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Order F13-22

MINISTRY OF TECHNOLOGY, INNOVATION AND CITIZENS' SERVICES

Elizabeth Barker
Adjudicator

November 7, 2013

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Summary: The applicant requested information from the Ministry related to a Notice of Intent advising of the Province's plan to directly award contracts for telecommunications and other services to TELUS. The Ministry notified TELUS of its intention to disclose all of the information to the applicant. TELUS requested a review of the Ministry's decision on the grounds that disclosure would harm its interests under s. 21(1)(c). The adjudicator found only a small portion of the information was supplied in confidence under s. 21(1)(b), and that disclosure could not reasonably be expected to result in harm under s. 21(1)(c). The adjudicator ordered disclosure of all of the requested information.

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

Authorities Considered: B.C.: Order 00-09, [2000] B.C.I.P.C.D. No. 9; Order 00-10, [2000] B.C.I.P.C.D. No. 11; Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order 01-39, [2001] B.C.I.P.C.D. No. 40; 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 F07-15, [2007] B.C.I.P.C.D. No. 21.

Cases Considered: *Merck Frosst Canada v. Canada (Health)*, 2012 SCC 3.

INTRODUCTION

[1] This inquiry concerns the applicant's access request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to the Ministry of Technology, Innovation and Citizens' Services ("Ministry"), for information pertaining to a Notice of Intent advising of the intention of the Ministry, on behalf

of the Province of British Columbia, to directly award contracts to TELUS Communications Company (“TELUS”) for strategic, telecommunications and other services.

[2] Specifically, the applicant requested: “Any and all agreements, early start letters and letters of intent pertaining to the services contemplated by Notice of Intent #4015 executed by either the Government of British Columbia or Telus Communications Company, and any extensions thereof.”

[3] The Ministry provided TELUS with notice under s. 23 of FIPPA of the applicant’s request, providing it with a copy of the records and seeking its views regarding the disclosure of TELUS’s business information.¹ After considering TELUS’s views, the Ministry determined that it would grant the applicant full access to the records.

[4] TELUS objected to disclosure of some of the information contained in the records and requested that the Office of the Information and Privacy Commissioner (“OIPC”) review the Ministry’s decision. Mediation was not successful and TELUS requested that the matter proceed to inquiry. The Ministry, TELUS and the applicant provided submissions.

ISSUE

[5] The issue before me is whether the Ministry is required to refuse access to any of the information requested under s. 21(1) of FIPPA. Under s. 57(3)(b) of FIPPA, the onus is on TELUS, the third party, to prove that s. 21(1) requires access to the information be refused.

DISCUSSION

[6] **Background**—In December 2008, the Ministry initiated a negotiated request for proposals process (“NRFP”) inviting vendors to submit proposals to provide various telecommunications services to the Province’s core government ministries and to BC Hydro, WorkSafeBC, BC Lottery Corporation, ICBC and six regional health authorities.

[7] Later, the Ministry decided that a strategic relationship arrangement with a single telecommunications vendor acting as a primary supplier with a wider

¹ A “third party” is defined as any person, group of persons or organization other than the person who made the request or the public body. (Schedule 1 of FIPPA).

scope of services was required and that TELUS was the only qualified supplier. As a result, the NFRP was cancelled, and the Ministry issued Notice of Intent #4015 advising of its intention to directly award contracts to TELUS. On July 29, 2011, TELUS and the Ministry signed the Telecommunications Services Master Agreement, covering a wide range of telecommunication services and upgrades.

[8] TELUS objects to disclosure of some of the information requested by the applicant because it believes that disclosure will significantly harm its competitive or negotiating positions (s. 21(1)(c)(i)), result in similar information no longer being supplied to the public body (s. 21(1)(c)(ii)), and cause it undue financial loss and its competitors undue financial gain (s. 21(1)(c)(iii)).

[9] **The Records**—The records are as follows:²

- A. February 1, 2010 “Letter of Agreement”, (pp. 5-14). TELUS objects to disclosure of some information on p. 8.
- B. Two pages listing the rates for certain services, along with their accompanying cover letters, (pp. 1-4). TELUS does not object to disclosure of the cover letters, only to disclosure of the rate information on pp. 2 and 4.
- C. July 29, 2011 “Letter of Agreement”, (pp. 156-158). TELUS objects to disclosure of some information on all three pages of this record.
- D. December 17, 2010 “Letter of Intent”, (pp. 24-58). TELUS objects to disclosure of some information on pp. 38, 43, 44, 47 and 48.³
- E. June 15, 2011 “Letter of Agreement”, (pp. 128-150). TELUS objects to disclosure of some information on pp. 138-142 and 144-150.

[10] Where I have identified the disputed records by their title and provide detail about their content, I do so only because TELUS has already openly done the same in its submission and supporting affidavit.

[11] **Harm to Third-Party Business Interests**—Section 21(1) of FIPPA requires public bodies to withhold information the disclosure of which would harm

² The page numbers in brackets are those marked on the responsive records.

³ At para. 8(b) of its submissions, TELUS objects to disclosure of the percentage information on p. 47, although it has not been highlighted in the record itself to indicate that TELUS wishes to withhold it. I have treated it as if it were highlighted. Further, at para. 9 of its submission, TELUS explains that it no longer objects to disclosure of information highlighted on p. 28.

the business interests of a third party. The relevant portions of s. 21 are as follows:

- 21(1) The head of a public body must refuse to disclose to an applicant information
- (a) that would reveal
 - ...
 - (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, ...

[12] The principles to be considered in applying s. 21(1) are well established.⁴ All three of the following elements must be met in order to properly withhold information under s. 21(1):

- The information is a trade secret of a third party, or the commercial, financial, labour relations, scientific or technical information of or about a third party.
- The information was supplied to the public body in confidence.
- Disclosure of the information could reasonably be expected to cause significant harm to the third party's competitive position or the other types of harm as set out in s. 21(1)(c).

[13] While the third party need not show on a balance of probabilities that the harm will in fact come to pass if the records are disclosed, the third party must nonetheless do more than show that such harm is simply possible.⁵

⁴ 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.

⁵ *Merck Frosst Canada v. Canada (Health)*, 2012 SCC 3, at para. 196.

Commercial, financial, or technical information – s. 21(1)(a)

[14] TELUS submits that the records contain commercial, financial, labour relations, scientific or technical information of or about TELUS. The Ministry submits that the records contain commercial and financial information within the meaning of s. 21. The applicant points out that without access to the records, he cannot confirm whether all the information sought to be withheld is commercial or financial information.

[15] From my review of the records, I find that the information in dispute is a combination of commercial, financial and technical information about TELUS. It includes specifics of the financial and commercial dealings TELUS has with the Province for the provision of technical services.

Supplied in confidence – s. 21(1)(b)

[16] The second part of the test requires a two-part analysis. The first step is to determine whether the information was “supplied” by TELUS. The second is to determine if the supplied information was supplied “in confidence”.

[17] Information contained in an agreement will not normally qualify as information that has been “supplied” by the third party because it is typically the product of a negotiation process.⁶ However, as stated in Order 01-39,⁷ information in an agreement that might otherwise be considered negotiated nonetheless may be supplied in two circumstances. The first being when the information provided by the third party was immutable so it was not open to negotiation and was incorporated into the agreement without change. The second occurs when the information contained in an agreement would allow a reasonably informed observer to draw accurate inferences about confidential information supplied by the third party, but which is not contained in the contract itself.

[18] I will apply the approach above. If I find that the information in dispute qualifies as having been “supplied” for the purposes of s. 21(1)(b), I go on to determine whether it was supplied “in confidence”.

⁶ Order 04-06, [2004] B.C.I.P.C.D. No. 6 at para. 45. See also Order 01-20, [2001] B.C.I.P.C.D. No. 21, para. 81.

⁷ [2001] B.C.I.P.C.D. No. 40, paras. 45-50, which was upheld on judicial review in *CPR v. The Information and Privacy Commissioner et al (In The Matter of the Judicial Review Procedure Act)*, 2002 BCSC 603. See also Order 01-20, [2001] B.C.I.P.C.D. No. 21 at paras. 85-86 and Order 00-09, [2000] B.C.I.P.C.D. No. 9.

Supplied

[19] TELUS concedes that, with the exception of Record D, all of the information in dispute is included in an agreement, and that previous orders have stated that the terms of an agreement are negotiated rather than supplied. However, TELUS submits the information in dispute contained in these agreements qualifies as having been “supplied” because it falls into one of the two exceptions articulated in Order 01-39.⁸ The Ministry, on the other hand, is of the view that the information in dispute was not “supplied” as that term has been interpreted in previous orders.⁹ The applicant submits that, given the large total value of the contracts, it is inconceivable that the information that TELUS seeks to withhold was not subject to negotiation.¹⁰

[20] I will address each of the records in turn.

[21] **Record A:** This record sets out TELUS’s and the Ministry’s agreement regarding pricing of long distance and conferencing services. It is signed by both parties and its subject line declares that it is a “letter agreement”.¹¹ TELUS seeks to withhold the dollar figure for the “conferencing capital costs component”, on p. 8. This is a sum that the Ministry agrees to pay TELUS for costs associated with any network infrastructure upgrades completed by TELUS, if the Ministry terminates the agreement early.

[22] It is clear that Record A is the result of negotiation and agreement between TELUS and the Ministry. In my view, it is reasonable to conclude that information contained within the agreement, including the conferencing capital costs component dollar figure, was also subject to negotiation. TELUS, however, submits that this dollar figure “represents” the capital costs incurred by TELUS for network infrastructure upgrades,¹² so it is TELUS’s immutable information and qualifies as having been “supplied” according to the first exception noted in Order 01-39. This argument, in particular the use of the word “represents”, and the lack of supporting evidence or detail, is insufficient to persuade me that this dollar figure was not the product of negotiation.

[23] Further, I am unable to see how disclosure of this information would enable an accurate inference to be made about what underlying information TELUS supplied in confidence during negotiation about its capital costs. TELUS’s materials, as well as Record A itself, both state that the conferencing capital costs component dollar figure represents a “portion” or “part” of capital

⁸ TELUS’s submission, para. 26.

⁹ Ministry’s initial submission, paras. 3.15-3.18.

¹⁰ Applicant’s initial submission, para. 25.

¹¹ Affidavit of John Black, TELUS’s Director of Client Services & Project Management, para. 15.

¹² TELUS’s submission, para. 28.

costs incurred by TELUS for infrastructure upgrades.¹³ How large a portion or part, however, is not revealed. Without knowing what size the proportion or part of the capital costs the dollar figure represents, one cannot calculate TELUS's capital costs.

[24] Therefore, I find that the conferencing capital costs component dollar figure on p. 8 was not “supplied” information under s. 21.

[25] **Record B:** TELUS objects to disclosure of the pricing information on pp. 2 and 4 of Record B. These pages were issued in conjunction with Record A, which requires that this pricing information be delivered by way of separate cover letter.¹⁴ One page details the price per minute for outgoing long distance calls and the other the price per minute for various conferencing services.¹⁵

[26] TELUS submits that the pricing information is supplied information for the purposes of s. 21 because a reasonably informed individual could use it to “determine a floor for a financial term in the contract or other immutable information not susceptible of change... such as the base rate TELUS is willing to provide services at”.¹⁶

[27] I disagree that knowledge of the rate at which TELUS agreed to provide services would reveal confidential immutable or fixed information supplied during negotiations. It goes without saying that the rate at which a company is *willing* (i.e., agrees) to provide a service incorporates many factors, and disclosure here does not reveal what the price might be in another context. TELUS has not satisfactorily explained or provided evidence of what (and how) confidentially supplied information would be revealed by disclosure of these prices.

[28] Therefore, I find that the pricing information on pp. 2 and 4 of Record B was negotiated and dependent on agreement, so it does not qualify as “supplied” under s. 21.

[29] **Record C:** TELUS explains that this record, which it calls the Pharmanet Agreement, describes the process for discounting prices and crediting the Province in order to maintain a “flat spend” amount for Pharmanet data circuits during the first year of their agreement. TELUS objects to disclosure of three dollar figures in Record C:

- the amount of the monthly credit that TELUS will provide the Province (p. 156),

¹³ TELUS's submission, paras. 27-28 and Black affidavit para. 17.

¹⁴ Sections 10 and 11 of Record A. Pages 1 and 3 are the cover letters and TELUS does not object to their disclosure.

¹⁵ TELUS submission, para. 19.

¹⁶ TELUS's submission, paras. 34-35.

- the difference between the “flat spend” amount and the initial revenue commitment (p. 157), and
- the price for data circuits (p. 158).¹⁷

[30] TELUS submits that these three dollar amounts “represent objective figure[s] immutable to TELUS”, which fall within the first exception noted in Order 01-39.¹⁸ The evidence provided to support this assertion consists of two short paragraphs describing the record.¹⁹

[31] In my view, the disputed information in Record C does not meet the criteria for “supplied” information as set out in previous orders. The title and the language of Record C make it clear that the record contains information that was subject to discussion and agreement, and it reflects the give-and-take of negotiation. Further, despite its assertions, TELUS has not provided evidence that establishes that these three dollar amounts would directly or indirectly reveal its fixed costs or other immutable information.

[32] Therefore, I find that Record C does not contain supplied information under s. 21.

[33] **Record D:** This document is called a “Letter of Intent”. TELUS submits that this document records its understanding of the NRFP negotiations up to that point, but it is not an agreement because it was never signed by the Ministry. TELUS objects to disclosure of some information on pp. 38, 43, 44, 47 and 48.²⁰

[34] TELUS explains that the disputed information includes its proposals for pricing and contributions to a strategic investment fund and a data upgrade fund, and not all those proposals became part of an eventual agreement.²¹

[35] The Ministry agrees that this document is not an agreement between the parties, although it “was heavily negotiated by the parties and ended up laying the foundation for an agreement that was finalized”.²²

[36] I conclude that Record D was created by TELUS—and shared with the Ministry—in order to frame TELUS’s understanding and intentions regarding the state of their negotiations. The Ministry did not sign the document and in my

¹⁷ Although it originally objected to disclosure of a significant portion of p. 158, and the records are highlighted to reflect that, in its affidavit evidence (at para. 32) TELUS confirms that it now only objects to disclosure of the dollar figure on that page.

¹⁸ TELUS’ submission, paras. 27, 29, 30.

¹⁹ Black affidavit, paras. 31-32.

²⁰ Per para. 9 of TELUS’s initial submission, TELUS no longer objects to disclosure of the information it initially wanted withheld from p. 28.

²¹ TELUS’s submission paras. 36-39 and Black affidavit, paras. 20-24.

²² Ministry’s reply submission, para. 1.

view, it is not an agreement recording the outcome of their negotiations. In summary, I find that all of Record D contains information that was “supplied” under s. 21.

[37] **Record E:** This document is titled “Letter Agreement” and is addressed to TELUS.²³ Given its title and the fact that it is signed by representatives of both TELUS and the Ministry, I find that it is an agreement. TELUS objects to disclosing some information on pp. 138-141 and 142 and all of the information on pp. 144-150 because it is immutable information. It also suggests that this is information from which accurate inferences could be drawn about underlying confidential information supplied by TELUS.

[38] TELUS submits that pages 138-141 are “terms that relate to TELUS’s agreement with Microsoft and the provision of Microsoft Office Live Meeting services and software.”²⁴ I agree that a reasonably informed individual, having access to these pages, could make accurate inferences about information that TELUS supplied during the negotiations with the Ministry about TELUS’s pre-existing, fixed arrangements with Microsoft. Therefore, I find that the information on pp. 138-141 was “supplied” for the purposes of s. 21.

[39] TELUS also objects to disclosure of rates for Microsoft Live Meeting on p. 142, and it submits: “The fees, volume discounts and the cost of subscriptions are all rates of TELUS, connected to and tied to the provision of services under the agreement TELUS has with Microsoft.”²⁵ However, in my view, the assertion that the information on these pages “relates” to, or is “connected” or “tied” to an agreement with Microsoft is insufficient to establish that it was not subject to negotiation with the Ministry. The disputed information on this page reveals what the Ministry has *agreed* to pay for subscriptions. In addition, I fail to see how one could accurately infer TELUS’s fixed costs based on this information, and TELUS does not provide detail or further explanation that would make this connection clear. Therefore, I find that the information on p. 142 was not supplied, under s. 21.

[40] TELUS also submits that the entire contents of pp. 144-150, entitled “Schedule C: Terms of Service for Microsoft Office Live Meeting Service and Software,” were not subject to alteration during TELUS’s negotiations with the Ministry so amount to “supplied” information.²⁶ TELUS explains that these are the terms of its agreement with Microsoft and they were never liable to alteration during TELUS’s negotiations with the Ministry. In other words, the Microsoft terms of service are immutable because they are a fixed condition of any use, by TELUS, of Microsoft’s product. My review of this disputed information confirms

²³ Black affidavit, para. 15.

²⁴ Black affidavit, para. 28.

²⁵ Black affidavit, para. 30.

²⁶ Black affidavit, para. 28.

that this is the case, so I find that pp. 144-150 contain information that was “supplied” by TELUS.

In Confidence

[41] The next step in the analysis is to determine if the records that I found were supplied (all of Record D at pp. 24-58 and parts of Record E at pp. 138-141 and 144-150) were supplied “in confidence”.

[42] TELUS says it has consistently treated all of the records as confidential and that the records were only distributed to a small group within TELUS, with reminders that the pricing was to remain confidential. It adds that the records were supplied to the Ministry with the understanding they were to be treated as confidential during negotiations.²⁷ The Ministry makes no submission regarding the confidentiality of the information in dispute, but it agrees that negotiations with TELUS were confidential.²⁸

[43] Record D contains the phrase “private and confidential” in the footer of each page and in bold font at the top of page one. It also has a confidentiality clause. Record E has the word “confidential” in uppercase letters on the first page. I am satisfied that the parties had a mutual understanding that the contents of these records were to remain confidential. In conclusion, I find that all of the disputed information in Record D and some of the disputed information in Record E (pp.138-141 and 144-150) was supplied in confidence under s. 21.

Harm to third party – s. 21(1)(c)

[44] The third step in the s. 21 analysis is to determine if disclosure of the information that was supplied in confidence would be harmful to TELUS’s business interests under s. 21(1)(c). As set out above, I find that only some of the information in dispute was supplied in confidence. I do not need to conduct this part of the analysis for information that was not supplied in confidence, however, I will do so for the sake of completeness.

[45] The standard of proof applicable to harms-based exceptions like s. 21 is whether, on the balance of probabilities, disclosure of the information could reasonably be expected to cause the specific harm. Although there is no need to establish certainty of harm, it is not sufficient to rely on speculation, as former Commissioner Loukidelis explained in Order 00-10:

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

²⁷ Black affidavit, paras. 33-37.

²⁸ Ministry’s reply submission, para. 2.

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.²⁹

[46] TELUS submits that disclosure of the withheld information would cause three of the four harms set out in s. 21(1)(c). I will address each individually below.

Harm to competitive or negotiating position – s. 21(1)(c)(i)

[47] With respect to this harm, TELUS submits that the telecommunication services industry is highly competitive and other companies are attempting to take over TELUS's share of the market. It submits that disclosure of the information in dispute will negatively impact its ability to negotiate prices on a competitive scale as competitors will know the rates at which TELUS is willing to provide services to the Ministry. The fear is that they will use that information to their advantage and "undercut" TELUS's prices on future bidding opportunities and gain a portion of TELUS's share of the telecommunications service provider market. It will also result in TELUS customers requesting better rates.³⁰

[48] The only additional information TELUS provides regarding this harm relates to what it calls its "Internal Financial Information":

Further, if the Internal Financial Information is released, TELUS would suffer significant financial harm within the meaning of section 21(1)(c)(i). Capital investment information, investment credit information and capital cost information could possibly reveal commercial and technical information about the services TELUS is able to provide and the necessary capital expenditures it chooses to make each year.³¹

[49] Although TELUS does not define what it means by "Internal Financial Information", it identifies five instances of such information in the records: Record A (p. 8) and Record D (pp. 43, 44, 47 and 48).³²

[50] The information withheld from p. 8 is a dollar figure called the "conferencing capital costs component", which is discussed above in paragraphs 21-24 where I found that it did not qualify as information that had been supplied in confidence. That dollar figure represents an undefined portion of capital costs incurred by TELUS for infrastructure upgrades. Because an important variable is

²⁹ Order 00-10, [2000] B.C.I.P.C.D. No. 11, at p. 9.

³⁰ TELUS's submission, paras. 36 and 50 and Black affidavit, paras. 40-41.

³¹ TELUS's submission, para. 52. Once again, in describing these records, I have only provided details that TELUS has already revealed in its submissions.

³² TELUS's submission, para. 8(b).

missing—the size of the portion—it is not apparent how this dollar figure would divulge the information that TELUS submits. Similarly, the disputed information on pp. 43, 44 and 47, which I found was supplied in confidence, consists of percentages in formulas for calculating how much money will be contributed to various funds. For example: X% of an unknown variable will be contributed. In my view, it is impossible, with only a percentage of an unknown variable, to learn the information that TELUS fears will be revealed. Finally, the information withheld on p. 48, also supplied in confidence, is a dollar figure that TELUS proposed to contribute to a data upgrade fund, which never came into being. The connection between that proposed, but never fulfilled, contribution and the information that TELUS alleges its disclosure would divulge is not evident and TELUS does not explain.

[51] Further, regarding its “internal financial information”, TELUS also submits:

In previous cases, internal financial information has not been treated as different from other types of information included in a contract... these decisions do not consider that internal financial data such as capital investment amounts are more akin to trade secrets than pricing information.³³

[52] I do not take this to be a claim that the disputed information *is* a trade secret under s. 21(1)(a)(i) because elsewhere in its materials TELUS only refers to the information as commercial, financial, labour relations, scientific or technical information. Rather, I understand this to be an argument that what TELUS calls its “internal financial information” is more sensitive than other types of information and disclosure is more likely to result in harm, or cause a greater harm, than disclosure of other types of information. However, TELUS provides no further explanation and detail or law that supports its contention that what it calls its “internal financial information” is akin to a trade secret and/or is more sensitive than other information.

[53] TELUS has the burden of establishing that any harm to its competitive and negotiating position is reasonably foreseeable and that it would be “significant”. However, despite its assertions, TELUS did not provide evidence showing how disclosure of the disputed information could reasonably be expected to result in harm to its competitive or negotiating position. For example, it provides no information about its marketplace and it does not attempt to quantify the alleged financial harm in relation to its assets and revenues. Without such evidence I am unable to understand the alleged connection between disclosure and the anticipated harm.

³³ TELUS’s submission, paras. 53-55.

[54] Furthermore, I agree with Order F07-15,³⁴ in which former Commissioner Loukidelis stated that the disclosure of existing contract pricing and related terms that may result in the heightening of competition for future contracts is not a significant harm or an interference with competitive or negotiating positions. Having to price services competitively is not a circumstance of unfairness or undue financial loss or gain; rather, it is an inherent part of the bidding and contract negotiation process.

[55] As a result, I am not satisfied that there is a clear and direct connection between disclosure of the disputed information and a reasonable expectation of significant harm to TELUS's competitive or negotiating position.

Similar information will no longer be supplied – s. 21(1)(c)(ii)

[56] TELUS submits that disclosure of the information about the data upgrade fund on pp. 48-49 of Record D (which I found was supplied in confidence) will result in this harm. It claims that the information about the fund is innovative and the financial incentive for providing it was minimal. TELUS describes the consequences of disclosure as follows:

TELUS may change its future negotiation strategy. In the future, TELUS may choose to provide less detailed information in its proposal during negotiations if this information is disclosed. It is in the Province's best interest to have full and frank negotiations for the provision of services and to explore the potential options."³⁵

[57] It also submits that disclosure could reasonably be expected to "interfere" with TELUS's "financial situation".

[58] TELUS does not explain in what way the information is innovative, or how the continued supply of such information is in the public interest. I also note that it does not argue that disclosure will prevent it from bidding on future contract opportunities offered by the Province. Similarly, there was no further explanation or detail about what TELUS means by interference with its financial situation. Therefore, I find that TELUS has failed to provide sufficient explanation and evidence to demonstrate a clear or direct connection between disclosure of the disputed information on pp. 48-49 and the harm in s. 21(1)(c)(ii).

[59] In conclusion, TELUS has not established that disclosure of the disputed information on pp. 48-49 could reasonably be expected to result in similar information no longer being supplied to the Ministry.

³⁴ [2007] B.C.I.P.C.D. No. 21, para. 43.

³⁵ TELUS's submission para. 61, Black affidavit para. 44.

Undue financial loss or gain – s. 21(1)(c)(iii)

[60] There are two types of information, which if disclosed, TELUS submits will result in undue financial loss to TELUS and/or gain to its competitors, under s. 21(1)(c)(iii).³⁶ They are what TELUS refers to as “Rate and Pricing Information”³⁷ and “Microsoft Terms and Conditions”.³⁸ I will deal with each individually.

[61] **Rate and Pricing Information**—TELUS’s submission regarding disclosure of this disputed information is as follows:

Likewise, if the Rate and Pricing Information is disclosed, TELUS’ competitors will gain something for nothing - information that TELUS has spent considerable effort developing. The rate for the provision of services that TELUS proposed to the Ministry was developed by TELUS as a result of its extensive knowledge [of] the industry. Disclosure of this information would unfairly benefit TELUS’ competitors as they would have the benefit of the information without expending the efforts that TELUS did to create it. On this basis, the Rate and Pricing Information should not be disclosed.³⁹

[62] TELUS does not provide any detail to support these assertions. Without more, I am unable to assess whether disclosure would result in a financial loss or a gain, let alone whether it would be undue. For example, there is no explanation or evidence about what is meant by “considerable effort” (*i.e.*, in terms of staff time or money spent), or information about who the competition is and the benefits they would reap from access to the disputed information. TELUS points to Order 00-10⁴⁰ as support for its claim regarding undue financial loss and gain. However, in that case, there was evidence provided about the size and/or significance of the loss. No such evidence was provided in this inquiry.

[63] It is clear to me that in any competitive bidding situation, rate and pricing information will naturally reflect a multitude of changing factors, such as the scope of the project, the state of telecommunication technology, labour market conditions and acceptable profit margins. So, while I do not doubt that the rate and pricing information has some value to TELUS’s competitors, absent more fulsome evidence and argument, I believe it would be of very limited value. In my view, TELUS has not established a clear and direct connection between

³⁶ TELUS’s submission paras. 62-67.

³⁷ Record B (pp. 2, 4), Record C (pp. 156-158), Record D (p. 38), Record E (p. 142). TELUS’s submission para. 8(a).

³⁸ Record E (pp. 138-141, 144-150). TELUS’s submission para. 8(c).

³⁹ TELUS’s submission, para. 66.

⁴⁰ [2000] B.C.I.P.C.D. No. 11.

disclosure of the rate and pricing information and an undue financial loss to itself or an undue financial gain to others.

[64] **Microsoft Terms and Conditions**—TELUS's submission regarding this information is as follows:

Finally the Microsoft Terms and Conditions should not be disclosed as disclosure would result in an unreasonable loss to TELUS in terms of its ongoing relationship with Microsoft. TELUS is bound by confidentiality provisions in its contract with Microsoft to keep the information included in the Microsoft Terms and Conditions confidential. Voluntary disclosure of this information by TELUS may harm the future relationship which TELUS has with Microsoft. As such, the Microsoft Terms and Conditions should not [sic] be redacted from the Records in accordance with section 21(1)(c)(iii).⁴¹

[65] I do not know exactly what TELUS means by harm to its future relationship with Microsoft, and TELUS does not explain. Section 21(1)(c)(iii) speaks of undue financial loss or gain, and the onus is on TELUS to prove that there is a reasonable expectation of that type of harm. Furthermore, although the materials satisfy me that TELUS and Microsoft agreed not to disclose each other's "confidential" information,⁴² there is nothing in the inquiry materials that convinces me that Microsoft considers the terms of service for Microsoft Office Live Meeting (on pp. 144-150) to be confidential. This is clearly a boiler-plate terms of service agreement of the type the public is very familiar with when using Microsoft products. In addition to the generic nature of its terms, it refers only to "the Customer" and it contains no dollar amounts or details of a financial or other nature pertaining specifically to the relationship Microsoft has with TELUS. Likewise, there is nothing in the materials that suggests that the disputed information on pp. 138-141, which is also terms of agreement for the use of Microsoft software, would be considered confidential by Microsoft. In my view, TELUS has not demonstrated how disclosure of any of this information could reasonably be connected to a financial loss or gain.

[66] In conclusion, I find that TELUS has failed to prove that there is a reasonable expectation that disclosure of the information it refers to as "Rate and Pricing Information"⁴³ and "Microsoft Terms and Conditions"⁴⁴ could reasonably be expected to result in undue financial loss to TELUS and/or gain to its competitors.

⁴¹ TELUS's submission para. 67.

⁴² Black affidavit para. 27.

⁴³ Record B (pp. 2, 4), Record C (pp. 156-158), Record D (p. 38), Record E (p. 142). TELUS's submission para. 8(a).

⁴⁴ Record E (pp. 138-141, 144-150). TELUS's submission para. 8(c).

CONCLUSION

[67] In conclusion, I find that TELUS has failed to prove that disclosure of the requested information could reasonably be expected to result in the harms articulated in s. 21(1)(c). Therefore, the Ministry is not required, under s. 21(1) of FIPPA, to refuse to disclose the information requested by the applicant.

ORDER

[68] Pursuant to s. 58 of FIPPA, I direct the Ministry to give the applicant access to the withheld information on or before **December 20, 2013**, and, concurrently, provide me a copy of its cover letter and the records sent to the applicant.

November 7, 2013

ORIGINAL SIGNED BY

Elizabeth Barker, Adjudicator

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