OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order F05-05

**FORENSIC PSYCHIATRIC SERVICES COMMISSION,
PROVINCIAL HEALTH SERVICES AUTHORITY**

Bill Trott, Adjudicator
February 24, 2005

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Summary: Commission requested and accepted six proposals from a consulting company, which retained a named individual to deliver some or all of the contract services. Applicant requested access to records relating to the Commission's direct or indirect retainer of the services of the named individual. Section 21(1) does not require the Commission to refuse to disclose time estimates, daily rate information and total fees and administrative expenses respecting the contract services, or standard contract terms and conditions.

Key Words: third party commercial or financial information – supplied in confidence – undue financial loss or gain – competitive position – negotiating position – interfere significantly with – public interest – significant harm.

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

Authorities Considered: B.C.: Order 00-24, [2000] B.C.I.P.C.D. No. 27; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 03-28, [2003] B.C.I.P.C.D. No. 28; Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 03-15, [2003] B.C.I.P.C.D. No. 15; Order 04-06, [2004] B.C.I.P.C.D. No. 6; Order 00-22, [2000] B.C.I.P.C.D. No. 25; Order 01-39, [2001] B.C.I.P.C.D. No. 40; Order 03-03, [2003] B.C.I.P.C.D. No. 3; Order 03-33, [2003] B.C.I.P.C.D. No. 33; Order 00-37, [2000] B.C.I.P.C.D. No. 40; Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order 03-04 [2003] B.C.I.P.C.D. No. 4; Order 02-50, [2002] B.C.I.P.C.D. No. 51; Order 00-10, [2000] B.C.I.P.C.D. No. 10; Order 01-36 [2001] B.C.I.P.C.D. No. 37. **Ont.:** Order MO-1705, [2003] O.I.P.C. No. 232; Order MO-1706, [2003] O.I.P.C.D. 238; Order MO-1735, [2003] O.I.P.C.D. No. 273; Order PO-2228, [2004] O.I.P.C.D. No. 13; Order MO-1787, [2004] O.I.P.C.D. No. 99; Order MO-1882, [2004] O.I.P.C.D. No. 288.

Cases Considered: *Jill Schmidt Health Services Inc.* v. *British Columbia (Information and Privacy Commissioner*), [2001] B.C.J. No. 79, 2001 BCSC 101; *Canadian Pacific Railway* v. *British Columbia (Information and Privacy Commissioner) et al.*, [2002] B.C.J. No. 848, 2002 BCSC 603; *Lavigne* v. *Canada (Office of the Commissioner of Official Languages),* [2002] 2 S.C.R. 773.

1.0 INTRODUCTION

[1] This inquiry arises out of a request by the applicant under the *Freedom of Information and Protection of Privacy Act* ("Act") for records concerning a "Forensic Psychiatric Services Contractor". The request was directed to the Provincial Health Services Authority, which forwarded it to the Forensic Psychiatric Services Commission ("the Commission"). The request, for records from April 1, 2001 to June 10, 2002 relating to direct or indirect retainers of the services of a single named individual ("the Individual Contractor"), was expressed in the following terms:

- all request(s) for proposals under which [the Individual Contractor] was retained directly or indirectly by Forensic Psychiatric Services,

- a description of the services to be provided by [the Individual Contractor] or any corporation for which [the Individual Contractor] acted (but only insofar as [the Individual Contractor] was acting for that corporation),

- the total amount for which, and the rate at which, services of [the Individual Contractor] has [*sic*] been retained by Forensic Psychiatric Services (regardless of the named contractor),

- the total amounts paid by Forensic Psychiatric Services for the services of [the Individual Contractor] and the entities to which those payments were made including, but not limited to, KPMG and Inter Qualicare Services, Inc., and

- electronic mail records from [the Individual Contractor] to public servants in Forensic Psychiatric Services concerning 'British Columbia Institute of Technology', 'BCIT'; 'Total Quality Management'; 'TQM'; 'Accountability Measures'; 'Quality Improvement'; 'CQI'; and/or 'Integrative Project'.

[2] The Commission gave third-party notice of the request to KPMG Consulting LLP ("KPMG"), now BearingPoint Inc., under s. 23 of the Act, with respect to the application of s. 21 of the Act to some of the 133 pages of responsive records. KPMG opposed disclosure and provided the Commission with reasons why KPMG believed s. 21 applied to the records.

[3] The Commission responded to the applicant's access request by releasing pp. 1-81 with severing of personal information under s. 22 of the Act. These pages are not in dispute. They include the invoices that KPMG rendered for each relevant project—which indicate the number of hours, the total fees and the administrative costs for the month covered by each invoice—as well as expense claims for the project. It may be possible—and indeed the applicant has attempted these calculations in his submissions—to use this information to

derive a blended daily rate (and, in some cases, the daily rate charged for the services of the Individual Contractor).

[4] Pages 81 and 82 were withheld in their entirety under s. 17(1)(c) of the Act. Pages 83-133 consist of six proposals from KPMG to the Commission for provision of services ("Proposals"). Proposals 1, 2, 3, 4 and 6 were withheld entirely under s. 21 of the Act. All of proposal 5 was withheld under ss. 17 and 21. I will have more to say later about the fact that the Commission accepted the Proposals, so their terms and conditions became the contractual terms and conditions for the services to which the invoices relate in pp. 1-81 of the responsive records.

[5] The applicant requested a review by this office of the Commission's decision to withhold the information it did. Because the matter did not entirely settle in mediation, a written inquiry took place under Part 5 of the Act. As the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act, I have dealt with this inquiry by making all findings of fact and law and any necessary order under s. 58 of the Act.

[6] KPMG was given notice of the inquiry and made submissions. During the course of my deliberations, notice was also given to the Individual Contractor, who then made his own submission.

[7] The Portfolio Officer's fact report confirmed that mediation resolved the first and fifth items of the access request and left for inquiry the Commission's decisions to withhold pp. 82-83, 125-127 under s. 17(1)(c) and to withhold pp. 84-133 under s. 21(1).

[8] In its initial submission, the Commission released a severed version of pp. 82 and 83, with the severed information being withheld under s. 22 of the Act. The Commission also applied on s. 22 to sever the identities of two individuals (other than the Individual Contractor) in pp. 84-133. As a result of a further exchange of submissions, the applicant confirmed that he did not wish further identification of those other individuals named in the records. Section 22 is therefore not an issue in this inquiry and identifying information that relates to individuals other than the Individual Contractor is not part of this decision.

[9] The Commission abandoned its reliance on s. 17 in its initial submission (para. 8), but continued to withhold all six proposals under s. 21(1) of the Act. Then, as part of its reply submission, the Commission, with the agreement of KPMG, disclosed portions of the six proposals, but continued to withhold some information under s. 21(1) in pp. 84-133. This constitutes the information in dispute in this inquiry and resolves down to the following information:

- number of days estimated to complete specific tasks (pp. 86, 98, 99, 109, 110 118, 126 and 128)

- total number of days estimated to complete projects (pp. 86, 99, 100, 110, 118, 126, 127 and 128)

- daily rates charged to the Commission (pp. 118, 129), total fees and total administrative costs of the proposals (pp. 87, 100, 111, 118, 127, 129)

- a limited number of standard contract terms and conditions attached to the proposals (pp. 88, 101, 112, 120, 130).

2.0 ISSUES

[10] The issues to be addressed in this decision are as follows:

1. Is the Commission required by s. 25(1)(b) of the Act to disclose information to the applicant?

2. Is the Commission required by s. 21(1) of the Act to refuse to disclose information to the applicant?

[11] The applicant submitted arguments on the s. 25(1)(b) issue in his initial submission and the Commission and KPMG addressed that issue in their reply submissions, even though it was not identified in the notice of written inquiry issued by this Office. I have, in light of the parties having joined on the issue, considered it.

[12] The Commission (para 10, initial submission) and KPMG (pp. 2-3, initial submission) submitted that the burden is on KPMG, under s. 57(3)(b) of the Act, to prove that the applicant has no right of access to the disputed information. Section 57(3) applies where the inquiry is into a decision to give an applicant access to all or part of a record containing information that relates to a third party. Section 57(1) applies where the inquiry is into a decision to refuse an applicant access to all or part of a record (except to the extent third-party personal information is involved, in which case s. 57(2) applies).

[13] In Order 00-24, [2000] B.C.I.P.C.D. No. 27, the public body reversed its decision about the applicability of s. 21(1) and this shifted the burden of proof to the third party under s. 57(3)(b):

> The Ministry initially decided to withhold the interest rate under ss. 17 and 21 of the Act. It later decided, however, not to apply s. 21. It communicated this decision to this Office during the inquiry process, by a letter dated December 7, 1999 from counsel to the Ministry, and Conair was notified of the decision at that time. Conair requested, and was granted, an adjournment of the time for filing submissions to enable it to address the s. 21 issue. Conair continues to object to disclosure on the basis of s. 21.
>
> In these circumstances, this inquiry is into the Ministry's decision to refuse access under s. 17 only. Under s. 57(1) of the Act, the burden of proof is on the Ministry with respect to s. 17. The Ministry's initial submission says the Ministry bears the burden of proof under s. 21, but its decision not to rely on s. 21 shifts the burden to Conair under s. 57(3)(b) of the Act. (This shift in the burden of proof was acknowledged in the December 7, 1999 letter from counsel to the Ministry. Conair's initial submission acknowledges that it has the s. 21 burden of proof and it has submitted evidence and argument on the s. 21 issue. So has the Ministry.)

[14] The circumstances in Order 00-24 are not present when the public body decides, with the agreement of the third party, to release part of a record that it previously withheld entirely. The burden of proof under s. 57 does not shift to the third party respecting the public body's continued refusal to disclose the rest of the record.

[15] This inquiry flows from the applicant's request for review of the Commission's decision to refuse access to information in the requested records. The amount of information in issue narrowed in mediation and in the parties' submissions in the inquiry, but it remains an inquiry into a decision of the Commission (supported by KPMG) to refuse to give the applicant access to information in the requested records. These circumstances fall under s. 57(1) of the Act and the Commission bears the burden of proving that s. 21(1) constrains the applicant's right of access. This distinction may have little or no practical significance where, as here, KPMG has participated fully in support of the applicability of s. 21(1).

3.0 DISCUSSION

[16] **3.1 Procedural Objections** – KPMG and the Commission object to the applicant's submission of *in camera* material. I have reviewed that *in camera* material and have decided that it is not relevant to the determination of the application of s. 25 or s. 21 of the Act. I have therefore not considered it in reaching my decision.

[17] In addition, the Commission questions the inclusion by the applicant of an exhibit to his affidavit. The Commission states that Exhibit O "contains a document which was apparently labelled by the applicant as one 'provided by 'headhunting' firm Ray and Berndtson Robertson Surrette'". The Commission requested "clarification as to the facts on which this assertion is based (i.e. how did this record come into his possession and why does he assert it was provided by this firm)". The exhibit in question is an organizational chart of "Director Patient and Client Services, FPSC". This aspect of the applicant's affidavit is not relevant to the issues before me, so I have not considered this document or that part of the applicant's affidavit in reaching my decision.

[18] **3.2 Background** – The Commission provides background and context for this matter in its initial submission (paras. 12-13) and in an affidavit (paras. 1-23) sworn by Leslie Arnold, its Chief Executive Officer ("Commission CEO"). The Commission is established under the *Forensic Psychiatry Act* to provide inpatient and outpatient forensic psychiatric services, essentially care and treatment for mentally-ill persons who have come in contact with the criminal justice system. The services are offered through medical staff, psychologists, nurses, social workers and nursing case coordinators in both a secure hospital setting (at the Forensic Psychiatric Hospital) and in various community release settings.

[19] Prior to October of 2000, the Commission underwent a process of accreditation for the Forensic Psychiatric Hospital, conducted by the Canadian Council on Health Services Accreditation ("CCHSA"). The Commission was apparently the first forensic health service in Canada to undergo such voluntary accreditation, which involves a two-part process. The first part involves self-assessment by the Commission of how it believes it measures

against CCHSA standards. The second part uses outside examiners (known as "surveyors"), who conduct an onsite examination of the Commission's performance. This review is summarized in a written report called the Accreditation Survey Report.

[20] The first onsite accreditation examination of the Forensic Psychiatric Hospital occurred in mid-November, 2000. On completion of the onsite visit and before issuing the report, the surveyors met with representatives of the Commission and stressed the need for the Commission to develop a quality improvement plan and framework. They indicated that they would be recommending a conditional accreditation, but the conditions attached to the accreditation only became apparent to the Commission when it received the March 30, 2001 decision letter and report. The site received "accreditation with focused visit" status. The focused visit was scheduled for March 30, 2002. The purpose of the focused visit was to evaluate the Commission's progress in several stated areas.

[21] The Commission CEO deposed that "[t]he work that the [CCHSA] required the Commission to carry out by the scheduled visit was substantial and it was important that it be carried out as quickly as was possible" (para. 20, affidavit). In addition, in early March of 2001, the Commission CEO became aware that the Commission had to meet certain deadlines imposed by the Crown Agencies Secretariat for a comprehensive agency performance plan (affidavit, para. 21).

[22] These two demands led the Commission CEO to identify several discrete key projects that needed to be undertaken. She deposed that the Commission did not have staff with the specialized expertise necessary to carry out these projects, so she was "required to look outside the organization for consultants who had the requisite skill and expertise to carry out these projects in a timely way" (para. 22, affidavit). The Commission invited KPMG to submit a number of proposals for the needed services and KPMG retained the Individual Contractor to provide those services to the Commission.

[23] The core of the applicant's submission about this background is his belief that there was a conflict of interest whereby the Individual Contractor benefited from a "sweetheart" deal between the Commission and others (para. 4, initial submission). The applicant states he is concerned that the Commission awarded specific work without a request for proposal or a contract and alleges "a serious breach of government policy". The applicant says he is concerned about the use by public bodies of contractors to do the work of public service managers. The applicant had brought these issues to the attention of the Merit Commissioner, the Deputy Minister of Health and the Chief Executive Officer of the Provincial Health Services Authority, and I consider them in the discussion below about whether s. 25 of the Act requires disclosure of the disputed information in the public interest.

[24] KPMG states that it is one of the largest providers of systems integration services and business advice in the world, employing over 15,000 professionals in 39 countries. It regularly retains consultants, subcontractors and contractors to provide the required services. The Individual Contractor denies both the perception and reality of any conflict of interest, and provides details of his involvement with the Commission and with an educational institute.

[25] **3.3 The Proposals** – Proposals 1, 2 and 3 are dated March 21, 2001. The first is a proposal for "Case Management Manual"; the second is for "Quality Management Framework"; and the third is for "Developing Performance Indicators". These proposals are structured in the same way. The first part contains KPMG's understanding of the Commission's requirements, a project summary and estimated time requirements, accountability reporting, the project team and fees and expenditures. The second part consists of several pages of "standard terms and conditions".

[26] The Commission included Proposals 1, 2 and 3 in its response to the access request even though they predate the April 1, 2001 start-date of the request. Since the Commission included these records and the parties have made submissions respecting them, I have considered Proposals 1, 2 and 3 in this inquiry.

[27] Proposals 4, 5 and 6 consist of three letters from KPMG to the Commission, dated May 9, 2002, June 18, 2001 and May 29, 2001 respectively. Each letter outlines a description of the objective of the project, members of the consulting team, the steps or approach to be taken, the time-lines and fees and expenses. Each letter also refers to attached "standard terms and conditions", a copy of which accompanies Proposals 4 and 6. No "standard terms and conditions" document physically accompanies Proposal 5 in the disputed records, though Proposal 5, like the other Proposals, refers to attached "standard terms and conditions". The copy of Proposal 6 in the disputed records appears to be missing the last page of the "terms and conditions". I attach no significance to these discrepancies. Each letter is signed by the KPMG managing director; two of the letters are also signed by the Commission CEO, agreeing to the arrangements and terms. The third letter has a handwritten date under the phrase "the arrangements and terms set out are as agreed".

[28] Proposals 4 and 6 (letters of May 9, 2002 and May 29, 2001) specifically state a daily rate, as the services were to be delivered by one person, the Individual Contractor. Each of the other Proposals involved more than one person working on a project, but a blended "daily rate" could be derived from the total hours and total fees for each such Proposal.

[29] Fourteen lines remain withheld from each of the "standard terms and conditions" documents. They come within the section about "fees and invoices" and describe the billing and payment arrangements.

[30] The Commission accepted all six Proposals (paras. 27-28, Arnold affidavit,). The contract work ensued on the projects involved, was billed for by KPMG and paid for by the Commission. As already noted, the Commission disclosed to the applicant the invoices and expense forms submitted for each project, with personal information severed under s. 22 and not in issue in this inquiry.

[31] **3.4 Public Interest Disclosure** – The applicant has not specified whether he is relying on s. 25(1)(a) or s. 25(1)(b), but, as I understand his argument, he is relying on

s. 25(1)(b), which requires public interest disclosure of information in certain circumstances. This section 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 …
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.

[32] In assessing whether s. 25(1)(b) requires disclosure of this information in the public interest, I have applied the approach taken in Order 02-38, [2002] B.C.I.P.C.D. No. 38. (See, also, Order 03-28, [2003] B.C.I.P.C.D. No. 28.)

[33] The applicant provides a great deal of information in his initial submission about what he believes are practices that amount to a conflict of interest by the Individual Contractor and breaches of certain policies by the Commission.

[34] The applicant says that there "is strong evidence that serious irregularities have occurred in the execution and performance of the contract" (para. 37, reply submission) and the failure to put out the work for a request for proposal does not conform to government policy (para. 6, initial submission).

[35] The applicant's other concern is that the Commission was contracting with an individual to perform a public service position.

[36] The applicant says he believes the conditions he describes engage the public interest override in s. 25(1)(b) of the Act. The alleged conflict of interest and irregularities in the awarding of the work and the contracts themselves, amount to an urgent and compelling public interest in knowing what was agreed to between the Commission and KPMG. He says (para. 7, initial submission):

> It is clearly in the public's interest to expose wrongdoing in the public service, whether such wrongdoings are simply transgressions of government policy or whether they are more serious offences.

[37] Later, the applicant states (para. 38, reply submission):

> Without the Commissioner having to establish wrongdoing, s. 25 of the Act provides that information must be released if it is clearly in the public interest and if it concerns matters of public accountability. Both these criteria apply to the records under dispute.

[38] The Commission argues that the applicant has conflated s. 25(1)(b) with the Act's general policy of favouring access for public accountability reasons. It says significant public curiosity or interest in a record does not equate to the conditions in s. 25(1)(b) nor is this

provision engaged by the assertion that the information in the records may establish some kind of policy breach.

[39] KPMG argues that s. 25 is an extraordinary provision, reserved for extraordinary and pressing circumstances: "Even if we were to take his allegations as fact, they amount to a public policy skirmish including a conflict of interest by one individual" (para. 6, reply submission). The Individual Contractor clearly and articulately denies the applicant's allegations.

[40] The first question is whether, in the circumstances, the disclosure, without delay, of the information in dispute is required. I have reviewed the submissions on this point, the records in dispute and the background to this matter provided by all parties. I can find no grounds for urgent disclosure of the information in dispute.

[41] Further, I can find no grounds sufficient to trigger a clear public interest under s. 25(1)(b) in the disclosure of the severed information. I am not sure, especially in light of the nature of the alleged misdeeds, how the specific fee figures and number of hours of these contracts would contribute to public debate and political participation. Further, given that the Commission has disclosed invoices, receipts and the descriptive portions of the proposals, I do not consider that the remaining severed information contributes, in any substantive way, to facilitating the expression of public opinion and the making of political choices.

[42] I find that s. 25 of the Act does not require the Commission to disclose any of the information in dispute in this inquiry.

[43] **3.5 Third-Party Business Interests** – Section 21 requires a public body to, under certain circumstances, refuse to disclose information relating to third-party business interests. The Commission clarifies in its initial submission that it is relying on both ss. 21(1)(c)(i) and (iii), as is KPMG.

[44] Section 21(1) creates a three-part test, each element of which must be satisfied before a public body is required to refuse disclosure of information. The Commissioner discussed the history and application of similar provisions in access to information legislation across Canada, and the application of s. 21(1), in Order 03-02, [2003] B.C.I.P.C.D. No. 2. In deciding this matter, I have applied the approach taken in, for example, Order 03-02, Order 03-15, [2003] B.C.I.P.C.D. No. 15, and more recently Order 04-06, [2004] B.C.I.P.C.D. No. 6. For court decisions that have reviewed these principles, see *Jill Schmidt Health Services Inc.* v. *British Columbia (Information and Privacy Commissioner*), [2001] B.C.J. No. 79, 2001 BCSC 101) and *Canadian Pacific Railway* v. *British Columbia (Information and Privacy Commissioner) et al.*, [2002] B.C.J. No. 848, 2002 BCSC 603.

Commercial or financial information

[45] The first part of the test is, in the context of this inquiry, whether the information in dispute is commercial or financial information of or about a third party.

[46] Several orders have described "commercial" information as including "information about the buying or selling of goods and information pertaining to commerce." For example, in Order 00-22, [2000] B.C.I.P.C.D. No. 25 (upheld on judicial review: *Jill Schmidt Health Services Inc.*), the Commissioner held that hourly charges and other fees payable under a nursing services contract (including management fees, general and administrative fees and total amounts of the contracts in dispute) qualified as "commercial" and "financial" information. He took the same view in Order 03-15 and Order 04-06.

[47] The information in dispute consists of the number of hours estimated to complete specific tasks; the total hours for each Proposal; daily rates; total fees and total administrative costs for each Proposal; and the terms and conditions for services. I find it is commercial or financial information of or about a third party within the meaning of s. 21(1)(a)(ii).

Was the disputed information "supplied" to the Commission?

[48] The second question is whether the information was "supplied, implicitly or explicitly, in confidence". I will first deal with whether KPMG "supplied" the disputed information to the Commission. The "supplied" element of s. 21(1)(b) has been considered many times. It was, for example, considered extensively in Order 01-39 [2001] B.C.I.P.C.D. No. 40, Order 03-02, Order 03-03 [2003] B.C.I.P.C.D. No. 3, Order 03-15 and Order 04-06, and judicial consideration is found in the *Jill Schmidt Health Services Inc*. (which upheld 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.* (which upheld Order 01-39) cases.

[49] I will first describe the evidence on the "supply" issue and the applicant's position respecting its factual import or sufficiency of the evidence. Then I will analyze the parties' submissions on the "supply" element in light of the evidence.

[50] The Commission CEO deposed as follows in her affidavit:

> [25] I contacted Patricia Ryan, Managing Director for KPMG Consulting LP, … in early March 2001 and spoke to her about three key projects and the tight timeframes within which they had to be completed. I asked that she have her company provide me with project proposals for these three projects, which she did on March 21, 2001. These three different project proposals are contained in the withheld records, pp. 84 to 117.
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> …
>
> [27] I reviewed these three contract proposals and decided to accept them without any changes or modifications. I did not engage in negotiations with Ms. Ryan about any of the terms.
>
> [28] Over the next year, I subsequently sought three additional project proposals from the Third Party in respect of work that essentially constituted an extension of work undertaken in respect of the first three projects. As with the earlier three project proposals, after reviewing them I decided to accept the terms proposed without any adjustments. These proposals are contained in pages 118-133 of the withheld records in this inquiry.

[51] Patricia Ryan, the managing director of KPMG, deposed as follows in her affidavit:

> [7] … The three contract proposals were accepted without any changes or modifications. These three different project proposals are contained in the withheld records, pp. 84 to 117.
>
> [8] Over the next year, KPMG Consulting provided three additional project proposals to the Commission for work that was essentially an extension of work undertaken in respect of the first three projects. These three additional project proposals were also accepted without any adjustments. These proposals are contained in pages 118-133 of the withheld records in this inquiry.

[52] The applicant says the Proposals became contracts and thus became "negotiated" information, and that (para. 9, reply submission):

> … neither the third party nor the public body have presented evidence that the telephone call(s) from Leslie Arnold to Patricia Ryan was not the point of negotiation and that the "proposals" were *not*, in fact, a statement of their formal agreement of the terms.

[53] The applicant also advances what he describes as a "plausible speculation" that the Proposals were accepted without modification because the negotiations had already taken place. He argues that "[p]erhaps they [Ms. Ryan and Ms. Arnold] then agreed on the work and the price and Ms. Ryan simply reflected those negotiations in her 'proposals'" (para 10, reply submission), in which case the Proposals were negotiated contracts that were the joint product of both parties.

[54] The evidence is that the Commission CEO contacted the managing director of KPMG to request the submission of the Proposals, which the Commission CEO subsequently accepted. It is not clear whether this was the Commission's usual procurement process, but I am satisfied that the disputed information in the Proposals represents terms and conditions under which KPMG contracted to provide services to the Commission. None of the parties has suggested otherwise.

[55] With regard to the applicant's contention that the Proposals were nonetheless the result of negotiations that occurred before they were submitted, there is evidence that telephone discussions took place in early March 2001. They are described in the affidavit of the Commission CEO, but not in the affidavit of managing director of KPMG. The Commission CEO does not say whether "price" (to use the applicant's word) was discussed. The affidavit of the managing director indicates she negotiated with the Individual Contractor who undertook the projects (para. 6). The Commission CEO has deposed that she accepted the terms of the Proposals without negotiation.

[56] It is reasonable infer from the evidence that the Commission CEO discussed, or at the very least described, the work and the tight timelines involved to the managing director of KPMG before the Proposals were submitted. The Commission's argument about "supplied", and my assessment of it, follows below. The presence or absence of explicit evidence about

whether pre-Proposal communications(s) between the Commission CEO and the managing director of KPMG touched on price is not critical to the outcome of that assessment.

[57] The Commission contends that the Proposals were "supplied" because they were prepared and provided by KPMG and accepted by the Commission without change or negotiation. The argument is explained as follows in the Commission's initial submission:

> 56. …It seems well-established that, as a general rule, information that has been "negotiated" by a public body and a third party is not "supplied" by the third body for purposes of section 21(1)(b): Order 24-00; [*sic*] Order 00-22 (affm'd *Jill Schmidt Health Services Inc.* v. *British Columbia (Information and Privacy Commissioner)*, [2001] B.C.J. No. 79, 2001 BCSC 101); Order 00-09, Order 03-03; Order 03-05; *Canadian Pacific Railway* v. *British Columbia (Information and Privacy Commissioner) et al.,* [2002] B.C.J. No. 848, 2002 BCSC 603. Rather such information is viewed by the Commission to have been jointly created by the parties through the negotiation process.
>
> 57. There are exceptions to this general rule where, for example, accurate inferences about confidential information that has been supplied by the third party can be drawn from the negotiated contract terms: [quoted passages from Order 00-22 and *Jill Schmidt Health Services Inc.* v. *British Columbia (Information and Privacy Commissioner* are not reproduced]
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> 58. The evidence adduced in this inquiry makes it clear that the records in dispute here do not constitute "negotiated" information. The records are not the result or product of contractual negotiations and thus cannot be described as the culmination of a "give and take" process. The records were not generated by the Commission, but rather were prepared by KPMG and provided to the Commission. Each proposal was agreed to by the Commission without any change and without "negotiating" different contract language. Thus the evidence clearly supports a conclusion that the project proposals were not only "supplied" by KPMG to the Commission, but they were "explicitly" supplied on a confidential basis.
>
> 59. Alternatively, because these project proposals reflect the precise contract terms agreed to by the Commission, disclosure of them would permit a precise or accurate inference to be made of the underlying supplied confidential information.

[58] In Order 01-39, Nitya Iyer, to whom the Commissioner had delegated the conduct of that inquiry, summarized the approach to the s. 21(1)(b) "supply" issue where contract information is involved:

> [43] ... By their nature, contracts are negotiated between the contracting parties. The fact that the requested records are contracts therefore suggests that the information in them was negotiated rather than supplied. It is up to CPR, as the party resisting disclosure, to establish with evidence that all or part of the information contained in the contracts including their schedules was not negotiated, as would normally be the case, but was "supplied" within the meaning of s. 21(1)(b).
>
> [44] A number of cases have addressed the difference between negotiated and supplied information (see Orders 00-09, 00-22, 00-24, 00-39, 01-20). The thrust of the

reasoning in all of these decisions is that the information contained in contractual terms is generally negotiated. Information may be delivered by a single party or the contractual terms may be initially drafted by only one party, but that information or those terms are not "supplied" if the other party must agree to the information or terms in order for the agreement to proceed (see Order 01-20, paras. 81-89).

[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 of 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).

…

[48] Most recently, in Order 01-20, Commissioner Loukidelis again stated that information provided by one party and accepted by another (as evidenced by its inclusion in the contract), is negotiated, not "supplied" information (at para. 93).

[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."

[50] The second situation in which otherwise negotiated information may be found to be supplied is where 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, about information not expressly contained in the contract: Order 01-20 at para. 86. Such information may be relevant to the negotiated terms but is not itself negotiated. In order to invoke this sense of "supplied", CPR must point to specific evidence showing what accurate inferences could be drawn from which contractual terms about what underlying confidentially supplied information. Moreover, as discussed below, where information originally supplied in a bid proposal is simply accepted by the other party and incorporated into a contract, the mere fact that disclosure of the contract will allow readers to learn the terms of the original bid will not shield the contract from disclosure.

[59] When Order 01-39 was upheld in *Canadian Pacific Railway* v. *British Columbia (Information and Privacy Commissioner) et al.*, Ross J. said the following:

> [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 nonsusceptible 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.
>
> …
>
> [74] With respect to this first exception, the Delegate considered the decision in *Jill Schmidt*, and then concluded:
>
> > [49] … 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.
>
> [75] 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 ...
>
> [76] 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.

[60] The Commission's argument on "supplied"—that the incorporation of a term from a proposal into a contract signifies "supply" or that the contract term constitutes underlying confidentially "supplied" information in the proposal—is on all fours with arguments that were made and rejected in Order 00-22 and Order 01-39 and in other orders, such as: Order 01-20, [2001] B.C.I.P.C.D. No. 21, paras. 86, 87, 93, 95; Order 03-04, [2003] B.C.I.P.C.D. No. 4, paras. 29-32; Order 03-15, paras. 57-67; and Order 04-06, paras. 38-50.

[61] In Order 03-15 the Commissioner stated as follows, in relation to information in a contract resulting from an RFP process:

> [66] An RFP process aims to generate competitive proposals from qualified parties for the provision of goods or services to government. If all goes well, it leads to the government contracting with one, or more, of the proposing parties to provide the goods or services sought. It would hardly be surprising that terms in a contract arrived at resemble, or are even the same as, terms in the contractor's proposal. It might well be more unusual for the contract arrived [at] to be completely out of step with the terms of the contractor's proposal. A successful proponent on an RFP may have some or all of the terms of its proposal incorporated into a contract. As has been said in past orders, there is no inconsistency in concluding that those terms have been negotiated since their presence in the contract signifies that the other party agreed to them. This is not changed by the Ministry's contention that the terms in the Health Services Agreement were not negotiated, or even negotiable, because the Ministry believes that it simply accepted terms proposed by JMHS.

[62] The same observation holds true here, where KPMG was invited to offer, and the Commission subsequently accepted, terms and conditions on which it would perform services for the Commission.

[63] The Commission asks me to distinguish Order 03-15 on several grounds. It notes that the public body in Order 03-15 "dropped its initial claim that s. 21(1)" applied to the records in dispute, so the only party advancing s. 21 was the third-party contractor. I am not able to see how this distinguishes Order 03-15 from this case.

[64] The Commission says, also, that in Order 03-15 there was affidavit evidence filed by the Ministry of Attorney General indicating the hourly rate at issue "was arrived at through negotiation" between a Ministry representative and the third party. Additionally, the third party conceded in reply submissions that her hourly rate "was negotiated to the extent that there were discussions between [her] and the Ministry on the rate, even through she provided the hourly figure, and those discussions constituted negotiations as the term is applied by the Commissioner under s. 21 of the Act". Thus, the Commission submits, it was decided in Order 03-15 that the hourly charge figure was the product of contractual negotiation and was not "supplied" for purposes of s. 21(1)(b), but in this inquiry KPMG has made no concession on this point. On the contrary, the Commission argues the evidence is that the rate was provided by KPMG in confidence and was not "negotiated" between the Commission and KPMG.

[65] Further, the Commission says, in Order 03-15 there was conflicting affidavit evidence as to whether the "hours" figures had been negotiated. The third party said they were fixed, while the Ministry said they were negotiated. In contrast, the Commission submits that the evidence in this inquiry is consistent that the Proposals were not negotiated. In addition, the information supplied by KPMG was information that was "not susceptible of change in the negotiation process" as distinct from "information that was susceptible of change but, fortuitously, was not changed", though the Commission does not say why the information here was "not susceptible of change".

[66] I am not able to see how these aspects of Order 03-15 undermine the proposition, also expressed in earlier and subsequent decisions, that a public body's acceptance of terms of a proposal, so that they become terms of a contract, does not signify the "supply" of the contract terms under s. 21(1)(b) of the Act.

[67] More recently, in Order 04-06, Commissioner Loukidelis considered the daily fee rate, maximum fees and the maximum expenses in contracts awarded as a result of an invitation to quote to provide three experienced senior business analysts. The Ministry of Health Services had disclosed the aggregate total fees and expenses for each contract, but maintained the daily fee rate was covered by s. 21 and that the daily (and hourly) rates would be disclosed, or could be accurately inferred, from the severed information. The Ministry's evidence, supported by the third parties, was that "there was absolutely no negotiation between the parties as to the fees" (Order 04-06, para. 42). The Commissioner reiterated that the incorporation of a term from a proposal into a contract does not signify that the contract term was supplied (Order 04-06, para. 46); that while a fee rate in a contract may bear a relationship to the contractor's cost structure it did not follow that the fee bargain struck between the public body and contractor constitutes or reveals "an immutable contractor cost" that has been "supplied" by the contractor (Order 04-06, para. 48); and, that the mere incorporation of a term from a proposal into a contract "does not shield the contract from disclosure on the basis that it reveals underlying confidentially-supplied information" (Order 04-06, para. 49).

[68] Order 04-06 also discussed two orders under Ontario's *Municipal Freedom of Information and Protection of Privacy Act*, Order MO-1705, [2003] O.I.P.C.D. No. 232 and Order MO-1706, [2003] O.I.P.C.D. No. 238. In Order MO-1705, a cold beverage company submitted a contract proposal to a school district that formed the basis for an interim oral agreement between the parties. Adjudicator Bernard Morrow concluded that the terms of the proposal, as the terms of the oral agreement under which the parties operated for three years, were not "supplied" information. He stated as follows:

> [29] … the fact that a contract is preceded by little negotiation, or that the contract substantially reflects that proposed by a third party, does not lead to a conclusion that the information in the contract was 'supplied' within the meaning of section 10(1). The terms of a contract have been found not to meet the criterion of having been 'supplied' by a third party, even where they were proposed by the third party and agreed to with little discussion (See Order P-1545).
>
> …

> [32] I accept that as a practical matter, the affected party physically supplied the proposal to the Board. Had the appellant sought access to the proposal immediately after it was submitted, it may well have met the "supplied" test. However, circumstances changed significantly over the ensuing months. First, the Board announced the affected party as the winning bidder, and accepted the affected party's proposal. Second, the Board and the affected party then entered into an oral agreement to proceed on the basis of the terms set out in the proposal. Third, the parties began to act in accordance with the terms of the proposal, which is most clearly evidenced by the presence of the vending machines in the Board's schools. The appellant made his request after these events had occurred. In my view, at the time of the request, the nature of the proposal, read as whole, had changed from constituting a mere proposal to a document reflecting the terms of an oral agreement. In other words, the oral agreement incorporated by reference the essential terms of the proposal. Therefore, in my view, many of the withheld portions of the proposal are properly considered to be the terms of a contract, which do not meet the "supplied" test in section 10(1). As indicated above, the fact that contractual terms are proposed by a third party and agreed to with little discussion does not lead to the conclusion that they must have been supplied.

[69] In Order MO-1706, Adjudicator Morrow required access to be given to the proposal a cold beverage company submitted to a school district, and to the subsequent written contract between the parties. He stated:

> [48] … past decisions of this office have established that the terms of a contract between an institution and affected party will not normally be considered to have been "supplied" within the meaning of section 10(1). This is the case even where the contract substantially reflects terms proposed by a third party.
>
> [49] In this case, there would appear to be consensus between the parties that the terms of the Contract were negotiated over a fairly lengthy period of time. However, both the affected party and the Board take the position that the severed information in the Contract was not the result of a negotiation process since the severed information is identical to the information contained in the Proposal. I disagree. In general, agreed upon terms of a contract are not qualitatively different, whether they are the product of a lengthy exchange of offers and counter-offers, or the result of an immediate acceptance of the terms offered in a proposal. Except in unusual circumstances (for example, where a contractual term incorporates a company's secret formula for manufacturing a product, amounting to a trade secret), agreed upon terms of a contract are considered to be the product of a negotiation process and therefore not considered to have been 'supplied'.

[70] Ontario Order MO-1705 and Order MO-1706 reflect an established line of reasoning in that province, a line of reasoning that continues in even more recent decisions, for example: Order MO-1735, [2003] O.I.P.C.D. No. 273, paras. 65-74; Order PO-2228, [2004] O.I.P.C.D. No. 13, paras. 27-30; Order MO-1787, [2004] O.I.P.C.D. No. 99, paras. 27-34; and Order MO-1882, [2004] O.I.P.C.D. No. 288, paras. 25-26.

[71] For the reasons given above, I do not accept that the disputed information was "supplied" because the Commission agreed to it as proposed by KPMG, nor do I accept that

the "supplied" element is met because the contract terms are the same as, and therefore would reveal, terms proposed by KPMG.

[72] Finally, I would observe that the disputed information is prone or susceptible to change. It is not the kind of information that is immutable or not susceptible to change through negotiation and KPMG's own statement that pricing components are affected by negotiation and discounting (p. 6, initial submission) reflects the mutability of that information.

[73] Based upon this discussion, I find that the information in dispute was not "supplied" within the meaning of s. 21(1)(b) of the Act.

Was there confidentiality?

[74] I have considered the arguments and evidence of whether there was confidentiality in relation to the information in dispute. The Commissioner considered the issue of what constitutes "in confidence" in Order 00-37, [2000] B.C.I.P.C.D. No. 40, at p. 10, and in Order 01-39 the Commissioner's delegate, Nitya Iyer, adopted this and added, at para. 28:

> The test is objective and the question is one of fact; evidence of the third party's subjective intentions with respect to confidentiality is not sufficient: *Re Maislin Industries Ltd. and Minister for Industry* (1984), 10 DLR (4th) 417 (F.C.T.D.); see also *Timiskaming Indian Band* v. *Canada (Minister of Indian and Northern Affairs)* (1997), 148 DLR (4th) 356 (F.C.T.D.).

[75] The Commission and KPMG say the Proposals themselves provide evidence of express confidentiality (paras. 41, 42, 54, Commission initial submission; p. 5, KPMG initial submission; para. 17, KPMG reply submission). They point to the fact that each page of Proposals 1, 2 and 3 and the "standard terms and conditions" that accompany them, is marked with the words "Proprietary and Confidential". Proposals 4, 5 and 6 are not so marked, but "Proprietary and Confidential" is marked at the bottom of each page of the "standard terms and conditions" that accompany the copies of Proposals 4 and 6 in the disputed records. The Commission also points to s. 14 of the "standard terms and conditions" (para. 41, initial submission), which reads as follows:

> **14. Confidentiality.** "Confidential Information" means all documents, software, reports, software, reports, data, records, forms and other materials KPMG Consulting and Client provide to each other in the course of the engagement: (i) that have been marked as confidential; (ii) whose confidential nature has been made known; or (iii) that due to their character and nature, a reasonable person under like circumstances would treat as confidential. Notwithstanding the foregoing, Confidential Information does not include information which: (i) is already known to the other party at the time of disclosure; (ii) is or becomes publicly known through no wrongful act of the other party; (iii) is independently developed without benefit of the other's Confidential Information; or (iv)

> is received from a third party without restriction and without a breach of an obligation of confidentiality. Neither party shall use or disclose to any person, firm or entity, any Confidential Information of the other party without the other's express, prior written permission; provided, however, that notwithstanding the foregoing, Confidential Information may be disclosed to the extent that required by law. These confidentiality restrictions and obligations shall terminate two (2) years after the expiration or termination of the engagement.

[76] The Commission submits evidence that, during early March of 2001, the Commission CEO had telephone discussions with KPMG's managing director in Vancouver (paras. 44, 54, Commission's initial submission; paras. 25-26, Commission CEO's affidavit). The Commission CEO deposed at para. 26:

> 26. In my telephone discussions with Ms. Ryan about these project proposals we specifically discussed their confidential nature. Ms. Ryan was very clear that these project proposals would be provided to me on a confidential basis only and I assured her the information would be received on this basis. It was thereafter understood by me that all project proposals from that company would be provided to me on a confidential basis.

[77] KPMG provides the following evidence in its managing director's affidavit (at paras. 6-7):

> 6. … I also believe that [the Individual Contractor], a consultant KPMG Consulting has negotiated with in confidence and subcontracted with for this work has the requisite skills and expertise to provide services in relation to these projects.
>
> 7. KPMG Consulting provided to the Commission, on a confidential basis, three project proposals on March 21, 2001. …

[78] The Individual Contractor's submission does not add to the above evidence.

[79] Citing Order 03-02, the applicant argues that KPMG cannot rely on "boilerplate" statements of confidentiality in a contract between the parties (para. 61, initial submission; para. 7, reply submission). Citing Order 00-22, he also says that markers of confidentiality must be explicit and not as a result of a "*post hoc* affidavit" stating the parties implicitly intended or understood the information was supplied in confidence.

[80] I have reviewed the evidence from the Commission and KPMG, as well as the applicant's arguments. The confidentiality clause in the standard terms and conditions is not a marker of confidentiality, as I do not read the above-quoted wording to cover the records in this inquiry. It covers, rather, the product of the contract, *i.e.*, the records and other materials produced or provided "in the course of the engagement", not the terms of the proposal or contract establishing the engagement. This situation is similar to the contractual provisions in Order 03-15, at para. 75, which the Commissioner described as covering "information obtained by the contractor 'as a result' of the agreement, as opposed to the terms and provisions of the agreement itself".

[81] The Commission relies upon the external confidentiality markers in the first three proposals. This practice is inconsistent as the subsequent three proposals do not have the external markers. There is no explanation of why some should have the confidentiality wording and other proposals not have the same wording.

[82] The Commission also relies on the conversations between its Commission CEO and KPMG's managing director. I note that the managing director does not mention these telephone conversations in her affidavit. She deposes that KPMG provided the three project proposals on a confidential basis. She does not address whether the further three additional project proposals were in confidence. I also note the Individual Contractor does not specifically address this issue in his submission. While the Commission has provided evidence of its understanding of KPMG's expectation of confidentiality, there is only the assertion by KPMG that the information was provided in confidence. The KPMG argument and evidence asserts that it "provided the proposals to the Commission with the understanding and clearly marked 'Proprietary and Confidential'". It does not provide any details as to the understanding (see p. 5, KPMG's initial submission and para. 7, Ryan affidavit).

[83] Further, there is no evidence before me that the Commission conducted, by invitation or advertisement, a competitive bid process or request for proposal process to meet these particular projects. There is no written documentation of the expectations of the process and the confidentiality expectations. The Commissioner noted this in Order 04-06 at para. 51.

[84] Based upon my examination of the evidence and arguments, I conclude the "in confidence" element in s. 21(1)(b) is not met.

Harm to the third party's interests

[85] The third part of the test requires there to be a reasonable expectation of harm to third-party interests as specified in s. 21(1)(c). The Commission discusses ss. 21(1)(c)(i) and (iii) in its initial submission. KPMG discusses ss. 21(1)(c)(i) and 21(1)(c)(iii) in its initial submission and s. 21(1)(c)(i) in its reply submission.

[86] I have applied the reasoning in Order 03-04, at para. 35, and Order 04-06, at para. 55, where the Commissioner stated that he applied the reasoning in Order 02-50, [2002] B.C.I.P.C.D. No. 51, at paras. 111-112 and 124-137, to assess the evidence of the s. 21 harm. In Order 02-50, the Commissioner assessed the Ministry's s. 17 claim "by considering whether there is a confident, objective basis for concluding that the disclosure" would reasonably be expected to meet the s. 17 harms. In Order 03-04 and Order 04-06, the Commissioner applied this approach to s. 21(1)(c) harm. In Order 04-06, he adopted the language from *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, and stated, at para. 58, that "there must be a clear and direct connection between the disclosure of specific information and the harm that is alleged."

[87] In addition, I have applied the Commissioner's approach in Order 00-10, [2000] B.C.I.P.C.D. No. 10, at pp. 10-15, to the meaning "harm significantly" in s. 21(1)(c)(i).

I have applied the Commissioner's approach to the meaning of "undue", in s. 21(1)(c)(iii), as stated in Order 00-10, at pp. 16-18, and in Order 01-36 [2001] B.C.I.P.C.D. No. 37, paras. 56-65.

[88] The Commission and KPMG rely on reasoning in KPMG's September 4, 2002 letter for their argument why the disclosure would either cause significant harm to the third party's competitive position or significantly interfere with its negotiating position. The letter stated, in part (see p. 5, initial submission,):

> The confidentiality of this information is acutely important because the proposals and communications concern the provision of technical services in very competitive commercial markets worldwide. KPMG Consulting is also pursuing other Government procurement opportunities using these same services categories and strategies. If KPMG Consulting's information contained in the contract were released, KPMG Consulting's competitors on Government or commercial procurements would have a distinct advantage in knowing what KPMG Consulting expects to do during those contracts and be able to react accordingly. This information would expose KPMG Consulting's marketing strategies and supplier relationships it spent considerable time and effort to develop. Release of this information could cause KPMG Consulting substantial competitive harm and would impair the government's ability to obtain necessary services and information in the future.
>
> …
>
> Again release of this information would significantly restrict the ability of KPMG Consulting to compete for Government contracts. This would restrict the Government from gaining the benefits of a competitive market in satisfying their needs of these or similar services.

[89] KPMG's managing director deposes at para. 9 of her affidavit attached to its initial submission:

> It is my belief and personal understanding that release of the proposals KPMG Consulting provided to the Commission, and information contained therein, would significantly harm the competitive position of KPMG Consulting by exposing our proposal, pricing, and fee structures and negatively impacting our relationship with our subcontractors and current and future negotiating positions.

[90] In its initial submission, the Commission (at para. 64) argues that the records indicate that the disclosure would reveal the then current year pricing, the types of services and how long it will take for discrete tasks within individual projects. This information, the Commission argues, is not available from other sources and would assist competitors to undercut it on the pricing component of future tenders or proposals for health services contracts. The competitive value, even though the projects are complete, is found in contract amounts, the breakdown applied to these amounts and the description of services. The Commission argues that the release of the information could reasonably be expected to result in unfair or undue financial gain to the third party's competitors.

[91] KPMG submits at page 6 of its initial submission that:

> … Pricing and negotiations are extremely competitive in today's global economy with fewer public sector funds available to the consulting industry. Release of this information would expose to our competitors our negotiations with our consultants, negotiated fees, and discounting of our standard fees in order to provide our services to our client, the Commission in this case.

[92] At para. 9 of her affidavit, the managing director states:

> It is my belief and personal understanding that release of the proposals KPMG Consulting provided to the Commission, and information contained therein, would significantly harm the competitive position of KPMG Consulting by exposing our proposal, pricing, and fee structures and negatively impacting our relationship with our subcontractors and current and future negotiating positions.

[93] In its reply submission, KPMG provides *in camera* evidence and argument about the harm to the third party of the disclosure of certain information.

[94] In his initial submission (paras. 77 to 80 and appendix T-1) and reply submission (at para. 16), the applicant submits that the Individual Contractor's rate can be calculated from KPMG's invoices, which were released as part of this request (see pp. 4 to 76 of the records not in dispute). These invoices reveal the number of hours one contractor worked on the project and the daily rate charged. The applicant states at para. 86 of his initial submission that "… the rate charged by [KPMG] for the services of the [Individual Contractor] appears to have been different on different invoices. The rate is, at any event, disclosed by the invoices and the invoices have been surrendered."

[95] With respect to an expectation of harm, the applicant, in his reply submission (para. 13) argues that the "possibility of disclosure of the documents should reasonably have been foreseen by KPMG. KPMG should have ensured that contracts were written that would better protect the information in its 'proposals'. Instead, KPMG, for whatever reason, chose not to enter into a written contract." The applicant argues that "if [KPMG] did not take all reasonable steps to assure that the requested information was not made public, then it must be assumed that … KPMG did not believe itself likely to sustain loss as a result of disclosure."

[96] The evidence of harm must be objective and more than generalized and speculative, and show a clear and direct connection between the disclosure of the information and the harm. In Order 04-06, at para. 61, the Commissioner reviewed the Federal Court's approach under the federal *Access to Information Act* to assessing the issue of competitive markets. The mere "heightening of competition" is not interference with contractual or other negotiations: "[a]n obstruction in actual negotiations must be shown."

[97] In the case of s. 21(1)(c)(i), the harm or interference must be "significant". KPMG argues that the disclosure of pricing for services and how long it would take to complete discrete tasks within individual projects would expose to its competitors the

negotiations with its contractors, its negotiated fees and discounting of its standard fees. The question is whether the alleged harm or interference is significant. The evidence and argument is directed to KPMG's competitive position. While the evidence demonstrates it is reasonable to expect harm to flow from the disclosure, there is an absence of evidence in this matter to demonstrate that the harm or interference to competitive position would be significant.

[98] The market conditions surrounding the contract are an important consideration in assessing the harm under s. 21(1)(c)(i). In Order 00-22 and Order 03-15, there was clear evidence of highly competitive markets and a small number of competitors in the market. The Individual Contractor states that he has specialized knowledge and expertise. However, I do not have any evidence on the competitive nature of the market for contractors in this context, other than generalized assertions that global markets are highly competitive.

[99] In addition, the extent of the harm in relation to the assets or revenues of the third party may be relevant in determining whether the harm is significant (see Order 00-10, at p. 11). The parties have not provided any evidence on KPMG's assets or revenues, other than to say KPMG employs over 15,000 professionals in 39 countries, providing services to over 2,100 public and private sector clients all over the world (p. 3, KPMG's initial submission,).

[100] The evidence in this case is unlike that in Order 03-33 where the Commissioner found that, even though he did not have qualitative evidence as to the magnitude of harm, expressed in dollar terms, he had evidence of the highly competitive market in Internet payment transaction-processing services, the applicant had competitive interests, and the Ministry was expected to issue a new RFP for the same services.

[101] I am unable to find that, given the passage of time and the fact that much of this information is known through the access to information releases by the Commission, that the disclosure of the remaining information could reasonably be expected to significantly harm KPMG's competitive position or interfere significantly with KPMG's negotiating position.

[102] Further, there is an absence of evidence to show that the loss to the third party or gain to its competitors would be "undue". In Order 03-15, in reference to s. 17(1)(d), the Commissioner observed at para. 25 that "[s]imply putting contractors and potential contractors to government in the position of having to price their services competitively is not a circumstance of unfairness or 'undue' financial loss or gain." In Order 04-06, at para. 62, he applied this reasoning to s. 21(1)(c)(iii). The parties have not shown that the loss or gain would be undue as the evidence in Order 00-10 demonstrated.

[103] Neither KPMG nor the Commission provided evidence about the disclosure of the billing information contained in the standard terms and conditions.

[104] Based upon the above discussion, I find the Commission has not met its burden to prove that it is reasonable to expect that the disclosure of the information in dispute would harm significantly the competitive position or interfere significantly with the negotiating position of the third party. In addition, the Commission has not met its burden to prove that it

is reasonable to expect the disclosure of the information in dispute would result in undue financial loss or gain to any person or organization.

[105] As the s. 22 issue was not pursued by the applicant, I have not found it necessary to discuss or decide the matter.

4.0 CONCLUSION

[106] For reasons given above, I find that s. 21(1) does not require the Forensic Psychiatric Services Commission of the Provincial Health Services Authority to refuse to disclose the information in dispute. Under s. 58 of the Act, I require the Commission to give the applicant access to the information.

February 24, 2005

ORIGINAL SIGNED BY

Bill Trott
Adjudicator