



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

Order F05-16

KWANTLEN UNIVERSITY COLLEGE

Celia Francis
Adjudicator

June 8, 2005

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Summary: Applicant requested copy of cafeteria management contract between Kwantlen University College and a food services company. KUC disclosed most of contract, withholding payment and capital investment information under s. 21. Severed information does not meet the second and third parts of the s. 21 test and is ordered disclosed.

Key Words: financial information of or about a third party—supplied in confidence—competitive position—negotiating position—interfere significantly with.

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

Authorities Considered: B.C.: Order 01-39, [2001] B.C.I.P.C.D. No. 40, Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order F05-01, [2005] B.C.I.P.C.D. No. 1; Order F05-05, [2005] B.C.I.P.C.D. No. 6; Order F05-09, [2005] B.C.I.P.C.D. No. 10; Order 03-15, [2003] B.C.I.P.C.D. No. 15.

1.0 INTRODUCTION

[1] The Kwantlen Student Association, the applicant in this case, made a request under the *Freedom of Information and Protection of Privacy Act* (“Act”) to Kwantlen University College (“KUC”) for copies of two records: the current contract for management of KUC’s parking lots between KUC and a named parking company; and the current contract for management of cafeteria services between KUC and a named food services company. After providing notice under s. 23 of the Act to the third-party companies, KUC disclosed copies of the two contracts, severing information from each record under ss. 17 and 21 of the Act.

[2] The applicant requested a review by this Office of KUC's decision to deny access to some of the information, also arguing that s. 25 of the Act required disclosure of the severed information. Mediation led to full disclosure of the parking contract and most of the cafeteria contract, with a few items of information still withheld under s. 21. KUC also withdrew its application of s. 17 and the applicant withdrew its s. 25 argument.

[3] Because the matter did not settle fully in mediation, a written inquiry was held under Part 5 of the Act. I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act. The Office invited and received submissions from the applicant, KUC and the third-party food services company.

2.0 ISSUE

[4] The issue before me in this case is whether s. 21 of the Act requires KUC to withhold information. Under s. 57(1) of the Act, KUC has the burden of proof regarding s. 21.

3.0 DISCUSSION

[5] **3.1 Application of Section 21** – Many orders have addressed s. 21 and the principles for its application are well-established. See, for example, Order 01-39¹, Order 03-02², Order F05-01³, Order F05-05⁴ and Order F05-09⁵. I have applied here, without repeating them, the principles established in those orders.

[6] The relevant parts of s. 21 read as follows:

Disclosure harmful to business interests of a third party

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, ...

[7] **3.2 Record in Dispute** – KUC disclosed almost all of the “Food Services Agreement” between itself and the third party, withholding 11 lines of information in

¹ [2001] B.C.I.P.C.D. No. 40, upheld on judicial review.

² [2003] B.C.I.P.C.D. No. 2.

³ [2005] B.C.I.P.C.D. No. 1.

⁴ [2005] B.C.I.P.C.D. No. 6.

⁵ [2005] B.C.I.P.C.D. No. 10.

Appendix 2 of the agreement. The agreement, which is for a 10-year term from July 1, 2000 to June 30, 2010, begins with the third party's agreement to provide various food services in accordance with Appendix 1, its "Statement of Quality". It continues with a "Payment" section, which refers to "specifics of the financial agreement" outlined in Appendix 2, a May 19, 2000 "letter of intent" from KUC to the third party (the record in dispute). The remainder of the agreement describes the parties' agreement on other aspects of the third party's operation of food services at four of KUC's campuses and on KUC's obligations, which include providing certain facilities.

[8] KUC withheld six lines of information in the letter of intent under the heading "Financial Option Two" (which describes the terms of payment by the third party to KUC) and five lines under the heading "Capital Investment" (which sets out certain capital investments to be made by the third party).

[9] **3.3 Does Section 21 Apply?** – Section 21 contains a three-part test, all three parts of which must be satisfied before a public body is required by s. 21 to withhold information. The information must be of a specified type, it must have been supplied implicitly or explicitly in confidence and its disclosure must result in one of the specified harms listed in the section.

[10] KUC, which has the burden of proof in this case, says in its brief initial submission that it was leaving it to the third party to "flesh out and fully support" the third party's position on the severed information and that it supports the third party's position. However, KUC said in its even briefer reply that it did not take a position on s. 21 and that it refused access to the severed portions because the third party took the position that s. 21 requires KUC to withhold that information. It said that it would abide by my decision in this case. As will be seen by the following discussion, I have found that KUC did not meet its burden in this case, including having regard to the third party's submissions.

Financial or commercial information

[11] The first step in the application of s. 21 is determining whether the information is of a type described in s. 21(1)(a), including financial or commercial information of or about a third party. KUC and the third party both say that the information in issue here is clearly commercial and financial information about the third party. The third party describes the severed information as including the capital investment required by the third party as part of the agreement and the percentage of sales that the third party will pay back to KUC as part of the agreement (paras. 7-8, third party's initial submission; p. 1, KUC's initial submission). The applicant believes that the withheld information is "descriptive of the compensation/income consideration and capital investment that KUC would receive under the agreement" (p. 2, initial submission).

[12] The third party's description of the nature of the withheld information is accurate. Although I do not necessarily consider the disputed information to be "commercial" information, as I discussed that term in Order F05-09, it is financial information of or about the third party for the purposes of s. 21(1)(a)(ii), as it concerns the third party's financial obligations to pay certain revenues to KUC and make certain investments.

Supply in confidence

[13] KUC and the third party both say that the information in dispute was supplied in confidence while the applicant disputes this. I will first deal with whether the information in dispute was “supplied” for the purposes of s. 21(1)(b) and then whether it was supplied “in confidence”.

[14] Previous orders have established that, in order to meet the second part of the s. 21 test, the information must first have been “supplied” within the meaning of that term as explained in previous orders and court decisions.. The terms of an agreement or contract, as the products of negotiation or give and take between the parties to the agreement, will not normally meet the “supply” part of the test because they are created jointly by the parties to the contract.

[15] The applicant says that it received from KUC reference information which is publicly available in KUC’s library and which it says shows KUC’s income from the agreement. Its intent in making this submission was apparently to show that, because the actual income or revenue information is publicly available, the terms of the agreement under which the revenue is paid ought also to be public. In any case, since the applicant did not provide me with a copy of the supposedly publicly available revenue information, I have no way of knowing if there is a correlation between it and the terms of the agreement.

[16] KUC says that the information in dispute was supplied in the third party’s proposal. It provides in support of this argument a one-page document that it calls Schedule “A”. This document says it is the foreword to the third party’s proposal and includes the following statement:

Should we be successful in our efforts at managing your business we would require a Letter of Intent to officially notify us of your [KUC’s] decision and would simultaneously incorporate the substance of our proposal into a written contractual Agreement.

[17] KUC and the third party gave no other particulars to support their position that the information in dispute was “supplied”. They did not, for example, describe the process under which the parties arrived at the agreement or provide any documentation from the request for proposal process. They also did not provide the third party’s proposal or other similar evidence in support of the third party’s position on this point, such as affidavit evidence from knowledgeable employees involved in the proposal process. Nor did they provide evidence to show that the information in the proposal was incorporated into the letter of intent without change or negotiation into the letter of intent and that it was immutable and not “susceptible of change” (see, for example, Order 01-39). There is also no suggestion from KUC or the third party that third-party financial information could accurately be derived from the disputed information (see, for example, Order 03-02).

[18] The food services agreement says it sets out what the parties agreed to. The “Payment” section of the agreement refers to the letter of intent as outlining the “specifics of the financial agreement”. Similarly, the opening phrases of the letter of intent state that KUC confirms its intent to enter a new agreement to operate cafeterias on four of its campuses. It says KUC anticipates finalizing the agreement with the third party in the coming weeks and that “the operating agreement will need to incorporate the following issues that have been concluded as part of the Tender and Review Process”. The first heading in the letter, “Financial Option Two”, is followed by the phrase “as defined in...[the third party’s] tender submission”, suggesting that the third party submitted at least two options for payment during the tendering process, and that KUC and the third party agreed on Option Two (details of which are part of the disputed information).

[19] The language of the agreement and appendix supports the conclusion that the KUC and the third party engaged in a negotiation process, including “a tender and review process” (to quote the letter of intent), to arrive at the terms of the agreement, including the severed information in the letter of intent. The disputed information is the kind of negotiated information that the Information and Privacy Commissioner and others have found not to meet the “supply” test for contract and agreement terms. The information in dispute does not meet the “supply” part of the s. 21 test.

[20] Further, orders dealing with the issue of “confidentiality” of supplied information have made it clear that there must be an objective basis for concluding that information was supplied in confidence. Evidence of the third party’s subjective intentions will not suffice on its own.

[21] There is nothing before me that indicates that the information in dispute was supplied “in confidence”, either implicitly or explicitly. Again, the third party simply asserts that the disputed information was supplied in confidence and provides no support for its contention. KUC says that the information in dispute was supplied in the third party’s proposal on the basis that it was to be held in strict confidence by KUC. It points to Schedule “A”, the foreword to the third party’s proposal, which states that the proposal is proprietary to the third party and asks that KUC hold the proposal in “strict confidence”. Schedule “A” pertains to the third party’s wishes on submission of the proposal, however, not to the terms of the agreement. I note that the Commissioner commented on this distinction in Order 03-15⁶, as follows:

[76] The Ministry and JMHS would treat the JMHS proposal and the Health Services Agreement as one and the same for purposes of the “in confidence” element in s. 21(1)(b), but that is not the case. There is no para. in the Health Services Agreement that is the same or like para. 5.7 of the RFP. Para. 5.7 of the RFP, moreover, relates to JMHS’s proposal, which is not the same as the agreement that was subsequently arrived at between the parties (even if the proposal and the agreement contain some same or similar figures). A commitment to maintain the confidentiality of proposals responding to an RFP is not an agreement to maintain confidentiality of the terms of contracts that may be reached with successful proponents.

⁶ [2003] B.C.I.P.C.D. No. 15.

[22] The third party's wishes respecting confidential submission of the proposal also do not mean that KUC received the proposal in confidence, much less the agreement terms resulting from the parties' dealing. KUC provided no other support for its position on this issue, such as documentation from the proposal process or affidavit evidence on any mutual expectations of confidentiality for the terms of the agreement.

[23] As the applicant points out, the agreement itself is silent on the confidentiality issue. Apart from Schedule "A", which, as noted, does not assist in determining whether the information in dispute in the agreement was supplied "in confidence", I have no basis on which to conclude that the disputed information meets the confidential part of the supply test.

[24] To summarize, I find that the information in dispute was not supplied within the meaning of s. 21(1)(b). I further find that, even assuming for discussion's sake only that the disputed information had been supplied, it was not supplied in confidence, explicitly or implicitly, for the purposes of s. 21(1)(b).

Significant harm to competitive or negotiating interests

[25] I have found that the information in dispute is "financial information" of or about the third party but that it does not, on two grounds, meet the second part of the s. 21 test. Although I need not take the matter further, I will, however, also consider whether the severed information meets the harms test under s. 21(1)(c)(i), assuming for the purposes of discussion that the information in dispute was supplied in confidence under s. 21(1)(b).

[26] The third party said that disclosure of the severed information "would be significant". It says that it believes that the disclosure of the severed information "would severely compromise its competitive position vis-a-vis its competitors both in this agreement and in any other university context" (paras. 8-9, initial submission). It added the following at p. 2 of its reply submission:

There are a small number of companies who bid in this industry and the industry is a low margin industry. Any financial information which is disclosed through this process would help the competitors and disadvantage the Third Party in any attempts at re-bidding at Kwantlen University College, as well as in any other bids being competed for through British Columbia and across Canada.

[27] KUC says in its initial submission that:

- (c) the information in question would appear to
 - (i) harm significantly the competitive position of [the third party] because it would provide competitors with a clear view of the economic criteria by which [the third party] is prepared to enter into an agreement of this kind. This information would allow a competitor to undercut [the third party].

[28] KUC did not explain how the “economic criteria” would, in its view, allow an (unspecified) competitor to undercut the third party. KUC’s vague suggestion that the disputed information “would appear to” significantly harm the third party’s competitive position does not come close to meeting the standard in s. 21(1)(c)(i), which requires that disclosure “could reasonably be expected to” cause significant harm.

[29] The applicant, in rebutting the third party’s harm arguments, points out that speculation does not satisfy the third part of the s. 21 test, referring to Order 03-02 for support. It does not believe that KUC has discharged its burden with regard to s. 21.

[30] The third party did not explain what it meant by saying that disclosure of the severed information “would be significant”. Nor did it provide any evidence to support its contention on the supposedly competitive and “low margin” nature of the industry. The third party also failed to provide any argument or evidence on what, if any, other bidding processes in which it may currently be involved, nor how disclosure of the information in dispute could reasonably be expected to compromise its negotiating or competitive position, significantly or otherwise, in such bidding processes.

[31] As for possible harm to the third party’s position in bidding for future agreements with KUC, the current agreement is at this point halfway through its term. It is possible that KUC and the third party will not renew the contract in 2010. If they do, it may be under the same terms or they may negotiate completely new terms, including new payment and investment options. Any future agreement will almost certainly be influenced by the then prevailing market and other relevant conditions.

[32] Given the paucity of evidence and argument to support KUC’s and the third party’s speculative assertions on harm, I am unable to conclude that disclosure of the information in dispute could reasonably be expected to significantly harm the third party’s competitive position or significantly interfere with its negotiating position. I find s. 21(1)(c)(i) does not apply to the information in dispute.

4.0 CONCLUSION

[33] For the reasons given above, under s. 58 of the Act, I find that s. 21 does not require KUC to refuse access to the information in dispute and I require KUC to provide the applicant with access to that information.

June 8, 2005

ORIGINAL SIGNED BY

Celia Francis
Adjudicator