Office of the Information & Privacy Commissioner for British Columbia

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Order F19-23

MINISTRY OF ATTORNEY GENERAL

Celia Francis
Adjudicator

May 21, 2019

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Summary: An applicant requested access to records related to a contract between the Ministry of Attorney General's Liquor Distribution Branch (LDB) and Brains II Canada Inc. and/or Brains II Solutions Inc. (Brains II). The Ministry decided to grant partial access to the records. Brains II made a third-party request for review of the Ministry's decision to disclose information, saying all of it fell under s. 21(1) (harm to third-party business interests). The adjudicator found that some of the information was Brains II's commercial information and that some of this information was supplied in confidence. The adjudicator found, however, that Brains II had not established that harm under s. 21(1)(c) could reasonably be expected to result from disclosure of the records. The adjudicator confirmed LDB's decision to disclose the information.

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

INTRODUCTION

[1] An applicant requested access under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to records related to a contract between the Ministry of Attorney General's Liquor Distribution Branch (LDB) and Brains II Canada, Inc. and/or Brains II Solutions, Inc. (collectively, Brains II), for the period March 2014 to September 2017. LDB gave notice of the request under s. 23 of FIPPA to Brains II, the third party. Brains II objected to the disclosure of the records, saying they were confidential business records containing trade secrets. LDB then told Brains II that it had decided to disclose the records in severed form. LDB said it would withhold some of the information under s. 21(1) (harm to

third-party business interests) and s. 22(1) (harm to third-party personal privacy) of FIPPA.

[2] Brains II requested a review by the Office of the Information and Privacy Commissioner (OIPC) of LDB's decision to disclose information. Mediation of the request for review by the OIPC was not successful and the matter proceeded to inquiry. The OIPC received submissions on s. 21(1) from Brains II, LDB and the original access applicant.

ISSUE

[3] The issue before me is whether LDB is required by s. 21(1) to withhold portions of the requested records. Under s. 57(3)(b) of FIPPA, Brains II has the burden of proving that the applicant has no right of access to the records.

DISCUSSION

Preliminary matter

[4] LDB's decision letter and the records indicate that LDB also decided to withhold some information under s. 22(1).[1] However, I am tasked here with deciding on LDB's decision to disclose information, not its decision to withhold information. I will not, therefore, consider s. 22(1) in this order. I will also not consider whether s. 21(1) applies to the information LDB decided to withhold under that section. The access applicant is, of course, free to request a review of LDB's decision to withhold information under ss. 21(1) and 22(1) at a later date.

Information in dispute

[5] LDB retrieved 193 pages of responsive records, which are as follows:

- Request for proposal (RFP), for point of sale and technical equipment repair and maintenance for BC liquor stores (pp. 1-27);
- Brains II's proposal in response to the RFP, including photographs, appendices and safe implementation checklist (checklist) (pp. 28-114, 143-170, 183);[2]
- Spreadsheets (pp. 115-142);
- Letters (pp. 171, 180);
- Statement of work (pp. 172-173);

[1] It has marked a small amount of information in the emails and Brains II's proposal as falling under s. 22(1).

[2] Page 183 is a signed copy of Schedule B, a blank copy of which formed part of the RFP (p. 26). LDB appeared to link p. 183 to the amendment (p. 182) but I see no connection between the two. Rather, p. 183 appears to form part of Brains II's proposal.

- Scoring guide (pp. 174-176);
- Comparison of store equipment warranty and repair/maintenance (comparison) (p. 177);
- Meeting minutes (pp. 178-179);
- Direct award justification (p. 181);
- Amendment (p. 182); and
- Emails (pp. 184-193).

[6] Brains II said that the records should be withheld, in full, under s. 21(1). LDB agreed to withhold the following under s. 21(1): most of the information in Brains II's proposal, the scoring guide and the comparison; and all of the checklist, photographs and appendices.[3] LDB decided to disclose all of the RFP, spreadsheets, letters, statement of work, direct award justification, emails, amendment and meeting minutes. The information that LDB proposes to disclose is the information in dispute.

Section 21 – Third-party business interests

[7] The relevant parts of s. 21(1) of FIPPA in this case 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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> (i) trade secrets of a third party, or
> (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
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
> ...

[8] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies.[4] All three parts of the s. 21(1) test must be met in order for the information in dispute to be properly withheld. First, Brains II must demonstrate that disclosing the information in issue would reveal: trade secrets; or commercial, financial, labour relations, scientific or technical

[3] The checklist, photographs and appendices appear to form part of Brains II's proposal.

[4] See, for example, Order 03-02, 2003 CanLII 49166 (BCIPC), Order 03-15, 2003 CanLII 49185 (BCIPC), and Order 01-39, 2001 CanLII 21593 (BCIPC).

information of, or about, a third party. Next, Brains II must demonstrate that the information was supplied, implicitly or explicitly, in confidence. Finally, it must demonstrate that disclosure of the information could reasonably be expected to cause one or more of the harms set out in s. 21(1)(c).

[9] I find below that s. 21(1) does not apply. This is because, while I accept that ss. 21(1)(a) and (b) apply to some of the information, Brains II has not established a reasonable expectation of harm under s. 21(1)(c).

Section 21(1)(a) – type of information

[10] **Commercial information**: Brains II said that the information is its commercial information.[5] LDB said that the records "may contain commercial or financial information of [Brains II] in the form of contracts."[6] The applicant did not address this issue directly.

[11] FIPPA does not define "commercial" information. However, previous orders have held that "commercial information" relates to commerce, or the buying, selling, exchanging or providing of goods and services. The information does not need to be proprietary in nature or have an actual or potential independent market or monetary value.[7]

[12] Proposal, statement of work, direct award justification, amendment, letters and emails: Some of the information that LDB proposes to disclose in these records concerns the products and services Brains II proposed to supply to LDB, descriptions of its methods and equipment for supplying those things, and its business history. Guided by past orders, I am satisfied that this information is commercial information of or about Brains II. I find that s. 21(1)(a)(ii) applies to this information.

[13] However, some of the information that LDB proposes to disclose in Brains II's proposal (on pages 17-41) consists of the RFP criteria and requirements and is taken directly from the RFP. It is not information of or about Brains II and Brains II did not explain how it might be. I find that this information is not information, commercial or otherwise, of or about Brains II for the purposes of s. 21(1)(a).

[14] RFP: LDB clearly authored this record. It sets out the criteria and requirements for the RFP process, such as the services and staffing levels LDB asked proponents to provide. It does not mention Brains II and contains no information of or about it.

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[5] Brains II's initial submission, paras. 12-14.
[6] Ministry's response submission, para. 21.
[7] See Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17, and Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62.

[15] Spreadsheets of BC Liquor stores: These records also contain no information of or about Brains II. It appears that they formed part of the RFP but this is not clear. I find that the information in these records is not information, commercial or otherwise, of or about Brains II for the purposes of s. 21(1)(a).

[16] Scoring guide and comparison: The portions of these records that LDB proposes to disclose are the criteria by which LDB evaluated the proposals of Brains II and the other proponents that responded to the RFP. These portions contain no information of or about Brains II. Brains II did not explain how any of this information is commercial information of or about it. I find that the information at issue in these records is not information, commercial or otherwise, of or about Brains II for the purposes of s. 21(1)(a).

[17] Meeting minutes: This record is the minutes of a November 2015 meeting between LDB and the proponents who responded to the RFP, including Brains II.[8] It appears to be an LDB record and lists a series of bulleted questions and issues that LDB dealt with at the meeting. Although it lists the individual proponents who attended the meeting, there is no indication of which proponent raised which question or issue. There is no information of any kind of or about Brains II, apart from its name indicating it was present at the meeting. While Brains II's name may be commercial information, I find that the rest of the information in this record is not information, commercial or otherwise, of or about Brains II for the purposes of s. 21(1)(a).

[18] **Trade secrets:** Brains II also argued that the records contain its trade secrets. Given my finding that some of the information at issue is Brains II's commercial information and the rest is not information of or about Brains II at all, I do not need to consider whether any of this information is also trade secrets of Brains II. I note, in any case, that LDB has decided to withhold the specific information in the proposal that Brains II cited as its trade secrets.

Conclusion on s. 21(1)(a)

[19] I found that s. 21(1)(a)(ii) applies to some of the information that LDB proposes to disclose in the proposal. It also applies to all of the statement of work, the direct award justification, the amendment, letters and emails. I consider below whether s. 21(1)(b) applies to this information.

[20] As I found that s. 21(1)(a)(ii) does not apply to the balance of the information in dispute, the Ministry is not required to refuse to disclose it under s. 21.

[8] Pages 178-179.

Section 21(1)(b) – supply in confidence

[21] The next step is to determine whether the information in issue was "supplied, implicitly or explicitly, in confidence." The information must be both "supplied" and supplied "in confidence."[9]

[22] I will consider whether s. 21(1)(b) applies to the information I found falls under s. 21(1)(a)(ii):

- Original portions of Brains II's proposal; and
- All of the statement of work, the direct award justification, amendment, letters and emails.

[23] **Supplied:** BC orders have consistently 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. This is so, 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" (i.e., not open or susceptible to negotiation) and was incorporated into the agreement without change; or
- Where the information in the agreement could allow someone to draw an "accurate inference" about underlying information a third party had supplied in confidence but which does not expressly appear in the agreement.[10]

[24] Order 01-39 also said this about the "supply" element in contracts:

> By their nature, contracts are negotiated between the contracting parties. The fact that the requested records are contracts therefore suggests that the information in them was negotiated rather than supplied. It is up to CPR, as the party resisting disclosure, to establish with evidence that all or part of the information contained in the contracts including their schedules was

[9] See, for example, Order F17-14, 2017 BCIPC 15 (CanLII), at paras. 13-21, Order 01-39, 2001 CanLII 21593 (BC IPC), at para. 26, and Order F14-28, 2014 BCIPC 31 (CanLII), at paras. 17-18.
[10] See, for example, Order 01-39 2001 CanLII 21593 (BC IPC) at para. 45, and Order F13-22, 2014 BCIPC No. 4 (CanLII) at para. 17. Key judicial review decisions have confirmed the reasonableness of this approach. 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 *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848, 2002 BCSC 603 and *K-Bro Linen Systems Inc. v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 904.

> not negotiated, as would normally be the case, but was "supplied" within the meaning of s. 21(1)(b).[11]

[25] Brains II said that the records include contracts. It argued, however, that they contain immutable information in the form of "fixed costs and specific product information." It said that this information was non-negotiable, was incorporated into the agreements without change and was, therefore, supplied within the meaning of s. 21(1)(b).[12] It did not point to specific information in the records that, in its view, was "immutable" or "non-negotiable."

[26] The applicant generally disputed Brains II's arguments.[13]

[27] LDB noted that previous orders have found that contract terms are generally negotiated, not supplied. It said it was, therefore, unable to conclude that the information was supplied.[14]

[28] Two of the records are contracts or agreements:

- Statement of work: The May 2015 statement of work (pp. 172-173) sets out the work Brains II would do for LDB according to specified pricing and an agreed-upon schedule, with the scope of the work to be determined by LDB. Brains II did not explain how the information in this record was immutable and incorporated unchanged into the statement of work. This is not evident from the record itself. On the contrary, it is referred to as an "agreement" and is signed by both parties.[15] This supports the conclusion that Brains II and LDB agreed on the terms of the statement of work. I find that the information in the statement of work was negotiated, rather than supplied for the purposes of s. 21(1)(b).[16]

- Amendment: The July 2015 amendment (p.182) sets out the terms of a modified agreement between Brains II and LDB. In it, the parties state that they agree to modify their agreement in accordance with specified conditions. Both parties signed the agreement. This supports the conclusion that Brains II and LDB agreed on the terms of the amendment. Brains II did not explain how the information in this record was immutable and incorporated unchanged into the amendment. This is also not evident from the record itself. I find that the information in the amendment was not supplied but negotiated for the purposes of s. 21(1)(b).

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[11] At para. 43.
[12] Brains II's initial submission, paras. 16-18.
[13] Applicant's response submission, p. 3.
[14] LDB's response submission, para. 28.
[15] It appears to relate to an earlier agreement between Brains II and LDB.
[16] Ministry's response submission, para. 28.

[29] The remaining records are not agreements or contracts. Some orders have considered the issue of supply in relation to records other than contracts. In Order F19-11,[17] for example, I considered whether a business had supplied a proposal to the public body. Order 01-36[18] considered whether a tire recycling business had supplied a list of suppliers to the public body.

[30] The remaining records are these:

- Direct award justification: This July 2015 record, a form on LDB letterhead, extended Brains II's contract with LDB.[19] Its contents indicate that LDB staff generated the information in it. I could identify no information in this record that Brains II may have supplied. Brains II did not explain how it might have done so or how disclosure might reveal underlying supplied information. I find that the information in this record was not supplied for the purposes of s. 21(1)(b).

- Proposal: This December 2015 record is Brains II's proposal in response to the RFP. The record itself originated with Brains II. I found above that some of the information that LDB proposes to disclose was taken directly from LDB's RFP and is therefore not Brains II's information. However, I accept that Brains II generated the remaining information that LDB proposes to disclose: introductory remarks; descriptions of Brains II's work for other customers and its staff; its business processes; and its responses to the RFP requirements. I find that this information was "supplied" for the purposes of s. 21(1)(b).

- Letters: The January 2016 letter is from LDB to Brains II.[20] LDB evidently created and sent this letter. I could identify no information in this record that Brains II may have supplied. I find that it was not "supplied" to LDB for the purposes of s. 21(1)(b).

  The March 2013 letter is from WorkSafeBC to LDB and is about Brains II.[21] I find that it contains information that was "supplied" for the purposes of s. 21(1)(b).[22]

- Emails: These records are strings of emails between Brains II, LDB and another proponent.[23] I find that the information in the emails to LDB was

[17] Order F19-11, 2019 BCIPC 13 (CanLII).
[18] Order 01-36, 2001 CanLII 21590 (BC IPC).
[19] Page 181.
[20] Page 171.
[21] Page 180.
[22] Order 02-04, 2002 CanLII 42429 (BC IPC), at para. 15, said that a third party need not have supplied information directly to the public body in order for the information to have been supplied for the purposes of s. 21(1)(b).
[23] Pages 184-193.

> supplied for the purposes of s. 21(1)(b). As for the emails from LDB, I could identify no information in outgoing emails that Brains II may have supplied. I find, therefore, that the information in the emails from LDB was not supplied.

[31] **In confidence:** A number of orders have discussed examples of how to determine if third-party information was supplied, explicitly or implicitly, "in confidence" under s. 21(1)(b), for example, Order 01-36:[24]

> [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;
> 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.

[32] I will consider the "in confidence" part of the s. 21(1)(b) test for the information I found was "supplied":

- Portions of Brains II's proposal;
- Letter of March 2013; and
- Brains II's emails to LDB.

[33] Brains II said that it supplied the information, implicitly in confidence, to LDB. It said it has consistently treated the information "in a manner that indicated

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

a concern for confidentiality."[25] It added that it has protocols to ensure information was not leaked (for example, encrypted servers and secure email), the information was not available publicly and the associated information and records were prepared for a purpose that would not entail disclosure.[26]

[34] The applicant generally disputed Brains II's submission. The applicant said that Brains II had not offered any evidence that Brains II and LDB had agreed to keep the information confidential or that LDB had treated the information in confidence.[27]

[35] LDB said that some of the information at issue is publicly available online on Brains II's website. It said that the information, therefore, did not meet elements 2 and 3 in paragraph 31 above. LDB said it was, therefore, unable to conclude that the information was supplied "in confidence."[28] LDB did not say, however, which information was available on Brains II's website or provide documentary evidence in support of this point, such as printouts from the relevant website pages.

[36] Proposal: The opening paragraph of Brains II's proposal states that it contains Brains II's proprietary and confidential information.[29] The RFP states that LDB would receive and hold in confidence all proposals, subject to FIPPA. I am satisfied, therefore, that Brains II submitted its proposal in confidence. I found above that some of the information in the proposal was "supplied" for the purposes of s. 21(1)(b). I find that this supplied information was supplied "in confidence" within the meaning of s. 21(1)(b).

[37] Letter of March 2013: Brains II did not explain how this letter from WorkSafeBC to LDB was supplied "in confidence." LDB said nothing about whether this information was supplied in confidence. The letter itself contains no explicit markers of confidentiality. There is no basis for finding that the information in this letter was supplied "in confidence" for the purposes of s. 21(1)(b).

[38] Emails: Brains II did not explain how the information in its emails to LDB was supplied "in confidence." LDB said nothing about whether this information was supplied in confidence. The emails contain a statement in the sender's signature block that the email may contain Brains II's confidential and privileged information. However, this is a standard boilerplate statement that does not connect to the individual contents of the emails. Brains II has not, in my view,

[25] Brains II's initial submission, para. 21.
[26] Brains II's initial submission, paras. 19-23.
[27] Applicant's response submission, p. 3.
[28] LDB's response submission, paras. 29-31.
[29] Page 30.

established that the information in its outgoing emails was supplied "in confidence" for the purposes of s. 21(1)(b).

Conclusion on s. 21(1)(b)

[39] I found that some of the information in Brains II's proposal was supplied in confidence for the purposes of s. 21(1)(b). However, the rest of the information in dispute was either not "supplied" or not supplied "in confidence."

Harm under s. 21(1)(c)

Standard of proof for harms-based exceptions

[40] Numerous orders have set out the standard of proof for showing a reasonable expectation of harm.[30] 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".[31]

[41] Moreover, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*,[32] Bracken J. confirmed that it is the release of the information itself that must give rise to a reasonable expectation of harm.

Discussion and findings

[42] I found above that ss. 21(1)(a)(ii) and (b) did not apply to some of the information at issue. Technically, I need not consider whether s. 21(1)(c) applies

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[30] For example, Order 01-36, 2001 CanLII 21590 (BCIPC), at paras. 38-39.
[31] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* [*Community Safety*], 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.
[32] *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875, at para. 43.

to this information. However, for completeness, I will consider Brains II's harm arguments respecting all of the information in dispute.

[43] Brains II made a number of arguments in support of its position on harm, which I will discuss in more detail below.[33] The applicant disputed what it called Brains II's "bald statements." It added that Brains II had provided no evidence regarding any loss it would suffer if the information were disclosed.[34] LDB said it was unable to conclude that release of the records would result in harm under s. 21(1)(c) to Brains II.[35] It did not explain why it thought so.

- Brains II said that the information at issue is trade secrets, including Brains II's fixed prices, specific product information and industry partnership information.
    - This is not information in dispute because LDB proposes to withhold this type of information, so I do not need to decide if its disclosure would cause harm under s. 21(1)(c).

- Brains II said that disclosure would lead to a significant loss in the economic value of the information.
    - Brains II did not explain how the information has economic value.
    - It did not explain what it meant by "significant loss" and did not attempt to quantify any such loss.
    - It did not explain how disclosure of the information could reasonably be expected to result in any such loss to it.

- Brains II said that the IT industry is "fiercely competitive on price and quality of service."
    - Brains II did not name its competitors or explain how the IT industry is "fiercely competitive."
    - It did not give examples or explain how its prices and services compare with those of its competitors.

- Brains II said that it would, more likely than not, "suffer significant financial harm" if the information were disclosed, as a result of its competitors imitating and replicating Brains II's "unique business approach," thus decreasing the value of the information.

[33] Brains II's initial submission, para. 28. The quotations are also from this paragraph.
[34] Applicant's response submission, pp. 3-4.
[35] LDB's response submission, para. 33.

- Brains II did not explain how its "business approach" is "unique" and did not point to specific portions of the records disclosure of which might reveal this type of information.
- Brains II did not explain why its competitors might want to imitate and replicate its business approach.

- Brains II said that Brains II would "lose its edge in project bid tendering, as well as it may face a decline in market share as competitors leverage Brains II's proprietary business model."
  - Brains II did not explain what it meant by its "proprietary business model," did not point to specific portions of the records disclosure of which would reveal such information and did not explain how this information gives it an "edge."
  - Brains II did not explain how its competitors could "leverage" information on its business model in future bidding processes nor how this might lead to Brains II losing its "edge" or market share.
  - It did not explain how these things could reasonably be expected to result in significant harm to it under s. 21(1)(c).
  - Future bidding processes would involve different conditions, criteria and requirements. Presumably Brains II would not simply reproduce past bids but tailor any future proposals to fit these new RFPs.
  - The records are some years old. Brains II did not explain how disclosure of the information in dispute could reasonably be expected to harm its competitive or negotiating position in an RFP process years later.

- Brains II said that this [loss of "edge"] would result, not just in a heightening of competition, but in the "total displacement" of Brains II's market share.
  - Brains II did not explain what its market share is nor how disclosure of the information at issue might have the result it fears.
  - It did not explain how this could lead to significant harm to it under s. 21(1)(c).

[44] Brains II also did not address the specific information that LDB proposes to disclose and link its disclosure to the anticipated harms. This information consists of the following:

- LDB's own RFP, which it presumably posted on the public BC Bid procurement website.
- Spreadsheets listing names, addresses and hours of LDB's liquor stores.
- LDB's own criteria in the scoring guide and comparison.
- High level, promotional information about Brains II in its proposal that responds to some of the requirements in the RFP, as well as headings, criteria and requirements in the proposal that were taken directly from the RFP.
- Innocuous administrative information in the emails and letters.
- Basic, practical and administrative reasons for LDB and Brains II agreeing to extend their agreement.
- Issues and questions about the RFP process raised in the proponents meeting of November 2015, which are not evidently attributable to any particular proponent.
- Information on the terms of work in the contract documents.

[45] I do not see, and Brains II did not explain, how disclosure of this straightforward information, some of which is not even of or about Brains II, could reasonably be expected to result in harm to Brains II under s. 21(1)(c).

Conclusion on s. 21(1)(c)

[46] Brains II has not, in my view, provided objective evidence that is well beyond or considerably above a mere possibility of harm, which is necessary to establish a reasonable expectation of harm under s. 21(1)(c).[36] Brains II's arguments on harm amount to little more than assertions and do not persuade me that any of the harms under s. 21(1)(c) could reasonably be expected to result from disclosure. It has not demonstrated a clear and direct connection between disclosing the information in dispute and a reasonable expectation of the alleged harms. Therefore, I find that Brains II has not met its burden of proof and that s. 21(1)(c) does not apply to the information that LDB has decided to disclose. LDB is thus not required to refuse the applicant access to this information under s. 21(1).

[36] *Community Safety*, at para. 54.

CONCLUSION

[47] For reasons given above, under s. 58(2)(a) of FIPPA, I require LDB to give the applicant access to the information it decided to disclose by July 3, 2019. LDB must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records.

May 21, 2019

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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