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Order F13-30

VANCOUVER ISLAND HEALTH AUTHORITY

Ross Alexander, Adjudicator

December 19, 2013

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Summary: Retirement Concepts Senior Services requested a review of Vancouver Island Health Authority's decision to disclose certain financial statements to an applicant union. Retirement Concepts stated that disclosure of the records would harm its business interests under s. 21 of FIPPA. The adjudicator found that s. 21 did not apply because there was no harm within the meaning of s. 21(1)(c).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 21.

Authorities Considered: B.C.: Order F13-20, 2013 BCIPC No. 27; Order 01-26, [2001] B.C.I.P.C.D. No. 27; Order 01-39, [2001] B.C.I.P.C.D. No. 401; Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order F13-17, 2013 BCIPC No. 22.

INTRODUCTION

[1] This is a third party request for review by Retirement Concepts Senior Services Ltd. ("Retirement Concepts") of a decision by the Vancouver Island Health Authority ("VIHA") to disclose audited financial statements that relate to a care home facility known as "Qualicum Gardens". The applicant is the Health Employees Union ("Union").

[2] Retirement Concepts is a third party contractor currently operating Qualicum Gardens. However, it was not operating Qualicum Gardens during the time period that relates to the financial statements at issue in this inquiry.

[3] Retirement Concepts opposes disclosure of the records on the basis that disclosure will be harmful to its business interests within the meaning of s. 21 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

ISSUE

[4] The issue is whether VIHA is required to refuse to disclose the records because disclosure would be harmful to business interests within the meaning of s. 21 of FIPPA.

[5] Retirement Concepts has the burden of proof in this inquiry pursuant to s. 57(3) of FIPPA.

DISCUSSION

Background and Procedural History

[6] Retirement Concepts is a privately held company in the retirement home and senior services industry in British Columbia, owning and operating independent and assisted living facilities. The applicant Union has members who are employees of Retirement Concepts.

[7] Prior to 2011, a partnership known as the “Qualicum Gardens Partnership” provided long-term care services at Qualicum Gardens pursuant to a contract with VIHA.¹

[8] In 2011, Retirement Concepts acquired Qualicum Gardens and started providing the services at Qualicum Gardens for VIHA. A provision of Retirement Concepts’ contract with VIHA requires it to provide VIHA with its audited financial statements annually.²

[9] The Union requested records from VIHA relating to long term care contractors for all care facilities in VIHA’s health authority, including all audited financial statements for 2011 and the three previous fiscal years. The Union later narrowed this request to two specific care facility locations, one of which was Qualicum Gardens.

[10] VIHA decided to release the responsive records regarding Qualicum Gardens, and notified Retirement Concepts of this intention. After receiving this notice, Retirement Concepts requested that the Office of the Information and Privacy Commissioner review VIHA’s decision. This matter was not settled during mediation, and it proceeded to inquiry.

¹ Union submissions at Exhibit 9.

² VIHA submissions at Appendix 2.

Records

[11] The records at issue are the 2009³ and 2010 audited financial statements of the Qualicum Gardens Partnership (“records”). VIHA advised it does not have 2008 or 2011 audited or unaudited financial statements for Qualicum Gardens.

[12] **Harm to Third-Party Business Interests** — The principles for s. 21 are well established.⁴ For s. 21 to apply, the elements in ss. 21(1)(a), (b) and (c) must all be met. The information must be:

- a) a trade secret of a third party, or the commercial, financial, labour relations, scientific or technical information of or about a third party;
- b) supplied to the public body in confidence; and
- c) reasonably expected to cause significant harm to the third party’s competitive position, undue financial loss or gain, or the other types of harm as set out in s. 21(1)(c) if disclosed.

[13] Retirement Concepts submits that the information in question satisfies the test in s. 21 of FIPPA. It argues that the information meets ss. 21(1)(a) and (b), and that there is a reasonable expectation of harm to its interests as provided in ss. 21(1)(c)(i) and (iii) because public disclosure of the information would interfere significantly with its competitive position or result in undue financial loss. It states that competitors could use the information to copy Retirement Concepts’ proprietary business model to achieve profits and unfairly compete with it. Additionally, it asserts the Union will use this information to help its negotiating position with Retirement Concepts.

[14] The Union submits that the records must be disclosed because Retirement Concepts has failed to satisfy each of the three elements of s. 21.

[15] VIHA takes no position in this inquiry.

Type of Information – Section 21(1)(a)

[16] The information captured by s. 21(1)(a) includes:

- (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,

³ Qualicum Gardens Partnership’s complete 2009 audited financial statements are not before me. The statement of cash flows and notes to the financial statements are not part of the records.

⁴ See, for example, Order F13-20, 2013 BCIPC No. 27.

[17] The records clearly contain financial information within the meaning of s. 21(1)(a) of FIPPA.

[18] The Union submits that s. 21(1)(a) does not apply, however, because the information is not “of” or “about” Retirement Concepts since Retirement Concepts did not acquire Qualicum Gardens until after the time periods covered in the financial statements (the 2009 and 2010 fiscal years).

[19] Retirement Concepts, for its part, never addresses the fact that the records are not the financial statements “of” Retirement Concepts, or that it was not operating Qualicum Gardens during the time periods captured in the records.

[20] I am satisfied the records are of or about a third party. In this case, the third party is the Qualicum Gardens Partnership, a business whose operations Retirement Concepts has acquired. As such, I am satisfied that s. 21(1)(a) applies to the records.⁵

Supplied, Implicitly or Explicitly, in Confidence – Section 21(1)(b)

[21] The second part of the test in s. 21(1) is whether the information was “supplied”, either implicitly or explicitly, “in confidence”. This is a two part analysis. The first step is to determine whether the information was “supplied”. The second step is to determine whether the information was supplied “in confidence”.

[22] Retirement Concepts submits that the records were supplied in confidence within the meaning of s. 21(1)(b), while the Union submits that they were not. VIHA is silent on this issue.

Supplied

[23] The Union submits that Retirement Concepts did not acquire Qualicum Gardens until 2011, so Retirement Concepts did not supply the financial statements for previous years. However, previous orders such as Order F13-20 and Order 01-26 that state that s. 21(1)(b) is not limited to instances where the information was supplied directly by the third party opposing disclosure.⁶

[24] The Union also submits that the records are merely one of the services provided to VIHA. It states that VIHA purchased the records and owns the financial information in them because a provision of the contract states that records provided to VIHA “shall be the property” of VIHA. It states that the records here are analogous to financial statements prepared by a public body

⁵ Union submissions at Exhibit 9.

⁶ Order F13-20, 2013 BCIPC No. 27 at para. 20; Order 01-26, [2001] B.C.I.P.C.D. No. 27 at para. 29.

employee about a publicly owned facility, with the only difference in this case being that VIHA has chosen to contract out of the preparation of its financial statements. For this reason, the Union states that the information was not supplied within the meaning of s. 21(1)(b).

[25] I disagree with this submission. This is not a case of a third party preparing financial statements about the operations of a public body. The financial information at issue is the revenue, expenses and other financial information of the Qualicum Gardens Partnership. The information contained in the statements is not about VIHA's operations. The financial statements were provided to satisfy VIHA that there were sufficient financial resources available for the agreed care services to be carried out as required under the contract.⁷ In my view, the statement in the contract that records provided to VIHA shall be the property of VIHA does not undermine the fact that information about the Qualicum Gardens Partnership was supplied to VIHA.

[26] The Union further submits that the records are “negotiated” rather than “supplied” within the meaning of s. 21(1)(b) because the contract requires that the “form and content” of the records be “reasonably acceptable” to VIHA. This submission relates to the fact that the terms of a contract do not usually meet the definition of supplied for s. 21(1)(b) because the terms are negotiated. As stated in Order 01-39, the exceptions to this are if the information is an immutable fact, or if an accurate inference can be made about information that was supplied to a public body in confidence but is not expressly contained in the contract.⁸

[27] The records in this case contain financial information that was provided to VIHA as part of reporting requirements under a contract. However, they are not negotiated terms of an agreement. The actual content of the financial information (ie. revenue, expenses, assets, etc.) are immutable facts.

[28] For the reasons above, I find that the records were supplied within the meaning of s. 21(1)(b).

In Confidence

[29] For s. 21(1)(b) to apply, the information must be supplied, explicitly or implicitly, in confidence. This test for “in confidence” is objective, and the question is one of fact. Evidence of the third party's subjective intentions with respect to confidentiality is not sufficient.⁹

[30] As stated in Order 03-02, a confidentiality clause can assist the determination of whether the parties to a contract intended for the related

⁷ Affidavit of T. Baena at para. 11.

⁸ Order 01-39, [2001] B.C.I.P.C.D. No. 401 at paras. 45 and 50.

⁹ F13-20, 2013 BCIPC No. 27 at para. 22.

information to be confidential.¹⁰ There is such a clause in the contract in this case, which states:

Any reports or records provided to [the public body]...shall be the property of [the public body] and maintained in compliance with appropriate legislation, including [FIPPA]. Subject to the requirements of [FIPPA], [the public body] will respect the confidentiality of such information.¹¹

[31] Retirement Concepts and the Union have differing views about the effect of this provision.

[32] Retirement Concepts submits that the clause requires VIHA to respect its confidentiality with respect to the financial records.

[33] The Union submits that Retirement Concepts could not reasonably believe the records were supplied in confidence because the contract states that records provided to VIHA become the property of VIHA, and Retirement Concepts cannot have a reasonable expectation of privacy over information for which it has surrendered ownership. It submits that this is particularly true since the contract states that confidentiality is “subject to the requirements” of FIPPA. The Union also submits that the clause states that VIHA will merely “respect” confidentiality, which is not a guarantee of confidentiality.

[34] In my view, the statement about ownership does not override VIHA’s contractual undertaking to handle the records in confidence. In my view, the statement that VIHA “...will respect the confidentiality of such information” is telling of the parties’ intentions. The Union submits that the use of the word “respect” undermines the strength of the phrase because it is not a guarantee – or even a conditional guarantee – of confidentiality. While I agree that this phrase is not a guarantee, in my view the word “respect” relates to the fact that VIHA is not in a position to guarantee confidentiality because FIPPA applies. In

¹⁰ Order 03-02, [2003] B.C.I.P.C.D. No. 2 at para. 62; also see Order F13-17, 2013 BCIPC No. 22 at para.19.

¹¹ This provision is in a contract that is an exhibit to the affidavit of H. Lu. The contract is between a health authority and a different company (not Retirement Concepts or the Qualicum Gardens Partnership), and states that it relates to a different care facility location. However, I find that this provision reflects a term of the agreement between VIHA and Retirement Concepts in relation to the Qualicum Gardens. I am satisfied of this because Mr. Lu directly refers to this provision in the body of his affidavit (para. 21), and because this contract matches the excerpts of the Qualicum Gardens contract that VIHA provided in its submissions, including a page footnote with the same date.

The Union identified that the contract provided by Retirement Concepts does not appear to relate to Qualicum Gardens, and it requests that VIHA either be ordered to provide: the contract specifically governing the relationship between Retirement Concepts and VIHA with respect to Qualicum Gardens; or an explanation of why the contract cannot be provided. However, this request is outside of the scope of this inquiry.

my view, this contractual clause is persuasive evidence that the financial statements were supplied and accepted in confidence.

[35] The Union submits that there must be a “mutuality of understanding” between the parties for the information to have been supplied in confidence, and VIHA did not consider the records to have been supplied in confidence because VIHA decided that s. 21 does not apply.

[36] Previous orders have considered whether the public body and third party have a “mutuality of understanding” when determining if information was supplied in confidence. The mutual intention of the parties to keep the information confidential will often shed light on those questions, but it is not necessarily determinative. As stated in Order F13-20, the determination of whether information is confidential depends on its contents, its purposes and the circumstances under which it was compiled.¹²

[37] In this case, the records are financial statements that were provided pursuant to a contract, and the contract states that VIHA will respect the confidentiality of the information. They are the financial statements of a privately held company that are not available from other sources, and relate to one specific business operation. Further, there is no evidence from VIHA that it did not accept the records in confidence, or that its understanding was anything other than the terms of the contract. In these circumstances, I am satisfied that the records at issue were supplied in confidence within the meaning of s. 21(1)(b).

Reasonable Expectation of Harm from Disclosure – Section 21(1)(c)

[38] Section 21(1)(c) of FIPPA states in part:

21(1) The head of a public body must refuse to disclose to an applicant information

...

(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, or ...

[39] The Union submits that Retirement Concepts has provided no specific details or evidence to establish that there is a reasonable expectation of harm to Retirement Concepts if the records are disclosed.

¹² Order F13-20, 2013 BCIPC No. 27 at para 27.

[40] Retirement Concepts submits that it will suffer harm from disclosure of the records because its competitive position would be significantly damaged if its competitors receive the information, and its negotiating position with the Union would be significantly harmed. It submits that disclosure of the records would result in an undue financial loss to Retirement Concepts.

[41] With respect to harm from competitors, Retirement Concepts' CFO says Retirement Concepts has a unique and proprietary model, and that disclosure of the detailed information in the records would allow competitors to copy Retirement Concepts' business model, which would cause significant harm to Retirement Concepts' competitive position.¹³

[42] This argument is not persuasive, particularly since Retirement Concepts does not explain how disclosing financial records – which are not Retirement Concepts' financial statements and relate to Qualicum Gardens before Retirement Concepts started operating the business – would reveal its unique and proprietary business model. I am not satisfied that there is a reasonable expectation that disclosure of the records will result in significant harm to the competitive position of Retirement Concepts, or an undue financial loss or gain.

[43] Retirement Concepts also submits that disclosure will cause significant harm to its labour negotiations with unions because the unions will be able to derive financial information that is valuable to their negotiating position, and harmful to Retirement Concepts' position. Retirement Concepts' VP of Operations explains that Retirement Concepts and the Union are currently negotiating their first standalone collective agreement, and there are a number of contentious issues.¹⁴ He states that the Union would not ordinarily have access to this kind of private financial information during negotiations and that disclosure will significantly disturb the balance of the collective bargaining unit, resulting in a risk of an impasse at the bargaining table and the further risk of a labour dispute.

[44] Retirement Concepts does not explain, however, how disclosure of the financial statements of a different legal entity that previously operated Qualicum Gardens could harm Retirement Concepts' current negotiations, or what information in the records the Union could reasonably be expected to use to harm Retirement Concepts' negotiating position. I am therefore not satisfied that there is a reasonable expectation of significant harm to Retirement Concepts' negotiating position from disclosure of the records, or that there is a reasonable expectation that disclosure will result in undue financial loss or gain.

[45] In summary, I am not satisfied on the materials before me that disclosing the records could reasonably be expected to harm Retirement Concepts within the meaning of s. 21(1)(c)(i) or (iii).

¹³ Affidavit of H. Lu at paras. 25 and 26.

¹⁴ Affidavit of T. Baena at paras. 4 to 8.

CONCLUSION

[46] I find that s. 21(1) of FIPPA does not require VIHA to refuse to give the applicant access to the records. For the reasons given above, under s. 58 of FIPPA, I require VIHA to give the Union access to the records on or before February 4, 2014 pursuant to s. 59. I also require VIHA provide me a copy me of its cover letter to the Union, together with a copy of the records.

December 19, 2013

ORIGINAL SIGNED BY

Ross Alexander
Adjudicator

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