



OFFICE OF THE  
INFORMATION & PRIVACY  
COMMISSIONER  
— for —  
*British Columbia*

Order F11-08

**VANCOUVER ISLAND HEALTH AUTHORITY**

Jay Fedorak, Adjudicator

March 9, 2011

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**Summary:** The HEU requested access to documents related to quality assurance in the provision of dietary and housekeeping services between the public body and Compass Canada. Compass asked for a review of the public body's decision to give access to the records. The information was found to be commercial and financial information of Compass, but Compass failed to demonstrate that it had supplied the information "in confidence". Moreover, the third part of the three-part test of s. 21(1) of FIPPA, relating to significant harm to business interests, was not met. The public body was ordered to disclose the records.

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

**Authorities Considered: B.C.:** 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 F10-37, [2010] B.C.I.P.C.D. No. 55; Decision F07-03, [2007] B.C.I.P.C.D. No. 14; Decision F08-02, [2008] B.C.I.P.C.D. No. 4; Order F05-05, [2005] B.C.I.P.C.D. No. 6; Order F07-07, [2007] B.C.I.P.C.D. No. 9; Order F10-26, [2010] B.C.I.P.C.D. No. 38; Order F10-28, [2010] B.C.I.P.C.D. No. 40; Order 03-05, [2003] B.C.I.P.C.D. No. 5; Order 01-39, [2001] B.C.I.P.C.D. No. 40; Order 04-06, [2004] B.C.I.P.C.D. No. 6; Order F11-05, [2011] B.C.I.P.C.D. No. 5; Order 00-39, [2000] B.C.I.P.C.D. No. 42; Order No. 67-1995, [1995] B.C.I.P.C.D. No. 40; Order 00-10, [2000] B.C.I.P.C.D. No. 11; Order F08-22, [2008] B.C.I.P.C.D. No. 28.

## 1.0 INTRODUCTION

[1] This order arises from two requests by an applicant, the Hospital Employees' Union ("HEU"), for copies of quality assurance reports and related documents created pursuant to the contract for the provision of dietary and housekeeping services between the Vancouver Island Health Authority ("VIHA") and Compass Canada ("Compass").

[2] VIHA provided Compass with notice as a third party, under s. 23 of FIPPA, that it had received the requests and invited Compass to comment on the application of s. 21(1) of FIPPA to the responsive records. Compass responded providing reasons why it believed that s. 21(1) applied. VIHA reviewed this information but decided that s. 21(1) of FIPPA did not apply. It gave notice to Compass, under s. 24 of FIPPA, that it intended to disclose all of the requested records. Compass requested a review of VIHA's decision to disclose the information.

[3] Mediation did not resolve the matter, and the OIPC held a written inquiry under Part 5 of FIPPA regarding Compass's request for review of the decision not to apply s. 21 to the records. The OIPC issued the notice to VIHA, Compass and the HEU.

## 2.0 ISSUE

[4] The issue before me is whether VIHA is required to refuse access to the records under s. 21(1) of FIPPA. Under s. 57(3)(b) of FIPPA, it is up to Compass to prove that the HEU has no right of access to the records.

## 3.0 DISCUSSION

[5] **3.1 Records in Dispute**—The records consist largely of reports on the compliance of Compass with the quality assurance provisions of the contracts, which require Compass to meet certain standards of service and to provide VIHA with regular reports on its actual compliance. In addition, there are records created by Joint Site Operating Committees ("Committees") that the contract requires be established to resolve issues relating to compliance with quality assurance targets. These Committees consist of staff of Compass and VIHA. At each meeting, Compass was required to provide a report including a progress review, systems review, future planning, organizational review and quality indicators.<sup>1</sup> The records also include emails between Compass staff on issues of quality assurance.

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<sup>1</sup> HEU initial submission, Exhibit B Environmental Support Services Agreement Between Vancouver Island Health Authority and Compass Group Canada (Health Services) Ltd. and Compass Group USA Investments LLP, Article 4.10.

[6] Compass has not indicated directly any specific passages that it believes should be withheld under s. 21(1) of FIPPA. It did indicate in its response to the s. 23 notice from VIHA that it took the position “that the Documents in their entirety *not be* disclosed to the applicant.”<sup>2</sup>

[7] The HEU has not received any records, as Compass’s objections concerned the records in their entirety.

[8] **3.2 Preliminary Issue**—In its initial submission, the HEU tried to raise a new issue: the application of s. 25 of FIPPA. It argued that disclosure of the information was in the public interest in accordance with s. 25.<sup>3</sup> This was the first time the HEU raised this issue.

[9] Past orders and decisions of the OIPC have said parties may raise new issues at the inquiry stage, only if permitted to do so.<sup>4</sup> The HEU had an opportunity during mediation in which to raise s. 25 of FIPPA. It did not explain why it did not raise the issue prior to its initial submission or why it should be permitted to raise s. 25 at this late stage. I have decided, therefore, not to permit the union to raise s. 25 in this inquiry.

[10] **3.3 Harm to Third-Party Business Interests**—Section 21(1) of FIPPA requires public bodies to withhold information the disclosure of which would harm the business interests of a third party. It sets out a three-part test for determining whether disclosure is prohibited, all three elements of which must be established before the exception to disclosure applies. These are the relevant FIPPA provisions:

**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,

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<sup>2</sup> Compass to VIHA, December 9, 2009; italics are Compass’s.

<sup>3</sup> HEU initial submission, paras. 31-34.

<sup>4</sup> See for example Order F10-37, [2010] B.C.I.P.C.D. No. 55; Decision F07-03, [2007] B.C.I.P.C.D. No. 14, and Decision F08-02, [2008] B.C.I.P.C.D. No. 4.

[11] Numerous orders have considered the application of s. 21(1) and the principles for its application are well established.<sup>5</sup> Commissioner Loukidelis conducted a comprehensive review of the body of case decisions in several jurisdictions in Order 03-02.<sup>6</sup>

[12] The first part of the test requires the information to be a trade secret of a third party or the commercial, financial, labour relations, scientific or technical information of or about a third party. The second part of the test requires the information to have been supplied to the public body in confidence. The third part of the test requires that disclosure of the information could reasonably be expected to cause significant harm to the third party's competitive position or other types of harm as set out in s. 21(1)(c).

### ***Commercial or financial information***

[13] Compass submits that the information at issue in the records is its commercial and financial information, because its disclosure would reveal information about Compass's operations and business methods, including labour and costing strategies and structure, use of software, metrics, auditing techniques and capital investment analysis.<sup>7</sup>

[14] Compass also asserts that some of this information constitutes trade secrets.<sup>8</sup> Compass does not explain, however, how the information in the records would reveal this type of information and this is not clear on the face of the records.

[15] The HEU denies that the information constitutes trade secrets or is otherwise the commercial or financial information of Compass. It characterizes the information as demonstrating whether Compass is meeting the quality assurance standards set out in the contract. It submits that "this type of information, by its very nature, is the opposite of proprietary commercial or financial information belonging to Compass."<sup>9</sup>

[16] VIHA did not address this issue in its submission.

[17] The records are about the services that Compass employees provide to VIHA and the extent to which they are meeting their contractual obligations. This constitutes commercial information of Compass as previous orders have interpreted these terms. For example, Order F05-05<sup>10</sup> found that commercial information included terms and conditions for providing services and products by

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<sup>5</sup> See for example, Order 03-02, [2003] B.C.I.P.C.D. No. 2 and Order 03-15, [2003] B.C.I.P.C.D. No. 15.

<sup>6</sup> At paras. 28-117.

<sup>7</sup> Third party's initial submission, paras. 8-10.

<sup>8</sup> Third party's initial submission, para. 8.

<sup>9</sup> Third party's initial submission, paras. 10 and 12.

<sup>10</sup> [2005] B.C.I.P.C.D. No. 6.

a third party. Order F07-07<sup>11</sup> found that information relating to the buying or selling of goods or services qualified as commercial information for the purpose of s. 17(1)(b). I found that the terms relating to the provision of services in the contract for cleaning services were the commercial and financial information of Compass in Order F10-26, and with respect to similar contracts with other third parties in Order F10-27 and Order F10-28.<sup>12</sup> I find that the information at issue is the commercial information of Compass. Therefore, it is not necessary for me to determine whether the information also consists of trade secrets or technical or scientific information. The information passes the first part of the test.

### ***Supplied in confidence***

[18] I will separate the concept of “supplied in confidence” into two parts. The first will be to determine whether the records were “supplied” to VIHA. The second will be to determine whether any records that were “supplied” were also done so “in confidence”.

[19] Compass submits that it provided the requested records to VIHA and that, in so doing, it “supplied” them in a manner consistent with the findings of previous orders. It argues that the information at issue is immutable. The quality assurance reports are not subject to change, it says, as they are actual assessments of service quality that another party undertook on behalf of Compass. The information in the other records is equally immutable, according to Compass, as it is based on events that occurred.<sup>13</sup>

[20] HEU submits that the information about whether Compass is meeting the quality assurance standards required by the contract is not the type of information that can be considered to have been “supplied” in accordance with s. 21(1)(b), though it does not elaborate on why it considers this to be the case.<sup>14</sup>

[21] VIHA’s submission did not address this issue.

[22] I note that one of the original requests was for “Quality Assurance Reports provided by Compass”. It is clear by the very nature of this request that it was for documents Compass supplied to VIHA, at least in the general sense of being physically transferred by Compass to VIHA. Compass had the records produced and gave them to VIHA. The other records responsive to the request appear to have been created and provided to VIHA by Compass staff. I agree with Compass that these records were not subject to amendment or change by VIHA. I am therefore satisfied that Compass “supplied” all of these records within the meaning of s. 21(1)(b). This is consistent with the finding of Commissioner Loukidelis in Order 03-05, in which he found that the third party had supplied to the City of Vancouver a letter and memorandum that it had prepared.<sup>15</sup>

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<sup>11</sup> [2007] B.C.I.P.C.D. No. 9.

<sup>12</sup> [2010] B.C.I.P.C.D. 38; [2010] B.C.I.P.C.D. 39; and [2010] B.C.I.P.C.D. No. 40.

<sup>13</sup> Third party’s reply submission, paras. 9-10.

<sup>14</sup> HEU’s reply submission, para. 12.

<sup>15</sup> [2003] B.C.I.P.C.D. No. 5, para. 12.

[23] I will now deal with whether Compass supplied the information “in confidence”.

[24] Numerous orders have dealt with the issue of whether information was supplied “explicitly or implicitly, in confidence”. In Order 01-39,<sup>16</sup> for example, the Commissioner’s delegate, Nitya Iyer, held the following:

[27] **3.3.2.1 “in confidence”** - Information is supplied, explicitly or implicitly, in confidence within the meaning of s. 21(1)(b) of the *Act* if, in all of the circumstances, it can be objectively regarded as having been provided in confidence with the intention that it be kept confidential. In federal jurisdiction, the meaning of confidentiality is well-established:

[W]hether information is confidential will depend upon its content, its purposes and the circumstances in which it is compiled and communicated, ...

[28] The test is objective and the question is one of fact; evidence of the third party’s subjective intentions with respect to confidentiality is not sufficient: *Re Maislin Industries Ltd. and Minister for Industry* (1984) 10 DLR (4<sup>th</sup>) 417 (FCTD); see also *Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs)* (1997) 148 DLR (4<sup>th</sup>) 356 (FCTD).

[25] In Order 04-06,<sup>17</sup> Commissioner Loukidelis found that assertions by a third party alone, without corroboration from a public body, were insufficient to establish that the information was provided “in confidence”. He held:

The ITQ says nothing about confidentiality. Each contract requires the contractor to keep confidential all material it receives or produces as a result of the contract, but there is no confidentiality obligation on the Ministry and no provision for confidentiality of information in the contract itself. Representatives of the successful proponents have provided affidavit evidence as to their expectations of confidentiality. However, the affidavits of the Ministry personnel are silent on any expectation of confidentiality.

I conclude that the “in confidence” element in s. 21(1)(b) is not met. Neither the ITQ nor the contracts evidence an intention for the contracts to be confidential. Ministry personnel have furnished no evidence on the issue. Representatives of the successful proponents have deposed that, based on what they describe as industry practice, their proposals were implicitly provided in confidence. Even putting this evidence at its highest, it goes to the proposals, not contracts, and it does not address any mutuality of understanding between the Ministry and the contractors (which is also not supported by the silence of the ITQ and the contracts on the confidentiality question).

<sup>16</sup> [2001] B.C.I.P.C.D. No. 40.

<sup>17</sup> [2004] B.C.I.P.C.D. No. 6, paras. 51-53. ITQ is an abbreviation for Invitation to Quote.

[26] Compass asserts that it supplied the records to VIHA either explicitly or implicitly in confidence.

[27] VIHA's submission was silent on this issue. However, it is clear from the correspondence of VIHA that it did not consider the records to have been supplied in confidence. When VIHA notified Compass under s. 24 that it had decided to release the records, VIHA observed:

A convincing argument has not been made that supports that the records contents were supplied to the Health Authority, either explicitly or implicitly in confidence.<sup>18</sup>

[28] With respect to the question as to whether Compass provided the information "explicitly" in confidence, Compass does not provide arguments or otherwise demonstrate that there were any explicit indicators of confidentiality.

[29] I have reviewed the records at issue and the relevant provisions of the contract, which the HEU submitted as an exhibit to its initial submission, in order to determine whether there were any explicit indicators of confidentiality. I can confirm that there are no explicit indicators of confidentiality in any of these items with respect to the records at issue. Therefore, I find that Compass did not provide the information "explicitly" in confidence.

[30] Compass's submission provides more detailed argument and evidence with respect to its claim that the records were supplied "implicitly" in confidence.<sup>19</sup> Corporate counsel for Compass provided an affidavit that attested to the following:

In the preparation and release of the Requested Documents to the Public Body, the Third Party reasonably believed they were submitting the Requested Documents to the Public Body in confidence, and that the Public Body would not disclose same without the consent of the Third Party.<sup>20</sup>

[31] The situation in this case is similar to that in Order 04-06, in that the only evidence that Compass supplied the information "implicitly" in confidence in this case is the above-quoted assertion of confidentiality on the part of Compass in the affidavit testimony. There is no further evidence that it was supplied "in confidence".

[32] VIHA's s. 24 letter to Compass indicates that there was no "mutuality of understanding" with respect to the confidentiality of the information, which Commissioner Loukidelis has identified as being necessary to establish the application of s. 21(1)(b). In Order F11-05,<sup>21</sup> where confidentiality was also at issue, Senior Adjudicator Francis noted that VIHA did not provide any policies or

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<sup>18</sup> VIHA to Compass, December 18, 2009.

<sup>19</sup> Third party's initial submission, paras. 12-15.

<sup>20</sup> Third party's initial submission, Affidavit of corporate counsel, para. 7.

<sup>21</sup> [2011] B.C.I.P.C.D. No. 5, para. 42.

procedures or anything else to support its argument that it had received the information in dispute in confidence. In this case, neither Compass nor VIHA provided any policies or procedures or any other objective evidence. In the end, Compass has only its own assertion to rely on. This is not a sufficient basis on which to conclude that the information was supplied “implicitly in confidence” as past orders have interpreted this term. Therefore, I find that Compass did not supply the information “implicitly” in confidence.

[33] In summary, Compass has failed to meet the second part of the s. 21 test because it has not shown that the information in dispute was supplied, explicitly or implicitly, “in confidence”. I find that s. 21(1)(b) of FIPPA does not apply to the records. This finding is consistent with that of Commissioner Loukidelis in Order 00-39<sup>22</sup> and Commissioner Flaherty in Order No. 67-1995,<sup>23</sup> which dealt with similar issues.

### ***Harm to third party interests***

[34] As none of the information at issue meets the “supplied in confidence” test in s. 21(1)(b), it is technically not necessary for me to deal with the harms part of the analysis under s. 21(1)(c). Nevertheless, for completeness, I will consider the submissions made on this issue.

[35] Compass submits that disclosure of the information would harm its ability to obtain extensions of the existing contracts because it would enable competitors to understand “the basic strategic and costing thrust of the service operation” which would allow competitors to “copy and/or undercut [Compass].”<sup>24</sup> Compass also submits that disclosure of information relating to labour relations would interfere with its labour relations.<sup>25</sup> It does not specify which provisions of s. 21(1)(c) apply with respect to these two different arguments. Based on its submission, however, I understand it to be relying on s. 21(1)(c)(i), which refers to harm to the competitive or negotiating position of the third party, for both arguments. I have come to this conclusion because none of the provisions in s. 21(1)(c) appear to be applicable with respect to those arguments

[36] The HEU submits that Compass’s “assertions of harms are vague and speculative, without reference to any, much less cogent, evidence that any harm to its competitive position will result.”<sup>26</sup> It states further:

With respect to paragraph 21(1)(c)(i), Compass Group has provided no evidence that the disclosure of the requested records could reasonably be expected to significantly harm its competitive position or interfere significantly with its negotiating position. Compass Group relies on impacts such as re-bids, costing to the service operation, specialized techniques,

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<sup>22</sup> [2000] B.C.I.P.C.D. No. 42.

<sup>23</sup> [1995] B.C.I.P.C.D. No. 40.

<sup>24</sup> Third party’s initial submission, para. 16.

<sup>25</sup> Third party’s initial submission, para. 17.

<sup>26</sup> HEU’s initial submission, para. 30.

and processes and methods to provide its service operations, labour relations, and alleged confidential information from third parties used to conduct and complete internal quality assurance audits and reports. Yet no evidence is provided, and no attempt is made to link the harms claimed in any causal way to the release of quality assurance reports. The HEU respectfully submits that this is the case because no such causal link exists between them.<sup>27</sup>

[37] HEU also argues that any cost pressures arising from dealing with a unionized workforce that arises from information in the requested records are not harm as contemplated by s. 21(1)(c) of FIPPA.<sup>28</sup>

[38] VIHA's submission did not address this issue.

[39] Commissioner Loukidelis set out the standard of proof under the reasonable expectation of harm test in Order 00-10,<sup>29</sup> where he said the following:

Section 21(1)(c) requires a public body to establish that disclosure of the requested information could reasonably be expected to cause "significant harm" to the "competitive position" of a third party or that disclosure could reasonably be expected to cause one of the other harms identified in that section. There is no need to prove that harm of some kind will, with certainty, flow from disclosure; nor is it enough to rely upon speculation. Returning always to the standard set by the Act, the expectation of harm as a result of disclosure must be based on reason. ... Evidence of speculative harm will not meet the test, but it is not necessary to establish certainty of harm. The quality and cogency of the evidence must be commensurate with a reasonable person's expectation that the disclosure of the requested information could cause the harm specified in the exception. The probability of the harm occurring is relevant to assessing the risk of harm, but mathematical likelihood will not necessarily be decisive where other contextual factors are at work.

[40] Compass's evidence consists of brief general assertions without illustrative examples or any external corroboration of those assertions. Compass has not, for example, explained how disclosure of the information at issue would undermine its ability to obtain extensions of its current contracts, and it has not given any indication about what future bidding processes it is likely to be engaged in. Nor has it explained how disclosure would allow its competitors to "undercut" it for the purpose of winning future contracts. Compass's argument centres on the harm in the context of bidding processes. However, the information at issue is not information from Compass's original bid: it is factual information created after the contract was implemented. I see no evidence that

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<sup>27</sup> HEU's reply submission, para. 13.

<sup>28</sup> HEU's initial submission, para. 30.

<sup>29</sup> [2000] B.C.I.P.C.D. No. 11, p. 10.

the disclosure of the information at issue would enable someone to infer details of its original bid and Compass has not shown how anyone could infer this information. Compass has also not established that there is a reasonable connection between the information at issue and any anticipated bidding process. In Order 03-15,<sup>30</sup> Commissioner Loukidelis found that s. 21(1)(c)(i) applied to a breakdown of costing information in a contract, on the grounds that a competitor could use this kind of information to advantage in a future bidding process. This case does not involve information about costs in the contract. It concerns satisfaction levels with respect to quality of service.

[41] Compass's argument that disclosure of the information would have an impact on its ability to conduct labour relations is similar to the argument that Commissioner Loukidelis dismissed in Order F08-22,<sup>31</sup> where he found that "putting contractors in a position where they have to deal with cost pressures from their unionized work force does not constitute harm under s. 21(1)(c)(i)".<sup>32</sup> I dismiss Compass's arguments in this case for the same reasons.

[42] I have also reviewed all of the records responsive to the request. I cannot see, on their face, how disclosure could reasonably be expected to result in the harms that Compass outlined. The records consist largely of periodic reports on the quality of service that the contract required Compass to provide to VIHA. The remaining records include narrative reports from the Joint Site Operations Committee and correspondence between Compass and VIHA. It is not clear how a competitor or the HEU could use this information to cause harm in accordance with s. 21(1)(c)(i).

[43] I agree with the HEU that Compass's evidence does not meet the standard for establishing a reasonable expectation of harm that Commissioner Loukidelis set out. Therefore, I find that s. 21(1)(c)(i) does not apply to the requested information.

### **Summary**

[44] I found that the information at issue was the commercial information of Compass in accordance with s. 21(1)(a)(i). I found that Compass had "supplied" the information to VIHA, but that it failed to establish that it had supplied the information "in confidence" and that s. 21(1)(b) did not apply. I also found that Compass had failed to establish that disclosure would result in a reasonable expectation of harm in accordance with s. 21(1)(c)(i). As a result, Compass has failed to meet its burden of proof on the application of s. 21(1). Therefore, I find that s. 21(1) of FIPPA does not apply to any of the requested records and VIHA must disclose them.

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<sup>30</sup> [2003] B.C.I.P.C.D. No. 15.

<sup>31</sup> [2008] B.C.I.P.C.D. No. 28.

<sup>32</sup> [2008] B.C.I.P.C.D. No. 28, para. 37

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#### **4.0 CONCLUSION**

[45] For the reasons given above, under s. 58 of FIPPA,

1. I find that s. 21(1) of FIPPA does not require the head of VIHA to refuse to give the HEU access to any of the requested information and I require the head of VIHA to give the applicant access to all of the requested information.
2. I require the head of VIHA to give the applicant access to the disputed information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before April 20, 2011 and, concurrently, to copy me on its cover letter to the applicant.

March 9, 2011

#### **ORIGINAL SIGNED BY**

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Jay Fedorak  
Adjudicator

OIPC File No. F10-40741 and F10-40742