



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

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Order F14-01

## VANCOUVER COASTAL HEALTH AUTHORITY

Ross Alexander, Adjudicator

January 16, 2014

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**Summary:** Compass Group requested a review of Vancouver Coastal Health Authority's decision to disclose its contract with VCHA to the applicant Hospital Employees' Union. Compass argued disclosure would harm its business interests. The adjudicator determined that the information in the contract was not supplied in confidence within the meaning of s. 21(1)(b) of FIPPA, and VCHA was ordered to disclose the contract.

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

**Authorities Considered: B.C.:** Order F13-06, 2013 BCIPC No. 6; Order F12-13, [2012] B.C.I.P.C.D. No. 18; Order F08-22, [2008] B.C.I.P.C.D. No. 40; Order F10-28, 2010 BCIPC 40; Order F10-40, 2010 BCIPC No. 60; Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order F13-02, [2013] B.C.I.P.C.D. No. 2; Order F13-07, [2013] B.C.I.P.C.D. No. 22; Order F08-22, [2008] B.C.I.P.C.D. No. 40; Order No. 26-1994, 1994 CanLII 1432; Order 01-39, [2001] B.C.I.P.C.D. No. 40; Order F10-26, 2010 BCIPC 38.

**Cases Considered:** *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3; *K-Bro Linen Systems Inc. v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 904; *Jill Schmidt v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 101; *Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603.

## INTRODUCTION

[1] This is a third party review by Compass Group Canada Ltd. (“Compass”) of a Vancouver Coastal Health Authority (“VCHA”) decision to disclose a contract between Compass and VCHA for patient care and support services to the applicant Hospital Employees’ Union (“HEU”).

[2] This issue arises from HEU’s request to VCHA for “current servicing agreements between VCHA and patient care and support service contractors for acute and health authority-owned residential care facilities”. The contract is responsive to HEU’s request.<sup>1</sup>

## ISSUE

[3] The issue in this inquiry is whether VCHA is required to refuse to disclose the contract to the applicant because disclosure would be harmful to business interests within the meaning of s. 21 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

[4] Compass has the burden of proof in this inquiry to prove that the HEU has no right of access to the disputed information, due to s. 57(3) of FIPPA.

## DISCUSSION

[5] **Harm to Third Party Business Interests**—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. Section 21(1), which sets out the three-part test that must be met for the section to apply, states in part:

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, or...

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<sup>1</sup> The original agreement is between VCHA and another third party, but was assigned to Compass.

[6] The principles to be considered when applying s. 21(1) are well established.<sup>2</sup> The first part of the test requires the information to be a trade secret of a third party, or the commercial, financial, labour relations, scientific or technical information of, or about, a third party. The second part of the test requires the information to have been supplied to the public body in confidence. The third part of the test requires that disclosure of the information could reasonably be expected to cause significant harm to the third party's competitive position, or the other types of harm set out in s. 21(1)(c).<sup>3</sup>

[7] Compass submits that the contract meets all of the elements of s. 21. It states that the contract is the type of information protected from disclosure in that the information was directly supplied in confidence or is information that permits accurate inferences of its sensitive business information, and that disclosure of the contract can reasonably be expected to result in harm under s. 21(1)(c).

[8] The HEU submits that Order F08-22, Order F10-28 and Order F10-40 are determinative of the issues in this case.<sup>4</sup> In each of these orders, s. 21 did not apply to contractual terms between a health authority and a third party because the information was negotiated rather than "supplied" by the third party, and because none of the branches of s. 21(1)(c) regarding harm were met.

[9] VCHA takes no position in this inquiry.

#### ***Commercial or financial information – s. 21(1)(a)***

[10] The contract relates to patient care and support services provided by Compass. The HEU does not dispute that the contract contains commercial or financial information. I find, consistent with previous orders, that the information at issue constitutes commercial and financial information.<sup>5</sup>

#### ***Supplied in confidence – s. 21(1)(b)***

[11] Section 21(1)(b) requires consideration of whether the information in dispute was supplied, either implicitly or explicitly, in confidence. This is a two-part analysis. The first step is to determine whether the information was supplied to VCHA. The second step is to determine whether the information was supplied "in confidence".

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<sup>2</sup> Order F13-06, 2013 BCIPC No. 6.

<sup>3</sup> Order F12-13, [2012] B.C.I.P.C.D. No. 18.

<sup>4</sup> Order F08-22, [2008] B.C.I.P.C.D. No. 40; Order F10-28, 2010 BCIPC 40; Order F10-40, 2010 BCIPC No. 60.

<sup>5</sup> For example, see Order F10-28, 2010 BCIPC 40 at paras. 9 and 10.

[12] Previous orders have stated that contractual terms are not usually supplied because the terms are negotiated.<sup>6</sup> Compass submits these orders are of limited use in light of the recent Supreme Court of Canada decision in *Merck Frosst Canada Ltd. v. Canada (Health)*. In particular, Compass points to the Court's statement about the balance between access to information and protection of third party information, such as confidential commercial information. Compass also refers to a statement in *Merck Frosst* that the content rather than the form of the information must be considered when determining whether the information was supplied by a third party.<sup>7</sup>

[13] In my view, *Merck Frosst* does not affect how previous orders of this Office have interpreted or applied FIPPA. First, *Merck Frosst* dealt with the interpretation and application of the federal *Access to Information Act*, which differs from FIPPA. Second, *Merck Frosst* is primarily about the notice that a public body is required to give a third party in a proceeding and what standard of proof is applicable in assessing third-party harm. It did not involve determination of the matter that lies at the heart of this inquiry, which is whether contract terms are supplied or negotiated. This issue has been well canvassed in previous orders and several court decisions, as noted below.

[14] I do not see how Compass' comments about the careful balance between access to information and the exceptions to access advance its case. This balance is certainly reflected in BC's FIPPA itself, and thus in previous decisions of this Office and BC courts respecting s. 21.<sup>8</sup> On Compass' second point, both before and since *Merck Frosst*, orders of this Office have, in fact, considered the content of information when determining whether it was supplied by a third party within the meaning of s. 21(1)(b).<sup>9</sup> *Merck Frosst* does not invalidate the utility of previous orders for this inquiry.

[15] The issue of whether information in a contract is supplied has been considered in many orders. Previous orders have found that the information in a contract between a public body and a third party is not usually supplied within the meaning of s. 21(1)(b), even when there was little or no overt negotiation giving rise to the contract.<sup>10</sup> As stated in Order F10-22, the information is usually

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<sup>6</sup> Order F10-40, 2010 BCIPC No. 60.

<sup>7</sup> Compass' submissions at para. 36. *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3.

<sup>8</sup> See, for example, ss. 2, 4 and 21 of FIPPA; Order 03-02, [2003] B.C.I.P.C.D. No. 2; *K-Bro Linen Systems Inc. v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 904.

<sup>9</sup> See, for example, Order 01-20, [2001] B.C.I.P.C.D. No. 21 at para. 85.

Order F13-02, [2013] B.C.I.P.C.D. No. 2 at paras. 15 to 17; Order F13-07, [2013] B.C.I.P.C.D. No. 22 at paras. 16 to 17.

<sup>10</sup> For example, see Order F08-22, [2008] B.C.I.P.C.D. No. 40 at para. 60.

negotiated rather than supplied because the other party agreed to its inclusion in the contract.<sup>11</sup> The term supply, as stated in Order F08-22:

...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 terms that the contracting parties themselves have labelled as proprietary.<sup>12</sup>

[16] Compass refers to Order No. 26-1994, which states that certain information in a contract may be supplied by a third party.<sup>13</sup> As stated in the judicial review of this order, these exceptions apply “...where the information remains relatively unchanged, or where an accurate inference can be made of underlying, supplied confidential information.”<sup>14</sup>

[17] The issue of supplied versus negotiated, and the exceptions to contractual information being negotiated, has been explained and clarified since Order No. 26-1994. Adjudicator Iyer stated in Order 01-39 that:

Information that might otherwise be considered negotiated nonetheless may be supplied in at least two circumstances. First, the 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 cost 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 within which the disputed information is exchanged between the parties. A bid proposal may be “supplied” by the third party during the tendering 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.

...

The second situation in which otherwise negotiated information may be found to be supplied is where its disclosure would allow a reasonably informed observer to draw accurate inferences about underlying confidential information that was “supplied” by the third party, that is, about information not expressly contained in the contract: Order 01-20 at para. 86. Such information may be relevant to the negotiated terms but is

<sup>11</sup> Order F10-40, 2010 BCIPC No. 60 at para. 12.

<sup>12</sup> Order F08-22, [2008] B.C.I.P.C.D. No. 40 at para. 60.

<sup>13</sup> Order No. 26-1994, 1994 CanLII 1432.

<sup>14</sup> *Jill Schmidt v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 101 at para. 32.

not itself negotiated. In order to invoke this sense of “supplied”, CPR must point to specific evidence showing what accurate inferences could be drawn from which contractual terms about what underlying confidentially supplied information. Moreover, as discussed below, where information originally supplied in a bid proposal is simply accepted by the other party and incorporated into a contract, the mere fact that disclosure of the contract will allow readers to learn the terms of the original bid will not shield the contract from disclosure.<sup>15</sup>

[18] I adopt this approach from Order 01-39, which has been cited in numerous orders.<sup>16</sup>

[19] Compass’ position is that the entire contract is supplied. It submits that the financial terms in Schedule “F” contain immutable facts that it directly supplied. Compass also submits that the entire contract was supplied within the meaning of s. 21(1)(b) because disclosure would allow accurate inferences to be made by Compass’ competitors about its confidential business strategy and plans, by its customers about its pricing strategies, and by the HEU about Compass’ negotiating position in the context of collective bargaining.

[20] Compass submits, in the alternative, that certain portions of the contract should be redacted even if the remainder of the information is disclosed. Most of this information relates to the financial terms of the contract, such as pricing information.

[21] The fact that disclosure may reveal Compass’ offer, or allow others to use the information to their advantage, does not mean that the information is supplied. As stated in Order F10-40 and other orders, the terms of a contract are negotiated even if they are the same terms as the third party’s bid and disclose the terms for which the third party is willing to provide goods or services, because the other party agreed to its inclusion in the contract.<sup>17</sup> Therefore, even if information in the contract discloses terms that Compass is considering using in bids on future contracts, these terms are still negotiated terms in the contract. This includes the prices and pricing structures in the contract. The financial terms in the contract are not, for example, fixed costs such as overhead or labour costs that Compass is obligated to pay under a collective agreement. For the terms of a contract to be supplied within the meaning of s. 21(1)(b), the information must be immutable or enable accurate inferences about confidential information that was supplied by a third party and is not expressly contained in the contract.<sup>18</sup>

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<sup>15</sup> Order 01-39, [2001] B.C.I.P.C.D. No. 40 at paras. 45 and 50, upheld and quoted in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603.

<sup>16</sup> For example, Order F10-26, 2010 BCIPC 38; Order F10-28, 2010 BCIPC 40; Order F13-06, 2013 BCIPC No. 6.

<sup>17</sup> Order F10-40, 2010 BCIPC No. 60 at para. 12.

<sup>18</sup> Order 01-39, [2001] B.C.I.P.C.D. No. 40 at paras. 45 and 50.

[22] I will first consider the contract other than the financial terms in Schedule “F”, and then consider the financial terms in Schedule “F”.

The Contract, excluding Schedule “F”

[23] It is clear on the face of the contract that the information at issue is negotiated, not supplied within the meaning of s. 21(1)(b). The information does not contain immutable facts or enable accurate inferences about information that was supplied in confidence, and Compass does not explain what specific immutable information would be revealed from disclosure.

Schedule “F”

[24] Compass states that the “Capital Investment & Contractor’s Equipment” information at Schedule “F” pertains to and contains underlying costs that were directly supplied to VCHA and remain unchanged in the contract. It submits that disclosure of this information would reveal the offer that was made by Compass to VCHA, which is proprietary and highly sensitive to Compass.

[25] The issue of whether the Schedule “F” financial information was supplied or negotiated turns on the specific content of the information. Without disclosing the specific terms of this information, it lists items that Compass is required to purchase or supply under the contract, and their cost. Another part of Schedule “F” sets out an agreed valuation for certain matters if specific events occur.

[26] In my view, the items that Compass is required to purchase are negotiated because Compass’ obligations under the contract are subject to negotiation. The related costs of these items would be immutable if they disclosed costs that Compass had previously incurred, or if they disclosed pre-existing obligations for Compass to purchase those items at those specific prices. However, when reading this information in the context of Schedule “F”, this information appears to be the estimated costs to purchase the agreed items after the contract was formed.<sup>19</sup> Further, there is no evidence that Compass is obligated to purchase the stated items from a third party for the specified costs. Based on the evidence before me, I am not satisfied that Compass supplied this information within the meaning of s. 21(1)(b) because the information is negotiated.

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<sup>19</sup> Sections 3 to 5 of Schedule “F”. This finding is notwithstanding the fact that one word in Schedule “F” suggests that the items had been purchased because it is written in the past tense.

[27] With respect to the valuations, I find that this information is negotiated, and it does not enable accurate inferences about confidential information that was supplied by a third party and is not expressly contained in the contract. Based on the evidence before me, I am not satisfied that Compass supplied this information within the meaning of s. 21(1)(b) because the information is negotiated.

[28] In summary, I find that Compass has not demonstrated that it supplied any of the contract information within the meaning of s. 21(1)(b) of FIPPA, so it cannot be withheld under s. 21.

***Harm to third party interests – s. 21(1)(c)***

[29] Since no information in the contract meets the “supplied” test in s. 21(1)(b), it is unnecessary for me to consider s. 21(1)(c).

**CONCLUSION**

[30] For the above reasons, pursuant to s. 58 of FIPPA, I require VCHA to give the applicant access to the contract on or before February 28, 2014. VCHA must concurrently copy me on its cover letter to the applicant, together with a copy of the records.

January 16, 2014

**ORIGINAL SIGNED BY**

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Ross Alexander, Adjudicator

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