEU's point.

[30] This perspective is not entirely applicable, however, because the version of the disputed information "uncloaked" by the HEU's technical skill was not fully comprehensible and, at least initially, was not a public disclosure at the time of uncloaking. The HEU also ignores the question of whether the FHA's March 18, 2002 decision to refuse access to the disputed information, which did not, of course, contemplate the FHA's faulty severing that occurred, was authorized by s. 17(1) of the Act.

[31] As I have held before – notably, in Order 01-52, [2001] B.C.I.P.C.D. No. 55, at para. 73 – the disclosure of information through an access request under the Act, other than personal information relating to an access applicant, is to be approached on the basis that it is disclosure to the world. This is because it would be a contradiction to treat the right of access under the Act to information (other than personal information relating to an applicant) as a right that is limited to particular applicants or purposes when it is – as s. 2(1) of the Act affirms – a public right that is not restricted to particular purposes. This case is different, however, because the disputed information did not come to the HEU, or anyone else, through the right of access created by the Act. To the contrary, the FHA intended to withhold the disputed information and believed it had done so. The HEU was aware that the FHA's faulty severing of the disputed information was a mistake and that, had the FHA known of its mistake, the ineffectively severed electronic records would not have been delivered to the HEU. In these circumstances, the FHA's delivery of the ineffectively severed records to the HEU, and the HEU's web-posted process for imperfectly recovering severed information from those records, was not disclosure under the Act. There should therefore be no assumption based on rights granted under the Act that it was or is public disclosure, unsevered, of the fully and accurately arranged PWC reports or that there remains no risk of harm under s. 17(1) of disclosure of the fully and accurately arranged PWC reports.

[32] The HEU has been able, because of the FHA's faulty severing of the disputed information and the HEU's decision to knowingly exploit that mistake, to significantly but imperfectly reconstitute the disputed information. The HEU argues that its less than perfect knowledge of the disputed information, gained through FHA's severing mistake, undercuts the FHA's decision to refuse access to the fully and accurately constituted disputed information. It says I should therefore determine that the FHA is not authorized under s. 17(1) to refuse access to the fully and accurately constituted disputed information.

[33] The FHA responded to this argument, in part, as follows (at paras. 14 and 15 of its further reply submission):

> … it is apparent upon following the instructions on the HEU website that much of the information retrievable is in incomprehensible form for the average person. Some of the pages provided in the HEU's submission of November 12th are not accurate and reflect difficulty which even the HEU with its knowledge of the industry had in reconstructing the severed portions of these documents. It is also notable that the "reconstructed" pages provided with the said submission are incomplete. Many of the pages severed have not been included with the submission – and at least some of those are tables which when accessed would be unintelligible to the average person. In the circumstances, the suggestion by the applicant that any damage that could have been done through disclosure, has already been done, has little credibility.
>
> What does appear to be clear is that the HEU is engaged in a relentless campaign against the government's privatization of hospitals. Given that they already have access to the entire document it is submitted that the only conceivable purpose for this application is to obtain a clean copy to be used in that campaign. While the

> existing document is buried in the HEU website and unlikely to be viewed by the proponents, the HEU's probable future use of the complete document would undoubtedly come to the attention of proponents and then the harm would be done.

[34] I have decided that the HEU's argument that risk of harm under s. 17(1) has been eliminated is not sustainable. I have found that the FHA was authorized to refuse to disclose the disputed information because of risk of harm to it under s. 17(1). The HEU, through the FHA's error, gained knowledge of the imperfectly reconstituted disputed information. From the perspective of the limits of my jurisdiction under the Act, that horse is clearly out of the barn. I have no authority to require the HEU to return the mistakenly disclosed information to the FHA or to restrain the HEU from using that information. I am satisfied, however, that the HEU's knowledge of the imperfectly recovered information in the records has not completely negated the risk of harm that the FHA has established could, under s. 17(1), reasonably be expected to result from disclosure of the fully and accurately constituted disputed information. I acknowledge that this case is close, but find that, following the FHA's ineffective severing of the disputed information, there remains ongoing risk of harm under s. 17(1). The FHA is authorized to protect itself against that risk by refusing to give access to the fully and accurately constituted severed information in the records.

[35] **3.4 Public Interest Disclosure** – Although referred to by implication in the HEU's request for review, this issue was not developed in the submissions of the HEU or anyone else. I have decided that s. 25(1) does not require the compulsory disclosure, without delay, of the disputed information. The risks of harm in s. 25(1)(a) do not present themselves here and I detect no "other reason" under s. 25(1)(b) why disclosure without delay is clearly compelled in the public interest.

4.0 CONCLUSION

[36] Section 58(1) of the Act provides that, after completing an inquiry under s. 56, I must dispose of the issues by making an order under that section. Section 58(2) provides that, if the inquiry is into a decision to refuse to give access to part of a record (in this case, two records), I must make one of the orders in ss. 58(2)(a) to (c). Accordingly, since I have found that the FHA's decision to refuse access to the disputed information was authorized by s. 17(1) of the Act, under s. 58(2)(b), I confirm that decision.

[37] Following the FHA's faulty severing of the disputed information, there remains a live risk of harm under s. 17(1), which I find the FHA is authorized to protect itself against by refusing to give access to the fully and accurately constituted disputed information.

[38] I find that s. 25(1) does not require the FHA to disclose the disputed information.

October 7, 2003

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia