OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order 03-02

UNIVERSITY OF BRITISH COLUMBIA

David Loukidelis, Information and Privacy Commissioner
January 28, 2003

Quicklaw Cite: [2003] B.C.I.P.C.D. No. 2
Document URL: http://www.oipc.bc.ca/orders/Order03-02.pdf
Office URL: http://www.oipc.bc.ca
ISSN 1198-6182

Summary: The applicant, a journalist, asked UBC for access to records respecting on-campus supply of goods or services by third-party businesses. UBC decided that ss. 14 and 17(1) authorize, and that s. 21(1) requires, UBC to withhold a 1998 draft agreement with two banks. No evidence was provided regarding s. 21(1), nor is there a basis on the face of the disputed record, or otherwise, to conclude that s. 21(1) applies. Further, neither s. 14 nor s. 17(1) authorizes UBC to refuse disclosure. Section 14 does apply, however, to notes made by UBC's in-house lawyer on two pages of the draft agreement.

Key Words: financial or economic interests – trade secret – third party commercial or financial information – monetary value – supplied in confidence – competitive position – negotiating position – significant harm – interfere significantly with – undue financial loss or gain – disclosure clearly in the public interest – solicitor client privilege – financial or economic interests – information about negotiations – reasonable expectation of harm.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 2(1), 14, 17(1), 21(1)(a), (b) and (c), 25(1)(b).

Authorities Considered: British Columbia: Order No. 8-1994, [1994] B.C.I.P.C.D. No. 11; Order No. 9-1994, [1994] B.C.I.P.C.D. No. 12; Order No. 11-1994, [1994] B.C.I.P.C.D. No. 14; Order No. 19-1994, [1994] B.C.I.P.C.D. No. 22; Order No. 21-1994, [1994] B.C.I.P.C.D. No. 24; Order No. 22-1994, [1994] B.C.I.P.C.D. No. 25; Order 26-1994, [1994] B.C.I.P.C.D. No. 29; Order No. 45-1995, [1995] B.C.I.P.C.D. No. 18; Order No. 126-1996, [1996] B.C.I.P.C.D. No. 53; Order No. 210-1998, [1998] B.C.I.P.C.D. No. 3; Order No. 220-1998, [1998] B.C.I.P.C.D. No. 13; Order No. 246-1998, [1998] B.C.I.P.C.D. No. 40; Order 262-1998, [1998] B.C.I.P.C.D. No. 57; Order No. 315-1999, [1999] B.C.I.P.C.D. No. 28; Order No. 320-1999, [1999] B.C.I.P.C.D. No. 33; Order No. 321-1999, [1999] B.C.I.P.C.D. No. 34; Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order 00-09, [2000] B.C.I.P.C.D. No. 9; Order 00-16. [2000]

B.C.I.P.C.D. No. 19; Order 00-22, [2000] B.C.I.P.C.D. No. 25; Order 00-47, [2000] B.C.I.P.C.D. No. 51; Order 00-47, [2000] B.C.I.P.C.D. No. 51; Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order 01-39, [2001] B.C.I.P.C.D. No. 40; Order 02-04, [2002] B.C.I.P.C.D. No. 4; Order 02-30, [2002] B.C.I.P.C.D. No. 30; Order 02-38. [2002] B.C.I.P.C.D. No. 38; Order 02-50, [2002] B.C.I.P.C.D. No. 51. **Ontario:** Order 36, [1988] O.I.P.C. No. 36; Order 120, [1989] O.I.P.C. No. 84; Order P-263, [1992] O.I.P.C.D. No. 4; Order P-385, [1992] O.I.P.C.D. No. 192; Order P-609, [1994] O.I.P.C.D. No. 7; Order P-1545, [1998] O.I.P.C. No. 69; Order P-1604, [1998] O.I.P.C. No. 189; Order P-1611, [1998] O.I.P.C. No. 200; Order PO-1698, [1999] O.I.P.C. No. 102; Order PO-1973, [2001] O.I.P.C. No. 245; Order PO-2018, [2002] O.I.P.C. No. 83; Order MO-1553, [2002] O.I.P.C. No. 99; Order PO-2084, [2002] O.I.P.C. No. 202. **Alberta:** Order 96-013, [1996] A.I.P.C.D. No. 13; Order 2000-005, [2000] A.I.P.C.D. No. 23; Order 2001-019, [2001] A.I.P.C. No. 35; Order F2002-002, [2002] A.C.I.P.C.D. No. 22; Order F2002-011, [2002] B.C.I.P.C.D. No. 43.

Cases Considered: *Tromp* v. *University of British Columbia et al.*, [2000] B.C.J. No. 761; *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) et al.*, [2002] B.C.J. No. 848, 2002 BCSC 603; *Canada Packers Inc.* v. *Canada (Minister of Agriculture)* (1989), 53 D.L.R. (4th) 246, [1988] F.C.J. No. 615; *Air Atonabee Ltd.* v. *Canada (Minister of Transport)*, [1999] S.C.J. No. 453 (T.D.); *Hutton* v. *Canada (Minister of Natural Resources)*, [1997] F.C.J. No. 1468; *Société Gamma Inc.* v. *Canada (Department of Secretary of State)*, [1994] F.C.J. No. 589; *Promaxis Systems Inc.* v. *Canada (Minister of Public Works and Government Services)*, [2002] F.C.J. No. 120; *Halifax Development Ltd.* v. *Canada (Minister of Public Works and Government Services)*, [1994] F.C.J. No. 2035; *Perez Bramalea Ltd.* v. *National Capital Commission*, [1995] F.C.J. No. 63; *Bitove Corp.* v. *Canada (Minister of Transport)*, [1996] F.C.J. No. 1198; *St. Joseph Corp.* v. *Canada (Minister of Public Works and Government Services)*, [2002] F.C.J. No. 361; *Canada Post Corp.* v. *National Capital Commission*, [2002] F.C.J. No. 982; *Parker* v. *John Abbott College* (1985), 1 C.A.I. 192; *Société du vin internationale* v. *Régie des permis d'alcool du Québec et al.*, [1991] C.A.I. 299 (appeal denied, [1992] C.A.I. 351); *Hydro-Pontiac Inc.* v. *St.-Ferréol-les-Neiges (Municipalité de)*, [1997] C.A.I. 53; *Norstan Canada Inc.* v. *Université de Sherbrooke et Bell Canada*, [1997] C.A.I. 226; *Syndicat des enseignants du collège Dawson* v. *Collège Dawson et al.*, Dossier No. 00 08 69, July 13, 2001; *Regroupement des étudiantes et étudiants en sociologie de l'Université de Montréal* v. *Université de Montréal et al.*, Dossier No. 01 01 08, December 4, 2002; *Sous-ministre du Revenu* v. *C.A.I.*, [1988] C.A.I. 195, *John de Kuyper & fils (Canada) Ltée. et al.* v. *Société de vin internationale Ltée.*, [1992] C.A.I. 351; *Kattenburg* v. *Manitoba (Department of Industry, Trade & Tourism)*, [1999] M.J. No. 498; *Atlantic Highways Corp. (Re)*, [1997] N.S.J. No. 238; *Canadian Broadcasting Corp.* v. *Northwest Territories (Commissioner)*, [1999] N.W.T.J. No. 117; *Canadian Pacific Ltd.* v. *Canada (Competition Act, Director of Investigation and Research)*, [1995] O.J. No. 4148 (O.C.J.); *Canadian Pacific Ltd.* v. *Canada (Competition Act, Director of Investigation and Research)*, [1995] O.J. No. 1867 (O.C.J.); *Southern Railway of British Columbia* v. *Canada (Deputy Minister of National Revenue)*, [1991] B.C.J. No. 49 (S.C.); *Nathawad* v. *Canada (Minister of National Revenue)*, [1998] B.C.J. No. 3283 (S.C.); *British Columbia (Securities Commission)* v. *B.D.S.*, [2002] B.C.J. No. 955 (S.C.), 2002 BCSC 664; *Gendis Inc.* v. *Richardson Oil and Gas Ltd.*, [1999] 12 W.W.R. 629, [1999] M.J. No. 310 (Man. Q.B.); *Fraser Milner Casgrain LLP* v. *Canada (Minister of National Revenue)*, (2002), 6 B.C.L.R. (4th) 135, [2002] B.C.J. No. 2146 (S.C.); *College of Physicians and Surgeons of British Columbia* v. *British Columbia (Information & Privacy Commissioner)*, [2002] B.C.J. No. 2779, 2002 BCCA 665 (C.A.).

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1.0 INTRODUCTION

[1] Like Order 03-03, [2003] B.C.I.P.C.D. No. 3, and Order 03-04, [2003] B.C.I.P.C.D. No. 4, this decision stems from a request to the University of British Columbia ("UBC"), under the *Freedom of Information and Protection of Privacy Act* ("Act"), for access to what the applicant, a journalist, described as "marketing contracts" and associated records respecting the exclusive supply by businesses of services and goods to "UBC students, faculty and staff".

[2] An inquiry was held, in writing, under Part 5 of the Act. Because different third parties and records are involved, I have issued three separate orders. This order sets out procedural history and legal principles relevant to all records and parties involved. It also addresses the issues involved in the applicant's request for review of UBC's decision to

withhold draft exclusive marketing agreements with the Royal Bank of Canada and HSBC Bank of Canada (formerly the Hongkong Bank of Canada). This order also addresses the applicant's contention that UBC did not conduct an adequate search for one requested record. Order 03-03 deals with the request for review by Telus Corporation ("Telus") and Order 03-04 deals with the request for review by Spectrum Marketing Corporation ("Spectrum"). For clarity, although I held a single inquiry, I have, in this and each of the orders just mentioned, independently considered each request for review on its merits.

General background to the request and UBC's responses

[3] Turning to the history of this matter, here are the relevant parts of the applicant's December 22, 2000 access request:

> 1. All the papers that Dennis Pavlich brought to our meetings on Dec. 1 and Dec. 19, 2000. (Except for any papers that have already been given to me.)
> 2. All contracts with Spectrum Marketing and its president Dale Boniface, and the amounts UBC paid to it and him.
> 3. All draft or final marketing contracts between UBC and banks (eg. Bank of Montreal, Bank of Hong Kong) to exclusively supply services to UBC students, faculty and staff (including any arrangements to promote bank products/services). If not a "contract," then the amount of money due to be paid (even draft or proposed figures.) The potential deal was apparently cancelled.
> 4. The final exclusive marketing contract between UBC and an airline to supply services. eg. Canadian Airlines.
> 5. Any exclusive marketing contracts between UBC and a phone company. eg. Telus.
> 6. Any contracts between UBC and a bank to share lists of UBC graduates names, for the purpose of marketings. [*sic*] eg. Between UBC external affairs/Alumni Assoc. and the Bank of Montreal. (The arrangements that were cited in the B.C. Privacy Commissioner's Oct. 2000 report.)

[4] In an e-mail dated December 23, 2000, the applicant added a seventh item to this request. He asked for a copy of a "contract (including payments) between Manufacturers Life and the UBC Association [*sic*] to provide promotional material to UBC graduates on insurance products".

[5] In its March 5, 2001 response, UBC said that, respecting items 3, 4 and 5 of the request, "all the contracts contain confidentiality clauses and are being withheld under sections 14, 17, and 21 of the Act." UBC did not identify what contracts were being withheld under these sections. Its response also said there were no records to disclose in relation to three items of the request. Respecting item 1, UBC said Dennis Pavlich "did not keep a record of which papers he did or did not bring" to the meetings mentioned in the request. It said that item 2 covered the same information the applicant had sought in

1997 and that there "have been no further contracts since that time." As for item 6, UBC said there "is no contract between UBC and a bank to share lists of UBC graduate names." Last, UBC said that, regarding item 7, any contracts between the UBC Alumni Association ("Alumni Association") and "outside companies" were not in UBC's custody or control, such that UBC was "unable to provide you with any records."

[6] In a March 16, 2001 letter, the applicant requested a review, under Part 5 of the Act, of UBC's decision to refuse access. In his request for review, the applicant said "Apply sec. 25 if need be."

[7] In a supplementary response dated April 25, 2001, UBC told the applicant that it had, after all, found 48 pages of records that responded to item 1 of the applicant's request. It severed information from four pages of those records under s. 21 of the Act and severed third-party personal information under s. 22 on some 15 pages of records. (The Portfolio Officer's Fact Report indicates that, as a result of UBC's disclosure of these severed records, the applicant decided not to pursue UBC's response in that respect.)

[8] UBC added that it had reviewed its original decision regarding item 5 of the request and had decided to conduct a third-party consultation respecting the records covered by item 5. It did not identify which records were affected by this decision. It told the applicant that it would notify him of its decision regarding the affected records during the week of May 21, 2001. It added that it had estimated a fee of $162 for providing access to records that responded to item 1 of the request, but said it had decided to waive this fee. (Further communications about the fee followed, including UBC's June 25, 2001 confirmation that it had correctly estimated the fee and was, as it had earlier indicated, waiving the fee. There is, accordingly, no fee-related issue before me here.)

[9] UBC responded again on May 22, 2001. It maintained its earlier position on disclosure of records falling under items 2 and 5 of the request and refused, on the basis of ss. 14, 17 and 21 of the Act, to disclose information. It indicated that it had received copies of records that responded to item 6 and that it was conducting a third-party consultation respecting those records. On June 14, 2001, UBC provided a further response regarding the item 6 records. It said that, having conducted the third-party consultation, it was refusing to provide access to these records under ss. 17 and 21 of the Act.

[10] On October 4, 2001 UBC wrote to the applicant and said that it had reviewed its decision regarding items 2, 4, 5 and 6 of the applicant's request and said that it was "now willing to provide access to these records."

[11] As regards item 4 of the request, on November 7, 2001, UBC disclosed to the applicant an agreement between UBC and Canadian Airlines, which had terminated on April 30, 2000. (As noted above, Telus and Spectrum have each requested reviews of UBC's decision to disclose records in response to items 2 and 5 and Order 03-03 and Order 03-04 deal with those requests separately.)

[12] As regards item 3 of the applicant's access request, in its October 4, 2001 letter to the applicant, UBC stood by its original decision to deny access to draft or final contracts between UBC and the two banks under ss. 14, 17 and 21 of the Act. This order deals with that decision to deny access, as well as the adequacy of UBC's search for a record responsive to item 7.

2.0 ISSUES

[13] The issues addressed in this order are as follows:

1. Did UBC conduct an adequate search under s. 6(1) for an agreement between the UBC Alumni Association and an insurance company?

2. Is UBC authorized by s. 14 or s. 17(1) to refuse access to a draft contract with the two banks?

3. Is UBC required by s. 21 to refuse access to a draft contract with the two banks?

4. Does s. 25(1) of the Act require UBC to disclose the draft contract with the two banks?

[14] Section 57(1) of the Act provides that, where the public body has refused access, it is up to the public body "to prove that the applicant has no right of access to the record or part."

[15] Although s. 57 does not say who bears the burden of establishing that the public body has met its s. 6(1) duty by conducting an adequate search for records, previous decisions have established that the public body has that burden.

[16] Section 57 is also silent on the question of who, if anyone, bears the burden of establishing that s. 25(1) requires a public body to disclose information. In Order 02-38, [2002] B.C.I.P.C.D. No. 38, I addressed the burden of proof under s. 25(1) at paras. 32-39. As I indicated there, s. 25(1) either applies to information or it does not and it is ultimately up to the commissioner to decide that issue. In an inquiry such as this, it will be in an applicant's interest, as a practical matter but not as a legal duty, to provide whatever evidence she or he can to support the application of s. 25(1). Similarly, although a public body bears no burden of proof under s. 25(1), it has a practical incentive to assist with any relevant evidence to the extent it can. I have applied these considerations in this case.

3.0 DISCUSSION

[17] **3.1 UBC's Search for Records** – As is indicated by the Notice of Written Inquiry that this Office issued, the applicant contends that UBC failed to comply with its s. 6(1) duty to assist him by conducting an adequate search for an agreement between the

UBC Alumni Association and an insurance company. The applicant alleges UBC has a copy of that agreement in its custody and under its control.

[18] Section 6(1) of the Act requires UBC to make every reasonable effort to assist the applicant by responding openly, accurately, completely and without delay. It is well established that, in searching for records, UBC must undertake such efforts as a fair and rational person would consider adequate. Its efforts must be thorough and comprehensive, but a standard of perfection is not imposed. See, for example, Order 02-52, [2002] B.C.I.P.C.D. No. 53.

[19] UBC says it is aware of an agreement between the UBC Alumni Association and Manufacturers Life Insurance Company to "provide UBC Alumni with promotional material concerning insurance products" (para. 11, initial submission). UBC says it does not have a copy of that record in its possession. It says it is not a party to the agreement and that is has no control over it. UBC says the UBC Alumni Association is a separate legal entity over which it has no control. It argues that, although the Notice of Written Inquiry characterizes the issue as a s. 6(1) reasonable search matter, the proper question is whether UBC has custody or control of the agreement between the UBC Alumni Association and the insurer. Applying the criteria articulated in Order No. 11-1994, [1994] B.C.I.P.C.D. No. 14, and Ontario Order 120, [1989] O.I.P.C. No. 84, UBC argues it is clear that it does not have custody or control of that record.

[20] Applying the control criteria set out in Order 02-30, [2002] B.C.I.P.C.D. No. 30, I have decided that UBC does not have custody or control of the agreement between the UBC Alumni Association and the Manufacturers Life Insurance Company. In reaching this conclusion I have considered the affidavit sworn by Christina Ulveteg, UBC's Freedom of Information Co-ordinator. I am further satisfied, again based on Christina Ulveteg's affidavit, that UBC's search was adequate. She deposed that she searched files within those UBC offices that would be likely to have a copy of the agreement and could not find a copy. It is obvious UBC is not disputing that such an agreement exists. It simply says it has looked for a copy in its custody or control but has not found one. I am satisfied UBC conducted an adequate search for a copy of that agreement. I also find that the agreement is not in the custody or under the control of UBC for the purposes of the Act. Accordingly, UBC responded appropriately to the applicant in this respect.

[21] **3.2 Description of the Disputed Record** – Only one disputed record is covered by this order. It is described in UBC's initial submission, at para. 6, as a draft Exclusive Strategic Alliance Agreement between UBC, the Royal Bank of Canada and the HongKong Bank of Canada. In his affidavit, Hubert Lai, UBC's University Counsel, deposed that this draft agreement, dated for reference September 1, 1998, was "never executed by the parties." (I refer below to this record as the "draft agreement" and to the two third-party banks as "RBC" and "HSBC".)

[22] **3.3 Public Interest Disclosure** – Section 25(1) of the Act provides for mandatory disclosure of certain information in the public interest, without an access request. Section 25 reads as follows:

Information must be disclosed if in the public interest

25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or

(b) the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.

(3) Before disclosing information under subsection (1), the head of a public body must, if practicable, notify

(a) any third party to whom the information relates, and

(b) the commissioner.

(4) If it is not practicable to comply with subsection (3), the head of the public body must mail a notice of disclosure in the prescribed form

(a) to the last known address of the third party, and

(b) to the commissioner.

[23] As I noted earlier, the applicant's request for review mentioned s. 25. In his initial submission, he says that, as a "matter of public interest", UBC's alumni "have the right to know how much we have been sold for, a measure of what we are allegedly 'worth.'" He does not advance any other public interest arguments for disclosure of the draft agreement.

[24] Pointing out that the applicant's argument cannot plausibly relate to the circumstances described, UBC says that only s. 25(1)(b) could possibly be said to apply. UBC says the public interest in disclosure must be balanced against the public interest in non-disclosure. It also says that the duty to disclose under s. 25(1) applies only in the "clearest and most serious of situations", citing Order No. 246-1998, [1998] B.C.I.P.C.D. No. 40.

[25] UBC also cites Order 00-16, [2000] B.C.I.P.C.D. No. 19, where I indicated that, although the functioning of the Labour Relations Board was generally a public interest matter, s. 25(1)(b) did not require disclosure of records relating to how the Board had handled a particular labour dispute. UBC emphasizes this passage from p. 14:

> This provision is not an investigative tool for those who seek to look into the affairs of a public body. It is an imperative requirement for disclosure which is triggered by specific information the disclosure of which is clearly in the public interest.

[26] UBC says, at paras. 39 and 40 of its initial submission, that "exceptional circumstances" must exist before s. 25(1)(b), which has a "very high threshold", compels disclosure to satisfy the "urgency in the public receiving the information."

[27] Order 02-38, [2002] B.C.I.P.C.D. No. 38 reflects my thinking on the interpretation and application of s. 25(1)(b). It elaborates what I said about this issue in Order 01-20, [2001] B.C.I.P.C.D. No. 21, which involved a public interest disclosure argument in relation to UBC's exclusive supply agreement for Coca-Cola products. Applying the principles articulated in both those cases, I have decided that, for the reasons given in Order 01-20, s. 25(1)(b) does not require UBC to disclose the draft agreement.

[28] **3.4 Harm to Third-Party Interests** – This case is unusual. This is because, even though s. 57(1) of the Act provides that where the public body has refused access, it is up to the public body to prove that the applicant has no right of access, neither UBC nor the banks – which support UBC's s. 21(1) claim and have been given notice as third parties in this inquiry – have provided evidence explicitly directed at s. 21(1).

[29] For its part, UBC says the following at para. 29 of its initial submission:

> 29. UBC made its initial decision to refuse the Applicant access to this draft agreement on the basis of its discussions with the Royal Bank of Canada and HongKong Bank of Canada. These parties sought and received Interested Parties status in this Inquiry and obtained the right to make submissions and provide *In Camera* evidence supporting a claim of the Third Party business harm under section 21. UBC now understands that neither of the Interested Parties will be providing evidence in support of the section 21 issue regarding disclosure of this document. While recognizing the test for section 21 as set out in the Commissioner's Order 00-20, UBC will not be providing any affidavit evidence on section 21 in this Inquiry in the absence of any evidence from the Interested Parties on this issue. UBC takes the position that s. 21 applies to prevent disclosure of this document and adopts and relies upon the submissions of the Interested Parties in this regard.

[30] RBC did not make any submissions in the inquiry. HSBC's s. 21 submissions read, in their entirety, as follows:

> HSBC takes the position that section 21 of the Act excepts from disclosure the information at stake on this inquiry. *There is no reasonable prospect, however, that HSBC's position will prevail at this time in view of the manner in which section 21 of the Act has been interpreted and applied in Orders 00-09, 00-22, 00-24, 00-39, 00-41, 01-20, 01-21, and 01-39. In light of those orders, HSBC has decided not to expend resources in preparing evidence and argument in relation to section 21 at this time.*
>
> If judicial review proceedings ensue from this inquiry, and if the matter is referred back to the Information and Privacy Commissioner for British Columbia on grounds that one or more of Orders 00-09, 00-22, 00-24, 00-39, 00-41, 01-20, 01- 11, and 01-39 interpret and apply section 21 erroneously, HSBC reserves the right to adduce evidence and argument at that time on the application of section 21 to the information at stake on this inquiry.

> HSBC confirms its position that section 21 of the Act applies to the information at stake on this inquiry. HSBC does so to preserve its position and to preserve its status in this inquiry and in any ensuing judicial review proceedings. [my emphasis]

[31] The principles that apply in s. 21(1) cases are clear; the allocation under s. 57(1) of the burden of proof in this case is also clear. Bearing in mind that UBC alone has the burden of proof under s. 57(1), UBC – and the banks, as a practical matter – have elected at their risk not to tender evidence on the s. 21(1) issue. I nonetheless intend to review the s. 21(1) principles in some detail in this order, with reference to decisions by my predecessor and to the interpretation and application of comparable provisions elsewhere in Canada.

[32] In October 4, 2001 letters to Telus and to Spectrum notifying them about UBC's decision that it was not required to refuse disclosure in their cases, UBC said the following about Order 01-20, [2001] B.C.I.P.C.D. No. 21:

> In October 1999, UBC received a request for the same Coca-Cola agreement from a second applicant. UBC took the same position it had in 1996. The matter was once against [*sic*] contested by the applicant and proceeded to inquiry. In May of 2001, Commissioner Loukidelis issued Order 01-20. Unfortunately, Commissioner Loukidelis came to a different conclusion on sections 17 and 21 than his predecessor, David Flaherty, and ruled that UBC must disclose the exclusive sponsorship contract in its entirety. …
>
> Order 01-20 obviously has a significant impact on the current request for records containing your information. We have reviewed and analyzed Order 01-20 in detail to determine how it would affect the current request, and have determined that UBC, with the evidence available to it, would not be successful in meeting the new requirements set by Commissioner Loukidelis for sections 17 and 21. As a result, UBC is of the view that it has no choice but to give the applicant access to the records, unless you, as a third party, wish to commence a review pursuant to s. 52(2) of the Act.

[33] This passage, which I mention here only as general background to the s. 21(1)(b) discussion below, did not say what "new requirements" Order 01-20 supposedly set out. The principles I expressed in that decision – including as regards the supply requirement in s. 21(1)(b) – are consistent with my predecessor's decisions and with the jurisprudence elsewhere in Canada in relation to provisions comparable to s. 21(1). Nor, contrary to the tenor of HSBC's submissions in this case, have I taken an approach to s. 21(1) inconsistent with my predecessor's or from approaches elsewhere in Canada. As the discussion below demonstrates, the British Columbia approach to the 'supplied in confidence' requirement, as discussed in the passages quoted below from Order 00-22, [2000] B.C.I.P.C.D. No. 25, and *Canadian Pacific Railway* v. *British Columbia (Information and Privacy Commissioner) et al.*, [2002] B.C.J. No. 848, 2002 BCSC 603, accords with approaches taken across Canada.

History of third-party business exceptions

[34] It is instructive to look back at the policy considerations that underlie provisions such as s. 21(1) before examining the cases. Section 21(1) of the British Columbia Act is similar to s. 17(1) of the Ontario *Freedom of Information and Protection of Privacy Act* ("Ontario Act"), which was enacted in 1987. In 1980, before enactment of the Ontario legislation, the Ontario Commission on Freedom of Information and Personal Privacy, known as the Williams Commission, addressed the question of third-party business information. The following relevant passage from the Commission's report, *Public Government for Private People*, merits quotation in full (vol. 2, ch. 14, at pp. 312-314):

> **BUSINESS INFORMATION**
>
> The language of the exemptions relating to valuable business information varies from one jurisdiction to the next; nevertheless, there appears to be agreement as to the underlying purpose of such an exemption and on the types of information which should be covered.
>
> It is accepted that a broad exemption for all information relating to businesses would be both unnecessary and undesirable. Many kinds of information about business concerns can be disclosed without harmful consequence to the firms. Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be served. Business information is collected by governmental institutions in order to administer various regulatory schemes, to assemble information for planning purposes, and to provide support services, often in the form of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should as far as is practicable, form part of the public record. For example, public scrutiny of the effectiveness with which governmental institutions discharge their responsibilities with respect to consumer protection or the protection of the environment requires information about the vigour with which enforcement mechanisms have been deployed against firms who refuse to comply with regulatory standards. The ability to engage in scrutiny of regulatory activity is not only of interest to members of the public but also to business firms who may wish to satisfy them-selves that government regulatory powers are being used in an even-handed fashion in the sense that business firms in similar circumstances are subject to similar regulations [45]. In short, there is a strong claim on freedom of information grounds for access to government information concerning business activity. The strength of this claim is recognized in each of the freedom of information schemes we have examined in that none of these schemes simply exempts all information relating to the activities of business concerns.
>
> Two further propositions are broadly accepted as imposing limits on the general presumption in favour of public access. The first is that disclosure should not extend to what might be referred to as the informational assets of a business firm -- its trade secrets and similar confidential information which, if disclosed, could be exploited by a competitor to the disadvantage of the firm. It is not suggested that business firms have a general "right to privacy." To the extent that information

concerning business activity may include information concerning identifiable individuals, the information may fall under another exemption relating to personal privacy. Business firms as such, however, are not accorded an equivalent "privacy" interest in the schemes we have examined. Nor is it suggested that business firms should enjoy a general right of immunity from disclosures which reveal that they have engaged in unlawful or otherwise improper activity. The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information. In all the freedom of information schemes we have examined, some means for exempting commercially valuable information is included to meet these concerns.

The second proposition limiting presumptions in favour of disclosure holds that it is desirable to permit governmental institutions to give an effective undertaking not to disclose sensitive commercial information where such undertakings are necessary to induce business firms to volunteer information useful to a governmental institution in the proper discharge of its responsibilities. There is, however, some disagreement as to whether an explicit provision for such undertakings ought to be included in a freedom of information law. The U.S. act does not contain explicit reference to this question but, as we have seen, recognition of this interest has been developed in the case law interpreting the act. The commentary accompanying the Australian Minority Report Bill suggests that such a provision should not be included for fear that it would encourage the granting of confidential status in circumstances where it was neither necessary nor appropriate. It is our view, however, that a provision of this kind can be drafted so as to indicate legitimate uses of such undertakings.

How, then, is an exemption relating to sensitive commercial information to be drafted? The principal difficulty in structuring an exemption lies in striking an appropriate balance – one that will not impose impossible burdens of proof either on business firms who wish to assert that disclosure would be harmful, or on those who request access to government information relating to businesses. Essentially, there are three questions to be addressed in designing an exemption relating to commercial information. First, what kind of information is to be subject to the exemption? Second, should express reference be made to the competing public interest in disclosure so as to effect, in some cases, a balancing test under the exemption? Third, how should confidences extended by government be protected?

With respect to the first question, the difficulty is one of identifying the kinds of information that constitute a firm's "informational assets." First, it must be acknowledged that the concept of "trade secrets" is too narrow for the purposes of a freedom of information act exemption. There may be many kinds of information submitted to government which would be of interest to a firm's competitors but which could not be said to be "trade secrets" in the full legal sense. For example, information relating to current levels of inventory, profit margins or pricing

strategies may not constitute trade secrets but they might, if disclosed, confer an unfair advantage upon a firm's competitors [46]. Accordingly, we believe that the exemption should refer broadly to commercial information submitted by a business to the government, but should limit the exemption to information which could, if disclosed, reasonably be expected to significantly prejudice the competitive position of the firm in question. We recommend, therefore, a provision drafted in terms such as the following:

> A government institution may refuse to disclose a record containing a trade secret or other financial, commercial, scientific or technical information obtained from a person, the disclosure of which could reasonably be expected to prejudice significantly the competitive position, or interfere significantly with the contractual or other negotiations, of a person, group of persons, or organization.

A number of comments should be made with respect to this proposed formulation. First, the exemption is restricted to information "obtained from a person" in accord with the provisions of the U.S. Act and the Australian Minority Report Bill, so as to indicate clearly that the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself. The fact that the commercial information derives from a non-governmental source is a clear and objective standard signalling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. It is the original source of the information that is the critical consideration: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind. An illustration of this point may be useful. A questionnaire filled in by a corporation would, of course, be exempt from access to the extent that it contained commercially valuable information. A document prepared by a public official containing a compilation of information from such questionnaires would also be exempt to the extent that the original information submitted by the corporation could be deduced from its contents. However, a statistical compilation of the survey results from which one could not ascertain commercially valuable information concerning specific respondents would not be exempt from access.

[35] Consistent with the Williams Commission's suggestions, s. 17(1) of the Ontario Act, like s. 21(1)(b) of the British Columbia Act, stipulates that information must have been "supplied" by a third party to a government institution before it can qualify for protection under s. 17(1) of the Ontario Act. In Ontario Order PO-2084, [2002] O.I.P.C. No. 202, Assistant Commissioner Mitchinson recently cited the Williams Commission report with approval in affirming that the purpose of s. 17(1) is the "protection of the informational assets of a third party" (p. 10).

[36] The federal *Access to Information Act* ("Federal Act"), which came into force in 1983, covers many federal government institutions and agencies. Section 20 of the Federal Act contains a third-party business interests disclosure exception. Although not identical to s. 21(1) of the British Columbia Act, s. 20(1)(b) of the Federal Act requires an institution to refuse to disclose commercial, financial or certain other information if it is confidential and has been "supplied" by a third party and s. 20(1)(c) and s. 20(1)(d)

reflect harms tests that are similar to s. 21(1)(c) of the British Columbia Act. The Federal Act was reviewed by the Standing Committee on Justice and Solicitor General in its 1987 report to Parliament, *Open & Shut: Enhancing the Right to Know and the Right to Privacy*. The report did not recommend any change to the s. 20(1)(b) criterion of supply.

[37] The Federal Act has recently been reviewed again by the federal government's Access to Information Review Task Force. Its June 2002 report, *Access to Information: Making it Work for Canadians*, at p. 60, the Task Force said the following about s. 20:

> We believe that the provision is basically sound, and that the courts have consistently applied it as originally intended by Parliament. This is one of the few areas of the Act where there is a substantial body of case law. Therefore, changes being recommended are essentially to clarify the current exemptions and the public interest override, and to reform the administrative practices relating to third party information.

[38] The Task Force did not recommend any change to the s. 20(1)(b) supply requirement.

Review of British Columbia decisions

[39] At the time of UBC's decision and the inquiry respecting Telus's request for review, s. 21 of the Act read as follows:

> **Disclosure harmful to business interests of a third party**
>
> 21 (1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> (i) trade secrets of a third party, or
>
> (ii) commercial, financial, labour relations, scientific or technical information of a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> (iii) result in undue financial loss or gain to any person or organization, or
>
> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

> (2) The head of a public body must refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.
>
> (3) Subsections (1) and (2) do not apply if
>
> (a) the third party consents to the disclosure, or
>
> (b) the information is in a record that is in the custody or control of the British Columbia Archives and Records Service or the archives of a public body and that has been in existence for 50 or more years.

[40] The first case in which I interpreted and applied s. 21(1) was Order 00-09, [2000] B.C.I.P.C.D. No. 9, where I said the following, at pp. 5 and 6:

> The second part of the s. 21 test is that the information must have been supplied by the third party to the public body. That supply of information must have been, "implicitly or explicitly", in confidence. Information in an agreement negotiated between two parties does not, in the ordinary course, qualify as information that has been "supplied" by someone to a public body. See, for example, Order No. 26-1994, Order No. 45-1995 and Order No. 315-1999. See, also, Ontario Order P-263 (January 24, 1992), and Order P-609 (January 12, 1994).
>
> There will be exceptions to this rule, although none exists in this case. For example, it may be possible for someone to draw an accurate inference, from a negotiated agreement, of underlying confidential information that was, effectively, supplied by the third party to the public body during negotiations. In such cases, the criterion of supply to the public body will have been satisfied. See the orders cited in the preceding paragraph.

[41] I concluded that the third party had not shown, in the context of negotiated agreements with the province, that the contents of those agreements constituted information "supplied" in confidence in any of the senses described above. In assessing the evidence in that case, I applied principles that my predecessor, David Flaherty, articulated in Order No. 26-1994, [1994] B.C.I.P.C.D. No. 29, the first case in which he examined the information supply issue in any depth. My decisions since then have continued to interpret and apply s. 21(1)(b) in a manner consistent with Order No. 26-1994 and other decisions of Commissioner Flaherty.

[42] In Order No. 26-1994, an applicant had sought access to a contract between BC Hydro and a third party. Commissioner Flaherty noted, at p. 7, that both BC Hydro and the third party had expressed "concern" about the requirement of supply in confidence, specifically because of what those parties considered

> … the restrictive scope applied by the Ontario Information and Privacy Commissioner based on a similar provision in the Ontario *Freedom of Information and Protection of Privacy Act*, section 17(1).

[43] My predecessor went on to say the following, at p. 7, about the principles he derived from Ontario Order P-263, [1992] O.I.P.C. No. 4, Order P-385, [1992] O.I.P.C.D. No. 192, and Order P-609, [1994] O.I.P.C.D. No. 7:

> In a series of orders, the Ontario Information and Privacy Commissioner reviewed the applicability of the third-party business information exception (section 21(1) in the British Columbia legislation):
>
> > A number of previous orders have addressed the question of whether information contained in an agreement entered into between an institution and a third party was supplied by the third party. In general, the conclusion reached in these orders is that, for such information to have been supplied to an institution [public body in B.C.], the information must be the same as that originally provided by the affected person. Since the information contained in an agreement is typically the product of a negotiation process between the institution and a third party, that information will not qualify as originally having been 'supplied' for the purposes of section 17(1) of the Act. [Ministry of Environment and Energy, Ontario Order P-609, page 2, January 12, 1994]
> >
> > ...the information contained in these records was the result of negotiations between the institution and the affected parties and does not consist of information 'supplied' by the affected parties to the institution. In addition, I cannot conclude that disclosure of the records would permit the drawing of accurate inferences about information actually supplied to the institution by the affected parties, and, therefore, the institution and affected parties have failed to satisfy the second part of the section 17(1) test. [Re: Stadium Corporation of Ontario Limited, Ontario Order P-263, page 17, January 24, 1992]
> >
> > It has been established that information which is the result of contractual negotiations between a governmental institution and an affected person, does not qualify as information which has been 'supplied', regardless of whether this information may have been treated confidentially.... [Ministry of Natural Resources, Ontario Order P-385, page 3, December 18, 1992]

In general, I find the Ontario interpretation of "supplied in confidence" provides a reasonable basis for application in British Columbia. However, I also agree with B.C. Hydro and Westech that a strict application of this interpretation could produce results that were not intended by the legislators. Information in a negotiated contract may in fact have been "supplied in confidence" by a third party in some cases. I cite two examples, although this is not an exhaustive list:

1. Where the third party has provided original or proprietary information that remains relatively unchanged in the contract; and

2. Where disclosure of the information in the contract would permit an applicant to make an "accurate inference" of sensitive third-party business information that would not in itself be disclosed under the Act.

The "accurate inference" test extends the definition of "supplied" to include information where disclosure of the seemingly innocuous information would allow the OTEU to see into the financial and commercial affairs of Westech in ways that are precluded by the wording of section 21(1) of the Act. See Order No. 8-1994, at page 10 (Ministry of Employment and Investment and the Office of the Premier,

> May 26, 1994); Order No. 9-1994 at page 5 (Ministry of Finance and Corporate Relations, May 26, 1994); and Order No. 22-1994 at pages 5 and 13 (Workers' Compensation Board of British Columbia, September 1, 1994) for my previous discussions of "accurate inferences."
>
> I accept the submissions of B.C. Hydro and Westech in the present instance and find that the information severed under section 21(1) has been "supplied in confidence." The written contract records the terms on which Westech agreed to supply services to B.C. Hydro. There was ample evidence introduced at the inquiry to show that the severed information was supplied by Westech to B.C. Hydro in confidence, both because the information remains relatively unchanged from that originally provided by Westech, and because disclosure of the information would allow the applicant to draw accurate inferences about sensitive third-party business information and business concepts that fall within the protection of section 21(1).

[44] With only one clear exception, which I will address below, Commissioner Flaherty's other s. 21(1) decisions apply the above-cited principles to the s. 21(1)(b) requirement of supply in confidence as it relates to contracts between public bodies and third parties.

[45] In Order No. 45-1995, [1995] B.C.I.P.C.D. No. 18, BC Transit had withheld from the applicant union certain information in BC Transit's contract with Deltassist Community Services Society, under which Deltassist provided transit services to BC Transit. At p. 3, my predecessor noted that BC Transit had withheld information "dealing with fixed costs, vehicle costs per hour, and total direct cost of operations" of the third party, as well as "two other financial figures" from one schedule to the contract. Deltassist requested a review of BC Transit's decision to disclose the rest of the contract. At p. 5, Commissioner Flaherty set out and applied the principles from Order No. 26-1994. At p. 7, he found that BC Transit, not the third party, had supplied any information in the contract that remained relatively unchanged and he went on to uphold BC Transit's decision. In doing so, he commented, at p. 7, on Deltassist's plea for a broad interpretation of the confidential supply requirement under s. 21(1)(b):

> In its reply submission, Deltassist invited me to be guided by the legislative intent of section 21 as set out in the heading, "Disclosure harmful to business interest of a third party," by allowing it to "colour" my interpretation of the three-part test set out in the section by taking "a broad rather than a narrow approach to the meaning of 'supplied in confidence'..." (Reply of the Third Party, p. 2) It argues that "where a third party uses its business expertise in confidentially negotiating the details of provisions that ultimately appear in a contract with a public body and the result of the disclosure of those contract terms will be harm to the business interests of the third party, the outcome of these discussions should not be disclosed." (Reply of the Third Party, pp. 2, 3) I find that this characterization of the second part of the section 21 test is not persuasive.

[46] Order No. 210-1998, [1998] B.C.I.P.C.D. No. 3, involved a competitor's request for a copy of an agreement between BC Transit and Seaboard Advertising, which gave Seaboard the right to rent out advertising space on bus shelters. BC Transit took the

position that it could not withhold the contract because none of the information in it had been supplied within the meaning of s. 21(1). Relying on Order No. 26-1994, Seaboard argued that it had provided information that remained relatively unchanged in the contract and disclosure of the information would permit the applicant to make an accurate inference of Seaboard's underlying information. At p. 4, Commissioner Flaherty said the following:

> The central issue of this inquiry is whether the information was "supplied" to or "negotiated" with BC Transit. BC Transit's Director, Information and Privacy, Chris Harris, stated in his July, 1997 decision letter that:
>
> > While, in your [Seaboard's] letter of June 17th, you have asserted that the agreement 'was *negotiated* in confidence,' you do not claim that the information contained in it was in fact *supplied* to BC Transit in this manner. The wording of the contract itself, as well as internal records, indicate that the substantive details found in the agreement were in fact 'negotiated' with you by BC Transit, with the result that the requirement of Section 21(1)(b) has not been met. (Submission of BC Transit, page 13)
>
> BC Transit relied on Order No. 26-1994 for the purpose of distinguishing between information "supplied" to and "negotiated" between the two parties, concluding "that no indirect supply of confidential business information was in issue" and that "no Seaboard-supplied information was to be found in the Contract." (Submission of BC Transit, pp. 15, 16, 17, 23)

[47] At p. 5, Commissioner Flaherty accepted BC Transit's submission that information could not be characterized as supplied in confidence if it was identical to information – including a form of contract – found in BC Transit's request for proposals ("RFP") that led to the contract with Seaboard. At p. 6, he said the following:

> In conclusion, I accept BC Transit's summary statement on the matter:
>
> > ... none of the Core Structure was 'supplied' by Seaboard within the meaning of s. 21(1)(b) of the Act. The affidavit evidence, and the documents before you, either directly demonstrate that information in the Licence Agreement was initially released by BC Transit as part of the RFP, effectively to the world at large, or permit you to infer, with conviction, that any information *not* included in the RFP was negotiated by the parties and not 'supplied' by Seaboard in confidence either directly or secondarily. (Reply submission of BC Transit, paragraph 13)
>
> I find that the third party has failed to establish that the information was supplied in confidence.

[48] It should be noted that the preceding passage from BC Transit's submission also expressly contended that any information not found in the RFP had not been supplied within the meaning of s. 21(1)(b) because that information had been "negotiated by the parties".

[49] In Order No. 220-1998, [1998] B.C.I.P.C.D. No. 13, Commissioner Flaherty upheld a public body's decision to withhold, under s. 21(1), "ranges of hourly rates and

daily rates" that had been supplied to the government "when contractors offer their services" (p. 7). I distinguished this case in Order 00-22, where the disputed information consisted of the essential mutually-agreed terms of the contract with the public body.

[50] Order No. 262-1998, [1998] B.C.I.P.C.D. No. 57, dealt with an outdoor advertising agreement between Pattison Outdoor (formerly Seaboard) and the City of Abbotsford. A Pattison competitor had sought a copy of that agreement. At p. 3, my predecessor said the following:

> Pattison submits that the record in dispute should not be disclosed, because it contains its commercial, financial, and operations information; because it was negotiated in confidence and treated as confidential by Pattison and Abbotsford; and because disclosure would harm significantly its competitive position and interfere significantly with its negotiating position. Disclosure could also result in undue financial gain to a competitor.
>
> I have reviewed the record in dispute. For purposes of this inquiry, I am prepared to accept that the record in dispute contains commercial information of Pattison within the meaning of section 21(1)(a)(ii) of the Act. But I am not satisfied that the information in the record in dispute was "supplied, implicitly or explicitly, in confidence" within the meaning of my discussion of this test in Order No. 26-1994, October 3, 1994, pp. 7-8; and Order No. 210-1998, January 14, 1998, pp. 3-6.

[51] Order No. 315-1999, [1999] B.C.I.P.C.D. No. 28, involved an agreement between the British Columbia Lottery Corporation and an actor, under which the actor performed in television commercials advertising lottery products. Commissioner Flaherty said the following, at p. 5:

> The second branch of the test under Section 21(1)(b) requires that the information be supplied, implicitly or explicitly, in confidence. The Corporation submits that the "fees reflected in the two agreements were negotiated between the parties. Both of the parties engaged independent agents who are expert and knowledgeable in negotiating fees for this type of service." (Supplementary Submission of the Corporation, p. 2)
>
> Although there was no confidentiality clause in the first agreement, the affidavit evidence establishes that the contents of both agreements were understood to be strictly confidential (Affidavit of Gerard Simonis, paragraph 3; Affidavit of Leslie Nielsen, paragraph 4; and Affidavit of Leslie Robertson Gascoigne, paragraph 3). The second agreement contained an express confidentiality provision preventing the parties from disclosing the terms without the prior written consent of the other parties.
>
> I conclude, however, that the information does not meet the second branch of the test, because it was not "supplied in confidence" within the meaning of Section 21(1)(b). The phrase "supplied in confidence" does not include information resulting from contractual negotiations, regardless of whether the information was treated as confidential or not. See Order No. 61-1995, November 1, 1995.

> As a consequence, I find that the information does not fall within the scope of Section 21 of the Act.

[52] Order No. 320-1999, [1999] B.C.I.P.C.D. No. 33, issued just before my predecessor's term expired, dealt with a contract between a school board and a marketing company, under which the company agreed to perform marketing services. The school board had disclosed the entire contract except for a page that described the services the company would perform and the percentage commission rate payable to the company for its services. Although he did not set out his reasoning in doing so, Commissioner Flaherty found that the information remaining in dispute had been supplied in confidence to the school board. At p. 7, he distinguished the information there in dispute from that in issue in Order No. 126-1996, [1996] B.C.I.P.C.D. No. 53, as follows:

> I note that the information in dispute in this inquiry comes from a proposal for the third party to offer services, not the contents from [*sic*] an actual contract as in Order No. 126-1996, September 17, 1996. In comparison to the specific amounts of money at stake in that Order, this inquiry does not deal with similar data. In fact, no specific sums of money are mentioned, only a commission rate, since the record in question is essentially a contractual retainer for the services of the third party.

[53] The following passage, at p. 8, sets out his entire discussion of the s. 21(1) issue before him in Order No. 320-1999:

> The second issue raised in this inquiry is whether disclosure of the information would be harmful to the business interests of the third party under section 21 of the Act. The School District states that it has withheld "Spectrum's confidential negotiating process and commission rate," because the latter has persuaded the School District "that the disclosure of the obscured information would significantly harm Spectrum's competitive position."
>
> The third party submits that the description of its processes and services contained in the record constitutes a "trade secret" under the Act. "Trade secret" is defined in Schedule 1 as follows:
>
> > "trade secret" means information, including a formula, pattern, compilation, program, device, product, method, technique or process, that
> >
> > (a) is used, or may be used, in business or for any commercial advantage,
> >
> > (b) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use,
> >
> > (c) is the subject of reasonable efforts to prevent it from becoming generally known, and
> >
> > (d) the disclosure of which would result in harm or improper benefit.
>
> While the description contained in the record concerns the "process" which the third party intends to follow in providing services to the School District, I do not

> accept that there is sufficient evidence to establish that this general information derives independent economic value, actual or potential, from not being generally known. As I indicated, the services described in the record are typical of any such offer of services. The description does not contain any information that could remotely be construed as proprietary in nature. There is also insufficient evidence to establish that disclosure of this "process" would result in any harm or improper benefit. I therefore reject the third party's submission that the description of the services constitutes a "trade secret" within the meaning of the Act.
>
> While I accept that the information in dispute meets the first branch of section 21(1)(a)(ii), insofar as it constitutes commercial or financial information of a third party and it was supplied explicitly in confidence within the meaning of section 21(1)(b), I find that the School District has failed to establish the third branch of the test. There is insufficient evidence to establish that disclosure could reasonably be expected to "harm significantly the competitive position or interfere significantly with the negotiating position of the third party" under section 21(1)(c)(i), or that it could reasonably be expected to "result in undue financial loss or gain to any person or organization" under section 21(1)(c)(iii).
>
> I find that the School District has not met the requirements of Section 21 of the Act for non-disclosure of the information in dispute.

[54] The last of Commissioner Flaherty's s. 21(1) decisions I will address is Order No. 126-1996, which UBC cited in its October 4, 2001 letters to various parties as setting out his approach to s. 21. Order No. 126-1996 dealt with an agreement between UBC, Coca-Cola and others regarding the marketing of cold beverages on the UBC campus. My predecessor's description of the s. 21(1) submissions made by UBC and Coca-Cola is as follows, at p. 3:

> UBC and Coca-Cola, which made a joint submission, state that from "the outset of the discussions that led up to the Cold Beverage Agreement, UBC and Coca-Cola agreed that all negotiations and any resulting agreement would be confidential. The Cold Beverage Agreement contains an express obligation of confidentiality." They did so in the belief that "disclosure would cause serious financial and economic harm to each of them and would give their respective competitors an undue benefit." (Submission of UBC and Coca-Cola, paragraphs 2.1, 2.2) I have presented below, as I found it appropriate to do so, details of their joint submissions under section 14, 17 and 21.
>
> UBC emphasizes that almost all of the revenue that UBC receives from Coca-Cola over the life of the Cold Beverage Agreement will be spent on improving access for disabled and handicapped persons to the premises and programs of UBC. (Submission of UBC and Coca-Cola, paragraph 3.10; Affidavit of David W. Strangway, President, UBC, paragraphs 5-8; and Affidavit of John Lane, Physical Access Advisor, UBC)

[55] His discussion of the s. 21(1) issue in Order No. 126-1996 is as follows, at pp. 5 and 6:

Section 21: The confidentiality agreement in the Cold Beverage Agreement

UBC and Coca-Cola provided me with extensive affidavit evidence to the effect that disclosure of the records in dispute would harm their respective financial or economic interests. Under section 21, only the interests of Coca-Cola are relevant; those of UBC were considered under section 17. I have reviewed these affidavits carefully and the attached submissions, each of which has been made available to the applicant. (See Submission of UBC and Coca-Cola, paragraphs 3.1-3.18, 7.1-7.38, and the accompanying affidavits) I found this evidence very persuasive. I am also not in a position to reveal information disclosed to me in three *in camera* affidavits that supplemented the open affidavits of the Vice-president for External Affairs of UBC, the General Sales Manager for Coca-Cola in British Columbia, and the President of Spectrum Marketing, a consultant to UBC.

In general, Coca-Cola argues that disclosure of its information in the records in dispute "would confer an unwarranted advantage on Coca-Cola's competitors in the intensely competitive soft drink industry," give them possession of a valuable document about how to structure a sophisticated sponsorship transaction and, further, give them access to the financial considerations affecting the final agreement. Disclosure would also interfere significantly with Coca-Cola's negotiating position with other third parties for comparable agreements. (Submission of UBC and Coca-Cola, paragraphs 3.13-3.17)

The most important and relevant point that can be made is that the confidentiality clause in the Cold Beverage Agreement, which I have had an opportunity to review on an *in camera* basis, and the contents of the record in dispute, explicitly reflect the specific language of each of the three tests under section 21 of the Act. These are exactly the tests that Coca-Cola, or any other third party, must establish in order to create a mandatory exemption whereby UBC, or any other public body under the Act, "must refuse" to disclose information harmful to the business interests of a third party.

This is the first time that I have reviewed a contract explicitly designed to establish, up front, the terms and conditions for compliance with section 21(1), which I have called for in other Orders. (See Order No. 11-1994, June 16, 1994, p.12; Order No. 21-1994, August 15, 1994, p. 6; and Order No. 19-1994, July 26, 1994, p. 4)

I find the UBC arguments and evidence on section 21 persuasive. Therefore, I agree with the submission of UBC and Coca-Cola that disclosure of the records in dispute would reveal commercial, financial, or technical information of Coca-Cola, reveal information explicitly supplied in confidence, could reasonably be expected to harm significantly Coca-Cola's competitive position or interfere significantly with its negotiating position, and could result in undue financial loss to Coca-Cola. (Submission of UBC and Coca-Cola, paragraphs 7.1-7.38) However, I am not persuaded that either section 21 or section 17 can be applied to the signatories to the contract.

[56] My predecessor upheld UBC's decision to withhold the cold beverage agreement under s. 21(1). I find it noteworthy that, at p. 5, he said the "most important and relevant point" was that the contents of the cold beverage agreement, and a confidentiality clause it contained, "explicitly reflect the specific language of each of the three tests under

section 21 of the Act." Commissioner Flaherty then said these are "exactly the tests" that a third party must meet in order to trigger the application of s. 21(1). This decision was later quashed, on other grounds, on judicial review. See *Tromp* v. *University of British Columbia et al.*, [2000] B.C.J. No. 761.

[57] Commissioner Flaherty's reference in Order No. 126-1996 to his plea in earlier cases for confidentiality clauses requires some analysis. One earlier decision he mentioned is Order No. 11-1994. At p. 13 of that decision, Commissioner Flaherty said that, if the Ministry of Health wanted to have custody or control of records in the hands of a private contractor, it should amend its contracts accordingly. That case clearly dealt with custody or control of records, not supply under s. 21(1).

[58] The second case that Commissioner Flaherty mentioned in Order No. 126-1996 is Order No. 21-1994, [1994] B.C.I.P.C.D. No. 24. That case involved s. 21(1), but my predecessor's concern in that case about appropriate contract language focused solely on the issue of explicit or implicit confidentiality. My predecessor had doubts in that case about whether the evidence established that the information had been supplied "in confidence" for the purposes of s. 21(1)(b). Although he ultimately concluded the information had been supplied in confidence, he said the following about confidentiality of supply, at p. 6:

> … in future cases I would hope to receive more explicit proof on this matter of expectations of confidentiality. The standard contract entered into under the *Continuing Care Act* should be appropriately amended to take account of the new rules under the *Freedom of Information and Protection of Privacy Act* with respect to data protection and access to information.

[59] The last case cited in Order No. 126-1996 on the contractual language point is Order No. 19-1994, [1994] B.C.I.P.C.D. No. 22. It is true that case dealt with s. 21(1), but my predecessor's concern there, as in Order No. 21-1994, was with establishing confidentiality for the purposes of s. 21(1)(b). At p. 4 of Order No. 21-1994, Commissioner Flaherty said he "would prefer such claims of confidentiality to be more explicit in future so as to put all parties to such a contract on appropriate notice." He did not deal with the supply issue.

[60] Accordingly, the three decisions to which Commissioner Flaherty referred in Order No. 126-1996 as calling for contract provisions did not go to the question of supply under s. 21(1)(b).

[61] Nor do the three cases just discussed take away from the many decisions in which my predecessor adopted and applied the principles governing when information has been "supplied" for the purposes of s. 21(1)(b). As the preceding survey indicates, my predecessor held, on several occasions over the years, that negotiated contract terms generally cannot be considered to have been "supplied" to a public body within the meaning of s. 21(1)(b). Commissioner Flaherty may have concluded in Order No. 126-1996 that the s. 21(1) test will be met if a public body and a third party contractually agree that it is met. If that was his intent, I must respectfully disagree. This

would amount to accepting that a public body can, by contract, entirely oust the right of access to records that the Act gives, as s. 2(1) affirms, to "the public" in order "to make public bodies more accountable to the public". As I have said before, contracting out of the Act is void as against public policy. See Order 00-47, [2000] B.C.I.P.C.D. No. 51.

[62] To be clear, I accept that a confidentiality clause can greatly assist the determination of whether the parties to a contract intend information related to it to be confidential. In this respect, I support my predecessor's call for public bodies to address intentions of confidentiality in their contracts for products and services. Public bodies should also address their confidentiality intentions in records that govern tenders, requests for proposal and other procurement processes. Similarly, where third parties voluntarily supply information to a public body, they ideally should do so knowing the public body's confidentiality practices. Since a public body cannot guarantee confidentiality if the Act mandates disclosure, it should frame any contract provisions, representations or policies accordingly. On this point, see Order 02-04, [2002] B.C.I.P.C.D. No. 4, to which I will return below.

[63] To summarize, setting aside Order No. 126-1996 (and perhaps Order No. 320-1999, [1999] B.C.I.P.C.D. No. 33) my predecessor's s. 21(1) decisions reflect the principles he articulated in Order No. 26-1994, which I have also accepted.

[64] The British Columbia Supreme Court has, on judicial review, accepted the view of the supply requirement as I have expressed it. In *Jill Schmidt Health Services Inc.* v. *British Columbia (Information and Privacy Commissioner)*, [2001] B.C.J. No. 79, 2001 BCSC 101, Satanove J. dealt with an application for judicial review of Order 00-22. That case dealt with a nursing services contract between a public body and a private business. I had held that s. 21(1) did not require the public body to withhold a schedule of rates, fees and expenses, as the evidence before me showed that it had been negotiated by the parties and not "supplied" by the contractor to the public body. In doing so, I referred to the principles expressed in Order No. 26-1994 and other decisions of Commissioner Flaherty and said the following, at p. 8:

> All this evidence speaks to a contract negotiation that resulted in changes to the contractor's initial proposal. In my view, it would put form over substance to characterize the process described in Ron Williams' affidavit, for example, as the "supply" of information by JS to the Ministry within the meaning of s. 21(1)(b). JS may, in a literal sense, have supplied information by delivering to the Ministry a document on which the information was written. I do not believe, however, that the Legislature intended the "supply" element in s. 21 to be determined on such a literal and artificial basis. Section 21(1)(b) contemplates the delivery of confidential business information of a third party, not information which is prone to change (and does change in some way) because it is the very subject of the negotiation process and, having been negotiated, becomes part of the essential terms of the contract. The disputed information in the contract referred to in the Williams and other affidavits was determined through a dialogue, or negotiation, between the Ministry and JS. I cannot agree that this information is to be

> characterized as "supplied" by the contractor, when it was the result, in this particular case, of the give and take of negotiations between the parties.

[65] The Ministry and the third-party contractor alleged that my interpretation and application of s. 21(1)(b) was wrong. In upholding Order 00-22, Satanove J. did not take exception to my interpretation or application of s. 21(1)(b).

[66] The same approach to the interpretation of s. 21(1)(b) was taken by Nitya Iyer, to whom I delegated the conduct of the inquiry that led to Order 01-39, [2001] B.C.I.P.C.D. No. 40. Her decision was upheld on judicial review in *Canadian Pacific Railway*, above, where Ross J. said the following about the supply issue (at paras. 68-69 (B.C.J.)):

> **B. Did the Delegate err in concluding that the information in the Documents had not been "supplied" within the meaning of s. 21(1)(b) of the *Act*?**
>
> [69] The appropriate standard of review is reasonableness, see *Jill Schmidt Health Services Inc.* v. *British Columbia (Information and Privacy Commissioner) supra*.
>
> [70] Counsel for CPR submits that the Delegate erred in her interpretation of the meaning of the term "supplied". In particular, counsel submits that the Delegate erred in requiring the disputed information to be by nature immutable and non-susceptible to change in order to be considered "supplied" within the terms of the section. This interpretation, it was submitted, is contrary to the decision of Justice Satanove in *Jill Schmidt, supra*.
>
> [71] CPR also submits that the Delegate failed to recognize the adequacy of the evidence adduced by CPR in the inquiry, did not adequately consider, and misinterpreted that evidence.
>
> [72] The Delegate noted that, for purposes of the section, information that is contractual is negotiated, not supplied, despite having been initially drafted or delivered by a single party, see Order 01-20.
>
> [73] She then made reference to an exception to this rule, stating:
>
> > [45] Information that might otherwise be considered negotiated nonetheless may be supplied in at least two circumstances. First, the information will be found to be supplied if it is relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of s. 21(1)(b). To take another example, if a third party produces its financial statements to the public body in the course of its contractual negotiations, that information may be found to be "supplied". It is important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it.

> [46] In other words, information may originate from a single party and may not change significantly – or at all – when it is incorporated into the contract, but this does not necessarily mean that the information is "supplied". The intention of s. 21(1)(b) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but, fortuitously, was not changed. In Order 01-20, Commissioner Loukidelis rejected an argument that contractual information furnished or provided by a third party and accepted without significant change by the public body is necessarily "supplied" within the meaning of s. 21(1) (at para. 93).

[74] With respect to this first exception, the Delegate considered the decision in *Jill Schmidt* and then concluded:

> [49] In my view, it does not follow from the fact that information initially provided by one party was eventually accepted without significant modification by the other and put into their contract that the information is "supplied" information. If so, the disclosure or non-disclosure of a contractual term would turn on the fortuitous brevity or finessing of negotiations. Rather, the relative lack of change in a contractual term, along with the relative immutability and discreteness of the information it contains are all relevant to determining whether the information is "supplied" rather than negotiated. Evidence that a contractual term initially provided or delivered by the third party was not changed in the final contract is not sufficient in itself to establish that the information it contains was "supplied."

[75] She also addressed a second exception, namely, that the otherwise negotiated information is such that its disclosure would allow a reasonably informed observer to draw accurate inferences about underlying confidential information that was "supplied" by the Third Party, that is, information not expressly contained in the contract.

[76] CPR's interpretation focuses on whether the information remained unchanged in the contract from the form in which it was originally supplied on mechanical delivery. The Delegate's interpretation focuses on the nature of the information and not solely on the question of mechanical delivery. I find that the Delegate's interpretation is consistent with the earlier jurisprudence, see for example Order 26-1994:

> 1. Where the third party has provided original or proprietary information that remains relatively unchanged in the contract; and...

[77] Further, I do not consider that the Delegate elevated immutability to a test. Rather, it is clear from her reasons that she considered it, legitimately, in my view, to be one of the factors to be considered in assessing whether the information is "supplied" in the terms of section 21. I do not find her interpretation to be unreasonable.

[78] The Delegate undertook a lengthy and meticulous examination of the evidence adduced by the parties. Her conclusion was that CPR had failed to bring itself within either of the two exceptions. Accordingly, she concluded:

> CPR's evidence on the question of supply falls short of what is required to establish that the information in issue was "supplied" within the meaning of s. 21(1)(b).

> [79] Having carefully reviewed her Report, together with the evidence and submissions, I can find no material evidence that was overlooked or misapprehended by the Delegate. It is for the Delegate to weigh the evidence, I do not find either her review, or her conclusion in that regard to be unreasonable.

[67] Like the Federal Act, the British Columbia Act has been reviewed by an all-party committee of the Legislative Assembly, as required by the Act. In 1999, having held hearings around British Columbia, the Special Committee to Review the *Freedom of Information and Protection of Privacy Act* reported to the Legislative Assembly its recommendations for changes to the Act. The Special Committee did not recommend any change to the supply requirement. It recommended only that s. 21(1)(a) be amended to refer to information of "or about" a third party. This amendment was made earlier this year, by s. 5 of the *Freedom of Information and Protection of Privacy Amendment Act, 2002*. The Legislature made no other changes to s. 21.

Canadian jurisprudence – general comments

[68] The British Columbia approach to the question of supply has regularly been applied across Canada. The leading Canadian text on access to information is C. McNairn & C. Woodbury, *Government Information: Access and Privacy* (Carswell: Toronto, 1992 (current)). Surveying the situation across the country, the authors say the following about the supply criterion, at pp. 4-4 and 4-5:

> The Federal Court has confirmed, among other things, that the commercial information exemption is only available in respect of information that has been supplied by a third party, although the other categories of third party information under the federal Act are not so limited. It would not apply, therefore, to reports of government officers on what they had observed in the course of an official inspection.
>
> …
>
> The line of reasoning is equally applicable to the comparable exemptions in the Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Quebec and Saskatchewan Acts, all of which apply to commercial information supplied by a third party.
>
> …
>
> When a request is made for access to an agreement entered into between a government institution and a third party, the agreement as a whole is unlikely to be protected from disclosure by a commercial information exemption on the federal model if the institution played a significant role in developing its terms. Such protection was, for example, denied where an agreement to which access was requested was the result of negotiations and was based on the essential requirements for an agreement that were set out in the government's request for proposals, a document that was publicly available.
>
> In determining whether particular terms of an agreement were supplied by a third party, the fact that they originated with that party and were not significantly

> changed through the negotiation process does not necessarily mean that they were supplied by the third party. Rather, the absence of change is but one factor to be considered in making that determination.
>
> Information supplied by a third party would include any information that, if disclosed, would permit an accurate inference to be drawn as to information that was supplied by a third party. Thus, information generated by an institution could qualify for protection from disclosure if it were to carry such an inference. [footnotes omitted]

[69] I will now survey the case law from various jurisdictions across the country.

Canadian jurisprudence – federal

[70] I have already mentioned s. 20(1) of the Federal Act, which reads as follows:

> 20(1) Third party information – Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains
>
> (a) trade secrets of a third party;
>
> (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
>
> (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
>
> (d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

[71] A good number of Federal Court of Canada decisions have dealt with the "supplied" requirement in s. 20(1)(b). Although s. 20(1) of the Federal Act differs from s. 21(1) of the British Columbia, the supply requirement in both statutes is similar enough to warrant review of the federal decisions.

[72] The well-known decision of the Federal Court of Appeal in *Canada Packers Inc.* v. *Canada (Minister of Agriculture)* (1989), 53 D.L.R. (4th) 246, [1989] 1 F.C.J. No. 615, clearly established, for the purposes of the Federal Act, that the phrase "supplied to a government institution" in s. 20(1)(b) means exactly that. In that case, a reporter and a consumer researcher had made an access request for federal government meat inspection team audit reports on meat packing plants located in a specific part of the country. The third party Canada Packers Inc., resisted disclosure because these reports were, it contended, negative and could have serious effects in an industry with little consumer loyalty and consistently low profit margins. MacGuigan J. (as he then was) said the following at para. 12 (F.C.J.):

> Paragraph 20(1)(b) relates not to all confidential information but only to that which has been "supplied to a government institution by a third party". Apart from the

> employee and volume information which the respondent intends to withhold, none of the information contained in the reports has been supplied by the appellant. The reports are, rather, judgments made by government inspectors on what they have themselves observed. In my view no other reasonable interpretation is possible, either of this paragraph or of the facts, and therefore paragraph 20(1)(b) is irrelevant in the cases at bar.

[73] Also see, for example, *Air Atonabee Ltd.* v. *Canada (Minister of Transport)*, [1999] S.C.J. No. 453 (T.D.), and *Hutton* v. *Canada (Minister of Natural Resources)*, [1997] F.C.J. No. 1468 (T.D.).

[74] A number of Federal Court decisions have also specifically addressed the question of whether negotiated contract or lease terms constitute information that has been "supplied" to a federal government institution within the meaning of s. 20(1)(b) of the Federal Act. In *Société Gamma Inc.* v. *Canada (Department of Secretary of State)*, [1994] F.C.J. No. 589 (T.D.), Strayer J. (as he then was) dealt with a request for access to proposals for translation services that had been submitted to a federal government department in response to a request for proposals. He concluded the request for proposals was effectively a call for tenders, *i.e.*, an invitation for offers to contract with the relevant department. Although *Société Gamma Inc.* did not deal with a request for access to contracts resulting from the process, the following comments, at para. 8, usefully underscore the purposes of access to information legislation as they relate to third-party commercial interests under provisions such as s. 20(1)(b):

> … One must keep in mind that these Proposals are put together for the purpose of obtaining a government contract, with payment to come from public funds. While there may be much to be said for proposals or tenders being treated as confidential until a contract is granted, once the contract is either granted or withheld there would not, except in special cases, appear to be a need for keeping tenders secret. In other words, when a would-be contractor sets out to win a government contract he should not expect that the terms upon which he is prepared to contract, including the capacities his firm brings to the task, are to be kept fully insulated from the disclosure obligations of the Government of Canada as part of its accountability. …

[75] These comments were directed at the third party's contention that its contract proposal was confidential in nature, but they are of interest in terms of how the accountability goal of access to information legislation generally intersects with third-party business interests.

[76] Regarding the disclosure of contract proposals, I will mention here that MacKay J., in *Promaxis Systems Inc.* v. *Canada (Minister of Public Works and Government Services)*, [2002] F.C.J. No. 1204 (T.D.), said the following at para. 12:

> As in this case, the applicant in *Société Gamma* sought to preclude the release of proposal documents that had been submitted in response to a call for tenders, although in that case the release of bid prices was not at issue. Nevertheless, the principle is applicable to the circumstances of this case and I conclude, for reasons of public policy, that the information is not confidential information within the

> meaning of paragraph 20(1)(b), however it may have been considered and treated by Promaxis.

[77] Accordingly, he ordered disclosure of Promaxis's proposal, including its dollar amount, to the applicant.

[78] In *Halifax Development Ltd.* v. *Canada (Minister of Public Works and Government Services)*, [1994] F.C.J. No. 2035 (T.D.), counsel for the federal government had conceded in argument that rental rates under nine leases with the federal government were financial terms or commercial information that had been supplied to the relevant government institution within the meaning of s. 20(1)(b) of the Federal Act. McGillis J. disagreed, however, saying the following at para. 3:

> With respect, I do not agree that the rental rates constitute information which was "supplied" to a government institution. The evidence tendered on the motion establishes that the rental rates were negotiated between the applicant and respondent as a term of the leases. In my opinion, a negotiated term of a lease may not properly be characterized as information which was supplied to the government. Paragraph 20(1)(b) of the Act is therefore inapplicable to the facts of this case.

She held, therefore, that s. 20(1)(b) did not apply.

[79] In *Perez Bramalea Ltd.* v. *National Capital Commission*, [1995] F.C.J. No. 63 (T.D.), Simpson J. dealt with a request for access to a ground lease between the National Capital Commission ("NCC"), as landlord, and a commercial tenant. The case also dealt with several amendments to the ground lease and 19 pages of other material. Simpson J. ordered that "certain provisions which relate to participation rent" be withheld from the 19 pages of material, because "those figures were provided to the N.C.C. in confidence" (para. 12). Simpson J. denied, however, the third party's request to exempt the entire ground lease from disclosure.

[80] In *Bitove Corp.* v. *Canada (Minister of Transport)*, [1996] F.C.J. No. 1198 (T.D.), Pinard J. held that information in records relating "predominately to the negotiation of an amendment to a lease" between the federal government and Bitove Corp. for premises at Toronto's international airport had been supplied to the federal government within the meaning of s. 20(1)(b) (at para. 10). At para. 10, Pinard J. described the information in very general terms, as follows:

> … Certain of the information relates to the applicant's lease with a private lessor at Terminal 3 at the same airport. The information consists of records of meetings, including minutes of negotiating meetings, as well as detailed financial reports, including sales information and projections. …

[81] It is not possible from his reasons for judgement to determine with any precision what information was in dispute, but there is no explicit indication, certainly, that the exempt information consisted of the actual terms of any lease or lease amendment between the federal government and Bitove Corp.

[82] *St. Joseph Corp.* v. *Canada (Minister of Public Works and Government Services)*, [2002] F.C.J. No. 361 (T.D.), dealt with records connected with the federal government's sale of the Canada Communications Group ("CCG"), a printing, warehousing and distribution operation of the federal government, to St. Joseph Corp. An applicant sought access to the agreement of purchase and sale for that operation. Associated records, which amended and supplemented that agreement at the time of the transaction's closing were also caught by the request. It appears certain leases and subleases were amongst the responsive records, but Henaghan J. did not say whether those leases and subleases were between the federal government and St. Joseph Corp. or were existing agreements between the federal government and other parties that had been transferred to St. Joseph Corp. as part of the purchase. She cited *Bitove Corp.*, *Perez Bramalea* and *Halifax Development Ltd*., but in doing so focussed more on the confidentiality aspect of the s. 20(1)(b) test than the supply portion. It also seems to me, with respect, that she may, in dealing with the leases and subleases, have conflated the s. 20(1)(b) test with the separate, harms-based test found in s. 20(1)(c). I note, however, that Heneghan J. also rejected the contention that a confidentiality clause in the agreement of purchase and sale should determine the outcome, since that would amount to allowing the parties to contract out of the federal *Access to Information Act*. In the result, she ordered disclosure of almost all of the 3,000 pages of responsive records.

[83] Last, in *Canada Post Corp.* v. *National Capital Commission*, [2002] F.C.J. No. 982 (T.D.), the Federal Court held that s. 20(1)(b) of the Federal Act did not apply to information about sponsorship amounts paid by Canada Post Corp. to the National Capital Commission for public events. Kelen J. said the following at para. 14:

> In any event, I am of the opinion that paragraph 20(1)(b) of the Act does not apply to the case at bar for the reason that the negotiated amounts of the financial assistance cannot be characterized as information "supplied to a government institution by a third party" as required in paragraph 20(1)(b). See *Halifax Development Ltd.* v. *Canada (Minister of Public Works and Government Services)*, [1994] F.C.J. No. 2035, as per McGillis J. The intention of Parliament in exempting financial and commercial information from disclosure applies to confidential information submitted to the government, not negotiated amounts for goods or services. Otherwise, every contract amount with the government would be exempt from disclosure, and the public would have no access to this important information. …

Canadian jurisprudence – Ontario

[84] Decisions under the Ontario Act reflect the same approach to the question of supply as has been taken here and, more generally, under s. 20(10(b) of the Federal Act as well. I will not discuss the Ontario cases in any detail, but will give leading examples of the interpretive approach they take. In Order 03-03, I also discuss two Ontario decisions, Order P-1604, [1998] O.I.P.C. No. 189, and Order P-1611, [1998] O.I.P.C. No. 200, that, to the extent they might be interpreted as out of step with the accepted approach to supply, have been distinguished or not followed in later Ontario decisions.

[85] Section 17(1) of the Ontario Act reads as follows:

> **Third party information -- s. 17(1)**
>
> 17(1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[86] The first Ontario decision to address the supply question is Order 36, [1988] O.I.P.C. No. 36. A requester had sought a copy of an agreement between the Ontario government, General Motors and Suzuki regarding the establishment of an automobile assembly plant in Ontario. The Ministry of Industry, Trade and Technology and the third parties resisted disclosure of portions of the agreement under s. 17(1) of the Ontario Act. Schedule G to the agreement contained a statement, in general terms, of the type of assistance the government was prepared to provide in connection with the necessary upgrading of roads, as well as water and sewer services. Commissioner Sydney Linden (as he then was) said the following:

> In my view, the information at issue in this appeal was not "supplied" by the third party, within the meaning of subsection 17(1). Schedule "G" was included in the contract as a result of negotiations between the institution and the third party, and these negotiations were presumably based in part on information supplied by the third party. However, this "supplied" information and the information severed by the institution in this appeal are not one and the same, and the requirements of the Part 2 test have not been satisfied.

[87] Similarly, in Order P-263, [1992] O.I.P.C. No. 4, Assistant Commissioner Wright held that, because the parties had not provided evidence which enabled him to identify portions of an agreement that had been supplied, he was unable to identify such information and therefore the supply criterion had not been met.

[88] In Order PO-1698, [1999] O.I.P.C. No. 102, Assistant Commissioner Mitchinson dealt with an agreement between Ontario Hydro and a third party for financial advice services that the third party provided to Ontario Hydro. The third party argued that because it had delivered to Ontario Hydro the engagement letter that became the contract,

and the letter was more or less in the third party's standard form, the terms of that letter agreement had been "supplied" to Ontario Hydro within the meaning of s. 17(1)(b). Assistant Commissioner Mitchinson noted that, because of communications between the parties, the third party had reduced certain rates found in the record and that this meant the terms of the engagement had been negotiated and not supplied. He said the following about supply:

> Because the information in a contract is typically the product of a negotiation process between two parties, the content of contracts involving an institution and an affected party will not normally qualify as having been "supplied" for the purposes of section 17(1) of the Act. Records of this nature have been the subject of a number of past orders of this Office. In general, the conclusions reached in these orders is that for such information to have been "supplied", it must be the same as that originally provided by the affected party, not information that has resulted from negotiations between the institution and the affected party. If disclosure of a record would reveal information actually supplied by an affected party, or if disclosure would permit the drawing of accurate inferences with respect to this type of information, then past orders have also found that this information satisfies the requirements of the "supplied" portion of the second requirement of the section 17(1) exemption test (see, for example, Orders P-36, P-204, P-251 and P-1105).

[89] He therefore found that s. 17(1)(b) did not require Ontario Hydro to refuse disclosure of the contract. For a similar decision involving a contract with Ontario Hydro for a third party's services, see Order P-1545, [1998] O.I.P.C. No. 69.

[90] A series of recent decisions dealing with agreements between the Ontario government and a toll-highway operator have affirmed the long-standing interpretation of the supply requirement in s. 17(1)(b) of the Ontario Act. The Ministry of Transportation had decided to disclose all of the agreements, with the exception of portions of one of the agreements that it considered were privileged and portions of another that it considered contained exempt third-party personal information. The following passage is found at p. 8 of Order PO-1973, [2001] O.I.P.C. No. 245:

> Because the information in a contract is typically the product of a negotiation process between the institution and the affected party, the content of contracts generally will not qualify as having been "supplied" for the purposes of section 17(1) of the Act. A number of previous orders have addressed the question of whether the information contained in a contract entered into between an institution and an affected party was supplied by the third party. In general, the conclusion reached in these orders is that, for such information to have been "supplied" it must be the same as that originally provided by the affected party. In addition, information contained in a record would "reveal" information "supplied" by the affected party if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution.
>
> [See, for example, Orders P-36, P-204, P-251 and P-1105]

[91] Although it was accepted in Order PO-1973 that some information in some schedules to the share purchase agreement between the government and the third party had been supplied to the province within the meaning of s. 17(1)(b), other clauses in the body of the agreement itself were found to have been negotiated in the "normal course of negotiation of the agreement". There was no evidence to support the third party's assertion that these clauses were based on and disclosed confidential information that had been supplied to the government. On this basis, it was held that the clauses in the agreement itself had not been supplied within the meaning of s. 17(1)(b). Similar findings were made, to give one example, respecting the annual rent payable under the ground lease for land on which the highway was located (p. 15). The same reasoning applied to fees payable by the third party to the government for use of certain ministry information products (pp. 15-16). An application for judicial review of Order PO-1973 has been filed in the Ontario Superior Court of Justice but has not, at the time of writing, been heard. I do not know what the grounds are for that application.

[92] As noted above, in Order PO-2084, Assistant Commissioner Mitchinson recently re-affirmed that the Ontario approach to supply is as set out in Order PO-1973. Two other recent Ontario orders to the same effect are Orders PO-2018, [2002] O.I.P.C. No. 83, and MO-1553, [2002] O.I.P.C. No. 99.

Canadian jurisprudence – Quebec

[93] The Commission d'accès à l'information du Québec has on many occasions held that the supply requirement in art. 23 and art. 24 of the *Quebec Act Respecting Access to Documents held by Public Bodies and the Protection of Personal Information* does not apply to the negotiated terms of a contract between a third party and a public body. Articles 23 and 24 read as follows:

> 23. **Third Person.** – No public body may release industrial secrets of a third person or confidential industrial, financial, commercial, scientific, technical or union information supplied by a third person and ordinarily treated by a third person as confidential, without his consent.
>
> 24. **Third person.** – No public body may release information supplied by a third person if its disclosure would likely hamper negotiations in view of a contract, result in losses for the third person or in considerable profit for another person or substantially reduce the third person's competitive margin, without his consent.

[94] A leading case is *Parker* v. *John Abbott College* (1985), 1 C.A.I. 192, in which the Commission said (at p. 194, my translation):

> … All of the clauses of the contract consist of mutual obligations to do things, not to do things, or to transfer things that are found in all contracts. They set out the conditions to which the parties have agreed to be subject, such that it is impossible to know which party initiated which condition, and there is nothing that would allow one to know whether information in the document is information belonging to the third party intervener and was supplied by it to the

> public body. In the Commission's view, this is the meaning that must be given to the concept in articles 23 and 24 of information supplied by a third party.

[95] Another often-cited case is *Sociéte du vin internationale Ltée* v. *Régie des permis d'alcool du Québec et al.*, [1991] C.A.I. 299 (appeal denied at [1992] C.A.I. 351, citing *John Abbott* with approval).

[96] In *Hydro-Pontiac Inc.* v. *St.-Ferréol-les-Neiges (Municipalité de)*, [1997] C.A.I. 53, the Commission said the following at pp. 63 and 64 (again my translation):

> The Commission has often decided that information in a contract entered into between a third party and a public body is not information supplied by the third party because a contact is, by its nature, the reflection of the obligations of all of the parties. The Commission has, at the same time, sometimes held, with the implicit support on this point of the Quebec Court, that, if it is evident that information that forms part of the contract originates from the third party to the exclusion of the public body, that information should be considered as supplied by the third party within the meaning of the Act.

[97] In *Hydro-Pontiac*, a request had been made for access to a third party's proposal to a municipality for their joint development and exploitation of a hydro-electricity project. The Commission found that the third party's proposal and the agreement between it and the municipality contained commercial information that came exclusively from the third party and thus had been supplied to the municipality. Specifically, portions disclosing the levels of the third party's investment in the project, the form and timing of the investments and dealing with a third party's financial guarantees were financial information that had been supplied to the local government partner. Certain other clauses also disclosed the third party's strategies for commercialization and development of the project and its negotiation strategies in that respect.

[98] In *Norstan Canada Inc.* v. *Université de Sherbrooke et Bell Canada*, [1997] C.A.I. 226, an applicant requested access to proposals and contracts between the University of Sherbrooke and Bell Nortel or Bell Quebec for installation of a new telephone system at the University. At p. 239, the Commission re-iterated that a contract is not information supplied to a public body. It held that portions of the various agreements between the parties that reflected their obligations did not qualify as information supplied within the meaning of art. 23. Certain portions of the various contracts that came exclusively from the third party did, however, qualify as having been supplied.

[99] In *Syndicat des enseignants du Collège Dawson* v. *Collège Dawson et al.*, Dossier No. 00 08 69, July 13, 2001, the Commission held that four clauses of a contract between the College and Coca-Cola Bottling Ltd. ("Coca-Cola"), and an appendix of prices, were protected as having been supplied exclusively by Coca-Cola. (Coca-Cola had voluntarily disclosed the rest of the contract directly to the applicant, so only the four withheld clauses were in issue.)

[100] The Commission's most recent decision on this issue is *Regroupement des étudiantes et étudiants en sociologie de l'Université de Montréal* v. *Université de Montréal et al.*, Dossier No. 01 01 08, December 4, 2002. The Université de Montréal had issued a call for proposals for an exclusive beverage supply agreement. It had discussions with Pepsi Cola Canada Ltd. ("Pepsi") and Coca-Cola Limited and ultimately entered into an agreement with Pepsi. Before the Commission, Pepsi unsuccessfully argued, first, that the agreement's confidentiality clause should prevail over the right of access under the Act. In the alternative, citing *Norstan* and *Hydro-Pontiac*, Pepsi argued that the contract's contents, including product prices, qualified as information supplied to the university. In the further alternative, it argued that the Commission's previous interpretation of the supply requirement in arts. 23 and 24 should change, so that the contract's contents qualified as information supplied to the university.

[101] Pepsi's other arguments did not succeed either. The Commission affirmed, at p. 19, that a contract between a public body and a third party does not contain information supplied by the third party (my translation again):

> A contract or understanding is above all the outcome of a negotiation that leads to the conditions to which the parties have agreed, making it impossible to tell which party took the initiative to include the various conditions.
>
> At the same time, the Commission must, when dealing with information of a contractual nature, carefully examine the information to determine whether information in the contract did originate exclusively from Pepsi, to the exclusion of the University. If this is the case, the information is treated as having been supplied by Pepsi within the meaning of articles 23 and 24 of the Act.

[102] The Commission found that the contract had resulted from negotiations. It concluded that it was not possible, with one exception, to identify information that originated solely from Pepsi. The Commission distinguished the *Collège Dawson* decision – which, again, involved Coca-Cola and a cold beverage supply agreement – on the basis that Coca-Cola had there been able to show that disputed information had exclusively originated from Coca-Cola. Accordingly, the Commission held in Université de Montréal that prices, product information, payment methods, information about equipment and equipment maintenance, indemnities and other contract terms had not been supplied within the meaning of articles 23 and 24 of the Act. As an exception, the Commission accepted that certain technical and commercial information in Schedule "F" to the agreement could only have come from Pepsi and thus had been supplied to the university. (The Commission also ordered names found in Schedules "K" and "O" to the agreement withheld under the personal information protection provisions of the Act.)

[103] I will close by noting that the Quebec courts have on several occasions affirmed the Commission's approach to the supply issue. In *Sous-ministre du Revenu* v. *Commission d'accès à l'information*, [1988] C.A.I. 195, Biron J. said that it escaped his understanding how a contract concluded between two parties could be said to be information "supplied" by a third party. As I have already noted, in denying an appeal from the Commission's decision in *Société du vin internationale*, the court cited *John Abbott* with approval, at [1992] C.A.I. 351. Last, in *John de Kuyper & fils (Canada)*

Ltée. et al. v. *Société de vin internationale Ltée.*, [1992] C.A.I. 351, the court cited *John Abbott* and similar decisions without taking issue with the principles they express. At p. 358, the court said the following (my translation):

> … [M]any decisions [of the Commission] affirm that art. 23 does not apply, absent the supply of information by a third party, in the case of a contract with a public body … and in the case of invoices paid by a public body in performing a contract.

Canadian jurisprudence – Alberta

[104] In Order 2000-005, [2000] A.I.P.C.D. No. 23, an applicant had sought copies of agreements between the Calgary Regional Health Authority and a third-party business that resulted in the formation, as a partnership, of Calgary Laboratory Services. The applicant also sought copies of agreements between the Calgary Regional Health Authority and private providers of cataract surgery services during a specified period. Commissioner Clark found that financial information in certain financial statements that the private sector partner had supplied to the public body qualified as information supplied in confidence within the meaning of s. 15(1)(b) of the Alberta *Freedom of Information and Protection of Privacy Act*, the language of which is very close to the language of s. 21(1) of the British Columbia Act. He also held that the partnership agreement contained small amounts of third-party financial information.

[105] The Commissioner said the following in Order 2000-005 about the supply criterion in s. 15(1)(b):

> [para 85.] Generally, information in an agreement that has been negotiated by a third party and a public body is not information that has been supplied to a public body. However, there are exceptions where the information supplied to the public body during negotiations remains relatively unchanged in the agreement or where disclosure of the information would permit an applicant to make an accurate inference about information supplied to the public body during the negotiations.
>
> [para 86.] The foregoing interpretation of section 15(1)(b) is different from previous orders [such as Order 96-013, [1996] A.I.P.C.D. No. 13] in which I said that the information supplied must remain relatively unchanged in the agreement, and must also allow an applicant to make an accurate inference. However, I believe my current interpretation more closely reflects the commercial reality that, to reach an agreement, a third party must supply a certain amount of information, some of which may actually appear in the agreement, and some of which may be inferred from the agreement.

[106] At para. 91, Commissioner Clark held that the "remainder of the information contained in the partnership agreement was negotiated and therefore was not supplied" to the public body by the third parties. He therefore held that s. 15(1) did not apply to the balance of the partnership agreement.

[107] The following year, however, the former Commissioner held, in Order 2001-019, [2001] A.I.P.C. No. 35, that the City of Edmonton was required to refuse access to a memorandum of understanding ("MOU") between it and Telus Communications Inc.

The City had decided to release the MOU, but Telus sought a review of that decision. At paras. 11-13, the Commissioner agreed that the MOU "contains commercial information as it is an agreement between two business entities." His entire discussion of the supply issue reads as follows:

> 14. Evidence at the inquiry showed that the information in the MOU was explicitly "supplied" to the City because Telus developed the MOU, and the MOU sets out the terms of what Telus is prepared to do for the City.
>
> 15. Evidence also showed that the information in the MOU was supplied in "confidence". First, the City Council passed a motion when it adopted the MOU, "That the report and the copy of the Memorandum of Understanding, negotiated between Telus and the City, remain private as the Memorandum of Understanding stipulates that this information will be kept confidential and disclosing information could prejudice negotiations. S. 217(2)(a)(iii) *Municipal Government Act*."
>
> 16. Upon the coming into force of the Act, section 217(2)(a)(iii) of the *Municipal Government Act*, S.A. 1994, c. M-26.1, was repealed.
>
> 17. Second, the MOU contained a clause that agreed to the confidentiality of the document between the parties. The City acknowledged that the MOU was negotiated in confidence and that the confidence was maintained.
>
> 18. Therefore, based on the above two factors, I find that the information in the MOU was explicitly supplied in confidence to the City.

[108] I say more about Order 2001-019 in Order 03-03. I will only note here that Order 2001-019 is difficult to reconcile with Order 2000-005, with other Alberta decisions and with relevant case law elsewhere. For more recent Alberta decisions, which clearly deal with supply as understood in other Alberta cases, see Order F2002-002, [2002] A.C.I.P.C.D. No. 22, at paras. 40 and 48, and Order F2002-011, [2002] B.C.I.P.C.D. No. 43, at paras. 119 and 120.

Canadian jurisprudence – Manitoba

[109] Section 18(1)(b) of the Manitoba *Freedom of Information and Protection of Privacy Act* provides that third-party business information "supplied to the public body by a third party" in confidence may be protected from disclosure. In *Kattenburg* v. *Manitoba (Department of Industry, Trade & Tourism)*, [1999] M.J. No. 498 (Q.B.), Steel J. said the parties did not dispute that information in a MOU between Maple Leaf Foods Inc. and the Manitoba government had been supplied in confidence to the government (para. 11). He also noted, however (at para. 12), that the applicant had submitted that

> … while financial, commercial, scientific or technical information may have been provided by Maple Leaf to the Government of Manitoba prior to the drafting of the MOU, the MOU simply contains commitments made by both Maple Leaf and the Government of Manitoba regarding the construction and operations of the Brandon hog processing plant.

[110] Steel J. accepted that information in the MOU was "commercial, technical and financial information supplied to the public body by a third party" (para. 13). Since Steel J. did not describe the "information" in any detail – or describe the origins of the MOU – it is not possible to determine on what basis he considered information in the MOU had been "supplied". Because *Kattenburg* is, in the final analysis, somewhat cryptic, it is not possible to say definitively that it is inconsistent with the approach to supply taken elsewhere in Canada.

Canadian jurisprudence – Nova Scotia

[111] The Nova Scotia Supreme Court addressed the supply question in *Atlantic Highways Corp. (Re)*, [1997] N.S.J. No. 238. In that case, an applicant sought access to an agreement between the Nova Scotia government and various private companies to build a toll highway. One of the companies resisted disclosure under s. 21(1) of the Nova Scotia *Freedom of Information and Protection of Privacy Act,* the language of which is very similar to the language of s. 21(1) of the British Columbia Act. Section 21(1)(b) of the Nova Scotia legislation provides a public body is not required to refuse disclosure unless the information in question was "supplied, implicitly or explicitly in confidence" to the public body.

[112] Kelly J., having acknowledged that the third party had made an effort to keep some of its information confidential, said the following at para. 40:

> 40. I accept that AHC appears to have submitted certain confidential information to the Province as part of the negotiation process and, if the process had not resulted in a contract, that they would likely have been able to keep such information confidential through the effects of the Act. However, the AHC proprietary interest in any such confidential information is now so clouded by the negotiating process and by the significant and evidenced input of Provincial information that only strong proof evidencing such information as a distinct and severable part of the agreement would suffice. I do not find evidence of that nature before me in this hearing and I find AHC has not discharged its burden regarding the confidentiality aspect of s. 21.

[113] These remarks are consistent with the view that the negotiated terms of a contract cannot generally be viewed as information "supplied" by a third party to the public body. It is worth reproducing here Kelly J.'s concluding comments about the policy aspects of the case before her, at paras. 49 and 51:

> 49. The Review Officer in his written reasons for his recommendation concluded that a private company cannot expect to keep private the information contained in an agreement signed with government, particularly when public funds are involved. I confess to some difficulty with this broad statement as there may be rare circumstances where it could be in the public interest to do so. For example if such a contract also involved other protected information under the Act such as certain personal information. However, *the general statement is valid in most circumstances as it reflects the right of citizens to be informed of the use of public funds. The obvious danger is the use of the*

> *protection of 'commercial information' as a shield to keep from the public the information necessary to properly assess government acts. …*
>
> …
>
> 51. *This Act is an important part of the ongoing process of improving the democratic process in this Province. The past decisions of this jurisdiction and other jurisdictions have supported the basic purpose of this legislation, to provide protection to certain specified information that deserves privacy, and then to ensure the public has the information necessary to make an informed assessment of the performance of its government institutions.* [my emphasis]

[114] Section 2(a) of the Nova Scotia *Freedom of Information and Protection of Privacy Act* sets out the legislative purposes of that Act in a manner very similar to s. 2(1) of the British Columbia Act.

Canadian jurisprudence – Northwest Territories

[115] In *Canadian Broadcasting Corp.* v. *Northwest Territories (Commissioner)*, [1999] N.W.T.J. No. 117 (S.C.), the appellants had sought access to certain leases of commercial and residential space between the territorial government and third parties. The government refused access to portions of those records. The Information and Privacy Commissioner recommended that the records be released subject to severing of contract provisions dealing specifically with rents payable (including additional rent) and sections dealing with calculation of operation and maintenance costs.

[116] According to a government witness, all of the leases had been entered into as a result of requests for proposal issued by the government, to which landlords responded with proposals. Vertes J. identified the disputed information as clauses setting out a base rent for properties under each lease and the landlord's estimated operating and maintenance costs, usually found in a schedule appended to a lease. He noted that, in some cases, the leases also contained clauses stipulating the percentage of maintenance costs that the government would be required to pay as additional rent.

[117] At para. 50, Vertes J. agreed that "information supplied as part of a proposal meets the test for confidentiality", including information respecting maintenance and operating costs, but went on to say the following:

> 54. These comments raise another issue, that being whether information once incorporated into a contract is now subject to disclosure. The third parties argue that confidential information does not change its character just because it is incorporated into a contract. With respect to the information relating to operating and maintenance costs, supplied in the proposals and incorporated into the lease documents, I agree. But can the same be said for the rental rates stipulated in the lease documents? The third parties argue that it can.
>
> 55. Each lease contains a figure for base rent. Some of them also contain figures for an "additional rent" based on all or a percentage of operating and

> maintenance expenses. Counsel for the respondent government drew a distinction between the "rent" (a figure based on negotiations as between the government and each lessor after receipt and evaluation of proposals) and the operating and maintenance costs (whether designated as "additional rent" or in some other way). Her submission was that rent was not information obtained by the government in confidence (although it may still not be disclosable under other parts of s. 24). Counsel for the appellants argued that there should be no expectation of confidentiality concerning the actual rents negotiated and incorporated into the agreements.
>
> 56. In my opinion, the base rents set out in each document do not constitute confidential information within the purview of subsection 24(1)(b)(i). They are amounts arrived at through negotiation after receipt and evaluation of proposals. They do not depend on information relating to operating and maintenance costs. While the base rents may have been proposed by the third parties, in the sense that they may have been contained in the proposals submitted by them, they are still contract prices negotiated and agreed to by the parties.
>
> …
>
> 59. I therefore conclude that (a) the base rent figure contained in each lease is not exempt from disclosure pursuant to ss. 24(1)(b)(i), but (b) operating and maintenance costs, whether set out separately or as part of an additional rent component, are exempt from disclosure. Since s. 24 says that the head shall refuse disclosure if any exemption is established, then I conclude that the head was justified in refusing access to the information relating to operating and maintenance costs.

[118] I will now turn to the merits of this case.

The merits of the s. 21(1) case here

[119] As para. 29 of its initial submission acknowledges, UBC has not provided me with any evidence to support its decision under s. 21(1). Nor has HSBC or RBC provided any evidence respecting s. 21(1), bearing in mind that, while neither has the burden of proof under s. 57(1) of the Act because UBC has invoked the exception, both RBC and HSBC have been notified and permitted to participate in this inquiry as third parties. The net effect is that no party has provided any evidentiary basis respecting whether s. 21(1) requires access to be denied to all or any part of the draft agreement.

[120] As Satanove J.'s decision in *Jill Schmidt* affirms, a public body's failure to provide evidence to establish the application of s. 21(1) can be fatal to its case. As regards supply for the purposes of s. 21(1)(b), I note that, as the following discussion of solicitor client privilege indicates, UBC's evidence is that its outside legal counsel drafted the agreement. This runs against any finding that the draft agreement or part of it was supplied by either of the two banks to UBC within the meaning of s. 21(1)(b). In any case, there is no evidence before me to support a finding that s. 21(1)(c) applies. Certainly, UBC's decision that s. 21(1) applies does not support such a finding on my part. I find that s. 21(1) does not require UBC to refuse access to the draft agreement.

[121] **3.5 Solicitor Client Privilege** – UBC contends that s. 14 of the Act, which authorizes a public body to refuse to disclose information "that is subject to solicitor client privilege", authorizes it to withhold the draft agreement in its entirety. It is well established that this provision incorporates both branches of the common law of solicitor client privilege, *i.e.*, traditional solicitor client privilege for certain communications between client and lawyer and litigation privilege.

[122] UBC says the first type of privilege applies and relies on the affidavit sworn by Hubert Lai, University Counsel, para. 4 of which reads as follows:

> I have reviewed the unsigned draft agreement dated September 21, 1998 titled: "Exclusive Strategic Alliance Agreement, Institutional and Personal Financial Services" between UBC, the Royal Bank of Canada and the HongKong Bank of Canada. *This document is a draft agreement prepared by outside legal counsel retained by UBC for the purpose of negotiating and drafting the contemplated contractual relations between UBC, the Royal Bank of Canada and the HongKong Bank of Canada. The document was provided and received in confidence.* I further recognize the hand-written notes on pages 55 and 58 to be my own, made in my capacity as University Counsel providing legal advice to the Public Body, UBC. [my emphasis]

[123] At para. 21 of its initial submission, UBC says the four elements of solicitor client privilege set out in Order 00-08, [2000] B.C.I.P.C.D. No. 8, have been met here. At para. 44 of Order 00-08, I said the following:

> This type of privilege was discussed by Burnyeat J. in *Kranz* v. *Attorney General of Canada*, [1999] 4 C.T.C. 93 (B.C.S.C.). Burnyeat J. quoted with approval the following passage from the judgement of Thackray J. in *B.* v. *Canada*, [1995] 5 W.W.R. 374 (B.C.S.C.):
>
> > As noted above, the privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:
> >
> > 1. there must be a communication, whether oral or written;
> >
> > 2. the communication must be of a confidential character;
> >
> > 3. the communication must be between a client (or his agent) and a legal advisor; and
> >
> > 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.
> >
> > If these four conditions are satisfied then the communication (and papers relating to it) are privileged.
> >
> > It is these four conditions that can be misunderstood (or forgotten) by members of the legal profession. Some lawyers mistakenly believe that whatever they do, and whatever they are told, is privileged merely by the fact that they are lawyers. This is simply not the case.

[124] UBC contends, at para. 22 of its initial submission, that

> … an unexecuted draft agreement is to be considered in the same category as a draft opinion, both of which embody legal advice and ha[ve] been protected from disclosure by the Courts.

[125] It cites *Re Sokolov* (1968), 70 D.L.R. (2d) 325 (Man. Q.B.), at p. 329, and *Re Kask* (1966), 66 D.T.C. 5374 (B.C.S.C.), at pp. 5375-76, in support of this proposition.

[126] In a September 10, 2002 letter to UBC's counsel, I asked whether the draft agreement had been disclosed to anyone outside UBC – including RBC, HSBC or their respective lawyers – at any time before or after it was provided to Hubert Lai. In a September 23, 2002 letter to me, counsel to UBC said the following:

> Mr. [Hubert] Lai advises that the unsigned draft agreement dated September 21, 1998 referred to in paragraph 4 of his Affidavit was provided by outside legal counsel for UBC to both legal counsel for the RBC and an Assistant Vice President of the HSBC and their legal counsel. We are further informed that the draft agreement was provided for the purposes of negotiation among the parties and to receive comment by legal counsel on the draft agreement.

Is the draft agreement privileged?

[127] *Sokolov* was an oral decision by Matas J. (as he then was). It involved documents seized under the *Income Tax Act* from a corporation's lawyer. What was then s. 126A(1)(e) of the *Income Tax Act* contained a definition of solicitor client privilege for the purposes of that Act. Matas J. referred to that definition and to common-law authorities regarding solicitor client privilege. He went on to say the following, at p. 329, about an unexecuted agreement that was found among the disputed documents:

> 7. Unexecuted agreement (file 1195(17A)). If the agreement had been signed and had become part of the company records it would not be a privileged document. Since it was not signed it must be inferred that the advice of the solicitor was not taken; the document must be considered as being in the same category as a draft opinion. The document is privileged. (See *Re Kask*, *supra*, at p. 5377.)

[128] There are, however, several more recent decisions – including some from British Columbia – that address the same issue as *Sokolov*, but none arrives at the same result nor gives *Sokolov* a ringing endorsement. In *Canadian Pacific Ltd.* v. *Canada (Competition Act, Director of Investigation and Research)*, [1995] O.J. No. 4148 (O.C.J.), Farley J. said the following, at para. 17, about the above passage from *Sokolov*:

> Is this inference correct (or invariably correct)? I think not. It may frequently be the situation that a draft was not executed because it was not acceptable to the other side for either business or legal reasons or a combination thereof. If so disclosed to the other side, any privilege would have been lost. Similarly, it may not have been

> presented to the other side for negotiation purposes because of business reasons of the client or because the client perceived that it would not be well received by the other side.

[129] Farley J. also said the following, at paras. 17 and 18, about *Sokolov* and *Kask*:

> [17] … However we must appreciate both *Sokolov* and *Kask* involved the *Income Tax Act* and specifically the definition of "solicitor - client privilege" as found in then s. 126A …
>
> [18] … Thus it would seem to me that the Bank and CP must satisfy the onus of showing that there is legal advice privilege attaching to these draft documents and not that they were discarded for business purposes (if agreements) or that they were sanitized by the excision of facts (if they were minutes). … .

[130] Farley J. said the following in another decision involving the same parties and similar issues, *Canadian Pacific Ltd.* v. *Canada (Competition Act, Director of Investigation and Research)*, [1995] O.J. No. 1867 (O.C.J.), at para. 21:

> I did not find support for the proposition that unexecuted draft agreements are privileged since they embody legal advice as being supported in *Playfair Developments Ltd.* v. *The Ministry of National Revenue*, 85 D.T.C. 5155, at p. 5159. I think the statement to that effect at in *Re Sokolov*, 70 D.L.R. (2d) 325, at p. 5269, to be too baldly stated and I would think that privilege justification to be somewhat suspect.

[131] Closer to home, in *Southern Railway of British Columbia* v. *Canada (Deputy Minister of National Revenue)*, [1991] B.C.J. No. 49 (S.C.), Donald J. (as he then was) addressed a claim of privilege over documents seized under the *Income Tax Act*. One of the document classes was described as "working papers, including draft documents containing handwritten notes on them." Another category of documents included communications between lawyer and client, which Donald J. described, at p. 2, as embracing "advice and opinions, requests for instructions, submission of draft documents for instructions and general supervision on confidential legal matters." He held that the communications between lawyer and client were privileged. He went on to hold that draft documents that, it appears, had been circulated outside the lawyer-client continuum were not privileged.

[132] In *Nathawad* v. *Canada (Minister of National Revenue)*, [1998] B.C.J. No. 3283 (S.C.), Macaulay J. also dealt with a claim of privilege over documents seized from a lawyer under the *Income Tax Act.* These included unexecuted statutory declarations related to real estate transactions, as well as directions to pay transaction proceeds and statements of adjustments. At para. 11 and paras. 15-16, he said the following about solicitor client privilege:

> [11] … The question to be addressed next is the extent to which the privilege attaches to communications from solicitor to client relating to different aspects of a solicitor's services in relation to real estate transactions. There is a preliminary

> aspect of this discussion that, in my view, needs to be addressed. The existence of solicitor-client privilege is not dependent on the nature of the legal advice sought, but on the fact it is sought. Accordingly, it does not matter if the subject matter concerns a simple real estate transaction. It is the seeking of legal advice from a professional legal adviser that is privileged, no matter how mundane the subject may seem. …
>
> [15] … More troublesome are documents created by the solicitor in real estate transactions for clients to sign. It is difficult to conceptualise most conveyancing documents as confidential communications related to the giving or obtaining of legal advice. Many are never intended to be confidential. They are delivered to others after signing or filed in the Land Title Office. Some, such as directions to pay or purchaser's statements of adjustments, may be confidential communications between solicitor-client. These may result from the giving of legal advice but are not, in my view, necessarily privileged. I say this with deference to those who may take a broader view. For instance, in *Taves* [v. *Canada*, [1993] B.C.J. No. 1713] Baker J. refers at para. 13 to a letter "with two attached unexecuted documents." She found that the accompanying letter implicitly contained the law firm's advice to execute the documents and found all to be privileged.
>
> [16] … Generally speaking, I prefer the view expressed in *B.* v. *Canada*, *supra*. There, Thackray J. found that an authority to pay was not a privileged communication, but part of the mechanics of the transaction similar to cheques, vouchers, receipts, etc. in a financial transaction. I say generally because each document must be examined; an authority to pay may also contain privileged communications relating to the giving or obtaining of legal advice.

[133] Macaulay J. went on to say the following, at para. 17, about *Southern Railway of British Columbia*:

> [17] In *Southern Railway of British Columbia*, *supra*, Donald J. (as he then was) found that communications concerning the submission of draft documents for instructions were privileged, but then found that drafts were not privileged, except to the extent notations of communications may have been made on them. Such notations should be redacted, that is, deleted or excised. Similarly, parts of an authority to pay or statement of adjustments may have to be redacted to excise privileged parts.

[134] In *British Columbia (Securities Commission)* v. *B.D.S.*, [2002] B.C.J. No. 955 (S.C.), 2002 BCSC 664, Macaulay J. dealt with a claim of privilege over documents the production of which had been demanded under the *Securities Act*. At paras. 14 and 17, he said the following:

> [14] Absent the protected purpose [of seeking, formulating or giving legal advice], there is considerable authority to the effect that the privilege does not extend to other communications between the solicitor and client or to business, accounting or banking documents created to carry out instructions. …
>
> [17] … There may be a continuum of seeking or giving legal advice such that privilege attaches in the particular circumstances even though the document itself

> does not incorporate specific legal advice. As a result, draft corporate agreements may be privileged where advice is given or sought on their content although it is important to note that the privilege is not a blanket one. See *Gendis Inc.* v. *Richardson Oil and Gas Ltd.*, [1999] 12 W.W.R. 629 (Q.B.). A copy of a letter between two law firms would not normally be privileged but a copy created solely for the purpose of seeking legal advice would be. See *Re Sokolov* (1968), 70 D.L.R. (2d) 325 at 328 (Q.B.) and *Hodgkinson* v. *Simms* (1988), 55 D.L.R. (4th) 577 (B.C.C.A.). At the core of each of these decisions is a finding that privilege extends only if the document was created for the purpose of giving or receiving legal advice. The onus lies on the party asserting the privilege: *Hodgkinson* at p. 589.

[135] In the end, Macaulay J. held that correspondence between solicitor and client "re preparation of contractual documents" was privileged in that case. He also referred, at para. 23, to "drafts of agreements and legal advice respecting drafts" as being privileged.

[136] In *Gendis Inc.* v. *Richardson Oil and Gas Ltd.*, [1999] 12 W.W.R. 629, [1999] M.J. No. 310 (Man. Q.B.), the plaintiff alleged that a binding oral agreement for the sale of its interest in a company that it jointly owned with the defendant had been reached at a meeting between the two companies' representatives. After the meeting, the plaintiff had instructed its in-house lawyer to prepare a written agreement for the share sale. A draft of the agreement was eventually sent to the defendant. In an ensuing lawsuit, the defendant demanded production of three working drafts of the agreement that the plaintiff had not sent to the defendant. Without citing any similar cases, including the *Canadian Pacific* cases mentioned above, Jewers J. upheld the claim of privilege over the three drafts.

[137] In *Fraser Milner Casgrain LLP* v. *Canada (Minister of National Revenue)* (2002), 6 B.C.L.R. (4th) 135, [2002] B.C.J. No. 2146 (S.C.), common interest solicitor client privilege was held to apply to documents that were prepared by the lawyers or accounting advisers of one business group and at some point provided to another business group – and its separate lawyers and accounting advisers – in connection with arranging a complex commercial transaction between the two groups. Lowry J. found that common interest privilege was not limited to the litigation context and that disclosure of legal advice of one group to the other group was not a waiver of privilege. He found that common interest privilege applied because the documents shared between the two groups were made for the purpose of providing legal advice that was common to the interests of both business groups in having the transaction successfully completed.

[138] From the British Columbia cases, at least, it appears that a copy of a draft contract may be privileged depending on the relevant circumstances. To answer the question of whether the draft agreement in this inquiry is privileged, I must consider whether the draft agreement was privileged when it was communicated from UBC's outside counsel to its in-house counsel. I must consider whether its disclosure to the banks and their respective counsel was within a common interest privilege between UBC and the banks. I must also consider the status of Hubert Lai's handwritten notes on two pages of the draft agreement.

[139] Hubert Lai's evidence is that the draft agreement was prepared by UBC's outside legal counsel "for the purpose of negotiating and drafting the contemplated contractual relations between" UBC and the banks. I accept that the document was prepared and received in confidence and, in all the circumstances, I accept that the confidential communication by UBC's outside legal counsel to UBC was for the purpose of giving legal advice to UBC as the client. Setting aside, for the moment, the fact that the draft agreement was disclosed to the banks, I would find that it is a confidential and privileged solicitor-client communication and therefore protected from disclosure by s. 14 of the Act.

[140] UBC's privilege argument falls short, however, when it comes to the circulation of the draft agreement to the banks and their respective legal counsel. UBC says the draft agreement was provided to the banks and to their respective counsel "for the purposes of negotiation among the parties and to receive comment by legal counsel on the draft agreement." The evidence does not establish that the draft agreement was created to provide common legal advice for UBC and the banks. Nor does it establish, alternatively, that, having been created as a privileged communication to UBC, it was circulated to the banks for the purpose of giving and receiving common legal advice for UBC and the banks.

[141] It strains matters, and is I think unreasonable, to view the fact that UBC solicited comments from the banks and their respective banks' legal counsel as supporting a common interest privilege between UBC and the banks in legal advice that had been prepared by counsel for UBC. On the evidence before me, I conclude that this case bears more similarity to *Southern Railway of British Columbia*, where Donald J. found that draft agreements were not privileged, than it does to *Fraser Milner Casgrain LLP*, where Lowry J. found that the evidence before him established a common confidential interest in legal advice that had been generated by one group and shared with another in the course of completing a complex transaction.

Hubert Lai's handwritten notes are privileged

[142] It is apparent Hubert Lai made certain handwritten notes on two pages of his copy of the record, in the custody and under the control of UBC. He has deposed that he made the handwritten notes found on pp. 55 and 58 of the draft agreement. Those notes can only be described as mundane, but I am satisfied that they are privileged and should be severed in much the same way as similar information was redacted in a number of the cases discussed above, including *Southern Railway of British Columbia*, *Nathawad* and *British Columbia (Securities Commission)*. Also see *College of Physicians and Surgeons of British Columbia* v. *British Columbia (Information & Privacy Commissioner)*, [2002] B.C.J. No. 2779, 2002 BCCA 665 (C.A.), at paras. 60-69 (Q.L.).

[143] **3.6 Harm to UBC's Interests** – UBC also argues that s. 17(1)(a) authorizes it to refuse to disclose the entire draft agreement. The relevant parts of s. 17(1) read as follows:

> 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
>
> …
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia.

[144] As with s. 21(1), UBC has not provided any affidavit or other evidence to support its contention that disclosure of any or all of the draft agreement could reasonably be expected to harm its interests within the meaning of s. 17(1)(e). UBC's entire s. 17(1)(e) case is set out as follows, at paras. 24 and 25 of its initial submission:

> 24. The draft agreement between UBC and the interested parties was never executed. The negotiations surrounding the draft agreement have been over for some time. UBC acknowledges that there is no immediate harm to UBC by disclosing the draft agreement to the Interested Parties, Royal Bank of Canada and HongKong Bank of Canada. UBC cannot offer evidence of a specific, on-going contractual negotiations [*sic*] that would be affected by the release of the draft agreement.
>
> 25. UBC does submit, however, that the compelled disclosure of draft agreements held by the Public Body would in general practice be harmful to economic interest by greatly hampering its ability to conduct negotiations with third parties if they were compelled to provide such drafts in the course of future negotiations.

[145] As I understand UBC's position, disclosure of this four-year-old draft agreement could reasonably be expected to harm UBC's ability to conduct future negotiations with other parties if draft agreements must also be disclosed while negotiations are under way.

[146] In Order 02-50, [2002] B.C.I.P.C.D. No. 51, I discussed at some length the standard of proof for exceptions under the Act that use the reasonable expectation of harm test, including s. 17(1)(e). Applying the approach indicated in para. 137 of that decision, I find that UBC has not met its burden of proof in this case. It is at best speculative to contend that, if UBC is required to disclose this four-year-old draft agreement, its ability to conduct future contract negotiations will be harmed, much less greatly hampered, as UBC contends. It is difficult to see how disclosure under the Act of a draft agreement that has been a dead letter for some four years could reasonably be expected to harm UBC's negotiating position in other negotiations that may arise in the future.

[147] UBC refers to the harm that would allegedly flow from any compelled disclosure of draft agreements while negotiations are still ongoing. That is not this case, of course, and nothing in this decision can be interpreted as addressing such a case.

[148] I find that s. 17(1)(e) does not authorize UBC to refuse to disclose the disputed draft agreement.

4.0 CONCLUSION

[41] For the above reasons, under s. 58 of the Act, I require UBC to give the applicant access to the disputed record, with the exception that I confirm that UBC is authorized by s. 14 of the Act to refuse to disclose Hubert Lai's handwritten notes on pp. 55 and 58 of the disputed record. In light of my finding respecting s. 25(1), no order is called for under s. 58 in that respect.

January 28, 2003

David Loukidelis
Information and Privacy Commissioner
for British Columbia