



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

Order F10-27

VANCOUVER COASTAL HEALTH AUTHORITY

Jay Fedorak, Adjudicator

August 16, 2010

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Summary: The HEU requested access to the patient food services contract and the retail food services contract between the public body and Sodexo Canada. Sodexo asked for a review of the public body's decision to give access to portions of the contract relating to quality standards and targets; fees for food services; goods and services covered by certain rates; capital repayments; and customer sales base information. The information was found to be commercial and financial information of Sodexo, but the information in the contract was found to be negotiated and not supplied. Sodexo also failed to substantiate that disclosure would cause economic harm. The three-part test of s. 21(1) of FIPPA was not met. Public body ordered to disclose the rest of the contract.

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

Authorities Considered: B.C.: Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 03-15, [2003] B.C.I.P.C.D. No. 15; Order F05-05, [2005] B.C.I.P.C.D. No. 6; Order F07-07, [2007] B.C.I.P.C.D. No. 9; Order 00-09, [2000] B.C.I.P.C.D. No. 9; Order No. 25-1994, [1994] B.C.I.P.C.D. No. 29; Order 01-39, [2001] B.C.I.P.C.D. No. 40; Order F08-22, [2008] B.C.I.P.C.D. No. 40; Order F07-15, [2007] B.C.I.P.C.D. No. 2; Order F09-22 [2009] B.C.I.P.C.D. No.28

Cases Considered: *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* 2002 BCSC 603.

1.0 INTRODUCTION

[1] This order arises from a request by an applicant, Hospital Employees Union ("HEU"), for a copy of the patient food services contract and the retail food

services contract (“the contracts”) between the Vancouver Coastal Health Authority (VCHA”) and Sodexo Canada (“Sodexo”) and some related documents.

[2] The VCHA responded to the request by providing the HEU with copies of the records, while withholding some of the information under s. 21(1) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”). The HEU was not satisfied and requested a review of this decision by the Office of the Information and Privacy Commissioner (“OIPC”). During mediation of the request for review, the VCHA changed its position and decided that it should release the remaining information. It gave notice to Sodexo, as a third party, under s. 24 of FIPPA, that it intended to disclose all of the requested information. Sodexo requested a review of the VCHA’s decision to disclose the requested information.

[3] Mediation did not resolve the matter, and the OIPC held a written inquiry and issued a notice to the VCHA, Sodexo, and the HEU.

2.0 ISSUE

[4] The issue before me is whether the VCHA is required to refuse access to portions of the record in dispute under s. 21(1) of FIPPA.

[5] Under s. 57(3)(b) of FIPPA, it is up to Sodexo to prove that the HEU has no right of access to the portion of records that the VCHA had made a decision to release.

3.0 DISCUSSION

[6] **3.1 Record in Dispute**—The record consists of the complete contract between Sodexo and the VCHA for patient food services and retail food services. The information at issue is information that the VCHA originally withheld from its response to the HEU and which Sodexo argues should remain withheld. It consists of a small amount of information relating to the following: quality standards and targets; fees for food services; goods and services covered by certain rates; capital repayments; and customer sales base.

[7] **3.2 Harm to Business Interest**—Section 21(1) of FIPPA requires public bodies to withhold information the disclosure of which would harm the business interests of a third party. It sets out a three-part test for determining whether disclosure is prohibited, all three elements of which must be established before the exception to disclosure applies. These are the relevant FIPPA provisions in this case:

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,
 - ...
 - (iii) result in undue financial loss or gain to any person or organization, ...

[8] Numerous orders have considered the application of s. 21(1) and the principles for its application are well established.¹ Commissioner Loukidelis conducted a comprehensive review of the body of case decisions in several jurisdictions in Order 03-02.² I have applied those principles here without repeating them.

Commercial or Financial Information

[9] Sodexo submits that the information at issue in the records is its commercial and financial information, because it relates to the compensation it receives from supplying services to VCHA.³ The HEU accepts that the information could be the commercial and financial information of Sodexo.

[10] From my review of the records, I find that the quality standards and targets, fees for food services, goods and services covered by certain rates, capital repayments and customer sales base information at issue in this inquiry constitutes the commercial and financial information of Sodexo, as previous orders have interpreted these terms.⁴

Supplied in Confidence

[11] With respect to the second part of the test, Sodexo submits that it has taken great care to ensure that the information about it remains confidential. It cites several schedules of the contracts, which recognize that they contain commercial information of Sodexo submitted in confidence.⁵ The HEU does not take issue with whether Sodexo and the VCHA intended that they would treat the

¹ See for example, Order 03-02, [2003] B.C.I.P.C.D. No. 2 and Order 03-15, [2003] B.C.I.P.C.D. No. 15.

² At paras. 28-117.

³ Third party's initial submission, p. 3.

⁴ For example, Order F05-05, [2005] B.C.I.P.C.D. No. 6 found that commercial information included terms and conditions for providing services and products by a third party. In addition, Order F07-07, [2007] B.C.I.P.C.D. No. 9 found that information relating to the buying or selling of goods or services qualified as commercial information for the purpose of s. 17(1)(b).

⁵ Third party's initial submission, paras. 30-34.

information as confidential. The fundamental issue is whether Sodexo “supplied” this information in accordance with s. 21(1)(b) of FIPPA.

[12] As noted above, previous decisions have dealt extensively with the application of s. 21(1)(b) of FIPPA with respect to information in contracts between public bodies and private-sector service providers, like Sodexo. These decisions have established clearly that, in the words of Commissioner Loukidelis, “Information in an agreement negotiated between two parties does not, in the ordinary course, qualify as information that has been ‘supplied’ by someone to a public body.”⁶ He held that there might be rare circumstances where this would not be the case. Commissioner Flaherty in Order No. 26-1994⁷ had suggested that examples would be:

1. Where the third party has provided original or proprietary information that remains relatively unchanged in the contract; and
2. Where disclosure of the information in the contract would permit an applicant to make an “accurate inference” of sensitive third-party business information that would not in itself be disclosed under the Act.

[13] Adjudicator Iyer clarified the issue of “supplied” versus “negotiated” in Order 01-39 a decision upheld by the Supreme Court of British Columbia on judicial review.⁸ The adjudicator stated:

Information will be found to be supplied if it is relatively “immutable” or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead costs may be found to be “supplied” within the meaning of s. 21(1)(b). To take another example, if a third party produces its financial statements to the public body in the course of its contractual negotiations, that information may be found to be “supplied”. It is important to consider the context with which the disputed information is exchanged between the parties. A bid proposal may be “supplied” by the third party during the tender process. However, if it is successful and is incorporated into or becomes the contract, it may become “negotiated” information, since its presence in the contract signifies that the other party agreed to it.

In other words, information may originate from a single party and may not change significantly – or at all – when it is incorporated into the contract, but this does not necessarily mean that the information is “supplied”. The intention of s. 21(1)(b) is to protect information of the third party that is not

⁶ Order 00-09, [2000] B.C.I.P.C.D. No. 9, pp. 5-6.

⁷ [1994] B.C.I.P.C.D. No. 29, p. 7.

⁸ *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* 2002 BCSC 603.

susceptible of change in the negotiation process, not information that was susceptible to change, but, fortuitously, was not changed.⁹

[14] On judicial review, C. Ross J. agreed with Adjudicator Iyer:

CPR's interpretation focuses on whether the information remained unchanged in the contract from the form in which it was originally supplied on mechanical delivery. The Delegate's interpretation focuses on the nature of the information and not solely on the question of mechanical delivery. I find that the Delegate's interpretation is consistent with the earlier jurisprudence ...¹⁰

[15] Sodexo states that it "supplied" the information at issue to VCHA.¹¹ Sodexo submits that the tender process in the procuring of the contract:

Involves, in essence, a fixed price bid from the contractor, with subsequent negotiation resulting in modification of some terms. However, the parameters of the contract are established by the original bid pricing provided by Sodexo.¹²

[16] Sodexo argues that the bid price that it provided was formulated on its own business processes and costs. The modifications that it made to its bid price were based on its business processes.¹³

[17] VCHA now takes the position that, as a result of the decision of Commissioner Loukidelis in Order F08-22,¹⁴ s. 21 does not apply to the information at issue. This Order related to a request for access to information related to a contract between Sodexo and the Fraser Health Authority for housekeeping services. Sodexo tries to distinguish the information at issue in the present case from that of Order F08-22. The difference, it submits, is that the present case relates to a contract, whereas the previous case relates to a pricing in a Change Order and Addendum to another contract:

While they referred to provision of the primary contract, and repeated some of the pricing information from the primary contract, they did not contain all of the proprietary information supplied by Sodexo in the bid.¹⁵

[18] Sodexo describes some of the information at issue as "Sodexo's pricing under the agreements and the associated details indicating how Sodexo and VCHA have agreed that the price is to be calculated".¹⁶

⁹ Order 01-39, [2001] B.C.I.P.C.D. No. 40, paras. 45-46.

¹⁰ *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* 2002 BCSC 603, para. 75.

¹¹ Third party's initial submission, p. 3.

¹² Third party's initial submission, p. 4 and affidavit of Director of Finance, para. 6.

¹³ Third party's initial submission, p. 4.

¹⁴ Order F08-22, [2008] B.C.I.P.C.D. No. 40; VCHA's initial submission, p. 1.

¹⁵ Third party's initial submission, p. 5.

¹⁶ Third party's initial submission, affidavit of Director of Finance, para. 23.

[19] Sodexo's argument is not persuasive. The difference between the two cases is that the information from the previous case constituted, in effect, part of the contract relating to pricing of some services. The present case covers service performance targets and pricing information for a broader range of services. Therefore, the only real difference between the two cases is that the present case involves service performance targets. Sodexo has not explained why the performance target or pricing information at issue in the present case should be considered to have been "supplied" in a way that the information in Order F08-22 was not. Moreover, as VCHA had the option of whether to agree to Sodexo's bid in whole, or in part, I find the terms of the contract must be considered to have been "negotiated", not "supplied". By Sodexo's own description, this pricing information has clearly been the subject of negotiation, as VCHA has had a say in how the pricing is to be calculated.

[20] I also consider it to be significant that the other party to the contracts, the VCHA, does not corroborate Sodexo's account of the extent to which the terms of the contracts were negotiated or supplied and believes that it must release the information.¹⁷

[21] Another crucial point is that there is no evidence that Sodexo "supplied" the information at issue. The only evidence in support of the submission is one affidavit from an employee of Sodexo, who makes assertions about the relationship between its proprietary information, the original bid, and details in the contract, but without providing financial details or examples.

[22] I find that Sodexo has not demonstrated that it had "supplied" the information to the VCHA in accordance with s. 21(b) of FIPPA. While it has made assertions to this effect, it has not supported those assertions with any evidence or corroboration.

Harm to third party interests

[23] As none of the information at issue meets the "supplied" test in s. 21(1)(b), it is not necessary for me to deal with the harms part of the analysis under s. 21(1)(c). Nevertheless, for completeness, I will consider the submissions made on this issue.

[24] With respect to the third part of the test, Sodexo submits that disclosure of the requested records would significantly harm its competitive position. Sodexo states that it has two main competitors in the marketplace: Compass and Aramark.¹⁸ It submits that disclosure of the information to its competitors would enable them "to modify their own bids, either by appropriating some of Sodexo's pricing and reporting mechanisms or internal strategies and processes, and

¹⁷ VCHA's initial submission, p. 1.

¹⁸ Third party's initial submission, affidavit of Director of Finance, para. 2.

incorporating them in their own bids, or by restructuring their bids to undercut Sodexo”.¹⁹

[25] Sodexo is also concerned about the implications of disclosure on its labour relations. The employee of Sodexo states in his affidavit that the HEU is the exclusive bargaining agent of many of its employees who work on the VCHA contract. They submit that disclosure of the information at issue:

would give the HEU an extremely unfair advantage in future collective bargaining with Sodexo. This is because it would be potentially able to determine Sodexo’s profit margins in various areas, as well as Sodexo’s strategies for achieving those margins. HEU could then target its collective bargaining demands accordingly.²⁰

[26] The HEU also disagrees that disclosure would cause Sodexo undue harm. It cites the comments of Commissioner Loukidelis, in Order F07-15 that dealt with a similar case regarding a request for the contracts between the VCHA and a third party for cleaning services. The HEU quoted him, as follows:

the disclosure of existing contract pricing and related terms that results in mere heightening of competition for future contracts is not significant harm or significant interference with competitive or negotiating positions.²¹

[27] On the subject of disclosure affecting Sodexo’s relationship with the HEU as the bargaining agent for its employees, Commissioner Loukidelis dealt with that issue in Order F08-22. In that order he established that “putting contractors in a position where they have to deal with cost pressures from their unionized work force does not constitute harm under s. 21(1)(c)(i) or (iii)”.²² I agree with the HEU that the same applies in this case.

[28] The harm Sodexo has outlined as a result of disclosing the terms of the contracts is vague, merely speculative and lacking in evidentiary support. Its arguments regarding the harm of disclosure of the information in the contract are similar to those that previous orders have dismissed.

[29] Taking a different perspective, in Order F09-22, I found that disclosure of part of the third parties bid met the test of s. 21(1)(c) because the third party had demonstrated that the market was highly competitive and the loss of even one contract for a firm of its size would cause significant harm.²³ Sodexo, in contrast, while providing some information about its marketplace, has not quantified, even in general terms, the putative financial harm it fears that disclosure of the information would cause it. Moreover, in the present case, it is the contracts, not Sodexo’s bid, which the HEU has requested. Consequently, I find that Sodexo

¹⁹ Third party’s initial submission, para. 7.

²⁰ Third party’s initial submission, affidavit of J.V. para. 18.

²¹ Order F07-15, [2007] B.C.I.P.C.D. No. 2, para. 43 quoted in HEU’s initial submission, para. 10.

²² HEU’s initial submission, para. 15.

²³ Order F09-22, [2009] B.C.I.P.C.D. No.28, para. 37.

has failed to establish that it would suffer a reasonable prospect of harm from the disclosure of the terms of the contract and that s. 21(1)(c)(i), therefore, does not apply.

4.0 CONCLUSION

[30] I find that s. 21(1) of FIPPA does not require the VCHA to refuse to give the HEU access to the records. For the reasons given above, under s. 58 of FIPPA, I make the following order:

1. I require the VCHA to give the applicant access to this information within 30 days of the date of this order, as FIPPA defines “day”, that is, on or before September 28, 2010 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

August 16, 2010

ORIGINAL SIGNED BY

Jay Fedorak
Adjudicator

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