
Order F06-20

# INTERIOR HEALTH AUTHORITY

David Loukidelis, Information and Privacy Commissioner
November 9, 2006

Quicklaw Cite: [2006] B.C.I.P.C.D. No. 36
Document URL: http://www.oipc.bc.ca/orders/OrderF06-20.pdf
Office URL: http://www.oipc.bc.ca
ISSN 1198-6182

**Summary**: The third-party contractor requested a review of the public body's decision that s. 21(1) did not require it to refuse to give access to price information in a contract between the public body and the contractor for services at a seniors home care facility. Section 21(1) does not apply to the contract price information.

**Key Words:** third party commercial or financial information—supplied in confidence—competitive position—negotiating position—harm significantly—interfere significantly—no longer continue to be supplied.

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

**Authorities Considered: B.C.:** Order 00-24, [2000] B.C.I.P.C.D. No. 27; Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 03-15, [2003] B.C.I.P.C.D. No. 15; Order 04-06, [2004] B.C.I.P.C.D. No. 6; Order F05-05, [2005] B.C.I.P.C.D. No. 6; Order 00-22, [2000] B.C.I.P.C.D. No. 25; Order 01-39, [2001] B.C.I.P.C.D. No. 40; Order 03-03, [2003] B.C.I.P.C.D. No. 3; Order 03-04 [2003] B.C.I.P.C.D. No. 4. **Ont.:** Order MO-1706, [2003] O.I.P.C. No. 238; Order PO-2435, [2005] O.I.P.C. No. 207; Order PO-2467, [2006] O.I.P.C. No. 65.

**Cases Considered: B.C.:** *Jill Schmidt Health Services Inc. v. British Columbia (Information and Privacy Commissioner)*, [2001] B.C.J. No. 79, 2001 BCSC 101; *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848, 2002 BCSC 603. **Ont.:** *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.).

## 1.0 INTRODUCTION

[1] This inquiry concerns a request made, under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), for access to a contract between the Interior Health Authority ("IHA") and Retirement Concepts Seniors Services Ltd. ("Retirement Concepts")[1] for residential care services at a care facility for seniors in Williams Lake.

[2] The IHA gave Retirement Concepts a notice under s. 23 respecting the possible application of s. 21 to information in the requested records and Retirement Concepts made representations to the IHA opposing release of any information. The IHA decided that s. 21 did not apply to most of the contract because it was template language that the IHA used for all contracts, but decided that s. 21 did require it to refuse to give access to the total contract amount and the number of residential units at the facility.

[3] After the applicant requested a review by this Office of the IHA's decision to refuse disclosure of the price and unit information, the IHA reconsidered and determined that s. 21 did not require it to refuse disclosure. When notified of the IHA's revised decision, Retirement Concepts made a third-party request for review by this Office. This is the decision under review here.

[4] All of the contract in issue, a 28-page Residential Care Operating Agreement dated January 17, 2003 between the IHA and Retirement Concepts, has been disclosed to the applicant except for the amount of base funding in Schedule B and a revised calculation of that amount in a contract amendment dated May 19, 2004. The base-funding amount is, in both cases, the total annual contract fee payable to Retirement Concepts, minus estimated contributions by residents.

## 2.0 ISSUE

[5] The issue in this inquiry is whether s. 21(1) requires the IHA to refuse to give the applicant access to the base-funding amount in the contract and contract addendum between the IHA and Retirement Concepts.

[6] When the IHA decided that s. 21(1) did not apply and Retirement Concepts made its third-party request for review, the burden of proof fell, under s. 57(3)(b) of FIPPA, on Retirement Concepts to prove that the IHA is required to refuse to give access to the disputed information.[2]

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[1] Retirement Concepts is a privately-held Canadian company that owns and operates residential care, assisted living and nursing care facilities for seniors in British Columbia and Quebec.

[2] See, for example, Order 00-24, [2000] B.C.I.P.C.D. No. 27.

## 3.0 DISCUSSION

[7] Section 21(1) creates a three-part test, each element of which must be satisfied before a public body is required to refuse to disclose information. It reads as follows:

> **Disclosure harmful to business interests of a third party**
>
> 21(1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> (i) trade secrets of a third party, or
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> (iii) result in undue financial loss or gain to any person or organization, or
>
> (iv) reveal information supplied to, or in the report of an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquiry into a labour relations dispute.

[8] In Order 03-02[3], I discussed the interpretation and application of s. 21(1) and the history and application of similar provisions in access to information legislation across Canada. The interpretation and application of s. 21(1) was also judicially considered in *Jill Schmidt Health Services Inc. v. British Columbia (Information and Privacy Commissioner)*[4] and *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*.[5]

### *Commercial or financial information*

[9] I agree that the base-funding amount in the contract and contract addendum is commercial information and financial information about Retirements

[3] [2003] B.C.I.P.C.D. No. 2.
[4] [2001] B.C.J. No. 79, 2001 BCSC 101.
[5] [2002] B.C.J. No. 848, 2002 BCSC 603.

Concepts within the meaning of s. 21(1)(a)(ii) of FIPPA. Other orders have reached the same conclusion about similar information.[6]

***Supplied in confidence***

[10] The next question is whether the disputed information was supplied in confidence within the meaning of s. 21(1)(b) of FIPPA.

[11] The "supplied" element of s. 21(1)(b) has figured in many decisions and has been considered in depth.[7] The consensus of these decisions is that the contents of a contract between a public body and a third party will not normally qualify as having been "supplied" even when it has been preceded by little or no back and forth negotiation. The exceptions to this tend to be information that, although it is found in a contract between a public body and a third party, is not susceptible of negotiation and is likely of a proprietary nature. The reason for this is that the concept of 'supply' is intended to capture truly immutable third-party business information, not contract information that—by the finessing of negotiations, sheer happenstance or mere acceptance by a public body of a proposal—is incorporated in a contract in the same form that it was delivered by the third-party contractor. This is what I said in Order 03-15 with respect to price information in contracts for nursing services:

> [65] ...Just because an expense in a proposal, or a contract, remains the same despite the variation of other terms (such as the number of inmates in the VIRCC) does not mean that it is a fixed cost of the contractor. All that is really signified is that there is a continuing flat charge by the contractor to the Ministry. The "cost" is to the Ministry in order to contract for the services involved. JMHS, without a doubt, also has costs, but it cannot be assumed that the annual cost figures that have been withheld by the Ministry must be fixed costs to JMHS. JMHS can be expected to seek some profit out of the contract. It may also be able to increase its own efficiencies and to bargain down its own costs.
>
> [66] An RFP process aims to generate competitive proposals from qualified parties for the provision of goods or services to government. If all goes well, it leads to the government contracting with one, or more, of the proposing parties to provide the goods or services sought. It would hardly be surprising that terms in a contract arrived at resemble, or are even the same as, terms in the contractor's proposal. It might well be more unusual for the contract arrived to be completely out of step with the terms of the contractor's proposal. A successful proponent on an RFP may have some

[6] Order 00-22, [2000] B.C.I.P.C.D. No. 25; Order 03-15, [2003] B.C.I.P.C.D. No. 15, paras, 40-41.
[7] Order 01-39, [2001] B.C.I.P.C.D. No. 40, paras. 44-50; Order 03-02, [2003] B.C.I.P.C.D. No. 2, para. 60; Order 03-03, [2003] B.C.I.P.C.D. No. 3, paras. 17-35; Order 03-15, [2003] B.C.I.P.C.D. No. 15, paras. 57-65; Order 04-06, [2004] B.C.I.P.C.D. No. 6, paras. 44-50; Order F05-05, [2005] B.C.I.P.C.D. No. 6, paras. 58-72.

> or all of the terms of its proposal incorporated into a contract. As has been said in past orders, there is no inconsistency in concluding that those terms have been "negotiated" since their presence in the contract signifies that the other party agreed to them. This is not changed by the Ministry's contention that terms in the Health Services Agreement were not negotiated, or even negotiable, because the Ministry believes that it simply accepted terms proposed by JMHS.

[12] Much the same approach has been taken to supply in similar business information disclosure exceptions in Ontario's provincial and municipal access to information and privacy statutes.[8] For example, in a recent decision about contract price information for public sector health care services obtained during the 2003 SARS crisis, Adjudicator Bernard Morrow said this:

> 101. In my view, the Main Agreement, with the exception of the section marked "Company's Background", sets out the agreed upon contractual terms that govern the relationship between the Ministry and the affected party in regard to the implementation of the affected party's proposal, including the scope of service provision and fee structure. In my view, none of this information qualifies as the affected party's proprietary information or informational assets. Accordingly, I find that it was not supplied within the meaning of part 2 of the test under section 17(1).
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> 102. Appendix A of the Main Agreement contains the affected party's pricing information, specifically the chargeable rates for listed service providers. In my view, the information contained in Appendix A sets out agreed contractual terms that govern the relationship between the Ministry and the affected party with regard to the implementation of the affected party's proposal. It is clear that this document establishes clear contractual expectations regarding costing and funding and that these figures comprise agreement upon terms of the Main Agreement. This conclusion is consistent with this office's recent approach to pricing information [see Orders MO-1706 and PO-2435]. In Order PO-2435, Assistant Commissioner Brian Beamish addressed the status of "per diem information" that was found in the appendices of service level agreements between the Ministry and a consultant relating to the province's e-Physician project, including the Smart Systems for Health Agency (SSHA). In finding that this information did not meet the supplied test, Assistant Commissioner Beamish stated that "the per diem does not represent a fixed underlying cost, but rather, it is the amount being charged by the contracting party for providing a particular individual's services."
>
> 103. Applying this reasoning to the information in Appendix A, I find that the information contained in this document does not represent a fixed underlying cost, but rather the amount being charged by the affected party to the Ministry on an hourly basis for services delivered by various

[8] See, for example, Order MO-1706, [2003] O.I.P.C. No. 238; Order PO-2435, [2005] O.I.P.C. No. 207. For a recent analysis in the Ontario courts, see *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.).

> providers. The fact that the Ministry may label this information as proprietary information or unit pricing information is irrelevant. If the rates submitted by the affected party had been found to be too high, or otherwise unacceptable, the Ministry had the option of rejecting the proposal and not entering into a contract with the affected party. The acceptance or rejection of an affected party's rates is a form of negotiation and, in this case, the Ministry accepted the affected party's rates and a contract was concluded that included those rates. This information constitutes key terms of that contract that does not fall into the "inferred disclosure" or "immutablility" exceptions. Accordingly, I find that the information contained in Appendix A was not "supplied' in accordance with part 2 of the test under section 17(1).[9]

[13] Turning to the situation at hand, Retirement Concepts argues that the original and revised contract pricing information constitutes its confidential proprietary information:

> The model that Retirement Concepts uses is a unique and proprietary model. It has developed this model over its 15 years of experience delivering residential care and seven years experience delivering assisted living. The product that it delivers, the pricing structure, the design of the facility, and the operational delivery models are all unique and distinctive in a number of ways.[10]

[14] According to Retirement Concepts, it provided a confidential expression of interest to the IHA that set out a figure for revenue as a projected statement of income and cash flow for the 65 residential care beds at this facility in Williams Lake. That figure, less the per-day net user fee contributed by residents, is the base-funding amount in the contract, which Retirement Concepts says the IHA accepted without change or negotiation. According to Retirement Concepts, disclosure of the base-funding amount would enable calculation of its "per bed per day" cost, which is "highly confidential and proprietary, based on Retirement Concepts' years of service to this industry in development of a unique and rational model for the efficient and cost-effective delivery of services".[11]

[15] This case falls squarely within the many orders that have found that the contract price for services to a public body is not "supplied" information within the meaning of s. 21(1)(b). The fact that the IHA may have accepted a contract price that Retirement Concepts generated through application of its business model does not make the amount that the parties agreed upon information that is proprietary to Retirement Concepts. Nor does it mean that the price bargain struck between the IHA and Retirement Concepts constitutes immutable or underlying confidential information supplied by Retirement Concepts.

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[9] Order PO-2467, [2006] O.I.P.C. No. 65. Adjudicator Morrow reached the same conclusion regarding similar pricing information in an addendum to the contract.
[10] Initial submission, para. 34.
[11] Initial submission, para. 42.

[16] I find that the contract information in dispute was not "supplied" within the meaning of s. 21(1)(b). In light of this finding, the disclosure exception in s. 21(1) cannot apply, but, for completeness, I will also analyze the "in confidence" element in s. 21(1)(b) and the harm that Retirement Concepts claims for s. 21(1)(c) purposes.

[17] With respect to the requirement of supply "in confidence", there is no provision in the contract, or the contract amendment, for the contract itself to be kept confidential and there is no evidence from the IHA of an intention or commitment to hold the contract confidential. Retirement Concepts' evidence on this issue consists of the following statements in the affidavit of its chief operating officer:

> 16. On or about July 25, 2002, Retirement Concepts submitted an expression of interest for the development of the Williams Lake Seniors' Village.
>
> 17. At all material times, Retirement Concepts understood the expression of interest was a confidential process. The process was carried out on a confidential (sealed bid) basis.
>
> 18. The Operating Agreement is also a confidential document. At all material times, Retirement Concepts understood that it would be treated in confidence by the public body and not disclosed publicly outside of the public body.[12]

[18] I find that the "in confidence" aspect of s. 21(1)(b) is not established here. The fact that the expression of interest process may have been conducted in confidence does not mean that the concluded contract is confidential. Retirement Concepts' evidence of its understanding that the contract would be kept confidential does not address a mutual understanding between it and the IHA and is, in any event, too vague to establish an implicit or explicit condition of confidence. I have reached the same conclusion in previous orders.[13]

***Harm from disclosure***

[19] Retirement Concepts again stresses that the base-funding amount in the contract is a product of its proprietary business model and says it would suffer unfair harm in the form of competitors being able to use knowledge of that amount in bids against Retirement Concepts for public sector and private sector projects. Retirement Concepts also says that, if the disclosure of this contract information subjected it to unfair competition in the public sector, it might choose

[12] Affidavit of Azim Jamal, paras. 16-18.
[13] See Order 04-06, paras. 51-53, and Order 03-15, paras. 68-77.

to no longer bid for public sector projects and instead concentrate on only the private sector market.

[20] When interpreting and applying s. 21(1), the stated purposes of FIPPA to make public bodies more accountable—by giving the public a right of access to records that is subject to specified limited exceptions—have to be kept in sight.[14] The overarching principle is that contracts with public bodies should be available to the public, subject only to specified and limited disclosure exceptions in the circumstances of each case. Mere heightening of competition for future contracts is not significant harm or significant interference with competitive or negotiating positions. Simply putting contractors and potential contractors in a position of having to price their services competitively is not a circumstance of unfairness or undue financial loss or gain.

[21] Since the contract price was not "supplied", the risk of Retirement Concepts choosing not to supply similar information does not arise. Further, Retirement Concepts has submitted that because of its reputation and leadership in its field, it is subject to copying by competitors. This suggests that, if Retirement Concepts chooses to withdraw from the public sector if access is given to this information, others will continue to provide similar information in its place. Considering the intent of FIPPA, the wording of s. 21(c), previous orders and court decisions[15] and, above all, the facts and evidence here, I find that a reasonable expectation of harm from disclosure of the disputed contract price information has not been established under s. 21(1)(c).

## 4.0 CONCLUSION

[22] I find that s. 21(1) does not require the IHA to refuse to disclose the disputed contract information. Under s. 58 of FIPPA, I require the IHA to give the applicant access to that information.

November 9, 2006

**ORIGINAL SIGNED BY**

David Loukidelis
Information and Privacy Commissioner
for British Columbia

OIPC File No. F05-25259

[14] See s. 2(1) of FIPPA.
[15] See Order 04-06, paras. 54-62; Order F05-05, paras. 85-104; Order 03-04, [2003] B.C.I.P.C.D. No. 4, para. 39; Order 03-03, paras. 36-44.