Order F21-12

FRASER HEALTH AUTHORITY

Ian C. Davis
Adjudicator

March 23, 2021

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Summary: The applicant made a request under the *Freedom of Information and Protection of Privacy Act* to the Fraser Health Authority (FHA) for access to the entire file regarding an investigation into a named individual's care at a care centre prior to their death at a hospital. FHA decided it was required to disclose all of the responsive information, except for some information that it determined it was required to withhold under s. 22 (unreasonable invasion of third-party personal privacy). The business entity responsible for the care centre requested a review of FHA's decision, arguing that the information FHA decided to disclose should be withheld under s. 21 (harm to third-party business interests). The adjudicator confirmed FHA's decision that it is not required to refuse to disclose the disputed information under s. 21.

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

INTRODUCTION

[1] The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Fraser Health Authority (FHA) for access to the entire file regarding an investigation into a named individual's care at a care centre prior to their death at a hospital. Under s. 23 of FIPPA, FHA asked the care centre to provide its position on disclosure of the records.

[2] In response, the business entity responsible for the care centre (third party) took the position that the records should be withheld in their entirety under s. 22 (unreasonable invasion of third-party personal privacy) and s. 21 (harm to third-party business interests).[1]

[1] Investigator's Fact Report at para. 3; Affidavit #1 of FHA's FOI coordinator at para. 5.

[3] FHA disagreed with the third party's position and decided it was required to disclose the records except for certain information it concluded must be withheld under s. 22.

[4] The third party asked the Office of the Information and Privacy Commissioner (OIPC) to review FHA's decision. Mediation did not resolve the matter and it proceeded to inquiry. FHA and the third party made inquiry submissions. The applicant declined to make a submission.

PRELIMINARY MATTER

[5] The Investigator's Fact Report states that the "parties agree that the information designated under s. 22 should be withheld, therefore, the adjudicator will only consider whether the public body is required to refuse to disclose the information at issue under s. 21 of FIPPA."[2] The Notice of Inquiry states that the only issue at inquiry is "whether the public body is required to refuse to disclose the information at issue under s. 21 of FIPPA."

[6] The third party argues in its inquiry submissions that there is additional information in the records that should be withheld under s. 22, beyond what the Fact Report says the parties agreed to during mediation.[3] Specifically, the third party argues that certain individuals' names should be withheld under s. 22.[4]

[7] In reply, FHA submits that the third party has improperly raised s. 22 because the Fact Report clearly states that the only issue in this inquiry is s. 21.[5] FHA did not make any submissions on the application of s. 22.

[8] The third party is raising a new issue not stated in the Fact Report or the Notice of Inquiry. In general, a new issue will not be considered at the inquiry stage unless exceptional circumstances warrant it and the OIPC grants permission to add the issue.[6] However, since s. 22 is a mandatory exception to disclosure, I am obliged to put my mind to its application where it is apparent from my review of the records that s. 22 applies to some of the information in them.[7]

[9] In the circumstances of this case, I decline to add s. 22 as an issue. FHA advised the third party that it had received authorization to release certain personal information.[8] Given this, and having reviewed the records, it is not

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[2] Investigator's Fact Report at para. 8.
[3] Third party's submissions at paras. 18 and 63. The third party raises s. 22 despite stating at para. 4 of its submissions that the only issue is s. 21.
[4] Third party's submissions at para. 18.
[5] FHA's reply submissions at p. 1.
[6] Order F19-01, 2019 BCIPC 1 (CanLII) at para. 5.
[7] See, e.g., Order F08-03, 2008 CanLII 13321 (BC IPC) at paras. 73-79.
[8] Notice of Decision letter from FHA to the third party dated November 21, 2018 at p. 1.

apparent to me that s. 22 applies to any information other than what the parties previously agreed should be withheld under s. 22. Also, I am satisfied that the third party had a fair opportunity to raise its s. 22 concerns prior to the Investigator narrowing the issue to s. 21. In my view, the third party has not provided a satisfactory explanation as to why it is re-raising s. 22 now.

[10] Furthermore, it would undermine the mediation process to re-open this inquiry to invite submissions on an issue that the Investigator's Fact Report clearly states was addressed during mediation and was no longer in dispute. Whether s. 22 applies to any additional information is for FHA to decide prior to issuing its decision to the access applicant. To be clear, this order neither confirms nor rejects FHA's application of s. 22 to the records. I make no decision on that issue. It is FHA's duty to ensure that it responds to the applicant's request in accordance with the requirements of s. 22, given my conclusion on s. 21 below.

ISSUE

[11] The issue is whether FHA is required under s. 21 to refuse to disclose the information in dispute. Under s. 57(3)(b), the third party has the burden to prove that the applicant has no right of access to the information.

BACKGROUND

[12] The third party is a privately held business based in Vancouver, BC.[9] It is dedicated to providing senior care services and alternatives for retirement living. It provides a spectrum of services for seniors and their families throughout retirement communities and living services facilities.

[13] The records in dispute relate to an investigation involving the third party. A licensing investigator (Investigator) with Community Care Facilities Licensing, a branch of FHA, conducted the investigation. Community Care Facilities Licensing is responsible for conducting investigations regarding reportable incidents and other matters at care centres under the *Community Care and Assisted Living Act* (CCALA).[10]

[14] It is apparent from the records that the individual named in the applicant's access request was being cared for at the third party's care centre and that the investigation related to that individual's care at the care centre.

[9] The information in this background section is taken from the evidence in Affidavit #1 of FHA's FOI coordinator at para. 3 and Affidavit #1 of the third party's president at paras. 4-9, which I accept.
[10] S.B.C. 2002, c. 75.

RECORDS AND INFORMATION IN DISPUTE

[15] The records in dispute are emails with attachments between individuals involved in the investigation, primarily including the Investigator and the care centre manager. The attachments are as follows:[11]

- a Reportable Incident Form (filled-in), Health and Safety Action Plan documents, a Quality Assurance report, Internal Incident Investigation reports (including appendices), and Facility Investigation Questionnaires (filled-in);
- various documents relating to the named individual's care and medical history, including Progress Notes Reports, Care Plans, monthly medication use reports, and other documents about nutrition, weight and missed meals;
- a draft letter from FHA to the applicant responding to her concerns about the named individual's care;
- documents relating to building maintenance tasks;
- a one-page list of what appears to be the named individual's expenditures and the prices for certain products;
- fax cover sheets;
- the third party's policy and procedures manuals titled: "Concerns and Complaints Management" and "Missing/Wandering Resident – Code Yellow"; and
- blank versions of documents titled: "Visual Care Check List", "Daily Record of Care Form", "Complaint Form", "Complaints Log Form", "Complaint Management – Action Plan", and "Search Plan Checklist for Missing Resident/Tenant".

[16] As noted above, the information in dispute in this inquiry is all the information in the records except for the information FHA determined it is required to withhold under s. 22.

SECTION 21 – HARM TO THIRD-PARTY BUSINESS INTERESTS

[17] The parts of s. 21 that are relevant to this case provide:

> (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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> …

[11] Affidavit #1 of the third party's president at para. 15.

> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
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> (b) that is supplied, implicitly or explicitly, in confidence, and
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> (c) the disclosure of which could reasonably be expected to
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> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party, …
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> (iii) result in undue financial loss or gain to any person or organization ….[12]

[18] Section 21(1) creates a three-part test. The third party must establish all three parts: first, that the disputed information is one or more of the kinds of information described in s. 21(1)(a); second, that the information was supplied, implicitly or explicitly, in confidence, as required by s. 21(1)(b); and third, that disclosure of the information could reasonably be expected to result in one or more of the harms described in s. 21(1)(c).

[19] The third party submits that s. 21(1) requires FHA to refuse to disclose the disputed information. FHA submits that the third party has not met its burden under s. 21(1). As noted, the applicant did not make submissions.

Section 21(1)(a) – Type of information

[20] FHA submits that the various forms the third party uses to operate its care centre are sufficiently related to its commercial enterprise to fit within the scope of s. 21(1)(a).[13] However, FHA submits that the email correspondence, fax cover sheets, and the first and last pages of FHA's draft letter to the applicant do not constitute financial or commercial information.[14]

[21] The third party submits that all of the disputed information is commercial or financial information under s. 21(1)(a)(ii).[15] Specifically, it argues that:

> The email correspondence relates to [the third party], a commercial enterprise, complying with the Public Body's requirement to investigate based on the terms and conditions for providing its services to the resident

[12] Third party's submissions at para. 17. Neither party raised s. 21(2) or s. 21(3), and it is clear that neither section applies in this case.
[13] FHA's initial submissions at para. 15; Affidavit #1 of FHA's FOI coordinator at para. 6.
[14] *Ibid.*
[15] In para. 48 of its submissions, the third party says the disputed information constitutes "trade secrets" under s. 21(1)(a)(i); however, it clearly indicates at paras. 17 and 30-32 that it is only arguing that the disputed information is commercial or financial information under s. 21(1)(a)(ii). The third party provided no analysis of the definition of "trade secret" in Schedule 1 of FIPPA. To the extent the third party is relying on s. 21(1)(a)(i), I find, essentially for the reasons provided below in the analysis of s. 21(1)(c), that the disputed information does not constitute "trade secrets".

> of [the care centre]. [The third party] submits that the specific manner in which, at least in a procedural sense, [it] has cooperated and complied with the Public Body is sufficient to meet the test for financial and/or commercial information under the FIPPA.[16]

[22] In reply, FHA submits that the fact that the correspondence in the records "relates to the third party's obligation to cooperate with a licensing investigation is not sufficient, in itself, to establish the application of s. 21(1)(a) if there is nothing in the content of the communications that reveals financial or commercial information."[17]

[23] FIPPA does not define the terms listed in s. 21(1)(a)(ii). However, previous orders have held that "commercial information" relates to commerce, or the buying, selling, exchanging or providing of goods and services.[18] The information does not need to be proprietary in nature or have an actual or potential independent market or monetary value.[19] Past orders have found that commercial information includes information that:

- "reveals something of the way" the third party conducts its business, such as whether they are complying with regulations and bylaws;[20]
- relates to the third party's methods of providing services to its clients;[21] or
- relates to the third party's performance under a contract, in the context of an ongoing commercial relationship with the public body.[22]

[24] Financial information is about money and its use or distribution.[23] Previous orders have 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.[24]

[25] I find that most of the disputed information is commercial information of or about the third party. The third party's business is to provide care services to residents of the care centre.[25] FHA, as regulator, investigated and assessed the quality of the third party's care services in response to certain complaints. The

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[16] Third party's submissions at para. 32.
[17] FHA's reply submissions at p. 1.
[18] See, e.g., Order F08-03, 2008 CanLII 13321 (BC IPC) at paras. 62-63.
[19] Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17.
[20] Order F13-28, 2013 BCIPC 37 (CanLII) at para. 22. See also Order F19-17, 2019 BCIPC 19 (CanLII) at para. 68.
[21] Order F05-09, 2005 CanLII 11960 (BC IPC) at para. 18.
[22] Order F16-45, 2016 BCIPC 49 (CanLII) at paras. 25-26; Order F11-08, 2011 BCIPC 10 (CanLII) at para. 17; Order F18-21, 2018 BCIPC 24 (CanLII) at paras. 8-10.
[23] Order F19-39, 2019 BCIPC 44 (CanLII) at para. 55.
[24] Order F16-17, 2016 BCIPC 19 (CanLII) at para. 22.
[25] Affidavit #1 of the third party's president at para. 4.

information gathered and created in the investigation reveals how the third party provided its services and allowed FHA to assess whether it followed applicable law and policy. Although much of the information is about the healthcare of the named individual, for example, I accept that, in the investigative context of this case, the information is also commercial information because it reveals aspects of how the third party conducts its business. I am satisfied that this information, understood in context, fits within the definition of "commercial information" as past orders have interpreted that term.

[26] However, I find that some of the disputed information, such as the information in emails between the Investigator and the care centre manager, is neither commercial nor financial information.[26] In my view, this information does not reveal anything of substance about the third party's finances or how it provides care to residents.

[27] Also, some of this information is about minor administrative matters, which past orders have said does not constitute commercial or financial information.[27] For example, in one email, the care centre manager informs various individuals about her upcoming vacation and indicates where she is going.[28] I agree with the third party that this kind of communication shows, in a very general way, how it interacted with the FHA during the investigation. However, in my view, the manner in which the third party interacted with FHA is not commercial information because it does not reveal how the third party conducts its business of providing care services to residents. In the context of the investigation, I find that the third party and FHA were communicating for regulatory purposes. Accordingly, I do not see how the manner in which the third party interacted with FHA is "commercial" information.

[28] To conclude, I find that most, but not all, of the disputed information satisfies s. 21(1)(a). However, for completeness, I will consider all of the disputed information under s. 21(1)(b).

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

[29] The second step in the s. 21 analysis is to determine whether the disputed information was supplied in confidence to the public body as required by s. 21(1)(b). The analysis has two parts.[29] The first asks whether the information

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[26] Records at pp. 1-2, 16-19, 24-31, 48-50, 51 (April 4, 2018 1:53 PM email), 54, 57-60, 63-71, 78, 80, and 107. There are some slight discrepancies between the version of the Records provided by the third party and the version provided by FHA. For clarity, all references to the Records in this order are to FHA's version of the Records provided to the OIPC on March 8, 2021, including the page numbers in FHA's version.

[27] Order F19-05, 2019 BCIPC 6 (CanLII) at para. 21; Order F13-20, 2013 BCIPC 27 (CanLII) at para. 15.

[28] Records at p. 49 (April 4, 2018 11:30 AM email).

[29] See, for example, Order F19-39, 2019 BCIPC 44 (CanLII) at para. 57.

was supplied. The second asks whether the information was supplied in confidence.

Was the information "supplied"?

[30] FHA accepts that "much of the information was 'supplied' by the Third Party for the purposes of responding to requests for information."[30] However, FHA submits that email communications from the Investigator to the third party were not supplied.

[31] The third party submits that the disputed information was supplied to FHA, having regard to how past orders have interpreted that term.[31]

[32] Some of the records are communications from the third party to FHA. I accept that most of the information in these records was supplied by the third party to FHA within the meaning of s. 21(1)(b). This includes all of the information that the third party provided to FHA's team in the course of the investigation, including responses to questions or requests, and the third party's various forms and reports. The exception to this is where a document or email sent by the third party to FHA includes information originally from FHA, such as questions, requests or descriptions of allegations requiring the third party's responses.[32] That information does not satisfy s. 21(1)(b) because the third party did not supply it.

[33] The other records are communications from FHA to the third party, the applicant or between FHA employees.[33] I accept that some of the information in these records satisfies s. 21(1)(b) because it reiterates, or would allow someone to accurately infer,[34] information that the third party supplied to FHA.[35] Apart from that information, however, I find that the balance of the information in these records does not satisfy s. 21(1)(b) because the third party did not supply it.[36]

Was the information supplied "in confidence"?

[34] The next step is to determine whether the information the third party supplied was supplied in confidence. The third party must show that the disputed information was supplied "under an objectively reasonable expectation of confidentiality, by the supplier of the information, at the time the information was

[30] FHA's initial submissions at para. 17.
[31] Third party's submissions at paras. 33-36.
[32] For example, Records at pp. 3-5, 61-62, and 72-73.
[33] The communications from FHA to the third party, the applicant or between FHA employees in the Records at pp. 1-3, 10, 17-19, 24-26, 28-30, 33-35, 44-45, 47, 50-66, 68-70, and 81-86.
[34] See, e.g., Order 01-20, 2001 CanLII 21574 (BC IPC) at para. 86.
[35] Records at pp. 34, 45, 52, and 81-85.
[36] The information specified in footnote 33, except for the information specified in footnote 35.

provided."[37] Whether the disputed information was supplied in confidence is a question of fact and the test is objective; evidence only of the third party's subjective intentions with respect to confidentiality is not sufficient.[38]

[35] FHA submits that the information was not supplied in confidence because care centre "facilities have a statutory duty to provide information to licensing authorities under s. 9 of the [CCALA]."[39] FHA argues that the CCALA "does not cloak information supplied by a licensed facility to the regulator with confidence."[40]

[36] The third party submits that the information was supplied explicitly and/or implicitly in confidence.[41] The third party's sworn evidence is that it reasonably expected the information to be supplied in confidence because it is a private business and the information is sensitive. It says its employees and contractors are bound by confidentiality policies and the disputed information has never been available to the public. The third party argues that the confidentiality disclaimers on some of its emails and FHA's emails[42] show that the parties intended their communications to be confidential. According to the third party, its duty under the CCALA to supply information to FHA is irrelevant to whether the information was supplied in confidence.

[37] I accept that s. 9 of the CCALA required the third party to provide information to FHA for the purposes of the investigation. However, I am not persuaded by FHA's argument that this alone means the information was not supplied in confidence. Section 9 of the CCALA does not mention confidentiality, so I do not see how it precludes the possibility of confidentiality. Further, in Order F12-13, a third party was compelled under a seizure order to provide certain information to the public body, but the adjudicator found that the records were supplied in confidence.[43] In my view, similar reasoning applies here. Even though the third party was required to provide the information to FHA, it is still possible that it did so under an objectively reasonable expectation of confidentiality.

[38] The evidence and submissions do not establish that the third party and FHA explicitly agreed to confidentiality during the investigation, or that either party explicitly rejected confidentiality. Accordingly, I must consider whether there was an implicit expectation of confidentiality, having regard to the context and all

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[37] Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 23.
[38] See, for example, Order F13-20, 2013 BCIPC 27 (CanLII) at para. 22.
[39] FHA's initial submissions at para. 17.
[40] FHA's initial submissions at para. 17.
[41] Third party's submissions at paras. 37-45; Affidavit #1 of the third party's president at paras. 14-19.
[42] FHA states in its reply submissions that confidentiality disclaimers are only in the third party's emails. However, the Records at pp. 10, 46, and 47, for example, include emails from an FHA employee that include disclaimer language relating to confidentiality.
[43] Order F12-13, 2012 BCIPC 18 (CanLII) at paras. 26-28.

the circumstances. Relevant considerations include the contents of the records[44] and whether the information was:

1. communicated to the public body 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 public body;

3. not otherwise disclosed or available from sources to which the public has access;

4. prepared for a purpose which would not entail disclosure.[45]

[39] On the evidence before me, I am satisfied that the parties treated the disputed information in a manner consistent with it being confidential. I see no indication that the disputed information was disclosed to anyone other than FHA or that the information was publicly accessible. I accept the third party's evidence that, in accordance with its confidentiality policies, the disputed information was not used or disclosed other than internally, to FHA, or for other strictly limited purposes.[46]

[40] Further, the investigative context and the contents of the records satisfy me that the information was supplied under a reasonable expectation of confidentiality. The records were supplied to FHA in the context of a regulatory investigation generally relating to healthcare. The contents of the records simultaneously reveal information about sensitive matters, specifically the healthcare of care centre residents and the evaluation of the third party's compliance with laws and regulatory standards. For example, some of the records reveal in great detail aspects of the named individual's healthcare, which at the same time reveals the third party's standards of care and its employees' or contractors' work performance. Given this context, I find it was objectively reasonable for the third party to have expected confidentiality.[47]

[41] I also note that the records include Facility Investigation Questionnaires, which appear to record information obtained during investigative interviews about the named individual's care with some of the third party's care centre employees or contractors.[48] These documents prompt the interviewer to inform the interviewee, at the beginning and end of the interview, that the matters discussed are confidential. In my view, this supports a finding that, in general, the third party treated the investigation confidentially.

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[44] Order F13-20, 2013 BCIPC 27 (CanLII) at para. 27.
[45] Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 26.
[46] Affidavit #1 of the third party's president at para. 18.
[47] For a similar finding, see Order F19-05, 2019 BCIPC 6 (CanLII) at para. 37.
[48] Records at pp. 94-96, 105-106, and 109-113.

[42] As for the confidentiality disclaimers in certain emails, they provide at best minimal support for a finding of confidentiality for essentially the same reasons as the adjudicator provided in Order F19-05.[49] Typically, disclaimer language about confidentiality is automatically inserted into an email, so it is not a strong indication of the parties' intentions regarding the confidentiality of any particular email.

[43] Considering the context and the relevant circumstances, I conclude that the information the third party supplied to FHA was supplied under a reasonable expectation of confidentiality.

Section 21(1)(c) – Reasonable expectation of harm

[44] The final step in the s. 21 analysis is to determine whether disclosure of the disputed information could reasonably be expected to result in one or more of the harms described in s. 21(1)(c). The standard that the third party must satisfy is a "reasonable expectation of harm"; this is a "middle ground between that which is probable and that which is merely possible."[50] The release of the information itself must give rise to a reasonable expectation of harm.[51]

[45] I found above that s. 21(1)(a) and (b) did not apply to some of the disputed information at issue. Technically, I need not consider whether s. 21(1)(c) applies to this information. However, for completeness, I will consider all the information in dispute under s. 21(1)(c).

FHA's Position

[46] FHA submits that the third party's arguments on harm are "speculative and not sufficiently detailed to meet the evidentiary threshold under s. 21(1)(c)."[52] FHA says it was "unable to find any information in the records in dispute which revealed a particular design or unique operational delivery model."[53] FHA says the third party's various forms and checklists "are similar to the types of forms and checklists generally used for the operation of residential care facilities in furtherance of the statutory requirements under the *Adult Care Regulations*."[54]

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[49] Order F19-05, 2019 BCIPC 6 (CanLII) at para. 38.
[50] *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 170 v. British Columbia (Information and Privacy Commissioner)*, 2018 BCSC 1080 at para. 52 citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, and *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31.
[51] *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875 at para. 43.
[52] FHA's initial submissions at para. 25.
[53] FHA's initial submissions at para. 26.
[54] FHA's initial submissions at para. 25.

FHA notes that the records do not contain information about the third party's pricing.

Third Party's Position

[47] The third party submits that disclosure of the disputed information would significantly harm its competitive position under s. 21(1)(c)(i) and result in undue financial loss under s. 21(1)(c)(iii).[55]

[48] The third party says the disputed information reveals its operational delivery models, which are proprietary. The third party says its models and methods have been developed through trial and error over 30 years of delivering senior care services. The third party argues that the records disclose specific information about the efficient management of its facilities, which is the basis of its competitive advantage. The third party submits that its competitors could use this information to copy the third party's methods and gain a significant competitive advantage, or an undue financial benefit, without having to incur the costs that the third party incurred.

[49] The third party says it currently owns only one care centre, so the loss of this contract would result in significant damage to its competitive position. The third party also states that the senior care industry market is "highly competitive" and the "usual competitors", which the third party names, "compete to win contracts with public bodies" worth, in some cases, "millions of dollars".[56] The third party says it has bid successfully on projects in the past, will continue to do so, and intends to bid on at least one contract in the next six months.

[50] Further, the third party argues that disclosure of the disputed information could harm its reputation because some of the information "shows concern about its patient care."[57] However, the third party also says it is "confident that the current state of affairs is such that the residents receive a high standard of care and that the concerns highlighted in the complaints have been alleviated."[58]

[51] Finally, the third party expresses concern that if the disputed information is disclosed and "it had to spend resources responding to media concerns about what happened in the past", then its attention would be diverted away from providing care to its residents and dealing with the COVID-19 pandemic.[59]

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[55] Third party's submissions at paras. 46-61; Affidavit #1 of the third party's president at paras. 10-14 and 20-32.
[56] Third party's submissions at paras. 27 and 47.
[57] Third party's submissions at para. 58.
[58] Third party's submissions at para. 58.
[59] Third party's submissions at para. 59.

Analysis

[52] The third party addresses ss. 21(1)(c)(i) and (iii) together and argues that the same evidence establishes that both subsections apply, so I will analyze these two subsections together.

[53] For the following reasons, I find that the third party has not met its burden to establish that disclosure of the disputed information could reasonably be expected to result in significant harm to its competitive or negotiating position under s. 21(1)(c)(i) or undue financial loss or gain under s. 21(1)(c)(iii).

[54] The third party asserts that its methods and documents are "unique and distinctive in a number of ways."[60] It highlights specific methods and documents in the records but, in my view, does not adequately explain how these methods and documents are unique and why it thinks they differ from those of its competitors. Without more from the third party, I am not satisfied that the third party's methods or documents are so unique and distinctive that its competitors could reasonably be expected to gain a significant commercial advantage from access to the disputed information.

[55] Further, in my view, most of the disputed information is too specific to be of significant commercial value to the third party's competitors. Most of the information relates to specific incidents and events, related to a specific care centre and the healthcare of a particular individual. The third party does not adequately explain, and I am not persuaded, that such contextually specific information could be of significant commercial value to competitors who operate different care centres with different residents and operational needs.

[56] I also find it reasonable to assume, absent evidence from the third party on this, that contracts for new care facilities will have their own distinct requirements. I am not persuaded that a competitor could reasonably be expected to gain a significant competitive advantage in future procurement processes by knowing how the third party operates its particular care centre or how it responded to a specific investigation.

[57] By way of example, one record includes information about the named individual's food preferences and how the third party intended to accommodate them.[61] I do not see how the third party's competitors, operating in a different context, could reasonably be expected to gain a significant competitive advantage from knowing such specific information. In my view, the third party does not adequately explain how its competitors could extrapolate commercially valuable information from the day-to-day details of how the third party cared for

[60] Affidavit #1 of the third party's president at para. 22.
[61] Records at p. 87.

this individual, or how that information could be used to beat the third party in a contract bid.

[58] Another example is the "Internal Investigation Form". The third party says this document indicates that a "specific number of Primary Residential Care Aides were assigned to a particular wing of the facility for a specific shift".[62] However, the third party does not adequately explain how these details, which are so particular to its care centre, could be of significant commercial value to its competitors, who operate in different facilities with different needs. Without more from the third party, I do not see how the third party's competitors could exploit to their advantage information about the operational requirements of a particular care centre.

[59] A further example is the third party's "Housekeeper's Daily Routine Schedule", which reveals its "Good Housekeeping Procedures", broken down into 18 specific steps.[63] I accept that the third party has developed these procedures through its efforts over the years and that they likely differ, at least slightly, from those of its competitors. However, that is not sufficient to establish harm under s. 21(1)(c). In my view, the third party's supporting evidence does not establish that its housekeeping methods are innovative, unique or superior to the methods of its competitors such that its competitors would want to copy them.

[60] More importantly, even if its methods are unique, the third party's evidence and arguments fail to establish that its competitors could reasonably be expected to use those methods to gain a significant competitive advantage. The third party mentions that it intends to bid on future contracts, but it does not address care centre procurement processes even in general terms. The evidence before me does not indicate, for example, the components of a typical proposal or the typical assessment criteria. As a result, I cannot determine whether the disputed information is even the kind of information that forms part of a bid proposal, let alone whether it is the kind of information that could reasonably be expected to allow one proponent to gain a significant competitive advantage over another. None of this is obvious to me from the records alone and the third party does not adequately explain.

[61] The third party also says its competitors could use the disputed information "as a valuable benchmark or baseline … which will allow them to further optimize their business operations."[64] However, even if a competitor could use the disputed information to optimize their business operations, I am not persuaded that this would result in significant harm under s. 21(1)(c). The third party does not explain which aspects of a competitor's business would be

[62] Affidavit #1 of the third party's president at para. 24.
[63] Affidavit #1 of the third party's president at para. 25.
[64] Affidavit #1 of the third party's president at para. 28.

optimized, to what extent, or how exactly this would significantly harm the third party's position in future contract bids, for example.

[62] I accept that the third party spent time and effort developing its policies, manuals, and standard documents such as certain checklists and questionnaires. However, the third party does not adequately explain why it thinks these documents are distinctive or superior to its competitors' documents such that the competitors would likely copy them and benefit from doing so. For example, I see nothing special about the third party's template "Complaint Management – Action Plan".[65] It is a simple table with predictable field titles. I find it difficult to accept the third party's suggestion that its competitors do not have, or could not create, such a straightforward document or a similar document to the same effect. In my view, the same reasoning applies to the third party's other template documents, such as its "Complaint Form" and "Complaints Log Form".[66]

[63] I also note in relation to s. 21(1)(c)(iii) that there is no evidence to suggest, for example, that there is a start-up care centre business that could obtain undue financial gain, or cause undue financial loss, from simply adopting the third party's documents and policies without having to incur the costs that the third party incurred to develop its methods and documents.

[64] The third party also argues that, since it currently only owns one care centre, losing that contract would result in significant harm under s. 21(1)(c). However, the third party does not provide any persuasive evidence to establish that it is at risk of losing the contract. For example, the third party provides no indication that its contract is subject to renewal or termination or that its competitors have any interest in, or plan to, take over the contract. In my view, this argument is speculative and not persuasive.

[65] Further, the third party argues that disclosure of the disputed information could damage its reputation, which could in turn have a negative effect on its competitive position. However, the third party's own evidence is that it successfully dealt with the investigation and that any issues with its services have been resolved. Based on my review of the records, I am not persuaded that the disputed information is detrimental to the third party such that its disclosure could reasonably be expected to result in significant harm to the third party's reputation and competitive or negotiating position.

[66] Finally, the third party argues that if it has to expend resources dealing with the consequences of disclosure of the disputed information, such as negative attention in the media, then this will detract from its quality of care. I do not see how this argument is relevant to establishing harm under s. 21(1)(c). At any rate, there is no evidence beyond mere speculation to establish that there

[65] Records at p. 162.
[66] Records at p. 157-161.

will be negative media attention as a result of disclosure of the disputed information.

[67] To conclude, I acknowledge that, according to the third party, it can be "easy to overlook the significance" of the disputed information.[67] However, the third party does not provide the detailed evidence needed to understand why the information is of significant commercial value to its competitors and how exactly its disclosure could reasonably be expected to result in any of the harms described in s. 21(1)(c).

Summary

[68] To summarize, I accept that most, but not all, of the disputed information is commercial information under s. 21(1)(a)(ii) because it reveals aspects of how the third party conducts its business. Subject to certain exceptions specified above, I also accept that most of the commercial information was supplied in confidence by the third party to FHA within the meaning of s. 21(1)(b). However, for the reasons provided above, I am not satisfied that the third party has established that disclosure of the disputed information could reasonably be expected to result in the harms described in either s. 21(1)(c)(i) or s. 21(1)(c)(iii).

CONCLUSION

[69] For the reasons given above, I confirm FHA's decision that it is not required to refuse to disclose the disputed information under s. 21 of FIPPA.

March 23, 2021

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

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[67] Affidavit #1 of the third party's president at para. 28.