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Order F15-53

MINISTRY OF JUSTICE

Celia Francis
Adjudicator

September 30, 2015

CanLII Cite: 2015 BCIPC 56
Quicklaw Cite: [2015] B.C.I.P.C.D. No. 56

Summary: An applicant requested a copy of a food services agreement between Compass and the Ministry. Compass objected, on the grounds that disclosure of the agreement could reasonably be expected to harm its business interest. The adjudicator found that the information in the agreement was commercial and financial information of or about Compass but that the information had not been “supplied” to the Ministry. The adjudicator also found that Compass had not shown that disclosure could reasonably be expected to harm its business interests. The adjudicator ordered the Ministry to disclose the entire agreement to the applicant.

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

Authorities Considered: **B.C.:** Order 03-02, 2003 CanLII 49166 (BC IPC); Order 03-15, 2003 CanLII 49185 (BC IPC); Order 01-39, 2001 CanLII 21593 (BC IPC); Order 00-22, 2000 CanLII 14389 (BC IPC); Order F05-05, 2005 CanLII 14303 (BC IPC); Order F13-06, 2013 BCIPC 6 (CanLII); Order F13-07, 2013 BCIPC 8 (CanLII); Order F14-28, 2014 BCIPC 31 (CanLII); Order F06-20, 2006 CanLII 37940 (BC IPC); Order F14-04, 2014 BCIPC 4 (CanLII); Order F13-22, 2014 BCIPC No. 4 (CanLII); Order F08-22, 2008 CanLII 70316 (BC IPC); Order 03-05, 2003 CanLII 49169 (CanLII); Order F13-19, 2013 BCIPC 26 (CanLII); Order F13-17, 2013 BCIPC 22 (CanLII); Order F14-58, 2014 BCIPC 62 (CanLII); Order F15-04, 2015 BCIPC 4 (CanLII); Order F05-16, 2005 CanLII 24732 (BC IPC); Order F11-14, 2011 BCIPC 19 (CanLII), 2010 BCIPC No. 53 (CanLII); Order F10-39, 2010 BCIPC No. 59 (CanLII); Order F10-24, 2010 BCIPC 35 (CanLII); Order F10-25, 2010 BCIPC 36 (CanLII); Order 02-50, 2002 CanLII 42486 (BC IPC); Order 01-20, 2001 CanLII 21574 (BC IPC); Order 01-36, 2001 CanLII 21590 (BC IPC); Order F08-03, 2008 CanLII 13321 (BC IPC); Order 04-06, 2004 CanLII 34260 (BC IPC); Order 00-10, 2000 CanLII 11042 (BC IPC).

Cases Considered: *Jill Schmidt Health Services Inc. v. British Columbia (Information and Privacy Commissioner)*, [2001] B.C.J. No. 79, 2001 BCSC 101; *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848, 2002 BCSC 603; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3.

INTRODUCTION

[1] This order arises out of a request under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) to the Ministry of Justice (“Ministry”) for a copy of the agreement between the Ministry and Compass Group Canada Ltd (“Compass”) to supply food services to Fraser Regional Correctional Centre (“agreement”). The Ministry gave notice of the request under s. 23 of FIPPA to Compass, as the third party, saying it was considering disclosing the entire agreement. Compass objected on the basis that it believed disclosure of the agreement could reasonably be expected to harm its business interests under s. 21(1) of FIPPA. The Ministry then informed Compass that it had decided to disclose the entire agreement.

[2] Compass asked the Office of the Information and Privacy Commissioner (“OIPC”) to review the Ministry’s decision not to withhold the agreement under s. 21(1). Mediation by the OIPC did not resolve Compass’s request for review and the matter proceeded to inquiry. The OIPC received submissions from the Ministry and Compass. The applicant did not provide a submission.

ISSUE

[3] The issue before me is whether the Ministry is required by s. 21(1) of FIPPA to withhold the agreement. Under s. 57(3)(b) of FIPPA, Compass, as the party resisting disclosure, has the burden of showing that the applicant has no right of access to the agreement.

DISCUSSION

Record in dispute

[4] The 227-page record in dispute comprises the agreement between Compass and the Ministry for Compass to provide food services to Fraser Regional Correctional Centre, as well as to several other correctional facilities in BC, for the period April 1, 2012 to March 31, 2015. It includes a number of schedules, appendices and amendments to the agreement.

Third party business interests

[5] The relevant parts of s. 21(1) of FIPPA read as follows:

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,

(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...

[6] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies.¹ All three parts of the s. 21(1) test must be met in order for the information in dispute to be properly withheld.

[7] As Compass has the burden of proof regarding s. 21(1), it must first demonstrate that disclosing the information in issue would reveal commercial, financial, labour relations, scientific or technical information of, or about, a third party. Next, Compass must demonstrate that the information was supplied to the public body, implicitly or explicitly, in confidence. Finally, Compass must demonstrate that disclosure of the information could reasonably be expected to cause one of the harms set out in s. 21(1)(c).

[8] In assessing the parties' arguments on s. 21(1), I have taken the approach set out in previous orders and court decisions, as discussed below, bearing in mind that the burden of proof is on Compass.

Is the information financial or commercial information?

[9] FIPPA does not define "commercial" or "financial information". However, previous orders have said that "commercial information" relates to commerce, or

¹ See, for example, Order 03-02, 2003 CanLII 49166 (BC IPC), Order 03-15, 2003 CanLII 49185 (BC IPC), and Order 01-39, 2001 CanLII 21593 (BC IPC).

the buying, selling or exchange of goods and services, and that the information does not need to be proprietary in nature or have an actual or potential independent market or monetary value.² Previous orders have also held that hourly rates, global contract amounts, breakdowns of these figures, prices, expenses and other fees payable under contract are both “commercial” and “financial” information of or about third parties.³

[10] Compass argued that the agreement contains its commercial and financial information, as it is information about the “unique model” under which Compass is able to provide food services delivery, including related terms and pricing.⁴ The Ministry said that it accepts that the information in issue is “commercial” information.⁵

Finding on s. 21(1)(a)(ii)

[11] The agreement sets out the food delivery services Compass would provide and the payments it would receive for providing those services. I am satisfied that this information is both “financial” and “commercial” information of or about Compass, as previous orders have interpreted these terms.

Was the information “supplied in confidence”?

[12] The next step is to determine whether the information in issue was “supplied in confidence”. The information must be both “supplied” and “supplied in confidence”.⁶ I will first deal with whether the information was “supplied” for the purposes of s. 21(1)(b).

“Supplied”

[13] A number of orders have found that information in an agreement or contract will not normally qualify as “supplied” by the third party for the purposes of s. 21(1)(b), because the information is the product of negotiations between the parties. This is so, even where the information was subject to little or no back and forth negotiation. There are two exceptions to this general rule:

² See Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17, and Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62.

³ For example, Order 03-15, 2003 CanLII 49185 (BC IPC) at para. 41, Order 00-22, 2000 CanLII 14389 (BC IPC) at p. 4, Order F05-05, 2005 CanLII 14303 (BC IPC) at para. 46, Order F13-06, 2013 BCIPC 6 (CanLII) at para. 16, Order F13-07, 2013 BCIPC 8 (CanLII) at para. 36. In Order 04-06, 2004 CanLII 34260 (BC IPC), at para. 36, former Commissioner Loukidelis found that such information was also “about” the public body”.

⁴ Paragraph 11, Compass’s submission.

⁵ Paragraphs 4.05-4.07, Ministry’s submission.

⁶ See Order 01-39, 2001 CanLII 21593 (BC IPC), at para. 26, for example. See also Order F14-28, 2014 BCIPC 31 (CanLII), at paras. 17-18.

- where the information the third party provided was “immutable” – and thus not open or susceptible to negotiation – and was incorporated into the agreement without change;
- where the information in the agreement could allow someone to draw an “accurate inference” about underlying information a third party had supplied in confidence to the public body but which does not expressly appear in the agreement.⁷

[14] Key judicial review decisions have confirmed the reasonableness of these findings.⁸

[15] Compass’s submission on “supply” focussed on its argument that disclosure of the information in the agreement would allow competitors and public and private sector purchasers to draw accurate inferences about Compass’s “highly sensitive and proprietary business information”, which it supplied during a confidential bidding process. Compass said this information included the following: its confidential business strategies and plans regarding its provision of food services; the model and terms it will offer when bidding on future contracts; and information used “to establish a benchmark or reference” for its expected pricing. Compass added that it is currently engaged in negotiations with unionized employees working at the correctional facility. Disclosure of the agreement would, Compass argued, permit the union to accurately infer revenues that Compass earns through the provision of services to the correctional facility, which Compass says is information related to its negotiating position.⁹

[16] The Ministry said it was unable to conclude that the information in the agreement was “supplied” for the purposes of s. 21(1)(b), given that the information is in a negotiated agreement and past orders have found that information in agreements is not “supplied”.¹⁰

[17] The burden is on Compass to establish that disclosure of the information in the records could allow a reasonably informed observer to draw an accurate inference about confidentially “supplied” information that does not expressly appear in the records in dispute. The difficulty with Compass’s submission is that it did not explain or otherwise support its position. It did not, for example, provide evidence or show how an observer could accurately infer or work backwards

⁷ See, for example, Order 01-39 2001 CanLII 21593 (BC IPC) at para. 45, and Order F13-22, 2014 BCIPC No. 4 (CanLII) at para. 17.

⁸ See Order F08-22, 2008 CanLII 70316 (BC IPC), at para. 58, referring to *Jill Schmidt Health Services Inc. v. British Columbia (Information and Privacy Commissioner)*, [2001] B.C.J. No. 79, 2001 BCSC 101 and *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848, 2002 BCSC 603.

⁹ Paragraphs 4, 12 & 31, Compass’s submission.

¹⁰ Paragraph 4.10, Ministry’s submission.

from particular portions of the records to underlying confidentially “supplied” information on its business strategies. Compass’s mere assertion that this could happen falls short of what is required to establish that the information was supplied. I am unable to conclude, without more, that anyone reading the records would be able to accurately infer underlying confidentially “supplied” information.

[18] Compass referred to a number of BC, Ontario and Alberta orders and federal court cases in support of its “accurate inference” arguments. The facts of these cases are different from the facts before me and, in my view, they do not assist Compass.

Finding on s. 21(1)(b)

[19] For reasons given above, Compass has not, in my view, demonstrated that any of the information in issue was “supplied” to the Ministry within the meaning of s. 21(1)(b). In light of this conclusion, I need not also consider whether the information was supplied “in confidence”. I find that s. 21(1)(b) does not apply to any of the information in dispute.

Reasonable expectation of harm

[20] I have found that s. 21(1)(b) does not apply to the information in issue. Since this means that s. 21(1) does not apply, technically I need take the matter no further. However, for completeness, I will deal with Compass’s submission on the s. 21(1)(c) harm issue.¹¹

[21] For convenience, I reproduce the relevant provisions here:

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

...

- (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...

¹¹ The Ministry did not address s. 21(1)(c).

Standard of proof for s. 21(1)(c)

[22] Numerous previous orders have set out the standard of proof for showing a reasonable expectation of harm to a third party's interests for the purposes of s. 21(1)(c), for example, Order 01-36.¹² More recently, the Supreme Court of Canada confirmed the applicable standard of proof for harms-based exceptions:

[54] This Court in *Merck Frosst* adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”.¹³

[23] Past orders have said that s. 21(1)(c)(ii) does not apply where there is a financial incentive for providing the information.¹⁴

[24] Previous orders on s. 21(1)(c)(iii) have said that the ordinary meaning of “undue” financial loss or gain includes excessive, disproportionate, unwarranted, inappropriate, unfair or improper, having regard for the circumstances of each case. For example, if disclosure would give a competitor an advantage – usually by acquiring competitively valuable information – effectively for nothing, the gain to a competitor will be “undue”.¹⁵

Significant harm to competitive position, interfere significantly with negotiating position, undue loss or gain

[25] Compass said it has only a few major competitors and that it operates in a highly competitive market. Compass acknowledged that market conditions might be different another time and that the model, terms and conditions it offers might differ in future negotiations. Nevertheless, Compass argued, disclosure of

¹² Order 01-36, 2001 CanLII 21590 (BC IPC), at paras. 38-39.

¹³ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, at para. 94. See also Order F13-22, 2014 BCIPC 31 (CanLII), at para. 13, and Order F14-58, 2014 BCIPC 62 (CanLII), at para. 40, on this point.

¹⁴ See, for example, Order 03-05, 2003 CanLII 49169 (CanLII); Order F13-22, 2013 BCIPC 29 (CanLII).

¹⁵ See, for example, Order 00-10, 2000 CanLII 11042 (BC IPC) at pp. 17-19. See also Order F14-04, 2014 BCIPC 31 (CanLII) at paras. 60-63, for a discussion of undue financial loss or gain in the context of a request for a bid proposal.

this agreement could reasonably be expected to harm its competitive and negotiating position and cause it financial loss because it would:

- provide Compass’s prospective clients with a “benchmark or reference” for future pricing, thus affecting its negotiations with its clients
- provide Compass’s competitors with “valuable base-line information for use in structuring their competing proposals for the provision of food services”, thus putting Compass at a competitive disadvantage
- be detrimental to Compass’s business strategy by allowing its competitors to undercut it in future requests for proposal or negotiations for the provision of food services to the Ministry and others, both in BC and other provinces, which would be unfair to Compass¹⁶

[26] Beyond what is set out above, Compass did not provide details in support of its concerns. For example, it did not explain the nature or size of the competitive environment in which it operates. It also did not explain how its competitors could derive the “benchmark or reference” and “valuable base-line information” from this agreement and use it in their future bids, particularly in light of Compass’s acknowledgement that future market conditions might not be the same, so the terms it offers in the future might be different. It is precisely because these things would likely be different in future bidding processes that previous orders have found that harm could not be reasonably expected to occur on disclosure.¹⁷

[27] Compass also did not provide details on how disclosure could be detrimental to its business strategy, in the way it asserts. It also did not explain what financial losses it might suffer as a result of disclosure, still less how any such losses would be “undue”. There is also no evidence that, as a result of disclosure of an agreement or contract in the past, Compass or another service provider lost a contract or got a worse deal in a contract, in a subsequent round of negotiations.¹⁸ I would also note that a service provider is not obligated to enter into future agreements that are to its disadvantage.¹⁹

[28] As previous orders have noted more than once, “simply putting contractors and potential contractors to government in the position of having to price their services competitively is not a circumstance of unfairness or ‘undue’

¹⁶ Paragraphs 32-44, 54 Compass’s submission.

¹⁷ See Order F14-58, 2014 BCIPC 62 (CanLII), at para. 46, and Order F15-04, 2015 BCIPC 4 (CanLII), at para. 33, where I made similar findings in response to such arguments.

¹⁸ See Order F11-14, 2011 BCIPC 19 (CanLII), 2010 BCIPC No. 53 (CanLII), Order F10-39, 2010 BCIPC No. 59 (CanLII), Order F10-24, 2010 BCIPC 35 (CanLII), and Order F10-25, 2010 BCIPC 36 (CanLII), for similar findings.

¹⁹ See, for example, Order 03-15, 2003 CanLII 49185 (BC IPC), at paras. 25 & 27, and Order F05-16, 2005 CanLII 24732 (BC IPC), at para. 31, on these points.

financial loss or gain” for the purposes of s. 21(1)(c)(iii).²⁰ Heightening competition is not harm for the purposes of s. 21(1)(c)(i). A contractor’s resistance to disclosure during future contract negotiations also does not amount to harm to its competitive position. The reasonable expectation of harm must flow from disclosure of the information in question, not solely from the public body’s or third party’s opposition to disclosure. It is necessary to show an obstruction to actual negotiations.²¹ Compass has not done so.

[29] Compass also argued that disclosure of pricing information in the agreement would allow the union to infer the revenue Compass earns through that agreement. The union would, Compass continued, use this revenue information “as leverage to attempt to advance their goals with respect to members’ compensation” during contract negotiations at the Fraser Regional Correctional Centre (underway at the time of this inquiry). Compass submits that this would give the union an advantage to the detriment of Compass and interfere significantly with Compass’s negotiating position.²²

[30] Compass stated that it provides services across Canada.²³ It did not, however, explain what proportion of its revenues comes from this agreement, which covers several correctional facilities besides the one of interest to the applicant. Compass’s evidence also does not provide details on how, even if the union could derive the revenue that is attributable to the Fraser Regional Correctional Centre, it could use this information to Compass’s disadvantage in negotiations on the collective agreement. Compass has not, in my view, demonstrated an actual obstruction to its union negotiations. It follows that I find that Compass has not established that s. 21(1)(c)(i) or (iii) applies in this context either.

Similar information no longer supplied

[31] Compass argued that disclosure of the agreement would have a “definite chilling effect” on its willingness and ability to offer the same level of pricing in future agreements, as its competitive and negotiating position would be compromised as set out above in the discussion of s. 21(1)(c)(i). This would, Compass argued, be detrimental to the public interest in the provision of services at the lowest possible cost.²⁴

[32] I do not find Compass’s submission persuasive. There is an obvious financial incentive for Compass to provide comprehensive information in its future

²⁰ See, for example, Order 03-15, 2003 CanLII 49185 (BC IPC), at para. 25, and Order F06-20, 2006 CanLII 37940 (BC IPC), at para. 20, on this point.

²¹ See See Order 01-20, 2001 CanLII 21574 (BC IPC), at para. 112, and Order F05-05, 2005 CanLII 14303 (BC IPC), at para. 96, citing para. 61 of Order 04-06, 2004 CanLII 4260 (BC IPC).

²² Paragraphs 45-47, Compass’s submission; paras. 4-6, Seymour affidavit.

²³ Paragraph 2, Compass’s submission.

²⁴ Paragraphs 48-53, Compass’s submission.

proposals, including competitive pricing, in order for it to be successful in any future bidding process. It seems to me that providing less fulsome information in future is more likely to undermine Compass's interests than the public's. I also note that Compass did not say it will not bid in future contract opportunities if this agreement is disclosed. There is also no evidence that disclosure of similar information in the past has resulted in information no longer being supplied to the Ministry or another public body.²⁵

Conclusion on s. 21(1)(c)

[33] A party resisting disclosure must provide "cogent, case specific evidence of harm" and "detailed and convincing evidence".²⁶ Compass has provided no such evidence to support its submission that harm under s. 21(1)(c) could reasonably be expected to result from disclosure of the information in issue. As a result, Compass has not persuaded me that disclosure of the agreement could reasonably be expected to cause it harm under s. 21(1)(c).

Finding on s. 21(1)

[34] I found that the information in issue in this case is commercial and financial information under s. 21(1)(a)(ii). I also found that the information was not "supplied" to the Ministry and that consequently s. 21(1)(b) does not apply. Finally, I found that disclosure of the information in issue could not reasonably be expected to result in harm under s. 21(1)(c). Compass has not met its burden of proof in this case. I therefore find that s. 21(1) does not apply to the information in issue here.

CONCLUSION

[35] Under s. 58(2)(a) of FIPPA, I require the Ministry of Justice to give the applicant access to the agreement in dispute by November 13, 2015. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

September 30, 2015

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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²⁵ See, for example, Order F13-22, 2013 BCIPC 29 (CanLII), Order F13-19, 2013 BCIPC 26 (CanLII), and Order F13-17, 2013 BCIPC 22 (CanLII), for similar findings.

²⁶ See Order 02-50, 2002 CanLII 42486 (BC IPC), at paras. 124-137, which discussed the standard of proof in this type of case and summarized leading decisions on the reasonable expectation of harm.