Order 01-39

TRANSLINK

****** This Order has been subject to Judicial Review ******

David Loukidelis, Information and Privacy Commissioner
August 16, 2001

See Judicial Reviews page

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Summary: Applicants requested access to two contracts for operation of commuter rail service, a services agreement and a crewing agreement. Translink decided it was not required to refuse access under s. 21(1) of the Act and CPR requested a review of that decision. Although confidentiality is present through the contracts' terms, Translink is not required to refuse access as neither agreement contains information supplied to Translink. CPR also has not established that disclosure could reasonably be expected to harm significantly its competitive position or interfere significantly with its negotiating position.

Key Words: commercial information – financial information – supplied in confidence – harm significantly – competitive position – negotiating position – interfere significantly with.

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

Authorities Considered: B.C.: Order 00-09; [2000], B.C.I.P.C.D. No. 9; Order 00-10, [2000] B.C.I.P.C.D. No.11; Order 00-22, [2000] B.C.I.P.C.D. No. 25; Order 00-24 [2000] B.C.I.P.C.D. No. 27; Order 00-39, [2000] B.C.I.P.C.D. No. 42; Order 01-20 [2001] B.C.I.P.C.D. No. 21.

Cases Considered: *Air Atonabee Ltd.* v. *Canada (Minister of Transport)* (1989), 27 F.T.R. 194 (F.C.T.D.); *Maislin Industries Ltd. and Minister for Industry* (1984), 10 D.L.R. (4th) 417 (F.C.T.D.); *Timiskaming Indian Band* v. *Canada (Minister of Indian and Northern Affairs)* (1997), 148 D.L.R. (4th) 356 (F.C.T.D.); *StenoTran Services* v. *Canada (Minister of Public Works and Government Services)* (2000), 186 F.T.R. 134 (F.C.T.D.); *Jill Schmidt Health Services Inc.* v. *BC (Information and Privacy Commissioner),* 2001 BCSC 101; *CBC* v. *Northwest Territories (Commissioner),* [1999] N.W.T.J. No. 117 (N.W.T.S.C.).

1.0 INTRODUCTION

[1] This order results from the inquiry under Part 5 of the *Freedom of Information and Protection of Privacy Act* ("Act") conducted by Nitya Iyer under the authority I delegated to her, on March 2, 2001, under s. 49(1) of the Act.

[2] Nitya Iyer conducted the inquiry delegated to her and prepared a report, dated August 15, 2001, of her findings and her recommendation for an order under s. 58 of the Act. A copy of that report is attached to this order. Having taken no part in the inquiry conducted by Nitya Iyer, I have read her report and make this order on the basis of, and without variation from, the findings and recommendations in that report.

2.0 CONCLUSION

[3] As recommended by Nitya Iyer, by order under s. 58(2)(a) of the Act, I require the head of Translink to give the applicants access to all of the disputed records described in her report.

August 16, 2001

ORIGINAL SIGNED BY

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David Loukidelis
Information and Privacy Commissioner
for British Columbia

APPENDIX TO ORDER 01-39

INQUIRY REGARDING THE REQUEST FOR REVIEW BETWEEN THE VANCOUVER PROVINCE (APPLICANT) AND A SECOND APPLICANT AND TRANSLINK (PUBLIC BODY) AND CANADIAN PACIFIC RAILWAY (THIRD PARTY)

REPORT OF THE DELEGATE OF THE INFORMATION AND

PRIVACY COMMISSIONER

1.0 INTRODUCTION

[1] This case involves access requests by a Vancouver *Province* newspaper reporter and by an individual applicant (the "Applicants") for contracts between Canadian Pacific Limited ("CPR"), British Columbia Transit, now TransLink ("TransLink") and West Coast Express Limited ("WCE"), in respect of the West Coast Express commuter rail service. TransLink determined that the records ought to be disclosed under the *Freedom of Information and Protection of Privacy Act* RSBC 1996, c. 165 ("*Act*"). CPR objected on the basis that disclosure would cause it harm within the meaning of s. 21 of the *Act*. It requested a review under s. 52 that has resulted in this inquiry.

[2] **1.1 Procedural Background -** In June and July 2000, the Applicants requested access to the Purchase of Services Agreement between TransLink and CPR in respect of the West Coast Express rail service ("Services Agreement"), and to the Commuter-Rail Crewing Agreement between CPR and WCE ("Crewing Agreement"). WCE is a subsidiary of TransLink. TransLink notified CPR of the requests and CPR objected to the disclosure of the requested records on the basis of s. 21 of the *Act*.

[3] In September 2000, TransLink determined that the mandatory disclosure exception in s. 21 of the *Act* did not apply in the circumstances. CPR requested a review of that decision by the Information and Privacy Commissioner ("Commissioner") under s. 52 of the *Act*. A Notice of Written Inquiry was issued on January 17, 2001.

[4] CPR then raised two preliminary objections. First, it argued that the Commissioner's adjudication of the inquiry raised a reasonable apprehension of bias. Second, it argued that TransLink ought not to be a full participant in the inquiry because it had previously made a decision on the access request. On February 28, 2001, the Commissioner addressed these objections in written reasons. He determined that, although he did not consider that a reasonable apprehension of bias had been made out, it was expedient in the circumstances for him to delegate conduct of the inquiry to someone else. He also decided that it was not appropriate to limit TransLink's participation in this inquiry.

[5] On March 2, 2001, I was delegated to conduct this written inquiry and I received the initial submissions of the parties. CPR submitted all of its argument and evidence *in camera* from the other parties, including its request that its submission and supporting evidence be received *in camera*. Portions of TransLink's evidence were also submitted *in camera* from some or all of the other parties. In my letters of March 21 and April 3, 2001, I commented on how I ought to exercise my discretion to receive *in camera* material. As a result of these letters, both CPR and TransLink disclosed some of the material they had each previously submitted *in camera*. In particular, TransLink disclosed all of its evidence and submission to CPR, excepting the identity of the individual Applicant. CPR disclosed all of its submission and evidence to TransLink. Both TransLink and CPR submitted some of their evidence and submissions *in camera* from the Applicants to prevent disclosure of the content of the disputed records pending the outcome of this inquiry. Accordingly, unless otherwise

indicated, for the balance of this decision, any reference to *in camera* material means material received *in camera* from the Applicants only.

[6] In its reply submissions, CPR raised an issue as to the scope of the inquiry. It argued that two records addressed by TransLink in its initial submission were outside the scope of the inquiry. In the alternative, it requested an opportunity to make submissions on these records if I should determine that either or both were within the scope of the inquiry. In my letter of May 16, 2001, I wrote to inform the parties that I had determined that the one-page March 26, 1996 amendment to the Crewing Agreement ("Amendment") was within the scope of the inquiry but that the other record, a memorandum of agreement dated October 31, 1995 between CPR, West Coast Express and two other parties, was not. I extended the schedule for submissions to allow CPR to make an initial submission and the other parties to reply in respect of the additional record.

[7] Submissions concluded on May 23, 2001.

2.0 ISSUES

[8] In addition to the substantive issue of whether s. 21 of the *Act* applies to prohibit disclosure some or all of the information in the records in issue, CPR has again questioned TransLink's role in this inquiry. Thus, the issues I must determine in this inquiry are:

1. What is TransLink's role in the inquiry? In particular, what is its role in presenting submissions and evidence on the applicability of the s. 21 disclosure exception to the disputed records?

2. Has the three-part test in s. 21 been met in relation to the disputed records? In particular:

a) Would disclosure of the records reveal commercial or financial information of CPR?

b) Was such information supplied implicitly or explicitly in confidence?

c) Could disclosure of such information reasonably be expected to harm significantly the competitive position of CPR or interfere significantly with its negotiating position?

3.0 DISCUSSION

[9] **3.1 TransLink's Role in this Inquiry** - In its reply submission, CPR has questioned TransLink's full participation in this inquiry. It argues that it is inappropriate for TransLink to make submissions that effectively support its prior determination that the records in issue ought to be disclosed. This argument is very similar to CPR's submission to Commissioner Loukidelis in the course of its application requesting the Commissioner to recuse himself from conducting this inquiry. Before Commissioner Loukidelis, CPR argued that where a public body has "not advanced grounds for non-disclosure in its own capacity but has simply adjudicated upon submissions received from the third party, it ought not to advocate the correctness of its decision before the Commissioner."

[10] In his decision of February 28, 2001, Commissioner Loukidelis rejected this argument. He reviewed the provisions of the *Act* and distinguished them from judicial review proceedings. He noted that the s. 56 inquiry process is inquisitorial and that the public body is a central participant in the inquiry process. The *Act* expressly contemplates that public bodies have the same unrestricted rights of participation as other parties.

[11] I agree with Commissioner Loukidelis' remarks. While they were made in the course of his consideration of TransLink's participation in CPR's bias application, they are equally applicable to its objection to TransLink's participation in the inquiry itself. While it is true that TransLink determined that the records in issue ought to be disclosed, a determination on disclosure by a public body is expressly contemplated in the statute as a precurser to review and inquiry under Part 5 of the *Act*. The review and inquiry process set out in the *Act* clearly treats the public body as a full participant. From a practical point of view, in many cases (including the present one), the public body is the only effective presenter of the other side of the case. The Applicants do not have the records in dispute and much of the evidence and submissions has been withheld from them in order to maintain the confidentiality of the records in issue. If TransLink could not fully participate on an equal basis with CPR in this inquiry, my ability to assess the evidence and submissions with respect to the issues would be impaired.

[12] In its submission, CPR states that this is a hearing *de novo*: it is not a review of the decision of the public body. As is expressly stated in the statute, a s. 56 inquiry is triggered by a request under s. 52 for a review of a public body's decision, act or failure to act that is not resolved under s.55 or otherwise settled. It is a fresh hearing in the sense that the Commissioner is not restricted to reviewing the evidence upon which the public body made its determination. This structure does not restrict TransLink's ability to participate in this inquiry in light of the express statutory scheme discussed above.

[13] CPR also states that the evidence which it has provided in this inquiry is "under oath and is more specific and detailed" than what it provided to TransLink prior to TransLink's decision that the records ought to be disclosed. While this may be true, it certainly does not follow that the quality of CPR's earlier submission to the public body ought to reduce the weight I give TransLink's evidence and submissions in the present inquiry.

[14] Finally, I note that although the open affidavit of Christopher Harris, TransLink's Information and Privacy manager, expresses the reasons for his decision, on behalf of TransLink, that the s. 21 disclosure exception did not apply to the records in dispute, that explanation does not add materially to Mr. Harris's letter to TransLink containing his decision and reasons.

[15] In summary, I reject CPR's submission that TransLink's submissions and evidence in this inquiry should be given less consideration than those of CPR.

[16] **3.2 Description of the Requested Records** - The requested records consist of the Services Agreement and the Crewing Agreement in respect of the operation of the West Coast Express commuter rail service between Mission and Vancouver. These agreements

provide for financial compensation to CPR in respect of its track and related facilities and for its operation of the West Coast Express rail service. More particularly, the Services Agreement governs the terms of TransLink's access to and use of CPR track and related facilities to operate a commuter rail service between Mission and Vancouver. There are two short schedules to this Agreement. They set out times of train departures from various stations along the West Coast Express route and explain the nature of various cost items in the Agreement.

[17] The Crewing Agreement sets out the terms by which CPR will crew and operate West Coast Express commuter-rail trains between Mission and Vancouver. Attached to the Crewing Agreement are a number of schedules. These set out a train operating schedule, TransLink's request for a detailed proposal for crewing services and CPR's proposal to supply such services, and minutes of two meetings prior to finalization of the contracts. The Amendment is simply a two word addition to a single term of the Crewing Agreement that was added to rectify a clerical omission. Given the nature of the information contained in this latter record and that CPR treated it as part of the Crewing Agreement and made no different submission in respect of it, I will also treat it as part of the Crewing Agreement and will not refer to it further.

[18] The Applicants are primarily interested in disclosure of the financial terms of these agreements. They want to know how many "tax dollars" are being paid by TransLink directly or indirectly to CPR. No part of either agreement has been disclosed to date.

[19] **3.3 Section 21 of the *Act*** - Section 21 of the *Act* requires the head of a public body to refuse to disclose to an applicant information that would harm the business interests of a third party. Section 21(1) sets out a three-part test for determining whether disclosure is prohibited.

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.

[20] Unless all three elements of the s. 21(1) test are established, this disclosure exception does not apply.

[21] In circumstances such as these, where the public body has determined that the records ought to be disclosed, s. 57(3)(b) assigns the burden of proof to the third party to bring itself within the s. 21(1) exemption. In this case, CPR argues that it has met the s. 21(1) test because disclosure of the requested agreements, in whole or in part, would:
(a) reveal commercial or financial information of CPR,
(b) that was supplied, implicitly or explicitly, in confidence, and
(c) the disclosure of that information would harm significantly CPR's competitive position or interfere significantly with CPR's negotiating position.
[22] **3.3.1 Commercial or Financial Information** - CPR submits that the agreements comprise financial or commercial information within the meaning of s. 21(1)(a). TransLink concedes that the information is of a commercial or financial nature. The Applicants do not address this issue.

[23] I have examined the agreements. In my view, virtually all of the information they contain is of a commercial and/or financial nature and relates to CPR, as well as to TransLink. The bulk of the information concerns the purchase of access to CPR's track and crews to operate the West Coast Express.

[24] None of the parties has questioned whether the information is "of" the third party. It is clear that the requirement that the information be "of" the third party does not require that the information be only of that party. Here, the disputed information is "of" the third party and is also "of" the public body, as the information is contained in contracts between these two parties.

[25] I conclude that CPR has satisfied this part of the s. 21(1) test.

[26] **3.3.2 Supplied in Confidence** - The second part of the s. 21(1) test requires CPR to show that the information in issue was "supplied, explicitly or implicitly, in confidence." The cases have frequently discussed separately the question of whether the information was "supplied" by the third party from the question of whether it was supplied "in confidence." I will first consider the question of confidentiality and then turn to the supply requirement.

[27] **3.3.2.1 "in confidence" -** Information is supplied, explicitly or implicitly, in confidence within the meaning of s. 21(1)(b) of the *Act* if, in all of the circumstances, it can be objectively regarded as having been provided in confidence with the intention that it be kept confidential. In federal jurisdiction, the meaning of confidentiality is well-established:

[W]hether information is confidential will depend upon its content, its purposes and the circumstances in which it is compiled and communicated, namely:

a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that it could not be obtained by observation or independent study by a member of the public acting on his own,

b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and

c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication. (*Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989) 27 FTR 194 (FCTD).)

[28] The test is objective and the question is one of fact; evidence of the third party's subjective intentions with respect to confidentiality is not sufficient: *Re Maislin Industries Ltd. and Minister for Industry* (1984) 10 DLR (4th) 417 (FCTD); see also *Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs)* (1997) 148 DLR (4th) 356 (FCTD).

[29] The *Freedom of Information and Protection of Privacy Policy and Procedures Manual*, Ministry of Government Services, Information and Privacy Branch, Vol. 1, to which CPR referred in its submissions sets out some factors relevant to the determination of confidentiality (at Section C.4.12, pp. 13-4). They include:

- the existence or lack of an explicit statement of confidentiality, request for confidentiality, confidentiality agreement, or other objective evidence which indicates the parties' understanding that the information would be kept confidential,

- the type of information, including whether it would normally be kept confidential by the third party; and

- whether the information was supplied voluntarily by the third party, informally requested by the public body or required by the public body, where failure to supply the information would have negative consequences for the third party.

[30] The *Manual* also states that the confidentiality requirement in s. 21(1)(b) means that the information is provided with an expectation that its privacy will be maintained.

[31] In the present case, the focus of the confidentiality assessment is on whether the information in the disputed records was provided in confidence and whether, assessed objectively, it can be said that there was a reasonable expectation that it be maintained in confidence. The parties' submissions focussed on the interpretation of the confidentiality clauses contained in the agreements as explicit evidence of a reasonable expectation of continued confidentiality.

[32] For the purposes of s. 21(1)(b), different findings with respect to confidence might be made about the same information contained in two different records. A request for access to a contract might lead to a determination that all of the information in the contract is held in confidence (thereby including the schedules incorporated into it). However, a request for the original record that was subsequently incorporated as a schedule to the contract might not satisfy the confidentiality requirement for the disclosure exception if, standing alone, the original record contains insufficient markers of confidentiality.

[33] Here, certain of the schedules to the Crewing Agreement contain information which, at

the time they were originally created, may not have been intended to be confidential. Schedule III, which contains TransLink's request for detailed bid proposals that was sent to all short-listed firms, is an example of such information. However, the request for detailed bid proposals is in issue in this inquiry, not as an independent record, but only because it is a schedule to a contract with a public body for which access has been requested. As a schedule to the Crewing Agreement, the question of whether the request for detailed bid proposals (along with the information in all of the other schedules to the contract), is held in confidence must be answered by reference to the confidentiality clause that applies to the whole of the contracts, including their schedules. I must therefore consider whether the confidentiality clause signifies a reasonable intention and expectation by the parties that all of the information contained in the contracts and schedules be confidential.

[34] The same confidentiality clause is found in both the Services Agreement and the Crewing Agreement. It states:

[The named parties] agree that all of the terms and conditions of this Agreement, and all amounts paid under it, shall be and remain confidential information and shall not be divulged to any other person without the express written consent of the other party except to the parties' respective insurers, professional advisors and investors who shall be subject to this undertaking, save as the law requires.

[35] CPR argues that this clause is explicit evidence of the parties' intention that the information in the agreements remain confidential as far as possible. TransLink emphasizes the final limiting phrase in the clause and argues that the clause must be read as signifying that the parties contemplated that the information might be disclosed. TransLink provides evidence with respect to the history of this clause to support its submission.

[36] TransLink's evidence is that confidentiality was a contentious issue with respect to both Agreements. An exhibit to the *in camera* affidavit of RL, on behalf of TransLink, contains a letter dated October 29 from WCE to CPR concerning the proposed terms of a confidentiality clause for the agreements. The letter states that the then-proposed confidentiality clause is not acceptable to TransLink because the *Act* stipulates that all government contracts be available for scrutiny and may become available to the public.

[37] There is no evidence before me as to what the terms of the confidentiality clause were before this letter was sent. It appears from other *in camera* evidence that the phrase "save as the law requires" was added to the clause after the date of this letter, but there is no direct evidence establishing that the phrase was added because of the letter. There is no evidence that TransLink took the position, during finalization of the contracts, that there could be no reasonable expectation of continued confidentiality because of the *Act*. It is evident from the fact that the parties signed the agreements that TransLink agreed to the terms of the confidentiality clause they contain.

[38] Based on the evidence before me, does the confidentiality clause in the agreements objectively establish that the parties reasonably expected their agreements would be and remain confidential? I conclude that it does.

[39] Confidentiality clauses have sometimes been found to satisfy the "in confidence" requirement in s. 21(1)(b) (for example, see Order 01-20) and sometimes they have not (for example, see Order 00-09; *StenoTran Services v. Canada (Minister of Public Works and Government Services)* (2000), 186 FTR 134 (FCTD). In my view, the presence or absence, in a confidentiality clause, of a phrase acknowledging that disclosure of information the parties intend to keep confidential may be compelled by law does not mean that the parties, as between themselves, did not intend and expect that the information would remain confidential. It is merely an explicit acknowledgement of a risk that, despite their intentions and efforts, disclosure may ensue by force of law. Although, in Order 00-09, Commissioner Loukidelis noted that two of the disputed records contained confidentiality clauses that expressly acknowledged disclosure as required by law, I do not read him as finding that the confidentiality requirement was not satisfied in that case because of the express acknowledgement that the law may compel disclosure. Acknowledging a <u>risk</u> of involuntary disclosure does not mean that the parties cannot reasonably intend and expect confidentiality to be maintained. By the terms of their agreement, CPR and TransLink established a reasonable expectation that its terms would not be disclosed, save in the narrow circumstances specified: on consent of the other party, to a circumscribed group, and if required by law. Similarly, in Order 01-20, the confidentiality clause that was held to satisfy s. 21(1)(b) contemplated disclosure on express consent and on a "need to know" basis. Express contemplation of defined and circumscribed risks of disclosure does not mean there is no longer a reasonable expectation of confidentiality for the purposes of s. 21(1)(b).

[40] I find that the confidentiality clause in the contracts, read in the context of the confidential proposal process that preceded the agreements, is evidence of a reasonable expectation of continued confidentiality. The question is whether the letter of October 29, 1995 changes what it would otherwise be reasonable for the parties to expect. In my view, it does not. As I read it, the letter does not say that WCE or TransLink takes the position that the contracts <u>will</u> be required to be disclosed, and therefore there is no longer a reasonable intention and expectation of continued confidentiality. It simply says that, under the *Act*, the contracts will have to be made available for scrutiny if the law so requires and may, as a result, end up being disclosed to the public. If TransLink or WCE had intended to convey to CPR that they did not have an expectation of continued confidentiality, particularly in light of their subsequent agreement to the confidentiality clause that appears in both agreements, they would have to have said so much more clearly.

[41] Moreover, TransLink cannot support its argument about the meaning of the confidentiality clause and the reasonable expectations of the parties when they signed it by referring to the *Act*. The existence of the s. 21 mandatory disclosure exception does not mean that disclosure will or will not occur. That determination is only triggered by a request for access under the *Act* and the procedures following it. Until that determination is made, the *Act* no more displaces a reasonable expectation of confidentiality than does the risk that any legal proceeding of any kind will compromise the parties' expectations of confidentiality in any context. To take an example, if a patient is told by her physician that the results of certain medical tests may have to be disclosed to a health authority, it does not mean that there is no longer a reasonable expectation of confidentiality about the test results. Neither physician nor patient would expect the doctor to be able to disclose them to the world at large. There is

only a risk of disclosure as and to the extent the it turns out that the test results mean that disclosure is required by law. Similarly, the confidentiality clause in the agreements records the parties continued intention and expectation that confidentiality will be maintained, except to the extent that disclosure is subsequently required by law (including by an access request under the *Act*.)

[42] I conclude that CPR has satisfied the confidentiality requirement in s. 21(1)(b) with respect to the Services Agreement and the Crewing Agreement, including the schedules to these agreements.

[43] **3.3.2.2 "supplied" -** Having determined that the disputed records satisfy the "in confidence" requirement in s. 21(1)(b), I turn to the question of supply. 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 not negotiated, as would normally be the case, but was "supplied" within the meaning of s. 21(1)(b).

[44] A number of cases have addressed the difference between negotiated and supplied information (see Orders 00-09, 00-22, 00-24, 00-39, 01-20). The thrust of the reasoning in all of these decisions is that the information contained in contractual terms is generally negotiated. Information may be delivered by a single party or the contractual terms may be initially drafted by only one party, but that information or those terms are not "supplied" if the other party must agree to the information or terms in order for the agreement to proceed (see Order 01-20, paras. 81-89).

[45] Information that might otherwise be considered negotiated nonetheless may be supplied in at least two circumstances. First, the information will be found to be supplied if it is relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of s. 21(1)(b). To take another example, if a third party produces its financial statements to the public body in the course of its contractual negotiations, that information may be found to be "supplied." It is important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it.

[46] In other words, information may originate from a single party and may not change significantly - or at all – when it is incorporated into the contract, but this does not necessarily mean that the information is "supplied." The intention of s. 21(1)(b) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible of change but, fortuitously, was not changed. In Order 01-

20, Commissioner Loukidelis rejected an argument that contractual information furnished or provided by a third party and accepted without significant change by the public body is necessarily “supplied” within the meaning of s. 21(1) (at para. 93).

[47] In *Jill Schmidt Health Services Inc. v. BC (Information and Privacy Commissioner)*, [2001] BCSC 101, Satanove J. considered the question of when “relatively unchanged” contractual information is “supplied.” In that case, the petitioner argued that in the decision below (Order 00-22), Commissioner Loukidelis had erroneously replaced the “relatively unchanged information” exception with an exception based on “discrete or immutable third party business information.” In rejecting this argument, the Satanove J. clarified the nature of the exception (at para. 36):

In my view, the Commissioner’s reference to discrete or immutable information must be understood in context. He was explaining that the burden of proof had not been met by the Ministry to show that the Disputed Information was not the product of negotiations, and not *[sic]* original or proprietary information that remained unchanged. My reading of this passage is that in the absence of proof, not assertion, the Commissioner was not prepared to draw the inference that the Disputed Information remained unchanged during negotiations. If it had been discrete or immutable information then the only reasonable inference to draw would have been that the Disputed Information had not been changed. As the Disputed Information was not of a discrete or immutable type of information, then it was an equally reasonable inference to draw that the Disputed Information had changed and that the assertion in the affidavits referred to the literal supplying of information by physically delivering the document on which the information was written.

[48] Most recently, in Order 01-20, Commissioner Loukidelis again stated that information provided by one party and accepted by another (as evidenced by its inclusion in the contract), is negotiated, not “supplied” information (at para. 93).

[49] In my view, it does not follow from the fact that information initially provided by one party was eventually accepted without significant modification by the other and put into their contract that the information is “supplied” information. If so, the disclosure or non-disclosure of a contractual term would turn on the fortuitous brevity or finessing of negotiations. Rather, the relative lack of change in a contractual term, along with the relative immutability and discreteness of the information it contains are all relevant to determining whether the information is “supplied” rather than negotiated. Evidence that a contractual term initially provided or delivered by the third party was not changed in the final contract is not sufficient in itself to establish that the information it contains was “supplied.”

[50] The second situation in which otherwise negotiated information may be found to be supplied is where its disclosure would allow a reasonably informed observer to draw accurate inferences about underlying confidential information that was “supplied” by the third party, that is, about information not expressly contained in the contract: Order 01-20 at para. 86. Such information may be relevant to the negotiated terms but is not itself negotiated. In order to invoke this sense of “supplied”, CPR must point to specific evidence showing what accurate inferences could be drawn from which contractual terms about what underlying confidentially supplied information. Moreover, as discussed below, where information

originally supplied in a bid proposal is simply accepted by the other party and incorporated into a contract, the mere fact that disclosure of the contract will allow readers to learn the terms of the original bid will not shield the contract from disclosure.

[51] CPR's evidence on the question of supply falls short of what is required to establish that the information in issue was "supplied" within the meaning of s. 21(1)(b).

[52] **3.3.2.2.1 The Services Agreement** - With respect to the Services Agreement, CPR simply asserts, in its initial *in camera* submission, that significant financial terms supplied by CPR could be inferred from disclosure of the Services Agreement by a reader who is knowledgeable about commuter rail operations. CPR's *in camera* affidavit of DH does not identify which terms in the Services Agreement would permit such an inference to be made. Further, DH's affidavit acknowledges that the financial information in the Services Agreement changed somewhat during the course of negotiations. Thus, CPR's evidence suggests that the financial information in the Services Agreement <u>was</u> susceptible to change. If the information was susceptible to change, the magnitude of the actual changes made, and the reasons for them do not make the information any less negotiated, or any more "supplied," information.

[53] In its reply submission, CPR makes an assertion as to the cogency of DH's evidence and claims that it establishes that disclosure of the Services Agreement would permit an accurate inference to be drawn about financial terms that were supplied by CPR. CPR's assertion about the quality of its evidence is not persuasive. DH's affidavit does not identify what terms in the Agreement give rise to the inference about underlying supplied financial information. Absent additional evidence, it cannot be said that someone reading the Services Agreement could infer from its financial terms anything about financial information CPR may have confidentially supplied during the negotiation process (for example, CPR's fixed costs). TransLink's evidence is that it negotiated the financial terms of the Services Agreement. I conclude that the financial information in the Services Agreement was negotiated information.

[54] CPR adduces no specific evidence with respect to the non-financial terms of the Services Agreement. In its reply submission, it advances the proposition that contractual information is supplied rather than negotiated if what is originally delivered by the third party "remains essentially unchanged in the negotiated agreement." As I have stated above, this is not in itself sufficient to establish that the information was supplied rather than negotiated. In Order 01-20, Commissioner Loukidelis expressly rejected such an argument (at para. 15):

In my view, the fact that [the third party] may have proposed these contractual terms in identical or similar form to that form in which they subsequently were incorporated into the agreement does not change the fact that they were negotiated by the parties to the agreement - nor does it mean that these terms were "supplied" ... within the meaning of s. 21(1)(b). I also find that the proposal of these contractual terms (or some form of them) by [the third party], during the course of discussion and negotiation with [the public body], does not constitute the supply of confidential information which would be disclosed, by inference, by disclosure of the contractual terms.

[55] CPR's submissions with respect to the Services Agreement in this inquiry are precisely the arguments rejected by the Commissioner in Order 01-20. While there is some evidence in DH's *in camera* affidavit and in certain of the documents (also received *in camera*) preceding the final contract that some terms remained relatively unchanged, there is no evidence that any relative lack of change was anything other than fortuitous. TransLink's evidence is that there was a negotiation process over the Agreement as a whole. In the context of the negotiation of a complex agreement, the fact that certain terms do not change does not establish that the information in those terms was supplied rather than negotiated. CPR must establish that there is something in the nature of the contractual information in issue that makes it not susceptible of negotiated change. It has not done so. Further, CPR has not pointed to any specific terms of the Services Agreement from which an accurate inference could be drawn about confidential information that was supplied by CPR rather than negotiated between the parties. I conclude that CPR has not established that the terms of the Services Agreement were "supplied" within the meaning of s. 21(1)(b).

[56] **3.3.2.2.2 The Crewing Agreement** - With respect to the Crewing Agreement, CPR argues that the information in the main body of the Agreement is "supplied," not negotiated, information, because it was provided by CPR to TransLink during a confidential bidding process. CPR also argues that disclosure of the schedules to the Crewing Agreement would reveal sensitive competitive commercial information supplied by CPR.

[57] DH's *in camera* affidavit for CPR states that the Crewing Agreement was the product of a bid proposal and "bid clarification" process, rather than the result of a full negotiation over its specific terms. DH's affidavit contains evidence on the extent of the changes in various financial terms between CPR's bid and the final contract. DH points to Schedule II of the Crewing Agreement as containing not only a breakdown of various crewing charges, but also containing the assumptions underlying those amounts. DH's affidavit mistakenly identifies Schedule III as "CPR's tender proposal." In fact, it is TransLink's request for a detailed proposal and it was sent to all of the short-listed firms in the bidding process. Finally, DH identifies Schedule IV, which contains minutes of a meeting between the parties prior to finalizing the Crewing Agreement as containing CPR's original pricing proposals.

[58] CPR submits that the terms of the Crewing Agreement were supplied and not negotiated because they originated in a bid prepared by CPR in a confidential bidding process and, as CPR characterizes it, the bid price did not materially change. TransLink argues that the changes in various terms were material.

[59] CPR's arguments with respect to the Crewing Agreement rest on its view that information initially provided by a third party and incorporated without significant change into the contract between it and a public body is necessarily "supplied" and not "negotiated." As I have stated above, this is not the case. Information provided by one contracting party and accepted by the other can be just as much "negotiated" information as is a term that is hotly disputed. It is the agreement between the parties that results in the term becoming a term of their contract that is the significant step, not how long it took to reach the agreement. If there is something unchangeable in the nature of the information, then that contractual information may have been supplied by CPR rather than negotiated. Alternatively, CPR may

show that otherwise negotiated contractual information was "supplied" within the meaning of s. 21(1)(b) if its disclosure would permit an accurate inference to be drawn about confidential information that was supplied by CPR.

[60] In order to assess whether CPR can establish either of these exceptions to the general rule that negotiated information is not supplied, I must consider the content of the schedules to the Crewing Agreement and their relationship to the main body of the contract. Three of these schedules warrant detailed consideration. Schedule II contains the financial and non-financial aspects of CPR's original bid proposal together with certain assumptions relating to the financial terms. Schedules IV and V consist of minutes of meetings between CPR and TransLink during the bid clarification or negotiation process. (There were also other participants in the meeting recorded in Schedule V.)

[61] The contract expressly provides that all of the schedules form part of the agreement between the parties and sets out an order of precedence governing any errors, omissions or ambiguities in the provisions of the various documents comprising the contract. Other articles in the main body of the contract expressly incorporate various provisions in the bid proposal (Schedule II) as modified by the meetings recorded in Schedules IV and V. There is no question that disclosure of the Crewing Agreement together with these schedules would inform readers not only of the final terms of the contract between the parties, but also of the terms originally proposed by CPR and would provide a glimpse of the process that led to the final agreement.

[62] I accept that the information in Schedules II and IV was "supplied" within the meaning of s. 21(1)(b) at the time that it was initially provided by CPR to TransLink. I have some concern whether the information in Schedule V was "supplied" when it was created, as there were other participants at the meeting, and the minutes were prepared by a representative of WCE, not CPR. However, for the purposes of the following analysis, I will assume that the information in this schedule was supplied at some time before it was incorporated into the contract with the public body. Assuming that the information in Schedules II, IV and V was supplied at some earlier time, I must consider whether the incorporation of this information in the Crewing Agreement, which is the contract with the public body, means that the information which was previously supplied, is, by virtue of its inclusion in the agreement, negotiated and therefore subject to disclosure.

[63] That question was squarely addressed by Commissioner Loukidelis in Order 00-22 (it was not considered by Satanove J. on the judicial review). That case concerned a request for access to certain health care service contracts. The disputed information contained in the contracts originated in the third party's bid proposal in response to the Ministry's request for proposals. The process followed was similar to the one in this inquiry in that the public body provided some information in its request for proposals, the various bidders submitted their proposals, and there followed a period of discussion and modification of certain terms, culminating in a contract with the successful bidder. The difference between the parties' descriptions of the process in that case and the present one is that the parties in the health services contracts case described the discussion period between the bid proposal and the final contract as "contract negotiations." Here, CPR rejects such a characterization and describes

the discussions it had with TransLink as a "bid clarification" process. TransLink describes the process as a negotiation.

[64] In my view, little weight attaches to the label a party places on the discussions. The question is what was the character of those discussions. To the extent that the discussion contemplated alteration of the terms of the proposal, it was a negotiation, and any terms that were susceptible to alteration are negotiated, not supplied, information. This point can be illustrated by contrasting the request for proposals in Order 00-22, where the process contemplated possible alteration of the proposed terms before finalization of the contract, with the kind of bid tender arrangement common in construction contracts. In such situations, a unilateral contract arises upon submission of a tender, such that the tenderer cannot withdraw the tender without substantial penalty and the tenderer agrees that, if successful, the tender will automatically be a binding contract or that the terms of the tender will form the terms of a subsequent contract between the parties. While the question of whether an accepted tender is "supplied" information has not yet been decided, it is clear that the bid proposal process here was much more akin to the former situation than the latter. The nature of the discussions that followed CPR's bid submission contemplated that the terms of the bid could be changed. The extent to which they were actually changed does not alter the fact that they were susceptible of change and, by virtue of this process as ratified by the final contractual agreement, comprised negotiated information.

[65] Moreover, the fact that the schedules to the Crewing Agreement, which are expressly incorporated into the parties' contract, contain information that was originally supplied so that disclosure of those portions of the contract would reveal that information does not exempt the information from disclosure. The parties could have chosen not to incorporate wholesale into the contract the original bid proposal and the minutes of the bid clarification meeting; however, they agreed to do so. The consequence of their decision is that the information in Schedules II, IV and V became part of the negotiated contract. The next question is whether either of the supply exceptions applies.

[66] In *CBC v. Northwest Territories (Commissioner)*, [1999] NWTJ No. 117 (NWTSC), Vertes J. drew a distinction between certain financial terms in a lease proposal (at para. 56). He found that the "base rent," which was subject to negotiation between the parties and included a profit component, was negotiated information. However, the figure for "additional rent," which was actually a percentage of operating or maintenance (that is, fixed) expenses, was supplied. In other words, the additional rent was not susceptible of change through negotiations, but the base rent was. In this case, the crewing prices and other financial terms set out in Schedule II would have included some relatively fixed costs such as labour and overhead. However, Schedule IV clarifies that the financial terms set out in Schedule II represent CPR's total price for its crewing services, including its profit margins. CPR has not presented evidence to show that disclosure of the overall financial terms in the schedules together with the final agreement would disclose relatively immutable information such as fixed costs or other items not susceptible of negotiated change. Indeed, the fact that there is some change in the financial terms suggests that these terms were susceptible of change through clarification or negotiation. I conclude that CPR has not established that the information in Schedules II, IV, and V to the Crewing Agreement was supplied on the basis

that it is relatively immutable.

[67] The information in the Crewing Agreement and its schedules may also be supplied if its disclosure would allow a reader to draw accurate inferences about underlying confidential information that was supplied by CPR. In this case, disclosure of Schedules II, IV, and V would reveal what CPR originally proposed and discussed concerning its bid, information that was likely confidential at the time it was provided. Whereas the non-financial terms of the bid proposal appear to me to have been incorporated into the final agreement with little or no change, it appears that there was some change in the financial terms. This lends the originally proposed financial terms in Schedule II (as well as Schedules IV and V) an “underlying” quality. However, the underlying quality of the financial information must be assessed in the context of the parties’ choice to incorporate that information into their contract.

[68] As Commissioner Loukidelis noted in Order 01-20, the fact that a third party proposed terms similar or identical to those subsequently incorporated into the contract does not mean that the incorporated terms were supplied. Here, the contracting parties chose to incorporate Schedules II, IV, and V into their agreement and, as a general principle of contract law any term expressly incorporated into the agreement may be relevant to the interpretation of the agreement as a whole. It is not possible for me to determine, without evidence or submissions of the parties and in the face of their express incorporation of the original proposal and bid clarification minutes, that certain terms in the schedules are not truly part of and relevant to the final agreement. Accordingly, I find that Schedules II, IV, and V do not contain “supplied” information within the meaning of s. 21(1)(b).

[69] Turning to Schedules I and III, I make the following findings with respect to supply. Schedule I (which sets out train arrival and departure times) does not meet the supply requirement because there is no evidence before me that it was supplied by CPR to TransLink in the sense that it was not susceptible of change. Nor is there evidence that its disclosure would allow an accurate inference to be drawn about underlying confidentially supplied information. Schedule III does not contain information supplied by CPR as it contains TransLink’s request for detailed bid proposals. The evidence does not establish that its disclosure would allow any accurate inference to be drawn about any underlying confidential information that was supplied by CPR.

[70] I conclude that the Crewing Agreement, together with its schedules, does not contain information supplied in confidence within the meaning of s. 21(1)(b). It is therefore not excepted from disclosure.

[71] **3.3 Significant Harm** - Having found that none of the disputed records were supplied in confidence, it follows that the s. 21(1) disclosure exemption does not apply and the disputed records must be disclosed. While it is not strictly necessary to address the third part of the s. 21(1) test, I will do so in the event that I have erred in my earlier conclusions.

[72] CPR relies only on s. 21(1)(c)(i). In Order 00-10, Commissioner Loukidelis addressed what standard of proof applies to s. 21(1)(c)(i). He found that proof of certainty that harm

will result from disclosure was not required. Speculative harm will not suffice. Rather, the standard is set out in the *Act* itself, and the "expectation of harm as a result of disclosure must be based on reason." After reviewing comparable provisions in other jurisdictions, he summarized the standard of proof required in s. 21(1)(c)(i) as follows:

To sum up for present purposes, the standard of proof for harms-based exceptions is to be found in the wording of the Act - here, whether the disclosure of information could reasonably be expected to cause the specific harm to be protected against. Evidence of speculative harm will not meet the test, but it is not necessary to establish certainty of harm. The quality and cogency of the evidence must be commensurate with a reasonable person's expectation that the disclosure of the requested information could cause the harm specified in the exception. The probability of the harm occurring is relevant to assessing the risk of harm, but mathematical likelihood will not necessarily be decisive where other contextual factors are at work.

[73] Section 21(1)(c)(i) requires not only proof of a risk of harm, it requires that the risk be that disclosure harm "significantly" the competitive position or interfere "significantly" with the negotiating position of the third party. In Order 00-10, Commissioner Loukidelis also addressed the meaning of "significantly" in this context:

By adding the word "significantly" in s. 21(1)(c)(i), the Legislature clearly indicated that something more than "harm" is needed. As is discussed below, by choosing a standard of significant harm, the Legislature clearly contemplated situations where disclosure could simply harm the interests of a private business, but still be permitted.

It is neither possible nor wise to attempt an exhaustive definition of what is meant by "harm significantly". It is something more than mere harm, but it is difficult to go further than that in defining it. At the very least, the party bearing the burden of proof must prove that the anticipated harm is, when looked at in light of the circumstances affecting the third party's competitive position or negotiating position, a material harm to that party's competitive position. Among other things, in determining whether a feared harm is "significant", the extent of the harm in relation to the assets or revenues of the third party may be relevant. Take an example where disclosure could reasonably be expected to cause a $100,000 loss to a third party. The impact of that loss on the competitive position of a struggling startup business will obviously be greater than the impact of the same loss on a large multi-national corporation. This difference was recognized in Order No. 57-1995, where my predecessor found it "highly unlikely" that disclosure of environmental test results about one gas station site could reasonably be expected to harm significantly the competitive position of Chevron Canada Limited.

[74] CPR's evidence with respect to s. 21(1)(c)(i) was provided *in camera* from the Applicants but not from TransLink. The affidavit of PB, a CPR official, was submitted *in camera* because of CPR's position that disclosure of any and all information in either of the agreements could reasonably be expected to result in the harms in s. 21(1)(c)(i). CPR's claim of the global applicability of s. 21(1)(c)(i) to all information in the disputed records means CPR must establish the risk of harm set out in s. 21(1)(c)(i) for each term of the agreements, including their schedules. If that risk of harm is only established in relation to the disclosure

of some information in the agreements, then s. 21(1)(c)(i) is only satisfied for that information.

[75] This case differs from Order 00-22, where most of the disputed contracts had been released by the public body and only selected figures (global contract amounts, hourly rates and other specific breakdowns of global contract amounts) were withheld from disclosure. In that case, Commissioner Loukidelis held that the risk of harm in s. 21(1)(c)(i) had been established for the disputed information.

[76] CPR's case for risk of harm in this inquiry is similar to the third party's position in Order 00-09. There, the third party objected to disclosure of its entire commercial agreements with a public body. Commissioner Loukidelis found that the third party's generalized assertions of risk of harm were insufficient for the purposes of s. 21(1)(c)(i). He analyzed the quality of the third party's evidence, in part, as follows:

As for litigation instituted by other parties against Delta Fraser and its two partners, Delta Fraser did not elaborate on how disclosure of its agreements with the Province, or disclosure of the other records, could hamper negotiations with those parties. Delta Fraser did not say how knowledge, by parties opposed in interest, of the terms of its arrangement with the Province could affect any such negotiations. I cannot, on the material before me, conclude that Delta Fraser has established that disclosure of the records could reasonably be expected to interfere significantly with Delta Fraser's negotiating position in respect of the matters dealt with in those proceedings. I make the same finding respecting the Individual Third Party.

Delta Fraser argued "this matter may lead to expropriation proceedings" and, "in this event, any resolution of the underlying matter would be hampered". This argument is not entirely clear. Delta Fraser did not explain how there might be a connection between disclosure, expropriation, and harm or interference. Nor did Delta Fraser say which body might initiate such proceedings or provide evidence to support its contention that "this matter" - presumably, the arrangement with the Province - "may" lead to expropriation proceedings. If the Province were to expropriate the property, Delta Fraser did not say how disclosure of the records through the Act would harm its interests within the meaning of s.21. The Province already has the records; its custody of the records is a pre-condition to the holding of this inquiry. Even if one assumes that another body may expropriate the property, Delta Fraser has not said how disclosure at this time could reasonably be expected to lead to any harm, to Delta Fraser or any other third party, in the context of an expropriation.

[77] PB's affidavit is not long, and it does not specifically address most of the information in the disputed records. While PB states the nature of the harm that would follow disclosure and relates that harm to disclosure of some specific items of information in the Services Agreement, PB does not explain <u>how</u> disclosure of that information, much less the rest of the agreement, would lead to the harm described. Similarly, PB's evidence of harm flowing from disclosure of the Crewing Agreement identifies some items in that agreement and asserts that their disclosure will cause significant harm to CPR's negotiating and competitive position relating to future crewing bids and in labour relations. Again PB does not say <u>how</u> disclosure of the identified information, or the other information in the agreement, would lead to the

harm described.

[78] PB's affidavit asserts that part of one of the agreements contains discrete and proprietary business information disclosure of which would allow the calculation of certain CPR costs. It is not clear to me, from reading the indicated part of the agreement, how such costs could be calculated. Nor is there evidence to establish CPR's claims that the disclosure of such costs would result in significant harm to its competitive or negotiating positions, or that the contract information from which it is said sensitive CPR costs might be derived is of a proprietary nature.

[79] CPR's evidence is also that the agreements in issue in this inquiry differ in unspecified ways from other commuter agreements, so that if those differences are disclosed, they would be used to CPR's disadvantage in negotiations for contracts with other commuter authorities. CPR's evidence on this point is both vague and speculative and does not satisfy s. 21(1)(c)(i).

[80] Disclosure of the items of information objected to in the affidavit of PB would certainly put more information in the hands of those with whom CPR is currently negotiating, or expects to negotiate with in the future, as well as in the hands of its competitors. However, it does not necessarily follow that the information would be useful in negotiations or competitively, or so useful as to interfere significantly with CPR's negotiating position or significantly harm its competitive position. For example, the terms of the agreements may reflect the particular geography, population, track and track facilities, and other features of the West Coast Express service, so that they are quite specialized and disclosure will not be of significant value to others. This is a point made by the Applicants in their initial submission; it is not adequately answered by CPR.

[81] It is not self-evident that disclosure of all or part of the disputed records could reasonably be expected to cause significant harm to CPR. There is no evidence of the comparability of the commuter rail services for which CPR is currently negotiating (or for which it expects to negotiate in future) to the West Coast Express service. From the evidence provided, it is not possible to determine how useful (or harmful to CPR) disclosure of information in the agreements would be to CPR's negotiations or to CPR's competitors. Nor can I determine how useful (or harmful to CPR) information in the agreements would be useful to parties in future negotiations with CPR over shipping rates for unspecified distances and locations.

[82] Finally, with respect to the risk of significant harm in labour negotiations, CPR's submission is that its future negotiating position will be harmed because disclosure of the Crewing Agreement will allow the union to derive certain information valuable to the union's negotiating position and harmful to CPR's position. While I accept that the type of information involved might strengthen the union's negotiating position, the evidence is insufficient to establish significant interference with CPR's negotiating position. Absent evidence as to the scope of CPR's collective agreements and when CPR will be involved in labour negotiations, it is not possible to determine how relevant CPR's profits on the Crewing Agreement will be or what significance information from the Crewing Agreement would have for labour negotiations.

[83] I conclude that CPR has not established that disclosure of all or part of the disputed records presents the risks of harm described in s. 21(1)(c)(i).

4.0 CONCLUSION

[84] For the reasons given above, I find that TransLink is not authorized by s. 21(1) of the *Act* to refuse to disclose all or part of the disputed records. Accordingly, I recommend that under s. 58(2)(a) of the *Act*, the Commissioner require TransLink to give the Applicants access to the disputed records.

August 15, 2001

ORIGINAL SIGNED BY

Nitya Iyer
Delegate of the Information
and Privacy Commissioner