



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

Order F08-22

**FRASER HEALTH AUTHORITY**

David Loukidelis, Information and Privacy Commissioner

December 24, 2008

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**Summary:** The public body was not authorized by s. 17(1) or required by s. 21(1) to refuse to disclose the pricing terms in an addendum and change order to a multi-year contract for housekeeping services in hospitals. The public body is ordered to provide access to the disputed information.

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

**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 00-41, [2000] B.C.I.P.C.D. No. 44; Order 00-47, [2000] B.C.I.P.C.D. No. 51; 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 01-52, [2001] B.C.I.P.C.D. No. 55; 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 03-15, [2003] B.C.I.P.C.D. No. 15; Order 04-06, [2004] B.C.I.P.C.D. No. 6; Order F05-05, [2005] B.C.I.P.C.D. No. 6; Order F05-29, [2005] B.C.I.P.C.D. No. 39; Order F06-01, [2006] B.C.I.P.C.D. No. 2; Decision F06-07, [2006] B.C.I.P.C.D. No. 26; Order F06-20, [2006] B.C.I.P.C.D. No. 36; Order F07-15, [2007] B.C.I.P.C.D. No. 21. **Ont.:** Order MO-1706, [2003] O.I.P.C. No. 238; Order PO-2435, [2005] O.I.P.C. No. 207; Order PO-2467, [2006] O.I.P.C. No. 65.

**Cases Considered: S.C.C.:** *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029; *Athey v. Leonati*, [1996] 3 S.C.R. 458; *R. v. Find*, [2001] 1 S.C.R. 863; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773; *Health Services and Support Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 191. **Federal:** *Canada Packers Inc. v. Canada (Minister of Agriculture)* (1988), 53 D.L.R. (4<sup>th</sup>) 246 (F.C.A.); *Re Saint John Shipbuilding Ltd. v. Canada (Minister of Supply and Services)* (1990), 67 D.L.R. (4<sup>th</sup>) 315 (F.C.A.). **B.C.:** *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; *Fraser Health Authority v. Hospital Employees' Union* (2003), 226 D.L.R. (4<sup>th</sup>) 563 (B.C.S.C.). **Ont.:** *R. v. Potts* (1982), 110 C.C.C. (3d) 383 (Ont. C.A.); *Ontario*

(*Minister of Labour v. Big Canoe*, (1999), 181 D.L.R. (4<sup>th</sup>) 603 (Ont.C.A.); *Ontario (Ministry of Transportation) v. Copley* (2004), 24 Admin. L.R. (4<sup>th</sup>) 10 (Ont. Div. Ct.); *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Ont. Div. Ct.).

**Texts Considered:** R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4<sup>th</sup> ed (Markham: Butterworths Canada Ltd., 2002).

## 1.0 INTRODUCTION

[1] This order concerns an access request under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) for “renewed or newly signed contracts, including amendments, appendices and schedules” between the Fraser Health Authority (“FHA”) and Sodexho MS Canada Limited (“Sodexho”) for housekeeping services in the FHA hospitals. The access applicant is a union (“Union”) that represents Sodexho employees.

[2] In October 2003, the FHA and Sodexho entered into a multi-year, multi-million dollar agreement for housekeeping services in the FHA hospitals (“Agreement”). The Union made an access request for the Agreement. The FHA applied s. 21 of FIPPA to withhold some information and the Union did not seek a review of that decision.

[3] The Union made its access request after the parties to the Agreement agreed to an addendum (“Addendum”) and a change order (“Change Order”) in March 2005. The FHA applied s. 17(1) and s. 21(1) to deny access to some information in the Addendum. The Union requested a review of that decision. In mediation by my office, the FHA disclosed more, but still not all, of the Addendum. It also identified and disclosed the Change Order, again with some information withheld under s. 17(1) and s. 21(1).

[4] A written inquiry was held under Part 5 of FIPPA concerning the FHA’s application of s. 17(1) and s. 21(1) to withhold information from the Addendum and the Change Order.

## 2.0 ISSUES

[5] The issue here is the FHA’s application of s. 17(1) and s. 21(1) of FIPPA to the Addendum and the Change Order.

[6] The FHA has the burden of proof under s. 57(2), but because s. 21(1), which protects third-party business interests, is in issue, Sodexho was given an opportunity to participate in the inquiry, which it did.

[7] The FHA provided written submissions, two affidavits of David Lawson, its Chief of Shared Services, and a brief affidavit of Ron McKerrow, Vice-President of Business Development and Service Delivery at the Provincial Health Services Authority. The reason for two affidavits from David Lawson was that one contained five *in camera*

paragraphs concerning risk of harm from disclosure of the information in issue and four *in camera* exhibits consisting of unsevered copies of the Addendum and Change Order, parts of the Agreement, and parts of Sodexho's contract proposal to the FHA. These *in camera* materials were also reflected in six *in camera* paragraphs in one of the FHA's submissions. Sodexho provided written submissions and the affidavit of Bryan Harvey, its District Manager responsible for the Agreement. The Union provided written submissions and the affidavit of Jim Amos, a United Kingdom-based academic who the Union described as an expert in freedom of information.

### 3.0 DISCUSSION

[8] **3.1 Background**—In its submissions and supporting affidavit, the FHA explained that the Agreement came about as a result of the enactment in 2002 of the *Health and Social Services Delivery Improvement Act*,<sup>1</sup> which allowed health authorities “to contract for non-clinical services outside the context of collective agreements and free of certain restrictions contained in collective agreements in place at the time.” According to the FHA, health authorities “took advantage of this opportunity, and through the outsourcing of various services such as laundry, security, housekeeping and food services...have achieved savings of tens of millions of dollars each year”, adding that these savings “have been redirected to clinical and other services aimed at maintaining or improving access to health care and wait time for patients in British Columbia.”<sup>2</sup>

[9] The FHA initiated a selection process in the fall of 2002 for the outsourcing of housekeeping services in its hospitals. Contractors were publicly invited to complete a pre-qualification form where they were asked to provide information that would help the FHA assess their fitness to provide required services. Qualified contractors, including Sodexho, were then provided with a formal and detailed Request for Proposal for Housekeeping Services (“RFP”) and were invited to submit a response that would be open for acceptance for 120 days.<sup>3</sup>

[10] Article 1.11 of the RFP addressed how the contracting process would proceed after the FHA selected a preferred vendor, as follows:

If the Preferred Vendor submits a submission which is acceptable to the FHA in its entirety without any changes required by the FHA, the FHA intends to enter into negotiations for a Contract based on that submission. If the Preferred Vendor's submission is not acceptable to the FHA in its entirety, however, the FHA in its discretion and as a condition of negotiating any Contract with that Vendor may negotiate any and all such changes to the submission as the FHA may require in the best interest of the FHA. If any of such negotiations on the Contract of submission are not successful within such time period as the FHA may require, the FHA may, at any time thereafter upon two days notice to the Vendor, discontinue

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<sup>1</sup> Sections 6(2), 6(4) and 9 of the *Health Social Services Delivery Improvement Act* were subsequently declared unconstitutional by the Supreme Court of Canada in *Health Services and Support Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 191. Those provisions were then repealed by the *Health Statutes Amendment Act, 2008*.

<sup>2</sup> FHA initial submission, at paras. 11 and 12.

<sup>3</sup> FHA initial Submission, at paras. 23 and 24.

further negotiations and discussions with that Vendor. If the FHA has discontinued further negotiations with the Preferred Vendor in accordance with the foregoing, the FHA may at any time thereafter commence negotiations and finalization of the Contract in accordance with the foregoing process with any other Vendor, in the same manner as if that Vendor was the Preferred Vendor. The foregoing process will be repeated with that Vendor, and with each other Vendor until either a Contract is awarded by the FHA or until negotiations have been terminated by the FHA.

Notwithstanding the foregoing, if the FHA in its sole discretion is not satisfied with any of the submissions received or with the results of any negotiations between the FHA and the Vendors in accordance with the foregoing, or if the FHA determines that none of the submissions are acceptable to the FHA and that negotiations in relation to those submissions would produce a result which would also likely not be acceptable to the FHA, or if the FHA is unable to conclude a Contract acceptable to the FHA for whatever reason the FHA considers in its own best interests, then notwithstanding anything to the contrary in this RFP or any custom of the trade or any duty of fairness to the contrary, the FHA may terminate this RFP or negotiate with and award the Contract to any other firm or firms as may be acceptable to the FHA, whether or not such firms were recipients of this RFP and whether or not such firms submitted submissions.

Award of the contract is in all cases, conditional on the vendor executing a contract with terms and conditions acceptable to the FHA in its sole discretion.<sup>4</sup>

[11] Other RFP terms provided that:

- The FHA offered its negotiated contracts to “Affiliates, Contracted Facilities, other Health Authorities and associated Business Alliances” and requested proponents to indicate if they were not able to offer the same pricing, terms or conditions to others.
- The FHA was not bound to accept any proposal and retained sole and absolute discretion to postpone or cancel the RFP.
- The FHA also retained sole and absolute discretion to cancel any resulting contract with 90 days written notice at any time for whatever reason.

[12] The RFP also contained the following terms concerning confidentiality and FIPPA:

**9. Confidentiality**–Subject to term 20.<sup>5</sup> Responses submitted in confidence to the Fraser Health Authority shall be so honoured. The FHA will not release to the public, any specific information regarding any submitted responses except as may be required under law. Contract awards that equal or exceed ten thousand dollars (\$10,000) are posted on external and internal media bulletin boards or sites. Vendors shall treat all information received through competitive bidding process as confidential.

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<sup>4</sup> Open Affidavit of David Lawson, Exhibit ‘A’, at pp. 7-8.

<sup>5</sup> Term 20 of the RFP provided that British Columbia law and courts would govern any resulting contract.

**18. Freedom of Information and Protection of Privacy Act (FOIPPA)**—The Fraser Health Authority is subject to legislation governing the protection of personal privacy and as such, the FHA records are subject to access under this Act. The Vendor will at all times comply with all requirements of the FHA to protect confidential information from disclosure pursuant to the various exceptions to disclosure from time to time available under the FOI. Without limiting the foregoing, the Vendor shall treat all confidential information disclosed by the FHA, and all data, communications, information, files and work product developed, produced or utilized by the Vendor, as being significant to the financial or economic interests of the FHA as contemplated by section 17 of that Act. The Vendor acknowledges and confirms that information provided by the Vendor, including its submission in response to the RFP, is commercially sensitive and its disclosure may be harmful to business interests of the Vendor as contemplated by section 21 of the Act. The FHA shall keep confidential all such information provided by the Vendor to the greatest extent permitted under that Act, and will give the Vendor as much prior notice of publication as is practicable in order that the Vendor may seek an injunction or other protective order or relief as may be available to it at law. This Act governs the collection, use, retention, security and disclosure of personal information managed by the public organizations. The Act also applies to all electronic information accessed or returned by the Vendors. If documents submitted contain protected, proprietary or confidential information, identify the specific issue or information and provide supporting reasons why the Fraser Health Authority should NOT release this information if requested by a FOIPPA inquiry.

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**31. Ownership of Proposals**—All documents will be received and held in confidence by the Fraser Health Authority, subject to the provisions of the Freedom of Information and Protection of Privacy Act (FOIPP).

[13] Sodexho's response to the RFP had the following statement printed on the front:

This proposal contains information proprietary to Sodexho MS Canada. This information is presented to you, in confidence, for your decision-making process and is not to be duplicated or distributed further.

[14] The FHA selected Sodexho as the preferred vendor for the services. According to David Lawson's evidence, Sodexho's response formed the basis of the Agreement, with some fundamental terms offered in the proposal—including itemized pricing, volume discounts and price adjustments—being incorporated unchanged in the Agreement, while others were subject to negotiated adjustments.<sup>6</sup>

[15] The Agreement permitted contract changes and additions in response to changes in the required services. I accept that Article 7, entitled "Security, Access, Confidentiality & Material Change in Status", applied to the Agreement, Addendum and Change Order. Article 7.1 provided that non-public FHA or patient information disclosed to Sodexho in connection with the Agreement was confidential. Sodexho agreed not to disclose or use that information for any purpose other than in connection with the

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<sup>6</sup> Open Affidavit of David Lawson, at para. 11.

Agreement and acknowledged the rights of patients to personal privacy. Articles 7.1(3) and (6) addressed information to be considered confidential to Sodexo, the applicability of FIPPA, and public or third-party communications about the Agreement, as follows:

(3) The Health Authority shall use reasonable efforts not to disclose any information of a proprietary nature concerning the Contractor (“Contractor’s Confidential Information”) including: its methods, systems, business practices or the pricing arrangements under this Agreement. [Text omitted about Contractor owned or licensed accounting systems and other software.] Notwithstanding the provisions of this Article 7.1(3), the Contractor understands that the Health Authority operates within a legislative framework in which reporting and accountability relationships to the Government of British Columbia exist and that the Health Authority has certain responsibilities to conduct business in an open manner through public hearings, public meetings and other means. The Contractor acknowledges that the Fraser Health Authority is subject to the *Freedom of Information and Protection of Privacy Act* (FOIPPA). Any Contractor Confidential Information which the Contractor wishes to protect from disclosure following the expiration or earlier termination of this Agreement must be expressly marked Confidential and identified as such to the Health Authority at or prior to the expiration or termination of the Term.

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(6) The Contractor agrees to develop its [sic] public communication materials respecting this Agreement in coordination with the Health Authority Communication/Public Relations department. The Contractor will, to the extent possible, confer with the Health Authority, prior to communicating with the media or other third parties regarding the content or performance of this Agreement. As appropriate and practical, the parties will agree upon standardized and uniform responses to questions from the media and third parties regarding this Agreement. Each party will inform the other on a timely basis of requests by third parties for information about the Agreement and the nature and content of the response provided.

[16] The FHA issued a press release disclosing that, under the Agreement, it would pay Sodexo approximately \$73 million for housekeeping services over a five-year term, with savings estimated at over \$50 million. The FHA must disclose its total payments to Sodexo each fiscal year as required by the *Financial Administration Act*.<sup>7</sup> David Lawson expressed his opinion that this level of disclosure by the FHA is consistent with the generally expected level of accountability for public body outsourcing contracts in British Columbia:

Total costs are generally made public, but the prices of individual line items are not. I am informed that this is the practice at other health authorities in British Columbia, and this is also consistent with the confidentiality, public disclosure and transparency requirements in the *Agreement on Internal Trade*. In my view, this approach balances the public interest in the accountability of public bodies with the importance of maintaining the integrity of the bidding process.<sup>8</sup>

<sup>7</sup> R.S.B.C. 1996, c. 140.

<sup>8</sup> Open Affidavit of David Lawson, at para. 24.

[17] **3.2 The Addendum and the Change Order**—The Addendum is a five-page document adjusting the price for contract services at the Matsqui/Sumas/Abbotsford Hospital and amending the performance bonus structure in successive years of the Agreement. The FHA withheld the following information from the Addendum:

- adjusted contract pricing for Matsqui/Sumas/Abbotsford Hospital;
- adjusted incentive payment amounts for contract performance across facilities in successive contract years.

[18] The Change Order is an 8-page document amending the Agreement as to factual, service and operational changes. The FHA withheld the following information from the Change Order:

- adjusted contract pricing resulting from re-calculation of cleanable square metres per facility;
- average per-square-metre charge for contract services applied to calculate pricing adjustments;
- aggregate adjusted annual contract price and one time start-up charge for transfer of St. Mary's hospital programs;
- annual, per program and per facility, adjusted contract pricing for transfer of St. Mary's hospital programs;
- reason for de-escalation of contract price in year two of the Agreement;
- aggregate and per-facility adjusted annual contract pricing for additional exterior areas.

[19] The RFP included the FHA's calculations of the total square metres to be serviced per facility and per service area category<sup>9</sup> across facilities. The FHA also released tables of those measurements in the Agreement and as revised by the Change Order.

[20] Sodexho's organized labour costs are publicly known to the extent that the hourly wage rates and related terms are set out in its collective agreements with the Union.

[21] The FHA candidly, and accurately in my view, described the withheld information as "Pricing Information" that "all relates to prices payable for Sodexho's services under the Addendum and the Change Order".<sup>10</sup> The information consists of pricing adjustments for services and performance incentive payments.

[22] According to the FHA, the price changes in the Change Order are based on the price per square metre offered in Sodexho's response to the RFP and agreed to in the Agreement. Disclosure of the withheld information would reveal the performance incentive payment terms in the Agreement and, in conjunction with the already

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<sup>9</sup> The service area categories are: Administrative Areas, Common Non-Patient, Diagnostic Area, Outpatient/Daycare, Inpatient Areas Acute, Inpatient Areas LTC and Critical Care Area ex OR.

<sup>10</sup> FHA initial submission, at para. 3.

disclosed measurements of the service areas, would reveal square metre contract pricing, by facility and service area category.<sup>11</sup>

[23] **3.3 Past Refusal to Disclose Information in the Agreement**—The full text of the Agreement is not before me, but it is nonetheless evident that some of the information withheld from the Addendum and Change Order—for example the average per square metre charge for contract services applied to calculate the pricing adjustments in the Change Order—would also be information that is in the Agreement.

[24] Sodexo submitted that the FHA's past refusal to disclose information in the Agreement—a refusal the Union did not ask to have reviewed under FIPPA—is binding, such that information withheld at that time from the Agreement, or that would reveal such information, is protected from disclosure in the Addendum or Change Order. As Sodexo put it:

...given that there was no application for review of FHA's decision to sever this information from the Agreement, that decision is binding on the [Union] and indeed must be accepted as being correct under the *Act* (and indeed Sodexo says that that decision was correct). Second, in these circumstances, information in the addendum or Change Order which, if released, would expressly or impliedly reveal information in the Agreement which was withheld under s. 21, must be protected from disclosure on that basis alone. That is, [the Union] cannot be permitted to obtain, through an application for review with respect to the Addendum or Change Order, information in the Agreement which was withheld pursuant to s. 21, and with respect to which [the Union] did not seek a review. Not only would this be manifestly unfair but it would constitute an inappropriate circumvention of the processes and intent of the *Act*. Moreover, it would result in the release of information that is intended under the *Act* to be protected from disclosure.

[25] It was not improper or unfair for the Union to make an access request for renewed, amended or newly signed contracts between the FHA and Sodexo. The FHA's disclosure of information in response to the access request for the Agreement would undermine a claim of confidentiality for the same information in the Addendum or Change Order for the simple reason that the information has already been released. This reasoning does not apply, however, to information that the FHA withheld from Agreement. That decision was never the subject of an inquiry or order under FIPPA, so the Union's access request and request for review for the Addendum and Change Order are not challenging any previous adjudication of issues under FIPPA. Sodexo's focus on the fact of the FHA's refusal to disclose pricing information in the Agreement begs rather than answers the question of whether the FHA properly applied s. 17(1) or s. 21(1) to the Addendum and Change Order or, for that matter, to the Agreement.

[26] Last, information in the Agreement is not underlying, confidential, supplied information within the meaning of s. 21(1)(b) of FIPPA by virtue of its reappearance in

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<sup>11</sup> The information in issue in fact includes a table of the annual per square metre bid average for each service area category.



the contract amendments. As I said in Order F06-20<sup>12</sup> about contract pricing that was traceable to the contractor's proposal:

[15] This case falls squarely within the many orders that have found that the contract price for services to a public body is not "supplied" information within the meaning of s. 21(1)(b). The fact that the IHA may have accepted a contract price that Retirement Concepts generated through application of its business model does not make the amount that the parties agreed upon information that is proprietary to Retirement Concepts. Nor does it mean that the price bargain struck between the IHA and Retirement Concepts constitutes immutable or underlying confidential information supplied by Retirement Concepts.

[27] **3.4 Affidavit of Jim Amos**—The FHA and Sodexo objected to the affidavit of Jim Amos on the ground that it did not meet common law rules governing expert evidence in judicial proceedings or procedural rules for expert evidence in the *Evidence Act*.<sup>13</sup>

[28] In a preliminary ruling,<sup>14</sup> I noted that criteria for the admissibility of expert evidence in judicial proceedings does not apply in an inquiry under FIPPA because it is not governed by the strict rules of evidence. I concluded that evidence in the Amos affidavit could be relevant, but that I would not be considering it as expert opinion evidence as to the applicability of s. 17 or s. 21 of FIPPA to the information in issue:

[18] The applicant [Union] describes Amos's evidence as "research-based". That may be so, but that label only goes so far. Amos appears to have specialized knowledge of the public policy issues around public access to supply and service contracts with government, as well as some factual knowledge about public disclosure practices in this area in the United Kingdom and, to a lesser extent, the United States, Australia and Canada.

[19] He does not have any indicated specialized or direct (first hand or otherwise) knowledge that is specific to the operation or disclosure practices of health authorities or facilities in British Columbia, or to the public body, contractor or housekeeping services contract involved in this inquiry. He offers broad policy perspectives and predictions about whether public access to price information in supply and service contracts with government is harmful to government or contractors, an issue that is to some degree familiar ground for most access to information commissioners.

[20] I am not persuaded that the affidavit shows his evidence is based on empirical study in a scientific, technical or other verifiable sense. His evidence—whether characterized as argument or commentary—illuminates the public policy debate in the United Kingdom, United States, Canada and Australia, around access to information legislation and public disclosure of pricing information in supply or services contracts with government. His evidence may well have some relevance in an inquiry under the Act, which is not a trial, but I am not going to consider his opinions on public policy as expert opinion evidence on the consequences, in terms of harm under s. 17 or s. 21 of the Act, of public access to the disputed information

<sup>12</sup> [2006] B.C.I.P.C.D. No. 36. Also see Order F07-15, [2007] B.C.I.P.C.D. No. 21, at paras. 37-40.

<sup>13</sup> R.S.B.C. 1996, c. 124, ss. 10 and 11.

<sup>14</sup> Decision F06-07, [2006] B.C.I.P.C.D. No. 26.

in this inquiry. The kind of opinion evidence in Amos's affidavit is qualitatively quite different from the kind of opinion evidence from grizzly bear biologists that I considered in Order 01-52.

[29] I deferred further consideration of Amos's evidence, subject to any further response to that evidence from the FHA or Sodexho. Neither of them provided evidence after my preliminary ruling and I am satisfied that they were already able to, and did, respond to Amos's evidence in their submissions to the inquiry.

[30] My preliminary ruling analyzed previous decisions on the relevance of the public accessibility of similar information in other jurisdictions.<sup>15</sup> The existence of a law or policy of accessibility in another jurisdiction cannot be used to read content into FIPPA that is not supported by FIPPA's legislative language. However, concrete evidence explaining another jurisdiction's accessibility experience with similar information, or showing whether transparency has stanching the viability of supply and service contracts with government in another jurisdiction, could be relevant to whether contract information here is in fact confidential at all or whether its disclosure could reasonably be expected to result in harm as defined in FIPPA.

[31] I conclude that Jim Amos is an academic who studies the policy and impact of public sector access to information laws in the United Kingdom and to a lesser extent also the United States, Australia and Canada. He holds a sincere conviction that contracts for products and services to government should generally be publicly accessible and that there is little or no cause for concern that such disclosure is harmful to the economic interests of public bodies or contractors:

13. Based on my research, I am informed, and do verily believe that the information broker industry is well established in the US. A company may use an information broker to obtain information such as what information the government possesses regarding the company, information regarding the company's competitors, and/or details of the competitor's contracts with government, of how an agency is interpreting a particular provision:

The publishing of contract price information in the USA is now established by procurement rules. While this remains a subject of contention, it is now increasingly recognized as a cost of doing business with government. (Exhibit "B", page 15)

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15. The UK FOIA was implemented in full in January 2005, and the practices around FOIA disclosure continue to develop. Based on my research, I am informed, and do verily believe that the current practices with respect to FOIA disclosure in the UK are broadly consistent with the conclusions of my study. It is becoming more accepted that contracts between government and suppliers will be disclosed, substantially intact. This is subject to consideration of the applicability of exemptions on a case by case basis.

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<sup>15</sup> Order F05-29, [2005] B.C.I.P.C.D. No. 39; Order 01-52, [2001] B.C.I.P.C.D. No. 55; Order 01-20, [2001] B.C.I.P.C.D. No. 21; and, *Canada Packers Inc. v. Canada (Minister of Agriculture)* (1988), 53 D.L.R. (4<sup>th</sup>) 246 (F.C.A.).

16. I am informed, and do verily believe that the sensitivity of contract information declines over time.

17. A recent example of FOIA disclosure concerns the Norwich and Norfolk Hospitals Trust (the “Trust”) where the PFI contracts were disclosed publicly, available on the Trust’s website, substantially intact. Key documents, including the Summary of the Norfolk and Norwich University Hospital PFI, and the Full Facilities Management Agreement between Norfolk and Norwich Health Care NHS Trust and Octagon Healthcare Limited, were available to the public on April 25, 2006 at <http://www.nnuh.nhs.uk/QA.asp?ID=14>. These documents provide detailed financial disclosure of contract price. It is my understanding that the Trust and its suppliers are agreed that performance reports should be published. Detailed financial information that would enable a competitor to find out about the internal costs of the supplier would not be disclosed.

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20. I am not aware of harm to economic interests, either to the public body or to the supplier, as a result of appropriate FOIA disclosure in the UK. My research into other jurisdictions revealed little evidence of harm to economic interests, either to the public body or to the supplier as a result of appropriate FOI disclosure.

[32] Jim Amos’s work may have merit, but I find the views expressed in his affidavit are too qualified and removed from this access request, the information at issue and this jurisdiction to be given evidentiary weight in this inquiry.

[33] **3.5 Harm to Financial or Economic Interests of the FHA**—Section 17(1) of FIPPA 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.

[34] One of FIPPA's twin purposes under s. 2(1) is to make public bodies "more accountable to the public" by "giving the public a right of access to records", a goal that is further advanced by "specifying limited exceptions to the rights of access"<sup>16</sup> to information in FIPPA. The force of the right of access in s. 4 is reinforced for all non-personal information in contracts with public bodies by the fact that s. 57 puts the burden of proving the applicability of s. 17 or s. 21 on the public body or the third party contractor, not on the access applicant. Public body accountability through the public right of access to information is acutely important and especially compelling in relation to large-scale outsourcing to private enterprise of the delivery of public services, in this case aspects of hospital care.<sup>17</sup>

[35] I have held in previous orders that s. 17(1) requires a confident and objective evidentiary basis for concluding that disclosure could reasonably be expected to result in harm.<sup>18</sup> Referring to language used by the Supreme Court of Canada in an access to information case, I have said that "there must be a clear and direct connection between the disclosure of specific information and the harm."<sup>19</sup> The focus is on what a reasonable person would expect, based on evidence.<sup>20</sup> The probability of harm occurring is relevant to the assessment, but mathematical likelihood will not be decisive when other contextual factors are at work.<sup>21</sup> A public body's and contractor's mutual agreement to resist disclosure of a contract for services between them is not harm under s. 17(1) or s. 21(1). As I said in Order 01-20:

I do not think it lies for UBC [the public body] and CCB [the vendor] to say that, because CCB insisted that UBC contract on confidential terms and said or suggested that it would not deal with UBC in any other way, there is a reasonable expectation of harm to either or both of them under s. 17(1) or s. 21(1)... [S]uch an argument amounts to CCB defining a reasonable expectation of harm under s. 17(1) and s. 21(1) on the basis of its own resistance to the public accessibility of its negotiations and contracts with UBC. This stands the reasonable expectation of harm requirement on its head. In my view, the reasonable expectation of harm must flow from disclosure of the information in question, not solely from the public body's or third party's opposition to disclosure.<sup>22</sup>

[36] The FHA maintains that disclosure of the contract pricing information in the Addendum and Change Order can reasonably be expected to harm its economic or financial interests, and those of other health authorities, by:

1. destabilizing and threatening the continuing viability of the Agreement and the FHA's relationship with Sodexo; and

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<sup>16</sup> Section 2(1)(c).

<sup>17</sup> Order F07-15, [2007] B.C.I.P.C.D. No. 21, at para. 23.

<sup>18</sup> Order 02-50, [2002] B.C.I.P.C.D. No. 51, at paras. 124 to 137.

<sup>19</sup> Order 04-06, [2004] B.C.I.P.C.D. No. 6, at para. 58, referring to *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773.

<sup>20</sup> Order 00-41, [2000] B.C.I.P.C.D. No. 44, at p. 9.

<sup>21</sup> Order 00-10, [2000] B.C.I.P.C.D. No. 11, at p. 9.

<sup>22</sup> [2001] B.C.I.P.C.D. No. 21, at para. 112.

2. harming the FHA's interests in the procurement of other services through a tendering or request for proposal process.<sup>23</sup>

[37] It says the pricing information falls under ss. 17(1)(d) and (e) and also under the opening language of s. 17(1). The FHA describes the harm threshold for s. 17(1) as the "lowest level" identified in FIPPA because it does not have to be "significant", as s. 21(1) requires, or "grave and immediate", as s. 19(2) requires. Referring to earlier orders, the FHA extracts the proposition that, while the expectation of harm must not be fanciful, imaginary or contrived, the very nature of the question requires "some level of speculation, but the speculation must be based on reason rather than fancy." All that needs to be established, the FHA asserts, is a reasonable expectation of *any* risk of harm to the FHA's financial or economic interests in the context of its efforts to achieve economic efficiencies with scarce public dollars in order to meet ever-increasing demands for public health care.<sup>24</sup>

[38] The FHA's concern is that Sodexho will perceive disclosure of the information, which Sodexho regards as proprietary, to compromise Sodexho's ability to negotiate with its unionized and non-unionized workforce. According to the FHA, "mere common sense" dictates that Sodexho will respond to these fears by not competing for contracts with the FHA and other health authorities, or by factoring risks associated with these fears into pricing and other terms on which it is willing to contract. The "result will almost inevitably be either fewer bids or higher prices" that will harm the FHA and other health authorities, bearing in mind that a reasonable expectation of "bare" harm will suffice for this disclosure exception. The FHA describes this harm as "a social or business reality that is indisputable among reasonable people", a social context fact that is known to all without expert testimony or reliance on the principle of judicial or official notice and that is impossible to quantify on an evidentiary basis.<sup>25</sup>

[39] I conclude for reasons given below that the FHA has not discharged its burden of proving that it is authorized to withhold information under s. 17(1).

[40] Section 17(1) is characterized by a general clause followed by a list of circumstances included in the general clause. Meaning must be given to the general clause and to the words in the included list.

[41] In *National Bank of Greece (Canada) v. Katsikonouris*,<sup>26</sup> the Supreme Court of Canada, took the following interpretive approach to a standard mortgage clause that began with general terms, which were followed by the word "including" and an enumeration of circumstances:

...Whatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it. But it would be illogical to proceed in the same manner when a general term precedes an enumeration of specific examples. In this situation, *it is logical to*

<sup>23</sup> FHA initial submission, at para. 10.

<sup>24</sup> FHA initial submission, at paras. 6-9.

<sup>25</sup> FHA initial submission, at paras. 13-15.

<sup>26</sup> [1990] 2 S.C.R. 1029.

*infer that the purpose of providing specific examples from within a broad general category is to remove any ambiguity as to whether those examples are in fact included in that category. It would defeat the intention of the person drafting the document if one were to view the specific illustrations as an exhaustive definition of the larger category of which they form a part.*<sup>27</sup> [emphasis added]

[42] Ruth Sullivan has elaborated on the complexities of interpreting a provision that consists of a list of specifics linked to a more general term:

La Forest J. here [in *National Bank of Greece (Canada) v. Katsikonouris*] makes an important point, namely, not every enumeration of specifics that is linked to a more general term is meant to limit the scope of that general term. Sometimes the enumeration of specifics has a different purpose, such as removing doubt respecting the scope of the provision or expanding its scope by adding specifics that would not ordinarily be included in the general term. Sometimes the purpose is simply to provide examples. To determine why a given list of specifics has been included, the provision must be analyzed with care.

It is arguable, however, that in carrying out such an analysis the fact that the list follows rather than precedes the general description to which it is linked is not conclusive, or even significant. *The important factor here is not so much word order as the meaning of the words used to introduce the list of specific terms and to link them in the general category. The relationship between the specifics and the general category is also important.*<sup>28</sup> [emphasis added]

[43] Sections 17(1)(a) to (e) are examples of information the disclosure of which may result in harm under s. 17(1). Information that does not fit in the listed paragraphs may still fall under the opening clause of s. 17(1), “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.” The intent and meaning of the listed examples are interpreted in relation to the opening words of s. 17(1), which, together with the listed examples, are interpreted in light of the purposes in s. 2(1) and the context of the statute as a whole.

[44] Section 17(1), like FIPPA’s other harms-based exceptions to disclosure, requires a reasoned assessment of the future risk of harm if the information in question is disclosed. Civil law conventionally applies the balance of probabilities for determining what happened in the past, with anything that is more probable than not being treated as certain.<sup>29</sup> This approach is not followed for hypothetical or future events, which can only be estimated according to the relative likelihood that they would happen.<sup>30</sup> Disclosure exceptions that are based on risk of future harm, therefore—as in other areas of the law dealing with the standard of proof for hypothetical or future events—are not assessed according to the balance of probabilities test or by speculation. Rather, the chance or risk is weighed according to real and substantial possibility.<sup>31</sup>

<sup>27</sup> *Katsikonouris*, at para. 12.

<sup>28</sup> R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4<sup>th</sup> ed (Markham: Butterworths Canada Ltd., 2002), at p. 181.

<sup>29</sup> *Athey v. Leonati*, [1996] 3 S.C.R. 458, at paras. 28-29.

<sup>30</sup> *Ibid.*, at paras. 27, 29.

<sup>31</sup> *Ibid.*

[45] Real and substantial possibility is established by applying reason to evidence. This is distinct from mere speculation, which involves reaching a conclusion on the basis of insufficient evidence. To my mind, the FHA's idea of 'reasoned speculation' is a contradiction in terms that has no place in the analysis. Certainty of harm need not be established, but, again, "[e]vidence of speculative harm will not meet the test."<sup>32</sup> A rational and objective basis for conclusion that fully considers the context of the particular disclosure exception lies at the heart of the concept of reasonable expectation of harm.

[46] Section 19(1)(a) of FIPPA, which the FHA's argument mentioned, is an example of how the assessment of reasonable expectation of harm is a contextual exercise. Section 19(1)(a) is the exception for disclosure that could reasonably be expected to threaten the safety or mental or physical health of an individual other than the applicant. Two similar disclosure exceptions in the Ontario legislation<sup>33</sup> were considered in the case of *Ontario (Minister of Labour) v. Big Canoe*.<sup>34</sup> The Ontario inquiry officer's decision under review posed a "reasonable expectation of probable harm" test. This was rejected on judicial review, with the Ontario Divisional Court saying this:

Endangerment or the serious threatening as to the safety of a person does not mean that there must be probable harm. As well, a reasonable expectation in the context of these two sections does not import a requirement that there is "likely" to be a bad result based on a balance of probabilities. Even considering the French version of the relevant provisions (which must be viewed on an overall basis for comparison with the English and not on a word for word basis), the test used by the Officer of a "reasonable expectation of probable harm" does not in our view conform to the purposes of the sections, their substance or the overall context of the Act.

[47] The Ontario Court of Appeal observed in the same case that the "reasonable expectation of probable harm" test was developed by the Federal Court of Appeal in the context of provisions in the federal access to information legislation exempting information from disclosure in circumstances where that could reasonably be expected to result in material financial loss or interfere with contractual negotiations.<sup>35</sup> That test was not apt in the context of an exemption to protect personal health and safety:

The interests at stake in that case [*Canada Packers*] were less compelling than those of personal safety and bodily integrity. It is unreasonable to require a government institution to show an expectation of probable harm to an individual in order to rely on the personal safety exemption provision in the FOI.

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<sup>32</sup> Order 00-10, [2000] B.C.I.P.C.D. No. 11, at p. 9.

<sup>33</sup> *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 14(1)(e) (could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person) and s. 20 (could reasonably be expected to seriously threaten the safety or health of an individual).

<sup>34</sup> (1999), 181 D.L.R. (4<sup>th</sup>) 603.

<sup>35</sup> *Canada Packers Inc. v. Canada (Minister of Agriculture)* (1988), 53 D.L.R. (4<sup>th</sup>) 246, at p. 255, and *Re Saint John Shipbuilding Ltd. v. Canada (Minister of Supply and Services)* (1990), 67 D.L.R. (4<sup>th</sup>) 315.

The expectation of harm must be reasonable, but it need not be probable. Section 14(1)(e) requires a determination of whether there is a reasonable basis for concluding that disclosure could be expected to endanger the life or physical safety of a person. In other words, the party resisting disclosure must demonstrate that the reason for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety. Similarly, s. 20 calls for a demonstration that disclosure could reasonably be expected to seriously threaten safety or health of an individual, as opposed to there being a groundless or exaggerated expectation of a threat to safety. Introducing the element of probability to this assessment is not appropriate considering the interests that are at stake, particularly the very significant interest of bodily integrity. It is difficult, if not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes s. 14(1)(e) or 20 to refuse disclosure.<sup>36</sup>

[48] In short, harms-based exceptions to disclosure operate on a rational basis that considers the interests at stake. What is a reasonable expectation of harm is affected by the nature and gravity of the harm in the particular disclosure exception. There is a sharp distinction between protecting personal safety or health and protecting commercial and financial interests. There is also a justifiably high democratic expectation of transparency around the expenditure of public money, which is appropriately incorporated into the interpretation and application of s. 17(1) when a public body's and service provider's commercial or financial interests are invoked to resist disclosure of pricing components in a contract between them for the delivery of essential services to the public.

[49] As I said in Order 00-41, about the withholding of contract price information under s. 17(1)(d):

I do not accept that the release of the financial information in this case could reasonably be expected to result in undue financial loss or gain to a third party [the service provider to the public body]. For example, the amount of the contract has been disclosed; however, the monthly payment for the same contract has not been disclosed. It seems unusual for one figure to be released and the other withheld. BC Transit argued that if the amount of the successful bid is made public, it will become nearly impossible for the "winner" of the bid to remain competitive.

Using this logic, payment schedules would almost never be released, under the guise of protecting the competitive interest of the "winning" bidder and protecting that bidder from "undue" loss. Businesses who contract with public bodies must have some understanding that those dealings are necessarily more transparent than purely private transactions. Even if one assumes loss could be expected to the third party, such loss would not be "undue".<sup>37</sup>

[50] The threshold for harm under s. 17(1) is not a low one met by any impact. Nature and magnitude of outcome are factors to be considered. If it were otherwise, in

<sup>36</sup> (1999), 181 D.L.R. (4<sup>th</sup>) 603 at paras. 24-25.

<sup>37</sup> [2000] B.C.I.P.C.D. No. 44, at p. 8.



the context of s. 17(1) any burden, of any level, on a financial or economic interest of a public body could meet the test. This would offend the purpose of FIPPA to make public bodies more accountable to the public by giving the public a right of access to records, subject to specified, limited exceptions. It would also disregard the contextual variety of the harms-based disclosure exceptions in FIPPA.

[51] The FHA submitted that it had proved both as a matter of “social context facts” (*i.e.*, judicial notice) and by evidence that competitive harm could reasonably be expected to accrue to Sodexho, and hence to the FHA, if the pricing information withheld from the Addendum and Change Order were disclosed. Judicial (or administrative) notice is the acceptance without proof of facts that are clearly uncontroversial or beyond reasonable dispute. The threshold for judicial notice is strict in that the facts must be either so notorious or generally accepted as not to be the subject of debate among reasonable persons or must be capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.<sup>38</sup> The proposition that disclosure of the contract pricing information in the Addendum or Change Order could reasonably be expected to result in harm under s. 17(1)(d) or (e) or the opening words of s. 17(1), in the form of competitive harm to Sodexho that flows down to financial or economic harm to the FHA, does not qualify for judicial notice on either of those accounts. Nor do Jim Amos’s conclusions qualify for judicial notice. The existence of conflicting views amongst reasonable people reinforces the conclusion that these matters are not uncontroversial or beyond dispute and thus cannot be resolved by judicial notice.

[52] I conclude that s. 17(1)(e) is not applicable here because this is pricing information in a concluded contract, the product of negotiation, not “information about negotiations carried out by or for a public body”.

[53] I am constrained in my ability to discuss the details of the FHA’s *in camera* submissions on risks of harm it apprehends to its relationship with Sodexho and its future procurement efforts. Suffice it to say that putting contractors in a position of having to price their services to public bodies competitively and cope with cost pressures from their unionized or non-unionized work forces are not circumstances of undue financial loss or gain under s. 17(1)(d) or s. 21(1)(c)(iii), or significant harm to or interference with their competitive or negotiating positions under s. 21(1)(c)(i).<sup>39</sup> I also find that s. 17(1) is not met on the speculative and circuitous basis of risk of harm to the financial or economic interests of the FHA and other health authorities, flowing from contractors being deterred or driving up of the prices they are willing to offer, in response to fears and perceptions they have about the public disclosure of contract price information compromising their ability to compete.

[54] The FHA relied on the case of *Fraser Health Authority v. Hospital Employees’ Union*,<sup>40</sup> in which an injunction was granted restraining the Union from continuing to

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<sup>38</sup> *R. v. Find*, [2001] 1 S.C.R. 863, at para. 48, referring also to *R. v. Potts* (1982), 110 C.C.C. (3d) 383 (Ont. C.A.).

<sup>39</sup> Order 07-15, [2007] B.C.I.P.C.D. No. 21, at para. 43; Order 00-41, [2000] B.C.I.P.C.D. No. 44, at pp. 7-8.

<sup>40</sup> (2003), 226 D.L.R. (4<sup>th</sup>) 563 (B.C.S.C.).

publish a leaked the FHA document that analyzed bids submitted in response to a FHA request for proposal for the outsourcing of security services. This decision is not on point. It was about contract bids and the impact of their disclosure on the bid process, not about information in a resulting contract. The Court found irreparable harm to the FHA if the Union was permitted to continue to publish the leaked bid information and accepted that the Union had no lawful right to a leaked document. The Union's right to lawful access to pricing in a concluded contract with the FHA, through an access request under FIPPA, was neither argued nor decided.

[55] I tend to agree with the Union<sup>41</sup> that the FHA's announcements that the Agreement saved many millions of public dollars, which it says were redirected to improving direct patient care, do not sit well with its position that disclosure of contract pricing will jeopardize those savings, when transparency and access to information are fundamental to the ability of the public to assess the soundness of the FHA's performance claims.

[56] The FHA has not established a real and substantial possibility of harm under s. 17(1) if the pricing information in the Addendum and Change Order is disclosed.

[57] **3.6 Harm to Sodexho's Interests**—Section 21(1) creates a three-part test, each element of which must be satisfied before a public body is required to refuse to disclose information. 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 in the report of an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquiry into a labour relations dispute.

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<sup>41</sup> Union reply submission, at p. 7.

[58] Section 21(1) has now been analyzed and applied in many orders in which it has been held that this exception does not require a public body to refuse access to the mutually-generated contents of contracts between public bodies and third parties. The reasonableness of this has been confirmed in key judicial review decisions.<sup>42</sup> Orders and judicial decisions about the very similar third-party business exemptions in Ontario's access and privacy laws have yielded much the same result.<sup>43</sup> Bearing all this in mind, I will now analyze the required elements for the application of s. 21(1).

### **Commercial or financial information**

[59] There is no dispute that the pricing information in issue is commercial or financial information about the third party, Sodexho, within the meaning of s. 21(1)(a) (ii).

### **Supplied information**

[60] Many decisions have addressed the "supplied" element in s. 21(1)(b).<sup>44</sup> The clear and prevailing consensus—including in the courts—is that the contents of a contract between a public body and a third party will not normally qualify as having been "supplied", even when the contract has been preceded by little or no back-and-forth negotiation. The exceptions to this are information that, although found in a contract between a public body and a third party, is not susceptible of negotiation and is likely of a truly proprietary nature. The rationale is that "supply" is intended to capture immutable third-party business information, "not contract information that—by the finessing of negotiations, sheer happenstance, or mere acceptance of a proposal by a public body—is incorporated in a contract in the same form in which it was delivered by the third-party contractor"<sup>45</sup> or mutually-generated contract terms that the contracting parties themselves have labelled as proprietary.

[61] Sodexho and the FHA argued that the pricing information was "supplied" because they had mutual expectations that proposals, and the resulting financial terms of the Agreement with the successful proponent, would be kept confidential. They also relied on Article 7.1(3) of the Agreement, which protects the confidentiality of information that is proprietary to Sodexho. As Sodexho put it, the pricing in the Agreement, and later the Addendum and Change Order, were established by its original bid pricing to the FHA:

This bid pricing reflects a host of different factors related to Sodexho's organizational structure, management, organization and direction of work, labour costs, and work methods, all of which is proprietary information to Sodexho. These

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<sup>42</sup> See *Jill Schmidt Health Services Inc. v. British Columbia (Information and Privacy Commissioner)*, [2001] B.C.J. No. 79, 2001 BCSC 101 and *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848, 2002 BCSC 603.

<sup>43</sup> See, for example, Order MO-1706, [2003] O.I.P.C. No. 238; Order PO-2435, [2005] O.I.P.C. No. 207; Order PO-2467, [2006] O.I.P.C. No. 65, at paras. 101-103; and, *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.).

<sup>44</sup> Order 01-39, [2001] B.C.I.P.C.D. No. 40, at paras. 44-50; Order 03-02, [2003] B.C.I.P.C.D. No. 2, at para. 60; Order 03-03, [2003] B.C.I.P.C.D. No. 3, at paras. 17-35; Order 03-15, [2003] B.C.I.P.C.D. No. 15, at paras. 57-65; Order 04-06, [2004] B.C.I.P.C.D. No. 6, at paras. 44-50; Order F05-05, [2005] B.C.I.P.C.D. No. 6, at paras. 58-72.

<sup>45</sup> Order F06-20, [2006] B.C.I.P.C.D. No. 36, at para. 11.

factors include, but are not limited to: (a) labour costs (both bargaining unit and management employees) which in turn includes not only the hourly wage, but benefits costs, staffing levels, recruitment costs, retention strategies, training costs, strategies to increase productivity, and health and safety in the workplace; (b) overhead costs, including the manner in which Sodexho allocates upper management and administrative resources; (c) supply costs, including distribution plans; (d) costs of professional and other third party services. Likewise, agreed to modifications of this bid price, or changes to the pricing or payment structure, are all premised on and constrained by these same aspects of Sodexho's business processes.

Thus, in supplying a bid price, even if that price may be subsequently modified in certain respects through negotiation, Sodexho is revealing a significant amount of proprietary information about its internal business processes, costs and strategies, which are not susceptible of negotiation and change.<sup>46</sup>

[62] Not surprisingly, the Union submitted that these are negotiated contract terms and not "supplied" information under s. 21(1)(b). In reply, Sodexho stressed that "the issue of underlying confidential information is of the essence in this matter", submitting as follows:

...First, the disclosure of the requested information in the Amendment [*sic*] and Change Order, which is at issue in this inquiry, effectively results in the disclosure of the same information in the primary Contract, which [the Union] was previously denied and which denial was accepted as valid by the [Union].

Second, the disclosure of the requested information, either in the Amendment [*sic*] and Change Order or, by necessary result in the primary Contract, would result in [the Union] (or Sodexho's competitors) being able to reach reasonably accurate inferences with respect to underlying aspects of Sodexho's business operations, which is highly confidential, and which would result in substantial harm to Sodexho's competitive and business interests....

In this case, the [Union] has already received access to the vast majority of the primary Contract and the Amendment [*sic*] and Change Order. Only very limited information has been withheld – which would demonstrate how specific components of this work have been priced. It is this information which, combined with the information [the Union] already holds about Sodexho's labour costs (which information is also available publicly to Sodexho's competitors by virtue of its being contained in a collective agreement), would allow [the Union] and/or Sodexho's competitors to infer significant information about Sodexho's underlying operational strategies and organizations, which would be of significant harm to Sodexho.<sup>47</sup>

[63] Sodexho also argued that s. 21(1) protected price information in the Addendum and Change Order that would expressly or implicitly reveal information the FHA had withheld under s. 21(1) when it responded to the Union's access request for the Agreement.

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<sup>46</sup> Sodexho initial submission, at p. 4.

<sup>47</sup> Sodexho reply submission, at pp. 5-6.

[64] I have already explained that the FHA's past refusal to disclose information in the Agreement does not resolve the applicability of s. 21(1) to the Addendum or Change Order, and that price information in the Addendum or Change Order is not underlying, confidential supplied information under s. 21(1)(b) or proprietary to Sodexho, by virtue of it also being in the Agreement or in Sodexho's bid responding to the RFP.

[65] Because the disputed information does not meet the "supplied" test in s. 21(1)(b) it is not strictly necessary to conduct the harms part of the analysis in s. 21(1)(c). I will, nonetheless, offer some remarks on this point.

### ***Harm***

[66] Sodexho's submissions did not specify any heads of harm under s. 21(1)(c), but it appears that the heads it relied upon were s. 21(c)(i) (harm significantly Sodexho's competitive position or interfere significantly with its negotiating position) and s. 21(1)(c)(iii) (result in undue financial loss to Sodexho and undue financial gain to the Union and Sodexho's competitors). Sodexho's arguments mirror those of the FHA under s. 17(1) with, helpfully, somewhat more detail about disclosure to the Union:

If the commercial and financial information contained in the Agreement and/or Addendum were to be disclosed to the [Union], it would give the [Union] an extremely unfair advantage in future collective bargaining with Sodexho, as well as giving the [Union] the means to undermine Sodexho's ability to be successful from a business standpoint on its current contracts. That is, if the information about the manner in which Sodexho is compensated under the Agreement is disclosed to the [Union], the [Union] could discern the factors which underlie Sodexho's ability to be profitable on those contracts and be in a position to affect any or all of these factors, though influencing or directing its members.

It would be a significant benefit to Sodexho's competitors and a significant disadvantage to Sodexho if its competitors and/or the [Union] could obtain information about Sodexho's price under this Agreement or Addendum and the associated details indicating how Sodexho and FHA have agreed that the price is to be calculated, such as square footage rates.<sup>48</sup>

[67] In the discussion above of the applicability of s. 17(1), I explained that putting contractors in a position of having to price their services to public bodies competitively and cope with cost pressures from their unionized or non-unionized work forces are not circumstances of undue financial loss or gain under s. 17(1)(d) or s. 21(1)(c)(iii). Nor are they circumstances of significant harm to or interference with contractors' competitive or negotiating positions under s. 21(1)(c)(i). The nature of the information—negotiated pricing for goods and services for a public body—is key to this conclusion. The information is 'about' the contractor as the other party to the agreement and the provider of the services, but the information is not a trade secret, proprietary or confidential to the contractor, and the contract is a matter of public spending in which there is high public interest in transparency and openness. Indeed, the more significant the contract, the greater that interest.

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<sup>48</sup> Sodexho initial submission, p. 5.

[68] I cannot agree with Sodexho's characterization of the Union gaining access to this information as an "extremely unfair advantage in future collective bargaining with Sodexho", for the reason that this is not a private arrangement and an expectation that contracts to provide public services will be cloistered, private business documents would be unrealistic. FIPPA enshrines a rule of disclosure, to which non-disclosure is the exception. The Union will have access to no more pricing information than the public and will not, of course, have access to more than Sodexho does itself.

[69] The FHA argued that disclosure of total contract cost, in accordance with the *Financial Administration Act* and inter-provincial trade agreements, was enough transparency to properly balance the "public interest in the accountability of public bodies with the importance of maintaining the integrity of the bidding process."<sup>49</sup> I expect Sodexho would agree. In Ontario Order PO-1993, a provincial ministry argued something like this, contending that release of bid evaluation information for highway repair contract work would undermine the contract bidding principle of fair treatment and equality to all bidders. The Adjudicator took issue with this assertion:

It appears that the Ministry has interpreted this principle in such a way that it has developed a system of "fairness" and elevated it over its obligations to the public to be accountable for the use of public funds, in essence, suggesting that the integrity of the process itself satisfies any public accountability....

In my view, the ability of the public to scrutinize the bases upon which government contracts are awarded is an important aspect of public accountability. Subject to the proprietary interests of third parties, the approaches taken by government, the criteria against which tender documents are assessed and the degree to which proponents satisfy those criteria are all integral to the ability of the public to assess the operations of government and to hold it accountable for the use of public funds.<sup>50</sup>

[70] On judicial review, the ministry was critical of the Adjudicator's observations, but the Court considered them contextually relevant, balanced and supported

...by the principles enunciated by the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (S.C.C.) at paras. 61-63, that the overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry. Further, rights to state-held information are designed to improve the working of government and to make it more effective, responsive, and accountable.<sup>51</sup>

[71] This order concerns pricing information in a multi-million dollar outsourcing contract for housekeeping services in hospitals, not bid evaluation information for highway repair contracts. It would nonetheless equally be wrong to allow contract bidding systems, outsourcing models or processes, or public financial reporting

<sup>49</sup> Open Affidavit of David Lawson, para. 24.

<sup>50</sup> [2002] O.I.P.C. No. 29, at p. 21.

<sup>51</sup> *Ontario (Ministry of Transportation) v. Cropley* (2004), 24 Admin. L.R. (4<sup>th</sup>) 10 (Ont. Div. Ct.), at para. 87.

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requirements of some description to circumscribe or supplant the accountability of public bodies through the right of public access to information conferred in FIPPA.

#### **4.0 CONCLUSION**

[72] For the above reasons, I find that s. 17(1) does not authorize, and s. 21(1) does not require, the FHA to refuse to give the Union access to the pricing information in issue in the Addendum and the Change Order. Under s. 58(2) of FIPPA, I require the FHA to give the Union access to that information.

December 24, 2008

#### **ORIGINAL SIGNED BY**

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David Loukidelis  
Information and Privacy Commissioner  
for British Columbia

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