



Order F20-46

MINISTRY OF ATTORNEY GENERAL

Jill Nevile
Adjudicator

October 20, 2020

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Summary: The applicant requested copies of contracts between the Ministry of Attorney General (Ministry) and Sierra Group Inc. (Sierra). The Ministry decided to disclose the records to the applicant. Sierra disputed that decision and asserted that some information must be withheld under ss. 21 (harm to third party business interests) and 22 (unreasonable invasion of third party personal privacy) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator found that ss. 21 and 22 did not apply to the information in dispute and ordered the Ministry to disclose it to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 21 and 22.

INTRODUCTION

[1] This order arises out of an applicant's request to the Ministry of Attorney General (Ministry) under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for copies of contracts between the Liquor Distribution Branch of the Ministry and Sierra Group Inc. (Sierra). The applicant requested access to any contracts made between 2015 and 2018 for the implementation of an Oracle computer software program.

[2] The Ministry determined that the only responsive record was a contract between Sierra and the Ministry dated May 2, 2016.¹

[3] The Ministry gave Sierra notice of the access request under s. 23 of FIPPA and sought its views on the application of s. 21 of FIPPA (harm to third party business interests) to the contract. Sierra objected to the release of parts of the contract on the basis that s. 21 applied to some information in the contract,

¹ Ministry's reply submission at para. 2.

and that s. 22 (unreasonable invasion of third party personal privacy) applied to other information in the contract.

[4] After reviewing Sierra's response, the Ministry decided to grant the applicant full access to the contract.² The Ministry informed Sierra of its right under FIPPA to request a review of this decision.

[5] Sierra asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision. Mediation did not resolve the matter, and Sierra requested that the issues proceed to a written inquiry under Part 5 of FIPPA.

[6] Sierra provided an initial submission that addresses both ss. 21 and 22. The Ministry's reply submission addresses s. 22 only, and the Ministry says that it takes no position on the application of s. 21 to the disputed information. Sierra chose not to respond to the Ministry's submission. The applicant did not provide any submission.

ISSUES

[7] The issues I must decide in this inquiry are as follows:

1. Is the Ministry required to refuse to disclose the disputed information under s. 21?
2. Is the Ministry required to refuse to disclose the information in dispute under s. 22?

[8] The Ministry decided that it would give the applicant access to the information in dispute. Therefore, s. 57(3)(b) of FIPPA assigns the burden of proof to Sierra, as the third party, to prove that the Ministry must refuse to disclose the information to the applicant under s. 21(1).

[9] Section 57(2) of FIPPA says that the applicant has the burden to prove that disclosure of any personal information in the records would not be an unreasonable invasion of a third party's personal privacy under s. 22(1) of FIPPA. However, the party asserting that s. 22(1) applies, first has to prove that the disputed information qualifies as personal information.³

² Ministry's reply submission at para. 6.

³ Order 03-41, 2003 CanLII 49220 at paras. 9–11.

DISCUSSION

Background

[10] The Liquor Distribution Branch (LDB) is a part of the Ministry of Attorney General.⁴ The *Liquor Distribution Act* gives the LDB the sole right to purchase liquor for resale and reuse in British Columbia in accordance with the provisions of the *Importation of Intoxicating Liquors Act*.

[11] Oracle eBusiness Suite is the software LDB uses to handle financial reporting and accounting activities and to enable e-commerce capabilities for its wholesale customers. The LDB first implemented this software in 2005.

[12] In and around 2015, the LDB changed its business model to segregate its retail and wholesale operations, which impacted various computer systems and applications. The LDB decided to upgrade its current version of Oracle eBusiness Suite in order to assist with the segregation and for other future initiatives of the Branch. On June 24, 2015, the LDB issued a Request for Proposal (RFP) for professional services to upgrade the Oracle eBusiness Suite.

[13] The RFP was for a contractor to drive the "discovery" stage of the upgrade project. The deliverables for the discovery stage included creating the detailed business requirements, a gap analysis and the budgetary cost for the upgrade.

[14] The RFP contemplated that following the discovery stage, the LDB would request a fixed price offer from the contractor to complete the upgrade according to the scope, strategy and plan delivered in the discovery stage. If the LDB was satisfied with the contractor's fixed price offer, then the LDB would renew the contract and the parties would amend the contract to add another statement of work to complete the second stage activities.

[15] The LDB received 10 proposals in response to the RFP. Sierra was the successful proponent. Based on the proposal submitted by Sierra, the LDB hired Sierra to perform the services outlined in the RFP.

[16] Consistent with the terms of the RFP, after finishing the discovery stage of the project, Sierra presented a proposal to complete the second stage of the upgrade. The LDB was satisfied with Sierra's proposal for the second stage and the parties entered into a contract for completion of the software upgrade. The contract is the record in dispute in these proceedings. Sierra completed the services it was retained for under the contract in or around July 2019.

⁴ The information in this background comes from the Ministry's reply submission at paras. 17-26.

Record and information at issue

[17] The record in dispute is a 146 page contract comprised of the main agreement, an amendment, and several change orders. Sierra's proposal for the second stage of work is included in Schedule A of the contract and is labelled "Appendix A1 - Statement of Work".

[18] The Ministry says that it has disclosed the contract to the applicant, only withholding under ss. 21 and 22 the information that Sierra requested proceed to inquiry.⁵ The Ministry's inquiry submission includes a copy of the severed contract that it disclosed to the applicant.

[19] Sierra's inquiry submission also includes a copy of the contract, with the information that Sierra says should be withheld marked in red. Sierra's severing does not match the severed contract that the Ministry gave to the applicant. Specifically, Sierra appears to now agree to the disclosure of some of the information that the Ministry did not disclose to the applicant. In other instances, Sierra has marked information that it asserts should be withheld although I can see that the Ministry has already disclosed that information.

[20] In my view, whether ss. 21 or 22 apply to information that the Ministry has already disclosed to the applicant is moot. Therefore, I conclude that the only information that I need to decide about in this inquiry is the information that the Ministry did not disclose to the applicant. This information includes the information that Sierra originally withheld, but later disclosed in the copy of the contract provided with their submission. I conclude that the information which is in dispute for this inquiry is properly marked in the record the Ministry has provided with these submissions.

Harm to third-party business interests – s. 21

[21] Section 21 of FIPPA requires public bodies to refuse to disclose information that could reasonably be expected to harm the business interests of a third party.⁶

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

(a) that would reveal

(i) trade secrets of a third party, or

⁵ Ministry's reply submission at para. 7.

⁶ Schedule 1 of FIPPA defines a "third party" to mean "any person, group of persons or organization other than (a) the person who made the request, or (b) a public body." It is not in dispute that Sierra is a third party under FIPPA.

- (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) 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,
 - (iii) result in undue financial loss or gain to any person or organization, or
 - (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[22] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies to information.⁷ The party resisting disclosure must first demonstrate that disclosing the information at issue would reveal the type of information listed in s. 21(1)(a). Next, it must demonstrate that this information was supplied, implicitly or explicitly, in confidence to the public body under s. 21(1)(b). Finally, it must demonstrate that disclosure of the information could reasonably be expected to cause one or more of the harms set out in s. 21(1)(c). All three elements of s. 21(1) must be met in order for the information in dispute to be properly withheld.

Section 21(1)(a) – type of information

[23] Sierra argues that the withheld information is either commercial information or technical information.

[24] FIPPA does not define the terms listed in s. 21(1)(a)(ii). However, previous orders have said the following:

- “Commercial information” relates to commerce, or the buying, selling, exchanging or providing of goods and services. The information does not

⁷ Order F17-14, 2017 BCIPC 15 at para. 9.

need to be proprietary in nature or have an actual or potential independent market or monetary value.⁸

- “Commercial” and “financial” information of or about third parties includes hourly rates, global contract amounts, breakdowns of these figures, prices, expenses and other fees payable under contract.⁹
- “Technical information” is information belonging to an organized field of knowledge falling under the general categories of applied science or mechanical arts. It 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.¹⁰

[25] The withheld information is about products and services that Sierra will provide to the Ministry, including the costs and methods associated with providing them. The information relates to the buying and selling of goods and services and it includes the prices payable under the contract. I find that all of the withheld information is commercial and/or financial information about Sierra. Therefore, I do not need to decide if it is also technical information.

Section 21(1)(b) – Supplied in confidence

[26] I will first consider whether Sierra “supplied” the information in dispute to the Ministry, and secondly whether it did so “in confidence.”

Supplied

[27] Information contained in an agreement will not normally be “supplied” for the purpose of s. 21(1)(b) because terms in an agreement are typically negotiated. In Order F08-22, former Commissioner Loukidelis stated that:

... the contents of a contract between a public body and a third party will not normally qualify as having been “supplied”, even when the contract has been preceded by little or no back-and-forth negotiation... The rationale is that “supply” is intended to capture immutable third-party business information, “not contract information that—by the finessing of negotiations, sheer happenstance, or mere acceptance of a proposal by a public body—is incorporated in a contract in the same form in which it was delivered by the third-party contractor” or mutually-generated contract

⁸ Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17 and Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62, Order F20-23 2020 BCIPC 27 at para. 13.

⁹ For example, Order F13-20, 2013 BCIPC 27 at para. 14, Order F20-23 2020 BCIPC 27 at para. 13.

¹⁰ Order F13-19, 2013 BCIPC 26 at paras. 11-12, Order F12-13, 2012 BCIPC 18 at para. 11, Order F20-23 2020 BCIPC 27 at para. 13.

terms that the contracting parties themselves have labelled as proprietary.¹¹

[28] Numerous OIPC orders have similarly concluded that information in a contract is normally negotiated and not supplied.¹²

[29] In addition, past orders have stated that even where a contract's terms are the same as those in the proponent's RFP proposal, the terms of the resulting contract are still negotiated and not supplied because the other party had to agree to them.¹³ The purpose of s. 21(1)(b) "is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible of [sic] change but, fortuitously, was not changed."¹⁴

[30] However, there are two circumstances where information in an agreement may be supplied rather than negotiated. The first circumstance is where the information is relatively "immutable" or not susceptible to change during negotiation of the agreement, for example, the third party's fixed overhead or labour costs.¹⁵ The second circumstance is where disclosure would allow a reasonably informed observer to draw accurate inferences about underlying confidential information that was "supplied" by a third party.¹⁶

[31] Sierra argues that all of the withheld information meets the first part of the 21(1)(b) test because the withheld information was supplied to the LDB via Sierra's proposal to the RFP, the LDB did not generate the information in dispute, and the information was not a result of negotiations between the LDB and Sierra.¹⁷

[32] The Ministry provided an affidavit from the LDB's Director of Sourcing and Vendor Performance (Director). In his affidavit, the Director states that consistent with the terms of the RFP, after finishing the discovery stage of the project, Sierra presented a proposal to complete the second stage of the upgrade. The LDB was satisfied with Sierra's proposal and it was incorporated into the contract that is the record at issue in this inquiry.¹⁸

¹¹ Order F08-22, 2008 CanLII 70316 (BC IPC) at para. 60.

¹² Order 01-39, 2001 CanLII 21593 (BC IPC) at paras. 43–44, upheld on judicial review in *Canadian Pacific Railway v British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603; Order F13-06, 2013 BCIPC 6 at paras. 19–21; Order F14-01, 2014 BCIPC 1; Order F14-04, 2014 BCIPC 4; Order F14-28, 2014 BCIPC 31 at para. 20; Order F16-31, 2016 BCIPC 34 at paras. 23–26.

¹³ Order 03-15, 2003 CanLII 49185 at para. 66; Order F14-28, 2014 BCIPC 31 at para. 20.

¹⁴ Order 01-39, 2001 CanLII 21593 at para. 46.

¹⁵ *Ibid* at para. 45.

¹⁶ Order 01-20, 2001 CanLII 21574 (BCIPC) at paras. 85-89.

¹⁷ Third Party initial submission at paras. 6, 10, 15, 19, 23, 26, 30, and 35.

¹⁸ Director's affidavit at paras. 14-15.

[33] The evidence is clear that the document in question is a contract. The LDB was satisfied with Sierra's proposal. Despite the fact that it was a fixed price offer, and there may have been little back and forth between the parties, the result of the process was a negotiated contract. There is no evidence that the LDB did not have the option to either accept or reject the proposal. As previously noted above, past orders state that this type of information constitutes negotiated information and will not meet the definition of 'supplied' for the purposes of s. 21(1)(b).¹⁹

[34] The next question then is whether any of the information in dispute would disclose immutable information or enable accurate inferences about underlying confidentially supplied information.

[35] Sierra did not provide evidence that demonstrates that the withheld information would disclose immutable information or would enable accurate inferences about confidential information that was supplied by a third party. I have reviewed the withheld information, and in my view none of it falls into either category. For example, there is no evidence that any of the disputed information such as its labour costs was immutable and not subject to change by Sierra. It is not apparent from the materials before me that any of the withheld information would enable accurate inferences about confidential information that was supplied by a third party. I conclude Sierra has not met the burden of proof in proving either element of s. 21(1)(b) applies. I am, therefore, not satisfied that the information in dispute was "supplied" by a third party for the purposes of s. 21(1)(b).

[36] I found above that the information in dispute was not "supplied". This means that s. 21(1)(b) does not apply. I will, however, go on to consider Sierra's argument that the information was supplied "in confidence".

In confidence

[37] The test for "in confidence" is objective and the question is one of fact. Evidence of the third party's subjective intentions with respect to confidentiality alone is not sufficient.²⁰

[38] Sierra explains that the contract includes their proposal in response to a public procurement. Sierra states that the proposal information was provided in confidence since there are confidentiality obligations built into the contract itself. Sierra argues that the LDB agreed that the information was received in confidence and would be kept confidential per section 5 (Privacy, Security, and Confidentiality) of the contract, found at pages 8 and 9 of the Record. Sierra

¹⁹ For example, Order 01-39, 2001 CanLII 21593 at paras. 46-49.

²⁰ Order F13-20, 2013 BCIPC 27 (CanLII) at para. 22.

relies on section 5 of the contract to establish that all the withheld information was supplied confidentially.²¹

[39] I have reviewed the contract and there is nothing within it which provides that the LDB or the Ministry keep confidential any of the terms in the contract. The Privacy, Security and Confidentiality provisions on pages 8 and 9 of the contract are not about the Ministry or the LDB keeping the contractual terms confidential. Instead, they describe the obligations of the contractor (Sierra) to protect and keep confidential all information in the material and all information accessed or obtained while it performs work under the contract.²²

[40] I find, therefore, that s. 21(1)(b) does not apply since the information in dispute was not “supplied” nor was it supplied “in confidence”. As a result, Sierra has not proven that s. 21(1) applies to any of the withheld information.

[41] Given that I have found that the third party has failed to establish the second part of the s. 21(1) test, I need not consider whether the disclosure of the information in dispute could reasonably be expected to harm the business interests of the third party.

Section 22 – Third-Party Personal Privacy

[42] Section 22(1) states that the head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[43] Past orders describe the analytical approach to s. 22. First, the public body must determine if the information in dispute is personal information. If so, it must consider whether any of the information meets the criteria identified in s. 22(4), in which case disclosure would not be an unreasonable invasion of third party personal privacy and s. 22(1) would not apply.

[44] If s. 22(4) does not apply, the third step for the public body is to determine whether disclosure of the personal information falls within s. 22(3), in which case disclosure is presumed to be an unreasonable invasion of third party personal privacy. Finally, whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.²³ It is also at this stage that any s. 22(3) presumptions may be rebutted.

²¹ Third Party initial submission at paras. 6, 10, 15, 19, 23, 26, 30 and 35.

²² Records at p. 9.

²³ Order F13-09, 2013 BCIPC 10 at para. 18.

Sierra relies on s. 22 to withhold information on pages 66, 95, 100, 102, 104, 107, 110, 116-117, 119, 123-125 and 128-145.²⁴

Personal Information

[45] Section 22 of FIPPA only applies to “personal information.” FIPPA defines “personal information” as “recorded information about an identifiable individual other than contact information” and “contact information” as “information to enable an individual at a place of business to be contacted and includes the name, position or title, business telephone number, business address, business email or business fax number of the individual.”²⁵

[46] The withheld information contains the names of Sierra employees, the descriptions of their roles, estimates of what it will cost these employees to complete that job and their hourly rates. In order to qualify as personal information, the information must be reasonably capable of identifying a particular individual either alone or when combined with information from other available sources. I find where this information is linked to an identifiable individual, then it is the personal information of the Sierra employees. For example, there is information on pages 65-66 of the records that when combined allows someone to identify a particular employee’s hourly rate. I conclude this information is third party personal information because it is about several named third parties and it is not contact information.

[47] The Ministry points out that in some places the hourly rates and budgetary information is not personal information where it is not linked to specific Sierra employees, because it is not about identifiable individuals.²⁶ Sierra did not respond to this argument.

[48] I agree with the Ministry that the hourly rates and budgetary information is not personal information where it is not about an identifiable individual.²⁷ For example, I can see that some of the disputed information are fees that Sierra will charge the LDB for any change in work orders.²⁸ It is not clear to me that this information qualifies as personal information since it does not reveal any particular person’s rate or expenses. Sierra did not provide any argument or evidence that establishes how someone can use this information to infer an employee’s hourly rate.

²⁴ Ministry’s reply submission at paras. 11-15 states that Sierra has withheld some information that the Ministry has already released. This information is no longer at issue.

²⁵ See Schedule 1 of FIPPA for these definitions.

²⁶ Ministry’s reply submission at para. 36. For example, at pp. 95 and 100 of the records.

²⁷ As I have found that the Ministry cannot rely on s. 22 to withhold any information under s. 22, I need not point out every place where Sierra has withheld information under s. 22 that is not, in fact, personal information.

²⁸ For example, pages 95 and 100 of the records.

Not an unreasonable invasion of privacy – section 22(4)

The second step in the s. 22 analysis is to determine if the personal information falls into any of the types of information or circumstances listed in s. 22(4). If it does, then the disclosure of the personal information is not an unreasonable invasion of a third party's personal privacy and the information should be disclosed. The information cannot be withheld if the circumstances in s. 22(4) apply. The following parts of s. 22(4) were raised by what the parties said in their submissions:

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(a) the third party has, in writing, consented to or requested the disclosure,

...

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

...

(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,

...

Section 22(4)(a)

[49] Sierra submissions do not directly address s. 22(4). Sierra submits, however, that the names identified as personal information cannot be disclosed without their prior written consent.²⁹

[50] The Ministry submits that s. 22(4)(a) may require disclosure of the names of the Sierra employees who consented to their disclosure. The Ministry notes that Sierra sent an email to the Ministry and the OIPC with the names of seven individuals who Sierra says consented to the disclosure of their names in the contract.³⁰ The Ministry says it does not know whether the employees consented "in writing", so the Ministry is uncertain whether s. 22(4)(a) applies.³¹ Since neither party has provided further information about whether the consent was in writing, I am not satisfied that s. 22(4)(a) applies.

²⁹ Third party's initial response at para. 33.

³⁰ Email from Sierra to the OIPC and the Ministry dated February 28, 2020 at 1:35 pm.

³¹ Ministry's reply submission at para. 38.

Section 22(4)(e)

[51] This provision applies to third-party identifying information that in some way relates to a third party's job duties in the normal course of work-related activities.³²

[52] The Ministry submits that 22(4)(e) is relevant because the personal information is comprised of the names and roles of Sierra's employees as well as their hourly rates and cost. The Ministry says that Sierra is not a public body, but refers to past OIPC decisions which it submits have held that it is not an unreasonable invasion of privacy under s. 22 to disclose information about private sector employees acting in a professional or employment capacity.³³ The Ministry submits that the same reasoning applies to the personal information contained in the contract and, therefore, s. 22(1) does not apply.

[53] Sierra did not respond to the Ministry's submissions regarding ss. 22(4)(e).

[54] Section 22(4)(e) concerns information about a third party's position, functions or remuneration. The withheld information includes the names of Sierra employees, the descriptions of their roles, their hourly rates, and estimates of what it will cost these employees to complete that job.³⁴ In accordance with past decisions from this office,³⁵ I find that it is not an unreasonable invasion of privacy under s. 22 to disclose information about Sierra employees acting in a professional or employment capacity. I find that 22(4)(e) does, therefore, apply to the withheld information.

Section 22(4)(f)

[55] Section 22(4)(f) concerns information that would reveal financial and other details of a contract to supply goods or services to a public body. The Ministry submits that s. 22(4)(f) clearly applies, and therefore the information cannot be withheld under s. 22(1).³⁶ Sierra did not respond to this argument.

[56] The information in dispute is contained in a contract between Sierra and the Ministry to provide information technology services. This type of information is clearly captured by s. 22(4)(f) as it would reveal financial and other details of that contract. As a result, I find that 22(4)(f) also applies to the withheld personal

³² Order 01-53, 2001 CanLII 21607 at para. 40.

³³ Order F18-42, 2018 BCIPC 45 at para. 22; Order F08-03, 2008 CanLII 13321 at paras. 83-84.

³⁴ The definition of "employee" in FIPPA includes a service provider. A "service provider" means a person retained under a contract to perform services for a public body. Therefore, a "contractor" is an "employee" for the purpose of s. 22(4)(e). See schedule 1 of FIPPA for these definitions.

³⁵ Order F18-38, 2018 BCIPC 41 at para. 71, Order F10-33, 2010 BCIPC 46 at para. 14.

³⁶ Ministry's reply submission at para. 41.

information. I therefore find the Ministry is not authorized to withhold any information pursuant to s. 22(1).

Sections 22(3) and 22(2)

[57] Given my findings above, I do not need to complete the remainder of the s. 22 analysis. I also note that none of the parties provided submissions on ss. 22(3) or 22(2).

CONCLUSION

[58] For the reasons given above, under s. 58 of FIPPA, I make the following order:

1. The Ministry is not required to refuse to disclose the information in dispute under s. 21(1) or 22(1) of FIPPA, and it is required to give the applicant access to that information.
2. The Ministry must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records.

[59] Under s. 59, the Ministry is required to comply with this order by December 2, 2020.

October 20, 2020

ORIGINAL SIGNED BY

Jill Nevile, Adjudicator

OIPC File No.: F18-75803