Office of the Information & Privacy Commissioner for British Columbia

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Order F14-58

MINISTRY OF TECHNOLOGY, INNOVATION & CITIZENS' SERVICES

Celia Francis
Adjudicator

December 29, 2014

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Summary: The NDP Caucus requested records related to DDB Canada's services on the HST information campaign. The Ministry proposed to disclose most of the information, despite DDB's argument that its disclosure could reasonably be expected to harm DDB's business interests and those of its service providers. The adjudicator found that DDB had not shown how such harm could occur and ordered the Ministry to disclose the information.

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

Authorities Considered: B.C.: Order 03-02, 2003 CanLII 49166 (BC IPC); Order 03-15**,** 2003 CanLII 49185 (BC IPC); Order 01-39, 2001 CanLII 21593 (BC IPC); Order 01-36, 2001 CanLII 21590 (BC IPC); Order F08-03, 2008 CanLII 13321 (BC IPC); Order 00-22, 2000 CanLII 14389 (BC IPC); Order F05-05, 2005 CanLII 14303 (BC IPC); Order F13-06, 2013 BC IPC 6 (CanLII); Order F13-07, 2013 BCIPC 8 (CanLII); Order F14-28, 2014 BCIPC 31 (CanLII); Order 238-1998, 1998 CanLII 2355 (BC IPC); Order 04-06, 2004 CanLII 34260 (BC IPC); Order 00-10, 2000 CanLII 11042 (BC IPC); Order F09-13, 2009 CanLII 42409 (BC IPC); Order 02-50, 2002 CanLII 42486 (BC IPC); Order F06-20, 2006 CanLII 37940 (BC IPC).

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3.

INTRODUCTION

[1] The New Democrat Opposition Caucus ("NDP Caucus") requested access under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to copies of records, for the period February 2011 to December 2011, about:

> … media strategies, media analysis, media buys and advertising prepared by DDB Canada for Government Communications and Public Engagement [GCPE], Ministry of Finance, and other officials of the British Columbia government for the HST Information campaign … [including] products and plans created, invoices paid to DDB and subcontractors hired by DDB.

[2] The NDP Caucus stated that it was not interested in personal information or in records already publicly released.

[3] The Ministry of Citizens' Services and Open Government, which is now the Ministry of Technology, Innovation and Citizens' Services ("Ministry"), gave notice of the request under s. 23 of FIPPA to DDB Canada ("DDB") as the third party. DDB asked that the Ministry withhold some information under s. 21(1) of FIPPA, on the grounds that its disclosure could significantly harm the business interests of DDB or its "service providers".

[4] The Ministry did not, however, apply s. 21(1) to any of the information. Rather, it notified DDB that it had decided to give the applicant partial access to the records, withholding some information under s. 15 (disclosure harmful to law enforcement)[1] and s. 22 (disclosure harmful to personal privacy).

[5] DDB requested that the Office of the Information and Privacy Commissioner ("OIPC") review the Ministry's decision not to apply s. 21(1). It also asked for a review of the Ministry's s. 22 decision, arguing that this section applies to more information than the Ministry proposed to withhold under s. 22. DDB's third-party request for review put the access request on hold, so the NDP Caucus did not receive any records at that point.

[6] Mediation by the OIPC between DDB and the Ministry did not resolve the request for review and DDB requested that the matter proceed to inquiry. In June 2014, before the inquiry, the Ministry disclosed approximately 50 pages of records to the NDP Caucus, with minor severing under s. 22.[2] The Ministry and DDB made submissions to the inquiry, but the NDP Caucus did not.

[7] After the inquiry, the NDP Caucus confirmed to me that it was not interested in "personal information" and that it was therefore not necessary for

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[1] The NDP Caucus later confirmed that it was not interested in information the Ministry proposed to withhold under s. 15.

[2] The disclosed records comprised travel receipts and travel expense summaries for DDB and its service providers and emails between DDB and the Ministry on invoice adjustments.

me to deal with whether s. 22 applied to any of the information.[3] Accordingly, I have not considered s. 22 in this order and make no comment or finding about whether s. 22 applies in this case.

[8] The OIPC invited DDB's service providers to participate in the inquiry, as their records were among those in dispute. One service provider told the OIPC it had "nothing to hide" and declined to participate.[4] Two service providers provided submissions, to which I refer below.[5] The OIPC did not hear from the rest of the service providers.

ISSUE

[9] The issue in this case is whether the Ministry is required to withhold certain information under s. 21(1).

[10] Under s. 57(3)(b) of FIPPA, DDB has the burden of proving that s. 21 applies in this case.

DISCUSSION

Records in Dispute

[11] The records in dispute (approximately 173 pages) are the following:[6]

- work order requests from Government Communications and Public Engagement ("GCPE") to DDB
- DDB employee client hour sheets
- invoices from DDB to the Province of British Columbia (the "Province") (except total amounts)
- invoices from DDB's service providers to DDB (except total amounts)[7]
- expense reports for DDB and its service providers

[3] See my letter of November 14, 2014 to the NDP Caucus where I listed the s. 22 information in question.
[4] See email of December 6, 2014 to this Office. This service provider's records are at pp. 22, 23, 122-124, 194.
[5] See letter of December 8, 2014 from one service provider, regarding p. 76, and email of December 10, 2014 from another service provider, whose records appear at pp. 127-135, 149-156, 182-185.
[6] The NDP Caucus requested records from the Ministry of Finance, as well as from the Ministry of Citizens' Services and Open Government. The records before me appear to come only from Government Communications and Engagement, which is part of the latter ministry.
[7] DDB said it did not object to the release of the total amounts of its own and its service providers' invoices; para. 41, DDB's initial submission.

- a DDB purchase order
- information on DDB's production budget
- a cancelled invoice from DDB to the Province
- final and draft advertisements, including translations in several languages and advertisement scripts[8]

Third party business interests

[12] The relevant parts of s. 21(1) of FIPPA read as follows:

> 21(1) The head of a public body must refuse to disclose to an applicant information
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> (a) that would reveal
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> …
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
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> (b) that is supplied, implicitly or explicitly, in confidence, and
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> (c) the disclosure of which could reasonably be expected to
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> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
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> …
>
> (iii) result in undue financial loss or gain to any person or organization, or…

[13] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies.[9] All three parts of the s. 21(1) test must be met in order for the information in dispute to be properly withheld.

[14] As DDB has the burden of proof regarding s. 21(1), it must first demonstrate that disclosing the information in issue would reveal commercial, financial, labour relations, scientific or technical information of, or about, a third party. Next, DDB must demonstrate that the information was supplied to the public body, implicitly or explicitly, in confidence. Finally, DDB must demonstrate

[8] DDB said it did not object to the release of final versions of advertisements (see para. 41 of its initial submission). DDB did not say which records these were and this was not evident from the records themselves. I therefore consider all of the advertisements and scripts.

[9] See, for example, Order 03-02, 2003 CanLII 49166 (BC IPC), Order 03-15**,** 2003 CanLII 49185 (BC IPC), and Order 01-39, 2001 CanLII 21593 (BC IPC).

that disclosure of the information could reasonably be expected to cause one of the harms set out in s. 21(1)(c).

[15] In assessing the parties' arguments on s. 21(1), I have taken the approach set out in previous orders and court decisions, as discussed below, bearing in mind that the onus is on DDB.

Is it financial or commercial information?

[16] FIPPA does not define "commercial" or "financial information". However, previous orders have said that "commercial information" relates to commerce, or the buying, selling or exchange of goods and services, and that the information does not need to be proprietary in nature or have an actual or potential independent market or monetary value.[10] Previous orders have held that "financial information" includes profit and loss data, and overhead and operating costs.[11] A number of orders have held that hourly rates, global contract amounts, proposed lease terms and shared costs, breakdowns of these figures, prices, expenses and other fees payable under contract are both "commercial" and "financial" information.[12]

[17] DDB argued that the withheld information is "commercial information", because it relates to the buying and selling of goods and services to the Ministry. DDB also argued that it is "financial information", because it relates to money and its use or distribution, "namely amounts estimated to be billed for specific goods or services provided to the Ministry".[13]

[18] The Ministry said, without elaboration, that it had determined that "much of the information at issue" qualified as "commercial information".[14]

Finding on s. 21(1)(a)(ii)

[19] Based on past orders, I am satisfied that the information in issue in this case is the commercial and financial information of, or about, DDB and its service providers, for the purposes of s. 21(1)(a)(ii), in that it consists of:

- fees DDB billed the Province for its services[15]

[10] See Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17, and Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62.
[11] Paragraph 65, Order F08-03, 2008 CanLII 13321 (BC IPC).
[12] For example, Order 03-15, 2003 CanLII 49185 (BC IPC) at para. 41, Order 00-22, 2000 CanLII 14389 (BC IPC) at p. 4, Order F05-05, 2005 CanLII 14303 (BC IPC) at para. 46, Order F13-06, 2013 BC IPC 6 (CanLII) at para. 16, and Order F13-07, 2013 BCIPC 8 (CanLII) at para. 36.
[13] Paragraph 18, DDB's initial submission.
[14] Paragraph 4.13, Ministry's initial submission.
[15] See invoices and associated records.

- hourly rates and number of hours needed for DDB's employees to perform these tasks and services and related fees[16]
- services DDB provided, the number of hours DDB's employees spent providing these services, their hourly rates and total amounts billed per DDB employee[17]
- services and products DDB's service providers provided, together with the associated amounts and fees they billed to DDB[18]
- scripts and advertisements that DDB produced

Was the information "supplied in confidence"?

[20] The next step is to determine whether the information in issue was "supplied in confidence". The information must be both "supplied" and supplied "in confidence".[19] I will first deal with whether the information was "supplied" for the purposes of s. 21(1)(b).

"Supplied"

[21] The issue here is whether the information in the records was "supplied" to the Ministry for the purposes of s. 21(1)(b), regardless of who created the records. As the Supreme Court of Canada said recently, it is necessary to consider the content of the records, rather than their form. The fact that the information appears in a government record does not resolve the issue.[20] I would add that the fact that the information appears in a record provided, directly or indirectly, to a public body is also not determinative.

[22] A number of orders have considered the issue of when information is "supplied" to a public body for the purposes of s. 21(1)(b). These orders have found that information in an agreement or contract will not normally qualify as "supplied" by the third party, because the information is the product of negotiations between the parties. There are two exceptions:

- where the information the third party provided was "immutable" – and thus not open to negotiation – and is incorporated into the agreement without change and

[16] See Work Order Requests.
[17] See "employee client hours" sheets.
[18] See invoices from DDB's service providers to DDB and supporting documents.
[19] See Order 01-39 at para. 26, for example. See also Order F14-28, 2014 BCIPC 31 (CanLII) at paras. 17-18.
[20] *Merck Frosst Canada v. Canada (Health)*, 2012 SCC 3, at paras. 157-158.

- when the information in the agreement could allow someone to accurately infer underlying information a third party had supplied in confidence to the public body.[21]

[23] The Ministry said that it accepted that DDB supplied the draft advertising and campaign materials in confidence to the Ministry. It added that it was unable to conclude that DDB had supplied the remaining information, implicitly or explicitly, in confidence to the Ministry.[22] It did not explain how it had arrived at either conclusion.

[24] DDB said that it "directly supplied" the records in issue to the Ministry, "pursuant to the terms of a service agreement".[23] DDB addressed the issue of "supply" as follows:

> [30] The financial terms upon which DDB was prepared to provide services to the Ministry can also be considered to be information "supplied" within the meaning of the FIPPA because disclosure of pricing information will allow purchasers of DDB's services to make an accurate inference about DDB's confidential pricing strategies. Additionally, disclosure of the financial terms found in the Records will allow public and private sector purchasers to accurately infer information that will be used to establish a benchmark or reference for the expected pricing by DDB.[24]

[25] None of the parties provided me with a copy of the "service agreement". DDB's statement suggests to me, however, that the information in dispute flows from and reflects the terms of that service agreement. As noted above, such information is normally found to be "negotiated" not "supplied".

[26] Indeed, the contents of the records themselves, at least as far as DDB's own invoices and associated records are concerned, support the conclusion that the information in them was negotiated rather than "supplied". For example, the Work Order Requests (*e.g.*, pp. 3 and 216) are on Public Affairs Bureau ("PAB") letterhead,[25] contain information on certain tasks DDB was to perform at specified rates and are signed by both PAB/GCPE and DDB employees. I therefore conclude that the work order requests contain negotiated or agreed-upon terms, not "supplied".

[27] I also take the information in DDB's invoices and associated records to be negotiated rather than "supplied". DDB's admission that it supplied the records pursuant to the terms of a service agreement with the Ministry suggests that the agreement required that DDB provide the invoices to the Ministry for its approval.

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[21] See, for example, Order 01-39, at para. 45.
[22] Paragraph 4.16, Ministry's initial submission.
[23] Paragraphs 20 & 29, DDB's initial submission.
[24] DDB's initial submission.
[25] Public Affairs Bureau is GCPE's previous name.

This in turn suggests that the contents of the invoices and associated records were being provided under the terms the parties had previously negotiated or agreed on.

[28] Although DDB says it "directly supplied" the *records*, it does not address the issue of "supplied" versus negotiated *information*. In fact, it appears that DDB concedes that the information in issue was negotiated, as DDB's position is that the information in the records could allow someone to accurately infer underlying information supplied in confidence to the Ministry.

[29] As the party resisting disclosure, it is up to DDB to establish that disclosure of the information in the records could allow a reasonably informed observer to draw an accurate inference of confidentially "supplied" information that does not expressly appear in the records in dispute.[26] DDB did not, however, explain or otherwise support its position on this point. It did not, for example, provide evidence or explanations demonstrating how an observer could accurately infer or work backwards from particular portions of the records to underlying confidentially "supplied" information. DDB's assertion that this could happen falls short of what is required to establish this sense of "supply". The fact that others could use the information to their advantage does not mean the information was "supplied".[27] Without more, I am unable to conclude that anyone reading the records would be able to accurately infer underlying confidentially "supplied" information.

[30] As for the service providers' invoices, one of DDB's service providers said that the information in its records (unit pricing, rates and description of services) was "a confidential agreement" with DDB.[28] My review of the records reveals that the service providers invoiced DDB for their services. This suggests that DDB in turn "supplied" immutable information in the service providers' invoices and associated records to the Ministry for the purposes of s. 21(1)(b). I therefore find that the information in the service providers' invoices and associated records was "supplied" to the Ministry for the purposes of s. 21(1)(b).

[31] In addition, since both the Ministry and DDB said that DDB supplied the advertisements and scripts, I accept that the information in these records was "supplied" for the purposes of s. 21(1)(b).

Conclusion on "supplied"

[32] For the reasons given above, with the exception of the information in the advertisements, scripts and the service providers' invoices and their associated

[26] See paragraph 50, Order 01-39, for example.
[27] See Order F14-28, at para. 20 on this point.
[28] See email of December 10, 2014.

records, I find that the information in question was not "supplied" to the Ministry under s. 21(1)(b), as past orders have interpreted this term.

Was the information supplied, explicitly or implicitly, "in confidence"?

[33] A number of orders have discussed the test for determining if third-party information was supplied, implicitly or explicitly, "in confidence" under s. 21(1)(b), for example, Order 01-36:[29]

> [24] An easy example of a confidential supply of information is where a business supplies sensitive confidential financial data to a public body on the public body's express agreement or promise that the information is received in confidence and will be kept confidential. A contrasting example is where a public body tells a business that information supplied to the public body will not be received or treated as confidential. The business cannot supply the information and later claim that it was supplied in confidence within the meaning of s. 21(1)(b). The supplier cannot purport to override the public body's express rejection of confidentiality.
> …
>
> [26] The cases in which confidentiality of supply is alleged to be implicit are more difficult. This is because there is, in such instances, no express promise of, or agreement to, confidentiality or any explicit rejection of confidentiality. All of the circumstances must be considered in such cases in determining if there was a reasonable expectation of confidentiality. The circumstances to be considered include whether the information was:
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> 1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
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> 2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;
>
> 3. not otherwise disclosed or available from sources to which the public has access;
>
> 4. prepared for a purpose which would not entail disclosure.

[34] DDB did not make a submission on the issue of whether the information was "explicitly" supplied "in confidence". Its submission on the issue of "implicit" confidential supply is this:

> [34] DDB has a reasonable expectation that the commercial and financial information in the Records was supplied to the Ministry in confidence. The information contained within the records is of such a nature that it would not

[29] Order 01-36, 2001 CanLII 21590 (BC IPC).

> otherwise be disclosed or available from sources to which the public has access. Moreover, this information is consistently treated by DDB in a manner that reflects the confidential nature of the information.[30]

[35] As noted above, the Ministry said that it accepted that DDB had supplied the draft advertising and campaign materials "in confidence" to the Ministry. The Ministry said, however, that it could not conclude that DDB had supplied the remaining information "in confidence", either implicitly or explicitly.[31]

[36] Apart from this brief statement, which contradicts DDB's position for the most part, I have no submissions on the issue of "explicit" confidential supply. Nor is there any documentary evidence before me on this issue, such as express confidentiality provisions in the Request for Proposal or the service agreement, or relevant correspondence on mutual expectations of confidentiality. The records themselves also give me no clues on this issue, as they contain no express statements or markers of confidentiality. I therefore find that the information was not "explicitly" supplied "in confidence".

[37] As for the issue of "implicit" supply "in confidence", it would have been helpful if DDB had provided documentary evidence supporting its position on this issue, such as an affidavit from a knowledgeable employee or an explanation of the other circumstances set out above. DDB's submission on this topic is little more than a bare assertion. It does not provide me with a sound basis on which I could conclude that DDB supplied the records in dispute "implicitly in confidence" to the Ministry. The records themselves also do not assist me in determining whether the information in them was supplied "implicitly in confidence" to the Ministry. Although one of the service providers said that the information in its records (unit pricing, rates and description of services) was "a confidential agreement" with DDB,[32] it did not provide any support for its position on this issue. I find that the information in dispute was not "implicitly" supplied "in confidence" to the Ministry.

Conclusion on s. 21(1)(b)

[38] For reasons given above, DDB has not, in my view, demonstrated that any of the information in issue was supplied, explicitly or implicitly, in confidence to the Ministry. Therefore, I find that s. 21(1)(b) does not apply to any of the information in dispute.

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[30] DDB's initial submission.
[31] Paragraph 4.16, Ministry's initial submission.
[32] See email of December 10, 2014.

Reasonable expectation of harm

[39] I have found that s. 21(1)(b) does not apply to the information in issue. Technically, I need not take the matter further, since this means that s. 21 does not apply. However, for completeness, I will deal with DDB's arguments on the s. 21(1)(c) harm issue, as well as those of the service providers which made a submission on this point.

Standard of proof for s. 21(1)(c)

[40] Numerous previous orders have set out the standard of proof for showing a reasonable expectation of harm to a third party's interests for the purposes of s. 21(1)(c), for example, Order 01-36.[33] More recently, the Supreme Court of Canada confirmed the applicable standard of proof for harms-based exceptions:

> [54] This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences".[34]

Significant harm to competitive position, interfere significantly with negotiating position

[41] DDB argued that harm could reasonably be expected to occur, as follows:

- disclosure of specific unit prices, estimated costs, hours worked and hourly rates would allow its competitors to undercut the pricing DDB is able to offer the Ministry and its other clients, causing significant harm to DDB's competitive position
- disclosure of this information would also harm DDB's negotiating position with its service providers, as the service providers would be pressured to offer their other clients the same favourable rates they offer to DDB

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[33] Order 01-36, 2001 CanLII 21590 (BC IPC) at paras. 38-39.

[34] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, citing *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3, at para. 94.

- the records contain identifying information on DDB's service providers, which is confidential; one of DDB's services is locating suitable service providers which requires an investment of time and resources
- draft advertisements and scripts are proprietary work products not available to the public
- disclosure of a cancelled invoice would cause DDB harm as it would provide a misleading picture of the commercial transactions between the parties[35]

[42] DDB has not persuaded me that harm, significant or otherwise, could reasonably be expected to occur on disclosure of the information in issue here. DDB's arguments are vague and speculative and do not meet the evidentiary requirement for demonstrating harm under s. 21(1)(c)(i), as set out above.

[43] I make the same finding about the two service providers' arguments, which were similar to DDB's.[36] The "fee breakdown and other pricing details", unit pricing, rates and descriptions of services they are concerned about are stated in general and high level terms and are not detailed. The two service providers have not explained or provided any support, documentary or otherwise, for their argument that disclosure of this information could reasonably be expected to result in significant harm or prejudice to their competitive position or future negotiations.

[44] DDB points to Order 283-1998[37] in support of its argument that previous BC orders have "consistently held" that disclosure of unit prices, hourly rates and cost estimates could reasonably be expected to harm a third party's negotiating position. In that order, former Commissioner Flaherty found that disclosure of the "detailed amounts" (apparently cost estimates, unit prices and hourly rates) of a third party's charges fall under s. 21(1)(c). However, it is significant that the information in issue in that case was part of bids or proposals from bid proponents, not, as is the case here, information flowing from a service agreement between a public body and a third party.

[45] Other orders have also found harm under s. 21(1)(c) could occur on disclosure of unit prices, hourly rates and cost estimates, where there was sufficient evidence to support such a finding. In Order 00-22,[38] for example, former Commissioner Loukidelis found that disclosure of unit pricing and hourly rates in contracts could reasonably be expected to harm a third party's interests

[35] Paragraphs. 38-43, DDB's initial submission.
[36] See letter of December 8, 2014.
[37] Order 238-1998, 1998 CanLII 2355 (BC IPC).
[38] Order 00-22, 2000 CanLII 14389 (BC IPC) at p. 10.

under s. 21(1)(c)(i). In Order 03-15,[39] the former Commissioner found that s. 21(1)(c)(i) applied to hourly rates. More recently, Adjudicator Alexander found that there could be harm under s. 21(1)(c)(i) on disclosure of "charge out rates" (hourly, weekly and monthly rates) in bid proposals.[40]

[46] DDB has not explained or provided evidence of how disclosure of the information in issue could cause harm under s. 21(1)(c)(i) to DDB or its service providers. For example, DDB provided no evidence of the nature of the competitive environment in which it and its service providers operate. Nor has DDB shown how disclosure of the disputed information could allow its competitors to undercut it in future or how this could result in any harm to DDB or its service providers, still less "significant" harm. The same applies to the service providers which provided submissions.

[47] I would add that DDB's decision to enter into agreements in future with the Ministry or its other clients will depend on the market conditions and other factors prevailing at the time. Each case is unique and there is no obligation on DDB to enter into a future service agreement under terms that are not to its advantage.[41] The same applies to DDB's service providers.

[48] Heightening competition is not harm for the purposes of s. 21(1)(c)(i). A contractor's resistance to disclosure also does not amount to harm. It is necessary to show an obstruction to actual negotiations.[42] DDB and the service providers have not done so.

[49] DDB also does not persuade me that disclosure of its service providers' names could cause harm under s. 21(1)(c)(i). Its assertion that these names are confidential and that it required time and resources for DDB to locate the service providers does not mean disclosure of this information could cause DDB harm under s. 21(1)(c)(i). DDB did not quantify the time and resources it expended in locating the service providers in this case, let alone show how disclosure of their names would cause it significant harm under s. 21(1)(c).

[50] I am mindful here of the finding in Order 01-36[43] that disclosure of a list of suppliers that the third party had compiled would not result in harm under s. 21(1)(c)(i). Order 02-04 also found that disclosure of a list of service providers did not meet the test for s. 21(1)(c)(i).[44]

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[39] Order 03-15, 2003 CanLII 49185 (BC IPC). This order referred to a number of BC and Ontario cases on unit prices and hourly rates.
[40] See Order F13-17, 2013 BCIPC No. 22 at para. 34 and its footnotes.
[41] See, for example, Order 03-15, at paras. 25 & 27, and Order F05-16, at para. 31, on these points.
[42] See See Order 01-20, para. 112, and Order F05-05, at para. 96, citing para. 61 of Order 04-06, 2004 CanLII 34260 (BC IPC).
[43] Order 01-36, 2001 CanLII 21590 (BC IPC).
[44] At paras. 29-32.

[51] Turning to the draft advertisements and scripts, DDB's only argument about alleged harm on disclosure was that these records are proprietary and not available to the public. I accept that these factors might, in appropriate cases, assist in an assessment of confidentiality of supply. It does not however mean there would be harm from disclosing the information.

[52] It is also not clear to me how disclosure of the cancelled invoice would be misleading or, even if it were, how this could reasonably expected to result in significant harm under s. 21(1)(c)(i). The Supreme Court of Canada expressed skepticism about a similar argument in *Merck Frosst*.[45]

[53] For the reasons given above, I find that s. 21(1)(c)(i) does not apply to the information in issue here.

Undue financial gain or loss

[54] Former Commissioner Loukidelis considered the meaning of "undue" financial loss or gain under s. 21(1)(c)(iii) in Order 00-10. He said that "undue" includes excessive, disproportionate, unwarranted, inappropriate, unfair or improper, having regard for the circumstances of each case. For example, if disclosure would give a competitor an advantage – usually by acquiring competitively valuable information – effectively for nothing, the gain to a competitor will be "undue". In that case, the former Commissioner found that s. 21(1)(c)(iii) applied to the disputed information, as its disclosure would effectively allow the applicant (a competitor of the third parties whose information was in dispute) to "reap a competitive windfall".[46]

[55] DDB's arguments about undue financial loss or gain under s. 21(1)(c)(iii) were along the same lines as those it made above, which are that:

- DDB's competitors could use its service providers' unit pricing to undercut DDB in future bids, resulting in undue financial loss to DDB and undue gain to the competitors
- DDB's service providers would be pressured to offer similar rates to DDB's competitors, resulting in undue financial loss to the service providers and undue financial gain to DDB's competitors
- the service providers' competitors could in turn undercut the service providers, leading to undue financial loss to DDB's service providers and undue financial gain to their competitors[47]

[45] At para. 224.
[46] See, for example, Order 00-10, 2000 CanLII 11042 (BC IPC) at pp. 17-19.
[47] Paragraphs 47-52, DDB's initial submission.

[56] DDB provided no evidence on the extent of any such loss or gain, let alone on whether that loss or gain would be "undue". I recognize that it is not always possible to quantify undue financial loss or gain,[48] but DDB has provided me with no specifics which I could use to make a finding on this point. Its arguments are speculative and vague. The same applies to the service provider which made a similar submission on this point.[49]

[57] I again refer to Order 01-36 which dealt with whether disclosure of a list of suppliers that the third party had compiled, at a cost of $5,000, would result in harm under s. 21(1)(c)(iii). Former Commissioner Loukidelis found that no such harm would occur, because the third party's expenditure was relatively small and it had compiled the list from publicly available sources.[50]

[58] I also note that each case is unique and it is thus difficult to see how this one would set a precedent for future agreements.[51] In addition, as previous orders have noted more than once, "simply putting contractors and potential contractors to government in the position of having to price their services competitively is not a circumstance of unfairness or 'undue' financial loss or gain".[52]

[59] There is no confident and objective evidentiary basis on which I can conclude that disclosure of the information in issue here could reasonably be expected to result in undue financial loss or gain to third parties. I find that s. 21(1)(c)(iii) does not apply in this case.

Conclusion on s. 21(1)(c)

[60] A recurring theme in orders and court decisions on harm is that it is crucial for a party resisting disclosure to provide "cogent, case specific evidence of harm" and "detailed and convincing evidence".[53] Fatally for its case, DDB provided no such evidence to support its submissions that harm under s. 21(1)(c) could reasonably be expected to result from disclosure of the information in issue. I find that s. 21(1)(c) does not apply here.

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[48] See Order 00-10 at p. 17, on this point.
[49] See email of December 10, 2014.
[50] At para. 64.
[51] See, for example, para. 39, Order F09-13, 2009 CanLII 42409 (BC IPC) on this point.
[52] See, for example, Order 03-15, para. 25, and Order F06-20, 2006 CanLII 37940 (BC IPC) at para. 20, on this point.
[53] See Order 02-50, 2002 CanLII 42486 (BC IPC) at paras. 124-137, which discussed the standard of proof in this type of case and summarized leading decisions on the reasonable expectation of harm.

Conclusion on s. 21

[61] I found that the information in issue in this case is commercial and financial information under s. 21(1)(a)(ii). I also found that some of the information was not "supplied" to the Ministry, that none of it was supplied "in confidence" and that consequently s. 21(1)(b) does not apply. Finally, I found that disclosure of the information in issue could not reasonably be expected to result in harm under s. 21(1)(c)(i) or (iii).

[62] DDB has not met its burden of proof in this case. I therefore find that s. 21(1) does not apply to the information in issue here.

CONCLUSION

[63] I require the Ministry to give the applicant access to the information in issue under s. 21(1) by February 11, 2015. The Ministry must concurrently copy me on its cover letter to the applicant, together with a copy of the records.

[64] I remind the Ministry to, when preparing the records for disclosure, remove the information to which it proposed to apply s. 15 and s. 22, as well as the additional information to which DDB argued s. 22 applied, as the NDP Caucus is not interested in these types of information.

December 29, 2014

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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