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Order F17-14

PROVINCIAL HEALTH SERVICES AUTHORITY

Celia Francis
Adjudicator

March 31, 2017

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Summary: An applicant requested access to records about a contract with Stericycle for the disposal of biomedical waste. The Provincial Health Services Authority (PHSA) decided to disclose the responsive records, which were an information sheet about a contract between HealthPRO and Stericycle and an expired contract between Stericycle and the PHSA and other BC health authorities. HealthPRO and Stericycle objected to this decision, arguing that s. 21(1) (harm to third-party business interests) applied to the two records. The adjudicator found that s. 21(1) did not apply to the records and required the PHSA to disclose them to the applicant.

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

Authorities Considered: B.C.: Order F11-10, 2011 BCIPC 13 (CanLII); 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 01-36, 2001 CanLII 21590 (BC IPC); Order F08-03, 2008 CanLII 13321 (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 F15-53, 2015 BCIPC 56 (CanLII); Order F16-17, 2016 BCIPC 19 (CanLII); Order 04-06, 2004 CanLII 34260 (BC IPC); Order F14-28, 2014 BCIPC 31 (CanLII); Order F13-22, 2014 BCIPC No. 4 (CanLII); Order F08-22, 2008 CanLII 70316 (BC IPC); Order F13-22, 2014 BCIPC 31 (CanLII); Order F14-58, 2014 BCIPC 62 (CanLII).

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; *K-Bro Linen Systems Inc. v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 904; *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; *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875.

INTRODUCTION

[1] In July 2014, an applicant made a request to the Provincial Health Services Authority ("PHSA"), under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), for a copy of the contract for services between Stericycle Inc. ("Stericycle") and the PHSA. The PHSA told the applicant that the PHSA no longer has a contract with Stericycle, although it did have the (now-expired) 2011 contract between Stericycle, the PHSA and five other BC health authorities. The PHSA said it is now a member of a group purchasing organization, HealthPRO Procurement Services Inc. ("HealthPRO"), through which it obtains Stericycle's services. The PHSA said it had a HealthPRO information sheet summarizing the terms of this contract. The applicant said she would like copies of the expired contract and the information sheet.

[2] The PHSA first consulted with the other health authorities. It then gave notice of the request for the expired contract to Stericycle, under s. 23 of FIPPA. It also gave a s. 23 notice to HealthPRO of the request for the information sheet. The PHSA then told the applicant and the two third parties that it had decided to disclose the two records to the applicant. In January 2015, Stericycle and HealthPRO asked, separately, that the Office of the Information and Privacy Commissioner ("OIPC") review the PHSA's decisions to disclose the respective records, arguing that s. 21(1) (harm to third-party business interests) of FIPPA applies to the records.

[3] Mediation by the OIPC did not resolve the two third-party requests for review and the matters proceeded jointly to inquiry. The applicant and the two third parties made inquiry submissions, but the PHSA did not.

ISSUE

[4] The issue before me is whether the PHSA is required by s. 21(1) to refuse the applicant access to the two records in dispute. Under s. 57(3)(b) of FIPPA, the third parties have the burden of proving that the applicant has no right of access to the records.

DISCUSSION

Records in dispute

[5] The records in dispute are the following:

- the 59-page August 11, 2011 contract for the disposal of biomedical waste, including human and animal tissue ("expired contract"). The contract was for a two-year period, between Stericycle and six BC health authorities, one of which was the PHSA. Stericycle argued that the now-expired contract should be withheld in full.

- the five-page contract information sheet ("information sheet") summarizing the terms of the contract, also for the disposal of biomedical waste, between HealthPRO and Stericycle, for the period June 1, 2013 to May 31, 2018. HealthPRO argued that most of this record should be withheld.[1]

Preliminary issue – late raising of s. 25(1)(b)

[6] The applicant noted that HealthPRO's members are publicly owned and funded hospitals and health authorities. Among other things, she argued that the public has a right under s. 25(1)(b) to know how these bodies use public money.[2] HealthPRO disputed this argument, saying that s. 21(1) would be "rendered meaningless" if the applicant's argument were accepted.[3]

[7] Past orders have said that a party may raise a new issue at the inquiry stage only if given permission to do so.[4] There is no indication that the applicant raised s. 25 during mediation of this review. In addition, it was not listed as an issue in the fact report and notice of inquiry that the OIPC issued to the parties at the start of this inquiry. The applicant also did not seek permission to add this issue to the inquiry. She also did not explain why she did not raise s. 25 until this late stage or why she should be permitted to do so now. I will therefore not allow the applicant to raise this new issue at this late stage.[5]

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[1] HealthPRO provided a copy of the information sheet which indicates that HealthPRO has no concerns with the disclosure of the category headings on the information sheet but is concerned about the disclosure of the information under each heading.

[2] Applicant's response submission, paras. 1-5.

[3] HealthPRO's reply, paras. 1-3.

[4] See, for example, Order F11-10, 2011 BCIPC 13 (CanLII), at paras. 16-19. See also orders cited at footnote 4 of this order.

[5] Section 25(1)(b) overrides all of FIPPA's discretionary and mandatory exceptions to disclosure. Consequently, there is a high threshold before it can properly come into play. There is nothing in the information before me that suggests that s. 25(1)(b) is even remotely called into play.

Harm to third-party interests

[8] The relevant parts of s. 21(1) of FIPPA in this case read as follows:

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

[9] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies.[6] All three parts of the s. 21(1) test must be met in order for the information in dispute to be properly withheld. First, the third parties must demonstrate that disclosing the information in issue would reveal commercial, financial, labour relations, scientific or technical information of, or about, a third party. Next, they must demonstrate that the information was supplied, implicitly or explicitly, in confidence. Finally, they 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). In assessing the parties' arguments on s. 21(1), I have taken the same approach.

Is the information "financial or commercial information"?

[10] FIPPA does not define "commercial" or "financial" information. However, previous orders have held that

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

[6] 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).

need to be proprietary in nature or have an actual or potential independent market or monetary value.[7]

- hourly rates, global contract amounts, breakdowns of these figures, prices, expenses and other fees payable under contract are both "commercial" and "financial" information.[8]

[11] Information sheet – HealthPRO argued that the information sheet contains its commercial information.[9] The information sheet summarizes the terms of the contract between Stericycle and HealthPRO, including the services Stericycle provides, and its plans, processes and equipment. I am satisfied that the information at issue is "commercial" information of or about Stericycle and I find that s. 21(1)(a)(ii) applies to it.

[12] Expired contract – Stericycle did not specifically address the issue of whether the information in the expired contract is its commercial or financial information. However, the expired contract sets out the services Stericycle provided to the six health authorities, the financial terms, plans and standards for providing those services and other contractual matters. I am satisfied that this information is "commercial" and "financial" information of or about Stericycle and I find that s. 21(1)(a)(ii) applies to it.

Was the information "supplied in confidence"?

[13] The next step is to determine whether the information in issue was "supplied, implicitly or explicitly, in confidence." The information must be both "supplied" and supplied "in confidence."[10]

[14] "**Supplied" —** BC orders have consistently 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:

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

[8] 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, Order F15-53, 2015 BCIPC 56 (CanLII), at para. 11, and Order F16-17, 2016 BCIPC 19 (CanLII), at para. 24. 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.

[9] HealthPRO's initial submission, paras. 1-5; Affidavit of John Green, Vice President, Finance & Corporate Affairs, HealthPRO, para. 5.

[10] 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" (*i.e.*, not open or susceptible to negotiation) and was incorporated into the agreement without change; or

- where the information in the agreement could allow someone to draw an "accurate inference" about underlying information a third party had supplied in confidence but which does not expressly appear in the agreement.[11]

[15] Order 01-39 also said this about the "supply" element in contracts:

> By their nature, contracts are negotiated between the contracting parties. The fact that the requested records are contracts therefore suggests that the information in them was negotiated rather than supplied. It is up to CPR, as the party resisting disclosure, to establish with evidence that all or part of the information contained in the contracts including their schedules was not negotiated, as would normally be the case, but was "supplied" within the meaning of s. 21(1)(b).[12]

[16] Information sheet – HealthPRO said that it enters into contracts with suppliers of products and services related to healthcare on behalf of its members, which include Canadian hospitals and health authorities, such as the PHSA. HealthPRO said it is able to obtain "advantageous contract terms, including pricing, from these suppliers" which "translate into significant savings" for its members. HealthPRO said it conducts the negotiations with the suppliers and that its members do not participate in the negotiations with the suppliers or with HealthPRO itself. HealthPRO said that the PHSA did not negotiate any terms of the contract with Stericycle. Rather, HealthPRO said, the PHSA elected to participate in the contract on a "take it or leave it basis", upon which HealthPRO provided the PHSA with a copy of the information sheet. HealthPRO argued that the terms of the contract, as set out in the information sheet, are immutable and not "susceptible to change". Thus, HealthPRO argued, the information in the information sheet was "supplied" for the purposes of s. 21(1)(b).[13] The applicant disputed HealthPRO's argument on this point.[14]

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[11] 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. Key judicial review decisions have confirmed the reasonableness of this approach. 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 *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848, 2002 BCSC 603 and *K-Bro Linen Systems Inc. v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 904.

[12] At para. 43.

[13] HealthPRO's initial submission, paras.6-10; Green affidavit, paras. 6-7.

[14] Applicant's response submission, paras. 8-9.

[17] Previous orders that have considered contract terms under s. 21(1) have usually concerned the contracts themselves.[15] By contrast, in this case, the record before me is not the actual contract but an information sheet that summarizes the terms of the contract.

[18] I acknowledge that the PHSA is a member of HealthPRO and that it benefits from the contract pricing. HealthPRO's evidence was that it does not ask its members for changes to its supplier contracts and does not permit its members to make changes to those contracts. However, the PHSA could have conducted the contract negotiations with Stericycle, either on its own or in concert with its fellow healthcare organizations. The fact that it chose to assign this task to HealthPRO does not mean the information sheet contains "supplied" information. Moreover, HealthPRO admitted that it conducted the negotiations with Stericycle. In negotiating the contract, HealthPRO was clearly acting for, or in place of, its members. Thus, while HealthPRO provided the information sheet to the PHSA, in my view, the information sheet contains a summary of a contract negotiated on the PHSA's behalf. I therefore reject HealthPRO's argument that the information in the information sheet was not "susceptible to change" by the PHSA and was not negotiated. I also note that the PHSA did not support HealthPRO's position on the "supply" issue. I find that the information in the information sheet was not "supplied" to the PHSA for the purposes of s. 21(1)(b).

[19] Expired contract - I noted above that Stericycle, as the party resisting disclosure, has the burden of proof regarding s. 21(1). It is therefore up to Stericycle to establish that the information in the expired contract at issue was "supplied". However, Stericycle said nothing about this issue or indeed about any aspect of the three-part test under s. 21(1).[16] On this basis alone, Stericycle has failed to meet its burden regarding s. 21(1).

[20] In any case, I note that, at clause 19.1 of the expired contract, Stericycle "acknowledges and agrees" that a "purchaser" (*i.e.*, one of the six health authorities, which included the PHSA) may at its option proactively disclose the terms of the contract.[17] Moreover, the expired contract also states that the parties (*i.e.*, Stericycle and the six BC health authorities) "agree" to the terms of the contract. In the absence of evidence to the contrary, and having regard for the guidance in Order 01-39, as quoted above, I conclude that the information in the expired contract was negotiated, not "supplied" for the purposes of s. 21(1)(b).

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[15] For example, Order 01-39 and Order F16-17, 2016 BCIPC 19 (CanLII).

[16] Stericycle said that it agreed with HealthPRO's submission but HealthPRO's submission addressed the information sheet, not the expired contract.

[17] The PHSA drew this clause to Stericycle's attention when it gave Stericycle s. 23 notice of the request for the expired contract. It is noted in the Fact Report for this inquiry as well.

Conclusion on s. 21(1)(b)

[21] For reasons given above, I find that the information in the information sheet and the expired contract was not "supplied". As information must meet both parts of the test, this means that s. 21(1)(b) does not apply to the information in either record.

Reasonable expectation of harm under s. 21(1)(c)

[22] Information must meet all three parts of the test in order to be withheld under s. 21(1). I found above that s. 21(1)(b) does not apply to the information in the information sheet or the expired contract. This means that s. 21(1) does not apply to either record and, technically, I do not need to consider whether s. 21(1)(c) applies to them.

[23] I noted above that Stericycle did not address any of the aspects of s. 21(1) and, on this basis, failed to meet its burden on this exception. I therefore see no need to consider whether s. 21(1)(c) applies to the expired contract. However, HealthPRO did provide submissions on s. 21(1)(c) and, for the sake of completeness, I will consider whether s. 21(1)(c) applies to the information sheet.

[24] Numerous 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.[18] 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".[19]

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

[19] *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.

[25] Moreover, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*,[20] Bracken J. confirmed that it is the release of the information itself that must give rise to a reasonable expectation of harm and that the burden rests with the public body to establish that the disclosure of the information in question could reasonably be expected to result in the identified harm.

[26] I have taken these approaches in considering the arguments on harm under s. 21(1)(c).

[27] Significant harm to competitive or negotiating position – HealthPRO said that the information sheet would be a "useful guide" for Stericycle's competitors (*i.e.*, other suppliers). Its evidence continued as follows:

> … According, if the results of HealthPRO's efforts were made public its ability to achieve its objective (achieving the very best value for its members) would be compromised. It is my opinion that this would lead to less attractive contract terms being offered to HealthPRO as suppliers would seek to mitigate their loss of overall margin as a result of pressure from lower volume suppliers to match the HealthPRO contract terms.[21]

[28] HealthPRO did not explain what it meant by "less attractive contract terms" nor to whom they would be "less attractive": HealthPRO, Stericycle or its competitors. HealthPRO also did not explain the nature of the competitive environment in which Stericycle operates, for example, who Stericycle's competitors are, the services and contract terms they offer or how they differ from those that Stericycle offers.

[29] HealthPRO may be arguing that Stericycle and its competitors would offer HealthPRO less advantageous (*i.e.*, higher) prices in future. If so, I am not persuaded by this argument. It is more likely, in my view, that Stericycle's competitors could use the information at issue to offer HealthPRO lower prices. This might in turn encourage Stericycle to offer lower prices, or other better terms, to compete. This does not, however, translate into significant harm to Stericycle's competitive or negotiating position. As previous orders have said, putting contractors in a position of having to price their services competitively is not a circumstance of significant harm to, or interference with, contractors' competitive or negotiating positions under s. 21(1)(c)(i).[22]

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[20] *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875, at para. 43.
[21] Green affidavit, para. 10.
[22] See, for example, Order F08-22, at para. 67.

[30] I would add that Stericycle and its competitors are not obliged to agree to terms that are to their disadvantage. I also note that the information sheet does not include any pricing information for Stericycle's services. In my view, this limits its potential usefulness to Stericycle's competitors. Moreover, although Stericycle was aware from the notice of inquiry and the fact report that the information sheet was a record in dispute in this inquiry, it expressed no concern about disclosure of the information sheet.

[31] HealthPRO also argued that, if the information sheet were disclosed, Stericycle "may be less likely in the future to agree to participate in a Supplier Contract". HealthPRO said that, if this happened, its ability to achieve the most advantageous contract terms would be compromised.[23] HealthPRO's concern in this area arises from the identity of the applicant, who represents a Catholic newspaper.[24] Stericycle also expressed concern about the applicant, saying her organization advocates pro-life views. Stericycle also said its parent company in the USA had received threats.[25] It provided no details of the nature of the threats, however, and did not specifically state that the applicant's organization had made them.

[32] Neither HealthPRO nor Stericycle said explicitly that Stericycle would refuse to participate in a future supplier contract, if the information sheet were disclosed. Even if Stericycle did refuse to participate, HealthPRO did not explain how this would harm Stericycle's competitive or negotiating position, significantly or otherwise. HealthPRO also did not explain how this would compromise HealthPRO's ability to achieve advantageous terms in a future contract with another supplier. HealthPRO did not say that no other companies provide the same services as Stericycle. Thus, as above, if Stericycle chose not to participate in future contracts, Stericycle's competitors could step in, possibly offering lower prices or other terms advantageous to HealthPRO.

[33] It is also not clear how the identity of the applicant assists HealthPRO's position. The applicant did not comment on this aspect of HealthPRO and Stericyle's arguments. There is no evidence that the applicant's organization has issued threats against Stericycle or similar companies.

[34] HealthPRO has not persuaded me that disclosure of the information could reasonably be expected to result in significant harm to Stericycle's competitive or negotiating position for the purposes of s. 21(1)(c)(i). Its argument and evidence on these points are vague and amount to little more than assertions. They also do not make a link between disclosure and the anticipated harm, as is required to show that s. 21(1)(c)(i) applies.

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[23] The applicant expressed doubt about this argument, arguing that it was not convincing proof of harm; para. 11, response submission.
[24] HealthPRO's initial submission, para. 15; Green affidavit, para. 12.
[25] Stericycle's email of October 24, 2016.

[35] Information no longer supplied – HealthPRO argued that disclosure could result in it not receiving "similar information" (*i.e.*, advantageous contract offers) in future. Its evidence on this point was as follows:

> The harm caused by disclosure is of greater significance given that HealthPRO members are all publicly owned hospitals, healthcare authorities and their shared services organizations because, following such disclosure, these entities, funded by public funds, would be less likely to get the potential benefits in future Supplier Contracts which would have been available without such disclosure. [26]

[36] HealthPRO's evidence appears to relate more to potential harm to its competitive and negotiating position. In any case, HealthPRO did not explain why it would not likely get these "potential benefits", if the information sheet were disclosed. Moreover, as discussed above and contrary to what HealthPRO appears to be arguing here, disclosure of the information sheet could, in my view, be to HealthPRO's advantage, as it might promote competition among HealthPRO's suppliers. This in turn would assist HealthPRO in achieving "very best value" from suppliers for its members, which it says is a "fundamental reason" for its existence. As above, HealthPRO's evidence on this point is vague and does not link disclosure to the anticipated harm.

Conclusion on s. 21(1)(c)

[37] HealthPRO has not, in my view, provided objective evidence that is well beyond or considerably above a mere possibility of harm, which is necessary to establish a reasonable expectation of harm under s. 21(1)(c). It has not demonstrated a clear and direct connection between disclosing the information in dispute and the alleged harm. HealthPRO has not met its burden of proof in this case. I find that s. 21(1)(c) does not apply to the information in the information sheet.

Conclusion on s. 21(1)

[38] Information sheet – I found above that s. 21(1)(a)(ii) applies to the information in the information sheet but that ss. 21(1)(b) and (c) do not. I therefore find that s. 21(1) does not apply to this record.

[39] Expired contract – I found above that s. 21(1)(a)(ii) applies to the information in the expired contract but that s. 21(1)(b) does not. I therefore find that s. 21(1) does not apply to the information in the expired contract.

[26] Green affidavit, para. 10.

CONCLUSION

[40] For reasons given above, under s. 58(2)(a) of FIPPA, I require the PHSA to give the applicant access to the information sheet and the contract by May 16, 2017. The PHSA must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

March 31, 2017

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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