



OFFICE OF THE
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Order F14-28

VANCOUVER ISLAND HEALTH AUTHORITY

Ross Alexander
Adjudicator

July 30, 2014

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Summary: Compass Group requested a review of Vancouver Island Health Authority's decision to disclose its contracts with VIHA to the applicant Hospital Employees' Union. Compass argued disclosure could reasonably be expected to 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 VIHA was ordered to disclose the contracts.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 21(1)(b).

Authorities Considered: **B.C.:** Order F10-40, 2010 CanLII 7733; Order F11-09, 2011 BCIPC 12 (CanLII); Order F08-22, 2008 CanLII 70316; Order F07-15, 2007 CanLII 35476; Order F10-28, 2010 BCIPC 40 (CanLII); Order F14-01, 2014 BCIPC 1 (CanLII); Order No. 26-1994, 1994 CanLII 1432; Order 01-39, 2001 CanLII 21593.

Cases Considered: *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3; *Jill Schmidt v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC; *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603.

INTRODUCTION

[1] Compass Group Canada Ltd. (“Compass”) provides food and housekeeping support services to a number of Vancouver Island Health Authority (“VIHA”) facilities. The Hospital Employees’ Union (“HEU”) is in the process of collective bargaining negotiations with Compass.

[2] This inquiry is a review by Compass of VIHA’s decision to disclose three service contracts to the applicant HEU in response to the HEU’s request for service contracts between VIHA and specified third parties. Compass is one of the specified third parties.

ISSUE

[3] The issue in this inquiry is whether VIHA is required to refuse to disclose service contracts to the HEU because disclosure could reasonably be expected to harm Compass’ business interests within the meaning of s. 21(1) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

[4] Due to s. 57(3) of FIPPA, Compass has the burden of proof to establish that the HEU has no right of access to the disputed information.

DISCUSSION

[5] **Records**—The records at issue in this inquiry are three service contracts between VIHA and Compass. They are a:

- a) patient and retail food services agreement;
- b) housekeeping services agreement; and
- c) integrated services agreement.¹

[6] The body of each of the service contracts state the parties’ rights and obligations, and incorporate schedules into those contracts. The lengthy schedules contain detailed information about pricing, services and other matters.

[7] **Harm to Third Party Business Interests**—Section 21 of FIPPA requires public bodies to refuse to disclose information that could reasonably be expected

¹ The integrated services contract was originally between VIHA and another third party, but the third party assigned the contract to Compass.

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...

[8] Compass submits the information sought by the HEU is precisely the type of competitive, commercially valuable information that is protected from disclosure under s. 21. It states that it supplied the information within the meaning of s. 21(1)(b) “in that it was directly supplied, or in that its disclosure will permit [Compass] competitors to infer [Compass] confidential business tactics, strategies and plans regarding the provision of services to VIHA, and impact the ongoing collective bargaining between [Compass] and VIHA”. It also states that the information sought can reasonably be expected to result in the harms enumerated in s. 21(1)(c) by providing competitors with valuable baseline information about Compass and putting competitors in a position to outbid Compass for future contracts. Compass states it will also give the HEU an unfair advantage in its ongoing labour negotiations with Compass.

[9] The HEU submits that s. 21 does not apply to the service contracts, and that Order F10-40 is determinative in this case.² In Order F10-40, the HEU requested access to contracts and documents related to the provision of dietary and housekeeping services between VIHA and Compass Canada. In that order, Adjudicator Fedorak determined that s. 21 did not apply to terms in two contracts because the information was negotiated rather than supplied under s. 21(1)(b). He also found that there was no evidence of harm from disclosure of the records in issue under s. 21(1)(c).

² Order F10-40, 2010 CanLII 77331 (BC IPC).

[10] VIHA states that it considered the relevant provisions of FIPPA, as well as Orders F11-09, F08-22 and F07-15, and made the decision to release the service contracts because it determined that s. 21 does not apply to them.³

[11] I will now turn to analysis of s. 21. I will consider the three service contracts together given that they are similar records and the parties do not differentiate between them in making their arguments.

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

[12] The records at issue are contracts related to services provided by Compass. I note the HEU does not dispute that the contracts contain commercial or financial information. I find, consistent with previous orders, that the information at issue constitutes commercial and financial information within the meaning of s. 21(1)(a).⁴

Supplied in confidence – s. 21(1)(b)

[13] For s. 21(1)(b) to apply, the information must have been 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 VIHA. The second step is to determine whether it was supplied “in confidence”.

[14] Previous orders have stated that contractual terms are not usually supplied because terms are negotiated.⁵ 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)*.⁶ This is the same argument Compass made and I did not accept in Order F14-01 because, in my view, the decision in *Merck Frosst* is consistent with previous orders of this Office and it does not materially change the law for the matters at issue here.⁷

[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 is not usually supplied within the meaning of s. 21(1)(b), even when there is little or no overt negotiation giving rise to the terms in a contract. This is

³ Order F11-09, 2011 BCIPC 12 (CanLII); Order F08-22, 2008 CanLII 70316 (BC IPC); Order F07-15, 2007 CanLII 35476 (BC IPC).

⁴ For example, see Order F10-28, 2010 BCIPC 40 (CanLII), at paras. 9 and 10 and Order F14-01, 2014 BCIPC 1 (CanLII), at para. 10.

⁵ Order F10-40, 2010 CanLII 77331 (BC IPC).

⁶ 2012 SCC 3.

⁷ Order F14-01, at paras. 12 to 14. I note that the parties in this inquiry did not have the reasons from Order F14-01 before them in arguing this case because the submissions in this inquiry were made prior to the issuance of that order.

because the other party agreed to those terms.⁸ The term “supplied”, 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.⁹

[16] Compass refers to Order No. 26-1994,¹⁰ which states that certain information in a contract may be supplied by a third party. 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”.¹¹

[17] The issues of supplied versus negotiated, and the exceptions to contractual information being negotiated, have 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

⁸ For example, see Order F08-22, 2008 CanLII 70316 (BC IPC), at para. 60. Also see Order F10-40, 2010 CanLII 77331 (BC IPC), at para. 12.

⁹ Order F08-22, at para. 60.

¹⁰ 1994 CanLII 1432 (BC IPC).

¹¹ *Jill Schmidt v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 101 at para. 32.

para. 86. Such information may be relevant to the negotiated terms but is 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.¹²

[18] I adopt this approach from Order 01-39, which was upheld on judicial review and has been cited in numerous orders.¹³

[19] Compass’ position is that the service contracts were supplied within the meaning of s. 21(1)(b) of FIPPA. It explains that some of this information is confidential information that it directly supplied to VIHA during contract negotiations, “which were ultimately reflected in the service contracts”.¹⁴ It also states, in the alternative, that disclosure of parts of the service contracts 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] As stated in Order F14-01 and Order F10-40 among others, the terms of a contract are negotiated even if they are unchanged from the wording of a proposal, since the other party agreed to its inclusion in the contract.¹⁵ 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. 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.

[21] For the terms of a contract to be supplied within the meaning of s. 21(1)(b), the information must be immutable (*i.e.*, a fact that is not susceptible to change) or enable accurate inferences about confidential information that was supplied by a third party and is not expressly contained in the contract.¹⁶

[22] For the information in the bodies of the contracts, it is clear on the face of the contracts that the information is not supplied within the meaning of

¹² Order 01-39, 2001 CanLII 21593 (BC IPC), at paras. 45 and 50, upheld and quoted in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603.

¹³ For example, Order F10-28, 2010 BCIPC 40 (CanLII).

¹⁴ Compass’ submissions at para.10.

¹⁵ Order F14-01, 2014 BCIPC 1 (CanLII), at para. 21; Order F10-40, 2010 BCIPC 60 (CanLII), at para. 12.

¹⁶ Order 01-39, 2001 CanLII 21593 (BC IPC) at paras. 45 and 50.

s. 21(1)(b). The information is negotiated because Compass and VIHA agreed to its inclusion in the contract, and it is neither immutable nor enables accurate inferences about confidential information that was supplied by a third party and is not expressly contained in the contract.

[23] For the information in the schedules of the contracts, there are different types of information. There is pricing information that states the costs that VIHA is required to pay for services (“global pricing information”), as well as a number of pricing amounts that are components of the global pricing information (“pricing breakdown information”). There is also non-pricing information that is written using terminology that is common in contracts, and that expressly specifies the rights and obligations of Compass and VIHA under the contracts on various topics. Further, there is other information that does not expressly set out the rights and obligations between the parties. There is, for example, a PowerPoint presentation that does not expressly set out contractual rights and obligations between the parties, and other documents that set out Compass’ policies on certain topics. I will address these different types of information in turn.¹⁷

[24] Compass submits that the schedules to the service contracts have financial terms that “pertain to and contain information regarding underlying costs that were not negotiated between the parties and remain unchanged in the service contracts.” However, the mere fact that pricing information “remains unchanged” does not mean that it is supplied. As explained above, this argument has been rejected in numerous orders. Further, Compass does not explain how the pricing information could disclose its underlying costs. I find that the global pricing information is clearly not “supplied” because it required the agreement of both parties about what VIHA would pay for services and it is not within the exceptions to contractual information being negotiated.

[25] In addition to the global pricing information, the service contracts contain pricing breakdown information. Some of these price breakdowns are described as “costs” or “expenses”. This pricing breakdown information would be supplied if it was Compass’ actual costs or expenses that are not susceptible to change, or if it would allow a reasonably informed observer to draw accurate inferences about underlying confidential information that was supplied and is not expressly contained in the contract. This might be the case, for example, if the contract stated how much Compass is required to pay its employees under the terms of a collective agreement. However, based on the materials before me, I am not satisfied that is the case here.

¹⁷ It is apparent from the records on their face that some of the policies and other information in the schedules are the policies and information of VIHA, or VIHA in conjunction with other health authorities. Since a third party is not the source of this information, it is clearly not supplied under s. 21(1)(b). I therefore will not consider this information any further.

[26] The pricing breakdown information in the service contracts appears to show how Compass arrived at the amount it is charging VIHA, not the actual cost incurred by Compass.¹⁸ Since these amounts appear on their face to be agreed amounts Compass is charging VIHA rather than a list of costs incurred by Compass, this is not immutable information. In addition, Compass does not explain how disclosure of this pricing breakdown information would enable accurate inferences about underlying confidential information that is not part of the contract, and I am not satisfied that this information falls within the second exception to contract information being supplied. I therefore find that this pricing breakdown information is not supplied within the meaning of s. 21(1)(b) because it is contractual information that is not within the exceptions to contractual information being negotiated.

[27] For the information in the schedules not related to pricing, Compass' does not delineate this information from the information in the body of the contract. In its view, the terms and conditions contained in the service contracts would allow its competitors to make accurate inferences about its highly sensitive and proprietary business information, and that competitors will be able to structure their proposals to outbid Compass on future projects. It also submits that the HEU will be able to use this information to make an accurate inference in Compass' negotiating position in the context of collective bargaining with the HEU.

[28] As stated above, 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. Further, Compass does not explain or provide examples of what accurate inferences may be drawn from information in the service contracts about confidential information that it supplied and is not expressly contained in the contract. Based on my review of all of the materials before me, I find that the non-pricing information in the schedules that expressly specifies the rights and obligations of Compass and VIHA is also clearly negotiated information. There is nothing to suggest it is within the exceptions to contractual information being negotiated described above.

[29] The remaining information in the schedules does not expressly set out the rights and obligations between the parties. There are, for example, Compass' policies on certain topics and a PowerPoint presentation that does not expressly set out contractual rights and obligations between the parties. This information

¹⁸ Some of the terminology in the pricing breakdowns suggests that the amounts may be costs incurred by Compass (which would be immutable information). There are, for example, the terms "expenses" and "employee benefits". However, the sums of the pricing breakdowns approximate the total contract price charged to VIHA without specifying a profit. Since Compass must have some plan or expectation of profit, and absent evidence to the contrary on this point, I find it to be likely that the pricing breakdowns include profit for Compass. Therefore, I find that the pricing breakdown amounts are the expenses or charges to VIHA, not Compass' actual immutable expenses or costs.

may be supplied information in other contexts, but in this case this information was explicitly incorporated into provisions of the body of the contracts as part of the parties' rights and obligations. The information at issue does not contain immutable or unchangeable facts, and the content of this information was subject to negotiation and change as terms of the contracts.¹⁹

[30] Further, Compass does not explain and I am not satisfied that confidential business information (that is not expressly a term of the contract) can be accurately inferred from this information. Therefore, I am not satisfied that this information has been supplied within the meaning of s. 21(1)(b).

[31] In summary, I find that the service contracts were not supplied within the meaning of s. 21(1)(b) of FIPPA because they were negotiated. Since I have found that the service contracts were not supplied within the meaning of s. 21(1)(b), s. 21 does not apply to the records and it is not necessary for me to consider the harms set out in s. 21(1)(c).

CONCLUSION

[32] I require VIHA to give the applicant access to the service contracts in issue by **September 12, 2014**. VIHA must concurrently copy me on its cover letter to the applicant, together with a copy of the records.

July 30, 2014

ORIGINAL SIGNED BY

Ross Alexander
Adjudicator

OIPC File No.: F13-51833

¹⁹ I note that there is a small amount of information about previous audit scores in a few locations that appear on their face to be immutable information. However, for this information, the records refer to an external review process and state that the information is "reported". Given this, and absent specific evidence from Compass, I am not satisfied that Compass was the initial source that supplied this information, that the information was supplied in confidence even if Compass supplied the information, or that the information is not publicly available (so there would clearly be no harm from disclosure) even if Compass supplied this information in confidence.