



OFFICE OF THE  
INFORMATION & PRIVACY  
COMMISSIONER  
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Order F18-39

## MINISTRY OF TECHNOLOGY, INNOVATION AND CITIZENS' SERVICES

Meganne Cameron  
Adjudicator

September 27, 2018

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**Summary:** The Ministry of Technology, Innovation and Citizens' Services refused a journalist access to attachments to its contract with a third party related to the Okanagan Correctional Centre on the basis that disclosure could reasonably be expected to harm the third party's business interests. Order 16-49 held that s. 21 did not apply and ordered the Ministry to disclose the information in dispute. The Ministry filed a petition for judicial review of that decision. The British Columbia Supreme Court quashed the decision and remitted the matter back, and this is the resulting decision. The adjudicator determined that the Ministry was required to withhold some of the information in dispute pursuant to s. 21(1).

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

**Cases Considered:** *Plenary Group (Canada) Ltd. v. British Columbia (Information and Privacy Commissioner)*, 2018 BCSC 444 (CanLII); *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* 2014 SCC 31 (CanLII).

### INTRODUCTION

[1] This order arises from a remittal back to the Office of the Information and Privacy Commissioner (OIPC) by the Supreme Court of British Columbia for reasons set out in *Plenary Group (Canada) Ltd. v. British Columbia (Information and Privacy Commissioner)*, 2018 BCSC 444 (CanLII).

*Procedural history of case*

[2] In August 2014 the applicant, a journalist, asked the Ministry of Technology, Innovation and Citizens' Services (Ministry) for copies of six attachments to the Province's contract with Plenary Justice Okanagan Limited Partnership (Plenary) to design, build, finance and maintain the Okanagan Correctional Centre (OCC).<sup>1</sup> The Ministry disclosed copies of the requested records, withholding some information under s. 17(1) (financial harm to public body) and s. 21(1) (harm to third-party interests) of FIPPA. The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision to withhold information.

[3] While that inquiry was underway, the Ministry consulted with Plenary and reconsidered its decision. The Ministry notified Plenary, the applicant and the OIPC that it was no longer relying on s. 17(1) to withhold any information in the six attachments and that it had decided that s. 21(1) applied only to one of the attachments to the contract, Schedule 15. As a result, the Ministry planned to disclose the other five attachments in their entirety. In response, Plenary asserted that s. 21(1) also applied to information in Appendix 2F. The Ministry later disclosed complete copies of Schedule 8, and Appendices, 8A, 8B and 8C, but continued to withhold all of the information in Schedule 15 and Appendix 2F under s. 21(1).

[4] In Order F16-49, the adjudicator determined that s. 21(1) did not apply to Schedule 15 or Appendix 2F and required the Ministry to give the applicant access to the records by January 18, 2017. The Ministry filed a petition for judicial review of that order. At the judicial review, the adjudicator's order was quashed and the matter was remitted back to the OIPC to reconsider and determine whether s. 21(1) of FIPPA applies to Schedule 15 and Appendix 2F.

**ISSUE**

[5] The issue before me is whether the Ministry is required by s. 21(1) to refuse the applicant access to Schedule 15 and Appendix 2F.

[6] Sections 57(1) and 57(3)(b) say who has the burden of proof in this case. The Ministry must prove that s. 21(1) applies to Schedule 15 and Plenary must prove that it applies to Appendix 2F.

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<sup>1</sup> Specifically, Schedules 8 and 15 and Appendices 2F, 8A, 8B and 8C.

## DISCUSSION

### **Background**

[7] Plenary had the successful bid in response to the Province's Request for Proposals (RFP) for a performance-based, fixed-price agreement to design, build, partially finance and maintain the OCC for a term of 32.5 years, including a 2.5 year construction period.<sup>2</sup> As a result, the Province and Plenary entered into a contract (Contract). Appendix 2F and Schedule 15 form part of the Contract.<sup>3</sup> A description of the competitive selection process, the final agreement and ongoing monitoring, operations and maintenance phase are described in detail in the "Project Report: Okanagan Correctional Centre," a publicly available document provided as evidence in this inquiry by Plenary.<sup>4</sup>

### **Records in dispute**

[8] The balance of the Contract is not at issue in this inquiry and has not been provided as evidence by any of the parties. Only two attachments to the Contract are at issue: Appendix 2F and Schedule 15.

[9] Appendix 2F is a six-page chart for the construction of the OCC labelled "Draft Initial Project Schedule". The Ministry disclosed the columns listing the various tasks involved in the construction of the OCC (e.g., design development, construction mock-up, landscaping) and the proposed number of days needed to complete each task. It withheld the columns showing the proposed start and finish dates for each task as well as some graphical representations relating to the anticipated progress of each task.

[10] Schedule 15 is much more complicated. It is nearly 600 pages and contains tables, charts, graphs and other written information. The majority of the pages are comprised of columns of numbers, empty columns or columns filled with dashes. Some of the columns have headings but many do not. The pages are oriented in both portrait and landscape and many appear to be only partially displayed. A significant number of the pages are incomprehensible because the information is broken up between pages.

[11] With the permission of the Commissioner, Plenary provided an electronic version of Schedule 15 *in camera*.<sup>5</sup> Based on my review of the electronic version, Schedule 15 is, in actuality, a single complex Microsoft Excel workbook

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<sup>2</sup> Plenary's Affidavit of Plenary's Chief Financial Officer (CFO), Exhibit C, at p. 1.

<sup>3</sup> Ministry initial submission, at para. 4.04; Third Party initial submission, at para. 4. "Plenary" in this order will be used collectively to refer to Plenary Justice Okanagan Limited Partnership and Plenary Group (the named third party).

<sup>4</sup> Affidavit of CFO, Exhibit C.

<sup>5</sup> Affidavit of CFO, Exhibit D.

comprised of 26 separate pages (Tabs).<sup>6</sup> As this evidence was provided *in camera*, I cannot describe exactly what is displayed on the 26 Tabs. However, in general the Tabs contain data under specific headings, titles and/or categories. Some Tabs combine data with formulas to generate results which are displayed and described elsewhere in the Tabs.<sup>7</sup> There are also some Tabs which contain charts, graphs and other written information (i.e., a disclaimer, instructions and guidance related to the Tabs and the workbook in general).

[12] Based on my review of the Ministry and Plenary's submissions and evidence, including the *in camera* evidence, I gather that while a hardcopy of Schedule 15 was provided for the purposes of this inquiry, it was submitted to the Ministry in electronic form only.<sup>8</sup> The information in the hardcopy is, for the most part, illegible due to the size of many of the Tabs and the piecemeal manner in which they are printed. I am not able to view, let alone understand and differentiate between most of the Tabs. As a result, I have used the electronic *in camera* version of Schedule 15 for the purposes of determining whether the Ministry and Plenary have correctly applied s. 21 to the information in dispute in Schedule 15.<sup>9</sup>

[13] The Ministry and Plenary refer to Schedule 15 as Plenary's "financial model".<sup>10</sup> Plenary's affidavit evidence is that the financial model was adapted to meet the Ministry's RFP guidelines and then provided to the Ministry as a part of its proposal.<sup>11</sup> They have provided copies of those RFP guidelines as evidence in this inquiry.<sup>12</sup> Based on the parties' submissions and evidence, I gather that a financial model is a package of information, typically presented in Excel format, which displays a projection of the cost of a project. I further understand that proponents are regularly required to submit a financial model as part of their bid in a procurement process. The Ministry's evidence is that a financial model summarizes the key elements of a proponent's proposal (i.e., return on equity, financing costs, finance structure, security requirements, liquidated damages requirements and the project costs).<sup>13</sup>

[14] Plenary says that "the details of the financial model (e.g., the formulas, layout and structure of inputs and outputs) do not change substantially between

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<sup>6</sup> For clarity, each Tab is a separate "worksheet page" in the same Excel document. The Tabs are numbered and listed in the *in camera* portion of the Affidavit of the CFO.

<sup>7</sup> Affidavit of CFO, Exhibit D.

<sup>8</sup> Affidavit of PD PBC, at Exhibit B, p. 21.

<sup>9</sup> A careful comparison of the hardcopy and electronic versions of Schedule 15 satisfies me that they are the same record.

<sup>10</sup> See Ministry's Affidavits: Project Director with Partnerships BC (PD PBC), at paras. 17-19 and Exhibit B, Appendix B, at p. 27; Senior Vice President, Ernst & Young Orenda Corporate Finance Inc. (VP), at para. 3.

<sup>11</sup> Affidavit of PD PBC., at para. 14 and Exhibit B; Third Party Affidavit of R.J., at para. 11.

<sup>12</sup> Affidavit of PD PBC, at Exhibit B; Affidavit of CFO, at Exhibit A.

<sup>13</sup> Affidavit of VP, at para. 3.

bids.”<sup>14</sup> Based on my review of Schedule 15, I understand Plenary to be referring to the template-type information such as the headings and sub-headings and the instructions, organization and structure of the Tabs, rows, columns, charts, graphs and tables, as well as underlying formulas and figures used to generate outputs.

### ***Harm to third-party interests***

[15] The Ministry and Plenary say that s. 21(1) applies to Schedule 15. Plenary says that s. 21(1) also applies to the information withheld in Appendix 2F. The applicant says that the Ministry and Plenary have not established that s. 21(1) applies to any of the information.

[16] The relevant parts of s. 21(1) of FIPPA 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
  - (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, ...

[17] Each of the elements set out in ss. 21(1)(a), (b) and (c) must be satisfied before a public body is required to refuse disclosure under s. 21(1). I will address ss. 21(1)(a), (b) and (c) in turn.

### ***Type of Information – s. 21(1)(a)***

[18] The Ministry submits that the information in Schedule 15 is commercial information.<sup>15</sup> Plenary says that the information in Schedule 15 and Appendix 2F is its financial, technical and commercial information.<sup>16</sup> The applicant does not explicitly address the nature of the withheld information, although he acknowledges that it includes the precise costs and construction schedule for the OCC project.<sup>17</sup>

<sup>14</sup> Plenary initial submission, at para. 27.

<sup>15</sup> Ministry initial submission, at para. 4.15.

<sup>16</sup> Plenary initial submission, at para. 13.

<sup>17</sup> Applicant submission, at para. 4.

[19] FIPPA does not define “commercial”, “technical” or “financial 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>18</sup>
- hourly rates, global contract amounts, breakdowns of these figures, prices, expenses and other fees payable under contract are both “commercial” and “financial” information.<sup>19</sup>
- “technical information” will typically belong to an organized field of knowledge in the general categories of applied science or mechanical arts. It usually involves information prepared by a professional with the relevant expertise and describes the construction, operation and maintenance of a structure, process, equipment or entity.<sup>20</sup>

[20] Schedule 15 contains information about the OCC project costs, scheduling of payments, constructions costs, interest, expenses, taxes and other details related to the underlying financial structure of the project.<sup>21</sup> I find that it is both “commercial” and “financial” information of or about Plenary.

[21] Appendix 2F contains details about the planning and timing of construction related tasks. I find that this is commercial information because it relates to the provision of services and also technical information because it describes the construction of the OCC project, which Plenary was contracted to design and build.

***Supplied in confidence – s. 21(1)(b)***

[22] For s. 21(1)(b) to apply, the information must have been supplied, either implicitly or explicitly, in confidence. This is a two-part analysis. The first step is to determine whether the information was supplied to a public body. The second step is to determine whether the information was supplied “in confidence.”<sup>22</sup>

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<sup>18</sup> Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17; Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62.

<sup>19</sup> Order 00-22, 2000 CanLII 14389 (BC IPC) at p. 4, Order F05-05, 2005 CanLII 14303 (BC IPC) at para. 46; Order F15-53, 2015 BCIPC 56 (CanLII), at para. 11.

<sup>20</sup> Order F12-13, 2012 BCIPC 18 (CanLII) at para. 11.

<sup>21</sup> Affidavit of CFO, Exhibit D.

<sup>22</sup> Order F15-03, 2015 BCIPC 3 (CanLII) at para. 26.

### Supplied

[23] Previous BC orders have consistently stated that information contained in an agreement will not normally qualify as information that has been “supplied” by a third party to the public body because it is typically the product of a negotiation process.<sup>23</sup> Furthermore, the fact that a term from a proposal may be incorporated unchanged in a contract does not mean that the contract term is “supplied” information as opposed to “negotiated” information. As former Commissioner Loukidelis said in Order 03-15:

It would hardly be surprising that terms in a contract arrived at resemble, or are even the same as, terms in the contractor’s proposal. It might well be more unusual for the contract arrived to be completely out of step with the terms of the contractor’s proposal. A successful proponent on an RFP may have some or all of the terms of its proposal incorporated into a contract. As has been said in past orders, there is no inconsistency in concluding that those terms have been “negotiated” since their presence in the contract signifies that the other party agreed to them.<sup>24</sup>

[24] However, as stated in Order 01-39, information in an agreement that might otherwise be considered negotiated may nonetheless be supplied in two circumstances:

- Where the information the third party provided was “immutable” – thus not open or susceptible to negotiation – and it was incorporated into the agreement without change; or
- Where the information could allow someone to draw an “accurate inference” about underlying information of, or about, a third party that was supplied in confidence but which does not expressly appear in the agreement.<sup>25</sup>

[25] Schedule 15 and Appendix 2F form part of the Contract and as such, it follows that the parties agreed to their inclusion through a negotiation process. However, the Ministry and Plenary submit that the financial model contained in Schedule 15 was “immutable” and was therefore “supplied” for the purposes of s. 21(1)(b).<sup>26</sup> Plenary makes the same argument regarding Appendix 2F.<sup>27</sup> The applicant made no submissions on whether the information in dispute was

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<sup>23</sup> Order F13-22, 2013 BCIPC 29 (CanLII) at para. 17; See also: Order 04-06, 2004 CanLII 34260 (BC IPC) at paras. 45-46; Order 01-20, 2001 CanLII 21574 (BC IPC) at para. 81.

<sup>24</sup> Order 03-15, 2003 CanLII 49185 (BC IPC), at para. 66.

<sup>25</sup> Order 01-39, 2001 CanLII 21593 (BC IPC) at para. 50; See also: Order 01-20, 2001 CanLII 21574 (BC IPC) at para. 81; Order F13-22, 2013 BCIPC 29 (CanLII) at para. 17.

<sup>26</sup> Ministry initial submission, at para. 4.30; Third Party initial submission, at paras. 15-16.

<sup>27</sup> Plenary initial submission, at paras. 15-16.

supplied. I will first consider whether Appendix 2F was supplied before moving to Schedule 15.

[26] Appendix 2F – Appendix 2F is the six page project schedule which has been partially withheld. As previously stated, it is labelled “Draft Initial Project Schedule” and the disputed information is the proposed start and finish dates for each task and some graphical representations of the progress of each task. Plenary says that its construction contractor authored the schedule and that Plenary “supplied” it to the Ministry as part of its bid submission for the OCC project.<sup>28</sup> Plenary provided an affidavit from a Senior Manager with its construction contractor who deposed that his company authored the schedule and provided it to Plenary for inclusion in its bid. He says that the schedule was appended unchanged to the Contract.<sup>29</sup>

[27] Although the Ministry does not assert that s. 21(1) applies to Appendix 2F, it provided affidavit evidence in relation to that issue. A Project Director with Partnerships BC said that while the Ministry might be concerned about the end date in a project schedule, it “would likely not propose any material changes to the interim dates.”<sup>30</sup>

[28] I accept that Appendix 2F was authored by Plenary’s construction contractor and provided to Plenary for inclusion in its bid for the OCC contract. I also accept that it may have been appended, unchanged, to the Contract. However, Plenary’s submissions and evidence do not satisfy me that the information withheld in Appendix 2F was immutable, or not susceptible to change. As discussed in Order 01-39:

[I]nformation 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.<sup>31</sup>

[29] The fact that changes to the project schedule may not have been negotiated in this particular case does not mean that they could not have been, or that the information in Appendix 2F is immutable. In my view, the Ministry’s evidence that it would not likely propose any material changes to the interim dates indicates an understanding that negotiating changes to the schedule was possible and an option. Further, based on the fact that it is called a “Draft Initial” schedule, I conclude that the parties understood that it was not an immutable schedule. I therefore find that the information withheld in Appendix 2F was not

<sup>28</sup> Plenary initial submission, at para. 15(a).

<sup>29</sup> Plenary’s Affidavit of construction contracting company Senior Manager (SM), at para. 3.

<sup>30</sup> Affidavit of PD PBC., at para. 21.

<sup>31</sup> Order 01-39, 2001 CanLII 21593 (BC IPC), at para. 46.

supplied information under s. 21(1)(b). For that reason, the Ministry is not authorized to refuse to disclose it to the applicant under s. 21(1).

[30] Schedule 15 - The Ministry says that Schedule 15 is Plenary's financial model for the OCC project which was provided in response to the RFP. It says the financial model is immutable in nature and therefore supplied.<sup>32</sup> The Ministry acknowledges that two provisions in the RFP guidelines give the Ministry the "right to negotiate changes to the agreement/proposal." However, it says that the Ministry would not, "practically speaking" try to negotiate the terms of a financial model.<sup>33</sup> Specifically, the Ministry says the following:

The Financial Model contains inputs relating to Third Party costs. Such information is not, by its very nature, subject to negotiation. For instance, it is not a statement of obligations or liabilities, like other terms of contract, that can be negotiated so that one party can obtain a more advantageous position. Rather, it consists of information that refers to the costs to the Third Party in completing the OCC project. A provincial ministry would not seek to "negotiate" the content of a third party's financial model.<sup>34</sup>

[31] Plenary also submits that Schedule 15 is its financial model. It says:

The Financial Model is a Microsoft Excel spreadsheet containing all financial information relevant to the OCC Project. It was created using a template authored by and proprietary to Plenary Group, which Plenary Group invested significant time and resources to develop. The template applies underlying mechanics to convert inputs (e.g. external and internal project costs, debt and equity inputs) into the informational outputs required to generate Plenary Group's bid on a given project (e.g. debt repayment profiles, economic returns, subcontractor payment profiles, debt and equity metrics). The information contained in the template for the Financial Model is regularly used by Plenary Group with respect to its public infrastructure projects and often does not change from bid to bid...<sup>35</sup>

[32] Plenary provided evidence, partially *in camera*, that describes each of the 26 Tabs in Schedule 15. Based on my review of the Plenary's evidence, Schedule 15 can be divided in to two groups. Tabs 18 through 25 make up the first group (Group 1). The second group is comprised of Tabs 1 through 17 and 26 (Group 2).

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<sup>32</sup> Ministry initial submission, at para. 4.30.

<sup>33</sup> Affidavit of PD PBC, at para. 18.

<sup>34</sup> Ministry initial submission, at para. 4.30.

<sup>35</sup> Affidavit of CFO, at para. 11.

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*Group 1*

[33] Plenary's submission regarding the content of Tabs 18 through 25 of Schedule 15 was provided *in camera* and as such I am not able to describe it. However, based on my review of the submission and the RFP guidelines, it is clear that most of the information on these Tabs was not supplied by Plenary.

[34] First, I note that some information was not supplied by Plenary because it was provided by the Ministry as part of the RFP process. For instance, five blank forms that the Ministry's RFP guidelines provided to proponents.<sup>36</sup> Plenary's submission confirms that these forms were prescribed by the RFP.<sup>37</sup> There is also some withheld information about the Province's "Affordability Model workbook" that proponents were required to use and include in their financial model.<sup>38</sup> The RFP guidelines included instructions for where to find the workbook and how it was to be populated and run.<sup>39</sup> Based on the evidence provided, it is my view that the five blank forms and the workbook were not supplied by Plenary because the Ministry gave them to proponents.

[35] However, this is not the end of the analysis because information has been added to the forms and the workbook. For the reasons that follow, I find that none of the information in Group 1 was supplied pursuant to s. 21(1)(b).

[36] In Order F15-03 the adjudicator considered information a third party added to a template the public body provided to the third party during a procurement process. The information in dispute was attached to the parties' contract. The adjudicator ultimately concluded that some of the information added to the template was supplied under s. 21(1)(b) and some was not. He held that pricing information was negotiated rather than supplied because the parties agreed to it in the contract. However, he found that expenses and operating assumptions, which were based on contracts between the third party and other third parties, were immutable, in that they were fixed having been set out in third party contracts.<sup>40</sup>

[37] Applying the same analysis here, I am not persuaded that the information that Plenary added to the five blank forms and the Affordability Model workbook was supplied by Plenary.

[38] Plenary's submission in relation to this information is only that the "disclosure of the information in question would have the same effect as the

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<sup>36</sup> Affidavit of PD PBC, Exhibit B, at Appendix B, Forms A1-A5 at pp. 41-45.

<sup>37</sup> Affidavit of CFO, at para. 31.

<sup>38</sup> Affidavit of CFO, at para. 3 and Exhibit C, at pp. 12-13; Affidavit of PD PBC, at Exhibit B, Appendix B, p. 40.

<sup>39</sup> Affidavit of PD PBC, at Exhibit B, p. 11, para. 4.2.

<sup>40</sup> Order F15-03, 2015 BCIPC 3 (CanLII), at paras. 34-35.

disclosure of the information described at paragraphs 17, 18, and 19 of its affidavit.”<sup>41</sup> I have reviewed those sections of Plenary’s affidavit and am unable to see the connections it asserts exist or understand why those connections, if established, would prove it supplied all of the information on Tabs 18 through 25 to the Ministry.

[39] Additionally, it is clear to me that some of the information in Group 1 originated with the Province. For example, the evidence demonstrates that the Province set the assumptions with percentage rates and figures in one Tab.<sup>42</sup> Furthermore, some of the information in the forms was clearly negotiated, such as the commencement date for the project and payment schedules.

[40] I also note that there are certain costs related to Plenary’s expenses (i.e., regulatory, staff, legal) that, in some contexts, have been found immutable in past orders. However, nothing before me suggests that there is a fixed nature to the amounts appearing in the forms in these circumstances. As noted by the adjudicator in Order F14-01, third party costs appearing in a contract may be immutable if they disclosed costs previously incurred or pre-existing obligations to purchase those items at specific prices.<sup>43</sup> Where the information is an estimated cost or if there is no evidence that a third party is obliged to incur that cost, it is not immutable.<sup>44</sup> I make the same finding here. There is no evidence to suggest that the costs listed are anything other than estimates and as such, I find they are not supplied.<sup>45</sup>

[41] Even if I were to find that some of the information in Group 1 was supplied in confidence, I would have no difficulty finding that disclosure of a large portion of that information could not reasonably be expected to cause the type of harm listed in s. 21(1)(c). This is because at the beginning of this inquiry, the Ministry and Plenary agreed to disclose Schedule 8 and Appendices 8A through C to the applicant, and I can see that those records contain some of the same information in dispute in Group 1.<sup>46</sup> Neither the Ministry nor the third party has explained why it continues to assert that the disclosure of this information would cause Plenary the type of harm set out in 21(1)(c) when the information has already been disclosed.

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<sup>41</sup> Affidavit of CFO, at para. 31. I have not described Plenary’s evidence at paras. 17-19 further on this point because it was largely provided *in camera*.

<sup>42</sup> Affidavit of CFO, Exhibit C, at p. 13 says that the Province set the “affordability ceiling” at \$196.5 million. Additionally, page 22 of Exhibit C sets out the calculation for the “discount rate”, which is another figure that appears in the worksheet in question.

<sup>43</sup> Order F14-01, 2014 BCIPC 1 (CanLII), at para. 26.

<sup>44</sup> Order F14-01, 2014 BCIPC 1 (CanLII), at para. 26.

<sup>45</sup> I note also that the amounts have been “rounded” to the nearest \$1,000. In the absence of any further evidence about the nature of the cost, it is my view that this suggests a lack of finality or permanency to the amount.

<sup>46</sup> Plenary’s Response to the Applicant, at para. 13. Plenary states that it withdrew its objection to the release of the Appendix 8C.

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*Group 2*

[42] Group 2 includes all of Tabs 1 through 17 and 26 of Schedule 15. I have carefully reviewed the information on these Tabs in conjunction with Plenary's evidence and I am satisfied that some of the information in Group 2 is immutable information that was not susceptible to negotiation with the Ministry, despite its inclusion in the Contract.

[43] I cannot say exactly what information is in each of the Tabs or describe Plenary's *in camera* evidence. However, I can say that Schedule 15 is a complex Excel workbook, and its Tabs each contain many columns and rows with varied descriptive headings where one can input data both numerical and written. Clearly some cells in the Tabs contain mathematical formulas. Other Tabs include instructions for how to use the workbook, explanations about corrections or updates made to the information in the workbook, operating assumptions, a disclaimer and declaration of ownership of the information in the workbook and accounting policies.

[44] As noted earlier, the Ministry and Plenary refer to Schedule 15 throughout their submissions and evidence as Plenary's financial model. Based on my review of all of the relevant information available to me, I understand them to be saying that Schedule 15 is both the template for Plenary's financial model (which it uses in other bids) as well as its actual financial model for the OCC project because it is populated with data pertaining to the OCC project.<sup>47</sup>

[45] Having carefully reviewed Scheduled 15, I am satisfied that much of the information in the Tabs 1 to 17 and 26 is an Excel template created by Plenary to be used to generate and convey its financial model for the OCC project to the Ministry. I base this finding, in part, on the RFP guidelines, which stipulate that the proponents should provide a financial model in Microsoft excel format.<sup>48</sup> I note that the RFP guidelines indicate the categories of inputs and outputs that should be included and what elements should be addressed (i.e. capital, time-based assumptions, taxation, financing, payment mechanisms).<sup>49</sup> However, it is clear to me that it was up to the proponent to determine how to best generate and present the information requested by the Ministry.

[46] Plenary says that it uses Schedule 15, or at least elements of it, to create other financial models to bid on other public infrastructure projects.<sup>50</sup> It has provided a list, *in camera*, of a number of projects which it intends to bid on using

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<sup>47</sup> See for example: Plenary initial submission, at para. 27 and the Affidavit of CFO, at paras. 11 and 33; Also Ministry initial submission, at paras. 1.03, 4.30 and the Affidavit of VP, at paras. 3-5.

<sup>48</sup> Affidavit of PD PBC, Exhibit B, at p. 148-157 (Appendix B, para. 4.7).

<sup>49</sup> Affidavit of PD PBC, Exhibit B, at p. 148-157 (Appendix B, para. 4.7.2).

<sup>50</sup> Affidavit of CFO, para. 11.

the template information in Schedule 15 in the future.<sup>51</sup> This evidence leads me to the conclusion that Schedule 15 is a tool developed by Plenary to use in its project bids. As such, I agree with the Ministry and Plenary that some parts of Schedule 15, although included in the Contract, would not have been susceptible to negotiation because they are part of the template Plenary generally uses to create financial models. Therefore, I find that those parts of Schedule 15 are supplied information for the purposes of s. 21(1)(b).

[47] While I am satisfied that Plenary supplied the template information in Schedule 15 to the Ministry, there is additional data and information that is not a part of the template (i.e., the template has been filled out). It is not clear to me that all of the additional data and information that has been input into the template is immutable. I have considered the parties' submissions and do not find them to be of assistance with regard to identifying whether this information was supplied.<sup>52</sup>

[48] The RFP guidelines offer some insight into the types of information that would be input into the template, including schedules for payments made by the Province as well as the total amount to be paid by the Province.<sup>53</sup> In my view, those amounts would likely have been susceptible to negotiation and therefore, not supplied. However, there is also evidence that at least some of the added data and information may have been immutable, being that it was the product of Plenary's negotiations with other third parties.

[49] In any event, it is not necessary at this point to consider the parties' submissions regarding the information which was added to the template parts of Schedule 15. This is because it is obvious to me that if the template information is redacted, the balance of the information becomes meaningless. The template information (including the headings, subheadings and other explanatory information) is necessary to understand the rest of the information which has been added. Without the context of the template information, the applicant will simply be left with figures and empty columns.

[50] Section 4(2) of FIPPA says that

The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

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<sup>51</sup> Affidavit of CFO, para. 34.

<sup>52</sup> In particular, I note that Plenary's evidence largely focuses on whether the added information was subject to negotiation with the Ministry. As noted above, establishing that information in a contract was not subject to negotiation is not sufficient to prove that it was supplied.

<sup>53</sup> Affidavit of PD PBC, Exhibit B, at p. 148-157 (Appendix B, para. 4.7).

[51] As noted by former Commissioner Loukidelis in Order 03-16, there will be cases where, after protected information is removed, the remainder of the record conveys nothing intelligible. Where this is the case, the former Commissioner held that it is not reasonable to sever and disclose information under s. 4(2).<sup>54</sup> This would be the situation here, if I ultimately find that the Ministry is required to refuse to disclose the template information in Tabs 1 through 17 and 26.

[52] Therefore, for practical reasons, I am going to focus next on whether the other parts of the s. 21(1) test applies to the template information in Tabs 1 through 17 and 26. Only if I decide that s. 21(1) does not apply to that template information, will I go on to consider whether s. 21(1) applies to the balance of the information in Tabs 1 through 17 and 26.

### Supplied in Confidence

[53] The next step in the s. 21(1) analysis is to determine whether the template information in Tabs 1 through 17 and 26, which I have concluded was supplied, was supplied “implicitly or explicitly, in confidence”. To establish confidentiality of supply, it must be shown the information was supplied “under an objectively reasonable expectation of confidentiality, by the supplier of the information, at the time the information was provided.”<sup>55</sup> Evidence of the supplier’s subjective intentions with respect to confidentiality alone is insufficient.<sup>56</sup>

[54] The Ministry submits that it received the information in dispute implicitly and explicitly in confidence and that Plenary expected the information would be kept confidential.<sup>57</sup> It also referred me to sections of the RFP guidelines relating to confidentiality as well as the disclaimer on the cover page of Schedule 15, which specified that the financial model was the property of the third party and not to be re-produced or used for purposes other than the financial analysis of the OCC project.<sup>58</sup>

[55] Plenary says that the information in dispute was “provided to the Ministry on the understanding that it would be kept confidential.”<sup>59</sup>

[56] The applicant says that Plenary was aware it was bidding on a contract offered by a public body and therefore should have expected that the contract would be subject to FIPPA and open to scrutiny by the members of the public.<sup>60</sup>

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<sup>54</sup> Order 03-16, 2003 CanLII 49186 (BC IPC) at para. 54.

<sup>55</sup> Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 23.

<sup>56</sup> Order F13-20, 2013 BCIPC 27 (CanLII) at para. 22.

<sup>57</sup> Ministry initial submission, at paras. 4.21 and 4.16.

<sup>58</sup> Ministry initial submission, at paras. 4.17-4.19.

<sup>59</sup> Affidavit of CFO, at para. 35.

<sup>60</sup> Applicant submission, at paras. 11-13.

[57] Plenary responded to the applicant's submission, stating that s. 21(1) of FIPPA protects against the disclosure of some information and therefore the fact that FIPPA applies to the Contract does not necessarily mean that the information in dispute would be disclosed.<sup>61</sup> It further said that it had an expectation of confidentiality due to the "numerous confidentiality clauses in the RFP and the Contract (including on the cover page of the Financial Model)."<sup>62</sup>

[58] I do not accept the applicant's argument that Plenary could have had no expectation of confidentiality because it was bidding on a project with a public body subject to FIPPA. FIPPA has a number of exceptions to disclosure that, in specific contexts, protect information provided to a public body in confidence. Previous orders have determined that s. 21(1) can apply to information in a contract and it must not be disclosed.<sup>63</sup> As such, it is not automatically the case that Plenary could have had no reasonable expectation of confidentiality.

[59] I have reviewed the confidentiality clauses in the RFP and the disclaimer on Tab 1 of Schedule 15 and agree that this evidence supports the Ministry and Plenary's submissions that the information in dispute was provided to the Ministry on the express understanding that it would be kept confidential.

[60] I also note that the Ministry provided evidence that the RFP evaluators for the OCC project were advised that "one of the guiding principles in the RFP evaluation process was confidentiality," that they were required to sign a confidentiality agreement before viewing the proponents' materials and that Schedule 15 is stored in a server with controlled access and remains confidential.<sup>64</sup>

[61] I am satisfied, on the basis of the evidence outlined above, that there was a mutuality of understanding between the Ministry and Plenary that the information in Schedule 15 was supplied by Plenary to the Ministry in confidence. As such, I find that the template information on Tabs 1 through 17 and 26, was supplied in confidence pursuant to s. 21(1)(b) of FIPPA.

[62] I will now consider whether disclosing the template information in Schedule 15 could reasonably be expected to result in harm to a third party.

***Harm to third party interests – s. 21(1)(c)***

[63] In order to satisfy s. 21(1)(c), there must be a reasonable expectation that disclosing the information in dispute could cause the type of harm listed in s. 21(1)(c). The Ministry does not specify what specific harm would occur if the

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<sup>61</sup> Plenary Response to Applicant, at para. 10.

<sup>62</sup> Plenary Response to Applicant, at para. 11.

<sup>63</sup> For example, see: Order F15-03, 2015 BCIPC 3 (CanLII).

<sup>64</sup> Affidavit of PD PBC, at paras. 6-14.

information in dispute was revealed. It says that it “accepts that the harm requirement in s. 21 is met” and refers me to affidavit evidence it provided as well as Plenary’s submissions and evidence.<sup>65</sup>

[64] Plenary says that 21(1)(c)(i) and (iii) apply.<sup>66</sup> Those sections specify the following:

21(1) The head of a public body must refuse to disclose to an applicant information ...

(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, ...  
or

(iii) result in undue financial loss or gain to any person or organization, ...

[65] The standard of proof for s. 21(1) is whether disclosure of the information at issue could reasonably be expected to result in the specified harm. Meeting this standard requires demonstrating “that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but it need not be proved on the balance of probabilities that disclosure will in fact result in such harm.”<sup>67</sup> The Supreme Court of Canada said the following about this standard and the evidence required to meet it:

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...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>68</sup>

[66] Plenary says that the disclosure of the information in dispute would cause significant harm to its competitive and negotiating position and result in undue financial loss to it, and undue gain to its competitors. It says that its financial

<sup>65</sup> Affidavit of PC PBC, at para. 4.31.

<sup>66</sup> Plenary initial submission, at para. 12(e).

<sup>67</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII) at para. 206.

<sup>68</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* 2014 SCC 31 (CanLII) at para. 54 quoting *Merck Frosst Canada v. Canada (Health)*, 2012 SCC 3 (CanLII).

model information, including the template-type information, is a “fundamental tool to Plenary Group’s ongoing business” that it uses for various bids.<sup>69</sup> Plenary submits that the release of the information in dispute would inform its competitors of the underlying economics of all Plenary Group bids and, as such, would significantly harm its competitive position on future bids.<sup>70</sup>

[67] Specifically, it says that the financial model information contains “detailed disaggregated financial information such as financial inputs (debt and equity inputs) and other bid economics related to construction and operations” as well as “cash flow timings” based on financial structuring developed by Plenary to increase the competitiveness of its bids.<sup>71</sup>

[68] Plenary says that the public infrastructure project development and management industry is highly competitive and that typically, procurement processes involve between three and eight teams vying for a “design-build-finance-maintain” contract.<sup>72</sup> It says the procurement processes and commercial documents used by these entities are based on templates that do not vary significantly between projects, meaning an innovated financial or commercial structure developed for one project can be applied to future projects. Plenary says that disclosure of its financial model information would provide its competitors with insight into its strategies that could be used on their future project and significantly disadvantage Plenary in respect of its chances to win future bids, which would result in financial loss.<sup>73</sup>

[69] Plenary also says that the disclosure of the financial model information would inform its competitors of the financial arrangements, budgeting considerations, and bidding strategies it used to bid on the OCC contract, much of which does not change between bids.<sup>74</sup> It says that as a result, its competitors would be able to determine their relative competitiveness on these items and adjust their strategies to be more competitive on future bids, eliminating any competitive advantage Plenary gained through the development of its strategies. Plenary also provided a list, *in camera*, of a number of projects it anticipated it would bid on using some of the same strategies from Schedule 15.<sup>75</sup>

[70] The Ministry provided an affidavit which it says refers to the type of harms that could result if financial model information was disclosed.<sup>76</sup> The affidavit is from the Senior Vice President of Ernst & Young Orenda Corporate Finance Inc.

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<sup>69</sup> Plenary initial submission, at para. 26-27. Plenary referred to the template-type information as the “architecture” (i.e., the formulas, layout and structure of inputs and outputs) of the model.

<sup>70</sup> Plenary initial submission, at para. 26.

<sup>71</sup> Plenary initial submission at para. 26(a)-(b).

<sup>72</sup> Affidavit of CFO, at para. 33.

<sup>73</sup> Affidavit of CFO, at para. 33.

<sup>74</sup> Affidavit of CFO, at paras. 34 and 12(e).

<sup>75</sup> Affidavit of CFO, at para. 34.

<sup>76</sup> Ministry initial submission, at para. 4.31.

(VP), who is the head of the firm's public private partnership work in Canada and has led multiple projects similar to the OCC project and advised public and private entities on major infrastructure projects in Canada and abroad.<sup>77</sup> The VP said that "from a financial/commercial perspective, the financial model is the most confidential part of the response to the project bid because it summarizes all the key commercial elements of the proposal."<sup>78</sup> He provided an overview of the key elements of a financial model and specified that one of those is a proponent's strategy. He said that the disclosure of many of the elements in a financial model would

reveal highly confidential business information about the strategy of how investors approach the bidding and operation of their projects (such as by revealing what kind of sensitivity analysis their lenders require, the approach to structure the finance, how investors build returns and success fees into their bids and information about their general business costs and expenses such as audit fees, legal fees and other general oversight expenses incurred by investors).<sup>79</sup>

[71] The VP said that it takes a significant amount of expertise, time and resources to develop a financial model. He further deposed that it requires negotiation with lenders to secure the best funding and expertise to develop the most cost effective and profitable structure for the project.<sup>80</sup> With respect to the harm that would be caused by disclosure, the VP said the following:

The disclosure of a financial model would give proprietary information to potential competitors who could then use the information to develop their own financial models and financial structures without investing the significant time and money, and without the expertise, which the proponent had to expend and use in the development of its model. For this reason, a financial model is a highly competitively valuable source of information. Disclosure of the detailed terms of the financial structure would also enable competitors to demand the same terms from government and to use the information to the proponent's detriment in future bidding situations by undercutting them or refining their model further.<sup>81</sup>

[72] I accept the VP's evidence that if disclosed, a competitor lacking the same level of expertise and experience may be able to use the information to improve its own financial model. It is obvious to me from my review of Schedule 15 that the financial model information would have taken a significant amount of time, expertise and experience to develop. I also note that while the Ministry and Plenary refer to the entire financial model, it is my view that the template

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<sup>77</sup> Affidavit of VP, at para. 1-2.

<sup>78</sup> Affidavit of VP, at para. 3.

<sup>79</sup> Affidavit of VP, at para. 4.

<sup>80</sup> Affidavit of VP, at para. 5.

<sup>81</sup> Affidavit of VP, at para. 5.

information in Tabs 1 through 17 and 26, even if not completed (i.e., filled out with the additional information specific to the OCC project) contains information that could be used by competitors to improve their own financial models and compete against Plenary.<sup>82</sup>

[73] I further accept Plenary's evidence that it plans to use the template information in bids in the future (details of which it disclosed *in camera*). I find that if the template information is disclosed, the type of harm listed in 21(1)(c)(i) and (iii) could reasonably be expected to occur. I therefore find that ss. 21(1)(c)(i) and (iii) apply to the template information I determined was supplied in confidence in Tabs 1 through 17 and 26 of Schedule 15. Therefore, the Ministry must refuse to disclose it to the applicant under s. 21(1).

### **Summary - s. 21(1)**

[74] I have determined that ss. 21(1)(a)(ii) applies to all of the information in dispute in both Appendix 2F and Schedule 15. Section 21(1)(b) applies only to the template information located on Tabs 1 through 17 and 26 of Schedule 15. I find that ss. 21(1)(c)(i) and (iii) also apply to that information and therefore I order that it must not be disclosed.

[75] As discussed above, the template information on Tabs 1 through 17 and 26 cannot reasonably be severed because the remainder of those Tabs would be unintelligible.<sup>83</sup> I therefore found that the Ministry must refuse to disclose all of the information on those Tabs.

[76] As I concluded that s. 21(1) did not apply to Tabs 18 through 25 of Schedule 15, or to Appendix 2F, that information must be disclosed to the applicant.

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<sup>82</sup> Specifically, the template information would reveal Plenary's strategy for the project and allow others to see how it generates and conveys information related to its bids and give them access to any permanent values it uses in calculations from bid to bid.

<sup>83</sup> See paragraphs 49-52.

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## CONCLUSION

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

1. The Ministry is required to refuse to disclose to the applicant the information it withheld under s. 21(1) of FIPPA, subject to paragraph (2) below;
2. I require the Ministry to give the applicant access to Appendix 2F and all of the information on Tabs 18 through 25 of Schedule 15. The information must be provided by November 9, 2018 in a legible format and the Ministry must concurrently provide the OIPC Registrar of Inquiries with a copy of its cover letter and the records sent to the applicant.

September 27, 2018

### ORIGINAL SIGNED BY

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Meganne Cameron, Adjudicator

OIPC File No.: F15-60205