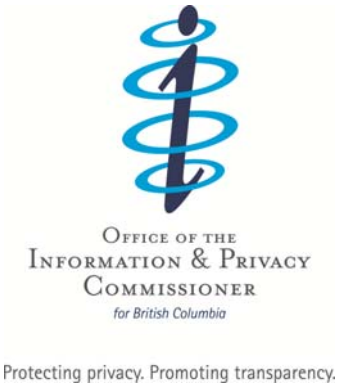

Order F11-14

MINISTRY OF FINANCE

Michael McEvoy, Adjudicator

May 12, 2011

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Summary: FIPA requested records related to the Revenue Management Project. The Ministry withheld some information under ss. 15, 17 and 21. The Ministry was authorized to withhold some of the records under s. 15 because their disclosure could reasonably be expected to harm the security of the Province's computer system. The Ministry was not authorized to withhold the list of computer software and certain server information withheld under this section. The Ministry was also not authorized to withhold any records withheld under s. 17 because it had not demonstrated that their disclosure could reasonably be expected to cause financial or economic harm to the Province. With respect to s. 21 the information was found to be commercial information of HPAS, but HPAS failed to demonstrate that it had "supplied" the information in confidence. Moreover, the third part of the three-part test of s. 21(1) of FIPPA, relating to significant harm to business interests, was not met. The public body was ordered to disclose the records it withheld under s. 21.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 15(1)(l), 17(1)(d) & (f), and 21(1)(a)(ii), (b) and (c)(i) & (ii).

Authorities Considered: B.C.: Order F09-04, [2009] B.C.I.P.C.D. No. 7; Decision F08-07, [2008] B.C.I.P.C.D. No. 25; Order 00-01, [2000] B.C.I.P.C.D. No. 1; Order F10-25, [2010] B.C.I.P.C.D. No. 36; Order 01-39, [2001] B.C.I.P.C.D. No. 40; Order 04-06, [2004] B.C.I.P.C.D. No. 6; Order F10-24, [2010] B.C.I.P.C.D. No. 35; Order F08-22, [2008] B.C.I.P.C.D. No. 40; Order F09-13, [2009] B.C.I.P.C.D. No. 18; Order F10-39, [2010] B.C.I.P.C.D. No. 59; Order F06-03, [2006] B.C.I.P.C.D. No. 8; Order 02-50, [2002] B.C.I.P.C.D. No. 51; Order F08-11, [2008] B.C.I.P.C.D. No. 19; Order 03-35, [2003] B.C.I.P.C.D. No. 35; Order 03-25, [2003] B.C.I.P.C.D. No. 25; Order 03-15, [2003] B.C.I.P.C.D. No. 15; Order F07-15, [2007] B.C.I.P.C.D. No. 21; Order F06-20, [2006] B.C.I.P.C.D. No. 36.

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] The BC Freedom of Information and Privacy Association ("FIPA") requested[1] under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") that the Ministry of Finance ("Ministry")[2] provide it with records related to the Revenue Management Project ("RMP"). The Project essentially involves collecting monies owed to government for things like unpaid student aid loans through a third-party service provider, EDS Advanced Solutions, now known as HP Advanced Solutions ("HPAS"). After providing notice to HPAS, the Ministry said it intended to release part of the requested records. HPAS then requested a review by the Office of the Information and Privacy Commissioner ("OIPC") of the Ministry's decision not to apply s. 21 to some of the information. Mediation did not resolve the matter and the OIPC held a written inquiry, issuing a notice to the Ministry, HPAS and FIPA.

[2] Commissioner Loukidelis issued Order F09-04,[3] which addressed only the information on which HPAS and the Ministry disagreed as to whether s. 21(1) applied. With respect to that information, Commissioner Loukidelis found that s. 21(1) did not require the Ministry to refuse to disclose the information as claimed by HPAS. He also determined that the Ministry was obliged to respond to the applicant on the applicability of all exceptions to disclosure, not just s. 21(1), since the third-party review HPAS requested froze only the Ministry's duty to respond to the access request for the information that was the subject of the third-party review.

[3] The Ministry subsequently disclosed most of the Master Services Agreement ("MSA") with its schedules and most of the Master Transfer Agreement ("MTA") with its schedules. The Ministry withheld some information under ss. 15, 17, 21 and 22 with respect to the MTA and MSA.

[4] FIPA then requested a review by the OIPC of the information the Ministry had withheld under ss. 15, 17 and 21. FIPA requested that the matter proceed directly to an inquiry because the previous mediation relating to these records was unsuccessful. The OIPC agreed to this request and soon after issued a notice to FIPA, the Ministry and HPAS.

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[1] December 9, 2004.
[2] When the original request was made the provincial government was represented by the Ministry of Small Business and Revenue. Those revenue functions were transferred to the Ministry of Finance in 2009.
[3] [2009] B.C.I.P.C.D. No. 7.

2.0 ISSUES

[5] The issues before me are whether the public body:

1. Is required to refuse access under s. 21(1) of FIPPA; and

2. Is authorized to refuse access under ss. 15(1)(l) and 17(1)(f) of FIPPA.

[6] Following from Order F09-04 referred to above, the records in issue under s. 21(1) are those that both the Ministry and HPAS agree are properly withheld.

[7] Under s. 57(1) of FIPPA, it is up to the head of the public body to prove that FIPA has no right of access to the information it believes must be withheld under ss. 15(1)(l), 17(1)(f) and s. 21(1) .

3.0 DISCUSSION

[8] **3.1 Records in Dispute**—The records at issue in this inquiry consist of portions of the MSA and the MTA and their respective schedules. The Ministry disclosed most of the MSA but withheld some information under ss. 15, 17 and 21. The withheld information in the MSA consists largely of financial amounts and percentages relating to fees and invoices; extensions of the agreement; performance targets and associated payments; gain sharing; liability; and information systems and software. The Ministry has also disclosed most of the MTA, withholding some portions relating to information systems and software under s. 15.

[9] **3.2 Harm to Security**—Section 15(1)(l) of FIPPA reads as follows:

> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to …
>
> (l) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

[10] In assessing the Ministry's application of s. 15(1)(l), I have taken the same approach as previous orders, including Order 00-01.[4] Commissioner Loukidelis outlined, in that Order, the nature of the evidence required to meet a harms-based test such as that set out in s. 15(1):

> …a public body must adduce sufficient evidence to show that a specific harm is likelier than not to flow from disclosure of the requested information. There must be evidence of a connection between disclosure

[4] [2000] B.C.I.P.C.D. No. 1.

> of the information and the anticipated harm. The connection must be rational or logical. The harm feared from disclosure must not be fanciful, imaginary or contrived.[5]

The parties' arguments

[11] I have carefully considered the parties' s. 15 arguments and evidence in full and reproduce below a synopsis of those submissions.

[12] The Ministry submits that release of the disputed information would assist a potential computer hacker ("hacker") to attack the Province's computer system. The Ministry argues that enormous harm would result because the system houses a significant amount of sensitive medical and student financial assistance information.[6]

[13] The Ministry submits in an affidavit from Bob Gebbie, the Director of Information Protection that:

> A hacker who wanted to attack the [Province's computer system] but did not have access to the [Section 15] Information, would have to guess as to the types of applications, equipment and the locations and names of servers. However, if a hacker already had access to the Information, in whole or in part, they would not have to guess or would, at the very least, not have to guess as much.[7]

[14] The affidavit attests further that the information at issue includes information identifying software applications. Sophisticated hackers are aware of the vulnerabilities of different applications, the Ministry said, and this information would assist them in identifying vulnerabilities in the system.[8]

[15] FIPA submits that the possibility that certain information could assist someone in committing a crime alone does not justify the withholding of the information under s. 15.[9] FIPA cites Order F09-13,[10] in which Senior Adjudicator Francis found that s. 15 did not apply to the plans of the constructions of the Canada Line, holding that public bodies must:

> … demonstrate how the release of specific requested information may lead to the anticipated harm. There is a strong public interest in transparency in relation to contracts involving public services to be delivered by private contractors and, in order to fit within the s. 15

[5] At p. 5.
[6] Ministry's initial submission, para. 4.05.
[7] Gebbie affidavit, para. 30.
[8] Gebbie affidavit, paras. 31-34.
[9] FIPA's reply submission, para. 6.
[10] [2009] B.C.I.P.C.D. No. 18.

> exception, there must be some indication that the public interest in transparency is outweighed by risks associated with disclosure.[11]

[16] FIPA also suggests that information about the software being used would be out of date. The information in the record is from 2004. FIPA suggests that the system must have "undergone ... many significant updates" since then.[12]

[17] HPAS made no submissions concerning the application of s. 15.

Findings

[18] For ease of organization, I will apply the s. 15 test to each group of records the Gebbie affidavit identifies.

Schedule 11

[19] The Gebbie affidavit states that Schedule 11 to the MSA refers to server names and locations that the Ministry seeks to withhold. The Ministry does not specifically state how the disclosure of the information in Schedule 11 would cause harm. What I observe, on reviewing the record in question, is that it contains only a series of street addresses at which HPAS will perform services under the Alternative Service Delivery contracts ("ASD contracts"). There is no mention of server names, types of servers or whether the Province keeps servers at these locations. For this reason, I cannot see how disclosing this information could cause harm to the Province's computer systems. Therefore, the Ministry is not required to withhold the withheld information in Schedule 11.

Schedule 20

[20] What I am able to say about the withheld information under Schedule 20, without revealing the substance of it, is that it describes how certain software applications "interact and interface" with one another. This information relates to matters "within the System exchange information."[13] Assuming a hacker was able to breach the firewall, the Ministry's evidence, including how the information would assist a hacker's targeted attack, persuades me that disclosure of this information would be particularly valuable to hackers. The withheld information in Schedule 20 provides a "road map" for a hacker to attack desired targets once inside the government's security perimeter. I have no difficulty concluding that disclosure of the withheld information could reasonably be expected to expose the electronically stored personal information of many citizens if hackers were able to breach the government's security firewall. The Ministry is therefore authorized to withhold it under s. 15(1)(l) of FIPPA.

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[11] FIPA's reply submission, para. 6; Order F09-13, para. 15.
[12] FIPA's reply submission, para. 8.
[13] Gebbie affidavit, para. 35.

Schedule 40

[21] Schedule 40 to the MSA contains the next group of records. Pages 1 through 4 identify computer server names, their model numbers and their physical location.

[22] I find the Ministry fails to make the case that disclosing the location of a building housing a server could reasonably be expected to harm the security of the server. The Ministry says that a hacker could "surveill" the site, thus enabling the hacker to "determine how to best seek to enter the premises for the purpose of gaining access to the Systems." However, the harm could not reasonably be expected to follow from knowledge of the locations of the buildings housing the servers. One would presume, given the sensitivity of stored personal information that no one could just walk into such a building without proper authority. Second, an external view of the building does not disclose its internal layout. Finally, the locations in question are government buildings—the applicant already knows this from the Ministry's partial release of Schedule 40. One can think of many buildings housing government systems, such as Vital Statistics and Driver Licensing locations, for example, whose computer systems would contain sensitive personal information. It is reasonable to assume that government would take measures to ensure the security of the information housed there. The Ministry's logic would lead to the absurd conclusion that the very fact of public knowledge of, and access to, these buildings could reasonably be expected to harm those computer systems.

[23] The Gebbie affidavit also explains that a hacker having access to server names would increase the chances of a successful attack on the system.[14] As in Order F10-39,[15] I do not find this argument compelling. The Ministry's submission states that, at the most, this disclosure of information, in whole or in part, would result in a hacker not having to guess the information, such as internet protocol (IP) addresses, or "at the very least, not have to guess as much."[16] The "guessing" the Ministry refers to is not so much "blind" guessing but rather involves, as the Gebbie affidavit notes, the use of scanning tools already available to hackers. The implication here is that the information at issue is, in any event, readily available to hackers and the most the disclosure might do is speed the process. Moreover, the evidence does not support the proposition that acquiring an IP address, for example, could reasonably be expected to lead to the harm of the unauthorized disclosure of sensitive information. By the Ministry's own admission,[17] the Province has layers of security designed to prevent unauthorized access to its data.

[14] Gebbie affidavit, para. 42.
[15] [2010] B.C.I.P.C.D. No. 59.
[16] Gebbie affidavit, para. 30.
[17] Gebbie affidavit, para. 12.

[24] Page 5 of Schedule 40 consists of an organizational flowchart explaining how various government system servers interact with each other. This is the same kind of "road map" described in Schedule 20 above in reference to the government's internal computer system. I apply the same reasoning here in finding that the disclosure of this information could reasonably be expected to result in the harm envisaged by s. 15.

[25] The remaining pages of Schedule 40, 6 through 20, comprise a lengthy list of software the Province utilizes. The disclosed portion of this section of the Schedule explains that HPAS must maintain and support these software systems. The Ministry says its main concern with disclosing the list is that it would make it unnecessary for hackers to utilize tools to scan for that information themselves. The implication, as with server names described above, is that hackers could gain the information in any event but that releasing the software names would make it somewhat easier for them to do so. In my view the Ministry does not make a persuasive case that the disclosure of this information would cause harm contemplated by s. 15. In this case, the names of the software are listed alphabetically. The list does not indicate what Ministry program, system or site is associated with each software application. Indeed, it is not clear that these software programs are necessarily associated with any government program, system or site. The Ministry does not explain or demonstrate how, in these circumstances, the information in question would be of value to a hacker.

[26] I reach the same conclusion with respect to a list of software withheld at pp. 9-4 through 9-10 of Parts 1 and 2 of Schedule 9 to the MTA.[18]

Application Criticality Table

[27] The next item is the "Application Criticality Table" at Appendix B of Schedule 15 to the MSA. As its name implies, the Table ranks the various software applications in terms of their criticality to the system as a whole. The Table also contains other information, the particulars of which I am unable to describe without revealing vulnerabilities of the systems themselves. The Ministry argues the harm would result from disclosure of this information because a hacker could properly identify and structure their attack accordingly. I agree with the Ministry and find that the disclosure of this information could reasonably be expected to lead to the harm described by the Ministry.

Schedule 13

[28] The withheld information under this schedule concerns "Business Continuity and Disaster Recovery Planning." The Ministry disclosed most of the schedule, except a small paragraph outlining examples of how HPAS would expect to back up operations in the event of a system failure. The Ministry says

[18] It appears the Gebbie affidavit mistakenly identified these records as being at Schedule 19 instead of Schedule 9. I have no record of pages relating to Schedule 19.

that a hacker, intent upon attacking its system, could use the withheld information to disrupt any attempt the Ministry might make to switch over to its back-up system.

[29] I do not agree. The information is so generic that I cannot conclude its disclosure could reasonably be expected to lead to the harm identified. Indeed, the information listed may not even constitute the back-up system for HPAS at all. It is only general examples of approaches HPAS might take in backing up its system.[19]

Schedule 19

[30] The Ministry also withheld a considerable amount of information noted in the Gebbie affidavit as "System Technical Specifications", found at s. 3.5 of Appendix 1 to Schedule 19 of the MSA. The Ministry argues this information, if released, would assist a hacker to understand the systems environment in order to launch an attack on it. I agree with the Ministry in this case. The record here contains very detailed information that I am unable to disclose. However, I have no difficulty concluding a hacker could use it in creating the harm identified by the Ministry.

[31] I reach the same conclusion concerning two pages of similar information withheld at Part 3 of Schedule 9 to the MTA. The Gebbie affidavit does not refer to it specifically but I am satisfied, for the same reasons stated in the above paragraph, that the Ministry properly withheld it.

Miscellaneous matters under s. 15(1)(l)

[32] The final severances relate to information contained within the "BC Revenue Management System – Enhanced Capacity and EAS Advanced Solutions Team in Swing Space" ("Swing Space").[20]

[33] The Ministry severed a single word on p. 8 under s. 15 without any explanation of why it did so. It is not apparent on its face how disclosure of this information would cause harm under s. 15. In addition, another page of the record already disclosed reveals the same word. I see no reason to withhold it.

[34] The Ministry withheld information on pp. 9–11 of Swing Space that contains a detailed diagram describing the "architecture of the System." Again, the Ministry argues this could assist a hacker to determine the systems' vulnerabilities and open it to attack. I agree with the Ministry for the reasons I articulated above with respect to the "road map" this information would provide a hacker.

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[19] I also note that the Ministry has already released to the applicant a reasonably thorough explanation of the back-up plan, minus the specifics (found at Schedule 40 to the MSA).
[20] Gebbie affidavit, para. 48.

[35] The Ministry also withheld "port numbers" at pp. 12–14 of Swing Space because it says this information would assist a hacker to attack the system. I agree with the Ministry here. Indeed the withheld information is more than the port numbers. It includes commands that privileged systems administrators would use to make configuration changes, including security safeguards that protect information on the server.[21]

[36] **3.3 Harm to the Financial Interests of the Public Body**—The relevant provisions of s. 17 are these:

> 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: …
>
> (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[37] Commissioner Loukidelis considered the application of s. 17(1) in numerous orders and established the principles for its application in Order 02-50.[22] In Order F07-15, he reiterated the standard of proof required to establish the application of s. 17 as follows:

> [17] I have held that there must be a confident and objective evidentiary basis for concluding that disclosure of information could reasonably be expected to result in harm under s. 17(1). Referring to language used by the Supreme Court of Canada in an access to information case, I have said, — there must be a clear and direct connection between the disclosure of specific information and the harm that is alleged.[23]

The parties' arguments

[38] The Ministry submits that, in adding s. 17(1)(f) in 2006, the Legislature enlarged the opening words of the section, thereby "expanding the scope" of s. 17(1).[24] The Ministry submits that the intent was:

> To make it clear that s. 17 authorized the head of a public body to withhold information the disclosure of which could reasonably be expected to harm the negotiating position of a public body ... regardless of whether or not actual financial harm is proven.[25]

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[21] Gebbie affidavit, para. 48.
[22] Order 02-50, [2002] B.C.I.P.C.D. No. 51, paras. 124-137.
[23] F07-15, [2007] B.C.I.P.C.D. No. 21.
[24] Ministry initial submission, para. 4.09.
[25] Ministry initial submission, para. 4.08.

[39] Nevertheless, the Ministry argues that disclosure would cause financial harm in this case.

[40] The Ministry argues, however, that while the threshold for harm is not a low one met by any impact, it is not required to show the potential harm be substantial or significant.[26] The Ministry submits that, even if a contextual approach applies to the evidentiary burden a public body must meet, it is "only required to show a reasonable expectation of some harm."[27] The Ministry suggests that the "worthy public objective of fiscal accountability" and the protection of the Province's finances through sound fiscal management is a relevant circumstance to take into account in applying s. 17.[28]

[41] The Ministry says it has carefully considered the findings in Orders F10-24[29] and F10-25[30] but submits the information at issue in this inquiry is materially different from the information at issue in those inquiries. It also submits that it has provided "evidence in this inquiry that the public body did not tender in the inquiry leading to Order F10-24."[31]

[42] The Ministry also distinguishes the "Joint Solutions Procurement" process leading to ASD contracts from a Request for Proposal ("RFP") process.[32] The Ministry's submission on this point is similar to the one the public body made in Order F10-24 and Order F10-25.[33] I will not repeat the background here, but the Ministry summarizes the three types of financial harms that could reasonably expect to result from the disclosure of the s. 17 Information as follows:[34]

- damage to the Province's negotiating position in relation to future contract negotiations;
- harm to government's ability to do ASD contracts in the future; and
- as the Province continues to engage in negotiations in relation to complex deals (including ASD deals), vendors will use provisions made public as a precedent to gain an advantage over the Province in future negotiations.

[43] One of the Ministry's main concerns is that disclosure of the information at issue would discourage some proponents from bidding on future projects. The Ministry submits it is in the government's interest that there be as many bidders as possible so that its negotiating position is enhanced. The Ministry concludes:

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[26] Ministry initial submission, para. 4.13.
[27] Ministry initial submission, para. 4.13.
[28] Ministry initial submission, para. 4.14.
[29] [2010] B.C.I.P.C.D. No. 35.
[30] [2010] B.C.I.P.C.D. No. 36.
[31] Ministry reply submission, para. 1.
[32] Ministry initial submission, paras. 4.18-4.48.
[33] For a more complete descriptions, see Order F10-24, paras. 20-27.
[34] Ministry initial submission, paras. 4.35-4.49.

> The disclosure of the Section 17 Information will likely result in a reduction of the number of companies willing to take part in the JSP ASD process in the future. Anything that results in a reduction of companies pursuing such ASD contracts (including the Commissioner requiring the disclosure of sensitive ASD provisions), will increase the Province's procurement costs in the future given the principles of supply and demand. The fewer the number of viable competitors, the more compensation will need to be paid by the Province.[35]

[44] FIPA rejects the Ministry's position concerning s. 17(1)(f). It argues this provision is merely an addition to what is set out in s. 17(1) and should therefore be interpreted consistently with each of the five preceding subsections. It argues that Orders F08-22[36] and F09-13[37] support this approach as well.[38]

[45] FIPA argues the Ministry's evidence regarding the negotiation process for ASD contracts is nearly identical to that in Orders F10-24 and F10-25 and therefore those Orders should be determinative of the issue here.[39] FIPA rejects the Ministry's attempts to distinguish these two Orders from the present case. It suggests that the only difference that the Ministry has been able to identify is the subject matter of the contracts.

[46] HPAS made no submissions concerning the application of s. 17.

Findings

[47] I begin here, as I did in Order F10-39, by dismissing at once the Ministry's position that s. 17(1)(f) in effect sets up a standalone provision to be read apart from the rest of the section. Commissioner Loukidelis set out the proper approach to the interpretation of s. 17(1) and its subsections in F08-22:[40]

> 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.

[35] Ministry initial submission, para. 4.54.
[36] [2008] B.C.I.P.C.D. No. 40.
[37] [2009] B.C.I.P.C.D. No. 18.
[38] FIPA's reply submission, para. 19.
[39] FIPA's reply submission, para. 22.
[40] [2008] B.C.I.P.C.D. No. 40, at para. 43.

[48] As I also noted in Order F10-39, s. 17(1)(f) was added by amendment subsequent to Order F08-22. In my view it is simply a further example to be interpreted in relation to the opening words of s. 17(1). Senior Adjudicator Francis reached this same conclusion in Order F09-13.[41]

[49] With respect to the Ministry's position concerning ASD contracts, I agree with the applicant that the Ministry's evidence and arguments regarding the negotiation process for these contracts are nearly identical to those in Orders F10-24 and F10-25. It is also similar to what I considered in Order F10-39. The Ministry argues that the ASD contracts are "unique" and unlike RFP type contracts that previous orders have found are not excepted from disclosure under s. 17. I have carefully considered all of the Ministry's submissions, including the Reimer affidavit and attached exhibits relating to the "Revenue Management Project" specific to this inquiry. I reject this argument as I did in Order F10-39. The described negotiations may be somewhat longer and perhaps more complex for ASD contracts, but they are still instruments whereby government pays third parties to provide products and services at an agreed price.[42]

[50] The government has committed to the expenditure of over $1 billion in taxpayer funds on nine ASD contracts to date.[43] This includes the ASD contract at issue here, valued at $301 million. In this regard, it is again important to remember FIPPA's purposes in assessing s. 17 (and s. 21) in relation to such contracts. Commissioner Loukidelis stated as follows in Order F08-22:[44]

> 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" 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…

[51] As I note above, one of the Ministry's main concerns is that disclosure of the information at issue would discourage some proponents to bid on future

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[41] [2009] B.C.I.P.C.D. No. 18, at para. 38. This order is under judicial review but not with respect to the application of s. 17.

[42] Senior Adjudicator Francis came to the same conclusion in Order F10-24 opining that, "[t]he Ministry's evidence and arguments can be applied to any government contract, and to any term in any such contract… ." She concluded that, "[i]n this respect, contracts done through the JSP process are not in my view qualitatively different from those done through negotiation in other RFP processes."

[43] Bethel affidavit, para. 11.

[44] Para. 34.

projects. I received *in camera* the evidence from the Ministry in support of its premise. I am therefore not at liberty to reveal it, but I can say that I find it to be speculative, imprecise and, in large measure, uncorroborated hearsay. In short, it is unconvincing. I also note that HPAS itself makes no claim that it would not bid on future projects, only that disclosure of the withheld records would be "a matter of concern" to it in future negotiations with the Ministry.[45] As noted, Order F10-24[46] also rejected this kind of argument, as did Commissioner Loukidelis in Order F08-22.[47]

[52] The Ministry also advances a variation on the above argument relating to what it says is the possibility of adding 40 government programs to its "Revenue Contract" with HPAS. It argues that successfully negotiating these additional contracts would require HPAS to disclose sensitive information. It says that if HPAS knew this information would be released, HPAS would withhold the information from government.

[53] I do not accept this proposition. The affidavit evidence supporting this argument states only that the affiant believes HPAS would refuse to disclose this information in the circumstances described.[48] No basis for this belief is stated. HPAS itself does not mention the possibility of adding 40 additional programs to its agreement with the Ministry. HPAS only says it expects that it will be unwilling to have this kind of disputed information "embedded in future agreements." However, it says it will still provide government with this information on what HPAS calls a "temporary" and "need to know basis".[49]

[54] Finally, the Ministry argues that its negotiating position on other complex deals, including ASD contracts, would be harmed by disclosure of the disputed records. This is because, it says, potential vendors would use such released provisions as "negotiating leverage" to gain an advantage over the Province.

[55] This is not a novel argument. The public body advanced it in Order F10-24.[50] Senior Adjudicator Francis said the following in her reasons:

> In this regard, [applicant] makes a valid point when it states that, despite numerous cases in which claims for disclosure of negotiated contracts have been denied, the Ministry does not point to any instance where a public body could say it got a worse deal the next time a deal was negotiated or that its negotiating expenses increased significantly because of the disclosure.

[45] Hamilton affidavit, para. 11.
[46] At para. 55.
[47] At para. 53.
[48] Reimer affidavit, para. 21.
[49] Attard affidavit, para. 18.
[50] At para. 50.

[56] The Ministry made precisely the same argument to me in Order F10-39. I noted then that it did not offer evidence of a "worse deal" in that case. It does not here either. As I stated in Order F10-39:

> … this paucity of evidence on the part of public bodies is especially salient considering we are now edging towards two decades of experience with FIPPA. It is also worth restating the obvious point there is a high likelihood at least one potential vendor would already know the kind of terms the government would be prepared to grant in an ASD contract—one of those companies that has already entered into such a contract and seeks to enter another. Moreover, if each ASD contract is unique, as claimed, it hardly supports the Ministry's argument that the terms of one contract would have relevance to another.[51]

[57] For the reasons stated above, I find that s. 17(1)(f) does not apply in this case.

[58] **3.3 Harm to Third-Party Business Interests—**Section 21(1) of FIPPA requires public bodies to withhold information the disclosure of which would harm the business interests of a third party. It sets out a three-part test for determining whether disclosure is prohibited, all three elements of which must be established before the exception to disclosure applies. These are the relevant FIPPA provisions:

> **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 …
>
> (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, …
>
> (iii) result in undue financial loss or gain to any person or organization, …

[51] Again, Senior Adjudicator Francis made the same finding in Order F10-24 at para. 53.

[59] Numerous orders have considered the application of s. 21(1) and the principles for its application are well established.[52] Commissioner Loukidelis conducted a comprehensive review of the body of case decisions in several jurisdictions in Order 03-02.[53]

[60] The first part of the test requires the information to be a trade secret of a third party or the commercial, financial, labour relations, scientific or technical information of or about a third party. The second part of the test requires the information to have been supplied to the public body in confidence. The third part of the test requires that disclosure of the information could reasonably be expected to cause significant harm to the third party's competitive position or other types of harm as set out in s. 21(1)(c).

Commercial or financial information

[61] The Ministry submits that the information at issue "relates to a commercial enterprise and therefore qualifies as 'commercial information'".[54]

[62] HPAS submits that the information at issue consists of:

- indemnification and limitation of liability amounts; and
- financial details of how HPAS is paid under the RMP Agreement and the methodology for calculating those amounts.[55]

[63] FIPA does not address whether the information is commercial or financial.

[64] The records relate to the terms under which HPAS provides revenue collection services to the government. Previous orders have interpreted this kind of information to constitute commercial information. For example, Order F05-05[56] found that commercial information included terms and conditions for providing services and products by a third party. Likewise, Order F07-07[57] found that information relating to the buying or selling of goods or services qualified as commercial information for the purpose of s. 17(1)(b).

[65] For the same reasons, I find that the information at issue here is the commercial information of HPAS. Given that part one of the test requires that only one of the delineated criteria be satisfied, it is not necessary that I determine whether the information also consists of trade secrets or technical, scientific or other information listed in s. 21(1)(a)(ii).

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[52] See for example, Order 03-02, [2003] B.C.I.P.C.D. No. 2 and Order 03-15, [2003] B.C.I.P.C.D. No. 15.
[53] At paras. 28-117.
[54] Ministry's submission, para. 4.99.
[55] Attard affidavit, paras. 6 and 12.
[56] [2005] B.C.I.P.C.D. No. 6.
[57] [2007] B.C.I.P.C.D. No. 9.

Supplied in confidence

[66] The Ministry submits that the information at issue meets the test of being supplied. In particular, the Ministry argues, it qualifies "on the basis that the disclosure of that information would reveal underlying confidential business strategies and commercial information regarding the Third Party".[58]

[67] HPAS submits that the indemnification and limitation of liability amounts were supplied during the course of the negotiations. The affidavit of the Vice President Finance & Administration attests that these amounts, to the best of his recollection:

> were amounts to which we were required to agree. They were treated as non-negotiable features of the transaction, were not the subject of negotiation, and did not change through the course of the RMP Agreement negotiations.[59]

[68] With respect to the remaining information, he submitted:

> the "EDS Overhead" percentage specified in sections 2.1.2 and 2.2.3 of Schedule 23 was an amount that HPAS identified as non-negotiable in the RMP Agreement negotiations. Similarly, the EDS methodology for calculating "benefits" was a proprietary methodology developed by EDS. It was also treated as a constant, non-negotiable aspect of the transaction and was not the subject of negotiations before execution of the RMP Agreement. The same is true of the termination amounts specified in Schedule 31, and the methodology for calculating those amounts at different stages of the RMP Agreement, both of which were treated as immutable as they were treated by the parties as non-negotiable aspects of the transaction.[60]

[69] FIPA disagrees that these arguments support the position that the information was supplied in confidence. It points out that numerous orders have established that the fact that a single party provided the information does not mean that the information was "supplied", if the other party agreed to the terms. Specifically, although the submissions of HPAS describe the terms as being "non-negotiable", this does not mean that they qualify as "supplied information".[61]

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[58] Ministry's submission, para. 4.102.
[59] Attard affidavit, para. 8.
[60] Attard affidavit, para. 13.
[61] FIPA's reply submission, paras. 28 and 29.

[70] Previous decisions have dealt extensively with the application of s. 21(1)(b) of FIPPA with respect to information in contracts between public bodies and private-sector service providers, like HPAS. These decisions have established clearly that, in the words of Commissioner Loukidelis: "Information in an agreement negotiated between two parties does not, in the ordinary course, qualify as information that has been "supplied" by someone to a public body."[62] The reasonableness of this has been confirmed in key judicial review decisions.[63]

[71] Commissioner Loukidelis also held in Order 00-09[64] that there might be rare circumstances where this would not be the case. He referred to Commissioner Flaherty's finding in Order No. 26-1994[65] which suggested that examples would be:

> 1. Where the third party has provided original or proprietary information that remains relatively unchanged in the contract; and
>
> 2. Where disclosure of the information in the contract would permit an applicant to make an "accurate inference" of sensitive third-party business information that would not in itself be disclosed under the Act.

[72] Adjudicator Iyer clarified the issue of "supplied" versus "negotiated" in Order 01-39, a decision upheld by the Supreme Court of British Columbia on judicial review.[66] The adjudicator stated:

> 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 costs 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 tender 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.

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[62] Order 00-09, [2000] B.C.I.P.C.D. No. 9, pp. 5-6.
[63] *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.
[64] 2000] B.C.I.P.C.D. No. 9, pp. 5-6.
[65] [1994] B.C.I.P.C.D. No. 29, p. 7.
[66] *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* 2002 BCSC 603.

> 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 to change, but, fortuitously, was not changed. [67]

[73] On judicial review, C. Ross J. agreed with Adjudicator Iyer:

> CPR's interpretation focuses on whether the information remained unchanged in the contract from the form in which it was originally supplied on mechanical delivery. The Delegate's interpretation focuses on the nature of the information and not solely on the question of mechanical delivery. I find that the Delegate's interpretation is consistent with the earlier jurisprudence ... .[68]

[74] In applying the above principles, I begin with the provisions in Schedule 23 that both the Ministry and HPAS identified as being information "supplied" under s. 21(1)(b) of FIPPA. It is clear these are negotiated provisions and not supplied. HPAS may have insisted upon the inclusion of these terms in the agreement. However, this speaks to the bargaining stance of HPAS rather than the inherent immutable nature of the withheld information. For example, the definition of "EDS Overhead" in Schedule 23 does not suggest the figure is immutable. Other than the figure being called "Overhead," neither the definition nor the affidavit evidence provides any basis for concluding it represents the kind of fixed cost or obligation Adjudicator Iyer referred to above. In isolation, the "Overhead" appears only to be an arbitrary figure HPAS proposed be added to certain costs it charged under the agreement. The Province had the option of whether or not to agree to these terms. Fortuitously for HPAS, it did so. In other words, these terms were negotiated and agreed upon, not supplied.

[75] With respect to the indemnification and limitation of liability amounts in Article 23 and the withheld terms under Schedule 31, I would apply the same reasoning as in the above paragraph—these items were not supplied but rather negotiated. This finding is consistent with numerous past orders, most recently, Orders F10-26 and F10-40.

[76] For the above reasons, the Ministry has not met the second branch of the test under s. 21(1)(b) that the withheld information was supplied. It is therefore not necessary that I deal with whether it was supplied "in confidence".

[77] It is also not necessary to deal with the harms part of the analysis under s. 21(1)(c). Nevertheless, for completeness, I will now consider the submissions made by the parties on this latter issue.

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[67] Order 01-39, [2001] B.C.I.P.C.D. No. 40, paras. 45-46.

[68] *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* 2002 BCSC 603, para. 75.

Harm to third party interests

[78] HPAS submits that it operates in a highly competitive industry. It identifies its competitors as Accenture Inc., CGI, Deloitte, IBM and Tata Infotech Ltd., and states that these companies are larger than HPAS.[69] HPAS argues that these companies compile corporate intelligence about each other and tailor their bids based on what they know about their competitors.[70] HPAS submits that in the event the information at issue is disclosed, this will:

> a) immediately become harmful as our competition sees what we do and how we do it. Because the information becomes public, it is harmful both not only within competition in future public sector bids, extensions, and recompetes, but also within competition in the private sector; and
>
> b) become an inhibitor to future contracts as HPAS will react more conservatively in terms of sharing this information during contracting for fear of it becoming public. Furthermore, this reduced transparency to the public body administering the contract will make it more difficult for them to manage as it establishes less trustful working relationships.[71]

[79] HPAS also submits that some of the information in the contract regarding software development methodologies consists of its intellectual property. It argues that disclosure to its competitors would give them an unfair advantage in that they would have access to a "world class methodology" without having to make the investment that HPAS made to develop it.[72]

[80] HPAS is also concerned about the consequences of disclosure of information regarding indemnification and limitation of liability. Such disclosure, HPAS submits, would reveal its overall risk tolerance. This would, it argues, harm its negotiations with other clients, because these partners "will expect the same indemnification and liability amounts that the Ministry obtained".[73]

[81] HPAS submits that disclosure of HPAS's revenue, cost structure and anticipated profit would give competitors "full insight and clarity on HPAS's financial model, costs, benefit calculations, and therefore profits".[74] This would harm HPAS's ability to successfully renew the contract. The loss of the contract would result in the loss of 250 positions and $50 million per year.[75] HPAS also submits that the information remains commercially sensitive despite the passage of time since the agreement was negotiated.[76]

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[69] Hamilton affidavit, para. 34.
[70] Hamilton affidavit, paras. 36-37.
[71] Hamilton affidavit, para. 39.
[72] Hamilton affidavit, para. 41.
[73] Attard affidavit, paras. 9-11.
[74] Attard affidavit, paras. 14-15.
[75] Attard affidavit, para. 15.
[76] Attard affidavit, para. 17.

[82] The Ministry agrees with HPAS that disclosure of the information would harm the negotiating position of HPAS and result in it suffering undue financial loss. It also submits that disclosure would result in information no longer being supplied to the Ministry.[77] The Ministry believes that disclosure of the information would dissuade some potential vendors from participating in ASD contracts and that others would be unwilling to share the same level of information. The Ministry submits that it is in the financial interest of the Ministry to have as many vendors participate as possible and the JSP process requires extensive sharing of information in order to maximize the financial benefits.[78]

[83] FIPA's submission is silent with respect to the harm of disclosure in accordance with s. 21(1)(c).

Findings

[84] Numerous previous orders have explained the harms test under s. 21(1)(c) and I adopt the approach taken in those cases here.[79]

[85] The information in issue essentially concerns the price of HPAS services to government and certain of HPAS's potential financial obligations to the Province. The essence of HPAS's argument is that disclosure of this material will undermine HPAS's competition in the marketplace because its competitors will use the information to HPAS's disadvantage. Second, HPAS says it expects disclosure of the disputed information will become an "inhibitor" to future contracts and the sharing of information.

[86] Past orders have rejected these types of arguments and there is nothing distinguishable about the facts of this case that would cause me to reach a different conclusion here. With respect to the disclosure of the economic terms of the contract in issue in Order F06-20,[80] for example, Commissioner Loukidelis stated the following:

> When interpreting and applying s. 21(1), the stated purposes of FIPPA to make public bodies more accountable—by giving the public a right of access to records that is subject to specified limited exceptions—have to be kept in sight. The overarching principle is that contracts with public bodies should be available to the public, subject only to specified and limited disclosure exceptions in the circumstances of each case. Mere heightening of competition for future contracts is not significant harm or significant interference with competitive or negotiating positions. Simply putting contractors and potential contractors in a position of having

[77] Ministry's initial submission, para. 4.103.
[78] Knight affidavit, paras. 50-52.
[79] See for example, Order 01-39, [2001] B.C.I.P.C.D. No. 40 , paras. 71-73 and Order 04-06, [2004] B.C.I.P.C.D. No. 6, paras. 54-62.
[80] [2006] B.C.I.P.C.D. No. 36 at para. 20. Commissioner Loukidelis made similar comments in Order F07-15 at para. 43.

> to price their services competitively is not a circumstance of unfairness or undue financial loss or gain.

[87] I adopt the same approach here in rejecting HPAS's arguments that disclosure of those portions of the agreement would cause the harm alleged under s. 21(1)(c)(i) or (iii).

[88] I would also note parenthetically that, while I cannot discuss the content details of the withheld information under s. 21, I can say that it does not disclose "software development methodologies" as HPAS claims in its submission.

[89] With regard to whether the information at issue would become an "inhibitor" to future contracts and the sharing of information as claimed by HPAS and the Ministry, I reject this argument for the reasons addressed at paras. 51-53 above.

[90] For all of the reasons set out above I find that a reasonable expectation of harm from disclosure of the disputed information has not been established under s. 21(1)(c).

4.0 CONCLUSION

[91] For reasons given above, I make the following orders under s. 58 of FIPPA:

1. Subject to paragraph 2 below I require the Ministry to give FIPA access to the information it withheld under s. 15(1)(l)

2. I require the Ministry to refuse to disclose, in accordance with s. 15(1)(l), the information in the requested record identified at paras. 20, 24, 27, 30, 31, 34 and 35 above.

3. I require the Ministry to give FIPA access to the information it withheld under s. 17(1)(f) and s. 21(1).

4. I require the Ministry to give FIPA access to this information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before June 23, 2011 and, concurrently, to copy me on its cover letter to FIPA.

May 12, 2011

ORIGINAL SIGNED BY

Michael McEvoy
Senior Adjudicator