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INFORMATION & PRIVACY
COMMISSIONER
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British Columbia

Order F10-24

MINISTRY OF HEALTH SERVICES

Celia Francis, Senior Adjudicator

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Summary: FIPA and BCGEU requested access to the contract between the Province and Maximus for the delivery of MSP and PharmaCare services. The Ministry disclosed the contract, withholding portions under ss. 15, 17 and 21. The application of s. 17 to certain items in the contract was the only issue at the inquiries and it was found not to apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 17(1)(d) & (e).

Authorities Considered: **B.C.:** Order 02-05, [2002] B.C.I.P.C.D. No. 5; Order F08-22, [2008] B.C.I.P.C.D. No. 40; Order F06-03, [2006] B.C.I.P.C.D. No. 8; Order 02-50, [2002] B.C.I.P.C.D. No. 51. Order F08-11, [2008] B.C.I.P.C.D. No. 19; Order 03-35, [2003] B.C.I.P.C.D. No. 35; Order 03-25, [2003] B.C.I.P.C.D. No. 25; Order 03-15, [2003] B.C.I.P.C.D. No. 15; Order F07-15, [2007] B.C.I.P.C.D. No. 21; Order F05-28, [2005] B.C.I.P.C.D. No. 38; Order F08-22, [2008], B.C.I.P.C.D. No. 40.

Cases Considered: *B.C.G.E.U. v. British Columbia (Minister of Health Services)*, 2005 BCSC 446; 2007 BCCA 379.

1.0 INTRODUCTION

[1] This order arises out of two separate requests made under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for copies of the November 4, 2004 contract between the Province of British Columbia and

Maximus BC Health Incorporated (“Maximus”)¹ for the delivery of services related to the Medical Services Plan (“MSP”) and the PharmaCare Plan (“PharmaCare”) for British Columbia (“the contract”). The applicants were the Freedom of Information and Privacy Association (“FIPA”) and the British Columbia Government and Service Employees’ Union (“BCGEU”). The Ministry of Health Services (“Ministry”) responded to the two requests by providing access to some records and withholding information under ss. 15, 17 and 21 of FIPPA. Both applicants were dissatisfied and requested reviews of the Ministry’s responses.

[2] During the course of mediation, the Ministry released additional information and ceased to rely on s. 21 of FIPPA. In addition, the applicants agreed not to pursue the information the Ministry had withheld under s. 15 and to reduce the scope of the records under review to portions of three articles and two schedules to the contract. As mediation was unsuccessful in resolving all matters, in particular those related to s. 17 of FIPPA, the OIPC held two written inquiries under Part 5 of FIPPA. The OIPC invited Maximus, the third party, to participate in each inquiry as “an appropriate person”.

[3] The issues were undecided when Commissioner Loukidelis left office on January 19, 2010. They were subsequently reassigned to me pursuant to a delegation of the Commissioner’s powers under s. 49 of FIPPA and I have considered and decided this matter independently.

[4] Although the applicants are two separate entities, the records and the public body are the same in each case, as are the submissions by the public body and Maximus. I have therefore disposed of the issues in the two inquiries in one order.

2.0 ISSUE

[5] The issue in this inquiry is whether s. 17(1) of FIPPA authorized the Ministry to refuse access to information in the identified articles and schedules.

[6] Under s. 57(1) of FIPPA, it is up to the head of the public body to prove that the applicants have no right of access to the information it believes must be withheld under s. 17(1).

3.0 DISCUSSION

[7] **3.1 Background**—Maximus was the successful proponent in what was described as a Joint Solutions Procurement (“JSP”) process leading to a contract, known as the “Health Benefits Operations Contract”, for Maximus to

¹ The contract in question is between Maximus Inc., Maximus Canada Inc., Maximus BC Health Inc. and Maximus Health Benefit Operations, Inc. I refer to them collectively here as Maximus.

operate the MSP and PharmaCare systems.² The JSP process is described as an initiative of the “Alternate Services Delivery” (ASD) Secretariat, a government office designed to assist in transforming the way government services are delivered, particularly in respect of the use of information technology systems. The ultimate aim is to “provide the best value for the tax dollar”.³

[8] The contract has been the subject of judicial review litigation: *B.C.G.E.U. v. British Columbia (Minister of Health Services)*.⁴ The Court of Appeal’s Judgment (paras. 2, 3, 16), consistent with the evidence filed in this proceeding, concisely outlines the background and nature of the contract:

[1] The Medical Services Plan (the “Plan” or “MSP”) provides health care insurance to residents of British Columbia. The Plan was established in 1965 and, by statute, operates in accordance with the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 under the direction of the Medical Services Commission (the “Commission”). The composition and powers of the Commission are established under the *Medicare Protection Act*. The Medical Services Plan, through its enrolment and adjudication processes, provides eligible residents with access to publicly funded health care and pays medical practitioners for the services they provide.

[2] On 4 November 2004, Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Minister of Health Services, entered into a ten-year contract (referred to as the “Master Services Agreement” or the “Agreement”) with Maximus BC Health Inc., Maximus BC Health Benefit Operations Inc., Maximus Canada Inc., and Maximus Inc. (collectively “Maximus”) to operate and administer most aspects of the Medical Services Plan. Most of the public employees who had been operating and administering the Medical Services Plan were members of the appellant, the British Columbia Government and Service Employees’ Union (“BCGEU”).

...

[16] The chambers judge described the Agreement and his understanding of the effects of its provisions as follows:

[8] The Master Services Agreement is a contract entered into by the appropriate ministry with Maximus for the purpose of “outsourcing” certain functions previously performed by employees by the Province of British Columbia. In the main, these services relate to the processing of accounts rendered to government by medical personnel for payment of fees and other charges which are covered by the *Medicare Protection Act* in the Province of British Columbia. The schedule of fees and the activities covered are determined by government. The mechanics of payment are pursuant to the contract to be carried out by Maximus. According to the evidence, 98.5% of the account payment information will be computer driven. There will be a small portion which may involve the intervention of an individual to

² I outline the JSP process below.

³ Paras. 4.06-4.10, Ministry’s initial submission.

⁴ 2005 BCSC 446; 2007 BCCA 379.

assess whether or not the claim falls within the insured services either by way of description of the activity or a determination as to whether the patient or person receiving the medical attention is an insured within the meaning of the scheme.

[9] It is important to note that the contract does not cover the delivery of medical services by health care professionals in the Province of British Columbia. The purpose of the contract is to ensure payment of accounts rendered by medical health care professionals pursuant to the appropriate legislation and pursuant to the appropriate schedule of fees and services as determined by the Province.

[10] Maximus, under the terms of the Master Services Agreement, does not determine fees, nor does it determine payment except entitlement to payment of fees in accordance with the policies and directives of the Province of British Columbia and the fee schedule that it has created. On any review of the agreement the Province, through the Ministry of Health, has oversight of all aspects of the operation and power to intervene if and when it deems it necessary.

[9] The JSP bidding process had several phases. The first phase, starting in July 2003, requested proposals from interested applicants, both domestic and international, for what was described as the “Health Benefits Operations” project. Vendors were invited to submit their qualifications. The Ministry selected four qualified companies to continue with the process. This was later narrowed down to two proponents, who participated in “an intensive three-month joint solution phase”.

[10] In March 2004, Maximus was selected as the successful proponent. The Ministry then entered into “interest based negotiations” with Maximus which were “hard fought”,⁵ extended over six months and resulted in a “10 year fixed price performance-based service contract with a five year renewal option”. The parties agreed that BC-based subsidiaries of Maximus Canada Inc. would deliver the services.⁶ Maximus agreed to offer positions to all 230 employees of the Health Benefit Operations program and also:

... committed to improve and sustain service levels with financial consequences for 27 specified service level requirements. A further 41 service level objectives were identified but not accompanied by financial penalties.⁷

[11] The contract was entered into on November 4, 2004.

[12] **3.2 Records in Dispute**—The records in dispute consist of portions of the following items from the contract:

- **Article 12.9: Benchmarking**

⁵ Para. 4.36, Ministry’s initial submission.

⁶ Paras. 4.40-4.41, Ministry’s initial submission.

⁷ Para. 20, Maximus’s initial submission; para 10, Ruff affidavit.

- **Article 13:** Gain sharing
- **Article 24.1:** Uninterrupted Services
- **Schedule “F”:** Service Levels
- **Schedule “L”:** Asset Conveyance Agreement

[13] **3.3 Records in public domain**—The public body has confirmed in its submissions that “significant portions” of the contract were tendered as evidence in the judicial review litigation, during which the Supreme Court refused an application to seal the court file.⁸ Both the Ministry and Maximus argue, and I agree, that the principles governing the Court on that application do not govern the test under s. 17 of FIPPA.

[14] It is not entirely clear whether any part of the records in dispute formed any part of the material filed in Court, and whether it is therefore accessible to any member of the public through a Court Registry search. I will assume that the answer to this is “no”, for if the answer is “yes”, there would seem to be little practical point in the applicants pursuing those records in this request, and little basis for the respondents’ argument that harm could flow from the disclosure of information that is already publicly available through the court registry.⁹ I therefore proceed on the basis that the records in dispute are not otherwise publicly available.

[15] **3.4 Harm to the Financial Interests of the Public Body**—Section 17 of FIPPA authorizes public bodies to withhold information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the Province of British Columbia. These are the relevant FIPPA provisions relied on in this case:

- 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: ...
- (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
 - (e) information about negotiations carried on by or for a public body or the government of British Columbia; ...

[16] The Ministry and Maximus provided much of the substance of their arguments and evidence *in camera*. This constrains me from discussing this material in detail. Their main point is that disclosure of the remaining information

⁸ 2005 BCSC 446, at paras. 72-76.

⁹ See also FIPPA, s. 20(1)(a).

in dispute would harm their negotiating positions in future, the Ministry with future alternate service delivery providers and Maximus with existing clients, prospective clients and other “teaming” vendors and subcontractors.

[17] Both Maximus and the Ministry argue that the JSP process is significantly different from the traditional Request for Proposal (“RFP”) process. Maximus said it was “expected to assume a greater level of risk because there was a longer contractual period of time over which to spread the risk”.

Ministry’s submission¹⁰

[18] The Ministry relies on s. 17(1)(e) of FIPPA. It argues that disclosure of the records in dispute could reasonably be expected to harm the negotiating position of the Province in future ASD negotiations and thus harm the financial interests of the Province.¹¹

[19] The Ministry emphasizes that, under s. 17(1), there is no requirement that the potential harm be substantial or significant. It is not necessary to demonstrate actual harm. While evidence of speculative harm will not suffice, “there must necessarily be a certain level of speculation, especially when one is dealing with information the public body has not disclosed before”. The Ministry submits that the opinions of its affiants regarding this question should be given considerable weight. It emphasizes that s. 17 is not to be narrowly interpreted and that, once the exemption applies, the Commissioner does not have jurisdiction to order the Ministry to disclose the information in its discretion.¹²

[20] As just noted, the Ministry in this case seeks to emphasize the “uniqueness” of the ASD contracts as compared with the typical RFP process in which the Province uses the RFP to set out the services it requires, and then selects the successful bidder based on price, expertise and experience. Of the thousands of contracts the Province enters into every year, only two or three “ASD contracts” are entered into.¹³

[21] The Ministry states that, under the JSP process, the Province articulates the outcome it is seeking. In turn, prospective vendors work with the Ministry to develop custom solutions. Discussions regarding potential solutions require the parties to disclose sensitive information to each other and require the Ministry to consider protections and clauses not commonly afforded. The process entails considerable negotiation of price and other fundamental elements of the deal

¹⁰ All parties made initial submissions and submissions in reply to the other parties’ initial submissions. In summarizing each party’s submission, I have taken into account the submissions they made both initially and in reply.

¹¹ Ministry’s initial submission, para. 4.55.

¹² Ministry’s initial submission, paras. 4.48-4.56; Ministry’s Reply submission, paras. 14-18.

¹³ Ministry initial submission, para. 4.61.

once each provider has arrived at a final solution.¹⁴ Considerable negotiation is therefore necessary even after the successful proponent is identified. In this case, it took approximately six months for negotiating teams of 5 or 6 people to conclude the contract.¹⁵

[22] The Ministry said that the long term nature of the arrangement and the interdependence of the parties (*i.e.*, the vendor acquiring government assets and staff) makes the ultimate contractual relationship “similar to a partnership in many ways”.¹⁶ Negotiations reflect government’s concerns not only about saving money, but also about ensuring that the vendor will assume risk and be reliable and sustainable over the term of the contract. The contract that is negotiated necessarily requires both parties to agree to unique provisions (such as gain sharing) that are not normally found in traditional contracts.¹⁷

[23] The Ministry said that proponents invest between \$1-2 million in developing their proposals and may take up to 25% of their contract term to recover their initial investment. In this case, the negotiations for this contract, which is worth \$324 million over ten years (with a five-year renewal option), took nearly six months:¹⁸

... The Ministry submits that in light of the realities of complex commercial negotiations, a reasonable person would expect that the disclosure of the contractual provisions at issue in this inquiry could reasonably be expected to harm the negotiating position of the Province in future ASD negotiations and thus harm the financial interests of the Province.¹⁹

...the service provider will often provide very sensitive financial and commercial information about themselves that they would not normally provide. As such, there is a greater risk that the release of such provisions will cause financial harm to either the province or the service provider than in the case of more traditional contracts.²⁰

Due to the long term nature of ASD contracts, the comprehensiveness of the services required and the amount of money involved, both government and service providers will often agree to terms they would not ordinarily agree to...²¹

[24] The Ministry submits that the release of these contract provisions is more likely to cause the parties financial harm than would be the case with standard

¹⁴ Ministry’s initial submission, para. 4.22-4.26..

¹⁵ Ministry’s initial submission, paras. 4.36-4.39.

¹⁶ Ministry’s initial submission, para. 4.68.

¹⁷ Ministry’s initial submission, paras. 4.69-4.74.

¹⁸ Ministry’s initial submission, para. 4.36.

¹⁹ Ministry’s initial submission, para. 4.52. I have also considered the Bethel affidavit which the Ministry provided in support of its arguments.

²⁰ Ministry’s initial submission, para. 4.79.

²¹ Ministry’s initial submission, para. 4.80.

contracts. The Ministry identifies the four types of potential financial harm that could result from the disclosure of the information in dispute:

- additional procurement costs due to extended negotiations in future ASD negotiations
- damage to the Province's negotiating position in relation to future contract negotiations
- as the Province continues to engage in negotiations in relation to complex ASD deals in the future, vendors will try to use unusual provisions in other contracts to their advantage in future negotiations, *i.e.*, "you gave in on this point before and so you should be able to do so again"
- harm government's ability to do ASDs in future²²

[25] The Ministry fears that, within the relatively small pool of companies sophisticated enough to offer ASD solutions, disclosure of the information at issue would result in fewer companies being willing to bid on provincial ASD projects because it could harm the companies' ability to negotiate future contracts with others. The Ministry also submits that companies that did choose to participate would be more guarded and less willing to disclose information as part of the process, which would reduce the quality of the solutions.²³ Fearing disclosure of options through a FIPPA request, a vendor might be unwilling, in negotiations with a Ministry, to raise an option it had never agreed to before, as the vendor might be unwilling to accept such an option in negotiations with other clients. Alternatively, if a vendor were willing to discuss such an option with the Province, it might require additional compensation (a "risk premium") to offset the risk of disclosure. The Ministry submits that this would cause delays of months and increase the costs to the Province by up to \$300,000 and by as much or more to the vendor.²⁴

[26] The Province might forgo advantages in one area to gain advantages in another, the Ministry argues, and the disputed information could give potential vendors additional bargaining power in future negotiations with the Province. Vendors might agree to terms that mean they lose money in the short term, due to large start-up costs, the Ministry argued, with the aim of making money later. The Ministry referred to these types of terms as "unusual provisions". The Ministry also said that vendors spend time and resources trying to find publicly available information about other vendors to use to their advantage in negotiations.²⁵ Access to such information will improve their bargaining power in negotiations, it said.²⁶

²² Ministry's initial submission, para. 4.106; I have also considered the Wolfe affidavit which the Ministry provided in support of its arguments.

²³ Ministry's initial submission, para. 4.96.

²⁴ Ministry's initial submission, para. 4.130; para. 77, Wolfe affidavit.

²⁵ Ministry's initial submission, para. 4.107-4.108; paras. 23 & 54-57, Wolfe affidavit.

²⁶ Ministry's initial submission, para. 4.118.

[27] The Ministry admits the Province has the option of holding firm in future negotiations and not agreeing to accept similar terms from other vendors, but says this would prolong the negotiations. The Ministry estimates any additional delays in the process could cost the Province several thousand dollars per day:²⁷

In the case of ASD arrangements, a service provider will often agree to terms that will involve their losing money in the short term, due to significant start up costs, with the objective of making money later on in the contract.

Similarly the Province, for those same reasons, will sometimes agree to provisions in ASD contracts that it would not ordinarily agree to in more traditional contracts. These provisions are ones that the Province is not usually willing to agree to in more traditional contracts but are [*sic*] willing to do so in ASD contracts because of the uniqueness of such arrangements.

[28] The Ministry also commented on the individual items as follows:

- **Article 12.9 - Benchmarking**—The Ministry said that “benchmarking” provisions are common in outsourcing initiatives. The purpose of a benchmarking provision is to allow one or both parties to seek adjustments in pricing or service delivery depending on various “benchmarks” which take into account certain realities that might exist at a future time, pertaining to matters such as cost (*e.g.*, inflation) or technology changes. There are many issues to negotiate in this area, including which party or parties may initiate the benchmark, when it may be initiated or triggered, who the “benchmarker” will be, the benchmark companies to be selected and whether service levels and pricing are benchmarked together or separately. The Ministry provided *in camera* evidence on benchmarking and on why it believes disclosure of the information relating to benchmarking in Article 12.9 would cause the Province financial harm in future ASD negotiations.²⁸

- **Article 13 - Gain sharing**—The Ministry says “gain sharing” provisions involve the parties agreeing to share profits that might accrue from the project in return for the Province providing the funds and the service provider taking on financial risks. The Ministry submits that “any disclosure of the fact that the Province agreed to the gain sharing provision in this case would result in financial harm to the Province.”²⁹ Again, much of its evidence on the harm it foresees occurring to its ability to negotiate future ASDs was *in camera*.

²⁷ Ministry’s initial submission, para. 4.120

²⁸ Paras. 80-103, Wolfe affidavit.

²⁹ Paras. 104-117, Wolfe affidavit.

- **Article 24.1 – Uninterrupted services**—The Ministry’s evidence on this item, including its subject matter, was almost entirely *in camera*.³⁰ I can say however that, as with the other withheld items, the evidence relates to the Ministry’s concerns about the detrimental effect on future ASD negotiations it foresees occurring if this item were disclosed.³¹
- **Schedule F - Service levels**—The Ministry’s evidence on this item was also mostly *in camera* but as above concerned the potential adverse effect disclosure of the withheld information might have on future ASD negotiations.³²
- **Schedule L - Asset conveyance agreement**—The Ministry submits that if the amounts that Maximus has agreed to pay for assets become public knowledge, other companies will refuse to pay a greater amount for similar assets in future contracts because the Province was willing to accept those amounts from Maximus. This would require the Province to forgo possible revenue or endure the cost of more protracted negotiations. Other aspects of the Ministry’s evidence were *in camera* but were in the same vein as those outlined above.³³

Submissions of Maximus

[29] Maximus takes no position respecting Article 12.9 or Schedule “L” but provides submissions on the other withheld items. Maximus states:

The only information that remains in dispute is a small amount of commercial information the disclosure of which would prejudice the company’s competitive position in the target market within the meaning of s. 17(1)(d) of the Act and thereby harm the government’s economic position both with respect to its own negotiating position on future outsourcing contracts and with respect to its position as a “partner” with MAXIMUS under the Master Services Agreement.³⁴

[30] Maximus submits that disclosure of information relating to gain sharing, Article 24.1 and asset conveyance could cause it undue loss in accordance with s. 17(1)(d) that will result in a reasonable expectation of financial or economic harm to government.³⁵ Maximus says that this information could be exploited by competitors in a way that would cause a reasonable expectation of harm to both the company and the government.

³⁰ While the Ministry’s submission did not even include the subject matter of article 24.1 in its “public” submission, the submission of Maximus did.

³¹ Paras. 118-135, Wolfe affidavit.

³² Paras. 136-199, Wolfe affidavit.

³³ Paras. 200-232, Wolfe affidavit.

³⁴ Maximus’s initial submission, para. 7.

³⁵ Maximus’s initial submission, para. 11.

[31] Maximus argues that the “ASD model” differs in several ways from conventional negotiations for government contracts. It involved considerably longer range budget projections, a much steeper learning curve with respect to government operations and much more transparency in terms of disclosing the company’s sensitive commercial information.³⁶

[32] Maximus says it had to assume greater risks because there is a longer contractual period over which to spread that risk. These risks involved “delivery service levels, cost over-runs, breaches of data security and privacy, disaster recovery/business continuity, and end-to-end integration of multiple systems and business processes.” Maximus believes that this information “would be highly useful information to [its] competitors on future outsourcing contracts.”³⁷

[33] Maximus also submits that it works within a highly competitive environment in government outsourcing with eight major rivals, most of them large companies with thousands of employees and contracts around the world. It expects to be competing with some of these same competitors for similar contracts in Alberta and the United States. Maximus also plans to use its experience in this contract to gain other outsourcing work within the province and across Canada. Disclosure of the information at issue would be “particularly helpful to [its] competitors”, Maximus argues, and would provide an undue benefit to them, as the information would provide its competitors with insight into its cost and gross profit levels which would benefit them in future negotiations.³⁸

[34] Maximus provides *in camera* most of its arguments relating to the specific harm that it anticipates could reasonably be expected to flow from disclosure of the individual articles and schedules of the contract.

BCGEU’s submissions

[35] The BCGEU submits that the Ministry and Maximus have failed to meet their burden of proof with respect to the application of s. 17. It notes that Commissioner Loukidelis held in Order 02-05³⁹ that it is for public bodies to demonstrate “cogent, case-specific evidence of the financial or economic harm that could be expected to result.” BCGEU addresses each of “four types of financial harm” the Ministry relied on and argues that each is supported by opinions that are general and speculative. They are not cogent, case-specific evidence of financial harm. BCGEU argues:

In summary, the Ministry claims that if one side learns that a provision has been agreed to in the past the other side loses the ability to claim that they will not agree to such a provision, thus harming one party’s bargaining

³⁶ Maximus’s initial submission, para. 25.

³⁷ Maximus’s initial submission, para. 22.

³⁸ Maximus’s initial submission, paras. 26, 30; Ruff affidavit; Lang affidavit.

³⁹ [2002] B.C.I.P.C.D. No. 5, at para 137.

position. In the future there could be [sic] some undefined harm to the Ministry. However, again, the Commissioner has required an entirely different quality of evidence to sustain a claim under section 17. If this type of evidence was enough to meet the requirements of section 17, no part of the Maximus contract would have been disclosed.⁴⁰

[36] It further argues:

Much of the affidavit material relied on to not disclose simply asserts that the disclosure would cause the harm described in section 17. This does not constitute evidence that establishes a reasonable risk of harm.⁴¹

FIPA's submissions

[37] FIPA argues that, while the process leading to the contract was undoubtedly complex, the agreement is, at its core, no different from any number of public/private partnerships entered into by governments across Canada for the past several years. Persons entering into those agreements are taken to understand that they are doing so in an area where public scrutiny is important and where freedom of information laws are operative.

[38] FIPA agrees with Maximus that, for s. 17(1)(d) to apply, it is necessary to establish a reasonable expectation of financial or economic harm to a third party that will result in a reasonable expectation of financial or economic harm to the government. Harm to the third party is by itself insufficient and FIPA argues that all of Maximus's arguments are focused on harm to itself, without connecting it to harm to the Government.

[39] FIPA argues that Maximus's arguments centre on the prospect of harm to Maximus's competitive position in the marketplace, because "its competitors will gain the upper hand through disclosure of the information at issue." FIPA submits that this would benefit rather than harm the economic interests of the Province:

Even assuming that Maximus is correct that its competitors described in paragraph 26 will exploit such information, the logical conclusion is that the information would be used to put together a better proposal in the marketplace for government projects thus resulting not in harm to the public body but in a benefit to the public body.⁴²

[40] FIPA also makes the following submissions in response to the Ministry's submission:

⁴⁰ BCGEU's reply submission, para. 9.

⁴¹ BCGEU's reply submission, para 21.

⁴² FIPA's reply submission, p. 3.

- Despite numerous cases in which claims for disclosure of negotiated contracts have been denied, the Ministry does not point to a single instance where a public body could say it got a worse deal the next time a deal was negotiated.
- Arguments about the sensitive information third parties are required to provide is not backed up with reference to the specific records in question, and in any event focuses on third party harm.
- The Ministry's argument that disclosure would result in fewer companies bidding on contracts and will result in less favourable terms for government conflicts with the position of Maximus that the market is "intensely competitive". FIPA submits:

Given this, and given the substantial profit motive, it is submitted that it is not reasonable to conclude that disclosure would result in a less competitive environment for government contracts.⁴³
- The Ministry's concerns based on the argument that "you gave on this point before" are not consistent with the Ministry's arguments elsewhere emphasizing the uniqueness of this process which tailors the contract to the particular problem. "It is difficult to see, given the specialized nature of the solutions, how the same issue could arise again".⁴⁴
- The Ministry's submissions regarding leverage in the negotiation process ignore the reality of doing business with government. "The reality is that such contracts have been disclosed under these laws for many years. Sophisticated businesses, like MAXIMUS, and like any company likely to be involved in 'complex commercial negotiations' already know this, and take [this] into account in the negotiation process".⁴⁵

[41] FIPA concludes that the Ministry's arguments are theoretical and not unique to this case "and when pushed to their logical conclusion could apply to every single term in the contract". FIPA contrasts this with the Ministry's decision to disclose most of the contract. It questions how the information at issue is really different from the rest of the contract, which the Ministry has released.⁴⁶

Analysis

[42] Commissioner Loukidelis considered the application of s. 17(1) in numerous orders. Several of those orders set out a detailed analysis explaining the test that applies to s. 17(1). Those orders consider the standard of proof, the application of the "reasonable expectation of harm" test in s. 17(1) and the

⁴³ FIPA's reply submission, p. 3.

⁴⁴ FIPA's reply submission, p. 3.

⁴⁵ FIPA's reply submission, p. 3.

⁴⁶ FIPA's reply submission, p. 4.

overarching purposes of FIPPA. The principles are well established.⁴⁷ A convenient statement is found in Order F08-22, whose analysis I adopt here, and which it is appropriate to quote at some length given the arguments that have been advanced on this review:

[34] One of FIPPA's twin purposes under s. 2(1) is to make public bodies "more accountable to the public" by "giving the public a right of access to records", a goal that is further advanced by "specifying limited exceptions to the rights of access" to information in FIPPA. The force of the right of access in s. 4 is reinforced for all non-personal information in contracts with public bodies by the fact that s. 57 puts the burden of proving the applicability of s. 17 or s. 21 on the public body or the third party contractor, not on the access applicant. Public body accountability through the public right of access to information is acutely important and especially compelling in relation to large-scale outsourcing to private enterprise of the delivery of public services, in this case aspects of hospital care.

...

[35] I have held in previous orders that s. 17(1) requires a confident and objective evidentiary basis for concluding that disclosure could reasonably be expected to result in harm. Referring to language used by the Supreme Court of Canada in an access to information case, I have said that "there must be a clear and direct connection between the disclosure of specific information and the harm." The focus is on what a reasonable person would expect, based on evidence. The probability of harm occurring is relevant to the assessment, but mathematical likelihood will not be decisive when other contextual factors are at work. A public body's and contractor's mutual agreement to resist disclosure of a contract for services between them is not harm under s. 17(1) or s. 21(1). As I said in Order 01-20:

I do not think it lies for UBC [the public body] and CCB [the vendor] to say that, because CCB insisted that UBC contract on confidential terms and said or suggested that it would not deal with UBC in any other way, there is a reasonable expectation of harm to either or both of them under s. 17(1) or s. 21(1)... [S]uch an argument amounts to CCB defining a reasonable expectation of harm under s. 17(1) and s. 21(1) on the basis of its own resistance to the public accessibility of its negotiations and contracts with UBC. This stands the reasonable expectation of harm requirement on its head. In my view, the reasonable expectation of harm must flow from disclosure of the information in question, not solely from the public body's or third party's opposition to disclosure.

...

[44] Section 17(1), like FIPPA's other harms-based exceptions to disclosure, requires a reasoned assessment of the future risk of harm if the

⁴⁷ See especially, Order F08-22, [2008] B.C.I.P.C.D. No. 40; Order F06-03, [2006] B.C.I.P.C.D. No. 8; Order 02-50, [2002] B.C.I.P.C.D. No. 51. See also Order F08-11, [2008] B.C.I.P.C.D. No. 19; Order 03-35, [2003] B.C.I.P.C.D. No. 35; Order 03-25, [2003] B.C.I.P.C.D. No. 25; Order 03-15, [2003] B.C.I.P.C.D. No. 15; Order F07-15, [2007] B.C.I.P.C.D. No. 21.

information in question is disclosed. Civil law conventionally applies the balance of probabilities for determining what happened in the past, with anything that is more probable than not being treated as certain. This approach is not followed for hypothetical or future events, which can only be estimated according to the relative likelihood that they would happen. Disclosure exceptions that are based on risk of future harm, therefore--as in other areas of the law dealing with the standard of proof for hypothetical or future events--are not assessed according to the balance of probabilities test or by speculation. Rather, the chance or risk is weighed according to real and substantial possibility.

[45] Real and substantial possibility is established by applying reason to evidence. This is distinct from mere speculation, which involves reaching a conclusion on the basis of insufficient evidence. To my mind, the FHA's idea of 'reasoned speculation' is a contradiction in terms that has no place in the analysis. Certainty of harm need not be established, but, again, "[e]vidence of speculative harm will not meet the test." A rational and objective basis for conclusion that fully considers the context of the particular disclosure exception lies at the heart of the concept of reasonable expectation of harm.

[46] Section 19(1)(a) of FIPPA, which the FHA's argument mentioned, is an example of how the assessment of reasonable expectation of harm is a contextual exercise. Section 19(1)(a) is the exception for disclosure that could reasonably be expected to threaten the safety or mental or physical health of an individual other than the applicant.

...

[48] In short, harms-based exceptions to disclosure operate on a rational basis that considers the interests at stake. What is a reasonable expectation of harm is affected by the nature and gravity of the harm in the particular disclosure exception. There is a sharp distinction between protecting personal safety or health and protecting commercial and financial interests. There is also a justifiably high democratic expectation of transparency around the expenditure of public money, which is appropriately incorporated into the interpretation and application of s. 17(1) when a public body's and service provider's commercial or financial interests are invoked to resist disclosure of pricing components in a contract between them for the delivery of essential services to the public.

....

[50] The threshold for harm under s. 17(1) is not a low one met by any impact. Nature and magnitude of outcome are factors to be considered. If it were otherwise, in the context of s. 17(1) any burden, of any level, on a financial or economic interest of a public body could meet the test. This would offend the purpose of FIPPA to make public bodies more accountable to the public by giving the public a right of access to records, subject to specified, limited exceptions. It would also disregard the contextual variety of the harms-based disclosure exceptions in FIPPA.

....

[53] I am constrained in my ability to discuss the details of the FHA's *in camera* submissions on risks of harm it apprehends to its relationship with Sodexo and its future procurement efforts. Suffice it to say that putting contractors in a position of having to price their services to public bodies competitively and cope with cost pressures from their unionized or non-unionized work forces are not circumstances of undue financial loss or gain under s. 17(1)(d) or s. 21(1)(c)(iii), or significant harm to or interference with their competitive or negotiating positions under s. 21(1)(c)(i). I also find that s. 17(1) is not met on the speculative and circuitous basis of risk of harm to the financial or economic interests of the FHA and other health authorities, flowing from contractors being deterred or driving up of the prices they are willing to offer, in response to fears and perceptions they have about the public disclosure of contract price information compromising their ability to compete. [footnotes omitted]

[43] The Ministry submits that in applying s. 17(1), I ought to give considerable weight to the opinions of its affiants. I agree that those opinions are entitled to serious consideration. On the other hand, those opinions are not conclusive. They must meaningfully speak to and must satisfy the legal standard articulated above.

[44] In this regard, it is important to note that what is in issue in this case are specific terms of a concluded contract, not background information or negotiating positions which preceded the contact. While the Commissioner has frequently sustained refusals to disclose the latter type of information under s. 17,⁴⁸ different considerations arise where the issue involves the concluded contractual terms.⁴⁹

[45] The question here is whether disclosure of the resulting and concluded portions of the Maximus contract not already publicly disclosed 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.

[46] Due to the extensive *in camera* submissions the Ministry and by Maximus made, I am somewhat constrained in framing these reasons. What I can state is that I have considered the Ministry's evidence and arguments carefully. Having done so, I am not persuaded that the disclosure of the records in question meets the standard set out in s. 17(1).

[47] The main point underlying the first three "harms" identified by the Ministry in its evidence and submissions is that, if the records in dispute are disclosed, other potential contractors will learn about them and will use the information to attempt to obtain the same terms, which will at the very least increase negotiating

⁴⁸ See Order 02-50, [2002] B.C.I.P.C.D. No 51; Order 03-25; [2003] B.C.I.P.C.D. No.25; Order 03-35, [2003] B.C.I.P.C.D. No.35; Order F05-28, [2005] B.C.I.P.C.D. No. 38.

⁴⁹ Order 03-15, [2003] B.C.I.P.C.D. 15; Order F07-15, [2007] B.C.I.P.C.D. No. 21; Order F08-22, [2008] B.C.I.P.C.D. No. 40.

costs if the Ministry does not agree. For the reasons that follow, I am not persuaded that this concern meets the legal test set out above.

[48] The Ministry's evidence and arguments can be applied to any government contract, and to any term in any such contract, including the terms in the Maximus contract that have already been disclosed. I am not satisfied that there is anything in the particular contractual terms in dispute that makes them qualitatively different from any number of other contractual terms that have already been disclosed in this matter.

[49] The fact that government *might* have to "push back" *if* a future contractor were to seek to rely on a "precedent" from a previous contract does not in my view satisfy the test in s. 17(1).

[50] The sophisticated contractors government is dealing with in ASD negotiations — Maximus refers to having "eight major rivals", most of them large companies with thousands of employees and contracts around the world — inevitably come to the table with extensive experience dealing with other clients, including government, and with benefit of extensive research and experience regarding the terms of engagement involving those clients. It is not reasonable to expect that the subject matter of those articles would not be negotiated, or that merely knowing the terms previously agreed to will make the negotiation more difficult or complex than would otherwise be the case. In this regard, FIPA makes a valid point when it states that, despite numerous cases in which claims for disclosure of negotiated contracts have been denied, the Ministry does not point to any instance where a public body could say it got a worse deal the next time a deal was negotiated or that its negotiating expenses increased significantly because of the disclosure.

[51] It is also worthy of note that where, as here, the contracting environment is one in which there are a limited number of sophisticated proponents capable of performing this sort of work and who bid on more than one project, there will very likely be one potential contractor who is well aware of the terms of that contract — namely, the contractor who is a party to the previous project. Any theory that the refusal to disclose under s. 17 gives Government protection from any proponent relying on past contracts cannot be sustained and becomes more and more unsustainable as more ASD contracts are entered into.⁵⁰

[52] The reality is that each set of contract negotiations takes place in its own environment and has unique factors that influence the terms of the contract and what the parties will agree to. Contract negotiations inevitably involve give and take on the part of the parties. Information is obviously an important part of

⁵⁰ It is noted that, in this case, the evidence was that five ASD contracts have been entered into, including the present one. The Government did not suggest that any contractor's involvement or experience with a previous contract or bidding process adversely impacted government in a future bid or negotiation.

negotiations, but I am not satisfied that the disclosure of ASD contractual terms, including the records in issue here, are qualitatively different from other types of government contracts which are publicly disclosed, many of which are “multi-year, multi-million dollar agreements”.⁵¹ In negotiating contracts, each party naturally attempts to negotiate the best terms for itself at the best price. A public body may agree to less favourable terms in one area in order to achieve more advantageous terms in another, just as a contractor will do. In this respect, contracts done through the JSP process are not in my view qualitatively different from those done through negotiation in other RFP processes.

[53] Indeed, in my opinion, the unique nature of each ASD arrangement makes it less appropriate to conclude that their disclosure could reasonably be expected to harm the financial interests of the Government. The evidence regarding the unique nature of ASD contracts makes clear that what was important to the Ministry in the Maximus negotiations might not be important, might not even arise, or might arise in a very different fashion, in a future ASD contract negotiation.

[54] Another major thrust of the arguments the Ministry advanced is that, if these ASD terms are disclosed, contractors will be more reluctant to bid on B.C. projects in the future because it could harm their ability to negotiate future contracts with others, and could adversely affect their ability to deal with vendors and sub-contractors.

[55] I do not accept that this argument meets the test in s. 17(1). I note that Maximus has not argued that disclosure of this contract would prevent it from bidding on future projects with the Province. Indeed, it has said quite the opposite.⁵²

[56] As FIPA pointed out, the Ministry’s concern about disclosure leading to a diminishing pool of contractors who are willing to bid is at odds with Maximus’s arguments about the highly competitive nature of the government outsourcing industry. Contractors are well aware that that the government pays in full and on time. In a competitive climate, contractors are in my view more likely to submit better priced, more attractive bids, in order to succeed over their competitors. This can only benefit the government, not harm its financial interest.

[57] I also regard the Ministry’s arguments about proponents being more “guarded” in the information they provide, or requiring “risk premiums”, as being speculative. These submissions speculate about the behaviour of contractors who will be under contrary expectations to provide complete information as part of a process to win the bid and acquire the contract. Nor has the Ministry connected this general risk to the particular contract terms in question here.

⁵¹ Order F07-15 [2007] B.C.I.P.C.D. No. 21; Order F08-22, [2008] B.C.I.P.C.D. No. 40

⁵² See para. 33 above.

[58] Maximus's arguments about possible harm relate to its own financial interests in future negotiations in a number of areas. It does not however explain how this possible harm could reasonably be expected also to harm the economic or financial interests of the Ministry or the government, as the opening words of s. 17(1) require. As noted, Maximus also did not suggest that it and its eight competitors would not submit bids in future as a result of disclosure in this case. Moreover, as past orders have said, putting contractors in a position of pricing their services and products more competitively or of coping with other cost pressures does not amount to undue harm or loss. In any case, any such actions would, as the applicants suggest, bring the government a financial benefit in the form of lower prices.

[59] The Ministry's and Maximus's arguments and evidence are speculative and in my view, do not provide a cogent basis on which to conclude that disclosure of the information could reasonably be expected to harm the government or Maximus. I find that s. 17(1) does not apply.

[60] I conclude with a brief mention of s. 17(1)(e). As previous orders have noted, the purpose of s. 17(1)(e) is to protect information related to negotiations. This term has been interpreted to mean information about negotiating techniques, strategies, criteria, positions or objectives. The information in issue here is not this type of information but is rather the results of negotiations — what the parties agreed on. Thus s. 17(1)(e) does not apply here.

CONCLUSION

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

1. I require the Ministry to give the applicants access to the information it withheld under s. 17(1).
2. I require the Ministry to give the applicant access to this information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before August 3, 2010 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

June 18, 2010

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator