OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 00-37

INQUIRY REGARDING SIMON FRASER UNIVERSITY INSURANCE POLICIES

David Loukidelis, Information and Privacy Commissioner
August 11, 2000

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Summary: SFU authorized to deny access to most of two insurance policies issued to SFU by an insurer partly owned by SFU. Wording of most of the policies was proprietary to the insurer. Disclosure could reasonably be expected to harm SFU as contemplated by s. 17(1), through increased premiums for insurance. Disclosure also could reasonably be expected to harm significantly the insurer's competitive position as contemplated by s. 21(1). Some information – such as premium amounts, policy periods and limits – could not be withheld under either section.

Key Words: commercial or financial information – monetary value – supplied in confidence – competitive position – significant harm – negotiating position – interfere significantly with – undue financial loss or gain.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 17(1), 21(1), 25.

Authorities Considered: B.C.: Order No. 15-1994; Order No. 26-1994; Order No. 61-1995; Order No. 126-1996; Order No. 210-1998; Order No. 315-1999; Order No. 00-09; Order No. 00-22; Order No. 00-24. **Alberta:** Order 97-013. **Ontario:** Order 203; Order P-219; Order P-263; Order P-248; Order P-394; Order P-609; Order P-1295.

1.0 INTRODUCTION

Simon Fraser University ("SFU") is, like approximately 40 other Canadian universities, insured by an insurer that is owned by those universities. The insurer, the Canadian Universities Reciprocal Insurance Exchange ("CURIE"), was formed in 1988 under the

Ontario *Insurance Act*. It operates under a reciprocal insurance exchange agreement in which subscribers (SFU and other member universities) agree to exchange with each other reciprocal contracts of indemnity or inter-insurance. By a letter dated June 10, 1999, the applicant made an access to information request to SFU, under the *Freedom of Information and Protection of Privacy Act* ("Act"), for copies of SFU's "general liability policy" for the policy periods 1998 and 1999.

In its August 11, 1999 response, SFU told the applicant that it was withholding all information in the 1998 and 1999 general liability insurance agreements between SFU and CURIE under ss. 17(1) and 21(1) of the Act. SFU said that disclosure of the policies could, as contemplated by s. 17(1), reasonably be expected to harm SFU's financial or economic interests and could reasonably be expected to harm CURIE's interests within the meaning of s. 21. This caused the applicant to ask, by a letter dated August 20, 1999, for a review of SFU's decision under s. 52 of the Act.

Because the matter was not resolved through mediation, I held a written inquiry under s. 56 of the Act. The University of Victoria ("UVic") and the University of British Columbia ("UBC"), also CURIE subscribers, made submissions as intervenors. CURIE also made submissions as the third party for the purposes of s. 21.

2.0 ISSUES

The issues in this inquiry, as set out in the Notice of Written Inquiry issued by this Office, are as follows:

1. Was SFU authorized to apply s. 17(1) of the Act to the general insurance liability policies issued by CURIE for SFU?

2. Was SFU required to apply s. 21(1) of the Act to the general insurance liability policies issued by CURIE for SFU?

In her initial submission, the applicant also argues that s. 25(1) of the Act favours disclosure of the records in the public interest. Although s. 57 of the Act is silent on the point, I find that the burden is on the applicant to establish that s. 25 applies.

As to the burden of proof on the other issues, s. 57(1) requires SFU to establish that it is authorized under s. 17(1) of the Act, or required under s. 21(1) of the Act, to refuse to disclose all of the information in the requested records.

3.0 DISCUSSION

3.1 Description of the Records in Issue – The 1998 and 1999 insurance policies in question are, respectively, eight and nine pages long. Each of them has a cover page that lists the name of the insured party, any additional insured parties, the policy period, the limit of liability, any deductible and the annual premium. The cover page is signed on behalf of CURIE by its authorized signatory, *i.e.*, its "attorney in fact". The rest of each policy contains its terms, conditions and limitations. These provisions specify the

liability coverages under the policy, exclusions from coverage, methods for determining liability limits, details of any deductible amounts and definitions of terms used in the policy. They also stipulate certain other conditions, including provisions respecting cancellation of the policy, the giving of notice by one party to the other and audits by CURIE of the insured.

3.2 SFU's Response Letter – As a preliminary point, it should be said that SFU's response letter to the applicant is an excellent example of what is contemplated by s. 8(1) of the Act. Section 8(1) says a public body must, where access is refused, tell the applicant "the reasons for the refusal and the provision" of the Act "on which the refusal is based". SFU's response is clearly written and provides the applicant with reasonable detail as to the basis for SFU's refusal. While applicants are always entitled to seek a review of a public body's decision, as was done here, in some cases a public body may avoid a request for review – and an inquiry – if it adequately explains its reasons for refusal to the applicant in the first place.

3.3 Harm to SFU's Financial or Economic Interests – SFU says disclosure of the policies – which are no longer in effect – could reasonably be expected to harm its financial or economic interests as contemplated by section 17(1) of the Act. That section reads as follows:

> 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
>
> (a) trade secrets of a public body or the government of British Columbia;
>
> (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;
>
> (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia.

Standard of Proof

I have observed in a number of cases – most recently, in Order No. 00-24 – that evidence of speculative harm will not meet the reasonable expectation of harm test under s. 17(1). The feared harm must not be imaginary or contrived and, although it is not necessary to establish a certainty of harm, the quality and cogency of the evidence presented must be commensurate with a reasonable person's expectation that the disclosure could cause harm as contemplated by s. 17(1).

Benefits to SFU of Membership in CURIE

SFU maintains that it "derives considerable economic and financial benefits from its participation" in CURIE, for the following reasons (quoted from its initial submission):

> (a) Because C.U.R.I.E. operates on a 5 year underwriting period as compared to the 1 year underwriting period used by commercial carriers, SFU has been able to rely on stable premiums which in turn have permitted it to budget its insurance costs beyond 1 year;
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> (b) SFU has paid lower premiums for insurance than it did before C.U.R.I.E. was available;
>
> (c) SFU has been able to obtain a wider range of coverages from C.U.R.I.E. than it could obtain in the commercial market at equivalent rates; and
>
> (d) SFU has the financial benefit of dividend refunds that are paid by C.U.R.I.E. to SFU as a subscriber. The total amount of dividends paid by C.U.R.I.E. to subscribers during the past seven years is more than $12,000,000.

SFU's submission is supported by an affidavit sworn by its Manager of Risk Management and Insurance, Gordon Wainwright, who has over 25 years experience working in various capacities in the insurance industry. Wainwright deposed that, before it became a CURIE subscriber on January 1, 1988, SFU faced considerable difficulty in obtaining appropriate and affordable insurance in the commercial insurance market. He deposed that commercial insurers have identified universities, including SFU, as having a high risk of liability exposure due to the nature of their activities. This perceived high risk was reflected in rising premiums for universities for insurance coverage.

Gordon Wainwright further deposed that the mid-1980s was "a most extreme period of difficulty" for the insurance industry generally, and that the industry

> … is characterized by cycles in which premiums rise and fall significantly, and during which particular types of coverages become difficult or impossible to obtain, and in which deductibles and other conditions become onerous from the point of view of insureds.

Before it joined CURIE, SFU encountered difficulty in obtaining "appropriate and affordable insurance" that was capable of adequately addressing its special insurance needs. Through CURIE, he deposed, SFU has been able to implement a comprehensive insurance scheme that meets the insurance needs of the university environment at rates substantially less than those offered in the commercial market.

Financial or Commercial Information of Monetary Value

SFU argues that s. 17(1)(b) of the Act applies because the policies in dispute represent financial or commercial information, or both, that belongs to it and that has, or is reasonably likely to have, monetary value.

I have no doubt that, for the purposes of s. 17(1)(b), the records contain information that can be described as financial information. The records set out policy limits, types of insurance coverage, annual premiums and deductibles. They contain information regarding the financial resources, or arrangements, of SFU. That information is financial information. On this point, I respectfully agree with the similar view expressed by Alberta's Information and Privacy Commissioner, Robert Clark, in Order 97-013 and other orders. In my view, the information in the policies also qualifies as commercial information for similar reasons.

The next question is whether this is financial or commercial information which "has, or is reasonably likely to have, monetary value", as contemplated by s. 17(1)(b). SFU says this case is governed by Order No. 315-1999. In that case, the British Columbia Lottery Corporation denied access, under s. 17, to its contract with an actor for his performance in television commercials. My predecessor upheld the public body's decision, noting that the public body derived "a significant benefit from the current arrangement with the actor". There was evidence that the actor provided his services for a lower fee than that he could charge in the United States. SFU makes a similar argument in this case, derived from paragraphs 12, 17 and 21 of the Wainwright affidavit:

> The Policy contains information that has, or is reasonably likely to have monetary value, to the extent that the Policy enables C.U.R.I.E. to provide coverages to SFU at lower premiums than those available from commercial insurers. In this sense, the Policy represents a savings to SFU. If the Policy is disclosed, it is reasonable to expect that C.U.R.I.E.'s continued ability to offer these rates would be undermined. SFU submits that this possibility represents a reasonable expectation of harm to its financial or economic interests that is likely to flow from disclosure of the Policy.

In my view, Order No. 315-1999 turned on its own facts and is not necessarily determinative of the outcome here. I must also respectfully disagree with Order No. 315-1999 to the extent it can be interpreted to suggest that s. 17(1)(b) may be satisfied merely by showing that information in a record relates to a financially beneficial arrangement for a public body. I prefer the interpretation of s. 17(1)(b) expressed by my predecessor in Order No. 61-1995 – and supported by Ontario decisions such as Order P-219, Order P-248 and Order P-394 – which requires the demonstration of a reasonable likelihood of independent monetary value in the information concerned.

SFU meets this point with the following argument, which is found in its initial submission and is supported by paragraphs 20 and 21 of the Wainwright affidavit:

> The information contained in the Policy is clearly of monetary value to C.U.R.I.E.'s competitors in that if disclosed it would effectively remove a competitive advantage which C.U.R.I.E. possesses over its competitors in the university insurance market. Specifically, if the Policy is disclosed, commercial carriers will have access to a policy template tailored to the insurance needs of universities. Disclosure of this information could reasonably be expected to have a detrimental impact on the financial or economic interests of SFU because any portion of C.U.R.I.E.'s subscriber base captured by commercial carriers would contribute directly to higher premiums being paid by SFU.

This argument – which speaks to medium to long term harm, as opposed to any possible short term benefits through lower commercial premiums – rests on the contention that the wording of the policy is essentially proprietary. SFU says CURIE has developed insurance policy wording which is specially adapted to universities' insurance needs, the wording of which has independent monetary value to commercial insurers, who would use it to compete with CURIE for its subscribers' insurance business. CURIE submitted an affidavit sworn by Keith Shakespeare, its Chief Operating Officer, as part of its s. 21 case. SFU did not rely on this affidavit as part of its s. 17(1) case, but portions of it are undoubtedly relevant to the s. 17(1) issues.

SFU cites Order No. 15-1994 here. In that case, my predecessor held that commercial or financial information had monetary value where its disclosure would help competitors to obtain market share. SFU rounds out this aspect of its argument with an assertion that disclosure could reasonably be expected to have a "detrimental impact" on it under s. 17(1), because any competitive harm to CURIE would "contribute directly to higher premiums being paid by SFU".

The contention that the CURIE policies contain proprietary contract language is made in paragraph 13 of Keith Shakespeare's affidavit:

> 13. The C.U.R.I.E. policies are not standard commercial policies similar to policies underwritten by any major Canadian, American or European insurers. The C.U.R.I.E. policies were developed by C.U.R.I.E. to specifically address the unique risks found in a university environment. The policies are manuscript, meaning that they were specially written policy wordings created by C.U.R.I.E., with the assistance of its advisors, including actuaries. The process of developing the policy wordings required an expenditure of extensive time and expense on consultants, and consultation with subscribers to identify their insurance needs. The policy wordings have been amended and refined since 1988 to more specifically address particular risks that universities in general are facing and the wordings are constantly reviewed to ensure that the coverages offered reflect the needs of the university subscribers and their intentions with respect to the risks they have agreed to share....

In addition to paragraph 13 of the Shakespeare affidavit, the following paragraphs are also relevant here:

> 15. C.U.R.I.E. has been successful in providing its subscribers with affordable coverage for the special risks faced by universities because of the high percentage of eligible institutions that have chosen to become subscribers. C.U.R.I.E.'s continued success depends on C.U.R.I.E. maintaining its subscribers. If the group of subscribers is reduced, C.U.R.I.E. will suffer financially as the costs per subscriber will increase.
>
> 16. Because of the limited number of potential subscribers C.U.R.I.E.'s financial position is particularly vulnerable to the loss of even one major subscriber.
>
> 17. Disclosure of premium information could harm C.U.R.I.E.'s ability to maintain existing subscribers and affect its ability to attract new subscribers. Disclosure of premium information could also affect C.U.R.I.E.'s dealings with re-insurers and service providers particularly those who generally charge fees and commissions based on a percentage of premiums rather than a fee for service.

As evidence of harm to its financial or economic interests through disclosure of the policies, UBC submitted an affidavit sworn by John Welch, its Risk and Insurance Manager. He deposed as follows:

> 8. UBC would clearly suffer financial and economic harm if it was deprived of the comprehensive insurance coverage and stable and affordable premiums provided by CURIE.
>
> 9. Based on UBC's experience prior to its involvement with CURIE, UBC would clearly be adversely affected by uncertainty and volatility in premiums and coverage if it was forced to obtain insurance in the commercial insurance market.
>
> 10. The success and efficiency of UBC's insurance and risk management programmes is at present inextricably linked to the continued success of CURIE. CURIE's viability and success is therefore critical to UBC. UBC benefits from CURIE's long-term stable membership of some 50 university and education subscribers within Canada. The disclosure of CURIE policies, previously kept in strict confidence by UBC and other universities, would in UBC's view allow competitive insurers in the short-term to erode the participation of other universities in the CURIE programme. This is of grave concern to UBC as the long-term health of UBC's risk and insurance management programmes is closely tied to the long-term success of CURIE.

A written submission by Robert Worth, UVic's Executive Director of Financial Services, supported, in a general fashion, the arguments of SFU and UBC.

Finding of Reasonable Expectation of Harm to SFU

I have concluded – not without some reservation – that the evidence here is sufficient to establish a reasonable expectation of harm to SFU as contemplated by s. 17(1). SFU's argument amounts to a claim that disclosure of the requested policies will harm CURIE's business interests sufficiently that this will, in turn, cause SFU's insurance premiums to rise. This increase would be caused, according to the Wainwright affidavit, because "any threat to C.U.R.I.E.'s ability to maintain its subscriber base is therefore harmful to the financial and economic interests of SFU". SFU also appears to argue that harm to CURIE could be expected to lead to reduction or elimination of dividends that CURIE might otherwise pay its subscribers. The Shakespeare affidavit supports this argument.

My reservation derives from my sense that CURIE's main competitive advantage ought to be the fact that it is member-owned. The most obvious barrier to competition, in that light, would be the need for commercial competitors to make a profit, whereas CURIE is not in that position. It might also be reasonable to infer that the fact CURIE's members effectively backstop its underwriting obligations with their own assets further enhances CURIE's ability to undercut commercial underwriters' pricing. It seems to me these factors might be more truly instrumental in affecting the entry of commercial insurers into the university insurance business than the special wording of CURIE's policies. No evidence was presented to me to suggest that CURIE's employees or officers possessed unique knowledge or skills that enabled them, from the start in 1988, to create CURIE's specialized coverage. I would have thought expert underwriters employed by commercial insurers – and benefiting from expert actuarial advice – could devise coverage that is currently competitive, in terms and extent of coverage, without those experts having seen SFU's CURIE policies for 1998 and 1999.

I must bear in mind, however, that s. 17(1) calls for a reasonable expectation of harm to the financial or economic interests of a public body. It does not require that disclosure of the disputed information must be the only, or the most critical, circumstance which could reasonably be expected to harm a public body's financial or economic interests in a given context. In this inquiry – which should be viewed as extremely specific to its facts – I have decided that SFU has satisfied the required standard of proof for several reasons. Specifically, I have before me detailed and informed evidence of the competitiveness of the insurance industry as it relates to CURIE's subscribers, of the independent monetary value likely to be attributable to CURIE's policy wordings and of the competitive use to which the policies could be expected to be put by commercial insurers if they were disclosed. I have also considered the applicant's submissions and found that they do not materially counter the evidence adduced by SFU, CURIE and UBC. It is therefore reasonable to conclude, relying on s. 17(1)(b) of the Act, that disclosure of information in the 1998 and 1999 policies could reasonably be expected to harm SFU's interests as contemplated by s. 17(1) on the specific facts before me.

As exceptions to this, I do not accept that SFU has established a reasonable expectation of harm, within the meaning of s. 17(1), from disclosure of the 1998 or 1999 policy number, named insured and address, names of additional named insured, policy period,

limit of liability, deductible, premium or (in the case of the 1999 policy) the February 19, 1999 endorsement adding a further named insured to the 1999 policy. The evidence before me speaks to the harm expected to follow from disclosure of what is said to be, essentially, the proprietary wording of the policies. Having reviewed the evidence, I am not persuaded that disclosure of the information just described, dating from 1998 and 1999, could reasonably be expected to harm SFU's interests under s. 17(1).

Among other things, I have difficulty with the argument that disclosure of the annual premiums for SFU in 1998 and 1999, and other such information respecting the 1998 and 1999 SFU policies, will enable commercial carriers to undercut CURIE's premiums, such that other CURIE subscribers will quit CURIE, thus raising SFU's premiums in turn. We are, after all, dealing with now outdated policies for SFU. It is also reasonable to expect that each university is situated differently as regards its insurability and the costs of covering it. Each CURIE member will present somewhat different risks and claims experiences. I also note that, among other things, CURIE retains cost advantages stemming from its non-profit nature. The benefits of membership in CURIE include member dividends and longer-term premium lock-ins, each of which is attested to in the evidence. Having considered this point with care, I am not persuaded that knowledge of the premiums paid by one CURIE subscriber last year and two years ago could reasonably be expected to cause the s. 17(1) harm just identified. Certainly, lower premiums for SFU are not in issue here – SFU says lower premium offers by commercial carriers will reduce CURIE's membership and therefore ultimately raise premiums for SFU. I am not persuaded that there is a reasonable expectation of harm to SFU's interests through higher CURIE premiums resulting from a membership drop due to commercial undercutting of other universities' premiums.

Undue Loss or Gain to Third Parties

SFU has also argued that disclosure of the policies could reasonably be expected to result in undue financial loss to CURIE and its subscribers and an undue financial gain to CURIE's competitors. It therefore says s. 17(1)(d) applies and allows it to withhold the policies. It says CURIE would suffer loss if, as a result of disclosure of the records, the number of its subscribers were reduced. This would cause its costs for each subscriber to increase.

SFU's evidence suggests that any decrease in the number of CURIE subscribers would lead to an increase in the costs for each subscriber of insuring through CURIE. It is reasonable to expect such a loss, the argument goes, in light of the evidence that commercial insurers are likely to undercut CURIE's premiums in order to gain market share. It is reasonable to conclude, SFU argues, that some subscribers would leave CURIE, thus leaving fewer subscribers to meet CURIE's costs. This would result in loss to remaining CURIE members.

From what I can see, however, there would be no impact on CURIE – except indirectly, perhaps. Being a reciprocal insurance exchange, CURIE consists of its subscriber universities. In the context of this inquiry, these subscribers are UBC, UVic and all other

subscribers except SFU. In light of my findings under s. 17(1)(b) in relation to monetary value and reasonable expectation of harm to SFU's financial or economic interests, I am satisfied that the reasonable expectation of financial loss to other subscribers under s. 17(1)(d) – other than UBC and UVic, who are excluded from the Act's definition of "third party" – would mirror that relating to SFU. Similarly, the reasonable expectation of financial loss to other subscribers is linked to the reasonable expectation of financial gain to third party insurers; it is also reflected in my finding of independent monetary value to commercial insurers under s. 17(1)(b). In light of my finding below under s. 21(1), however, I need not consider SFU's argument that "undue" financial loss to other subscribers, or "undue" financial gain to commercial competitors, would result from disclosure of the information that I have decided is otherwise protected under s. 17(1).

3.5 Harm to CURIE's Interests – SFU also withheld the requested records under s. 21(1) of the Act. In its submissions, SFU effectively adopted CURIE's position with respect to s. 21(1) of the Act, which was also supported by evidence from UBC and UVic. I have therefore analyzed the submissions of these four parties together.

Section 21(1) requires a public body to refuse to disclose information to an applicant if all three of its elements are met. It reads as follows:

> 21(1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> (i) trade secrets of a third party, or
>
> (ii) commercial, financial, labour relations, scientific or technical information of a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> (iii) result in undue financial loss or gain to any person or organization, or
>
> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

Is the Information a Trade Secret or Commercial or Financial Information?

Part of CURIE's initial submission dealt with its contention that the requested information qualifies as a "trade secret", as defined in Schedule 1 of the Act for the purposes of s. 21(1)(a)(i). This argument was supported by the Shakespeare affidavit and the affidavits filed by UBC and UVic. CURIE says the policies contain financial information in the form of "policy limits, premiums and other financial and underwriting information". I have already found that information in the records is financial information for the purposes of s. 17(1). I therefore also find that the records contain financial information within the meaning of s. 21(1)(a)(ii). A similar finding was made in relation to insurance information in Ontario Order P-1295 (November 19, 1996). It is therefore not necessary for me to determine whether the information is also a trade secret under s. 21(1)(a)(i).

Was the Information Supplied In Confidence to SFU?

CURIE says the information in the records was implicitly supplied in confidence to SFU within the meaning of s. 21(1)(b) of the Act. In support, it refers to Ontario Order P-1295. In that case, Assistant Commissioner Irwin Glasberg held – in relation to the Ontario provision similar to s. 21 – that information will have been supplied in confidence only if there was a reasonable expectation of confidentiality on the part of the supplier of the information at the time the information was provided. He went on to say that all the circumstances must be considered in determining if there is a reasonable expectation of confidentiality, including whether the information was

(1) communicated to the institution 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 government organization;

(3) not otherwise disclosed or available from sources to which the public has access;

(4) prepared for a purpose which would not entail disclosure.

CURIE's submissions focussed principally on the issue of confidentiality. It is equally important, however, to determine whether CURIE "supplied" information to SFU within the meaning of s. 21(1)(b). CURIE argued that a third party will have supplied information to a public body in the following case:

1. Where the third party has provided original or proprietary information that remains relatively unchanged in the contract; and

2. Where disclosure of the information in the contract would permit an applicant to make an 'accurate inference' of sensitive third-party business information that would not in itself be disclosed under the Act.

CURIE argued that, for the following reasons, the policies contain information supplied to SFU within the meaning of s. 21(1)(b):

> The Policy [*sic*] contains information which as already described incorporates specially written policy wordings developed by C.U.R.I.E. to address risks unique to the university setting. These policy wordings are original or proprietary in nature and remain relatively unchanged as they were developed by C.U.R.I.E. and as they appear in the Policy.
>
> C.U.R.I.E. submits that disclosure of the Policy would permit an applicant and, more importantly, C.U.R.I.E.'s competitors, to make an 'accurate inference' of sensitive third-party business information that would not in itself be disclosed under the *Act*.
>
> The Policy is in itself sensitive third-party business information. It represents the culmination of over ten years of experience in servicing the particular insurance needs of the university market. During this time C.U.R.I.E. has expended considerable resources developing and maintaining policy wordings to meet the unique insurance requirements of its subscribers.

In Order 00-22 and in Order 00-24 – which I issued after the parties made their submissions in this case – I confirmed that, ordinarily, information in an agreement negotiated between a public body and a third party does not qualify as information that has been "supplied" to the public body. I acknowledged, however, that this will not always be true. It is possible that in some cases information in a contract between a public body and a third party will have been supplied to the public body. I discussed this issue in some detail in Order 00-22 and dealt with it again in Order 00-24.

It will very rarely be the case that a contract between a public body and a third party qualifies as information "supplied" to the public body. This case, however, is for the most part out of the ordinary and offers such a rare instance. The only evidence before me on the point shows that the terms of these policies are more or less proprietary to CURIE. The material before me indicates that the form of contract, known as a manuscript policy, has been crafted especially for its university subscribers. The form of contract, as presented to the subscriber, is effectively the product that is offered by CURIE for purchase by the subscriber. The evidence establishes that there is no negotiation between the parties as to the terms of that product. The form of the policy as issued by CURIE remains unchanged from the version delivered to the prospective subscriber. With the exceptions noted below, therefore, I find that the information in the disputed records was "supplied" to SFU.

As an exception, the evidence does not establish that the information that I decided above cannot be withheld by SFU under s. 17(1) is information supplied in this sense to SFU. That information is determined as much by the needs of the subscriber as by any proprietary dictates of CURIE. With respect to premium amounts, I also note that CURIE's argument that it "supplies" these to subscribers is inconsistent with its argument, under s. 21(1)(c)(i), that disclosure of this information would interfere with

CURIE's negotiating position with subscribers. The evidence before me does not, in my view, support a finding that the information just described was "supplied", in confidence, by CURIE to SFU.

With respect to the confidentiality requirement in s. 21(1)(b), the evidence of CURIE and of all the universities involved in this inquiry consistently indicates that the policies are treated as confidential and that the universities receive them as such from CURIE. Once delivered, such policies – including the ones actually in issue here – are kept under lock and key to prevent disclosure. I had some concern that because the Ontario *Insurance Act* required the CURIE form of insurance contract to be filed with the Superintendent of Insurance as part of its licencing process in Ontario, at least, it might be a publicly accessible document. If this were so, CURIE would not be able to satisfy the confidentiality requirement in s. 21(1)(b) of the Act. However, on this point I have accepted the following evidence from the Shakespeare affidavit:

> 25. C.U.R.I.E. provides financial information to the Superintendents of Insurance in the provinces in which it operates but C.U.R.I.E. does not, nor is it required to, provide copies of its wordings to the Superintendents of Insurance as part of its ongoing reporting. C.U.R.I.E. provided copies of its wordings to the Ontario Superintendent of Insurance as part of its initial licensing application. C.U.R.I.E. does not provide the policy wordings to any regulatory or government agency.

There is no evidence before me to suggest that the CURIE policy is publicly available. As a result, I am satisfied, on the evidence before me, that the information in the disputed policies, with the exceptions I have noted above, was implicitly supplied in confidence to SFU for the purposes of s. 21(1)(b) of the Act.

Is There A Reasonable Expectation of Harm Through Disclosure?

CURIE argues that disclosure of the records could reasonably be expected to harm its competitive position "significantly", as required by s. 21(1)(c)(i). CURIE did not specify which information in the records – which SFU withheld in their entirety – met this test. It says that disclosure of the information would give potential competitors a competitive advantage, in the following way:

> If disclosed, the Policy [*sic*] would give commercial carriers access to a valuable document about how to structure insurance for the university environment, including financial and underwriting information and specially written policy wordings created by C.U.R.I.E. specifically for its subscribers.
>
> Access to the Policy will reveal to C.U.R.I.E.'s competitors the precise package of coverages that C.U.R.I.E. has identified as meeting the insurance needs of universities.
>
> British Columbia Order No. 126-1996, September 17, 1996
>
> C.U.R.I.E. has acquired a competitive advantage over commercial carriers in the university insurance business in large part by developing policies tailored to the

> special needs of its members. If this information is disclosed, the competitive position of C.U.R.I.E. will be lost.

As to the s. 21(1)(c)(i) requirement of significant interference with the third party's negotiating position, CURIE says disclosure of the requested policies would harm its ability to negotiate with existing and potential subscribers:

> C.U.R.I.E.'s negotiating position is particularly vulnerable because its ability to remain competitive depends on C.U.R.I.E. maintaining its current group of subscribers. If commercial insurance carriers are permitted to re-enter the university market using C.U.R.I.E.'s policy wordings as a template and offering coverages identical to C.U.R.I.E., then C.U.R.I.E. stands to lose subscribers. If the group of subscribers is reduced, C.U.R.I.E. will be forced to increase the premiums for existing subscribers and the costs of joining C.U.R.I.E. will be less attractive to potential subscribers.

In my view, despite CURIE's position to the contrary, the above argument does not go to interference with a negotiating position. It speaks to harm to competitive position. In my view, the evidence which I have found meets the standard of proof for the applicability of ss. 17(1)(b) and (d) to SFU also satisfies s. 21(1)(c)(i), on the basis that disclosure of the manuscript language of the policies could reasonably be expected to significantly harm CURIE's competitive position.

I have already found that the non-policy language information, described above, was not "supplied" to SFU within the meaning of s. 21(1)(b) of the Act. If it were necessary to do so, I would find that SFU has not established a reasonable expectation of significant harm to CURIE through disclosure of the non-policy language information. My comments above about disclosure of that information as it relates to SFU's interests under s. 17(1) are relevant here also.

In summary, with the exception of the non-policy language information that I have concluded SFU could not withhold under s. 17(1) and has not been "supplied" to SFU under s. 21(1)(b), SFU is required to withhold the language of the 1998 policy and the 1999 policy under s. 21(1) of the Act.

3.6 Public Interest Disclosure Under Section 25 – The applicant contends that, regardless of whether any of the Act's exceptions apply, s. 25(1) of the Act requires disclosure of the policies in the public interest. Section 25(1) reads as follows:

> 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.

The applicant has not made a persuasive case under s. 25(1). This is not a case where disclosure of information is dictated under s. 25(1) by some pressing or compelling need for disclosure. I find that s. 25(1) does not require disclosure of the 1998 or 1999 policies.

4.0 CONCLUSION

For the reasons given above, the following orders are made:

1. Having found that Simon Fraser University is required under s. 21(1) of the Act to refuse to disclose part of the information in the requested records, under s. 58(2)(c) of the Act, I require it to refuse access to that information, as described below;

2. Having found that Simon Fraser University is authorized under s. 17(1) of the Act to refuse to disclose part of the information in the requested records, under s. 58(2)(b), I confirm its decision to refuse access to that information, as described below; and

3. Having found that Simon Fraser University is not required under s. 21(1) of the Act, or authorized by s. 17(1), to refuse to disclose part of the information in the requested records, under s. 58(2)(a) of the Act, I require it to give the applicant access to the information described below.

The information that Simon Fraser University is not required or authorized to refuse to disclose, and which must be disclosed, comprises the following information in the 1998 policy and the 1999 policy: the policy number, the names and addresses of named insured and additional named insureds, the policy period, the limit of liability, the deductible amount and the premium. In addition, SFU is not authorized or required to refuse to disclose, and must disclose, the February 19, 1999 endorsement adding a further named insured to the 1999 policy.

August 11, 2000

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia