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Order 03-15

MINISTRY OF ATTORNEY GENERAL

David Loukidelis, Information and Privacy Commissioner
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Summary: The BCNU sought access to two contracts for nursing services at a correctional centre. The Ministry withheld some contract price information under s. 17(1) and some under s. 21(1). The third-party contractor argued that s. 21(1) applied to all of the disputed information. The exceptions claimed do not authorize or require the Ministry to refuse to disclose the disputed information. The Ministry has not established a reasonable expectation of harm in relation to information withheld under s. 17(1). Information withheld under s. 21(1) falls under s. 21(1)(a) and (c), but requirements of s. 21(1)(b) are not met.

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.

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

Authorities Considered: B.C.: 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 01-20, [2001] B.C.I.P.C.D. No. 21; Order 01-39, [2001] B.C.I.P.C.D. No. 40; Order 02-22, [2002] B.C.I.P.C.D. No. 22; Order 02-50, [2002] B.C.I.P.C.D. No. 51; Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 03-03, [2003] B.C.I.P.C.D. No. 3; Order 03-04 [2003] B.C.I.P.C.D. No. 4.

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.

1.0 INTRODUCTION

[1] This decision arises out of the August 28, 2001 request by the British Columbia Nurses' Union ("BCNU") to the Ministry of Attorney General ("Ministry"), under the *Freedom of Information & Protection of Privacy Act* ("Act"), for access to specific contracts between "the government and private contractors" for nursing services. The contracts requested were for Joye Morris Health Services ("JMHS") providing health care services for the Vancouver Island Regional Correctional Centre ("VIRCC) and Joye Morris providing services as Senior Nursing Consultant to the B.C. Corrections Branch. Joye Morris, a registered nurse, is the proprietor of JMHS.

[2] On October 11, 2001, the Ministry responded by disclosing two contracts, from which it withheld some information under s. 21(1) of the Act. The first is an April 1, 2001 contract between the provincial government and Joye Morris, individually, for senior nurse consulting services ("Professional Services Contract") to the Ministry's Corrections Branch (now part of the Ministry of Public Safety and Solicitor General). The second record is an August 9, 1999 agreement ("Health Services Agreement") between the provincial government and Joye Morris Health Services, for health care services at the VIRCC. Also included are two contract amendments dated December 6, 1999 and October 19, 2000.

[3] The BCNU requested a review of the Ministry's response. Its October 24, 2001 request for review raised the question of whether the withheld information had been supplied within the meaning of s. 21(1)(b) of the Act. The BCNU also contended that the harms test set out in s. 21(1)(c) had not been satisfied.

[4] Because the matter did not settle in mediation by this Office, a written inquiry was scheduled, under Part 5 of the Act. The Ministry later decided to disclose "a considerable portion" of the information that it had withheld. It also decided to continue to withhold "one item of information" from the Schedule of Payments under the Professional Services Contract under s. 17 instead of under s. 21.

[5] The result was to narrow the information withheld under s. 21(1) from the Health Services Agreement and to withhold, under s. 17(1) only, just one item of information in the Professional Services Contract. JMHS and Joye Morris as an individual made joint representations in the inquiry. They support the Ministry's decision to continue to withhold information in the Health Services Agreement under s. 21(1). They further maintain that s. 21(1) also requires the Ministry to withhold the one item of information in the Professional Services Contract that it is now withholding under s. 17(1) alone.

2.0 ISSUES

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

1. Is the Ministry authorized by s. 17(1), or required by s. 21(1), to refuse to disclose one item of contract price information in the Schedule of Payments of the Professional Services Contract?

2. Is the Ministry required by s. 21(1) to refuse to disclose certain contract price information in Appendix IV of the Health Services Agreement and amendments to it?

[7] Under s. 57(1) of the Act, the Ministry bears the burden of establishing that s. 17(1) authorizes it to refuse to disclose the disputed information in the Professional Services Contract. For s. 21(1), the burden of proof is now split. Under s. 57(3)(b), the burden is on JMHS to establish that s. 21(1) requires the Ministry to refuse to disclose the disputed information in the Professional Services Contract. Under s. 57(1), the burden is on the Ministry to establish that s. 21(1) requires the disputed information in the Health Services Agreement to be withheld.

3.0 DISCUSSION

[8] **3.1 BCNU's Procedural Objection** – In its initial submission, the BCNU objected to the Ministry's late decision to withdraw its reliance on s. 21(1) and rely on s. 17(1) respecting the disputed information in the Schedule of Payments for the Professional Services Contract. I have decided, in this case, to allow the Ministry to advance its s. 17(1) argument and to consider that issue on its merits. In this respect, I note that the BCNU has had an opportunity to make submissions on the s. 17(1) point and has not suggested that it has been prejudiced in its ability to respond to this issue.

[9] **3.2 Description of the Disputed Information** – The Ministry has, under s. 17(1), refused to disclose the hourly charge payable to Joye Morris under the Professional Services Contract. This figure appears in para. 1 of the Schedule of Payments to the contract. In her initial submission, Joye Morris maintained that s. 21(1) requires this item to be withheld. In her reply submission, at para. 9, she conceded that this figure was negotiated to the extent that there were discussions between Joye Morris and the Ministry on the rate, even though she provided the hourly figure, and those discussions constituted negotiations "as the term is applied by the Commissioner under Section 21 of the Act".

[10] The Ministry disclosed all other information in the Professional Services Contract. This included, in the Schedule of Payments, the number of hours involved (620) and stipulated maximum aggregate figures for contractor fees ($31,000), expenses ($5,000) and fees and expenses ($36,000). The relevant paragraphs from the Schedule of Payments (with the disputed information severed) read as follows:

> 1. Fees will be based on a rate of … [dollar figure severed]/per hour for 620 hours and will be payable to the Contractor in a proportioned amount of the hourly rate for part hours during which the Contractor is engaged in the fulfillment of obligations under this Agreement. In no event will the fees payable exceed, in the aggregate, $31,000.00
>
> 2. Expenses will be paid to the Contractor provided the same are supported, where applicable, by proper receipts and are in the opinion of the Assistant Deputy Minister, necessarily incurred by the Contractor in the fulfillment of obligations under this Agreement.
>
> In no event will the expenses payable to the Contractor exceed, in the aggregate, $5,000.00
>
> 3. In no event will the fees and expenses payable to the Contractor in accordance with paragraphs 1 and 2 of this Schedule exceed, in the aggregate, $36,000.00

[11] The Ministry has, under s. 21(1) of the Act, refused to disclose annual cost figures (with the exception of those for physician services) in Appendix IV to the Health Services Agreement and the two amended versions of this appendix that were implemented by the contract amendments dated December 6, 1999 and October 19, 2000. The Health Services Contract had a three-year term, from October 1, 1999 to September 30, 2002. This term was not altered by the two contract amendments.

[12] The Ministry refers to Appendix IV as a "Costs Chart". It is a schedule of hours and "Annual cost (including benefits)" items for JMHS to provide services to the VIRCC. The hours and annual cost items are broken down on the basis of the services involved (*i.e.*, head nurse, nursing services, physician services), a management fee and administration costs (*i.e.*, accounting, advertising, bank charges), as well as on the basis of the number of inmates involved (*i.e.*, 209-225, 226-230). The information withheld from Appendix IV and its amendments consists of the item-by-item figures and subtotal and total figures that appear under columns headed "Annual Cost (including benefits)".

[13] The explanation offered by the Ministry for why physician services annual cost figures have been disclosed is that the rates of pay for physician services are not set by JMHS. Other information in the Health Services Contract that has been disclosed indicates that the Ministry of Health and the B.C. Medical Association set the rates for physician services. The initial submission of JMHS and Joye Morris adds, at para. 8, that the physician services cost figures were not confidential in that JMHS did not calculate them but merely relied on province-wide figures for physician services.

[14] It should be noted that the Ministry disclosed to the applicant the maximum aggregate amounts for fees and expenses payable to JMHS under the Health Services Agreement, as that figure appears in para. 7 of that contract's Schedule of Payments ($574,878.01). The Ministry also disclosed to the applicant the upward adjustments to the aggregate maximum contract amount that were agreed to in the two contract

amendments. The wording of para. 7 of the Schedule of Payments to the Health Services Agreement and of the first contract amendment is unclear as to whether the aggregate fees and expenses payable ($574,878.01 and $767,380, respectively) are annual aggregates, or are three-year, contract-term, aggregates. The second contract amendment is somewhat different in that it amended para. 7 of the Schedule of Payments to stipulate the maximum aggregate fees and expenses for the period from April 1 to August 31, 2000 ($767,668.53) and for the period from September 1, 2000 to September 30, 2002 ($768,823.94).

[15] **3.3 Applicable Principles** – As indicated above, two of the Act's exceptions are engaged here. Section 17 authorizes a public body to refuse to disclose information the disclosure of which could reasonably be expected to harm financial interests as specified in the section. Only s. 17(1) is relevant here. It reads as follows:

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

[16] In Order 02-50, [2002] B.C.I.P.C.D. No. 51, I discussed at some length the standard of proof for exceptions under the Act that use the reasonable expectation of harm test, including s. 17(1), and have, without repeating it, applied that discussion here.

[17] Section 21(1) requires a public body to refuse to disclose third party business information under certain circumstances. It reads as follows:

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 or about 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.

[18] Section 21(1) creates a three-part test. Each of the elements set out in ss. 21(1)(a), (b) and (c) must be satisfied before a public body is required to refuse disclosure. I have recently discussed at length the legislative intention underlying s. 21(1), the history of third-party business information exceptions in access to information legislation in Canada and their treatment in British Columbia and elsewhere, in Order 03-02, [2003] B.C.I.P.C.D. No. 2, Order 03-03, [2003] B.C.I.P.C.D. No. 2 and Order 03-04, [2003] B.C.I.P.C.D. No. 4. Without repeating them here, I have used the principles to be applied under s. 21(1) as articulated in those decisions.

[19] I will address the application of both exceptions in relation to each of the disputed records.

[20] **3.4 Professional Services Contract** – I will first address whether s. 17(1) authorizes the Ministry to refuse to disclose the hourly charge figure in the Schedule of Payments to the Health Services Contract. I will then address Joye Morris's contention that s. 21(1) also requires the Ministry to refuse to disclose this information.

Section 17(1)

[21] The Ministry's s. 17(1) entire argument is found at para. 6.12 of its initial submission:

> The Public Body says that the disclosure of the Professional Services Contract Hourly Rate could reasonably be expected to harm the financial interest of the public body or of the government of British Columbia.

[22] The Ministry relies on the affidavit of Brian Mason, the Corrections Branch's Provincial Director, Strategic Planning and Corporate Programs. The text of that affidavit occupies just over two pages, approximately one page of which has been tendered *in camera*. The affidavit includes the following paragraphs (with *in camera* portions excluded):

> 4. The purpose for which the Branch entered into the Professional Services Contract with the Senior Nursing Consultant was to obtain her services as a senior nursing consultant to advise the Branch's senior management on all aspects of nursing care in correctional centres. The Professional Services Contract is a unique contract for the Branch. Under it, the Senior Nursing Consultant provides advice on nursing standards both in adult correctional centres and in youth custody centres. As such, her advice extends across two ministries: the Ministry of Public Safety and Solicitor General and the Ministry of Children and Family Development. (Nurses from youth custody facilities are members of the Nursing Consultant Group, Chaired by the Senior Nursing Consultant. See para. 6 below.)
>
> 5. I believe it will harm the Branch if other health care providers contracted to provide services in correctional centres become aware of the hourly rate paid to the Senior Nursing Consultant.
>
> 6. The Senior Nursing Consultant chairs the Nursing Consultant Group (the "Group") comprising contracted and staff head nurses from correctional centres and youth custody centres. … [15 lines of *in camera* text severed] Branch expenditures on health care are considerable, approximately $7.5 million annually. The majority of this amount ($4.6 million) is for contracted health services in correctional centres.
>
> 7. The Senior Nursing Consultant is one member of a small group (the others being the Branch's Director, Health Care Services, and the Branch's Director, Mental Health Services) that has prepared the Branch's Health Care Services Manual (the "Manual"). The Manual was developed for use by health care staff and contractors in correctional centres to guide them in providing services to offenders. … [four lines of *in camera* text excluded]
>
> 8. Although the Professional Services Contract was directly awarded, disclosure of the hourly rate paid to the Senior Nursing Consultant would, I believe, hinder the Branch's future ability to issue a Request for Proposals

> for the same services. Disclosure of the hourly rate paid in this unique contract would give bidders on other Branch health care contracts an advantage when preparing proposals and negotiating with the Branch. … [five lines of *in camera* text excluded]
>
> 9. I swear this Affidavit for consideration by the Information and Privacy Commissioner in this inquiry.

[23] The following analysis of the Ministry's s. 17(1) case is framed so as not to reveal *in camera* portions of Brian Mason's affidavit.

[24] I reject as speculative the Ministry's contention that disclosure of the hourly charge found in this contract with Joye Morris could reasonably be expected to harm the Ministry's financial interests by impairing or undermining the quality or effectiveness of services rendered by nursing and other health care workers who work in correctional facilities alongside or under the supervision of Joye Morris. The Ministry has provided no concrete or direct evidence to suggest that its decidedly counter-intuitive argument is in any degree a sound one. The same can be said for the Ministry's converse proposition that these workers can only reasonably be expected to effectively serve and respect the work and work product of Joye Morris if they do not know the hourly amount the Ministry pays for her services. The Ministry's contention is simply not credible. In this respect, I note that no evidence, general or specific, has been provided showing that the public availability of rates of remuneration of employees of public bodies has been harmful to their employers' economic or financial interests or that the public availability of financial details of contracts to supply goods and services to public bodies has had that effect.

[25] I also conclude the Ministry has not established that disclosure of the hourly charge figure for Joye Morris's services could reasonably be expected to result in undue financial loss or gain to third parties under s. 17(1)(d), by giving a negotiating advantage to other bidders on future health care contracts or possibly taking away a competitive advantage from Joye Morris. First, since this contract is unique, according to the Ministry, it is difficult to see how it would be a precedent for other circumstances. Second, the Ministry has not established that competitive advantage or disadvantage, if any, to Joye Morris and other bidders on future contracts would result in undue financial loss or gain to them. Simply putting contractors and potential contractors to government in the position of having to price their services competitively is not a circumstance of unfairness or "undue" financial loss or gain.

[26] I also conclude that the evidence and submissions before me do not justify a presumption that, if the hourly charge figure is disclosed, Joye Morris could reasonably be expected to refuse or to fail to diligently discharge her contractual obligations under this contract (if it has been extended) or other contracts, to the financial or economic detriment of the Ministry.

[27] I conclude that the evidence and submissions before me do not justify a finding that disclosure of the hourly charge figure for Joye Morris's services would lock the

Ministry's ability to negotiate appropriate, and competitive, rates for other contracts. At the very least, the Ministry itself has described this contract as unique and this should be a complete answer. In any event, there will always be many potential factors at work in the pricing of contracts for services to the Ministry. It is unrealistic to presume that qualified parties would no longer contract with the Ministry if rates or other terms agreeable to the Ministry were different – even less attractive in some or all respects – than contracts the Ministry previously entered into with others or for other services or in other circumstances.

[28] There is, finally, a more significant circumstance that undercuts the Ministry's claims of harm under s. 17(1). In addition to the hourly charge figure, the Schedule of Payments contains the maximum aggregate fees payable for Joye Morris's services under the contract ($31,000) and the number of hours those fees will be based upon (620 hours). The first figure has been withheld, while the second and third figures have been disclosed. In these circumstances, I do not see how disclosure of the hourly charge figure could possibly be a linchpin of harm under s. 17(1). The evidence and submissions before me do not justify any different conclusion.

Section 21(1)

[29] The Ministry dropped its initial claim that s. 21(1) requires it to refuse to disclose information in the Professional Services Contract. Joye Morris still maintains the s. 21(1) claim for the hourly charge figure, but her case is, I have decided, a slight one.

[30] As I find below for the disputed contract price information in Appendix IV of the Health Services Agreement, I conclude that the hourly charge rate in the Professional Services Contract is commercial or financial information, in this case of Joye Morris, within the meaning of s. 21(1)(a) of the Act.

[31] With respect to the "supply" requirement in s. 21(1)(b), Joye Morris's evidence is limited to the following paragraph in her first open affidavit:

> 44. With respect to the Professional Services Agreement between the Ministry and myself, although the Agreement was not entered into as a result of a RFP process the costing information from the Agreement was prepared by me based on my experience and research of the applicable rates for a nursing consultant of my experience and background, and the appropriate number of hours for the tasks being required by the Ministry. The estimates prepared by me were then used by the Ministry in the Agreement.

[32] The following paragraph in the affidavit of Brian Mason, submitted on behalf of the Ministry, is also relevant:

> 3. The hourly rate in the Professional Services Contract was arrived at through negotiation between myself, on behalf of the Branch, and Joye Morris, R.N. (the "Senior Nursing Consultant"), on her own behalf.

[33] I have already noted the acknowledgement of Joye Morris, at para. 9 of her reply submission, that the hourly charge figure was negotiated to the extent that the discussions about the rate between her and the Ministry constituted negotiations "as the term is applied by the Commissioner under Section 21 of the Act". Joye Morris deposed as follows in her second open affidavit:

> 10. With respect to Brian Mason's Affidavit, the hourly rate in the Professional Services Contract was supplied by me to the Ministry. However, there was discussions [*sic*] with Brian Mason about the applicable hourly rate before I submitted the hourly rate and afterwards. The Professional Services Contract was replacing a previous Professional Services Contract, in which the hourly rate figure had simply been submitted by me, and there was an issue about whether the previous hourly rate was still satisfactory in light of experiences under the previous Professional Services Contract.

[34] I conclude that, as part of the negotiation of the Professional Services Contract, there were discussions between Joye Morris and Brian Mason about what hourly rate was appropriate for her services, and the Ministry ultimately agreed to an hourly charge figure that Joye Morris had put forward in the context of those discussions. I find that this information in the Professional Services Contract was the product of contractual negotiation and was not "supplied" within the meaning of s. 21(1)(b).

[35] Turning to the "in confidence" requirement in s. 21(1)(b), the Professional Services Contract was, unlike the Health Services Agreement, awarded directly, without a request for proposal ("RFP") process. There is therefore no RFP representation of confidentiality to consider, as there is in relation to the Health Services Agreement. The evidence of an explicit or implicit expectation of confidentiality in this instance is limited to the terms of the Professional Services Contract itself and the following paragraph in the first open affidavit of Joye Morris:

> 46. It is my understanding based on my dealings with the Ministry over the years that the type of costing information contained in the Agreement [the Professional Services Contract] would be treated as confidential by the Ministry.

[36] This assertion is not supported by particulars or by any complementary or supporting evidence from the Ministry. It is not sufficient to establish an expectation of confidentiality under s. 21(1)(b).

[37] The Professional Services Contract does contain a confidentiality provision (para. 14.01) that is virtually identical to the confidentiality provision in the Health Services Agreement (para. 28). For the same reasons I give below in relation to the Health Services Agreement, however, I find that para. 14.01 does not establish that the hourly charge figure that has been withheld from the Schedule of Payments to this contract is confidential within the meaning of s. 21(1)(b).

[38] My finding that the requirements of s. 21(1)(b) are not met means that s. 21(1) does not apply to the hourly charge rate in the Professional Services Contract. If it were necessary to do so, I would also find that harm has not been established under s. 21(1)(c) with respect to this information. There is no evidence before me of any substance on this point and, as I similarly observed in relation to s. 17(1), it is hard to see, in the circumstances, how disclosure of the hourly charge figure could be a linchpin of any of the harms in s. 21(1)(c).

[39] **3.5 Health Services Agreement** – I will now address whether s. 21(1) requires the Ministry to refuse to disclose the figures that have been withheld from Appendix IV of the Health Services Agreement and its amendments.

Commercial or financial information

[40] The Ministry argues that the information withheld from the Health Services Agreement information is "commercial" or "financial" information of the contractor, JMHS. JMHS makes the same argument and Joye Morris, the principal of JMHS, also agrees. The Ministry refers to Order 00-22, [2000] B.C.I.P.C.D. No. 25, in which I held that hourly charges and other fees payable under a nursing services contract qualified as "commercial" and "financial" information of the third-party contractors. At pp. 3-4 of Order 00-22, I said the following:

> I have no doubt that the information is commercial and financial in nature and that it relates to the contractors. It also qualifies as information "of" the contractors in this case, although I also consider that, given the context, it may also be information "of" the Ministry. Reference in s. 21(1)(a)(ii) to information "of" a third party does not mean that information can be "of" only one party. To the extent that the disputed contract information in this case either derives from the contractors or was arrived at by a process of negotiation between the contractors and the Ministry, I find that it is information "of" the contractors under s. 21(1)(a)(ii) of the Act.

[41] The information in dispute in Order 00-22 included base hourly charges for nursing services and the services of other health professionals, shift differential charges, management fees, general and administrative fees and the total amounts of the health services contracts in dispute. I agree that the information withheld from the Health Services Agreement is commercial and financial in nature and that it relates to a third party, JMHS. As I indicated in Order 00-22, the information is "of" the third party within the meaning of s. 21(1)(a). See, also, Order 00-10, [2000] B.C.I.P.C.D. No. 11, at p. 6, in which I said that, at the very least, "the word 'of' in s. 21(1)(a)(ii) means commercial or financial information about a third party." (Effective April 11, 2002, s. 21(1)(a) was amended to add the words "or about" after the words "information of".)

[42] It is convenient to note here that Order 00-22 was upheld on judicial review: *Jill Schmidt Health Services Inc.* v. *British Columbia (Information and Privacy Commissioner)*, [2001] B.C.J. No. 79, 2001 BCSC 101.

Was the disputed information "supplied"?

[43] The second part of the s. 21(1) test requires the information in issue to be supplied, explicitly or implicitly, in confidence. I will first consider whether it was "supplied" in this case, then turn to the "in confidence" element.

[44] The Ministry maintains that the annual cost figures withheld from Appendix IV were "supplied" by JMHS. It acknowledges how the supply criterion has been interpreted and applied and then says the following, at para. 5.14 of its initial submission:

> The exception for information that remains relatively unchanged in the contract after negotiation, or that is relatively insusceptible of change in negotiation, is important recognition that characterizing an agreement as having been "negotiated" is of relatively little value in determining whether the relevant information was created jointly by the parties or was supplied by one party to the other. For example, a contract which may be described as having been "negotiated" may in fact have simply involved the proposal of contractual terms by one party and an acceptance of them in their entirety by the other party. Similarly, while some aspects of an agreement may have been "negotiated" in the relevant sense (i.e., jointly created by the parties), other information may have been supplied by one party and incorporated unchanged into the agreement.

[45] According to the Ministry, the disputed information in the Health Services Agreement "was not negotiated, nor was it negotiable, between the Public Body and the Third Party" (para. 5.15, initial submission). The Ministry says that "[c]hanges were the result of corrections of calculations, not of negotiations …[o]r, if any part of it was negotiated, that was only a small part, and the change was minimal."

[46] The Ministry relies on the affidavit of James May, the VIRCC's Director of Operations, who was a senior member of the team responsible for receiving and evaluating proposals submitted to the Ministry in the RFP process that led to the Health Services Agreement. James May deposed that Joye Morris "did all of the calculations that resulted in the numbers on the Costs Charts, and presented the Costs Charts (containing the results of the calculations) to the Ministry" (para. 5). With regard to the original version of Appendix IV, he deposed as follows:

> 6. No aspect of the MANAGEMENT section at the top of the July 26, 1999 Costs Chart was negotiated. That is, neither the numbers of hours to be devoted to on-site management by the head nurse, nor the rate of pay from which the dollar amounts that appear in the Annual Cost columns corresponding to management services by the head nurse were derived, were negotiated between the Ministry and Joye Morris Health Services. It was always my understanding that the rate of pay for the head nurse was a fixed cost of Joye Morris Health Services, and was not negotiable with the Ministry.
>
> 7. As to the HEALTH CARE SERVICE section of the July 26, 1999 Costs Chart, under "Nursing – General" the numbers of nursing hours to be

> provided were negotiated between the Ministry and Joye Morris Health Services, but none of the rates of pay from which the dollar amounts that appear in the Annual Cost columns corresponding to nursing services were derived were negotiated [*sic*] between the Ministry and Joye Morris Health Services. Each dollar amount that appears in the Annual Costs columns corresponding to the nursing services represents rates of pay multiplied by the agreed-to numbers of hours for the particular nursing service. It was always my understanding that the rates of pay to nurses employed by Joye Morris Health Services were a fixed cost to Joye Morris Health Services, and that none of that information was negotiable with the Ministry.
>
> 8. I do not recall whether any other aspects of the HEALTH CARE SERVICE section (ie.[*sic*], other than for "Physician Services", which was not negotiated and which has not been withheld) of the July 26, 1999 Costs Chart were negotiated or otherwise changed in discussion with Joye Morris, or whether any aspects of the MANAGEMENT FEE section of the July 26, 1999 Costs Chart or of the ADMINISTRATION section of the July 26, 1999 Costs Charts were negotiated or otherwise changed in discussion with Joye Morris. I recall that there was a change in numbers somewhere in those areas. And I recall that the change was very minimal.

[47] As regards the amendments to Appendix IV, James May deposed as follows:

> 9. The various sections of the July 26, 1999 Costs Chart were incorporated into the other Costs Charts, largely unchanged. I do not recall if any aspects of those other Costs Charts were negotiated or otherwise changed in discussion with Joye Morris. If there were changes, they were minimal. I recall that there were some changes that were the result of Province-wide negotiations.

[48] In her first open affidavit, Joye Morris deposed that, before the RFP process that led to the Health Services Agreement, JMHS was involved in preparing and submitting three previous proposals for nursing services in correctional facilities. She described the preparation of "costing information" for the RFP that led to the Health Services Agreement as follows:

> 15. By "costing information", I am referring to my calculations during those earlier RFP processes of the number of hours required on a weekly or annual basis for the various categories of services required under those RFP's, the rates associated with those categories of services, and the costs associated with those categories of services and for other categories such as general management fees and administration charges.
>
> …
>
> 18. During my preparation of the costing information used in the Proposal, I estimated the number of hours required to provide the services required by

the Ministry in RFP 128844 and the anticipated costs to JMHS in providing those services. I drew upon my experience as a health care contractor (from 1987 to present) and as a head nurse working in provincial Correctional Facilities (from 1985 to 1991) in preparing those estimates.

19. The process to estimate the costing information used in the Proposal was complex. I spent considerable time and effort researching and accumulating data to compose the costing information. All of the figures in the costing information, were derived from my own research and calculations, except for the Physician Services fees which I believe have already been released to the BCNU.

20. Negotiations following the submission of the Proposal for RFP 128844 resulted in only one change between the items in the Proposal compared to those in Appendix IV of the Health Services Contract. The Proposal included the annual costs for 2 days education/staff training. The Ministry's representatives indicated in the negotiations that JMHS would have to absorb those costs because the RFP had indicated training was to be at the contractor's own expense, so they were not included in the Health Services Contract.

21. The format of Appendix IV, and the figures used on it, were then prepared by me on my own computer once the Ministry had indicated its acceptance of the costing information shown in the Proposal, except for the deletion of the 2 days education/staff training costs. I then provided the Ministry with Appendix IV which was attached to the Health Services Contract prior to its execution.

22. The Schedule of Services in Appendix 1 of the Health Services Contract contain [*sic*] a number of calculations of the hours of Nursing Services (Para. 1) and Clerical Services (Para. 3). The hours in those sections are the hours indicated for the corresponding category of services in the Proposal, with the Ministry having added together the hours in the Proposal for the various components of overall nursing services outlined in the Proposal. No negotiations took place between the Ministry and JMHS over the Nursing or Clerical Services hours.

23. The aggregate figures for fees and expenses was [*sic*] calculated by my [*sic*] based on Para. 7 of the Schedule of Payments in the Health Services Contract, adding up the cost figures provided by me in the Proposal for the various categories of services, less any allowance for 2 days education/staff training costs.

24. Change did take place in the "hours" for Physician Services shown in the Proposal compared to those in Appendix IV. The hours for those services as shown in the Health Services Contract were revised from the corresponding figures in the Proposal. This reflected the fact that under the Health Services Contract, Physicians were to be paid partly on a "fee for service" basis billed directly to MSP plus "sessional rates" billed to JMHS, whereas under the Proposal it had been contemplated they would be paid

> on a sessional basis only. There was no change in the number of hours of actual services for Physicians in Appendix IV as compared to the Proposal. Anyway, I understand that the Physician Services hours and fees have already been provided to the BCNU and I consented to them being provided with that information.

[49] Joye Morris also deposed in her first open affidavit, at para. 26, that the first amendment to Appendix IV was necessitated by the increase in the number of inmates that might be incarcerated at the VIRCC. She deposed, at paras. 26 and 27, that JMHS "submitted new costing information" that had been "calculated by me using the same methods as for the costing information supplied in the original Proposal". She also deposed at paras. 26 and 27 that no negotiations occurred between the Ministry and JMHS respecting the amended "costing information". She deposed (at para. 29) that JMHS proposed more hours for clerical services, and therefore higher charges for those services, because of JMHS's experience that increased inmate numbers demanded more clerical services. JMHS estimated the increased number of working hours required and provided those figures to the Ministry for the purposes of the first amendment to Appendix IV. According to Joye Morris, no negotiations took place over these new figures.

[50] Similarly, Joye Morris deposed that the first amendment to Appendix IV increased the original "estimate" for bank charges because those charges had not included an allowance for the cost of the line of credit and interest charges on that line of credit, which JMHS had been forced to secure because of the "lack of monthly advances" under the Health Services Agreement. She deposed, at para. 30, that "the Ministry permitted an increase for bank charges" in the amendment, but also deposed that no negotiations took place with respect to the "supplied estimates" for bank charges.

[51] Joye Morris further deposed (at para. 31) that JMHS proposed increased Workers' Compensation Board ("WCB") costs "for certain categories of inmate numbers", since the increase in the number of clerical services hours in turn increased the WCB premiums that JMHS was required to pay for clerical workers.

[52] Joye Morris deposed, at para. 33, that the figures for the increased number of hours of nursing services and clerical services in the first amendment to Appendix IV, which were required because of the increased number of inmates that might be incarcerated at the VIRCC, "were prepared by me and no negotiation took place with the Ministry over my figures."

[53] Joye Morris deposed, at para. 35, that the second amendment to Appendix IV was made because of a province-wide increase in physician services rates negotiated by the Medical Services Plan of British Columbia. Changes to the rates for physician services "also resulted in changes to the WCB costs as Physician Services are one component of WCB costs". This is the only change between the first and second amendments to Appendix IV that the parties have noted in their submissions to me.

[54] I have noted, however, that there are other differences between the first and second amendments. The WCB figures were increased in the second amendment only with respect to the 276-300 and 301-324 inmate-count columns. All other WCB figures are the same in both amendments. There are, however, also changes in the bank charges, with those charges being increased in the 226-250, 251-275, 276-300 and 301-324 inmate-count columns of the second amendment. It is true that the bank charges increased between the original version of Appendix IV and the first amendment, but they also increased between the first and second amendments. Although no evidence was provided respecting this further increase in the bank charges, it appears that the second increase in bank charges may have been driven by increased interest costs on JMHS's line of credit stemming from the lack of monthly advances under the Health Services Agreement, to cover JMHS's increased payments to physicians for their services under the increased rates mentioned above.

[55] In her second open affidavit, Joye Morris disagreed with James May's contention that the "hours" figures in the Health Services Agreement were negotiated, deposing as follows:

> 9. With respect to James May's Affidavit, he is mistaken that the hours in the Health Services Contract were negotiated in any way. Those hours were compiled by me using the hours set out in the proposal without any variation whatsoever, or even a discussion about them.

[56] Joye Morris also provided an *in camera* affidavit that attaches five two-page appendices to the proposal JMHS had submitted in the RFP process that led to the Health Services Agreement. Her *in camera* affidavit also offers some explanation for how information in those exhibited appendices relates to the annual cost figures that have been withheld from Appendix IV and the amendments to it.

[57] At para. 18 of its initial submission, the BCNU argues that this case "is almost factually identical" to Order 00-22, [2000] B.C.I.P.C.D. No. 25, and says that, applying the "same factors", I "must come to the same decision in this application". The BCNU elaborates on this position in its reply submission, which merits quotation and not a summary:

> 6. … Adopting a narrow and restrictive interpretation of the word "supplied", the Public Body and Third Party argue that the financial information contained in a competitive bid is not "negotiated" information simply because the bid is successful and not changed by the Public Body.
>
> 7. The narrow and restrictive interpretation favoured by the Third Party and the Public Body does not correspond with the intention of the *Act*. The "supplied" information requirement of section 21 is designed to protect immutable information, not information calculated to win a competitive bid. On reviewing the affidavit of Ms. Morris, it is clear that the information contained in the Health Services Contract was created by

Ms. Morris for the purpose of completing a competitive RFP, and was not immutable information.

8. While the RFP submitted by Ms. Morris may have contained some immutable figures, such as bank charges, the majority of the dollar figures and the aggregate figure submitted were precisely calculated by Ms. Morris in order to succeed in a competitive bid process. At paragraph 10 of its Initial Submission, the Third Party does not characterize the disputed information as immutable, but rather argues that the dollar figures withheld are "work-product of Ms. Morris' many years of experience in creating costing information."

…

10. As principal of Joye Morris Health Services, Ms. Morris can set the dollar figures for rates associated with providing nursing services and costs associated with those services and set the administration charges and management fees that she wishes to charge. Obviously one factor in setting these rates is the Third Party's profit margin.

11. Ms. Morris has provided absolutely no information to indicate the rates associated with providing services, such as nursing services, are fixed costs. It is a reasonable inference that the Third Party, as a corporation, generates profits from charging administration and general management fees. Clearly these items are not fixed costs, but rather fees precisely calculated by Ms. Morris to strike a balance between maximum revenue for the Third Party and a competitive bid.

12. Ms. Morris has not simply provided the Public Body a list of fixed costs and asked the Third Party to pay those, instead she has created a competitive bid based on research and calculations and made choices about what to charge the Public Body. The Third Party does not have fixed wage and benefits costs for its employees as these employees are non-unionized and not bound by a collective agreement, nor does it have fixed general management fees. Ms. Morris can alter the aggregate costs of her bid by reducing wage and benefit costs of employees or reducing her management and administration fees.

13. It is a reasonable inference that Ms. Morris could change her bid if required by the Public Body to succeed in a competition. The fact that the Third Party was able to absorb certain training costs, as noted in paragraph 20 of Ms. Morris's affidavit, demonstrates that the costing figures were not fixed and that the Third Party was able to provide for those costs by reducing its profits in other areas, such as the administration or general management fees. If the costing figures were fixed, the Third Party would be unable to absorb additional costs.

14. Although the affidavit of James May, at paragraphs 6 and 7, states a belief that certain wage rates of employees of the Third Party were fixed and not negotiable, Mr. May provides no basis for this belief such as how he came

to believe that these costs were fixed or who advised him of this information. In any event, Mr. May's unsubstantiated belief is contradicted by Ms. Morris' affidavit in which she states costing information is based on calculations and research, not fixed costs such as wage rates established in a collective agreement.

15. The costing information in the Health Services Contract, even though it was accepted unchanged by the Public Body, does not meet the definition of "supplied" as applied by the Commissioner under section 21. Although Order 00-22, dealing with Health Services Contracts with the Public Body, does not address the issue of information provided by a third party and incorporated unchanged into a contract with a public body, later decisions of the Commissioner do. Specifically, Order 01-39 reviewed previous Commission decisions, including Order 00-22, and clarified that the term "supplied" includes information that is provided and accepted without changes by the public body as a part of a contract.

> 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 …
>
> …. 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.
>
> 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.
>
> *Order 01-39, paras. 44-6*

16. The Third Party and Public Body argue that because the requested information was not changed when it was incorporated into the Health Services Contract, it was "supplied". The Public Body has not met the evidentiary threshold established under section 21. In order for information to be "supplied", it must be immutable, such as a wage rate under a collective agreement (Order 01-39, para. 45). Ms. Morris' affidavit demonstrates that the requested information was not in this category. The Third Party has only provided evidence that Disputed Information was incorporated unchanged into the Health Services Contract, not that the information was immutable.

> 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."
>
> … 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.
>
> *Order 01-39, paras. 49-50*

[58] The contention that the annual cost figures were "supplied" within the meaning of s. 21(1)(b) has been tied in with the RFP process that led to the Health Services Agreement. The Ministry's position, essentially, is that the figures (some of which the Ministry believed were JMHS's "fixed costs") were neither negotiated nor negotiable. They were "supplied" because they were proposed by JMHS and accepted by the Ministry. JMHS's position, essentially, is that Joye Morris, as principal of JMHS, applied skill, experience, time and effort to compose "costing information" for its proposal in response to the RFP. Differences between the format and figures for JMHS's proposal and the format and figures for Appendix IV, and the amendments to it, are arithmetic corrections, are not substantive in nature, or reflect adjustments that JMHS nonetheless still "supplied".

[59] I have been provided with just one page of the RFP that led to the Health Services Agreement and with just five two-page appendices to JMHS's proposal submitted in response to the RFP. I also have the affidavit of James May and the open and *in camera* affidavits of Joye Morris.

[60] In my view, there is considerable merit in the BCNU's submission on the supply issue and Joye Morris's *in camera* evidence in fact supports the BCNU's position. Among other things, and without revealing its details, her *in camera* evidence indicates that JMHS's proposal presented annual cost figures on a contract year basis; that is, different sets of figures were given for each year of the contract. Some of the figures were the same for all contract years, while others were not. As a result of discussion with the Ministry, the annual cost figures in the Health Services Agreement reached between the parties were not broken down for the different years of the contract. Instead, median figures, more or less (but not necessarily) precisely, were used. The figures agreed to in Appendix IV and in its amendments also reflected the variety of adjustments that have already been described.

[61] In Order 03-02, [2003] B.C.I.P.C.D. No. 2, I reviewed some of the history of third-party business information exceptions in Canadian access to information legislation as well as many decisions concerning such exceptions. A lengthy relevant quote from the decision of Ross J. in *Canadian Pacific Railway* v. *British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848, 2002 BCSC 603, appears at para. 66 of Order 03-02. Part of that quote from Ross J.'s reasons consists of the following paragraphs from the report of my delegate, Nitya Iyer, in the inquiry that led to the order under judicial review in *Canadian Pacific*, *i.e.*, Order 01-39, [2001] B.C.I.P.C.D. No. 40. The relevant passage from Order 01-39 is as follows:

> [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).

[62] In Order 03-04, at para. 30, I summarized the situation as follows:

> 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.

[63] The Ministry and JMHS stress, and attempt to explain, the degree to which the annual cost figures that have been withheld under s. 21(1) were derived from figures that JMHS worked up and submitted in its proposal in response to the RFP.

[64] I agree with the BCNU, however, that James May's stated belief that the nurses' rates of pay in the Health Services Agreement were fixed costs to JMHS and therefore not negotiable warrants little, if any, weight. James May does not reveal the basis for his belief. His belief is also not substantiated by the evidence of Joye Morris, who could be expected to have more direct knowledge of this than James May. It must also be noted that James May's evidence, such as it is, on the question of fixed costs addresses only nurses' rates of pay. It does not address annual cost data withheld by the Ministry in relation to other services.

[65] I also agree with the BCNU that Joye Morris's evidence points to her having arrived at the "costing information" in the JMHS proposal with a view to balancing cost and profit for JMHS with the presentation of a competitive bid to the Ministry. Just because an expense in a proposal, or a contract, remains the same despite the variation of other terms (such as the number of inmates in the VIRCC) does not mean that it is a fixed cost of the contractor. All that is really signified is that there is a continuing flat charge by the contractor to the Ministry. The "cost" is to the Ministry in order to contract for the services involved. JMHS, without a doubt, also has costs, but it cannot be assumed that the annual cost figures that have been withheld by the Ministry must be fixed costs to JMHS. JMHS can be expected to seek some profit out of the contract. It may also be able to increase its own efficiencies and to bargain down its own costs.

[66] An RFP process aims to generate competitive proposals from qualified parties for the provision of goods or services to government. If all goes well, it leads to the government contracting with one, or more, of the proposing parties to provide the goods or services sought. It would hardly be surprising that terms in a contract arrived at resemble, or are even the same as, terms in the contractor's proposal. It might well be more unusual for the contract arrived to be completely out of step with the terms of the contractor's proposal. A successful proponent on an RFP may have some or all of the terms of its proposal incorporated into a contract. As has been said in past orders, there is no inconsistency in concluding that those terms have been "negotiated" since their presence in the contract signifies that the other party agreed to them. This is not changed by the Ministry's contention that terms in the Health Services Agreement were not negotiated, or even negotiable, because the Ministry believes that it simply accepted terms proposed by JMHS.

[67] In this case, there is evidence that rates payable to physicians were not determined by JMHS but, of course, those costs have not been withheld from the BCNU. There is a striking absence of evidence, however, that the annual cost figures that have been withheld under s. 21(1) were fixed costs of JMHS. Yet there is more than a little evidence, including in the *in camera* affidavit of Joye Morris, that those figures were negotiated contract terms. Annual cost figures were not "supplied" in respect of the Health Services Agreement simply because they relate or are traceable – in a greater or lesser degree depending upon the particular figure involved – to figures that appeared in JMHS's proposal in response to the RFP. I find that the information withheld by the Ministry was not "supplied" under s. 21(1)(b) of the Act.

In confidence

[68] The following paragraph in the affidavit of James May goes to the question of whether the annual cost figures withheld from the Health Services Agreement were supplied "in confidence" under s. 21(1)(b):

> 10. It was always my understanding that the information we received from potential contractors in their proposals, including in the proposal we received from Joye Morris Health Services, was being supplied and received in confidence. I have considerable experience in the request for proposals ("RFP") process, and in my experience it is always expected and understood by the parties to that process that all bid amounts and breakdowns of bid amounts are supplied and received in confidence.

[69] The Ministry and JMHS also relied upon the first open affidavit of Joye Morris:

> 13. Based on my dealings with Ministry representatives during those earlier RFP processes, it was my understanding that all costing information provided by JMHS as part of its proposals would be treated as confidential by the Ministry and not divulged to JMHS's competitors or third parties. By the same token, it was my understanding that any costing information supplied by JMHS's competitors would be treated as confidential information by the Ministry.
>
> 14. I cannot remember precise dates or times that Ministry representatives informed JMHS that the costing information would be treated as confidential and not supplied to JMHS's competitors or third parties, but recall this assurance having been communicated to me by various Ministry representatives during those RFP processes.
>
> …
>
> 16. I had the same understanding during the preparation of the proposal for RFP 128844, namely that the costing information in the proposal would be treated as confidential by the Ministry and not divulged to JMHS's competitors or third parties.
>
> 17. In addition, RFP 128844 contained a para, 5.7, indicating to me that the information would be treated as being confidential. Attached hereto as Exhibit "A" is a true copy of page 10 of the RFP which contains para. 5.7.

[70] Paragraph 5.7 in the RFP reads as follows:

> 5.7 OWNERSHIP OF PROPOSALS AND FREEDOM OF INFORMATION
>
> All documents, including proposals, submitted to the Province become the property of the Province. They will be received and held in confidence by the Province, subject to the provisions of the Freedom of Information and Protection of Privacy Act.

[71] The one page of the RFP that has been provided to me also includes a general confidentiality provision, which reads as follows:

> 5.9 CONFIDENTIALITY OF INFORMATION
>
> Information pertaining to the Province obtained by the proponent as a result of participation in this project is confidential and must not be disclosed without written authorization from the Province.

[72] There is no equivalent in the Health Services Agreement to para. 5.7 of the RFP. There is only a confidentiality provision, para. 28, which bears more similarity to para. 5.9 in the RFP. It reads as follows:

> 28. The Contractor will treat as confidential and will not, without prior written consent of the Assistant Deputy Minister, publish, release or disclose or permit to be published, released or disclosed before, upon or after the expiration or sooner termination of this Agreement, the Material or any information supplied to, obtained by, or which comes to the knowledge of the Contractor or the Health Care Personnel as a result of this Agreement except insofar as such publication, release or disclosure is necessary for the Contractor to fulfill its obligations under this Agreement or is required by any person lawfully entitled thereto pursuant to any applicable law of the Province or Canada.

[73] The word "material" is defined in the Health Services Agreement to mean:

> … all findings, data, reports, documents, records and material whether complete or otherwise that have been produced, received, compiled, or acquired by, or provided by or on behalf of the Province or the Assistant Deputy Minister to the Contractor as a result of this Agreement;

[74] The BCNU argues that confidentiality has not been established. It says that the reference to disclosure under the Act in para. 5.7 of the RFP means only that the Ministry can no longer rely on the Act to withhold any information "as confidential" (para. 5, reply submission).

[75] Paragraph 5.7 of the RFP constitutes a confidentiality commitment by the Ministry in respect of JMHS's proposal in response to the RFP. As was found in Order 01-20 at paras. 78-79, and in Order 01-39 at paras. 33-42, that commitment would satisfy the "in confidence" element in s. 21(1)(b). Unlike Order 01-20 and Order 01-39, however, where the confidentiality paras. were in the contracts to which access had been requested and also explicitly related to the provisions of those contracts, para. 5.7 is in the RFP. It explicitly goes to the confidentiality of JMHS's proposal. The Health Services Agreement itself contains no equivalent confidentiality para. Para. 28 of the Health Services Agreement is a confidentiality commitment of JMHS, not the Ministry. Further, it applies to information obtained by the contractor "as a result of" the agreement, as opposed to the terms and provisions of the agreement itself.

[76] The Ministry and JMHS would treat the JMHS proposal and the Health Services Agreement as one and the same for purposes of the "in confidence" element in s. 21(1)(b), but that is not the case. There is no para. in the Health Services Agreement that is the same or like para. 5.7 of the RFP. Para. 5.7 of the RFP, moreover, relates to JMHS's proposal, which is not the same as the agreement that was subsequently arrived at between the parties (even if the proposal and the agreement contain some same or similar figures). A commitment to maintain the confidentiality of proposals responding to an RFP is not an agreement to maintain confidentiality of the terms of contracts that may be reached with successful proponents.

[77] I also find that the "in confidence" element in s. 21(1)(b) has not been established with respect to the information in Appendix IV, and its amendments, to the Health Services Agreement.

Harm to third-party interests

[78] The following paragraph in the affidavit of James May is relevant to the Ministry's submission that disclosure of the annual cost figures it has withheld could reasonably be expected to result in both of the harms under s. 21(1)(c)(i) and in harm under s. 21(1)(c)(iii):

> 11. I believe that it would be unfair to Joye Morris Health Services, and/or to the Ministry, to disclose the Health Services Contract Information. The Ministry uses the RFP process to contract health care service providers for correctional facilities, and will undoubtedly be engaging in numerous RFP processes in the future. Future RFP processes for the provision of health care services at correctional facilities would very likely be harmed by disclosure of the Health Services Contract Information. I expect that any future bidder for a health care services contract with the Ministry would use the Health Services Contract Information to low bid on future contracts. Most companies that participate in the RFP processes are aware that pricing is weighted heavier than are other components of proposals. If competitors became aware of the dollar amounts submitted by previously successful bidders, they would likely submit unrealistic price quotes in

> trying to underbid each other. (For example, if proponent number one knew that proponent number two was going to bid $100,000 for a contract, proponent number one would likely bid $98,000.) This would create an inordinate amount of work for the evaluation team, and it would be almost impossible to fairly evaluate the various bids. If the Ministry were to award a contract based on accepting an unrealistic bid, and as a result of the bid being unrealistically low inadequate services were provided, there could very well be inmate unrest that could cause other serious problems.

[79] The Ministry also relies on the evidence of Joye Morris in her first open affidavit. She deposed at para. 37 that the BCNU is the union representing nurses working for JMHS's competitors and therefore has an interest in one of those competitors getting contracts for nursing services in correctional facilities instead of JMHS. She also deposed that several other companies could be expected to compete with JMHS on future RFPs. In addition, she deposed (at para. 43) that the BCNU "would use the costing information to try to unionize my staff".

[80] Joye Morris describes the competitive harm that she says could be expected to result from disclosure as follows, in her first open affidavit:

> 38. I believe the disclosure of the information in question would significantly harm JMHS's competitive position in any future RFP. Any proposal that JMHS is likely to make in response to future RFP's from the Ministry for correctional facilities will be based on the same data and methodology as was [*sic*] used to compile the costing information severed from the Health Services Contract, Amendment No. 1 and Amendment No. 2.
>
> 39. If JMHS's competitors gain access to this costing information, I know from my own experience in preparing costing information for proposals that the competitors will be able to undercut the costing component of JMHS's future proposals.
>
> 40. Such disclosure could very reasonably be expected to deprive JMHS of its ability to secure health service contracts in the future, with a resulting loss of revenue. Currently, all of the [*sic*] JMHS's revenue as a proprietorship derives from income received pursuant to its contract to provide health services to the Ministry for the Vancouver Island Regional Correctional Centre. Any harm to the competitive position of my company could result in JMHS being out of business.

[81] I will first address the contention that there is a reasonable expectation of harm under s. 21(1)(c) to the Ministry's interests. The Ministry must, presumably, be saying there would be "undue financial loss" to it as a "person or organization" under s. 21(1)(c)(iii). I find that this has not been established. There is no evidence that, in evaluating proposals submitted in response to an RFP process, the Ministry must accept the proposal with the lowest pricing components or must accept a proposal with "unrealistically low" pricing components. Indeed, the Ministry may not be required to contract with any of the proponents, even if all of their proposals are credibly priced.

Further, it is up to the Ministry, as the author and controller of its own RFP processes, to decide and adjust the attribution of weight to features other than pricing components in proposals.

[82] Even assuming for the purposes of argument that JMHS's proposals are credibly priced, the "burden" to the Ministry of receiving and evaluating similarly priced competitive proposals from other parties as well would not constitute an undue financial loss to the Ministry. Nor is it reasonable to expect that the possible submission of similarly-priced competitive proposals from other parties would result in undue financial loss to the Ministry by impairing its ability to exercise good judgment in evaluating proposals or causing it to enter into contracts for inadequate services.

[83] I will now address whether a reasonable expectation has been established of competitive, negotiating or financial harm to JMHS or of undue financial gain to its competitors or anyone else. In my view, the strongest point made is that the annual cost figures that have been withheld could, if disclosed, be used by JMHS's competitors to undercut JMHS respecting cost components in future RFPs for nursing services in correctional centres. It is unnecessary to determine whether the BCNU is requesting the information with that purpose in mind. I accept, as I have done in other orders, that if the BCNU is entitled to access to this information, it will be on the basis of a public right of access that could include JMHS's competitors.

[84] In Order 00-22, which also involved access to fees, expenses and hourly rates in contracts for nursing services in correctional facilities, I found that a reasonable expectation of significant harm to competitive position under s. 21(1)(c)(i) had been established. I stated as follows at p. 10:

> … The affidavits filed here attest to the fact that disclosure of the disputed information would assist competitors of JS [the third-party contractor] to undercut it on the pricing component of future tenders for health services health services contracts. There is also evidence that the pricing component can be critical to a successful contract proposal. Assuming that the disputed information is not available from other sources – of which there is no evidence before me – I accept that it would be a useful pricing guide for JS's competitors. While expiry of the contracts in issue could diminish their relevance and usefulness for competitive purposes, the contracts are relatively recent and their competitive value lies not only in the contract amounts, but also in breakdowns applied to those amounts. The test of reasonable expectation of significant harm to competitive position has been met in relation to JS.

[85] The disputed information and evidence in Order 00-22 bear similarity to this case, although one difference is that, in Order 00-22, access had been denied to aggregate fees and expenses as well as to hourly rates and breakdowns of aggregate contract amounts on the basis of services, expenses and fees. In this case, however, maximum aggregate fees and expenses in para. 7 of the Schedule of Payments have been disclosed. As a result, where figures that have already been disclosed also appear in Appendix IV or its

amendments, I do not accept that their disclosure again could reasonably be expected to harm JMHS.

[86] With respect to the remaining annual cost figures that have been withheld under s. 21(1), I conclude it has been established that their disclosure could reasonably be expected to harm significantly the competitive position of JMHS under s. 21(1)(c)(i). Although I find it has not been established that the disputed information actually or inferentially discloses a "methodology" that JMHS applied to generate "costing information", I accept that, for the particular circumstances of JMHS's business, there are specific competitors that could reasonably be expected to use the disputed information to undercut the costing component of JMHS's future proposals for similar contracts. I accept that the threshold of significant harm to JMHS's competitive position under s. 21(1)(c)(i) has been met, even though it has not been shown that JMHS might not still succeed in getting contracts because of its experience and history in rendering these particular services to the Ministry or for other reasons.

4.0 CONCLUSION

[87] For the reasons given, I find that s. 17(1) does not authorize, and s. 21(1) does not require, the Ministry to refuse to disclose the contract price information that has been withheld from the Schedule of Payments to the Professional Services Contract. Under s. 58 of the Act, I require the Ministry to give the BCNU access to that information.

[88] I also find, for the reasons given above, that s. 21(1) does not require the Ministry to refuse to disclose the contract price information that has been withheld from Appendix IV to the Health Services Agreement and the amendments to it. Under s. 58 of the Act, I require the Ministry to give the BCNU access to that information.

April 22, 2003

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia