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Order F15-04

INTERIOR HEALTH AUTHORITY

Celia Francis
Adjudicator

January 27, 2015

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Summary: The applicant requested agreements for ultrasound services between the Interior Health Authority and Canadian Ultrasound Solutions. The adjudicator found that disclosure of the agreements would not cause harm to Canadian Ultrasound Solutions and ordered the Interior Health Authority to disclose the agreements to the applicant.

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 00-22, 2000 CanLII 14389 (BC IPC); Order F05-05, 2005 CanLII 14303 (BC IPC); Order F13-06, 2013 BCIPC 6 (CanLII); Order F13-07, 2013 BCIPC 8 (CanLII); Order 04-06, 2004 CanLII 34260 (BC IPC); Order F14-28, 2014 BCIPC 31 (CanLII); Order 06-20, 2006 CanLII 37940 (BC IPC); Order F14-04, 2014 BCIPC 4 (CanLII); Order F13-22, 2014 BCIPC 4 (CanLII); Order 08-22, 2008 CanLII 70316 (BC IPC); Order 01-36, 2001 CanLII 21590 (BC IPC); Order F14-58, 2014 BCIPC 62 (CanLII); Order 00-10, 2000 CanLII 11042 (BC IPC); Order F14-04, 2014 BCIPC 31 (CanLII); Order 02-50, 2002 CanLII 42486 (BC IPC).

Cases Considered: *Jill Schmidt Health Services Inc. v. British Columbia (Information and Privacy Commissioner)*, [2001] B.C.J. No. 79, 2001 BCSC 101; *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848, 2002 BCSC 603; *Imperial Oil Ltd. v. Alberta (Information and Privacy Commissioner)* 2014 ABCA 231; *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] In late December 2013, an individual ("the applicant") made a request to the Interior Health Authority ("IHA") under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for access to the "contract" between the IHA and Canadian Ultrasound Solutions ("CUS") for the provision of ultrasound services "outside of the HSA collective agreement". The IHA gave notice of the request under s. 23 of FIPPA to CUS and requested its views on disclosure of the responsive records (two service agreements). CUS asked the IHA to withhold some of the information in the two agreements under s. 21(1) of FIPPA, on the grounds that its disclosure could reasonably be expected to harm CUS's business interests.

[2] The IHA told CUS that it did not believe s. 21(1) applied and that it had decided to give the applicant complete access to the requested records. CUS asked that the Office of the Information and Privacy Commissioner ("OIPC") review the IHA's decision not to withhold the information under s. 21(1).

[3] Mediation of CUS's third-party request for review was not successful and the matter was set down for inquiry. Shortly before the inquiry took place, the IHA disclosed copies of the responsive records with some information withheld. During the inquiry, the OIPC received submissions from all of the parties in this case: the IHA (the public body), CUS (the third party) and the applicant.

ISSUE

[4] The issue in this case is whether the IHA is required by s. 21(1) of FIPPA to withhold the information in dispute. Under s. 57(3)(b) of FIPPA, CUS has the burden of proving that s. 21(1) applies.

DISCUSSION

Records in dispute

[5] CUS initially objected to the disclosure of "significant portions" of the requested information, which is in two service agreements between CUS and the IHA: an "Ultrasound Services – General" agreement ("Ultrasound Agreement") and an "Ultrasound Services – Echocardiography" agreement ("Echocardiography Agreement").[1] In its request for review, however, CUS "concede[d] that the overall contract value and the contract wording may be disclosed to the applicant" but said that "at the very least" the rate per scan information should be withheld.

[1] Letter of February 12, 2014 from CUS to the IHA.

[6] CUS's initial submission addressed only "rate per scan" information. CUS confirmed its concern about disclosure of this information after the inquiry and also raised concerns with the disclosure of certain other dollar amounts.[2] Accordingly, I have considered these other dollar amounts as well as the "rate per scan" information to be the information in issue in this case. I will refer to both as "pricing information". Therefore, the information in dispute is as follows:

Ultrasound Agreement

- "rate per scan" information in Table 2 of Schedule B (p. 20)
- "rate per scan" column of the invoice templates (pp. 21-23)
- dollar amounts (middle of p. 18, bottom of pp. 21-23)

Echocardiography Agreement

- "rate per scan" information (p. 15)
- "rate per scan" information in the invoice templates (pp. 17-20)[1]
- dollar amounts (bottom of pp. 15 and 17-20)

Third party business interests

[7] 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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> …
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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…

[2] See CUS's email of January 14, 2015 to the OIPC.

[8] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies.[3] All three parts of the s. 21(1) test must be met in order for the information in dispute to be properly withheld.

[9] As CUS has the burden of proof regarding s. 21(1), it must first demonstrate that disclosing the pricing information in issue would reveal commercial, financial, labour relations, scientific or technical information of, or about, a third party. Next, CUS must demonstrate that the pricing information was supplied to the IHA, implicitly or explicitly, in confidence. Finally, CUS must demonstrate that disclosure of the pricing information could reasonably be expected to cause one of the harms set out in s. 21(1)(c).

[10] 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 CUS.

Is the information financial or commercial information?

[11] FIPPA does not define "commercial" or "financial information". However, previous orders have held that hourly rates, global contract amounts, breakdowns of these figures, prices, expenses and other fees payable under contract are both "commercial" and "financial" information of or about third parties.[4]

[12] CUS argued that the pricing information is "commercial information" as it is associated with the buying, selling or exchange of goods or services.[5] The IHA did not take a position on this issue.[6] The applicant referred to the withheld pricing details as financial information.[7]

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

[13] The pricing information consists of the amount of money per scan and certain other dollar amounts that the IHA pays CUS for performing several types of ultrasound services. I am satisfied that this information is both "financial" and "commercial" information of or about CUS, as previous orders have interpreted these terms.

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[3] 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).

[4] 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 BCIPC 6 (CanLII) at para. 16, and Order F13-07, 2013 BCIPC 8 (CanLII) at para. 36. In Order 04-06, 2004 CanLII 34260 (BC IPC), at para. 36, former Commissioner Loukidelis found that such information was also "about" the public body".

[5] Paragraph 9, CUS's initial submission.

[6] Paragraph 12, IHA's initial submission.

[7] Paragraphs 2-3, applicant's initial submission.

Was the information "supplied in confidence"?

[14] 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".[8] I will first deal with whether the information was "supplied" for the purposes of s. 21(1)(b).

"Supplied"

[15] A number of orders have found that information in an agreement or contract will not normally qualify as "supplied" by the third party for the purposes of s. 21(1)(b), because the information is the product of negotiations between the parties, even where the information was subject to little or no back and forth negotiation. There are two exceptions to this general rule:

- where the information the third party provided was "immutable" – and thus not open or susceptible to negotiation – and was incorporated into the agreement without change
- where the information in the agreement could allow someone to draw an "accurate inference" about underlying information a third party had supplied in confidence to the public body but which does not expressly appear in the agreement[9]

[16] Key judicial review decisions have confirmed the reasonableness of these findings.[10]

[17] CUS acknowledged that the terms of the agreements and their total value were "susceptible to negotiation". However, CUS said that it "supplied" the pricing information to the IHA through the request for proposal process and that this information was "immutable" and not negotiated before being included in the agreements.

[18] The IHA stated that the "contract was not only susceptible to negotiation but was in fact negotiated". It said the pricing or "fee rate" information in issue in the two agreements was the subject of a negotiation process between CUS and

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[8] See Order 01-39, 2001 CanLII 21593 (BC IPC), at para. 26, for example. See also Order F14-28, 2014 BCIPC 31 (CanLII), at paras. 17-18.

[9] See, for example, Order 01-39 2001 CanLII 21593 (BC IPC) at para. 45, Order 06-20, 2006 CanLII 37940 (BC IPC), at para. 11 (also citing Order 03-15, 2003 CanLII 49185 (BC IPC) at paras. 66-67), Order F14-04, 2014 BCIPC 4 (CanLII), at para. 12, and Order F13-22, 2014 BCIPC No. 4 (CanLII) at para. 17.

[10] See Order F08-22, 2008 CanLII 70316 (BC IPC), at para. 58, referring to *Jill Schmidt Health Services Inc. v. British Columbia (Information and Privacy Commissioner)*, [2001] B.C.J. No. 79, 2001 BCSC 101 and *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848, 2002 BCSC 603, as well as to relevant Ontario decisions.

the IHA. The IHA provided affidavit evidence on this point from its Director, Business Development, who had overall responsibility for the Request for Proposal process which led to these agreements. The Director deposed that he took part in a teleconference with CUS on the agreements to discuss its response to the Requests for Proposal and that, as a result of this discussion, CUS agreed to adjust some of its pricing information.[11]

[19] The applicant suggested that CUS's admission that the total value of the contracts was "susceptible to negotiation" meant that the price per scan was also negotiated. Even if the IHA accepted CUS's bid on price per scan, he argued, this did not mean it was not negotiated. He referred to Order 06-20, at para. 11, in support of his point on this issue.[12]

[20] CUS did not explain or provide any documentary support (such as an affidavit from a knowledgeable employee) for its position on "supply". CUS's assertion on this point also contradicts the IHA's sworn evidence that the pricing information was susceptible to negotiations and was negotiated.

[21] CUS referred to *Imperial Oil Ltd. v. Alberta (Information and Privacy Commissioner)*[13] ("*Imperial Oil*") in support of its position that the pricing information in dispute here was supplied because it was "immutable" and not negotiated.[14] *Imperial Oil* concerned a request for a remediation agreement, to which were attached five letters from expert consultants. The facts in the *Imperial Oil* case differ from those before me in this inquiry, so I find that *Imperial Oil* does not assist CUS. Furthermore, what the Alberta Court of Appeal said in that case is consistent with BC orders and court decisions, which have found that the information in agreements or contracts is negotiated and generally does not qualify as "supplied" information, unless it would allow one to accurately infer information the third party had supplied in confidence. The Alberta Court of Appeal also recognized that information that is incorporated unchanged into a contract, and so in essence is immutable, is "supplied" for the purposes of s. 21. In this case, CUS's assertions and lack of supporting evidence do not satisfy me that the pricing information is immutable and so qualifies as "supplied" information under s. 21.

[22] I accept the IHA's evidence that the pricing information in issue in this case was susceptible to negotiation and was negotiated between the parties to the agreements. As former Commissioner Loukidelis said in Order 06-20:[15]

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[11] Paragraphs 21-22, IHA's initial submission; paras. 8-9, first Harris Affidavit; paras. 5-11, IHA's reply submission; paras. 3-6, second Harris Affidavit.
[12] Paragraph 2, applicant's reply submission.
[13] 2014 ABCA 231.
[14] Paragraph 14, CUS's initial submission.
[15] 2006 CanLII 37940 (BC IPC).

> [15] This case falls squarely within the many orders that have found that the contract price for services to a public body is not "supplied" information within the meaning of s. 21(1)(b). The fact that the IHA may have accepted a contract price that Retirement Concepts generated through application of its business model does not make the amount that the parties agreed upon information that is proprietary to Retirement Concepts. Nor does it mean that the price bargain struck between the IHA and Retirement Concepts constitutes immutable or underlying confidential information supplied by Retirement Concepts.

[23] I find that the pricing information in issue here was not "supplied" within the meaning of s. 21(1)(b).

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

[24] 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:[16]

> [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.
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> …
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> [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;
> 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;

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

3. not otherwise disclosed or available from sources to which the public has access;
4. prepared for a purpose which would not entail disclosure.

[25] CUS said that the pricing information is confidential and that the parties have consistently treated it as such. It also pointed to two clauses in the agreements which in its view show that the information is confidential.[17] Both the IHA and the applicant submit that the clauses mentioned by CUS are not relevant to establishing confidentiality of the pricing information.[18] I agree. The first clause, paragraph 4 of Article 1.1 of each agreement, is a definition of the term "confidentiality" as used in the agreements. It refers to information whose unauthorized disclosure could be prejudicial to IHA's interests and says this information is protected under FIPPA, s. 51 of the *Evidence Act* and Schedule C ("Privacy Protection Schedule") to the agreements. This has nothing to do with confidentiality of supply of the pricing information in the agreements. The second clause CUS referred to, Article 18.2 in each agreement, states that the IHA acknowledges that CUS may, in consultation with the IHA, communicate generally with the public on the services CUS provides. An agreement on conditions for communicating with the public on services does not equate to an agreement to keep the contents of a contract confidential.

[26] Beyond the two clauses mentioned above, CUS did not provide any other support for its position that the pricing information is confidential and that the parties have consistently treated it as such. The IHA does not support CUS on this point. In addition, while the Request for Proposal states that the proposals would be kept confidential, there was no similar promise regarding any agreements that might flow from the Request for Proposal process. Further, the agreements themselves are silent on the issue of confidentiality. Indeed, Article 12.1 in each agreement states that contracts and contract information may be released under FIPPA.

[27] CUS has not, in my view, established that the pricing information in issue was supplied, implicitly or explicitly, "in confidence". I find that this information was not supplied, implicitly or explicitly, "in confidence" for the purposes of s. 21(1)(b).

Conclusion on s. 21(1)(b)

[28] I found above that the information in issue was not "supplied", implicitly or explicitly, "in confidence". I therefore find that s. 21(1)(b) does not apply to the information in dispute in this case.

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[17] Paragraph 16, CUS's initial submission.
[18] Paragraphs 25-28, IHA's initial submission; paras. 5-6, applicant's reply submission.

Reasonable expectation of harm

[29] I have found that s. 21(1)(b) does not apply to the information in issue. Since this means that s. 21(1) does not apply, technically I need take the matter no further. However, for completeness, I will deal with CUS's arguments on the s. 21(1)(c) harm issue. For convenience, I reproduce the relevant provisions here:

> 21(1) The head of a public body must refuse to disclose to an applicant information
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> …
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
>
> …
>
> (iii) result in undue financial loss or gain to any person or organization, or…

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

[30] 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.[19] 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".[20]

[31] Previous orders have said that the ordinary meaning of "undue" financial loss or gain under s. 21(1)(c)(iii) includes excessive, disproportionate,

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

[20] *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. See also Order F13-22, 2014 BCIPC 31 (CanLII), at para. 13, and Order F14-58, 2014 BCIPC 62 (CanLII), at para. 40, on this point.

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".[21]

Significant harm to competitive position, interfere significantly with negotiating position, undue loss or gain

[32] CUS argued that disclosure of the pricing information could reasonably be expected to harm its competitive and negotiating position in future request for proposal processes, and to cause it undue financial loss, as follows:

- it is a small company and its revenues come from a small number of contracts
- the loss of even one contract could cause it significant harm and "have a sizeable impact on its competitive position"
- the Request for Proposal that led to these agreements awarded up to 50 out of 75 points for pricing
- CUS "carefully crafted" its pricing information, based on its knowledge of its overhead and operating costs
- CUS's business is "low-margin and volume-based", "[a]s evidenced by the Pricing Information" in the two agreements
- the pricing information would "provide commercially valuable insight" into CUS's method of business and pricing strategy
- CUS would therefore be "particularly vulnerable" to competitors and at a "real disadvantage" in preparing future responses to requests for proposal[22]

[33] The IHA and the applicant both argued that the CUS had not provided evidence to show how disclosure of the pricing information would reveal that its business is low-margin and volume-based.[23] I agree. CUS also did not explain how the pricing information would provide "commercially valuable insight" into its business methods and pricing strategy and this is not obvious from the information itself. Moreover, as the applicant suggested,[24] no one can tell what

[21] See, for example, Order 00-10, 2000 CanLII 11042 (BC IPC) at pp. 17-19. See also Order F14-04, 2014 BCIPC 31 (CanLII) at paras. 60-63, for a discussion of undue financial loss or gain in the context of a request for a bid proposal.
[22] Paragraphs 19-21, CUS's initial submission.
[23] Paragraph 14, IHA's reply submission; para. 8, applicant's reply submission.
[24] Paragraph 7, applicant's reply submission.

the rules might be for future requests for proposal, if indeed there are any.[25] The IHA or another public body might also have different requirements in the future. The factors and market conditions that influenced CUS in offering its pricing in this case might be different in future requests for proposal. CUS can be expected to price its services differently according to factors in play in any given future situation and attempt to achieve the best bargain for itself in the process.

[34] CUS did not say what its total revenues are or what proportion of its revenues flow from these contracts. I also have no information on whether CUS is performing services at the anticipated volumes set out in the Request for Proposal and agreements and thus what the IHA is paying CUS to perform the various ultrasound services. The Request for Proposal says that, if the IHA is successful in recruiting staff, the anticipated service volumes in the contract will be reduced accordingly.[26] Thus, it is possible that the actual volume of services CUS is performing is lower than anticipated and that CUS is not actually receiving the maximum amount set out in the agreements. CUS also did not provide any information on the competitive environment in which it operates and how its relative size is relevant to determining any impact on its revenues from disclosure of the information.

[35] All these things would have assisted me in determining if disclosure of the pricing information could reasonably be expected to cause CUS "undue" financial loss or cause significant harm to CUS's competitive or negotiating position, for the purposes of s. 21(1)(c). 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" for the purposes of s. 21(1)(c)(iii).[27] 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.[28] CUS has not done so.

Conclusion on s. 21(1)(c)

[36] A party resisting disclosure must provide "cogent, case specific evidence of harm" and "detailed and convincing evidence".[29] CUS has provided no such

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[25] The Request for Proposal stated that the contract was to deal with short-term staffing shortages.

[26] Article 3.2, third paragraph, of the Request for Proposal (Exhibit A to the Macaspac Affidavit).

[27] See, for example, Order 03-15, 2003 CanLII 49185 (BC IPC), at para. 25, and Order F06-20, 2006 CanLII 37940 (BC IPC), at para. 20, on this point.

[28] See See Order 01-20, 2001 CanLII 21574 (BC IPC), at para. 112, and Order F05-05, 2005 CanLII 14303 (BC IPC), at para. 96, citing para. 61 of Order 04-06, 2004 CanLII 4260 (BC IPC).

[29] 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.

evidence to support its submission that harm under s. 21(1)(c) could reasonably be expected to result from disclosure of the information in issue. CUS has not persuaded me that disclosure of the pricing information could reasonably be expected to cause it harm under s. 21(1)(c). I find that s. 21(1)(c) does not apply here.

Conclusion on s. 21

[37] I have found that the information in issue in this case is "commercial" and "financial" information under s. 21(1)(a)(ii). I have also found that the information was not, implicitly or explicitly, "supplied in confidence" to the IHA and that consequently s. 21(1)(b) does not apply. Finally, I have 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).

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

CONCLUSION

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

January 27, 2015

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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