Order F22-32

FRASER HEALTH AUTHORITY

David S. Adams
Adjudicator

June 23, 2022

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Summary: The applicant made a request under the *Freedom of Information and Protection of Privacy Act* to Fraser Health Authority (FHA) for access to the asset purchase agreement (Agreement) by which FHA acquired the business assets of a third party. FHA decided it was required to disclose the Agreement, except for some information which FHA and the third party agreed should be withheld under s. 22 (disclosure harmful to personal privacy). The third party requested a review of FHA's decision, arguing that the entire Agreement should be withheld under s. 21(1) (disclosure harmful to business interests of a third party). The adjudicator confirmed FHA's decision that it is not required to refuse to disclose the disputed information under s. 21(1).

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

INTRODUCTION

[1] The applicant, a journalist, requested that Fraser Health Authority (FHA) provide him with the asset purchase agreement (the Agreement) by which FHA acquired the third party's assets and assumed its lease.

[2] FHA gave the third party notice, under s. 23 of the *Freedom of Information and Protection of Privacy Act* (FIPPA), that it planned to release the Agreement to the applicant, outlining its conclusion that s. 21(1) of FIPPA (disclosure harmful to business interests of a third party) was not applicable. In response, the third party took the position that the entire Agreement should be withheld under s. 21(1), and in the alternative, that s. 22 (disclosure harmful to personal privacy) applied to some of the information. FHA agreed to withhold some of the information under s. 22, but decided that it was required to release most of the Agreement to the applicant.

[3] The third party asked the OIPC to review FHA's decision on s. 21(1). Mediation did not resolve the issue in dispute and the matter proceeded to this inquiry. The applicant, the public body, and the third party each provided submissions.

Preliminary Matter

[4] The Investigator's Fact Report and the Notice of Inquiry both provide that the only issue in this inquiry is the application of s. 21(1) of FIPPA. The third party requested that FHA not disclose certain parts of the Agreement that it believed were exempt from disclosure under s. 22. FHA agreed to withhold this information. Since no party made submissions on the application of s. 22, and since it is expressly not in issue, I have not considered it.

ISSUE

[5] The sole issue I must decide in this inquiry is whether FHA is required, under s. 21(1) of FIPPA, to refuse to disclose the information in dispute. Under s. 57(3)(b), the burden is on the third party to prove that the applicant has no right of access to the information.

DISCUSSION

Background

[6] FHA is a regional health authority responsible for delivering health services to the public in the area from Burnaby to the Fraser Canyon. The third party is a privately held corporation based in BC's lower mainland and was the operator of an MRI clinic in Surrey. In 2018, the third party sold its assets to FHA, pursuant to the Agreement.

RECORDS AND INFORMATION IN DISPUTE

[7] FHA entered into the Agreement with the third party. The only record in issue is the Agreement, which consists of 77 pages, including three exhibits and two schedules. The third party submits that the entire Agreement must be withheld under s. 21(1). FHA and the applicant submit that s. 21(1) does not apply.

Harm to third party business interests – s. 21(1)

[8] The relevant portions of s. 21(1) follow:

> 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,
>
> …
>
> (iii) result in undue financial loss or gain to any person or organization…

[9] Section 21(1) creates a three-part test. The burden is on the third party to establish, first, that the information falls under one of the categories in s. 21(1)(a); second, that the information was supplied, implicitly or explicitly, in confidence, as set out in 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).

Section 21(1)(a) – Commercial or financial information

[10] The third party says that the information contained in the Agreement is commercial information. It points to the purchase price, purchased assets, lease terms, and other information in the Agreement as indications of commercial information, and says that the information was supplied to FHA for a business purpose.[1]

[11] FHA submits that information can be considered commercial in nature if it relates to a commercial enterprise, in that it relates to the buying or selling of goods or services. It accepts that the Agreement "constitutes commercial or financial information under s. 21(1)(a) of FIPPA as it relates to the transfer of assets".[2]

[12] The applicant does not make a submission about this aspect of the s. 21(1) test.

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[1] Third party's submission at 2.
[2] FHA's response submission at paras 12-13.

[13] FIPPA does not define "commercial" or "financial" information. Previous orders have consistently said that "commercial" information relates to commerce, or the buying and selling of goods and services, but that the information need not be proprietary in nature or have an independent monetary or marketable value. Meanwhile, "financial" information has been defined as information about money and its uses, including "prices, expenses, hourly rates, contract amounts and budgets".[3]

[14] Here, the Agreement deals with the sale of assets (including their prices) by the third party to the public body, and with related commercial arrangements. I accept the parties' submissions on this point and am satisfied that the Agreement consists of commercial and financial information of or about the third party within the meaning of s. 21(1)(a).

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

[15] The second step in the s. 21(1) analysis requires deciding whether the information was "supplied" by the third party, and if so, whether it was supplied, implicitly or explicitly, in confidence.

Supplied

[16] The third party says that the commercial information discussed above was supplied by it to FHA, and that the information should not be considered to be terms of a contract. It says that FHA did not know what assets the third party owned, what technology it used, or what the terms of its property lease were.[4]

[17] FHA submits that the Agreement is a negotiated agreement that does not contain information supplied by the third party. It says that contrary to the third party's claim, FHA and the third party negotiated between them the list of assets that would be purchased.[5]

[18] The applicant adopts FHA's arguments about this part of the test.

[19] Previous orders have found that information in a contract is usually the product of negotiation between the parties, and will therefore not count as being "supplied" for the purposes of s. 21(1). However, two exceptions to this principle have been identified, and information may be found to have been "suppled" by the third party in the following circumstances:

[3] For example, Order F21-15, 2021 BCIPC 19 (CanLII) at para 83.
[4] Third party's submission at 3.
[5] FHA's response submission at paras 14-15.

- where the information the third party provided was "immutable" – and thus not open or susceptible to negotiation – and was incorporated into the agreement without change; or
- where the information in the agreement could allow someone to draw an "accurate inference" about sensitive third-party business information that is protected under FIPPA.[6]

[20] The Agreement is, on its face, a contract. It deals solely with the sale of a business. The parties have not addressed the two exceptions noted above, and I find that neither applies. The third party has not shown that the information at issue was immutable, nor has it alleged that the release of the information would allow someone to draw an accurate inference about underlying sensitive business information that would otherwise be protected under FIPPA. I therefore conclude that the information in the Agreement was not "supplied" for the purposes of s. 21(1)(b).

In confidence

[21] Since I have decided that the information in the Agreement was not "supplied" for the purposes of s. 21(1)(b), I conclude that it cannot have been supplied in confidence.

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

[22] Having decided that the disputed information was not supplied, I do not need to consider whether disclosure of the Agreement could reasonably be expected to cause the harm the third party alleges. However, for the sake of completeness, and because the parties made detailed submissions on this point, I will consider the application of the third branch of the s. 21(1) test.

[23] The third party says that release of the Agreement to the applicant would cause undue harm to its competitive position, because competitors could use the information as a "how-to" guide to enter the clinic business. It says that its corporate existence continues, pointing out that only its assets were sold to FHA, but it does not say that it is still carrying on any kind of business. It says that it took substantial time and effort to piece together the information, which is not known to the public, and that potential competitors could use the information to estimate their likely costs and requirements.[7]

[6] Order F17-49, 2017 BCIPC 54 (CanLII) at paras 17-18.
[7] Third party's submission at 3.

[24] FHA says that mere assertions of contemplated harm are not enough to meet the standard of proof under s. 21(1)(c). It says they are too speculative and not sufficiently detailed, and that supporting evidence is lacking.[8]

[25] The applicant adopts FHA's arguments about this part of the test.

[26] Deciding whether s. 21(1)(c) applies requires an assessment of whether disclosure of the disputed information could reasonably be expected to cause the type of harm contemplated by s. 21(1)(c). The Supreme Court of Canada has held that the test for the reasonable expectation of harm is a "middle ground" between what is merely possible and what is probable. To establish a reasonable expectation, a party

> must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground…This inquiry is of course 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".[9]

[27] Moreover, for information that is alleged to give competitors "a head start in developing competing products, or to give them a competitive advantage in future transactions" (as the third party says is the case here) a party must show a "direct link between the disclosure and the apprehended harm and that the harm could reasonably be expected to ensue from disclosure".[10]

[28] Finally, previous orders have said that a party's failure to provide evidence to establish the application of s. 21(1) can be fatal to its case.[11]

[29] Applying these principles, I do not think the third party has established a reasonable expectation of 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)) if the Agreement were disclosed. The third party has provided no evidence to show how competitors would use the information to enter the field – a field in which the third party has not claimed it still operates. Moreover, the Agreement was executed in 2018, almost four years ago. I accept that the third party took substantial time and effort to assemble the information in the Agreement, but without any evidence on this point before me, I cannot see what use a competitor

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[8] FHA's response submission at paras 19-27.
[9] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at para 54. The Court said that this test should be used "wherever the 'could reasonably be expected to' language is used in access to information statutes".
[10] *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII) at para 219.
[11] For example, Order F20-02, 2020 BCIPC 02 (CanLII) at para 18, and Order F17-17, 2017 BCIPC 18 (CanLII) at para 64.

could make of the information that could reasonably be expected to harm the third party. Nor do I have any evidence or argument about what the third party's competitive position is, or might be in the future.

[30] In my view, the third party has not brought the harms it foresees out of the realm of speculation and assertion. I am not persuaded that disclosure of the Agreement could reasonably be expected to cause the harms the third party alleges.

Conclusion on s. 21(1)

[31] In summary, I find that the third party has established that s. 21(1)(a) applies because the Agreement consists of commercial and financial information of or about the third party. However, the third party has failed to show that it supplied the information to FHA under s. 21(1)(b) or that disclosure could reasonably be expected to cause harm under s. 21(1)(c). I conclude that FHA is not required to refuse to disclose the Agreement under s. 21(1).

CONCLUSION

[32] For the reasons above, I make the following order under s. 58 of FIPPA:

1) FHA is not required to refuse to give the applicant access to the information in dispute under s. 21(1) of FIPPA;

2) I require FHA to give the applicant access to the information in dispute under s. 21(1). FHA must concurrently provide the OIPC Registrar of Inquiries with a copy of its cover letter and the records sent to the applicant.

[33] Pursuant to s. 59(1) of FIPPA, FHA is required to comply with this order by **August 8, 2022**.

June 23, 2022

ORIGINAL SIGNED BY

David S. Adams, Adjudicator

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