Order 03-04

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. Spectrum sought a review of UBC's decision to disclose information relating to marketing services agreements between Spectrum and UBC. Section 21(1) does not require UBC to refuse to disclose the disputed information. The information falls under s. 21(1)(a), but the requirements under 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).

Authorities Considered: B.C.: Order No. 320-1999, [1999] B.C.I.P.C.D. No. 33; Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order 02-50, [2002] B.C.I.P.C.D. No. 50; Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 03-03, [2003] B.C.I.P.C.D. No. 3.

1.0 INTRODUCTION

[1] As do Order 03-02, [2003] B.C.I.P.C.D. No. 2 and Order 03-03, [2003] B.C.I.P.C.D. No. 3, 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, a journalist, described as "marketing contracts", between UBC and various businesses, respecting the exclusive supply of services and goods to "UBC students, faculty and staff". A number of the records covered by his request relate to services that Spectrum Marketing Corporation ("Spectrum") has provided to UBC.

[2] I held a single inquiry, under Part 5 of the Act, regarding the various records, issues and third parties involved in the applicant's access request and UBC's responses to it. The inquiry results in three separate orders, of which this is one. This order addresses the issues involved in the request for review made by Spectrum. Order 03-02 deals with the applicant's request for review respecting UBC's decision to withhold a draft exclusive marketing agreement with the Royal Bank of Canada and HSBC Bank, as well as the applicant's contention that UBC did not conduct an adequate search for one requested record. Order 03-03 deals with the request for review made by Telus Corporation. I have considered each request for review independently and on its own merits.

[3] The procedural history relevant to all records and parties involved in the inquiry is set out in Order 03-02. As for the background specific to this order, on April 9, 2001, UBC gave notice to Spectrum under s. 23 of the Act. The notice sought Spectrum's "views regarding disclosure" of records comprising and relating to agreements – which I describe further below – between UBC and Spectrum respecting marketing services to be provided by Spectrum. On April 26, 2001, Spectrum wrote to UBC and objected to disclosure of any information to the applicant. UBC wrote the applicant on October 4, 2001 and told him that it had decided to disclose the Spectrum-related records.

[4] On October 22, 2001, Spectrum requested a review, under Part 5 of the Act, of UBC's October 4, 2001 decision to disclose information. The Portfolio Officer's Fact Report in the inquiry and Spectrum's submission indicate Spectrum later agreed to the disclosure of most of its agreement with UBC, but it continues to oppose, under s. 21(1) of the Act, disclosure of the information described below.

[5] Contrary to this Office's policies and procedures, Spectrum's submissions contained a small amount of information reflecting the contents of mediation by this Office. I have ignored those portions of Spectrum's submissions, which are in any case not material to my decision.

2.0 ISSUES

[6] The issues addressed in this decision are as follows:

1. Does s. 25(1)(b) of the Act require UBC to disclose this information?

2. Is UBC required by s. 21(1) to refuse access to portions of the Spectrum-related records?

[7] Section 57(3)(b) of the Act provides that it is "up to the third party" – here, Spectrum – "to prove that the applicant has no right of access to the record or part" by virtue of s. 21(1).

[8] In Order 03-02, I have addressed all aspects of the s. 25(1) issue raised by the applicant, including the burden of proof issue. As I indicate below, the Order 03-02 also discussion applies here and I will not repeat it.

3.0 DISCUSSION

[9] **3.1 Records in Dispute** – As I have already noted, Spectrum agreed to the disclosure of most of the information in the requested records. Only information severed from pp. 1, 2, 4, 5, 7, 9, 11, 13, 15, 16, 20, 21, 23 and 27 remains in dispute. That disputed information is described below.

[10] Page 1 is an unsigned memorandum dated May 12, 1998 from UBC to Spectrum. The memorandum deals with "commissions owed to Spectrum from the airline agreement" between the parties. It sets out annual fees payable to Spectrum by UBC. It is not clear on the face of the document whether UBC actually ever sent the memorandum to Spectrum. The memorandum nonetheless appears to reflect discussions between UBC and Spectrum representatives regarding the fees payable. Two annual flat fees payable to Spectrum, and the total fee amount for the five years of the relationship the memorandum contemplated, have been severed from p. 1. So has the 50% annual advance against annual fees that UBC proposed to pay Spectrum.

[11] Pages 2 and 3 consist of a May 11, 1998 letter agreement between Spectrum and UBC, under which Spectrum was to provide an acting marketing manager for UBC's Business Relations Office. That letter agreement sets out a daily fee for providing those services. That amount has been severed from p. 1.

[12] Pages 4 and 5 consist of duplicate copies of a June 17, 1998 memorandum from UBC to Spectrum, each of which sets out a fee payable to Spectrum for its services in the absence of any new agreement between the parties at the relevant time. The daily fee for the one day a week that Spectrum was to provide services to UBC under that interim agreement has been severed.

[13] Pages 7 and 8 consist of a November 29, 1996 letter agreement between the two parties for Spectrum's consulting services for financial services and telecommunications business partnerships being pursued by UBC. That agreement sets out a daily fee payable for a named individual's services and a daily fee payable for another Spectrum representative's services. Both amounts have been withheld from p. 7.

[14] Pages 9 and 10 are a letter dated November 15, 1996 from Spectrum to UBC. It proposed that Spectrum would perform services for UBC "on institutional and non-institutional business partnerships and initiatives." It proposed an unspecified hourly fee

"on the traditional industry categories" and, in other "industry categories", a commission payable periodically to Spectrum. The proposed percentage commission rate has been severed from p. 9.

[15] Pages 11 and 12 consist of a January 17, 1996 letter agreement (on Spectrum letterhead) between Spectrum and UBC for Spectrum's services in pursuing an exclusive corporate partner "in the domestic and international airline category." This agreement is characterized as "an extension and addendum" to the May 10, 1995 letter agreement described below. On p. 11, the monthly flat commission fee payable to Spectrum has been withheld, as has the annual percentage commission rate payable to Spectrum.

[16] Page 13 is a June 8, 1999 letter from Spectrum to UBC. It enclosed a copy of the May 10, 1995 letter agreement described below. It mentions the percentage commission rates payable under that agreement and those two figures have been withheld from this page also.

[17] Pages 14-21 consist of a May 10, 1995 letter agreement between UBC and Spectrum regarding Spectrum's services in connection with a cold beverage exclusive corporate sponsorship project. The letter agreement was signed by both parties. Five paragraphs have been withheld from p. 15. Those paragraphs describe the services that Spectrum agreed to perform for UBC under that agreement. Those services are aimed at securing a cold beverage sponsorship agreement for UBC. On p. 16, the monthly flat consulting fee UBC was required to pay Spectrum, as well as two separate annual percentage commissions payable on the "gross amount raised on new monies received", as set out in the agreement, have been withheld. The same percentage commission rates have been severed on pp. 20 and 21.

[18] Page 23 of the records is an August 19, 1994 letter agreement between Spectrum and UBC respecting Spectrum's services in "locating a company who's willing to purchase advertising space" in a number of locations within UBC's Department of Athletic & Sport Facilities. The percentage commission fee payable to Spectrum and the amount of fees that Spectrum agreed to try to obtain for UBC from third party advertisers have been withheld.

[19] Page 27 sets out an advertising fee that BC Tel (now Telus) would pay to UBC for scoreboard advertising space and Spectrum's commission in securing that fee from BC Tel. The fee payable to UBC has been withheld, as has the amount of Spectrum's commission.

[20] **3.2 Is Public Interest Disclosure Required?** – Nothing in the nature or content of the Spectrum records, or other circumstances relevant to the Spectrum agreement, suggests that public interest disclosure under s. 25(1)(b) is required. For the reasons given in Order 03-02, I find that s. 25(1)(b) does not require UBC to disclose the Spectrum records.

[21] **3.3 Spectrum's Interests Under Section 21** – Section 21(1) of the Act requires a public body to refuse to disclose certain information if the disclosure could

reasonably be expected to harm third-party interests as provided in s. 21(1). I have, in Order 03-02, discussed at some length the principles that apply under s. 21(1) and comparable provisions across Canada. I will not repeat that discussion here. I have applied the s. 21(1) principles articulated in Order 03-02 and in Order 03-03 to Spectrum's case. This is how s. 21(1) read at the time of UBC's decision and 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.
>
> …

Is the information "commercial" or "financial" information?

[22] Section 21(1) only applies to information described in s. 21(1)(a). The disputed information in this case includes Spectrum's proposed and actual fees and percentage commission rates and descriptions of the services it agreed to provide to UBC. As previous decisions have indicated, this information qualifies as commercial and financial information under s. 21(1)(a).

[23] I do not accept, however, Spectrum's submission that the description of its services found at p. 2 of the 1995 agreement with UBC (p. 15 of the disputed records), qualifies as a "trade secret" as defined in Schedule 1 to the Act:

> **"trade secret"** means information, including a formula, pattern, compilation, program, device, product, method, technique or process, that
>
> (a) is used, or may be used, in business or for any commercial advantage,

> (b) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use,
>
> (c) is the subject of reasonable efforts to prevent it from becoming generally known, and
>
> (d) the disclosure of which would result in harm or improper benefit.

[24] Spectrum made a similar claim in Order No. 320-1999, [1999] B.C.I.P.C.D. No. 33. At pp. 7-8, my predecessor rejected its "trade secret" argument for the following reasons:

> While the description contained in the record concerns the "process" which the third party [Spectrum] intends to follow in providing services to the School District, I do not accept that there is sufficient evidence to establish that this general information derives independent economic value, actual or potential, from not being generally known. As I indicated, the services described in the record are typical of any such offer of services. The description does not contain any information that could remotely be construed as proprietary in nature. There is also insufficient evidence to establish that disclosure of this "process" would result in any harm or improper benefit. I therefore reject the third party's submission that the description of the services constitutes a "trade secret" within the meaning of the Act.

[25] In the present case, Spectrum agreed to act as a facilitator for, and consultant to, UBC to acquire a corporate sponsorship agreement under terms and conditions acceptable to UBC. The description of its services that Spectrum claims is a "trade secret" is no more than a very general list of types of activities that might be expected, quite obviously, to be undertaken by a facilitator and consultant engaged for the purpose that UBC engaged Spectrum. I am not satisfied that Spectrum has met the requirements in the Act's definition of "trade secret", particularly paras. (a), (b) and (d) of the definition.

Was the information supplied in confidence to UBC?

[26] The next requirement under s. 21(1) is that the information must have been supplied, explicitly or implicitly, in confidence to the public body.

[27] I will deal first with the confidentiality issue. Section 21(1) can apply only if information supplied to a public body has been supplied, implicitly or explicitly, in confidence. Spectrum says this was the case here, *i.e.*, that all its offers to UBC and its negotiations with UBC were confidential. Many of the disputed records are stamped confidential. The May 10, 1995 agreement between UBC and Spectrum, for example, is marked confidential and says "the information supplied in this agreement is supplied on a confidential basis". (This statement does not, of course, determine the issue of supply.) Spectrum says the following about supply at p. 1 of its initial submission:

> All Spectrum's contract negotiations are done on a confidential basis, and as such are stamped confidential. Spectrum's refusal to disclose our financial information

> and trade secrets falls under Section 21 thereby allowing us to keep private 'confidential' information that is exclusive to our business and method of negotiation.

[28] In all of the circumstances, I am satisfied that the parties had a mutual intention to maintain confidentiality of the disputed information.

[29] The remaining issue is whether the information was "supplied" to UBC within the meaning of s. 21(1)(b). Neither UBC nor Spectrum has offered direct evidence as to whether the disputed information was supplied. The records themselves, however, speak to a process of offer, counter-offer and agreement, from time to time over a period of years, on commission rates or fees payable to Spectrum for its various services.

[30] As I have explained in Order 03-02 and Order 03-03 – and as has also been said in other orders in this and other Canadian jurisdictions – information in an agreement negotiated between a public body and 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.

[31] In Order No. 320-1999, my predecessor accepted, at p. 9, that the description of services and percentage commission rate in a proposal for a Spectrum-school board agreement had been "supplied explicitly in confidence within the meaning of s. 21(1)(b)." As I have noted in Order 03-02, it is not clear whether, or on what basis, Commissioner Flaherty departed, in Order No. 320-1999, from the proposition that negotiated information is not supplied information. In the end, he ordered the disputed information disclosed because he found that the harms test under s. 21(1)(c) had not been met.

[32] In this case, the disputed information at pp. 2, 4, 5, 7, 11, 13, 15, 16, 20, 21 23 and 27 consists of contract terms – Spectrum fees and commission rates and a description of services to be supplied by Spectrum – to which UBC and Spectrum agreed. I find that this information was the mutually agreed-upon product of negotiations between the parties. I am not able to conclude that, if disclosed, this information would permit anyone to draw accurate inferences about underlying information of or about Spectrum, such as overheads or profit margins. I find that this information was not "supplied" under s. 21(1)(b) of the Act.

[33] As I have already noted, it is not clear whether the UBC memorandum at p. 1 of the disputed records was ever sent to Spectrum. The information that has been withheld from that record consists of calculations of commissions owed to Spectrum under an agreement between UBC and Spectrum relating to Canadian Airlines (an agreement that has been disclosed by UBC). I find that this information is no more "supplied" under s. 21(1)(b) than were the mutually agreed-upon fees and commission rates in the airline agreement.

[34] The proposed commission rate that Spectrum wishes to withhold at p. 9 of the disputed records was generated in the course of back and forth negotiations between the parties. I find that this information was negotiated, even though it does not appear to have been ultimately incorporated into the agreement that was reached. I am not able to conclude that, if disclosed, this information would permit anyone to draw accurate inferences about underlying information of Spectrum, such as overheads or profit margins. I also find that this information was not supplied under s. 21(1)(b).

Harm to Spectrum's interests

[35] In addition, and in the alternative to my finding under s. 21(1)(b), I have also decided that Spectrum has not established a reasonable expectation of harm as required by s. 21(1)(c). In considering this issue, I have applied my discussions of the reasonable expectation of harm test found in Order 02-50, [2002] B.C.I.P.C.D. No. 51, at paras. 111-112, 124-137, and in Order 03-03.

[36] On the basis of Order 01-20, [2001] B.C.I.P.C.D. No. 21, UBC decided that s. 21(1) did not require it to refuse disclosure. Acknowledging that UBC therefore bears no burden of proof, I note that it has provided no evidence to support its assertion that "a reasonable expectation of harm to the Third Party [Spectrum] is evidenced by the nature of the information alone" (para. 28, initial submission). Nor does UBC elaborate on this contention. For its part, Spectrum says the following at pp. 2 and 3 of its initial submission:

> Spectrum is withholding information from the applicant that is mainly financial in nature. The disclosure of this financial information would significantly harm Spectrum's competitive position and interfere with our contractual or other negotiations with current or prospective future clients. Specifically, our consulting fees and commission rates, i.e., our compensation, are part of Spectrum's selling and competitive advantage and position in the market place. Public knowledge of this information will cause significant harm to our competitive position and will cause Spectrum considerable undue financial loss now and in the future. When Spectrum approaches potential clients we try and negotiate the best deal possible. In some cases we are able to negotiate higher consulting fees and commission rates than in other cases. If our existing or potential new clients were privy to the fees and rates that we negotiated with UBC it would severely hamper our negotiating ability for potential new business and the renewal of existing business.
>
> We have also excluded the disclosure of a section in our contract dated May 10, 1995 (page 2 of 6), because this particular section describes in detail how we perform our services. This section of the contract deals with our processes and systems of negotiations. By publicly releasing this information, it is highly likely that our 'trade secrets' will be used by other marketing firms to their commercial advantage causing Spectrum serious harm. This will place Spectrum at a serious competitive disadvantage.
>
> …
>
> … Spectrum relies heavily on its unique processes and practices along with its confidential payment structure and commission rates. This information is part of

> our competitive position in the market place and public knowledge of this information will absolutely cause significant harm to our competitive position. Past reviews and the outcome of this review has and will cause us to carefully examine what information we do include in our contracts.
>
> The majority of Spectrum's clients are public bodies. Public bodies are 'public' for a reason and are meant to be accountable. However, since public bodies are nearly 100% of our client base we cannot make a decision to not deal with them, as this would cause us massive financial loss and force Spectrum to close its doors while laying off our employees. Under no circumstance can we afford to have our financial information or trade secrets released to the public.

[37] Assessing Spectrum's arguments about harm and the nature of the information in question as fairly as I can, I have decided Spectrum has not established a reasonable expectation of significant harm within the meaning of s. 21(1)(c)(i). Nor is there evidence sufficient to establish that disclosure could reasonably be expected to result in undue financial loss or gain to any person within the meaning of s. 21(1)(c)(iii).

[38] Spectrum has not given any details or evidence that support its above-quoted contention that disclosure will cause it significant competitive harm or loss. First, I do not accept that disclosure of the description of services Spectrum was to provide under its 1995 agreement with UBC would disclose trade secrets, much less that disclosure of that information could reasonably be expected to cause Spectrum "serious harm". Without in any way questioning the value of what Spectrum does or its expertise, I have already indicated the general and unremarkable nature of the types of activities listed in the description of services Spectrum was to provide. Nothing in the material before me suggests that Spectrum's marketing services approach the status of a "trade secret" under the Act.

[39] Nor am I persuaded that disclosure of specific fee amounts and percentage commission rates could reasonably be expected to cause harm within the meaning of s. 21(1)(c). For one thing, the agreements between UBC and Spectrum are from four to eight years old. There is no evidence as to whether those fees and commission rates remain current within the context of any ongoing relationship between UBC and Spectrum. Further, I am not persuaded that disclosure of the fees and commissions charged to UBC will necessarily harm Spectrum's ability to negotiate the best deal possible with other parties. Among other things, it is reasonable to infer that fees and commissions vary from deal to deal, depending on the nature and extent of Spectrum's services, the nature of the client and other competitive factors. I am not persuaded that Spectrum has established any reasonable connection between disclosure of remuneration information from its UBC relationship and any significant competitive harm or undue loss or gain in other hypothetical contract negotiations.

[40] For the above reasons, I find that Spectrum has not established a reasonable expectation of harm within the meaning of s. 21(1)(c) of the Act.

4.0 CONCLUSION

[41] For the above reasons, under s. 58(2)(a) of the Act, I require UBC to give the applicant access to the information in dispute in this case. 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