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Order F18-21

VANCOUVER COASTAL HEALTH AUTHORITY

Erika Syrotuck
Adjudicator

June 7, 2018

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Summary: The applicant made a request to Vancouver Coastal Health Authority for presentations relating to a specific project involving a third party. VCH refused to disclose portions of the records on the basis that they would harm the business interests of a third party under s. 21(1). The adjudicator found that s. 21(1) did not apply.

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

INTRODUCTION

[1] The applicant made a request to Vancouver Coastal Health Authority (VCH) for presentations about a specific project. The project involved IBM Canada Limited (IBM). VCH provided three sets of presentation slides, withholding some information under ss. 13 (advice or recommendations), 17 (harm to financial or economic interests of a public body) and 21(1) (harm to business interests of a third party) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review VCH's response. Mediation resulted in VCH disclosing additional information to the applicant which resolved the ss. 13 and 17 issues, but it continued to withhold some information under s. 21(1). Mediation failed to resolve the matter and the applicant requested that it proceed to inquiry.

[2] VCH did not provide submissions in this inquiry. VCH says that it "withheld this information at the request of IBM and understands that they will be providing their submission."[1] The applicant and IBM each provided submissions.

ISSUE

[3] The issue in this inquiry is:

1. Is VCH required to refuse to disclose the information in dispute under s. 21(1)?

[4] While VCH says that it takes no position on the information it withheld, it made the decision not to disclose the records to the applicant. Accordingly, under s. 57(1) the burden of proof is on the public body to prove that the applicant has no right of access to the information in dispute. My role is to determine if s. 21(1) applies to the disputed information and I will do so based on the records at issue and the submissions of the applicant and IBM.

DISCUSSION

Records in Dispute

[5] The records that contain the information in dispute are three sets of presentation slides. The slides were created by VCH for a presentation to its Board on a project which involved a commercial contract between VCH and IBM. VCH withheld several sentences and/or bullet points from each set of slides.

Section 21

[6] Section 21(1) requires public bodies to refuse to disclose information where disclosure could reasonably be expected to harm the business interests of a third party. The portions of s.21(1) pertaining to this inquiry state:

> 21 (1) The head of a public body must refuse to disclose to an applicant information
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> (a) that would reveal
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> ….
>
> (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
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> (c) the disclosure of which could reasonably be expected to

[1] Email from VCH Senior Legal Counsel, October 26, 2017.

> (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
> …

[7] Numerous OIPC orders have set out the analysis required under s. 21 and I adopt those same principles for this inquiry. Section 21(1) creates a three part test and each of the elements in ss. 21(1)(a), (b) and (c) must be met in order for a public body to withhold information under s. 21(1). I will consider each requirement in turn.

Section 21(1)(a) – commercial and financial information

[8] FIPPA does not define commercial or financial information. Past orders have said that "commercial information" relates to commerce, or 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] Past orders have found that information relating to services provided by a third party in exchange for payment is commercial and/or financial information.[3] In Order F11-08, the adjudicator found that the extent to which a third party was meeting their contractual obligations constituted commercial information.[4]

[9] IBM submits that the redacted information contains commercial and financial information. It submits that the information in dispute relates to services it performed under contract,[5] including information about its performance of those services and its position relating to the scope of services.[6] The applicant does not contest whether the information is of a financial or commercial nature.[7]

[10] In my view, all of the information in dispute is commercial information. The disputed information relates to the cost of services, the scope of the contractual relationship between VCH and IBM, and how IBM performed the services. I find that all of this is information that relates to services provided by a third party in exchange for money, and also relates to the extent to which IBM met their contractual obligations with VCH. As such, I find that it is commercial information of or about IBM.

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[2] Order F14-58, 2014 BCIPC 62 at para. 16; Order F16-39, 2016 BCIPC 43 at para. 17.
[3] Order F17-45, 2015 BCIPC 50 at para. 14; Order F16-39, 2016 BCIPC 43 at para. 18.
[4] Order F11-08, 2011 BCIPC 10 at para. 17.
[5] IBM's Reply Submission, page 2.
[6] IBM's Initial Submission, page 2.
[7] Applicant's submissions at para. 26.

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

[11] The next step is to determine whether the information in dispute was supplied, implicitly or explicitly, in confidence. I will first examine whether the information was supplied and then whether it was done so in confidence.

Supplied

[12] Determining whether information was "supplied" for the purposes of s. 21(1)(b) is a factual inquiry into the source of the information. The content rather than the form must be considered; the fact that the information appears in a government document does not, on its own, resolve the issue.[8]

[13] Information is generally not supplied by a third party where the public body is the source of the information. In *Merck Frosst Canada Ltd. v. Canada (Health),* the Supreme Court of Canada said that "judgments or conclusions expressed by officials based on their own observations generally cannot be said to be information supplied by a third party."[9] In Order F13-17, the adjudicator found that written evaluative comments by the public body were not "supplied" for the purposes of s. 21(1)(b) because they were made by the staff of the public body.[10] Similarly, in Order F15-37, the adjudicator determined that information that was internally decided and generated by the public body was not "supplied."[11]

[14] It is well established that information negotiated between a public body and a third party is ordinarily not supplied.[12]

[15] IBM submits that, although the information is contained in documents prepared by VCH, the information in dispute is supplied because it is based upon or attributed to commercial and financial information that originated from IBM.[13] It states that the information in dispute is "of or about" IBM and the commercial service it provided to VCH.[14] IBM also states that, "on the face of the documents themselves the [information in dispute] is represented as being supplied by IBM and being about IBM."[15]

[16] In my view, a small amount of the information in dispute was supplied because it clearly originated from IBM. For example, information that repeats IBM's opinion about its contractual relationship between IBM and VCH was "supplied" to VCH because IBM was clearly the source of that information.

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[8] *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3 at para 158.
[9] *Ibid.*
[10] Order F13-17, 2013 BCIPC 22 at para. 16.
[11] Order F15-37, 2015 BCIPC 27 at para. 64.
[12] Order 01-20, 2001 CanLII 21574 (BC IPC) at para. 81.
[13] IBM's Initial Submission, page 3.
[14] IBM's Reply Submission, page 2.
[15] IBM's Reply Submission, page 3.

Similarly, cost information about a joint proposal by IBM and another third party was "supplied" to VCH.

[17] Conversely, some of the information in dispute was clearly not supplied by IBM because it originated from VCH, such as statements that contain VCH's assessment of its working relationship with IBM. Similarly, statements about information that VCH provided to IBM and objective statements on the status of project components originated from within VCH. I find that this information was not "supplied" by a third party pursuant to s. 21(1)(b).

[18] Some of the information lacks context and I am not able to determine whether it was supplied by IBM, whether it originated within VCH or whether it was the product of a discussion between both parties. For example, some information relates to gaps in the scope of the project; it is unclear whether these gaps were identified by IBM, VCH or both. I am not satisfied that this information was "supplied" by IBM to VCH.

In Confidence

[19] While I have found only a small amount of information qualifies as supplied under s. 21(1)(b), I will consider whether any of the information in dispute was supplied implicitly or explicitly in confidence. To establish confidentiality of supply, a party must show that information was supplied under an objectively reasonable expectation of confidentiality, by the supplier of the information, at the time the information was provided.[16] The test for whether information was supplied, explicitly or implicitly, in confidence is objective, and the question is one of fact; evidence of the third party's subjective intentions with respect to confidentiality is not sufficient.[17]

[20] As I understand IBM's submissions, it is arguing that the information in dispute was implicitly supplied in confidence. IBM states that it supplied the information with the reasonable expectation that the information would be kept in confidence. It also states that the circumstances in this case "demonstrate beyond any reasonable question" that both it and VCH intended to keep the information in dispute confidential.[18]

[21] In Order 01-36, Commissioner Loukidelis outlined circumstances to be considered in determining if there was a reasonable expectation of confidentiality where the confidentiality of supply is alleged to be implicit. These circumstances include whether the information was:

[16] Order 01-36, 2001 CanLII 21950 (BC IPC) at para. 23.
[17] Order F17-45, 2017 BCIPC 50 at para. 21, Order 01-36, 2001 CanLII 21590 (BCIPC) at para. 23.
[18] IBM's Reply Submission, page 3.

> (1) communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
>
> (2) treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;
>
> (3) not otherwise disclosed or available from sources to which the public has access;
>
> (4) prepared for a purpose which would not entail disclosure.[19]

[22] IBM submits that it and VCH agreed that all matters connected to resolving the issues in the information in dispute were confidential.[20] It says that its contract with VCH imposes mutually binding obligations for non-disclosure and confidentiality. For instance, IBM states that its non-disclosure clause prevents it from disclosing the contents, particulars and context of the information in dispute. It states that this is evidence of a "mutuality of understanding" about the confidential nature of the information.[21]

[23] Confidentiality clauses in a contract can greatly assist the determination of whether the parties to a contract intended information related to it to be confidential.[22] However, IBM has not provided the contract or the non-disclosure clause or explained why it did not do so. As a result, I am unable to assess the extent to which the terms of the contract apply to the specific information in dispute. And, as VCH did not provide submissions on the withheld information, there is no persuasive evidence before me about VCH's understanding about whether it understood, at the time the information was provided, that it was done so in confidence. I am not persuaded by IBM's submissions on this point.

[24] IBM further states that it and VCH have consistently treated the information in a manner that protects it from disclosure and that the public does not have access to the information from other sources. Further, it says that VCH used the information to update its Board on a commercial contract which is a purpose that would not reasonably be expected to entail disclosure.[23] IBM also says that the information in dispute was intended and used only for internal purposes.[24]

[25] IBM has not provided persuasive evidence or particulars that support its assertions. In particular, I am not persuaded by IBM's assertions about how VCH

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[19] Order 01-36, 2001 CanLII 21590 (BCIPC) at para. 26.
[20] IBM's Initial Submission, page 3.
[21] IBM's Reply Submission, page 4.
[22] Order 03-02, 2003 CanLII 49166 (BC IPC) at para. 62.
[23] IBM's Initial Submission, page 3.
[24] IBM's Reply Submission, page 4.

treated the information in dispute, especially since VCH did not provide its own submissions in this inquiry. I am not satisfied that any of the information in dispute was supplied implicitly or explicitly in confidence.

Section 21(1)(c) – harm to third party

[26] Based on my above findings, I do not need to continue with the analysis but I will do so for the sake of completeness. The last step in the analysis is to determine whether disclosure of the information could reasonably be expected to result in any of the harms set out in s. 21(1)(c). In doing so, I will consider all of the information in dispute.

[27] It is well established that the language 'could reasonably be expected to' in access to information statutes means that the public body must establish that there is a reasonable expectation of probable harm.[25] This language tries to mark out a middle ground between that which is probable and that which is merely possible.[26] In order to establish that there is a reasonable expectation of probable harm, the public body must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground.[27] Further, it is not the information itself but its disclosure that must give rise to a reasonable expectation of harm.[28]

[28] IBM states that disclosure of the information in dispute can reasonably be expected to significantly harm its competitive position, significantly interfere with its negotiating position, and result in undue financial loss. Specifically, IBM states that:

- It will suffer loss to its corporate reputation and brand as a result of inaccuracies and contextual errors in the disputed information.[29]
- The loss of corporate reputation and brand will have adverse financial implications for it since it could reasonably be expected to harm its competitive position in future negotiations with VCH and others and diminish its chances of success in bids for future work.[30]
- Disclosure of the information in dispute would fuel unsubstantiated attacks on it and would inevitably cause harm to its brand, reputation and competitive position in the marketplace.[31]

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[25] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31 at para. 54.
[26] *Ibid.*
[27] *Ibid.*
[28] *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)* 2012 BCSC 875 at para. 43.
[29] IBM's Initial Submission, page 4.
[30] IBM's Initial Submission, page 4.
[31] IBM's Reply Submission, page 1.

- Disclosure of what were clearly intended to be internal comments within VCH management would be unfair to IBM because it has had no opportunity to counter or correct how the information in dispute was portrayed and cannot do so because of ongoing confidentiality obligations.[32]

[29] The applicant states that, while IBM expresses a fear of harm, it does not present evidence that meets the "well beyond" or "considerably above" threshold; for example, IBM did not explain how disclosure of the information in dispute could actually harm its competitive position or future negotiations.[33]

[30] In response, IBM submits that the real potential for significant harm is self-evident and that it is not reasonable, or in the public interest, for it to provide evidence of harm in advance of the actual harm because it would "require disclosure of the information and forecasting of public reaction." IBM also states that common sense leads "inescapably" to the conclusion that disclosure of the information will damage its reputation, harm its goodwill and provide critics with incomplete and inaccurate information.[34] IBM submits that the applicant's submissions "demonstrate vividly" the harm that disclosure would cause to it.[35] IBM says that the applicant readily acknowledges that the information would be harmful to its brand and reputation, and therefore cannot argue that others would not reasonably foresee the potential for harm to it.[36]

[31] In my view, IBM has failed to sufficiently describe the harms it expects to result from disclosure; it did not provide specific details about how any financial loss would be undue, or any details about how any harm to its competitive or negotiating position would be significant. I note that some of the information in dispute relates to the cost of a joint proposal between IBM and another third party for services to VCH, but IBM did not provide any particular submissions on how disclosure of that information would relate to any of the harms identified in s. 21(1)(c).

[32] Further, IBM has not established a direct link between the disclosure of the information and the harms it asserts will result. For example, I do not accept that disclosure of the information in dispute would harm IBM's "competitive position in future negotiations with VCH." As the information in dispute is in VCH's records, VCH knows it, so it makes no sense that disclosure would impact IBM's future negotiations with VCH. If IBM has another explanation for how this information might harm its competitive position in the future, it did not provide it. Additionally, IBM points to "loss of corporate reputation and brand as a result of

[32] IBM's Initial Submission, page 4.
[33] Applicant's response submissions at paras. 27-28.
[34] IBM's Reply Submission, page 4.
[35] IBM's Reply Submission, page 1.
[36] IBM's Reply Submission, page 5.

inaccuracies and contextual errors," but provided no specific details on which information it asserts is inaccurate and how disclosure would impact its corporate reputation and brand.

[33] In my view, IBM has not met the evidentiary standard required to show a reasonable expectation of probable harm. IBM has not provided evidence "well beyond" or "considerably above" a mere possibility of harm. I am not persuaded by IBM's assertion that the harms are self-evident or are easily understood on the basis of common sense. Rather, I find that IBM's submissions about the harm that it expects to result are vague and unsupported by evidence. I am not satisfied that disclosure of the information in dispute could reasonably be expected to result in one of the harms listed under s. 21(1)(c).

[34] In summary, while all of the information in dispute is commercial information, only a small amount was "supplied" by a third party. I am not satisfied that any of the information in dispute was supplied implicitly or explicitly in confidence or that disclosure of the information in dispute could reasonably be expected to result in the harms under s. 21(1)(c).

CONCLUSION

[35] Under s. 58, I find that s. 21(1) does not authorize Vancouver Coastal Health Authority to refuse to disclose the information in dispute. I require Vancouver Coast Health Authority to give the applicant access to this information by July 20, 2018. Vancouver Coastal Health Authority must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

June 7, 2018

Original Signed by

Erika Syrotuck, Adjudicator

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