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

Order 03-03

UNIVERSITY OF BRITISH COLUMBIA

David Loukidelis, Information and Privacy Commissioner
January 28, 2003

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Summary: The applicant, a journalist, requested copies of draft or final agreements between UBC and various businesses respecting on-campus supply of goods or services by third party businesses. Telus sought a review of UBC's decision to disclose a 1999 products and services agreement between them. Section 21(1) does not require UBC to refuse to disclose information in the agreement. The information falls under s. 21(1)(a), but requirements of s. 21(1)(b) and (c) are not established.

Key Words: financial or economic interests – trade secret – third party commercial or financial information – monetary value – supplied in confidence – competitive position – negotiating position – significant harm – interfere significantly with – undue financial loss or gain – disclosure clearly in the public interest.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 2(1), 14, 17(1), 21(1)(a), (b) and (c); 25(1)(b); *Copyright Act*, s. 32.1.

Authorities Considered: British Columbia: Order No. 322-1999, [1999] B.C.I.P.C.D. No. 35; Order 00-22, [2000] B.C.I.P.C.D. No. 25; Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order 02-50, [2002] B.C.I.P.C.D. No. 51; Order 03-02, [2003] B.C.I.P.C.D. No. 2. **Alberta:** Order 2001-19, [2001] A.I.P.C.D. No. 35. **Ontario:** Order P-1605, [1998] O.I.P.C. No. 191; Order P-1611, [1998] O.I.P.C. No. 200; Order PO-2018, [2002] O.I.P.C. No. 83; Order MO-1553, [2002] O.I.P.C. No. 99.

Cases Considered: *Jill Schmidt Health Services Inc.* v. *British Columbia (Information and Privacy Commissioner)*, [2001] B.C.J. No. 79, 2001 BCSC 101; *Canadian Pacific Railway* v. *British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848, 2002 BCSC 603; *Canadian Broadcasting Corp.* v. *Northwest Territories (Commissioner)*, [1999] N.W.T.J. No. 117 (S.C.).

1.0 INTRODUCTION

[1] This decision stems from a December 22, 2000 request to the University of British Columbia ("UBC"), under the *Freedom of Information and Protection of Privacy Act* ("Act"), for access to what the applicant journalist described in his request as "marketing contracts" between UBC and various businesses respecting the exclusive supply of services and goods to "UBC students, faculty and staff". The facts relating to the applicant's request are set out in Order 03-02, which is issued concurrently with this decision, and I will not repeat them here.

[2] One of the records covered by the applicant's request was a 1999 "Strategic Alliance Agreement" ("Telus agreement") between UBC and BCT.Telus Communications Inc. ("Telus"), represented in this inquiry by Telus Corporation. This is the only record in issue in this order. The Telus agreement is 50 pages long and has 15 schedules appended to it. In general terms, it establishes and governs the contractual relationship between Telus and UBC respecting, as Telus says on p. 3 of its initial submission,

> … the sale, marketing, forecasting, pricing and delivery by TELUS and its affiliates of telecommunications products and services to UBC and to businesses operating on UBC lands.

[3] On April 18, 2001, UBC gave notice to Telus under s. 23 of the Act. The notice sought Telus's "views regarding disclosure" of records "containing information the disclosure of which may affect your business interests." On May 8, 2001, Telus asked UBC to deny access to the Telus agreement. Telus also asked UBC to deny access to records containing "any information relating to the Alliance Agreement or the performance of TELUS and UBC under the Alliance Agreement". Telus's letter went on to specify certain information that it wished to remain confidential.

[4] On May 22, 2001, UBC wrote Telus to say that it would deny access to the Telus agreement. On October 4, 2001, however, UBC wrote again to say that it had decided to disclose the Telus agreement. This decision was made on the basis of the information available to UBC and Order 01-20, [2001] B.C.I.P.C.D. No. 21. On October 24, 2001, Telus requested a review, under Part 5 of the Act, of UBC's October 4, 2001 decision.

[5] I held a single written inquiry, under Part 5 of the Act, respecting the various records, issues and third parties involved in the applicant's access request and UBC's responses to it. That inquiry results in three separate orders, of which this is one. This order deals only with Telus's request for review. Order 03-02, [2003] B.C.I.P.C.D. No. 2 deals with the applicant's request for review respecting UBC's decision to withhold a draft exclusive marketing agreement involving the Royal Bank of Canada and HSBC Bank (formerly Hongkong Bank of Canada). Order 03-02 also sets out procedural history and legal principles that apply to all three orders, in this case, principles respecting s. 21(1) of the Act. Order 03-04, [2003] B.C.I.P.C.D. No. 4 deals with the request for review made by Spectrum Marketing Corporation ("Spectrum"). To be clear, Telus asked me to consider the merits of its request for review independently of the

requests for review made by Spectrum and the banks. I have done this. I have considered and decided each request for review arising from the applicant's request on its own merits, independent of the merits of the other requests for review.

2.0 ISSUES

[6] The issues in this order are as follows:

1. Does s. 25(1)(b) require UBC to disclose the Telus agreement?

2. Does s. 21(1) require UBC to refuse to disclose the Telus agreement?

[7] Under s. 57(3)(b) of the Act, it is "up to the third party" – in this case, Telus – to prove that, by virtue of s. 21(1), the applicant has no right of access to the record or part of it. As for the s. 25(1) issue, I addressed the burden of proof question in Order 03-02 and the principles discussed there apply equally here.

3.0 DISCUSSION

[8] **3.1 Does Section 25(1)(b) Require Disclosure?** – Nothing in the nature or content of the Telus agreement, or other circumstances before me, suggests that s. 25(1)(b) requires its immediate, mandatory disclosure. For the same reasons I gave in Order 03-02, which I consider equally applicable here, I find that s. 25(1)(b) does not require UBC to disclose the Telus agreement.

[9] **3.2 Telus's Interests Under Section 21** – Section 21(1) of the Act requires a public body to refuse to disclose certain information if disclosure could reasonably be expected to cause any of the kinds of harm identified in s. 21(1)(c). For convenience, I will reproduce here s. 21(1) as it read at the time of the inquiry in this matter:

> **Disclosure harmful to business interests of a third party**
>
> 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.

(2) The head of a public body must refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

(3) Subsections (1) and (2) do not apply if

(a) the third party consents to the disclosure, or

(b) the information is in a record that is in the custody or control of the British Columbia Archives and Records Service or the archives of a public body and that has been in existence for 50 or more years.

[10] I will not repeat here the principles that apply in s. 21(1) cases. They are articulated in a variety of cases, including Order 00-22, [2000] B.C.I.P.C.D. No. 25 (upheld on judicial review, at [2001] B.C.J. No. 79, 2001 BCSC 101), Order 01-20, [2001] B.C.I.P.C.D. No. 21, and Order 01-39, [2001] B.C.I.P.C.D. No. 40 (upheld on judicial review, at [2002] B.C.J. No. 848, 2002 BCSC 603).

Does the agreement contain commercial or financial information?

[11] Telus does not argue that the contents of the Telus agreement are a "trade secret" within the meaning of the Act. (At p. 7 of its initial submission, it says the contents of the Telus agreement are "proprietary" and have always been treated as such, but this is not an argument that the agreement's contents are a "trade secret" under the Act. Certainly, I would, without more, find it difficult to see how this could be so.)

[12] A large part of the Telus agreement consists of what can only be described as boilerplate provisions, including clauses dealing with waiver, assignment, severability of provisions, governing law and methods for the parties to give notice to each other. These clauses do not, on their face, appear to have commercial value or competitive sensitivity, but that does not mean they are not commercial or financial information of Telus within the meaning of s. 21(1)(a)(ii).

[13] I have observed in previous orders that information "of" a third party under s. 21(1)(a) need not relate only to that party. The terms of a mutually agreed-upon contract, assuming they are commercial, financial, labour relations, scientific or technical information, are information that is of both contracting parties under s. 21(1)(a)(ii).

[14] Here, I find that, under s. 21(1)(a)(ii), the Telus agreement is commercial or financial information and it is information of Telus. This conclusion is consistent with my finding as to the nature of the information in the exclusive supply cold beverage agreement in issue in Order 01-20.

Did Telus supply the agreement's contents in confidence?

[15] According to Telus, the Telus agreement was confidential as between the parties. It says the following at p. 3 of its initial submission:

> With respect to subsection 21(1)(b) of the Act, both TELUS and UBC have at all times considered the Alliance Agreement [*i.e.*, the Telus agreement] to be confidential, as evidenced by the non-disclosure provisions contained in Article 23 and section 4.3 of the Alliance Agreement. We further note that in section 23.1 of the Alliance Agreement UBC acknowledged that such information was strictly confidential and that each page of the Alliance Agreement has been stamped "Confidential". Internally, the TELUS Legal Department maintains strict control of electronic copies of the Alliance Agreement and copies are only circulated within TELUS to those personnel who have a need to know.

[16] I accept that the parties had a mutual intention to keep the Telus agreement confidential.

[17] The remaining question is whether information in the Telus agreement was "supplied" to UBC within the meaning of s. 21(1)(b) of the Act. At p. 7 of its initial submission, Telus acknowledges the way in which the s. 21(1)(b) supply requirement has been interpreted and applied in the past:

> In past decisions respecting the interpretation of section 21 of the Act, including the Coca-Cola decision [Order 01-20], the Office of the Privacy Commissioner has clarified that generally business terms which have been negotiated by the contracting parties are not "supplied" by a contracting party merely because the contracting party creates the written material evidencing the negotiated terms.

[18] The essence of Telus's argument is that the Telus agreement was "supplied" to UBC because it represents an innovative "strategic customer service delivery model" which Telus has developed to substitute a "partnering relationship" for the traditional "vendor/purchaser relationship for delivering telecommunications products and services" (p. 4, initial submission). Since Telus is maintaining that the Telus agreement has, in its entirety, a unique and proprietary quality that sets it apart from contracts such as the exclusive supply cold beverage agreement considered in Order 01-20, I will quote at some length from Telus's description of its "alliance model" (pp. 3-6, initial submission; where indicated, I have deleted small amounts of information that, though provided in an open submission, Telus has asked me to exclude from my published order):

> Securing and implementing strategic alliances with TELUS' large business and institutional customers in Alberta and British Columbia has been a key business focus for TELUS over the past 5 years. These customers include public companies, airport authorities, universities, educational institutions, municipal, federal, provincial and municipal governments and health care facilities. The alliance arrangements represent a significant and unique departure from the way telecommunications providers in Canada, including TELUS, have traditionally sold

and delivered services to large business customers. In the past, telecommunications services were typically sold and delivered on separate contractual terms and conditions. Typically there was at most informal arrangements [*sic*] respecting future telecommunications and infrastructure requirements of the customer, joint marketing arrangements respecting third parties and no customer incentives for increasing the customer's business with TELUS or business generated on the lands owned or administered by the customer.

As a result of, and in response to:

1. increased flexibility arising from deregulation or forbearance of certain telecommunications services by the CRTC;

2. enhanced competition among carriers for key national and regional business and institutional customers;

3. demands by large customers to have "one window" access to TELUS' organization;

4. the increasing sophistication of telecommunications and information technology ("IT") services enhancing the attractiveness to customers of having a telecommunications and IT applications partner available to them; and

5. the increasing recognition of business generally of the benefits of partnering with other organizations who can offer additional benefits outside a traditional buyer/seller relationship. These benefits could include joint marketing efforts designed to provide economic benefit to both parties

TELUS developed a strategic customer service delivery model. Where implemented, this alliance model effectively replaces a vendor/purchaser relationship for delivering telecommunications products and services with a partnering relationship. From TELUS' perspective, TELUS is able to secure a long term commitment from a customer to subscribe for certain services, preferential supply rights respecting future services including exclusivity, rights of first refusal and first offer, access to marketing opportunities to third parties and access to, and use of, customer premises and telecommunications infrastructure at no charge.

From the customer's perspective, the customer receives access to TELUS' technical and project management expertise for new technology initiatives, preferred access to TELUS technology partners, enhanced marketing profile and abilities through the use and leverage of the TELUS name and TELUS industry relationships, competitive pricing commitments, preferred service levels on services, escalation processes for resolving service issues and access to revenue sources through payment of marketing rights fees, intellectual technology funding and event sponsorship. The customer and TELUS also enjoy one window access to key executives in each other's organizations through the establishment of an alliance governance committee comprised of senior personnel from TELUS and the customer's procurement, IT and corporate development departments, which governs the alliance, discusses new technology and business opportunities and acts as a forum for resolving disputes.

TELUS' alliance model is a fundamental component of TELUS' strategy of retaining existing strategic business customers in TELUS' traditional operating territory of British Columbia and Alberta and winning long term business from new strategic customers in other provinces. TELUS currently has [number excluded] formal strategic alliance arrangements with key business customers in Alberta and British Columbia, and is currently finalizing a number of new alliances in those provinces as well as … [name of province excluded]. While each alliance has been tailored to suit the particulars of each customer, all alliances, including the UBC Alliance, are comprised of the same basic elements.

TELUS has faced a number of significant internal and external challenges in building a successful alliance strategy. The hallmark of a customer selected to be a strategic alliance partner of TELUS is an anticipated high volume demand for a variety of TELUS products and services, strategic visibility in the marketplace and the ability to provide TELUS with marketing access to third parties with a demand for TELUS products and services. The range of TELUS products and services contained within TELUS' strategic alliances include data services, video conferencing, consulting services, wireless services such as cellphones, paging, radio trunking, telecommunication and customer premise equipment (CPE) and infrastructure management and traditional telephone services as well as financial, HR and clinical system applications. As noted above, TELUS and its affiliates have typically delivered each of these services on a stand alone basis with no formal coordination of service terms or customer contacts. Bringing all these products and services under the umbrella of a strategic alliance governed by common principles and a common support team within an organization of approximately thirty thousand people has taken considerable internal resources and effort.

TELUS also faced challenges to develop an alliance model which meets CRTC regulatory requirements. As a telecommunications carrier, Telus and its services are subject to regulation under the *Telecommunications Act*. This legislation and related regulations and CRTC policy directives regulate how TELUS can provide tariffed and non-tariffed services to its customers, including restrictions, and in some cases prohibitions, on providing special arrangements or preferred treatment to a business customer over other customers and subsidizing services through rebates or other types of compensation. The terms under which Telus must provide tariffed services is different for each tariffed service. The unique nature of the TELUS alliance model is partly attributable to the creative manner in which TELUS has been able to offer additional value to TELUS' alliance partners while still complying with CRTC regulatory constraints.

As public institutions and government continue to face funding shortages, the payment of marketing rights fees, the sponsorship of research chairs and the establishment of technology research and development accounts has been an attractive feature of the alliance model for these customers in particular. TELUS' business case for the customer funding commitments by TELUS is premised upon the customer granting preferred supplier and marketing rights for TELUS for services for the long term (typically five years plus renewals) and the customer committing to hold particulars of the alliance strictly confidential to ensure that TELUS competitors are not in a position to undercut or otherwise compromise the

> balance of business interests upon which the alliance is based, either during the term of the alliance or during alliance renewal negotiations.

[19] Paragraph 3 of the affidavit of Kegan Adams, Telus's Account Vice-President, reads as follows:

> TELUS has aggressively pursued a business strategy of identifying and securing strategic alliances with high value or otherwise strategic business and institutional customers operating within British Columbia and Alberta … [four words excluded]. These alliances are based upon an alliance model which was developed internally at TELUS and presented to customers as a way to satisfy the anticipated telecommunications requirements of such customers and distinguish TELUS from its competitors. The Alliance Agreement between TELUS and the University of British Columbia ("UBC") was based upon the TELUS developed strategic alliance model and the form of the agreement was prepared by TELUS and presented to UBC. This same model formed the basis of alliance arrangements secured by TELUS with other customers in British Columbia, Alberta ... [two words excluded] after the UBC alliance was signed.

[20] Page 6 of Telus's initial submission continues as follows:

> The form of the Alliance Agreement was prepared by TELUS based upon the alliance agreement template developed by TELUS as part of TELUS' general alliance strategy. The business arrangement as well as the Alliance Agreement, which was based upon the agreement that has been put in place with TELUS' first strategic partner, was then presented to UBC. There were subsequent negotiations on certain agreement terms, such as the types of services to be included in the various preferred supplier categories and the amount of the sponsorship and IT and joint marketing funds payable by TELUS. TELUS has been advised by the external counsel for TELUS who was involved in the drafting of the revisions to the Alliance Agreement that such changes did not in any way alter the fundamental elements of the alliance or the form of agreement originally presented by TELUS to UBC.

[21] Telus's initial submission goes on to list what it describes as the "fundamental elements" of the alliance or the form of agreement that it contends were not altered by negotiations with UBC. The 11 items Telus lists can be described generally as rights or interests granted by UBC to Telus or the other way around. They amount to broad descriptions of matters the parties have chosen to address contractually. (Telus did not tender the list of items *in camera* – nor would I have accepted it as such – but Telus has nonetheless requested me not to disclose, or even paraphrase, the list of items in this order. I have decided to respect that request although, in my view, the listed elements are general, unremarkable and entirely to be expected in an exclusive or preferred services and products agreement or, in some cases, in any commercial contract.) At p. 7 of its initial submission, Telus concludes as follows about the supply issue:

> For the reasons discussed above, TELUS is of the view that the content of the Alliance Agreement, in so far as it is the embodiment of the TELUS alliance model

> which has been created and refined by TELUS and was presented as a package by TELUS to UBC clearly represents information which has been supplied by TELUS to UBC. While there was some negotiation of business terms in finalizing the Alliance Agreement, in TELUS' view the proper test to be applied is was [*sic*] the information contained in the alliance agreement provided by TELUS proprietary to TELUS and did TELUS at all times treat that information as proprietary. TELUS submits on both questions the answer must be yes.

[22] I have often said that information in an agreement negotiated between a public body and a third party will not normally qualify as information that has been "supplied' to the public body. The exceptions to this tend to be information that, though in a contract between a public body and a third party, is not susceptible of negotiation and change and is likely of a proprietary nature. In Order 00-37, [2000] B.C.I.P.C.D. No. 40, I identified an unusual example where the public body, Simon Fraser University, was a subscribing member of the Canadian Universities Reciprocal Insurance Exchange. The circumstances were unusual in that the form of the manuscript insurance policy involved was unique, it was exclusive to the reciprocal insurance exchange and its member subscribers (including SFU), it was non-negotiable and the public body was both a member of the third-party reciprocal insurance exchange and a subscriber to its product. I found that the form of the policy, but not information particular to the public body – policy number, named insured and address, names of additional named insured, policy period, limit of liability, deductible, premium amounts – was information supplied by the reciprocal insurance exchange to the public body as one of its member subscribers. I found that the form of policy was effectively the product that was offered by the reciprocal insurance exchange to its member subscribers. I held that the information that I found was qualified for protection under s. 21(1) also could be withheld under s. 17(1) of the Act.

[23] In Order 01-39, [2001] B.C.I.P.C.D. No. 40 (upheld on judicial review, at [2002] B.C.J. No. 848, 2002 BCSC 603), Nitya Iyer, to whom I had delegated the conduct of that inquiry, summarized the approach to the s. 21(1)(b) "supply" issue where contract information is involved:

> [43] … 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).

[24] Telus's submissions and affidavit evidence indicate that the Telus agreement is based on a "model" of a "strategic alliance" that Telus had developed. It is also apparent, however, that Telus alliance agreements are tailored to suit the customer and that Telus and UBC negotiated the terms of the agreement that they ultimately signed. Review of the Telus agreement confirms that it is indeed particular to UBC's characteristics and needs. This is so even if other Telus customers have agreed to parallel or similar terms in their alliance agreements.

[25] Telus claims that all the information in the Telus agreement is excepted from disclosure under s. 21(1). Its focus on the "supply" issue is on its strategic alliance business model and template agreement. Telus does not address the "supply" requirement for information in the Telus agreement that is particular to UBC. It is hard to imagine how the information that is particular to UBC could be said to have been supplied by Telus. In any event, evidence has not been provided to support such a proposition.

[26] Telus contends in argument – but has not included evidence in the affidavit it submitted – that its unidentified external legal counsel at some time told an unidentified person at Telus that revisions to the agreement resulting from negotiations did not "in any way alter the fundamental elements of the alliance or the form of agreement originally

presented" by Telus. I have not been provided with Telus's "alliance agreement template" from which the Telus agreement is said to be derived. There is no evidence before me as to which parts of the Telus agreement are said to be the same as any template agreement, which parts were added or revised and whether parts of the template agreement were omitted from the Telus agreement. Telus's claim is that the schedules as well as the body of the Telus agreement were all supplied in their entirety. This suggests that the "form of the original agreement presented", referred to by Telus in its argument, might have included both the body of the contract and all of its schedules, but Telus's submission is unsettling in its vagueness on this point. I also have other concerns, described below, about the status of the schedules to the Telus agreement.

[27] The following is obvious on the face of some schedules to the Telus agreement (Schedules "A", "B", "H", "I", "N" and "O"): they did not come from Telus (one schedule has a note in the lower right hand corner indicating that it was produced by UBC Planning & Development, with copyright protection claimed as of July 1997); they contain information that is entirely particular to UBC; they pre-date Telus's strategic business alliance model and represent the traditional product-by-product arrangement for delivery of telecommunications services; or they are clearly public information.

[28] These features of Schedules "A", "B", "H", "I", "N" and "O" to the Telus agreement give me great pause as to how any information in them could be said to have been "supplied" by Telus as part of its alliance agreement template or at all.

[29] In any event, and as I have said in earlier orders, the fact that one party may have proposed terms in identical or similar form to the form in which they subsequently were incorporated in a contract does not change the fact that they were negotiated by the parties to the contract, nor does it mean that the terms were supplied by the proposing party within the meaning of s. 21(1)(b). Schedules "C", "D", "E", "F" and "G" particularize products, services and opportunities covered by the Telus agreement. Schedules "J" and "M" particularize conditions of use of Telus and UBC marks. Schedule "K" particularizes matters to be reported on by Telus under the agreement. Schedule "L" is a list of Telus corporate affiliates covered by the agreement at its inception. The kind of information in these schedules is typical of mutually agreed-upon terms tailored to meet needs or characteristics of a particular customer. I would not regard the information in these schedules as "supplied" on the basis of which party drafted or put the schedules forward, originally or in the final wording that the parties agreed upon.

[30] Telus refers to Order 2001-019, [2001] A.I.P.C.D. No. 35, a decision of Robert Clark, the then Information and Privacy Commissioner of Alberta. In that case, Commissioner Clark denied access to a memorandum of understanding between Telus and the City of Edmonton on the ground that disclosure would be harmful to Telus's business interests. Para. 14 of that order reads as follows:

> Evidence at the inquiry showed that the information in the MOU was explicitly "supplied" to the City because Telus developed the MOU, and the MOU sets out the terms of what Telus is prepared to do for the City.

[31] I have no way of knowing what evidence was before Commissioner Clark in the proceedings leading to Order 2001-019. But if his conclusion on the "supply" issue was reached on the premise that supply is determined simply on the basis of what party has come up with or drafted contractual terms that the other party has accepted, then I must respectfully disagree. As I have said in earlier orders, such an interpretation and application of the supply criterion is a mechanical and fortuitous approach to the s. 21 disclosure exception. It is not in keeping with the interpretation and application of the supply requirement in orders in British Columbia or other Canadian jurisdictions. This is illustrated, for example, by the following passage from p. 5 of Ontario Order MO-1553, [2002] O.I.P.C. No. 99, respecting the "supply" requirement in s. 10(1) of the Ontario *Municipal Freedom of Information and Protection of Privacy Act*:

> As indicated above, this element of the three-part test under section 10(1) has been the subject of a number of prior orders involving contracts. Most of these orders have concluded that contracts between government and private businesses do not reveal or contain information "supplied" by the private businesses. These findings reflect the common understanding of a contract as the expression of an agreement between two parties. Although, in a sense, the terms of a contract reveal information about each of the contracting parties, in that they reveal the kind of arrangements the parties agreed to accept, this information is not in itself considered proprietary information that qualifies for exemption under section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party.

[32] The information in dispute in Ontario Order MO-1553 was a letter, a change order and an acknowledgement of the change order, all of which related to a contract between a public body, the City of Mississauga, and a third party for bus and bus shelter advertising. The disputed records contained information setting out contractual terms, including the duration of the contract, performance guarantee arrangements, financial reporting requirements, net billings projections and percentage of net billings to be distributed to the public body. The public body maintained that the disputed records contained unique terms and proposals that were developed solely for the public body. The third party maintained that the information in issue had been submitted to the public body in a sealed bid. Adjudicator Morrow concluded that the disputed records were not "supplied", saying the following at p. 6:

> … the City does not identify in its representations what "information", "terms" and "proposals" were actually supplied by the affected party to the City. Further, the affected party does not identify the substance of the "information" and "correspondence" that it refers to in its representations. In addition, the information requested is not the contents of the affected party's sealed bid but rather the product of negotiations between the City and the affected party.
>
> In my view, the reasonable inference to be drawn from the City's cover letter to the affected party, and the surrounding circumstances, is that the contents of the change order were the result of negotiations between the affected party and the City. The

> affected party submitted a proposal requesting specific modifications to the original contract; the City responded to this proposal with a counter-proposal, consisting of the cover letter, change order and acknowledgement. Some time later, an authorized officer representing the affected party signed and dated the acknowledgement and confirmed the affected party's agreement to the City's counter-proposal.
>
> Based on my review of the cover letter, change order and acknowledgement, and in the absence of detailed representations on this point from the City and the affected party, I am not satisfied that any of the information in the records was supplied by the affected party or would reveal information actually supplied, as required under section 10(1), as opposed to mutually generated through negotiation. My finding applies even if it could be said that some of the language in the record is substantially based on the proposal submitted by the affected party.

[33] Ontario Order MO-1553 relies on many earlier Ontario orders, including those I discussed in Order 03-02. Order MO-1553 also relies on the recent decision of Adjudicator Liang in Order PO-2018, [2002] O.I.P.C. No. 83. That decision dealt with portions of a contract with a public body for integrated network services, *i.e.*, contract provisions respecting the general consequences of termination, limitation of liability (dollar amounts only were in issue), intellectual property rights and definitions describing processes or systems used by the third party or identifying a subcontractor. Adjudicator Liang ordered disclosure of the disputed information except the definitions describing processes or systems used by the third party. At para. 30, she distinguished two earlier Ontario orders that had confirmed the withholding of some information in contracts, Order P-1605, [1998] O.I.P.C. No. 191, and P-1611, [1998] O.I.P.C. No. 200, on the following grounds:

> … In both, certain information in the contracts at issue was said to be proprietary in nature, revealing unique methods or strategies in which businesses had a proprietary interest. In Order P-1611, the company asserted that it had a copyright in the information, and in Order P-1605, the information was found to constitute a trade secret. The findings therefore do not apply broadly to the terms of contracts between government institutions and third parties. ….

[34] With respect to Ontario Order P-1611, Telus has not asserted here an interest in the Telus agreement based on copyright. Even if it had, I would not have found this established "supply" because copyright protection relates to reproduction, not to disclosure, and s. 32.1 of the *Copyright Act* (Canada) explicitly provides that disclosure pursuant to federal or provincial access to information legislation is not an infringement of copyright. With respect to Ontario Order P-1605, in that case some information in a contract was found to be a trade secret. As I noted earlier, Telus has not made that argument in this case nor, on the evidence before me, would it have been a sustainable argument.

[35] I return to what can only be characterized as the over-reaching generality of Telus's argument on "supply" of the entire Telus agreement and to the fact that its most

critical aspects, such as they are, are not even addressed in the supporting affidavit of Kegan Adams. I return to the fact that the burden of proof lies with Telus. I return to the proposition that, under access to information legislation, the provisions of a contract are, in general, treated as mutually generated, rather than "supplied" by the third party. I conclude that, on the evidence and argument before me, it has not been established that information in the Telus agreement was "supplied" within the meaning of s. 21(1)(b) of the Act.

Harm to third party business interests and other harm

[36] Although I have found that Telus has not established supply of information within the meaning of s. 21(1)(b) of the Act, I will consider the third part of the three-part s. 21(1) test.

[37] Telus argues that disclosure of the Telus agreement would significantly harm its competitive position (s. 21(1)(c)(i)) and also directly and indirectly result in undue financial gain to its competitors (s. 21(1)(c)(iii)). Telus says it has invested considerable resources in developing and refining its alliance model, which has enabled it to win new business from its competitors. It also does not believe that other telecommunications companies currently operating in Canada have developed and implemented a "fully developed and supported strategic customer alliance strategy similar to that used by Telus". It says disclosure would allow its competitors to compete for its premium public and private business customers nationally by matching funding commitments, service levels, joint marketing initiatives, included services and other alliance terms. Telus says that, if the Telus agreement is disclosed, the degree of the harm to it and of the undue gain to its competitors will multiply as my decision is used as a precedent for the disclosure of other Telus 'strategic alliances' with public entities.

[38] Telus suggests, finally, that disclosure of the Telus agreement may result in similar information no longer being supplied to UBC when it is in the public interest that it continue to be supplied (s. 21(1)(c)(ii)). If the Act requires disclosure of the Telus agreement, Telus expects to revisit its business strategy relating to public institutions and commitments to undertake joint marketing activities or share marketing information with public institutions. It says this may put public institutions at a disadvantage in relation to large private customers who are not subject to disclosure legislation and with whom Telus will continue to implement its existing alliance model and that it may result in reducing funding to public institutions.

[39] The above assertions are found in Telus's argument. The affidavit provided by Telus addresses to some degree the resources allocated by Telus to securing and maintaining strategic alliances and its expected gross revenue from alliance arrangements in 2002 and following years. Kegan Adams deposed as to his belief, to the best of his information and knowledge but without further particulars, that other telecommunications providers do not currently employ in British Columbia and Alberta a "strategic alliance strategy" similar to Telus's model which, Adams believes, has been instrumental in distinguishing Telus from its competitors and enabling it to retain and build high value

telecommunications business in those provinces. Telus's position on harm under s. 21(1)(c) is not otherwise addressed in the affidavit evidence.

[40] As with Telus's position on "supply", I cannot ignore the sweeping generality of its claim that disclosure of any and all information in the Telus agreement, including the schedules, would lead to harm as contemplated by s. 21(1)(c) or the fact that the most critical aspects of its assertions are not even addressed in the affidavit it has provided. The burden of proof rests with Telus. In Order 02-50, [2002] B.C.I.P.C.D. No. 51, at paras. 111-112, 124-137, I examined at length the standard of proof for harms-based exceptions under the Act. That order concerned s. 16 and s. 17, but s. 21 also sets out a reasonable expectation of harm test and a number of the cases discussed in that order related to establishing harm for third-party business interests exceptions. The discussion of proof of harm under s. 17 and s. 21 in Order 01-20, at paras. 57-66, is pertinent as well. It must also be remembered that, for s. 21(1)(c)(i) and (iii), the harm must be "significant" and the gain or loss must be "undue".

[41] On the harm issue in the present case, I refer as well to a decision that I examined in the context of "supply" in Order 01-20 and discuss in Order 03-02, *Canadian Broadcasting Corp.* v. *Northwest Territories (Commissioner)*, [1999] N.W.T.J. No. 117 (S.C.). That case considered the application of the third-party business interests exception to government leases of commercial and residential space. Vertes J. held that it was not enough to offer generalized statements in affidavits about a highly competitive environment without providing detailed evidence in that regard. He said the following:

> ¶31 What is notable about these affidavits is that they all contain a statement of fact (that the third parties operate in a highly competitive environment) but none of them provide detailed evidence as to the level of competition. I do not know whether, for example, each lease was the result of a separate RFP or if there were comprehensive RFP's covering requirements in a number of communities. With respect to each lease, how many competing proposals were received? Are these companies the only available providers of property for rent in some of these communities? One may assume that competitors would use whatever information they could get their hands on to underbid each other in a competitive market, but, that is different from being asked to assume that there are competitors in each of these marketplaces. Do these companies even compete with each other? There is nothing in the evidence to answer these questions.
>
> ¶32 Counsel for the third parties submitted that one can safely assume that there is competition because the government called for proposals. I do not agree. The government's regulations require the issuance of a tender or an RFP for every contract (unless it is one made directly under the authority of the Executive Council). There may only have been one submission in response to a particular RFP or there may have been many. I do not even know if the department directed any RFP to specific potential contractors, or whether it issued any RFP to the public at large. I note that the term "request for proposal" includes the solicitation of a proposal by public advertisement or private invitation: see s. 1 of the *Government Contract Regulations*, R.R.N.W.T. 1990, c. F-3. I do know that the

communities across the north vary greatly in size and in the level of economic activity. I also know that government plays a significant if not predominant role in the economic life of most northern communities. Thus, whatever private economic interests are present are no doubt actively interested in dealing with government on these types of long-term arrangements. But, having made these general comments, I still do not know whether there is in fact a highly competitive environment, as the third parties assert, or if the arguments about competition are being made in a vacuum.

[42] Vertes J. concluded that neither undue financial loss nor gain, nor prejudice to competitive position, had been established, saying the following:

Undue Financial Loss or Gain:

¶62 The respondents appear to take a cumulative approach to the three types of harm outlined above. In effect they say that, if there is prejudice to the third parties' competitive position and if outsiders could interfere with their contractual negotiations, then one can assume undue financial loss. But I do not think one can read any assumptions into the statute. These are distinct types of harm. The burden on the government here is to establish that release of this information could reasonably be expected to result in undue financial loss or gain. Just establishing prejudice to one's competitive position does not necessarily lead to the conclusion that undue financial loss is probable. The most that the third parties can say is that competitors could underbid them on future proposals or "drive down" the market by offering lower rents on other properties thereby forcing these parties to settle for lower rents when terms are periodically renegotiated.

¶63 It seems to me that the word "undue" is used in subsection 24(1)(c)(i) for the very purpose of distinguishing between mere financial losses or lower returns (caused say by not getting a contract or by having to renegotiate a rent not as high as the previous one) and financial losses that are unfair, improper, inappropriate, or excessive; in other words, "undue". I do not think this exemption is meant to shield third parties from lower profit margins. The word "undue" must have some meaning beyond that of mere loss of income in the sense of less profit.

¶64 No evidence has been put before me to show how release of this information, including rental rates, could reasonably result in undue financial loss. All that I have been told is that I can assume that, with better informed competitors, these third parties will suffer losses. This is too much of a generalization. I find that the exemption under this heading has not been established.

Prejudice to Competitive Position:

¶65 The respondents submit that where information can be used by competitors then it results in prejudice to the third parties' competitive position. I accept, as I said before, the general proposition that if information is available then a competitor will undoubtedly try to use that to its advantage. But even if I work from that assumption, that does not mean that I can assume that prejudice is the probable result. That depends on the specific market, the number and type of

> competitors, the manner in which the government organizes and issues its requests for proposals, and whether one can reasonably conclude that by knowing what rent the government is paying now could realistically assist in devising a rental rate in the future that will be the most competitive. It also ignores the fact that price is merely one factor in the evaluation of proposals.
>
> ¶66 Counsel for the third parties submitted that detailed and convincing evidence has been presented (in the form of statements such as those of Mr. Mrdjenovich quoted previously). He compared it favourably to the type of evidence presented in the *Re Information Commissioner* case (supra) [(1990), 72 D.L.R. (4th) 113 (F.C.T.D.)]. I respectfully disagree with counsel's estimation of the quality of the evidence presented.
>
> ¶67 The evidence put forward on behalf of the third parties speaks in general terms about operating in a small and highly competitive environment. Yet, as I noted previously, I have no evidence as to how competitive that environment actually is (in reference to government requests in general or to the requests relating to these properties in particular). I am given nothing but conclusionary statements. This can be contrasted with the type of evidence in the *Re Information Commissioner* case. There the court was provided with affidavits from different sources clearly establishing why and how the information sought in that case could prejudice the party's competitive position. There was detailed evidence as to the level of competition and the strategic value to competitors of the information sought. The evidence submitted to me falls far short of that type of detail. It is, to borrow a phrase from the *Halifax Development* case [[1994] F.C.J. No. 2035 (F.C.T.D.)], couched in generalities and falls significantly short of establishing a reasonable expectation of probable harm.
>
> ¶68 I find that the exemption pursuant to subsection 24(1)(c)(ii) has not been established with respect to release of the rental rates. I make no finding with respect to the operating and maintenance costs (the "additional rent" rates) since I have already held those to be exempt from disclosure under subsection 24(1)(b)(i). I think the respondents' argument may be stronger that release of the operating and maintenance costs (as opposed to rents) could reasonably be expected to prejudice the third parties' competitive positions but, again, better evidence would have to be provided.

[43] With deference, Telus's case for harm under s. 21(1)(c) falls far short even of the evidence in *Canadian Broadcasting Corp.* Not only are Telus's assertions of risk of harm general and conclusionary, the most important assertions are, as I have already noted, only made in argument and are not addressed in the affidavit Telus has provided. I have no hesitation in concluding that the harm requirement in s. 21(1)(c) of the Act has not been made out.

[44] I would add with respect to Telus's s. 21(1)(c)(ii) argument that it is not clear how, if disclosure of the Telus agreement moved Telus to reconsider its business relationships with UBC, this would result in similar information no longer being supplied. Presumably, Telus is referring to information in the Telus agreement or information to be provided under that agreement. (I have, of course, found that the

information in the agreement was not "supplied" under s. 21(1)(b)). On Telus's own scenario, if the Telus agreement were disclosed, it would be replicated and supplemented by competitors. This hardly suggests that information similar to information in the Telus agreement – or to be provided under it – would no longer be provided to UBC.

[45] I find that the necessary reasonable expectation of harm under s. 21(1)(c) has not been established.

4.0 CONCLUSION

[41] For the reasons given, I find that s. 21(1) does not require UBC to refuse to disclose information in the disputed record and, under s. 58 of the Act, I require UBC to give the applicant access to the disputed record. In light of my finding respecting s. 25(1), no order is called for under s. 58 in that respect.

January 28, 2003

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David Loukidelis
Information and Privacy Commissioner
for British Columbia