Order F22-47

INTERIOR HEALTH AUTHORITY

Jay Fedorak
Adjudicator

October 7, 2022

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Summary: A member of the Health Sciences Association (applicant) made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Interior Health Authority (IHA) for a copy of a contract and related records between the IHA and service providers for the provision of services to the Kelowna Urgent and Primary Care Centre (KUPCC). IHA responded to the request by withholding information under ss. 16 (harm to intergovernmental relations) and 17 (harm to the financial or economic interests) of FIPPA. The adjudicator found that neither s. 16(1) nor s. 17(1) applied and ordered IHA disclose the information at issue.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss. 16(1) and 17(1).

INTRODUCTION

[1] A member of the Health Sciences Association (applicant) made a request under the *Freedom of Information and Protection of Privacy Act (*FIPPA) to the Interior Health Authority (IHA) for a copy of a contract and related records between the IHA and service providers for the provision of services to the Kelowna Urgent and Primary Care Centre (KUPCC). IHA responded to the request by withholding the entire document under ss. 13, 16 and 17 of FIPPA, on the grounds that disclosure would reveal advice or recommendations, would harm intergovernmental relations and would harm the financial interests of IHA.

[2] The applicant requested a review by the Office of the Information and Privacy Commissioner (OIPC) of IHA's decision to deny him access under ss. 13, 16 and 17.

[3] As the result of mediation by the OIPC, IHA released some of the information but withheld the remaining information under ss. 16 and 17 of FIPPA. It ceased to rely on s. 13.

[4] Mediation was unable to resolve the remaining issues, and the applicant requested the matter proceed to an inquiry.

PRELIMINARY ISSUES

Section 21

[5] IHA has provided copies of the responsive records with markings that indicate it also has withheld information under s. 21 (harm to third party business). It did not reference the application of s. 21 in its initial response to the applicant nor in its submissions to this Inquiry. Moreover, the Notice of Inquiry does not list s. 21 as one of the issues to be decided. As previous orders have indicated, parties must request and receive permission from the OIPC to introduce new issues at an inquiry.[1] IHA has not done so in this case. I see no compelling reason to allow IHA to introduce this new issue into the inquiry at this late stage. Therefore, I decline to add, or consider, s. 21. Section 21 is not at issue in this Inquiry and, therefore, IHA cannot apply it to information in the requested records.

[6] I note that in each instance where IHA applied s. 21, it also applied ss. 16 and 17 to the same information.

Section 25

[7] In his submission, the applicant raises the application of s. 25. Section 25 requires public bodies to disclose information when it is in the public interest. The applicant did not request permission to raise this issue and the Notice of Inquiry does not include s. 25 as an issue before this Inquiry. The applicant did not request and receive permission from the OIPC to raise the issue. I see no compelling reason to add, or consider, s. 25 in this inquiry.

ISSUES

[8] The issues to be decided in this inquiry are whether:

1. IHA is authorized to withhold information under s. 16, and
2. IHA is authorized to withhold information under s. 17.

[1] For example, see Order F12-07, 2012 BCIPC 10, para. 6; Order F10-27, 2010 BCIPC 55, para. 10; Decision F07-03, 2007 BCIPC 30393 (CanLII), paras. 6-11; and Decision F08-02, 2008 BCIPC 1647 (CanLII).

[9] Under s. 57(1), IHA has the burden of proving that the applicant has no right of access to the information it withheld under ss. 16 and 17.

DISCUSSION

[10] **Background –** The parties have provided little information as to the background to this request. The entire submission of IHA is surprisingly brief. From what I can glean from the submissions, IHA, the health authority for the Interior Region of British Columbia, is attempting to address the shortage of primary care health services that has emerged owing to the lack of sufficient family physicians. As one approach, it has established Urgent and Primary Care Centres (UPCCs), where it employs medical professionals on contract to provide the services that family physicians would otherwise provide.

[11] The applicant contends that the creation of these centres exacerbates rather than alleviates the problems resulting from the shortage of family physicians. He is seeking access to the contracts and related information to discover the details of how much the physicians involved are compensated, to compare the public expense of UPCCs and fee-for-service family physicians. IHA has disclosed the contracts but withheld information relating to fees paid to the medial practitioners.

[12] The applicant has agreed to exclude any personally identifiable information from the scope of the request. IHA has severed this information and annotated the passages with s. 22. This severing is not at issue in this Inquiry.

[13] **Records at issue –** The records are 127 pages including an "IHA Standard Service Contract" between nurse practitioners and another with health profession corporations, along with appendices.

[14] **Information at issue –** The information withheld from the records includes: hours of operation; staffing levels; length of shifts, annual payment per employee, amount of maximum funding, amount of maximum billing per shift; the location where the contractors should refer patients seeking care after hours; and hourly rates for physicians and nurse practitioners.

Section 16

[15] Section 16 permits a public body to withhold information that could reasonably be expected to harm the conduct of relations between the government of British Columbia and another government.

[16] IHA's submission indicates that it is relying on s. 16(1)(a)(i) to refuse access. The relevant provision reads as follows:

> **16** (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to:
>
> (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:
>
> (i) the government of Canada or a province of Canada;

[17] Section 16(1)(a) uses the language "could reasonably be expected to harm." Previous orders and court decisions have established that public bodies must prove that disclosure will result in a risk of harm that goes "well beyond the merely possible or speculative."[2] The Supreme Court of Canada describes this as "a middle ground between that which is probable and that which is merely possible."[3] IHA must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to meet the standard.[4] The evidence it provides must demonstrate "a clear and direct connection between the disclosure of specific information and the harm" that it alleges.[5]

[18] As mentioned, IHA's submission about s. 16 is very brief. It says:

- This section is applicable to the working relationship between the Health Authority and the Ministry of Health, as well as to some of the many stakeholders involved in the overall planning and negotiations around the umbrella provincial initiative, under which this UPCC contract is guided, and as is outlined in the Strategic Policy Framework "Primary and Community Care in BC".
- Although not listed as signatories within the UPCC service provider contracts, other negotiating bodies, as described above, include regional hospital districts and Aboriginal governance.
- The complexities of the Urgent and Primary Care Centre negotiations and working relationships between the health authority and the ministry of health and other government and non-government agencies for the UPCCs are further articulated in the IH Mandate Letter and the IH Service Plan.[6]

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[2] *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3, at para. 206.
[3] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC, para 54.
[4] Order F17-01, 2017 BCIPC 1 (CanLII), para. 21.
[5] Order 02-50, 2002 BCIPC 42486 (CanLII), para. 137
[6] IHA's initial submission, p. 1.

[19] This is the extent of its submission with respect to the application of s. 16(1)(a)(i).

[20] The applicant submits that IHA has failed to establish that there is a reasonable expectation of harm from the disclosure of the information it withheld under s. 16(1)(a)(i).

Analysis

[21] IHA is relying on s. 16(1)(a)(i), which applies to information whose disclosure could reasonably be expected to harm the relations between the government of British Columbia, on one side, and the government of Canada or another provincial government, on the other. IHA has said that it has working and negotiating relationships with the BC Government's Ministry of Health and regional hospital districts and Aboriginal governments. However, IHA has not referred to the government of Canada or any other province or their agencies, which is an essential element of establishing s. 16(1)(a)(i) applies. None of the entities that IHA mentions fall into those categories of government. IHA is not an agency of the government of Canada or another province, nor are regional hospital districts or Aboriginal governments. Therefore, I find that IHA has not established that the records relate to the government of BC's relations with the government of Canada or another province of Canada or their agencies.

[22] I also note that IHA has failed to identify and establish the nature and consequences of the harm to any relationships that would result from the disclosure of the information at issue.

[23] Therefore, I find that s. 16(1)(a)(i) does not apply to the information at issue.

Section 17

[24] The provision that IHA is relying on is s. 17(1)(f), which reads as follows:

> **17** (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
>
> (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[25] The harms test for the application of s. 17(1) is the same as the one I described above with respect to s. 16(1).[7]

[26] IHA submits that negotiations continue for similar types of agreements throughout the province. It argues that these contracts are unique and disclosure of the information at issue would have an impact on future negotiations. It is concerned that parties involved in future negotiations would be able to use this information to the disadvantage of IHA.[8]

[27] IHA also submits that disclosure of this information might discourage some potential service providers from participating in future negotiations. In support of its position, it cites another case where the OIPC denied an applicant's request for review.[9]

[28] The applicant contends that IHA has failed to establish a direct connection between the disclosure of the information at issue and the alleged harm. The applicant disagrees that these contracts are unique. He points out that IHA and other health authorities routinely contract with service providers and disclose the terms of these contracts in response to FIPPA requests.[10]

Analysis

[29] The arguments of IHA do not establish that disclosing the information in dispute could reasonably be expected to cause harm under s. 17(1). As other BC Orders have noted, each set of contract negotiations are unique and involve give and take from all parties.[11] The fact that a party in a future negotiation may use information gained from the information at issue to take a firmer stance, does not mean, necessarily, that IHA will incur greater costs or be forced to agree to terms that are less advantageous to IHA. IHA offers no evidence to support its contention that disclosure of the information would discourage other service providers from participating in future negotiations. Moreover, previous orders have found that these types of arguments do not meet the test in s. 17(1).[12]

[30] I find IHA's arguments to be speculative and lacking evidentiary support. IHA bears the burden of proof, and it has failed to meet the standard harm's test for s. 17.

[31] Therefore, I find that s. 17(1) does not apply to the information at issue.

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[7] Paras. See also Order F22-39, 2022 BCIPC 44 (CanLii), paras 117-118.
[8] IHA's initial submission, p. 2.
[9] IHA's initial submission, p. 2.
[10] Applicant's response submission, paras 3-15.
[11] See, in particular, Order 10-24, 2010 BCIPC 35 (CanLii).
[12] For example, in Order 10-24, the adjudicator dismisses similar arguments in paras 47-60.

CONCLUSION

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

1. Section 16(1)(a)(i) does not authorize IHA to withhold the information at issue.

2. Section 17(1)(f) does not authorize IHA to withhold the information at issue.

3. The public body is required to give the applicant access to all of the information it withheld from disclosure, except for the personal information the applicant agreed was outside the scope of his request.

4. The public body must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records/pages described at item 3 above.

[33] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by November 22, 2022.

October 7, 2022

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

OIPC File No.: F20-82544