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Order F14-04

PROVINCIAL HEALTH SERVICES AUTHORITY

Hamish Flanagan, Adjudicator

February 20, 2014

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Summary: The applicant sought access to information in a successful proponent's proposal to provide pharmacy distribution services. The Provincial Health Services Authority had withheld the information under s. 21 of FIPPA because it concluded disclosure would harm the proponent's business interests. The adjudicator found that s. 21 of FIPPA did not apply to some information in the proposal because the parties had incorporated the information into the contract that arose from the proposal. Some other parts of the proposal could not be withheld because the harm required by s. 21 was not established; the remainder of the proposal could be withheld under s. 21.

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

Authorities Considered: B.C.: Order 03-02, 2003 CanLII 49166; Order 03-15, 2003 CanLII 49185; Order 03-33, 2003 CanLII 49212; Order F09-22, 2009 CanLII 63564; Order F05-09, 2005 CanLII 11960; Order 01-36, 2001 CanLII 21590; Order 04-06, 2004 CanLII 34260; Order F10-40, 2010 CanLII 77331; Order F06-20, 2006 CanLII 37940; Order F08-22, 2008 CanLII 70316; Order 01-39, 2001 CanLII 21593; Order 00-22, 2000 CanLII 14389; Order 03-05, 2003 CanLII 49169; Order F13-02, 2013 BCIPC 2 (CanLII); Order F11-08, 2011 BCIPC 10 (CanLII); Order F13-22, 2013 BCIPC 29 (CanLII); Order 00-10, 2000 CanLII 11042. **Ont:** Order MO-1706, [2003] O.I.P.C. No. 238; Order PO-2384, [2005] O.I.P.C. No. 49; Order PO-2435, [2005] O.I.P.C. No. 207; Order PO-2497, [2006] O.I.P.C. No. 136.

Cases Considered: *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.); *Re Maislin Industries Ltd. and Minister for Industry* (1984), 10 DLR (4th) 417 (FCTD); *Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs)* (1997) 148 DLR (4th) 356 (FCTD); *Merck Frosst Canada v. Canada (Health),* 2012 SCC 3.

INTRODUCTION

[1] The Provincial Health Services Authority ("PHSA") issued an Request For Proposal ("RFP") for pharmacy distribution services. The requested services included warehousing, logistics, and distribution of drugs to health care facilities across British Columbia. The applicant, an unsuccessful proponent, requested a copy of the successful proposal ("Proposal") and the resulting contract, including any contract amendments. The applicant particularly wanted to know the length of the term of the contract.

[2] The PHSA, after consulting the successful proponent, McKesson Canada ("McKesson"), released almost the entire contract, but withheld most of the Proposal because it concluded disclosure would harm McKesson's business interests under s. 21 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

ISSUE

[2] The applicant is no longer seeking the remaining parts of the contract that have been withheld. Therefore, the issue in this inquiry is whether PHSA is required to withhold parts of the Proposal it has not released because disclosure would be harmful to the business interests of McKesson under s. 21 of FIPPA.

DISCUSSION

[3] **Harm to Third-Party Business Interests: s. 21**—Section 21(1) of FIPPA requires the PHSA to withhold information that would harm the business interests of McKesson if disclosed. Section 21(1) sets out a three-part test for determining whether disclosure is prohibited, all three parts of which must be established before the exception to disclosure applies. These are the relevant provisions for this inquiry:

> **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
>
> …
>
> (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,
>
> …
>
> (iii) result in undue financial loss or gain to any person or organization, …

[4] The principles for applying s. 21 are well established.[1] The first part of the test requires the withheld 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 withheld 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 the other types of harm set out in s. 21(1)(c).

[5] Section 57 of FIPPA establishes the burden of proof on the parties in the inquiry. Since the information in issue is not personal information, it is up to McKesson to prove that the applicant has no right of access to the information or part.[2]

[6] I will consider the elements of s. 21 in turn.

Commercial, financial and/or technical information of or about a third party: s. 21(1)(a)

[7] Both the PHSA and McKesson say the information is commercial information because it relates to buying and selling, and they cite previous orders[3] where RFP proposals have been considered commercial information. McKesson further submits that some of the information is also financial, labour relations, scientific and technical information.

[8] The applicant says the information in the Proposal is not commercial information because it only comprises answers to questions posed in the RFP.

[9] I have considered the above submissions and reviewed the withheld records. It is clear the contents of the Proposal were created by McKesson with the aim of winning a contract with the PHSA. "Commercial information" relates to a commercial enterprise, but it need not be proprietary in nature or have an

[1] See for example, Order 03-02, 2003 CanLII 49166 and Order 03-15, 2003 CanLII 49185.
[2] Section 57(3)(b) of FIPPA.
[3] Including Order 03-33, 2003 CanLII 49212 and Order F09-22, 2009 CanLII 63564.

independent market or monetary value.[4] It suffices if the information is associated with the buying, selling or exchange of the entity's goods or services. The Proposal includes information detailing the nature of the products and services McKesson proposed to supply or perform and methods to be used in performing the proposed services. The information in the Proposal relates to the buying or selling of goods or services. Consistent with Order 03-33,[5] and Order F09-22[6] that dealt with similar proposals in response to an RFP, this is information relating to commerce.

[10] I am therefore satisfied that the information in the proposal is "commercial information" within the meaning of s. 21(1)(a)(ii) of FIPPA. Some of the information may also qualify under other listed categories of information in s. 21(1)(a), but I do not need to consider this further.

Supplied in confidence - s. 21(1)(b)

[11] The second part of the s. 21(1) test involves a two-part analysis. The first part is to determine whether the information was "supplied" to the PHSA. The second is to determine whether those records were supplied "in confidence".

Supplied

[12] Previous orders have recognized that information in an agreement between a public body and a third party is generally not supplied because it has been negotiated.[7] Conversely, information in a RFP proposal is generally supplied because it is submitted to a public body in response to a request for a proposal. However, information in a RFP proposal can become negotiated rather than supplied if it is incorporated into a contract.[8] Information incorporated into a contract between a public body and a third party is usually negotiated rather than supplied because the parties have agreed to its inclusion in the contract.[9] One exception to this is information that, despite being included in a contract was not susceptible to negotiation and change. Often, such information is referred to as being "immutable", and it is typically of a proprietary nature.[10] The applicant argues that the wording of the contract between the PHSA and McKesson incorporated the entire Proposal into the contract by reference, and therefore the Proposal is negotiated not supplied.

[4] Order F05-09, 2005 CanLII 11960 at para. 10, citing Order 01-36, 2001 CanLII 21590.
[5] 2003 CanLII 49212.
[6] 2009 CanLII 63564.
[7] Order 04-06, 2004 CanLII 34260 at para. 45.
[8] See for example Order 03-33, 2003 CanLII 49212 at para. 28.
[9] Order F10-40, 2010 BCIPC No. 60 at para. 12.
[10] Order 04-06, 2004 CanLII 34260 at para. 45.

[13] The PHSA and McKesson concede that the Proposal information that was incorporated into the contract is not supplied because it is negotiated. However, they do not agree that the entire Proposal was incorporated into the contract, and say that all of the information in the Proposal that was incorporated into the contract has already been released to the applicant.

[14] McKesson says the withheld information in the Proposal could never form part of a valid contract because it is "proprietary" information about things such as its investments, strategies and finances. McKesson also says that the withheld information is immutable information. Because immutable information is an exception to the general rule that information in a contract is negotiated not supplied, the information at issue would still be supplied if it is immutable. The applicant and the PHSA do not address whether any of the withheld information is immutable.

[15] The following statement in Order F08-22 is useful in considering the application of s. 21 to immutable information in contracts, where the Commissioner stated the term "supply":

> …is intended to capture immutable third-party business information, "not contract information that—by the finessing of negotiations, sheer happenstance, or mere acceptance of a proposal by a public body—is incorporated in a contract in the same form in which it was delivered by the third-party contractor"[11] or mutually-generated contract terms that the contracting parties themselves have labelled as proprietary.[12]

[16] Order 01-39[13] provides a helpful discussion of types of contractual information that may qualify as immutable information:[14]

> For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of s. 21(1)(b). To take another example, if a third party produces its financial statements to the public body in the course of its contractual negotiations, that information may be found to be "supplied." It is important to consider the context within which the disputed information is exchanged between the

[11] Order F06-20, 2006 CanLII 37940 at para. 11.
[12] Order F08-22, 2008 CanLII 70316 at para. 60.
[13] 2001 CanLII 21593.
[14] Ontario Order MO-1706, [2003] O.I.P.C. 238 citing Order PO-2384, [2005] O.I.P.C. No. 49; Order PO-2435, [2005] O.I.P.C. No. 207; Order PO-2497, [2006] O.I.P.C. No. 136 upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.) provides two further helpful examples of immutable information, which are the operating philosophy of a business and a sample of its products.

> parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it.
>
> In other words, information may originate from a single party and may not change significantly – or at all – when it is incorporated into the contract, but this does not necessarily mean that the information is supplied. The intention of s. 21(1)(b) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change, but, fortuitously, was not changed.

[17] The discussion of the immutable information exception in Order 01-39 concludes that the lack of change in a contractual term, in addition to the relative immutability or discreteness of the information it contains are factors to consider in determining whether information is supplied rather than negotiated.[15]

[18] All of the parties accept that some information in the proposal is incorporated by reference into the contract with the effect that it is negotiated not supplied. Therefore, the first question to consider is what information from the Proposal was incorporated into the contract.

[19] The body of the contract between the PHSA and McKesson resulting from negotiations between the parties describes the services McKesson must provide under the heading "Service Provider Obligations":

> 1. You must provide the services described in Schedule A ("the Services") in accordance with this agreement. You must provide the Services during the term described in Schedule A, regardless of the date of execution or delivery of this agreement

[20] The five numbered clauses in the contract that follow outline further obligations on McKesson in providing the services as defined. So it is clear that the services McKesson is required to provide under the contract are those described in Schedule A.

[21] Schedule A of the contract states:

> **SCHEDULE A - SERVICES**
>
> a) SERVICES: As specified on RFP BC HA SSO – 0069 including all information provided by McKesson Canada Corporation ("McKesson Canada") in response to the RFP BC HA SSO-0069. Should there

[15] Order 01-39, 2001 CanLII 21593 at para. 49.

b) be a discrepancy between the text of the RFP and McKesson Canada's proposal, the terms of McKesson Canada's proposal shall prevail.

- Section 3.0 to Section 5.0
- Appendix 1 to Appendix 4
- Appendix A to Appendix L

[22] The parties views of what parts of the Proposal were incorporated by reference into the contract differ due to their respective interpretations of Schedule A. The applicant says this section means the entire Proposal was incorporated and, therefore, was negotiated not supplied. The PHSA and McKesson submit that only the Proposal's description of the services was incorporated into the contract, by way of this clause, and that they have already disclosed this description of the services to the applicant.

[23] From my review of the records and the submissions, it is my view that the contract incorporates the part of the Proposal that relates to the services.

[24] In coming to my conclusions about the meaning of the above excerpts I find this statement from Halsbury's Law of Canada introduction to the interpretation of contracts[16] useful:

> Courts have repeatedly emphasized that the purpose of contractual interpretation is to give practical effect, or in commercial settings, to give commercial or business efficacy, to the parties' agreement. Consequently, any interpretation that results in absurd or unworkable consequences is to be avoided at all cost. But the purpose of interpretation should not be to rewrite the parties' contract or relieve one of them from the consequences of an improvident contract.

[25] Clause 1 of the contract quoted above says that the services are those in Schedule A. So the function that the contract relies on Schedule A for is to set out the services. In Schedule A itself, the use of the heading "services" in both the title of Schedule A and in the clause in the schedule[17] reproduced above is consistent with the intended function of Schedule A described in clause 1 of the contract.

[26] On first impression, the broad wording of the schedule clause, particularly the phrase "all information provided by McKesson Canada Corporation ("McKesson Canada") in response to the RFP BC HA SSO-0069" suggests that the entire proposal was incorporated into the contract. However, this wording

[16] Laws of Canada - Contracts, 1st. Ed. (2013 Reissue), authored by Angela Swan and Jakub Adamski at HCO-102 Interpretation of Contracts.

[17] I note that the contract does not contain any clause preclude the use of headings in interpretation of the contract.

must be read in light of the clear function of Schedule A as described above. Two further factors further support my finding that only the material relating to the services is incorporated into the contract. First, as McKesson points out in submissions, it is clear that the Proposal contains material that is simply not capable of forming part of a binding contract. This material is more advertorial in nature, for example detailing McKesson's general background, expertise and experience, in order to make its case that it should be the successful proponent. Incorporating the entire proposal would attempt to give contractual force to statements that are clearly not capable of bearing contractual force, and thus would have "absurd or unworkable consequences"[18] that are to be avoided.

[27] The second factor is the parties submit that they only intended to incorporate information that describes the services into the contract. The PHSA put it this way in their submission:

> The references to the Proposal in section 1 of the Services schedule (Schedule A) was expressly or by necessary implication intended to incorporate into the Contract those portions of the Proposal which describe, define or articulate the Services to be delivered by the Third Party under the contract

[28] While the parties' submissions above are useful, my conclusion that the parties' intent was to incorporate only the parts of the Proposal relating to services into the contract is not heavily reliant on those submissions because, as Halsbury's notes:

> the focus of the process of interpreting contracts is on the outward or objective communications. This means that while the process of contractual interpretation involves ascertaining the intentions of the parties, it focuses almost exclusively on what a reasonable person in the same context as the parties would have understood their expressions to mean…[19]

[29] Having determined that the contract incorporates only the parts of the Proposal relating to services into the contract, the next question is which parts of the Proposal "describe, define or articulate the services to be delivered".[20] Based on my review of the contract, I have concluded more material in the Proposal describes the services than McKesson and the PHSA submit.

[30] As noted above, clause 1 of the contract states that the function of Schedule A is to describe the services for the contract. However, Schedule A does not articulate what the services are, but states the services are "as

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[18] Laws of Canada – Contracts, 1st. Ed. (2013 Reissue), authored by Angela Swan and Jakub Adamski at HCO-102 Interpretation of Contracts.
[19] Laws of Canada – Contracts, 1st. Ed. (2013 Reissue), authored by Angela Swan and Jakub Adamski at HCO-104: Objective approach to the interpretation of contracts.
[20] Revised submission of PHSA at para. 21.

specified on [the] RFP...". The sentence then goes on to state that the services include all information submitted by McKesson in its Proposal.

[31] McKesson's Proposal confirmed that McKesson could provide the services described in the RFP, and provided further detail on how those services would be provided. McKesson summarizes its Proposal as outlining "the unique nature of the services, and the proposed value-added services and the methods used in performing the services"[21] and also describes its Proposal as "a highly original proposal which is composed of a unique amalgamation of services".[22] Similarly, the PHSA states that the Proposal "details the nature of the products and services that the Third Party was proposing to supply in response to the RFP, including such information as the Third Party's business, strategy, methods, qualifications and capacity." [23] I recognize that describing the services was not the RFP's sole function—the RFP was also designed to gather information such as the proponent's contact information and general information about the proponent's reputation and experience. But because the RFP and Proposal do describe the services, the parties determined to incorporate the Proposal's description of the services into the contract. It is not surprising that the parties incorporated the description of the services in the Proposal, as without it the contract would lack any specificity about the services to be provided.

[32] Further, from my review of the withheld information in the Proposal, I can see no principled distinction between some of the information McKesson and the PHSA say is incorporated into the contract because it describes the services, including Appendix E and G, and some of the information they say is not incorporated. Further, no satisfactory distinction has been made in the parties' submissions. In my view, some of the withheld information just as appropriately serves the function to "describe, define or articulate the services to be delivered by the Third Party" as the released information, indeed some of the information is identical to information released because it describes the services.[24]

[33] The information McKesson and the PHSA have already released because it describes the services and therefore is incorporated into the contract is also useful for determining the scope of the material in the Proposal that describes the services. I note that the released information describes in detail not just what services are to be provided but *how* services are to be provided. For example, Appendix E outlines how McKesson's Return Goods Policy will operate, and Appendix G outlines McKesson's procedures for dealing with a manufacturer's recall.

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[21] Initial submission of McKesson at para. 16.
[22] Affidavit of D. Weil at para. 3.
[23] Revised submission of PHSA at para. 14.
[24] For example, some of the information in Section 3 of the Proposal is duplicated in some Appendices to the Proposal released on the grounds they describe the services.

[34] I also note that in places the Proposal describes services that *may* be provided by McKesson. These services are not incorporated into the contract in my view because McKesson is not definitely agreeing to provide those services.

[35] In summary, I find that some of the withheld information in the Proposal defines, describes or articulates the services and therefore is incorporated by reference into the contract. I have highlighted in yellow the incorporated information in the copy of the records that accompany the PHSA's copy of this Order. For greater clarity I have provided brief paragraph by paragraph[25] explanations why information in the Proposal is incorporated into the contract at Addendum 1 to this Order.

[36] I also note the following withheld information is incorporated by reference by other parts of the contract:

> Para 3.1.9: The KPI measurements (information highlighted in yellow) are incorporated by reference by the 2nd paragraph in Schedule A of the contract on page 6 of the records.
>
> Appendix 4 is incorporated by reference by the multiple references to it in Schedule B of the contract on p. 7 of the records. The information provides details about which manufacturers' products will be able to be supplied under the contract. The comments section and the 2nd last sentence of the paragraph following the table on p. 79 of the records also provide some detail about the nature of those arrangements, which are aspects of the services provided under the agreement so would also be incorporated by reference under Schedule A. The remaining information in the paragraph following the table on p. 79 of the records (highlighted in pink) is not contractual in nature and would not be incorporated by reference under Schedule A were it not already incorporated by Schedule B.

Immutable information

[37] As discussed above, information in a contract can be supplied rather than negotiated if it is immutable information. McKesson asserts some of the withheld information is immutable, though it did not explain in detail what that information was and why.[26]

[38] I note that it is not just that the information is unchanged in content or format that makes it immutable. Previous orders make clear that this is not

[25] References to paragraph numbers refer to McKesson's information in the corresponding paragraph in the Proposal. All information incorporated because it describes services is highlighted in yellow in the copy of the records accompanying the PHSA's copy of this Order.

[26] Although I note that some of McKesson's detailed evidence on the issue of harm from disclosure is useful for understanding the proprietary and pre-existing nature of some of the information.

sufficient for information to qualify as immutable[27]—in the present case all the information incorporated by reference is unchanged, but that does not make it immutable. For example the information in Appendix A is pre-existing and was not changed before incorporation into the contract. However, the services it outlines are subject to negotiation. Nor is it enough that the information reveals information about how McKesson operates and therefore is labelled "proprietary". If the information describes services under the contract, the parties agreed that this information was incorporated into the contract and it is therefore negotiated. It is the lack of change in the contractual terms in addition to the relative immutability or discreteness of the information it contains that, considered in its full context, makes it immutable.

[39] The fact that the parties agreed that information about the services contained in the Proposal would be incorporated by reference into the contract strongly suggests that all the material in the Proposal that describes the services was negotiated.[28] It is apparent from the evidence that McKesson engaged in contract negotiations with the PHSA. Comparing the resulting contract with the Proposal, it is apparent that key terms (for example certain agreed payments), changed from the Proposal to the contract. Where contract terms are capable of being negotiated, and there is evidence they have been negotiated, the information cannot be said to be unchangeable and proprietary, even if the format or content of the information was not changed.

[40] Notwithstanding this, I find that some information in McKesson's Proposal that I determined was incorporated into the contract because it describes or articulates the services nonetheless falls within the exception for immutable information,[29] and is therefore supplied. The immutable information in the Proposal that was incorporated into the contract includes appendices to the Proposal that list which drug manufacturers McKesson has contracts of supply with,[30] and user guides and statements of technical specifications for McKesson software.[31] The information I found above was incorporated into the contract but which is immutable and therefore supplied not negotiated I have highlighted in green in the copy of the records accompanying the PHSA's copy of this Order. For greater clarity I have also provided in Addendum 2 to this order a brief paragraph by paragraph explanation why specific withheld information that I found was incorporated by reference is or is not immutable, to complement my analysis above.

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[27] See for example Order 00-22, 2000 CanLII 14389, Order 04-06, 2004 CanLII 34260 at para. 48, and Order 03-05, 2003 CanLII 49169 at para. 46.
[28] Order 00-22, 2000 CanLII 14389 at p. 7.
[29] See for example Order 04-06, 2004 CanLII 34260 at para. 45.
[30] Appendix 4.
[31] Appendix H.

Information not incorporated by reference

[41] The information in McKesson's Proposal that is not incorporated into the contract I also find to be supplied. This is consistent with previous orders dealing with information submitted to a public body in response to a request for a proposal.

"In Confidence"

[42] The PHSA and McKesson say the RFP response was supplied in accordance with a specific confidentiality provision. The applicant says there was no explicit statement in the RFP response about confidentiality.

[43] No explicit statement is required for confidentiality to exist; information can be supplied explicitly or implicitly, "in confidence". An explicit statement of confidentiality is only one factor in an implicit in confidence argument.[32]

[44] Whether explicit or implicit confidentiality is asserted, 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.[33]

[45] I am satisfied the evidence supports the finding that the Proposal's contents were explicitly supplied in confidence to the PHSA. A copy of the RFP was provided to me and relevant excerpts quoted in submissions, including the following:[34]

> **Confidentiality –** Submissions provided in confidence shall so be honoured. The only submission information the Health Authorities will release will be as required under law… All information received through the bid process is confidential…
>
> …
>
> **Freedom of Information and Protection of Privacy Act ("FOIPPA")** … The Health Authorities acknowledge that the submission includes information that is commercially sensitive and that its disclosure may be harmful to the business interests of the Vendor as contemplated by section 21 of FOIPPA, and accordingly the Health Authorities shall keep such information confidential to the greatest extent permitted under FOIPPA and prior to any release of such information under FOIPPA shall give the notices to the proponent as required there under.

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[32] Order F09-22, 2009 CanLII 63564.

[33] Order F13-02, 2013 BCIPC 2 at para. 18, from Order F11-08, 2011 BCIPC No. 10 at para. 24 citing Order 01-39, 2001 CanLII 21593 citing *Re Maislin Industries Ltd. and Minister for Industry* (1984) 10 DLR (4th) 417 (FCTD); see also *Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs)* (1997) 148 DLR (4th) 356 (FCTD).

[34] At pp. 22 and 23 of the RFP.

[46] The effect of the above provisions in the RFP is that all documents, including proposals, are received and held in confidence by the PHSA, subject to the provisions of FIPPA.

[47] The PHSA's explicit confidentiality assurance in the RFP is sufficient to satisfy the "in confidence" aspect of s. 21(1)(b), as it was in previous orders.[35] There was no need in light of the wording of the RFP above for McKesson to include a specific confidentiality clause in its RFP proposal. It was sufficient for it to rely on the wording of the RFP. The information in the proposal was explicitly supplied in confidence to the PHSA.

[48] I note the PHSA and McKesson provide strong evidence of a mutual intention of confidentiality in relation to the RFP proposal. However, it is not necessary for me to make any finding as to implicit confidentiality.

[49] **Harm to McKesson**—I will now consider whether the withheld information that meets the first two requirements of s. 21 (*i.e.*, is commercial information and supplied not negotiated) also meets the harm test.

[50] McKesson submits that disclosure of the RFP proposal can reasonably be expected to harm their competitive position or interfere with their negotiating position, and could reasonably be expected to result in undue gain to a competitor and loss to McKesson. They say that harm would reasonably be expected because the Proposal contains a tailor made solution in response to PHSA's request in the RFP for innovative solutions, they operate in a highly competitive marketplace, and they say the applicant is a direct competitor with significant resources to emulate McKesson's approach as revealed in its Proposal.

[51] The PHSA defers to McKesson's arguments on harm but notes the importance of fulsome RFP proposals, in particular to allow a public body to perform due diligence before committing public funds to a contract.

[52] In response, the applicant says that this RFP was unique and there is no evidence of a similar RFP occurring in the future. The applicant wants access to the proposal to investigate alleged discrepancies in the RFP process regarding the term of the contract, which is similar to the applicant's motivation in Order F09-22.[36] The applicant also says that the threshold for establishing harm has not been met by McKesson's evidence.

[35] See for example Order 03-33, 2003 CanLII 49212 at para. 36.
[36] 2009 CanLII 63564.

[53] As noted in Order F13-02,[37] the Supreme Court of Canada in *Merck Frosst*[38] has confirmed that the onus is on a third party to demonstrate that the third party exception applies, and that they must do so on the balance of probabilities.[39] The Court also noted that "what evidence will be required to reach that standard will be affected by the nature of the proposition the third party seeks to establish and the particular context of the case."[40] Where the third party is required to establish a reasonable expectation of probable harm, as former Commissioner Loukidelis explained in Order 00-10:

> 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.[41]

Application

[54] I am persuaded by the arguments of McKesson and the PHSA that the disclosure of some of the information in the proposal meets the harms test of s. 21(1)(c)(i) and (iii). In coming to this conclusion, I am guided by the Commissioner's reasoning in Orders F09-22, 03-33 and 00-10 concerning what, if any harm, McKesson might be subject to.

Significant harm to competitive position: s. 21(1)(c)(i)

[55] Some of the principles the Commissioner identified in Order 03-33 apply in this case. Both involve a competitor in a competitive industry requesting access to the proposal of the successful bidder in an RFP competition where there is the prospect of the parties competing against each other for future RFPs.[42] The applicant argues that this is a unique RFP and due to the term of the contract resulting from this RFP, this RFP will not likely be tendered again in the near term, if ever. However, McKesson's position is that the unique nature of the Proposal makes the information even more commercially valuable. The broader perspective is that the applicant and McKesson are established competitors in the pharmacy distribution business, with significant resources at their disposal. This means there is a reasonable prospect that the applicant and McKesson will

[37] Order F13-02, 2013 BCIPC 2 (CanLII) at para. 37. Order F13-02 is subject to an application for judicial review.
[38] *Merck Frosst Canada v. Canada (Health)*, 2012 SCC 3.
[39] See also for example Order F13-22, 2013 BCIPC 29 (CanLII) at para. 45.
[40] *Merck Frosst Canada v. Canada (Health)*, 2012 SCC 3 at para. 94.
[41] Order 00-10, 2000 CanLII 11042, at p. 9.
[42] Order 03-33, 2003 CanLII 49212 at para. 48.

submit proposals in response to RFPs for similar services in the future. As McKesson states, the Proposal could be a blueprint for future proposals regarding pharmaceutical distribution services to government clients.[43]

[56] The Commissioner found in Order 03-33 that the factors discussed above, together with the nature of the withheld information and the evidence as to the benefits that access to the withheld information would confer on competitors, were factors that persuaded him that the necessary reasonable expectation of harm had been established in accordance with s. 21(1)(c)(i).[44]

[57] Based on the parties' submissions, my review of the proposal and previous orders, I conclude that the disclosure of the information in the Proposal that I describe below could undermine McKesson's competitive advantage and diminish its chances of winning future contracts. Accepting that there will continue to be a competitive market for pharmacy distribution and other related services, I accept that McKesson has reason to fear that granting an advantage to its competitors could put future contracts at risk.

[58] In Order 00-10, the Commissioner held that among other things, in determining whether a feared harm is "significant", the extent of the harm in relation to the assets or revenues of the third party may be relevant.[45] In this case, as in many others, it is not possible to analyze these issues in quantifiable, dollar terms.[46] McKesson is a large company, so the loss of a contract would likely not cause it significant financial harm, but the loss of even one contract of the magnitude of the one resulting from the Proposal in issue here certainly has a sizeable impact on the competitive position of even a company as large as McKesson. I also note that the relative size of the applicant puts it in a position to work towards emulating any unique features of McKesson's approach revealed in its Proposal.

[59] In Order 04-06 some proposal material was referred to as general and generic, drawing from an Invitation to Quote and customer references. Disclosure of that information was determined to not reasonably be expected to result in harm under s. 21(1)(c).[47] I accept McKesson's submission that the PHSA's desire for innovative solutions means that some of the information in its Proposal is unique. McKesson's size allows it to invest significantly in proprietary systems and processes that are unique, and some examples of these are contained in its Proposal. However, there is also some more generic information in McKesson's proposal, similar to that in Order 04-06 which there is no harm in

[43] McKesson initial submission at para. 31.
[44] Order 03-33, 2003 CanLII 49212, para. 48.
[45] At p. 11.
[46] Order 00-10, 2000 CanLII 11042 at p. 11.
[47] Order 04-06, 2004 CanLII 34260 at para. 87.

releasing. This includes an organizational chart,[48] whether it agreed in its proposal to submit to a credit check,[49] and information about McKesson's memberships of industry associations.[50]

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

[60] As noted in Order 00-10, it is necessary to approach the issue of what is undue financial loss or gain in the circumstances of each case. This analysis can to some extent be guided by decisions in previous similar cases, which will give some sense of what may be undue in the present situation.[51] Section 21(1)(c)(iii) is not an open door for the recognition of harm to business interests of a third party which could reasonably be expected to flow, in some way or to some degree, from the disclosure of confidential business information.[52]

[61] In Order 03-33, the Commissioner found that disclosure of the information would result in harm in accordance with s. 21(1)(c)(iii), because it was expected that the applicant would be able to use the "commercially valuable insight that the disputed information would give" into the third party's "method of business, technologies and strategy".[53] The Commissioner went on to quote from Order 00-10: "if disclosure would give a competitor an advantage, usually by acquiring competitively valuable information, effectively for nothing, the gain to the competitor will be undue."[54]

[62] As in other cases where undue harm has been established,[55] the applicant here is a direct competitor of the third parties. As in Order 00-10 and Order 03-33, here the applicant and other competitors would gain some competitive insight from disclosure of some of the withheld information. McKesson is a large company with significant ability to develop systems and processes to offer value to clients. As noted above, McKesson's size allows it to invest significantly in systems and processes that are unique, and some examples of these are contained in its Proposal. PHSA encouraged proponents to submit innovative solutions to the RFP.[56] McKesson has provided evidence that some of the information in the Proposal has been developed or acquired over time, and in some cases can point to a monetary cost that is directly

[48] Appendix B.
[49] Para 3.3.12.
[50] Para 3.2.7.
[51] Order 00-10, 2000 CanLII 11042 at p. 18.
[52] Order 00-22, 2000 CanLII 14389.
[53] Order 03-33, 2003 CanLII 49212 at para. 51.
[54] Order 03-33, para. 52, quoting Order 00-10 at p. 18.
[55] For example Order 00-10 and Order 03-33.
[56] The end of Section 3.0 of the RFP states "The Health Authorities encourage proponents to submit innovative proposals." The RFP made provision for value added offers to be included by proponents.

attributable to the acquisition of certain information.[57] I have also noted that the applicant, as a company with significant resources has the ability to develop systems that emulate its competitors if provided with information about how they operate. By acquiring competitively valuable information for nothing, McKesson's competitor would receive undue gain. The resulting loss to McKesson from disclosure of this information would be undue because it would be inappropriate and unfair.

[63] In summary, I am persuaded that disclosure of some of the withheld information could reasonably be expected to result in undue loss to McKesson and undue gain to the applicant or direct McKesson competitors.

[64] I therefore find that ss. 21(1)(c)(i) and (iii) applies to some of the withheld information, as listed in Addendum 3. The exceptions to my finding of harm in disclosure of the proposal are where it contains information either identical or substantially similar to information that is already available through other sources, including information in the contract, RFP or revealed in affidavits filed in this inquiry, or where the information is sufficiently generic to not provide a reasonable basis to conclude that harm is likely to occur.

[65] I have considered whether the withheld information that meets the first two requirements of s. 21 (*i.e.*, is commercial information and supplied not negotiated) also meets the harm test. The withheld information that satisfies the harm test and therefore meets all of the s. 21 requirements and can be withheld is listed in Addendum 3. For greater clarity I have also provided in Addendum 3 brief paragraph by paragraph[58] explanations why certain withheld information does or does not meet the harms test to complement my analysis above.

CONCLUSION

[66] For the above reasons, pursuant to s. 58 of FIPPA, I make the following orders:

1. Subject to para. 2 below, I require the PHSA to give the applicant access to the Proposal by, **April 3, 2014**.

2. I require the PHSA to continue to withhold the information identified in Addendum 3 under s. 21 FIPPA.

[57] Affidavit of A. Anisef at para. 20.
[58] References to paragraph numbers refer to McKesson's information in the corresponding paragraph in the Proposal.

3. The PHSA must concurrently copy me on its cover letter to the applicant, together with a copy of the records.

February 20, 2014

ORIGINAL SIGNED BY

Hamish Flanagan, Adjudicator

OIPC File No.: F11-45512

Addendum 1

Para. 3.1.4: All of the withheld information except the last sentence describes how the services will be rolled out. Though this information is only identified as an example, it states that these services are the key implementation activities and describes how the implementation plan will be changed if changes are needed.

Para. 3.1.5: Much of the withheld information in this paragraph describes activities completed in the past. However, the highlighted information describes services McKesson will provide.

Para. 3.1.6: The highlighted information describe services McKesson committed to provide under the contract.

Para. 3.1.7: The highlighted information describe aspects of McKesson's service to the PHSA.

Para. 3.1.10: The highlighted information describes services being provided under the contract, in response to a question about how specific services will be provided. Some of this information duplicates information that has already been released because it is included in Appendix 3, which the parties agreed was incorporated by reference into the contract because it describes the services. This paragraph also provides detail about the format or content of reports McKesson would make available to the PHSA and refers to Appendix D for examples of the report formats.

Para. 3.1.11: The withheld information describes features of the services related to the distribution component of the contract.

Para. 3.1.13: Much of the withheld information in this paragraph describes how McKesson will comply with the law while delivering the services, including detailed processes and procedures it will follow to achieve compliance. These are services McKesson offered to perform under the contract and subsequently incorporated into the contract by agreement.

Para. 3.1.15: The withheld information describes how McKesson will secure inventory. It provides detailed information about services to be provided and how they will be provided.

Para. 3.1.16: The withheld information provides detailed information about McKesson's procedures in response to a specific request for information. The information describes services McKesson will perform.

Para. 3.1.17: The withheld information describes the service level for a particular aspect of the services.

Para. 3.1.18: The withheld information describes the process for a service under the contract in response to a detailed question. The content is similar to Appendix E which was released because the parties agreed it describes the services and therefore was incorporated by reference into the contract.

Para 3.1.19: The withheld information describes how McKesson will deliver a service in response to detailed questions in the RFP.

Para. 3.1.20: The yellow highlighted information describes how McKesson will deliver services in response to a detailed question in the RFP.

Para. 3.1.21: The highlighted information describes how services will be delivered in response to detailed questions in the RFP.

Para. 3.1.23: The highlighted information describes the service level under the contract, and actions McKesson will follow to provide service, in response to a question in the RFP about service level.

Para. 3.1.24: The highlighted information describes the service level to be provided by McKesson in response to a detailed question about service level. The information is also similar or identical to material in Para 3.1.7 of the Proposal.

Para. 3.1.25: The highlighted information duplicates information in Appendix 3 which has been released because the parties agreed it describes the services.

Para. 3.1.26: The highlighted information describes services that McKesson will make available to the PHSA in response to a detailed question about services in the RFP.

Para. 3.1.27: The highlighted information describes service levels in response to a detailed question about services in the RFP.

Para 3.1.28: The highlighted information describes services to be provided in response to detailed questions about services in the RFP.

Para. 3.1.29: The highlighted information duplicates information in Appendix G which has been released because the parties agreed it describes the services.

Para. 3.1.30: This paragraph conveys information about what service McKesson will provide and how it will provide the services in response to a question about how McKesson will provide distribution services. The affidavit evidence of A. Anisef (at para. 18) characterizes this information as being about how McKesson will fulfill its obligation if awarded the contract. As the parties have agreed, information about the services is incorporated into the contract.

Para. 3.1.31: The highlighted material describes services to be offered for ordering in response to a question about the service to be provided. Information highlighted on page 32 of the record describes functions of a McKesson computer software program. Because it is McKesson's software, the functionality of the software is controlled by McKesson and the functionality and features of the software are potentially subject to negotiation between PHSA and McKesson in the contract. That the functions did not change during negotiations for the contract is not enough to make the information immutable, because the information could have been changed.

Para. 3.1.32: The highlighted material describes services and service level regarding quality measures to be provided by McKesson. The material was provided in response to a detailed question.

Para. 3.1.34: One sentence relates directly to a service provision method. The remainder of the information in this paragraph (and paras. 3.1.35 and 3.1.36) is not part of the services delivered under the contract and not phrased as being an essential service in the RFP.

Para. 3.2.6: This paragraph conveys information about services McKesson will provide and how it will provide the services. Some of the services described support McKesson's ability to provide the core services under the contract, and in their context describe the functions McKesson will perform to support the services they are providing. As the parties have agreed, information about the services is incorporated into the contract.

Para. 3.3.2: The highlighted information describes services being offered by McKesson. This same information has already been released elsewhere in the Proposal because the parties agreed it describes the services and therefore was incorporated by reference into the contract.

Para. 3.3.3 and Para 3.3.4: The highlighted information describes services being offered by McKesson and which has already been released because the parties agreed it describes the services.

Para. 3.3.7 and Para. 3.4.1: The highlighted information describes services being offered by McKesson in Appendix 3 which has already been released because the parties agreed it describes the services.

Para. 3.4.5: The highlighted information describes a service being offered by McKesson.

Appendix 1: This information, except information in the last column that relates solely to costs, provides details about the delivery schedule service being offered by McKesson and how it will operate. McKesson describes its proposed delivery schedule in its Proposal in terms that indicate it is pre-existing, which typically suggests it may be immutable information. Often information in this form may qualify as immutable information because it outlines a fixed, pre-existing delivery schedule. However, the context is important. The RFP asks proponents to describe in detail how they will provide distribution services, and requests that schedule details be included. McKesson provided its delivery schedule in response to that question. In that context, the delivery schedule is not immutable but an offer of service. It is clear that this appendix is included to provide detail about how delivery services will be provided under the contract. Given the parties' intent that those parts of the proposal that describe the services are incorporated into the contract, and the ability for the delivery schedule to have been amended by negotiation,[59] this material is negotiated not supplied. That the level of service agreed is identical to a pre-existing level of service does not mean it was immutable or not susceptible to negotiation. Just because it was not changed does not make it immutable information. I note the affidavit of A. Anisef[60] characterizes this information as being about how McKesson will fulfill its obligation if awarded the contract. This description of services in Appendix 1 is a negotiated term incorporated by reference into the contract by the parties because it describes the services.

Appendix A: Related to Para 3.1.1. It provides details about how McKesson will roll out its services, which itself constitutes a service McKesson is offering and is therefore incorporated into the contract.

Appendix D: Appendix D provides detail about the format of reports (table headings and sub-headings highlighted yellow) incorporated in Para. 3.1.10 McKesson is agreeing to make available to the PHSA under the contract. It does not incorporate the content of the reports.

Appendix H: except pages 139, 165-6, and 188 which have already been released to the applicant. This is a response to the request at para. 3.1.31 for detail on how services will work. It also contains some information that describes the service in greater detail. This appendix provides detail about services provided under the contract.

[59] See Order 04-06, 2004 CanLII 34260 at para. 44.
[60] At para. 18.

Addendum 2

Para. 3.1.23 and Para 3.1.24: The information highlighted in green.

Appendix 4: Most of this information is immutable information because it comes from existing contracts between McKesson and other third parties which therefore were not susceptible to change during negotiations for the contract between McKesson and the PHSA. The last three sentences following the table in Appendix 4 are not immutable as they are subject to negotiation.

Appendix H: This is the manual that describes the technical requirements and functionality of a pre-existing McKesson computer software program. While the functionality of the software is controlled by McKesson and therefore was potentially subject to negotiation between the parties, this is outweighed by the pre-existing and proprietary nature of the manual that describes the functionality of software at a point in time, something which is unchangeable during negotiations and by the fact it is clear that the content of the manual (and the functionalities it describes) did not change during negotiation of the contract. I infer it is immutable information not dissimilar to a sample of a product.

Addendum 3

Paras. 3.1.1; 3.1.2; 3.1.3 – first paragraph only, the remainder of the information is duplicated in the contract which has already been released, the released information therefore does not meet the harm requirement;

Paras. 3.1.4 and 3.1.5 (except information highlighted yellow which is incorporated by reference);

Para. 3.1.6 except the first highlighted sentence which contains information already disclosed (see A. Anisef Affidavit at para. 12) and therefore will not cause harm if disclosed;

Para. 3.1.7 (except the information highlighted in yellow only that is incorporated by reference) and except the first sentence which contains information already disclosed (see A. Anisef Affidavit at para. 12);

Para. 3.1.8;

Para. 3.1.9 (except information highlighted yellow which is incorporated by reference by the 2nd paragraph in Schedule A of the contract on page 6 of the records);

Para. 3.1.10 (except information highlighted yellow which is incorporated by reference);

Para. 3.1.12;

Not Para. 3.1.13 — much of this section is incorporated into the contract, the remainder does not cause harm because the withheld information is a mere statement of compliance with regulatory requirements required of all proponents;

Para. 3.1.20: the words highlighted in pink in the first sentence, the information in the reminder of the sentence has already been disclosed at p 134 of the records and the remainder of the paragraph is incorporated by reference;

Para. 3.1.22;

Para. 3.1.23 including the immutable information highlighted green, except the last sentence (highlighted in yellow) that is incorporated by reference but not immutable information;

Para. 3.1.24 including the immutable information highlighted green, except the information highlighted in yellow only that is incorporated by reference, and except the last highlighted sentence which contains information already disclosed (see A. Anisef Affidavit at para 12);

Para. 3.1.25 and 3.1.28 (except information highlighted yellow which is incorporated by reference);

Para. 3.1.31 (except the information highlighted in yellow only that is incorporated by reference);

Para. 3.1.33;

Para. 3.1.34 (except the information highlighted in yellow only that is incorporated by reference);

Para. 3.1.35: the words highlighted in pink, the information not highlighted in the first sentence has already been disclosed at p 134 of the records;

Para. 3.1.36;

Para. 3.2.1 and Para 3.2.3;

Not para. 3.2.7 – this information is about McKesson's association memberships, McKesson has not established that release will result in harm to the standard required for s. 21;

Para. 3.2.8;

Not para. 3.2.9 – this is historical information that will not cause the harm required for s. 21;

Paras. 3.2.13 to 3.2.16;

Para. 3.2.17 – this type of information does typically not cause harm, but in this context it reveals information about recent/existing contracts McKesson has entered. I note that the Affidavit of A. Anisef (at para. 23) requests this information be withheld on s. 22 grounds. However this information is work contact information and therefore not personal information;

Para. 3.3.2 (except information highlighted yellow which is incorporated by reference;

Paras. 3.3.5 and 3.3.6;

Para. 3.3.7 except information highlighted yellow which is incorporated by reference and which his publicly available information about McKesson and in the contract;

Paras. 3.3.8 to 3.3.11;

Not para. 3.3.12, harm not established;

Para. 3.4.2 the information highlighted in pink, the remainder is revealed elsewhere in the contract and publicly available;

Para. 3.4.3 except the last bullet point which is information already released elsewhere;

Para. 3.4.4;

Para. 3.4.5 (except the information highlighted in yellow that is incorporated by reference);

Not Section 4 – The information of McKesson to which this section refers has not been withheld (at pages 53-64);

Section 5: – Material populated by McKesson - the remainder is duplicated in the RFP so there is no harm;

Not Appendix 1 because most of the material is incorporated by reference in Schedule 1, the remainder reveals only what delivery cost McKesson is willing to bear in this particular context;

Appendix 4 except the last three sentences on page 79 (which are incorporated by reference by Schedule B and not immutable);

Not Appendix B. McKesson's affidavit evidence is that release of this section of their organizational chart is personal information and will expose it to harm because of the risk employees will be headhunted by competitors. Retention of staff in competitive industries can be a real issue; but I have no evidence to indicate it is a particularly acute problem for McKesson. I am not satisfied that the risk of the harm identified of increased staff turnover is heightened by the release of this partial organizational chart, much of the content is publicly available elsewhere, for example on sites like Linked In. Two of the staff members listed in Appendix B supplied affidavits for this inquiry which reveal their name and position at McKesson, which is the same information about them

as is contained in Appendix B. I am also not persuaded that the organizational structure of McKesson as revealed in Appendix B is particularly proprietary or unique or linked to any competitive advantage McKesson may enjoy.

Appendix C;

The content of the Appendix D reports but not their format (table headings and sub-headings which show the format of reports McKesson is agreeing to make available to the PHSA under the contract), the format is duplicated in part in para. 3.1.10 and is incorporated by reference;

Appendix F (pages 135-6 only, page 134 has already been released);

Appendix H (except page 139, pages 165-166, 188 which have already been released);

Appendix I (except page 189 which though identified as withheld in the latest copy of the records supplied to me, has earlier been released to the applicant – a copy of this page was contained in the applicants submissions);

Appendix K.