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

Order F09-17

MINISTRY OF HEALTH SERVICES

Michael McEvoy, Adjudicator

October 28, 2009

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Summary: The Applicant sought records relating to the third party's business dealings with the Ministry, including contracts, research agreements and correspondence. The third party objected to their disclosure under s. 21 of FIPPA. The Ministry failed to prove that requested records were confidentially supplied or that their disclosure would harm the business interests of the third party.

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).

Authorities Considered: B.C.: Order 01-26, [2001] B.C.I.P.C.D. No. 37; Order F05-09, [2005] B.C.I.P.C.D. No. 10; Order 04-06, [2004] B.C.I.P.C.D. No. 6; Order F05-29, [2005] B.C.I.P.C.D. No. 39; Order F08-21, [2008] B.C.I.P.C.D. No. 39; Order 02-50, [2002] B.C.I.P.C.D. No. 51.

Cases Considered: *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773.

1.0 INTRODUCTION

[1] This case is about whether the Ministry of Health Services ("Ministry") must, under s. 21 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), refuse to disclose to an applicant certain records that are responsive to his request.

[2] The applicant sought access to records relating to the Ministry's dealings with a health care consulting company ("third party"), including contracts, research agreements and all correspondence between them dating from January 1, 1990 to the date of the request. The third party's business is

concerned with healthcare research and consulting services with a particular focus on the utilization of prescription drugs in Canada. When the Ministry was initially unable to locate any responsive records, the applicant stated that he knew of at least three sets of records: a Drug Identification Number ("DIN") sample list sent to another third party and others; a summary of the arrangements between the Ministry and the third party; and exchanges between the Ministry and the third party concerning an extension of their arrangement.

[3] The Ministry located and released a DIN sample list, a summary of arrangements between the Ministry and the third party and some correspondence and emails between it and the third party. The Ministry advised the applicant that disclosure of the remaining records could affect the business interests of a third party and that it was giving the third party an opportunity to make representations. Following those representations, the Ministry decided to sever some records under ss. 15(1)(l) and 17 of FIPPA, while withholding others under s. 21(1).

[4] The applicant requested a review of the Ministry's decision and complained about the adequacy of its search. Mediation resulted in the applicant being satisfied that an adequate search had been performed. While the parties also resolved the s. 15 and 17 issues, the Ministry continued to withhold certain records under s. 21(1). As a result, a written inquiry was held under Part 5 of FIPPA respecting the records still in issue under that section. This Office invited representations from the applicant, the Ministry and the third party.

2.0 ISSUE

[5] The issue in this inquiry is whether the public body is required to refuse access to the requested records under s. 21(1) of FIPPA.

[6] Section 57 of FIPPA establishes that the burden of proof in this inquiry is on the Ministry.

3.0 DISCUSSION

[7] **3.1 Records in Dispute**—The Portfolio Officer's Fact Report indicates that the records in dispute are pp. 14-18, 64-65, 75-91 and 103-108. The reference to pp. "103-108" appears to be a numbering error because they are the same as the pages numbered 102 to 107 before me. As such, I will refer to these requested records as pp. 102-107.

[8] The third party, in its initial submission, consented to the disclosure of pp. 75-91 with the exception of the name of another business referred to at pp. 75 and 80. I took the third party's consent to the disclosure of these pages to be unconditional, *i.e.,* not dependent upon whether the other business name was withheld. The applicant said he reserved the right to make further submissions

on the withheld portions of pp. 75 and 80. My order will reflect the requirement that the Ministry disclose the records the third party has consented to release. I also find that the disclosure of the other business name is an unresolved matter that I must dispose of in this inquiry.

[9] The remaining records in dispute under s. 21 are pp. 14-18, 64-65, 102-107 and references to the business at pp. 75 and 80. I will describe these records in more detail below.

[10] **3.2 Background—**As noted above, the third party is in the business of providing research and marketing consulting services relating to the healthcare sector. It focuses on the use of prescription drugs in Canada and its work involves extensive analysis of health data. In the early 1990s, the Ministry began providing the third party with aggregated DIN data that was not personal information. The DIN data included information about the number of prescriptions or pills dispensed over a specified period or the number of people in the province who received a particular drug, together with data about total claims made, total costs and information related to drug reimbursement payments.

[11] Over the course of several years, the third party made a series of proposals to the Ministry, all of which the Ministry rejected. In 1998, the third party first proposed that, in addition to aggregate data it was already receiving, it also be given individual-level drug claim data with the identifiers scrambled and encrypted so as to prevent individual identification. In return, the third party offered to provide research and analysis services to the Ministry for the purpose of financial forecasting and trend monitoring. This proposal included a sample of the type of report that it could provide. This sample report comprises pp. 102-107 of the disputed records.

[12] The third party provided another example of its work to the Ministry in 2000. This was a proposal it had made earlier to another business. The proposal is at pp. 75-91. There are two references to the other business in it, at pp. 75 and 80, which the third party seeks to withhold.

[13] In 2001, the third party made a similar proposal to the one made in 1998. In the course of discussions about this proposal, the third party provided certain information related to its data requirements. The third party now asserts that some, but not all of that information, should be withheld from disclosure. The information it seeks to withhold is contained in pp. 64-65 of the records in dispute.

[14] Discussions between the Ministry and the third party continued into 2002, in the course of which the third party submitted yet another proposal, five pages of which (pp. 14-18) it now says should not be disclosed.

[15] As noted, the Ministry did not accept these proposals nor did it finalize a data-sharing agreement or provide individual-level data to the third party.

[16] **3.3 Third-Party Business Interests**—Section 21 of FIPPA sets out a three-part test that must be satisfied before a public body is required to refuse to disclose information in response to an access request. In this case, the relevant parts of s. 21 are as follows:

> 21(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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> …
>
> (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
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> (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

Type of information

[17] The Ministry submits that the records in dispute contain commercial information. Many previous orders have considered the meaning of "commercial information".[1] Among other things, those orders have found the term to relate to commerce or the buying and selling of goods and services:

- Offers of products and services a third-party business proposes to supply or perform;
- A third-party business's experiences in commercial activities where this information has commercial value;
- Terms and conditions for providing services and products by a third party;
- Lists of customers, suppliers or sub-contractors compiled by a third-party business for its use in its commercial activities or enterprises; such lists may take time and effort to compile, if not skill;

[1] See for example Order F05-09, [2005] B.C.I.P.C.D. No. 10 and Order 01-36, [2001] B.C.I.P.C.D. No. 37.

- Methods a third-party business proposes to use to supply goods and services; or

- Number of hours a third-party business proposes to take to complete contracted work or tasks.[2]

[18] Previous orders have found that "commercial information" need not be proprietary in nature or have an independent market or monetary value.[3]

[19] As I noted above, the information in pp. 14-18 details the 2002 proposal the third party submitted for the provision of research reports in exchange for access to anonymized health care data. The information in pp. 64-65 is a detailed list of data required for each field in order to conduct a particular type of study and produce a particular type of report. The information on pp. 102-107 is both a description of the methodology and type of analysis that the third party could do, together with a discussion of their costs.

[20] The information in question is "commercial information" because it includes offers of services made by a third party, details of its business experience and methods, a proposal and the cost of providing the service. For this reason, it is not necessary for me to determine whether the information also constitutes a trade secret under s. 21(1)(a)(i) of FIPPA, as the third party argues.

[21] With respect to the business name at pp. 75 and 80, it is not evident that the name of a business alone constitutes commercial information under FIPPA. Previous orders have determined that lists of company names, involving time and effort to compile, may in some cases, be considered commercial information.[4] However, it is not necessary for me to determine this matter here in view of my findings under the second and third parts of the s. 21(1) test below.

Supply in confidence

[22] The Commissioner stated in Order 01-36[5] what is necessary to establish that information is supplied either explicitly or implicitly in confidence. I have applied those principles here without elaboration.

[23] In this case, there is no express promise of, or agreement to, confidentiality and therefore the issue is whether the information was implicitly supplied in confidence. Therefore, I will consider the relevant circumstances to determine whether there was a reasonable expectation of confidentiality.

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[2] Order F05-09, [2005] B.C.I.P.C.D. No. 10.
[3] Order 01-36, [2001] B.C.I.P.C.D. No. 37.
[4] Order 01-36, [2001] B.C.I.P.C.D. No. 37.
[5] [2001] B.C.I.P.C.D. No. 37.

[24] The third party submits that it confidentially supplied the information in pp. 14-18 because of statements contained in the email to which the pages were attached.[6] The third party's director of operations emailed that information to the Ministry, together with three other documents.[7] However, there is nothing in the email that unequivocally states the attached documents were supplied in confidence; rather, the email simply contains, below the signature line, this automatic "boilerplate" statement at the bottom, in both French and English:

> This message (including any attachments) is for the sole use of the intended recipients and may contain information that is confidential, proprietary and subject to copyright. Any unauthorized review, use or dissemination of this communication is strictly prohibited. If you have received this communication in error, please notify the sender and delete this message.

[25] I note that this statement appears on other emails the third party sent, regardless of whether the information in the email is purportedly confidential. Indeed, the statement is a conditional one at best, asserting that the message and "any" attachments "may contain" confidential information. This type of automatic statement on email is insufficient, without more, to establish in this case that the information so supplied attached is confidential or was supplied on the basis that it will be kept confidential.

[26] Information is not, by nature, confidential. In this case, there is no evidence that the third party requested at any point that the information on pp. 14-18 be treated confidentially (except after it was notified of the access request). There is also no evidence that the third party ever explicitly referred to the information as confidential or otherwise distinguished these pages from the others supplied in the same email. Nor is there any evidence that the Ministry understood that the records were supplied in confidence at the time of supply, or that it took any steps to protect the confidentiality of the information prior to the access request. The evidence indicates the Ministry did not solicit the information nor did it give undertakings as to its confidentiality. Indeed, the Ministry says only that it understood that the information was confidential when it processed the applicant's access request.[8] This after the fact declaration is insufficient to satisfy s. 21(1)(b) of FIPPA.

[27] This is not to say that unsolicited information cannot be supplied in confidence within the meaning of FIPPA. However, where, as here, allegedly confidential information is provided together with non-confidential information, the party supplying the information must take some clear step to identify the information which is confidential.

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[6] Third party's initial submission, para. 4(a).

[7] Page 3 of the Records contained in Exhibit "O" to the affidavit of Anita Foster. This page (without attachments) was disclosed to the Applicant.

[8] Ministry's initial submission, para. 4.23.

[28] Pages 64 and 65 are two pages within a nine-page document concerning the third party's "Data Field Requirements." There is no evidence that this information was supplied to the Ministry with the expectation of confidentiality. The document was attached to an email[9] sent by the third party's director of operations, with only the following explanation:

> [The third party] asked that I forward to you a copy of our data requirements documentation. If you have any questions concerning this please do not hesitate to contact me. I've also included, for your information, a copy of our Privacy and Confidentiality Policy.[10]

[29] For the reasons stated above in respect of pp. 14-18, this evidence is not sufficient to show that this information were supplied in confidence.

[30] The same rationale applies to pp. 102-107. In this instance, the third party argues these pages were supplied with "explicitly stated confidentiality"[11] but does not explain where the explicit statement of confidentiality is to be found in, or in association with, the records. The related fax cover sheet, p. 101, states:

> Privileged/confidential information may be contained in this facsimile and is intended only for the use of the addressee. If you are not the addressee, or the person responsible for delivering it to the person addressed, you may not copy or deliver this to anyone else. If you receive this facsimile in error, please notify us immediately by telephone. Thank you.

[31] The above discussion with respect to the boilerplate email statements applies here.

[32] I find that with respect to these and all of the records that the Ministry has not met its burden of proving that this information was supplied, explicitly of implicitly, in confidence within the meaning of s. 21(1)(b) of FIPPA.

[33] On pp. 75 and 80, another business is referred to, which the third party says is one of its suppliers of drug plan data. The third party submits the name of this supplier was supplied in confidence to the Ministry because the third party has a "confidentiality policy with each of its private drug plan data suppliers whereby their identification is kept confidential." However, the third party failed to provide evidence of how this "confidentiality policy" applied to this particular

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[9] Page 57 of Exhibit "O" to the Affidavit of Anita Foster. This page (without attachments) has been disclosed to the Applicant.

[10] The Privacy and Confidentiality Policy details how the third party ensures the confidentiality of personal information in its custody and control and appears to have been included to demonstrate to the Ministry that the third party could maintain the confidentiality of personal information disclosed to it by the Ministry; it does not apply to the business information disclosed by the third party to the Ministry.

[11] Third party's initial submission, para. 4(e).

business and it provides no other proof of confidential supply. In fact, the severed records provided by the Ministry clearly show that the information in question has, in fact, already been released. I therefore find that the business name was not provided in confidence under s. 21(1)(b).

[34] Because the requirement of s. 21(1)(b) is not met, none of the information is protected from disclosure. While it is technically not necessary for me to consider the third part of the s. 21 test, for the sake of completeness I will nevertheless do so.

Harm to third party

[35] The Ministry bears the burden of proving harm under the third part of the s. 21 test. Here, it has relied wholly on the third party's submissions.[12]

[36] The third party sets out the following view of what evidence is necessary to determine harm under s. 21.

> It is understood that it is common practice to provide evidence and possibly affidavits to strengthen the section 21 claims made in our responses, the purpose of which being to present facts pertaining to the harms that release of documents in question would cause. However, we fail to understand exactly how this would pertain to the document in question. This would be understandable in the case of contracts, detailed descriptions or relevant information. The documents being withheld are not items whereby factual evidence or affidavits can be provided. Potentially one could provide [the third party's] profit margins or operating expenses, but as a private company the risk of releasing any company property to a direct competitor should be obviously apparent and not need to rely on such figures.[13]

[37] The result is that no evidence has been proffered in this case with which to determine whether there is a reasonable expectation of harm.

[38] Establishing a reasonable expectation of harm requires more than speculation or generalization. I am not permitted to treat a reasonable expectation of harm as "obvious". What is required is a clear and direct connection between disclosure of the specific information and the harm that is alleged.[14] The evidence must be detailed and convincing enough to establish specific circumstances for the contemplated harm to be reasonably expected to result from disclosure of the information. A preference for keeping the disputed information in confidence will not justify non-disclosure.[15]

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[12] Ministry's initial submission, para. 4.30.
[13] Third party's initial submission, para. 3.
[14] See for example Order 04-06, [2004] B.C.I.P.C.D. No. 6, Order 05-29, [2005] B.C.I.P.C.D. No. 39 and Order F08-21 [2008] B.C.I.P.C.D. No. 39; see also *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773.
[15] See Order 02-50, [2002] B.C.I.P.C.D. No. 51 at para. 136-137.

[39] The reliance by the Ministry on the third party's submissions means that I must consider the submissions of the third party. With respect to pp. 14-18, the third party argues that disclosure would cause significant harm to its competitive position and result in undue gain to a competitor. However, it led no evidence of why or how such harm could happen. The third party does refer to allegedly investing numerous resources in developing "unique proposals such as the one contained in these pages"[16] but provided no evidence to show a connection between disclosure of this specific proposal and the harm alleged.

[40] With respect to pp. 64 and 65, the third party submits that it took years to develop the databases and gain the knowledge and reputation required to know which data sources would be beneficial for study purpose. It contends that release of this information would provide competitors with a laid-out plan of which exact data fields to request from the Ministry in order to achieve the study result without a similar investment in time or money.[17] It takes the position that disclosure would significantly prejudice its competitive position and future negotiations. Again, there is no evidence to show how the third party could be prejudiced. For example, there is no evidence about the third party's competitive marketplace that would allow me to judge whether its competitive position might be harmed.

[41] With respect to pp. 102-107, the third party says that release of its proposal would result in undue gain to its competitors. It contends this is because it would hand over to competitors a research proposal that it spent years to develop, enabling them to avoid having to make the same investments. The disclosure of the records, the third party submits, would give its competitors a head start on developing a similar proposal.[18] Again, there must be evidence of a clear and direct connection between disclosure and the alleged harm, not simply bald assertions.

[42] With respect to the business name at pp. 75 and 80, there is no evidence that release of the name would harm the business named or the third party. Moreover, as I noted above, the records already disclosed in this case point to a conclusion that the applicant already knows the name.

[43] Given the above findings, I conclude that the Ministry has not met its burden to establish that disclosure of the requested records could reasonably be expected to significantly harm the competitive position of the third party or interfere significantly with its negotiating position, or result in undue financial loss to the third party or undue financial gain to someone else.

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[16] Third party's initial submission, para. 4(a).
[17] Third party's initial submission, para. 4(b).
[18] The third party notes that its proposal has not yet been accepted.

4.0 CONCLUSION

[44] For the reasons set out above, I make the following orders:

1. The Ministry of Health Services is required to give the applicant access to the information it withheld under s. 21 of FIPPA; specifically the records with page numbers 14-18, 64-65, 75-91, including the name of the business at pp. 75 and 80 and 102-107.

2. The Ministry of Health Services shall make such disclosure within 30 days of the date of this order, as FIPPA defines day, that is, on or before December 10, 2009 and concurrently, shall copy me on its cover letter to the Applicant, enclosing a copy of the records.

October 28, 2009

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

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