



Order F20-41

## BRITISH COLUMBIA HOUSING MANAGEMENT COMMISSION

Celia Francis  
Adjudicator

September 23, 2020

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**Summary:** Two applicants made requests to the British Columbia Housing Management Commission (BCHMC) under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for the contract for the sale of the Little Mountain social housing site to Holborn Properties Limited. BCHMC disclosed the responsive records in severed form, withholding some of the information under s. 21(1) (harm to third-party business interests) of FIPPA. The adjudicator found that s. 21(1) did not apply and ordered BCHMC to disclose the information in dispute to the applicants. One applicant argued that s. 25(1)(b) (public interest override) required disclosure of the information in dispute. The adjudicator decided it was not necessary to consider s. 25(1)(b), in light of her decision under s. 21(1).

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

### INTRODUCTION

[1] This order concerns two requests under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for the contract (“Purchase and Sale Agreement”) for the sale of the Little Mountain social housing site (Little Mountain) by the British Columbia Housing Management Commission (BCHMC) to Holborn Properties Limited (Holborn). BCHMC gave Holborn notice of the requests under s. 23 of FIPPA and sought its views on disclosure. Holborn objected to the disclosure of some of the information. BCHMC decided to disclose the records in severed form, withholding some, but not all, of the information Holborn wanted withheld under s. 21(1) (harm to third-party business interests). I understand that BCHMC has provided the two applicants with severed copies of the responsive records.<sup>1</sup>

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<sup>1</sup> I gather that, when BCHMC disclosed the severed records, it withheld both the information BCHMC considers protected by s. 21(1) and the additional information that Holborn believes should be withheld under s. 21(1); BCHMC’s response submission, at para. 3.

[2] Holborn requested reviews by the Office of the Information and Privacy Commissioner (OIPC) of BCHMC's decisions to disclose some of the information Holborn thought should be withheld under s. 21(1). Mediation by the OIPC did not resolve the two third-party reviews and they proceeded jointly to inquiry. The OIPC also invited the two access applicants to participate in the inquiry.

[3] During the inquiry, the first applicant<sup>2</sup> requested and received the OIPC's permission to add s. 25(1)(b) (public interest override) as an issue.

[4] The OIPC received submissions from BCHMC, Holborn and the two applicants. The first applicant provided submissions on s. 21 and 25. The second applicant<sup>3</sup> provided a submission on s. 25 only.

[5] For reasons given below, I have decided that s. 21(1) does not apply to the information in dispute. In light of this decision, I have decided it is not necessary to consider whether s. 25(1)(b) applies to this information.

## **ISSUES**

[6] The issue to be decided in this inquiry is whether s. 21 requires BCHMC to withhold information. Under s. 57(1) of FIPPA, BCMHC has the burden of proving that the applicants have no right of access to the information that BCMHC decided to withhold under s. 21(1). Under s. 57(3)(b), Holborn has the burden of proof respecting all of the information Holborn believes BCHMC should withhold under s. 21(1).

## **DISCUSSION**

### ***Background***

[7] Little Mountain is a site in Vancouver bounded by 37th Avenue, Main Street, Ontario Street and 33rd Avenue. Social housing was first built at Little Mountain in the 1950s. British Columbia assumed ownership of Little Mountain in June 2006, as part of an arrangement in which the federal government transferred 17,300 social housing units to the Province.

[8] In 2008, BCHMC entered into an agreement for the sale of Little Mountain to Holborn. Most of the 224 units of social housing at Little Mountain were demolished in late 2009 and one building of 53 units was built. The rest of the Little Mountain site remains vacant to this day.<sup>4</sup>

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<sup>2</sup> OIPC File F18-75849.

<sup>3</sup> OIPC File F18-76353.

<sup>4</sup> This account is taken from the first applicant's response submission, pages 6-7.

### ***Information in dispute***

[9] The 99 pages of responsive records consist of four amendment agreements related to a 2008 purchase and sale agreement between the Provincial Rental Housing Corporation, Holborn and BCHMC for the Little Mountain property.<sup>5</sup> The information in dispute in those records is the information that BCHMC decided to withhold under s. 21(1), as well as the additional information that Holborn believes should be withheld under s. 21(1). The information in dispute is dollar figures and agreement terms.

### ***Preliminary matters***

#### *In camera submission*

[10] Before the inquiry began, Holborn asked that it be permitted to submit portions of its submission and affidavits *in camera*. The OIPC decided to accept some but not all of these portions *in camera*.

[11] In its initial inquiry submission, Holborn said that its submission is based on the OIPC's decision about the information that Holborn was allowed to adduce *in camera*. Holborn said, "Essentially, the OIPC denied Holborn the ability to protect certain information as in camera and denied Holborn's right to a fair process."<sup>6</sup>

[12] I dealt with a similar argument in Order F18-15 and had this to say:

As a general principle, the OIPC is required to consider proposed *in camera* information in light of its broad discretion to permit evidence into the inquiry and the need for procedural fairness for all parties. Accepting information *in camera* denies the opposing party the opportunity to respond to that information and restricts the adjudicator's ability to provide intelligible reasons. For that reason, it is problematic from a procedural fairness perspective.

My role in this inquiry is not to review the reasonableness or correctness of the *in camera* decision of another Commissioner's delegate. That role is reserved for the court on judicial review. In this case, the Ministry was given the opportunity to provide three submissions in support of its *in camera* application before the delegate made a decision with written reasons. The Ministry has provided no information that suggests that the *in camera* decision process was unfair. Therefore, I decline to revisit that decision.<sup>7</sup>

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<sup>5</sup> The 2008 purchase and sale agreement was not a record at issue in this inquiry.

<sup>6</sup> Holborn's initial submission, para.12.

<sup>7</sup> Order F18-15, 2018 BCIPC 18 (CanLII) at paras. 10-11, footnotes omitted.

[13] I arrive at a similar conclusion here. Holborn had two opportunities to present its case on its proposed *in camera* submissions before the Commissioner's delegate made her decision, with written reasons. Holborn has not argued that the *in camera* decision-making process was unfair. I decline, therefore, to revisit the delegate's decision.

*Should I reconsider test for third-party harm?*

[14] Holborn devoted a considerable part of its initial submission to arguing that I should reconsider the test for third-party harm. Holborn said:

1. The interpretation of "supplied" in s. 21(1)(b) is without foundation.
2. BC should follow the federal approach in interpreting "supply".
3. The purpose of s. 21(1) is not consistent with the "negotiated" rule in OIPC jurisprudence and this inconsistency has had a chilling effect on third parties.
4. The interpretation of s. 21(1) has had a chilling effect on third parties.

[15] In my view, the first and second points relate to the interpretation of "supply" in s. 21(1)(b), so I will deal with them when I address that part of the test. I consider the third and fourth points pertain to the issue of harm and I will deal with them under s. 21(1)(c).

***Third-party business interests – s. 21(1)***

[16] Holborn argued that s. 21(1) applies to all of the information it wants withheld. BCHMC said that it relied on Holborn's responses to the s. 23 notices that certain information must be severed pursuant to s. 21 and that BCHMC adopts the evidence and argument Holborn submitted in this inquiry.<sup>8</sup> The first applicant argued that s. 21(1) does not apply at all.

[17] The relevant parts of s. 21(1) of FIPPA in this case read as follows:

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

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<sup>8</sup> Para. 7, BCHMC's response submission.

- (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, ...

[18] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies.<sup>9</sup> All three parts of the s. 21(1) test must be met in order for the information in dispute to be properly withheld. First, BCHMC and Holborn must demonstrate that disclosing the information at issue would reveal one or more of types of information listed in s. 21(1)(a). Next, they must demonstrate that the information was supplied, implicitly or explicitly, in confidence. Finally, they must demonstrate that disclosure of the information could reasonably be expected to cause one or more of the harms set out in s. 21(1)(c).

[19] I find below that s. 21(1) does not apply because, while I find that s. 21(1)(a) applies, I find that s. 21(1)(b) does not. I also find that BCHMC and Holborn have not established a reasonable expectation of harm under s. 21(1)(c).

*Type of information – s. 21(1)(a)(ii)*

[20] Holborn said that the information in dispute is its financial and commercial information.<sup>10</sup> The first applicant agreed.<sup>11</sup>

[21] FIPPA does not define financial and commercial information. However, previous orders have held the following:

- “Commercial information” relates to commerce, or the buying, selling, exchanging or providing of goods and services. The information does not need to be proprietary in nature or have an actual or potential independent market or monetary value.<sup>12</sup>

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<sup>9</sup> See, for example, Order 03-02, 2003 CanLII 49166 (BCIPC), Order 03-15, 2003 CanLII 49185 (BCIPC), and Order 01-39, 2001 CanLII 21593 (BCIPC).

<sup>10</sup> Holborn’s initial submission, paras. 18-21.

<sup>11</sup> First applicant’s response submission, para. 4 of section on s. 21.

<sup>12</sup> See Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17, and Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62.

- “Commercial” and “financial” information of or about third parties includes hourly rates, global contract amounts, breakdowns of these figures, prices, expenses and other fees payable under contract.<sup>13</sup>

[22] Some of the information in dispute consists of the following: information about the purchase price and statement of adjustments, including dollar figures; indemnity clauses; mortgage information; terms about covenants, plans and confidentiality; definitions and related clauses; and the timing, structuring, calculation, financing and scheduling of payments. The other information in dispute is terms and conditions for the parties providing certain services, including specific provisions related to an indemnity. I find that all of the information in dispute is financial and/or commercial information of or about Holborn for the purposes of s. 21(1)(a)(ii).

*Supply in confidence – s. 21(1)(b)*

[23] The next step is to determine whether the information in issue was “supplied, implicitly or explicitly, in confidence.” The information must be both “supplied” and supplied “in confidence.”<sup>14</sup> Holborn argued that the information in dispute was supplied, implicitly or expressly, in confidence, while the first applicant argued the contrary.

[24] “**Supplied**” – BC orders have consistently found that information in an agreement or contract will not normally qualify as “supplied” by the third party for the purposes of s. 21(1)(b), because the information is the product of negotiations between the parties. Order 01-39 also said this about the “supply” element in contracts:

By their nature, contracts are negotiated between the contracting parties. The fact that the requested records are contracts therefore suggests that the information in them was negotiated rather than supplied. It is up to CPR, as the party resisting disclosure, to establish with evidence that all or part of the information contained in the contracts including their schedules was not negotiated, as would normally be the case, but was “supplied” within the meaning of s. 21(1)(b).<sup>15</sup>

[25] This is so, even where the information was subject to little or no back and forth negotiation. There are two exceptions to this general rule:

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<sup>13</sup> For example, Order F19-11, 2019 BCIPC 13 (CanLII) at para. 14, Order 03-15, 2003 CanLII 49185 (BC IPC) at para. 41, Order 00-22, 2000 CanLII 14389 (BC IPC) at p. 4, Order F05-05, 2005 CanLII 14303 (BC IPC) at para. 46, Order F13-06, 2013 BCIPC 6 (CanLII) at para. 16, Order F13-07, 2013 BCIPC 8 (CanLII) at para. 36, Order F15-53, 2015 BCIPC 56 (CanLII) at para. 11, and Order F16-17, 2016 BCIPC 19 (CanLII) at para. 24.

<sup>14</sup> See, for example, Order F17-14, 2017 BCIPC 15 (CanLII) at paras. 13-21, Order 01-39, 2001 CanLII 21593 (BC IPC) at para. 26, and Order F14-28, 2014 BCIPC 31 (CanLII) at paras. 17-18.

<sup>15</sup> At para. 43.

- Where the information the third party provided was “immutable” (i.e., not open or susceptible to negotiation) and was incorporated into the agreement without change; or
- Where the information in the agreement could allow someone to draw an “accurate inference” about underlying information a third party had supplied in confidence but which does not expressly appear in the agreement.<sup>16</sup>

[26] Holborn said that the information in dispute “was relatively immutable or not susceptible of change and was, therefore, supplied.”<sup>17</sup> Holborn did not explain why it thinks so. It also did not point to the specific information that it considers to be “relatively immutable” or explain what it means by “relatively”. (Holborn did not argue that the second exception applies here.)

[27] The first applicant said that Holborn had not provided any evidence in support of this argument. He also pointed out that Holborn’s affidavit evidence referred to the difficulty of reaching agreement and the uniqueness of the agreement. In his view, the information in dispute was negotiated, not supplied.<sup>18</sup>

[28] I agree with the first applicant and reject Holborn’s argument. For one thing, the records in question are agreements amending a 2008 purchase and sale agreement between Holborn, the Provincial Rental Housing Corporation and BCHMC (which is not before me in this inquiry). The title of each disputed record contains the term “agreement”. Moreover, there are several references throughout these agreements to the fact that the parties “agree” on the terms set out therein.<sup>19</sup> In addition, Holborn’s own evidence is that the terms of the agreement were unique, “given the transaction that was negotiated”.<sup>20</sup> This all supports the conclusion that the parties negotiated and agreed on the terms set out in the records. I find, therefore, that the information in dispute was negotiated and not “supplied” for the purposes of s. 21(1)(b).

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<sup>16</sup> See, for example, Order 01-39 2001 CanLII 21593 (BC IPC) at para. 45, and Order F13-22, 2014 BCIPC No. 4 (CanLII) at para. 17. Key judicial review decisions have confirmed the reasonableness of this approach. See Order F08-22, 2008 CanLII 70316 (BC IPC) at para. 58, referring to *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 and *K-Bro Linen Systems Inc. v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 904.

<sup>17</sup> Holborn’s initial submission, para. 24.

<sup>18</sup> First applicant’s response submission, para. 9 of section on s. 21(1).

<sup>19</sup> For example: pages 1 and 9 of the 99 page record, second last paragraph; page 18, third paragraph; page 26, clause D.

<sup>20</sup> Affidavit of Holborn’s Chief Operating Officer, para. 7.

### Should I reconsider interpretation of “supply”?

[29] Holborn noted that the OIPC’s interpretation of “supplied” in s. 21(1)(b) – i.e., that information that is “negotiated” is not “supplied” – dates back to 1994. In Holborn’s view, this interpretation was created “without proper foundation or rationale” and should be reconsidered.<sup>21</sup>

[30] Holborn argued that BC’s interpretation of “supplied” originated in a 1988 Ontario order.<sup>22</sup> In Holborn’s view, this Ontario order provided no reasons, authority or rationale for finding that the schedule to a contract was “negotiated” and not “supplied”.<sup>23</sup>

[31] I do not agree that this means that I should reconsider the interpretation of “supplied”. BC’s many orders interpreting this term date back over 25 years and, as noted above, have been consistently upheld at judicial review. As the first applicant said, “If the BC legislature is dissatisfied with the manner in which section 21 is being interpreted by the OIPC, it is free to legislate; for a quarter century, it has declined to do so.”<sup>24</sup> I therefore reject Holborn’s argument on this point.

[32] Holborn also referred to former Commissioner Loukidelis’s supposed reliance, in Order 00-22,<sup>25</sup> on *Halifax Development Ltd. v. Canada (Minister of Public Works and Government Services)*, [1994] F.C.J. No. 2035 (F.C.T.D.) (*Halifax*). Holborn said that, in *Halifax*, the Federal Court initially decided that “negotiated” does not mean “supplied”.<sup>26</sup>

[33] Holborn did not explain how this supports its view that I should reconsider the interpretation of the term “supplied”. In any case, as Holborn itself pointed out, correctly, *Halifax* was decided under the federal *Access to Information Act* (ATIA) which provides for the withholding of some third-party information under s. 20(1) of that Act, even where the information was not “supplied”. Moreover, as I read Order 00-22, former Commissioner Loukidelis was not relying on *Halifax* but simply referring to it in the context of his discussion of “supplied” versus “negotiated” information. He went on to find in Order 00-22 that certain contract terms had been negotiated, not “supplied”. This finding was upheld at judicial review.<sup>27</sup> I decline, therefore, to revisit the interpretation of “supplied”.

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<sup>21</sup> Holborn’s initial submission, paras. 51-57.

<sup>22</sup> Ontario Order 36-1988.

<sup>23</sup> Holborn’s initial submission, para. 54.

<sup>24</sup> First applicant’s response submission, section on s. 21(1), para. 14

<sup>25</sup> Order 00-22, 2000 CanLII 14389 (BC IPC), at page 6.

<sup>26</sup> Holborn’s initial submission, para. 53.

<sup>27</sup> *Jill Schmidt v. British Columbia (Information and Privacy Commissioner) et al.*, 2001 BCSC 101.



[34] I note that Order F18-28<sup>28</sup> dealt with a similar submission from the third party in that case. The senior adjudicator dismissed the third party's arguments there, for reasons similar to mine.

Should I adopt the federal approach?

[35] Holborn argued that I should adopt the approach to third-party interests taken in s. 20(1) of the federal ATIA. In Holborn's view, it more accurately reflects FIPPA's purposes and promotes negotiation between public bodies and third parties.<sup>29</sup> Holborn argued that the federal and BC Acts have produced two "incompatible results" in which a third party's information could be protected under the ATIA but not under FIPPA. In Holborn's view, "there is no rationale for having two inconsistent and irreconcilable regimes for the protection of third party information".<sup>30</sup> Holborn argued that these two different legislative regimes have "created incoherence" among access to information laws across Canada and have produced an "absurd consequence".<sup>31</sup>

[36] I reject Holborn's arguments on this point. Section 21(1) of FIPPA clearly sets out a three-part test for the mandatory withholding of third-party information. As noted above, this test has been applied in BC for over 25 years and the interpretation of the term "supplied" has been upheld in many orders and court decisions. As the first applicant suggested, third parties should expect different standards between federal and provincial access to information regimes. If anything, he argued, the federal government is "the odd one out".<sup>32</sup>

[37] Moreover, as former Commissioner Loukidelis said in Order 00-22,

... Section 21, as enacted by the Legislature, does not operate as a blanket protection from all perceived or real negative effects on third parties of doing business with government. Section 2(1) of the Act explicitly says that one of the Act's purposes is to make public bodies more accountable to the public by giving a right of access to records and specifying limited exceptions to the rights of access. Section 21 is an exception to disclosure which is circumscribed by its own specific requirements, one of which is the "supply" element in s. 21(1)(b). It has long been recognized in the cases that s. 21 – and similar provisions in Canadian and United States access to information laws – do not place

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<sup>28</sup> Order F18-28, 2018 BCIPC 31 (CanLII), at paras. 19-26. Although the third party in that case filed for judicial review of Order F18-28, it later discontinued the proceeding; Vancouver Registry No. S189086.

<sup>29</sup> Section 20(1) of the ATIA can be used to protect third-party information that was negotiated and not "supplied", where its disclosure could reasonably be expected to prejudice a third party (s. 20(1)(c)) or could reasonably be expected to interfere with a third party's contractual or other negotiations (s. 20(1)(d)).

<sup>30</sup> Holborn's initial submission, paras. 58-69.

<sup>31</sup> Holborn's initial submission, paras. 70-84.

<sup>32</sup> First applicant's response submission, section on s. 21(1), paras. 15-16.

third parties who contract with government in the same position they would be in if they entered into non-government contracts. The interpretation or application of s. 21, as it exists, cannot be dictated by a desire to change this fact. To do so would fail to give balanced meaning to the explicit requirements of the exception as laid down by the Legislature.<sup>33</sup>

[38] Order F18-28 also dealt with, and dismissed a similar argument, for much the same reasons.<sup>34</sup>

[39] **“In confidence”** – I found above that the information in dispute was not “supplied”. This means that s. 21(1)(b) does not apply. I will, however, consider Holborn’s arguments that the information was supplied “in confidence,” for the sake of completeness.

[40] A number of orders have discussed examples of how to determine if third-party information was supplied, explicitly or implicitly, “in confidence” under s. 21(1)(b), for example, Order 01-36:

An easy example of a confidential supply of information is where a business supplies sensitive confidential financial data to a public body on the public body’s express agreement or promise that the information is received in confidence and will be kept confidential. A contrasting example is where a public body tells a business that information supplied to the public body will not be received or treated as confidential. The business cannot supply the information and later claim that it was supplied in confidence within the meaning of s. 21(1)(b). The supplier cannot purport to override the public body’s express rejection of confidentiality.

...

The cases in which confidentiality of supply is alleged to be implicit are more difficult. This is because there is, in such instances, no express promise of, or agreement to, confidentiality or any explicit rejection of confidentiality. All of the circumstances must be considered in such cases in determining if there was a reasonable expectation of confidentiality. The circumstances to be considered include whether the information was:

1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;
3. not otherwise disclosed or available from sources to which the public has access;

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<sup>33</sup> Order 00-22, at page 8.

<sup>34</sup> Order F18-28, 2018 BCIPC 31, at paras. 23-26.

4. prepared for a purpose which would not entail disclosure.<sup>35</sup>

[41] Holborn argued that the information in dispute was submitted expressly or implicitly in confidence. It said it took “every possible step to protect the confidentiality of the information in the Agreement”.<sup>36</sup> The first applicant did not address this issue.

[42] Holborn referred to the confidentiality provision at Article 11.14 of the 2012 Amended and Restated Agreement in support of its position.<sup>37</sup> The confidentiality provision is itself part of the information in dispute and I cannot, therefore, describe it in any detail. I can, however, say that it asserts that information in the Agreement and other specified documents was supplied, and would be held, in confidence. Of course, only the four amended agreements are in issue here.

[43] It may well be that the parties wanted to hold the Agreement in confidence. However, neither the confidentiality provision nor Holborn’s affidavit evidence shows how the information in dispute was supplied “in confidence”.

[44] Holborn said that, as a privately-held company, it does not normally share its financial information.<sup>38</sup> Holborn also said that the terms of the Agreement were unique, sensitive and different from other agreements it has entered into,<sup>39</sup> although it did not explain how. In any case, neither of these points supports Holborn’s position that the information in dispute was supplied “in confidence” and Holborn did not explain.

[45] I find that the information in dispute was not supplied, explicitly or implicitly, “in confidence” for the purposes of s. 21(1)(b).

*Reasonable expectation of harm – s. 21(1)(c)*

[46] I found above that s. 21(1)(a) applies to the information in dispute but that s. 21(1)(b) does not. This means that s. 21(1) does not apply to the information in dispute and, technically, I need not consider s. 21(1)(c). However, Holborn’s main arguments concerned the alleged harm on disclosure. I will, therefore, consider whether disclosure of the information in dispute could reasonably be expected to result in harm under s. 21(1)(c).

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<sup>35</sup> Order 01-36, 2001 CanLII 21590 (BC IPC) at paras. 24-26.

<sup>36</sup> Holborn’s initial submission, para. 29.

<sup>37</sup> This clause appears on page 50 of the 99 pages of records.

<sup>38</sup> Affidavit of Holborn’s Chief Operating Officer, para. 4.

<sup>39</sup> Affidavit of Holborn’s Chief Operating Officer, paras. 6-8.

### Standard of proof for harms-based exceptions

[47] Numerous orders have set out the standard of proof for showing a reasonable expectation of harm.<sup>40</sup> The Supreme Court of Canada confirmed the applicable standard of proof for harms-based exceptions:

[54] This Court in *Merck Frosst* adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”.<sup>41</sup>

[48] Moreover, in *British Columbia (Minister of Citizens’ Services) v. British Columbia (Information and Privacy Commissioner)*,<sup>42</sup> Bracken J. confirmed that it is the release of the information itself that must give rise to a reasonable expectation of harm.

[49] I have applied these principles in considering the arguments on harm under s. 21(1)(c).

[50] **Competitive harm – s. 21(1)(c)(i)** – Holborn said that the real estate development market in the Lower Mainland is “robust” and “highly competitive”. It said that the parties reached the purchase and sale agreement on Little Mountain in 2008, during a global recession. Holborn argued that other entities, with which it is negotiating or likely to negotiate, could use the information in dispute as “leverage” or a “bargaining tool” against Holborn, to try to get it to agree to terms similar to the “highly sensitive provisions” in this “unique” agreement. Holborn said it uses these “unique terms” to “strategically structure new real estate deals going forward”. Thus, in Holborn’s view, disclosure of the information in dispute,

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<sup>40</sup> For example, Order 01-36, 2001 CanLII 21590 (BCIPC) at paras. 38-39.

<sup>41</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* [Community Safety], 2014 SCC 31, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 94. See also Order F13-22, 2014 BCIPC 31 (CanLII) at para. 13, and Order F14-58, 2014 BCIPC 62 (CanLII) at para. 40, on this point.

<sup>42</sup> *British Columbia (Minister of Citizens’ Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875 at para. 43.

which, it said, was meant to be confidential, would put it at a competitive disadvantage and interfere with its negotiating position.<sup>43</sup>

[51] The first applicant argued that Holborn did not support its contentions about harm, suggesting they were speculative.<sup>44</sup> I agree. First, Holborn did not explain how the real estate development market is competitive or name any of its competitors. It also did not explain how the provisions in question are “unique” and “highly sensitive”, nor how its competitors could “leverage” these provisions to Holborn’s detriment. Holborn would not, in any case, be obliged to agree to any future similar agreement terms, if it considered them detrimental to its financial interests.

[52] Secondly, Holborn did not explain how or why, given the supposed uniqueness of these provisions, which it said were arrived at “in light of the specific issues facing the parties in 2008”,<sup>45</sup> it might agree to these same terms in future agreements. Any such future agreements would be negotiated in new and different circumstances, with their own “specific issues”. Holborn also did not explain how disclosure of the information in dispute would interfere, let alone significantly, with any such future negotiations or with its competitive position.

[53] Holborn also said that disclosure of the financial details, including timing of payment and adjustments and commercial details regarding re-zoning, could cause it harm, “in that individuals without knowledge in real estate without the knowledge to understand the complexity of the deal could incorrectly interpret the information”. In its view, such individuals could “interpret the information unfavourably to Holborn, which could be injurious to the interests of Holborn in attracting buyers for its property developments”.<sup>46</sup>

[54] The first applicant countered that this argument is “as absurd as it is insulting”. In his view, Holborn is resisting disclosure because it thinks “the public is simply too ignorant to properly interpret a real estate deal of such alleged complexity”. He pointed out that Holborn could assist the public in interpreting the terms of the Agreement, if necessary.

[55] I agree. Holborn also did not explain how or why the public could interpret the information unfavourably or incorrectly, nor how this would in turn be injurious to Holborn’s business interests.

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<sup>43</sup> Holborn’s initial submission, paras. 32, 37, 40-43; Affidavit of Holborn’s Chief Operating Officer, paras. 5-9, 12, 14; Affidavit of Holborn’s Chief Executive Officer. Some of Holborn’s argument and evidence in these passages was received *in camera*.

<sup>44</sup> First applicant’s response submission, section on s. 21(1), paras. 19-20.

<sup>45</sup> Affidavit of Holborn’s Chief Executive Officer, para. 4.

<sup>46</sup> Holborn’s initial submission, para. 38; Affidavit of Holborn’s Chief Operating Officer, para. 10.

[56] **No longer supply – s. 21(1)(c)(ii)** – Holborn said that, if the Agreement became public, it would result in similar information no longer being supplied to BCHMC, since “other developers would not want to be similarly prejudiced by having the terms of their deal being disclosed”.<sup>47</sup> Holborn added that the potential for disclosure of third-party information would have a “chilling effect” on the willingness of third parties, including Holborn, to enter into negotiations and agreements with public bodies, to the detriment of citizens and public bodies. Holborn said that, if it had to disclose the information in dispute, it “would be reluctant in the future to negotiate a contract with a public body that includes unique concessions to that public body. Similarly, Holborn would be unlikely to engage in any kind of creative arrangements in respect of pricing, or other material terms of such a contract.”<sup>48</sup>

[57] Holborn did not explain how the results it suggested could reasonably be expected to come about if the information in dispute were disclosed. Other than itself, Holborn did not name any other developers who would be reluctant to participate in future agreements with public bodies for this reason. Contracts and agreements with third parties have been disclosed, both proactively and under FIPPA, for many years. There is no evidence that third parties have been or will be reluctant to participate in future agreements because of the potential for disclosure.<sup>49</sup>

[58] In any case, as Holborn itself has admitted, one of FIPPA’s purposes is to make public bodies more accountable to the public. This includes subjecting their agreements with public bodies – funded by taxpayers – to public scrutiny. As part of enjoying the benefits of doing business with public bodies, third parties must expect to participate in agreements under different conditions than they would with private entities.

[59] **Undue financial loss or gain – s. 21(1)(c)(iii)** – Previous orders have said that the ordinary meaning of “undue” financial loss or gain under s. 21(1)(c)(iii) includes excessive, disproportionate, unwarranted, inappropriate, unfair or improper, having regard for the circumstances of each case. For example, if disclosure would give a competitor an advantage – usually by acquiring competitively valuable information – effectively for nothing, the gain to a competitor will be “undue.”<sup>50</sup>

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<sup>47</sup> Affidavit of Holborn’s Chief Operating Officer, para. 9.

<sup>48</sup> Holborn’s initial submission, paras. 85-95.

<sup>49</sup> Order F18-28, 2018 BCIPC 31 (CanLII), dealt with, and dismissed, a similar “chilling effect” argument from the third party in that case at paras 27-29, 50-51, 56-57.

<sup>50</sup> See, for example, Order 00-10, 2000 CanLII 11042 (BC IPC) at pp. 17-19. See also Order F14-04, 2014 BCIPC 31 (CanLII) at paras. 60-63, for a discussion of undue financial loss or gain in the context of a request for a bid proposal.

[60] Holborn said that disclosure of the “unique” provisions related to rezoning and the development plan could result in financial loss to it.<sup>51</sup> Holborn also said that “the impact of the disclosure and the confusion/misinformation interpreting the disclosed information, could harm the reputation of Holborn” which would, in turn, cause it financial loss. It also argued that, given that BCHMC “has a public purpose to assist those who need social housing”, members of the public might be less willing to purchase properties Holborn had developed. This, Holborn said, would result in financial loss.<sup>52</sup>

[61] The first applicant disputed this argument, saying Holborn had given “general speculative statements about how disclosure could cause embarrassment or loss of reputation”.<sup>53</sup>

[62] I agree. Holborn did not explain how the withheld terms were “unique”. Holborn also did not explain how any of the supposedly harmful results might come about from disclosure, still less how any financial loss to it or gain to its (unspecified) competitors would be “undue”. It also did not offer any evidence that might quantify any such loss or gain.

#### *Conclusion on s. 21(1)(c)*

[63] Holborn’s submissions on harm amount to little more than assertions and do not persuade me that harm under s. 21(1)(c) could reasonably be expected to result from disclosure. It is not clear how disclosure of the information at issue, which is now several years old, could reasonably be expected to cause the harm Holborn fears and Holborn did not explain.

[64] Holborn and BCHMC have not, in my view, provided objective evidence that is well beyond or considerably above a mere possibility of harm, which is necessary to establish a reasonable expectation of harm under s. 21(1)(c).<sup>54</sup> They have not demonstrated a clear and direct connection between disclosing the information in dispute and a reasonable expectation of the alleged harms. Therefore, I find that Holborn and BCHMC have not met their burden of proof and that s. 21(1)(c) does not apply to the information in dispute.

## **CONCLUSION**

[65] For reasons given above, I find that BCHMC is not required to refuse the applicants access to any of the information in dispute under s. 21(1). Under s. 58(2)(a) of FIPPA, I require BCHMC to give the applicants access to all of the information in dispute.

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<sup>51</sup> Holborn’s initial submission, para. 39; Affidavit of Holborn’s Chief Operating Officer, para. 13.

<sup>52</sup> Affidavit of Holborn’s Chief Operating Officer, para. 11.

<sup>53</sup> First applicant’s response submission, section on s. 21(1), para. 21

<sup>54</sup> *Community Safety*, at para. 54.

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[66] As a term under s. 59, I require BCHMC to give the applicants access to this information by November 5, 2020. BCHMC must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicants, together with a copy of the records.

September 23, 2020

**ORIGINAL SIGNED BY**

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Celia Francis, Adjudicator

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