



Order F20-55

BRITISH COLUMBIA INSTITUTE OF TECHNOLOGY

Ian C. Davis
Adjudicator

December 8, 2020

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Summary: The applicant made a request to the British Columbia Institute of Technology (BCIT) for access to part of Manulife Financial Corporation’s response to a request for proposals issued by BCIT on behalf of a consortium of post-secondary institutions. BCIT disclosed the responsive record with some information withheld under s. 21(1) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The adjudicator determined that BCIT was required to refuse to disclose some, but not all, of the information withheld under s. 21(1). The adjudicator also decided that BCIT was not authorized to withhold a small amount of information on the basis that it was “not responsive” to the applicant’s access request.

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

INTRODUCTION

[1] The applicant made a request to the British Columbia Institute of Technology (BCIT) for access to part of Manulife Financial Corporation’s (Manulife) response to a request for proposals issued by BCIT on behalf of a consortium of post-secondary institutions. BCIT disclosed the responsive record with some information withheld under ss. 21(1) (harm to third-party business interests) and 22(1) (unreasonable invasion of personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review BCIT’s decision. During mediation, the applicant advised that the information withheld under s. 22(1) is no longer in issue. Mediation did not resolve the remaining s. 21(1) issue and it proceeded to inquiry. The OIPC invited Manulife to participate in the inquiry as a third party and it made submissions.

PRELIMINARY MATTER

[3] BCIT is withholding part of one page of the responsive record on the sole basis that it is “not responsive” to the applicant’s access request.¹ Past orders establish that a public body is not authorized by FIPPA to withhold parts of a responsive record on this basis.² Accordingly, in this case, I conclude that BCIT is not authorized to withhold the information marked as “not responsive”. BCIT must respond to the applicant’s access request as it relates to this information by either disclosing the information or withholding it under an exception in Part 2, Division 2 of FIPPA.

ISSUE

[4] The issue is whether BCIT is required to refuse to disclose the information withheld under s. 21(1). Under s. 57(1) of FIPPA, BCIT has the burden of proving that the applicant has no right to access the disputed information.³

BACKGROUND

[5] BCIT is a post-secondary educational institution and a member of the BC Colleges, Universities and Institutions Consortium (Consortium).⁴ The Consortium was created to ensure that benefits for employees of Consortium members are procured and delivered in the most cost-effective manner.

[6] In 2016, BCIT issued a “Negotiated Request for Proposals” (NRFP) on behalf of the Consortium. The NRFP initiated a competitive process to procure group employee benefits, including extended health, disability, life, and accidental death and dismemberment coverage.

[7] Manulife was the successful proponent in the NRFP. It has since been engaged to provide health and welfare benefits to employees of Consortium members.

[8] In April 2018, BCIT received the applicant’s access request. The applicant requested:

¹ Record at p. 32.

² See, for example, Order F15-25, 2015 BCIPC 27 (CanLII) at paras. 31-34; Order F15-23, 2015 BCIPC 25 (CanLII); and Order F15-24, 2015 BCIPC 26 (CanLII).

³ See, for example, Order 00-10, 2000 CanLII 11042 (BC IPC) at p. 3.

⁴ The information in this background section is based on the evidence, which I accept, in: the affidavit of BCIT’s Associate Director, Information Access, Privacy, and Policy Management (Associate Director) at paras. 2 and 5-7; the affidavit of BCIT’s Director, Corporate Services (Director) at paras. 3-4; and Affidavit #1 of Manulife’s Assistant Vice-President & Chief Underwriter, Group Benefits Sponsor Experience (AVP) at paras. 3 and 6-7.

... a copy of the completed schedules submitted by Manulife for the [NRFP]. Specifically, I am requesting a copy of documents from the received submissions from Manulife for the following schedules listed in Appendix B of the [NRFP]: Schedule 1a, 1b, 1c, 1d, and 1e.

[9] Appendix B of the NRFP⁵ is a list of schedules. The specific schedules requested are listed under the heading “Proponent Questions and Financial Responses”. These schedules are described as follows: Schedule 1a – Mandatory & General Questions; Schedule 1b – Extended Health Care, Dental & In/Expatriate; Schedule 1c – Life & Disability (including Long & Short Term, and 2nd Opinion Services); Schedule 1d – Accidental Death & Dismemberment; and Schedule 1e – Early Intervention.

RECORDS AND INFORMATION IN DISPUTE

[10] The record in dispute is the portions of Manulife’s proposal in response to the NRFP that correspond to the specific schedules referred to in the applicant’s access request.⁶ Although the record comprises only part of Manulife’s proposal, for ease of reference I will simply refer to it as the “Proposal”. The information in dispute is the information in the Proposal that BCIT severed under s. 21(1).

SECTION 21 – HARM TO THIRD-PARTY BUSINESS INTERESTS

[11] The parts of s. 21 that are relevant to this case provide:

- (1) The head of a public body must refuse to disclose to an applicant information
 - (a) that would reveal
 - ...
 - (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
 - (b) that is supplied, implicitly or explicitly, in confidence, and
 - (c) the disclosure of which could reasonably be expected to
 - (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
 - (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
 - (iii) result in undue financial loss or gain to any person or organization

⁵ Exhibit “A” to the Affidavit of the Director.

⁶ Affidavit of the Associate Director at para. 7.

[12] Section 21(1) creates a three-part test. BCIT must establish all three parts: first, that the disputed information is one or more of the kinds of information described in s. 21(1)(a); second, that the information was supplied, implicitly or explicitly, in confidence, as required by s. 21(1)(b); and third, that disclosure of the information could reasonably be expected to result in one or more of the harms described in s. 21(1)(c).

[13] BCIT and Manulife submit that s. 21(1) requires BCIT to refuse to disclose the disputed information; the applicant argues that it does not.

Section 21(1)(a) – Type of information

[14] The information that BCIT is withholding under s. 21(1) is found in sections of the Proposal relating to “Early Intervention”, “Life and Disability” and “Drug Plan Management Solutions”.⁷ The severed information is Manulife’s responses to specific questions and requests for information set out in the NRFP. In general, the disputed information relates to Manulife’s services, systems, resources, standards, strategies, performance and appeal processes. The information also includes some templates and samples of Manulife’s reports.

[15] BCIT and Manulife submit that the disputed information is commercial, financial and/or technical information of or about Manulife.⁸ The applicant did not address this part of the s. 21 test.

[16] FIPPA does not define the terms listed in s. 21(1)(a). However, previous orders have held that “commercial information” relates to commerce, or the buying, selling, exchanging or providing of goods and services. The information does not need to be proprietary in nature or have an actual or potential independent market or monetary value.⁹ Order F09-17 summarizes the kinds of information that past orders have found to be “commercial information”:

- Offers of products and services a third-party business proposes to supply or perform;
- A third-party business’s experiences in commercial activities where this information has commercial value;
- Terms and conditions for providing services and products by a third party;
- Lists of customers, suppliers or sub-contractors compiled by a third-party business for its use in its commercial activities or enterprises; such lists may take time and effort to compile, if not skill;

⁷ Affidavit #1 of the AVP at paras. 13-15, which I accept.

⁸ BCIT’s initial submissions at paras. 24-29; Manulife’s initial submissions at paras. 9-10.

⁹ Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17.

- Methods a third-party business proposes to use to supply goods and services; or
- Number of hours a third-party business proposes to take to complete contracted work or tasks.¹⁰

[17] I am satisfied that most of the disputed information falls within one or more of these categories. The information describes the services Manulife proposed to provide to the Consortium in exchange for money, and the methods Manulife proposed to use in providing those services. Manulife provided this information to BCIT and the Consortium in an attempt to win a contract, so the information clearly relates to commerce. I am satisfied that most of the disputed information is “commercial information” under s. 21(1)(a).¹¹ Therefore, it is not necessary to also consider whether this information is “financial” or “technical” information under s. 21(1)(a).

[18] Other portions of the disputed information reproduce questions posed, or requests for information made, by BCIT in the NRFP.¹² Although this information seeks commercial information from Manulife, it is not itself commercial information of or about Manulife. It is also clearly not financial or technical information. I find that this information does not satisfy the requirements of s. 21(1)(a).¹³

[19] The remainder of the s. 21 analysis below deals only with the disputed information that I found above to be “commercial information” under s. 21(1)(a).

Section 21(1)(b) – Supplied in confidence

[20] The second step in the s. 21(1) analysis is to determine whether the disputed information was supplied in confidence to the public body as required by s. 21(1)(b). The analysis has two parts.¹⁴ The first asks whether the information was supplied. The second asks whether the information was supplied in confidence.

¹⁰ Order F09-17, 2009 CanLII 59114 (BC IPC) at para. 17.

¹¹ For similar findings, see, for example: Order 03-33, 2003 CanLII 49212 (BC IPC) at para. 24; Order F19-23, 2019 BCIPC 25 (CanLII) at para. 12; and Order F09-22, 2009 CanLII 63564 (BC IPC) at para. 17.

¹² For example, parts of pp. 4, 33-38 and 40-44 of the Record.

¹³ For similar findings, see, for example: Order 04-06, 2004 CanLII 34260 (BC IPC) at paras. 82-83 and Order F19-23, *supra* note 11 at para. 13; Order F17-47, 2017 BCIPC 52 (CanLII) at para. 17. In the alternative, I would have found that this information is not “supplied” under s. 21(1)(b) for the reasoning set out in Order F16-48, 2016 BCIPC 53 (CanLII) at para. 20.

¹⁴ See, for example, Order F19-39, 2019 BCIPC 44 (CanLII) at para. 57.

Was the information supplied to BCIT?

[21] The parties' submissions on the supplied element of s. 21(1)(b) refer to principles established in previous s. 21 orders. Those orders consistently affirm that information in a contract will not normally qualify as supplied because the terms of a contract are typically negotiated.¹⁵ Even in a situation where no negotiations take place, one party must agree to the terms proposed by the other in order to form a contract. In this sense, the terms of a contract are the product of the mutual involvement of the contracting parties and are not simply supplied by one party to the other.

[22] One exception to the general rule that information in a contract is generally not supplied is information incorporated into a contract that is immutable and not negotiable, such as fixed overhead or labour costs set out in a collective agreement.¹⁶ Another exception is information in a contract that, if disclosed, would allow an accurate inference to be drawn about underlying supplied confidential information.¹⁷

[23] BCIT and Manulife submit that Manulife supplied the disputed information to BCIT.

[24] BCIT says the disputed information was supplied because it "was generated entirely by Manulife and pertains exclusively to its business, practices and processes."¹⁸

[25] Manulife argues that the disputed information in the Proposal "was not in any way negotiated with the Consortium. It was information provided to the Consortium, that was immutable."¹⁹ Manulife further submits that, "[u]nlike a proposal for fees, the methodologies and strategies for the services outlined are not subject to negotiation, they are not susceptible of change in the negotiation process".²⁰

[26] In response to BCIT and Manulife, the applicant submits that the disputed information was not supplied by Manulife to BCIT.²¹ The applicant draws a distinction between the NRFP and a "standard" or "traditional" request for proposals (RFP) where the successful proponent's proposal is incorporated into

¹⁵ For example, Order 01-39, 2001 CanLII 21593 (BC IPC) at paras. 43–44, upheld on judicial review in *Canadian Pacific Railway v British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603; Order F14-28, 2014 BCIPC 31 (CanLII) at para. 20; Order F19-23, *supra* note 11 at para. 23.

¹⁶ Order 01-39, *ibid* at para. 45.

¹⁷ Order 01-20, 2001 CanLII 21574 (BC IPC) at paras. 86.

¹⁸ BCIT's initial submissions at para. 31.

¹⁹ Manulife's initial submissions at para. 11; Affidavit #1 of the AVP at para. 8.

²⁰ Manulife's initial submissions at para. 12.

²¹ Applicant's submissions at paras. 1-21.

the final contract unchanged.²² He says that, in the case of a “traditional RFP”, the information in the proposal “would have to be supplied” because the terms submitted in the successful proposal are incorporated into the final contract without change or negotiation.²³ However, he argues that the NRFP is different because it explicitly allows proponents “to modify or edit their proposals” and to “negotiate responses”.²⁴ According to the applicant, this means that the disputed information in the Proposal is neither supplied nor immutable.

[27] In reply, BCIT submits that the applicant has “not set out the correct legal test” for the supplied element of s. 21(1)(b).²⁵ BCIT says final contracts are negotiated, but proposals are supplied.²⁶ BCIT argues that the Proposal contains information generated exclusively by Manulife that was provided to BCIT and the Consortium without their agreement or input. BCIT says that, even if the information in the Proposal was subsequently negotiated, this “does not alter the nature or purpose or origins of that document.”²⁷

[28] Manulife reiterates in its reply submissions that the disputed information was not negotiated.²⁸ Manulife’s evidence confirms that changes were made to the terms of the Proposal after it was submitted. However, Manulife says that these changes “were not as a result of negotiation, but rather were internal changes to the Manulife offering that had simply evolved during the passage of time, between the submission of the NRFP in 2016 and February 2017.”²⁹ Manulife emphasizes that the disputed information was not negotiated with BCIT or the Consortium when it was submitted in 2016 or any time thereafter.

[29] I am not persuaded by the applicant’s argument. I agree that the information in the Proposal may have been subject to change through negotiation *after* the Proposal was submitted; however, *when* the Proposal was submitted, it was not the product of negotiation or agreement in the same way that a contract is. There is no evidence before me to establish that, before Manulife submitted the Proposal, the information in it was negotiated with, or agreed to by, BCIT or the Consortium. Accordingly, I find that the disputed information was not negotiated.

[30] I am satisfied that the disputed information was supplied within the meaning of s. 21(1)(b). I accept BCIT’s and Manulife’s evidence that Manulife generated and provided the information to BCIT and the Consortium without their input or agreement. Therefore, I conclude that the information was supplied. This

²² *Ibid* at paras. 3 and 7-8.

²³ *Ibid* at para. 16.

²⁴ *Ibid* at para. 3.

²⁵ BCIT’s reply submissions at para. 1.

²⁶ *Ibid* at para. 2.

²⁷ *Ibid* at para. 4.

²⁸ Manulife’s reply submissions at paras. 6-14; Affidavit #2 of the AVP at paras. 4-6.

²⁹ Manulife’s reply submissions at para. 11.

conclusion is consistent with many past orders which have held that information in a proponent's response to an RFP or in a business proposal is supplied within the meaning of s. 21(1)(b).³⁰

Was the information supplied to BCIT in confidence?

[31] The next step is to determine whether the disputed information was supplied by Manulife to BCIT and the Consortium in confidence. BCIT must show that the disputed information was supplied "under an objectively reasonable expectation of confidentiality, by the supplier of the information, at the time the information was provided."³¹ Whether the disputed information was supplied in confidence is a question of fact and the test is objective; evidence only of the third party's subjective intentions with respect to confidentiality is not sufficient.³²

[32] BCIT submits that the disputed information was supplied in confidence.³³ BCIT notes that s. 26 of the Declaration of Interest for the NRFP (Declaration) requires proponents seeking confidentiality of information to submit a cover letter with their proposal detailing the specifics of their confidentiality request. The relevant sections in the Declaration read as follows:

24. Information provided by the Proponent in a proposal or otherwise through the NRFP process, even if it is identified as being supplied in confidence, may be disclosed where required by law or if required by order of a court or tribunal.
25. BCIT is subject to the Freedom of Information and Protection of Privacy Act ("FOIPPA") and may be required to disclose Proponent information in their custody or control. Disclosure pursuant to a FOIPPA request is subject to the application of that statute, including the exception and third party notification provisions. ...
26. To request documentation confidentiality, proponents must submit a covering letter, with their proposal, detailing the specifics of their request.
27. The Consortium may disclose, on a confidential basis, the information contained in the Proponent's proposal or otherwise provided to the Consortium through the NRFP process, to Consortium staff retained

³⁰ See, for example, Order 03-33, *supra* note 11 at para. 28; Order F09-22, *supra* note 11 at paras. 18-23; Order F13-06, 2013 BCIPC 6 (CanLII) at paras. 17-19; Order F19-23, *supra* note 11 at para. 30 (second bullet); Order F19-29, 2019 BCIPC 31 (CanLII) at para. 25; Order F14-21, 2014 BCIPC 24 (CanLII) at paras. 17-18; Order F13-07, 2013 BCIPC 8 (CanLII) at paras. 37-39; Order F20-23, 2020 BCIPC 27 (CanLII) at para. 22; Order F16-48, *supra* note 13 at paras. 14 and 18-20.

³¹ Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 23.

³² See, for example, Order F13-20, 2013 BCIPC 27 (CanLII) at para. 22.

³³ BCIT's initial submissions at paras. 30-36; BCIT's reply submissions at paras. 7-11; Affidavit of the Associate Director at paras. 8 and 12-16; Affidavit of the Director at paras. 7-9.

for the purposes of evaluating or participating in the evaluation of this proposal.³⁴

[33] Section 26 of the Declaration is reproduced verbatim in paragraph 9.1 of the NRFP.³⁵ That paragraph also states that proposals become the property of BCIT and the Consortium members and, as such, are subject to FIPPA.

[34] BCIT says it was unable to locate any confidentiality request submitted by Manulife. Nevertheless, BCIT submits that the information was supplied and received implicitly in confidence based on its “usual practice”, which is to accept responses to requests for proposals on a confidential basis.³⁶ BCIT says this practice is based on “general market expectations.”³⁷

[35] Manulife also submits that the disputed information was supplied in confidence.³⁸ Manulife says it did not submit a cover letter requesting confidentiality because it did not consider it necessary given the terms of the NRFP and the protections provided in s. 21 of FIPPA. It also did not want to draw any negative attention to its proposal. Manulife says it was “relying upon historical practices of RFP’s being confidential” and its understanding that its proposal would be anonymous.³⁹ Further, Manulife says it was relying on paragraph 16.1 of the NRFP, which reads as follows:

16 Ownership of Proposals

- .1 All documents, including proposals, submitted to BCIT become the property of BCIT and the Consortium. They will be received and held in confidence, subject to, and as allowed by, the provisions of the Freedom of Information and Protection of Privacy Act.⁴⁰

[36] The applicant submits that the disputed information was not supplied in confidence.⁴¹ He argues that compliance with s. 26 of the Declaration and paragraph 9.1 of the NRFP (the confidentiality request requirement) is the determinative factor in this case. He says these provisions clearly required Manulife to request confidentiality by way of cover letter; however, Manulife chose not to submit such a request, so the Proposal was not supplied in confidence. The applicant rejects the possibility of an implied assurance of confidentiality. He also argues that any guarantee of anonymity does not guarantee confidentiality.

³⁴ Exhibit “A” to the Affidavit of the Director at p. 6 (underlining added).

³⁵ Exhibit “A” to the Affidavit of the Director at p. 19.

³⁶ BCIT’s initial submissions at para. 36.

³⁷ *Ibid.*

³⁸ Manulife’s initial submissions at paras. 13-19; Manulife’s reply submissions at paras. 15-25; Affidavit #1 of the AVP at paras. 8-11 and 18; Affidavit #2 of the AVP at paras. 7-14.

³⁹ Affidavit #2 of the AVP at para. 7.

⁴⁰ Exhibit “A” to the Affidavit of the Director at p. 21 (underlining added).

⁴¹ Applicant’s submissions at paras. 23-56.

[37] In my view, the applicant focuses too narrowly on the NRFP terms setting out the confidentiality request requirement. I agree with the applicant that s. 26 of the Declaration and paragraph 9.1 of the NRFP, read in isolation, required Manulife to request confidentiality by way of cover letter. I also agree that Order F09-22, which the applicant relies upon, dealt with a similar requirement. In that case, the adjudicator found that the information was supplied in confidence because the third party made the required confidentiality request.⁴² In this case, however, Manulife did not make the required request, so I must consider whether confidentiality is established based on the entirety of the circumstances. In particular, I must interpret the NRFP documents in light of all their terms considered together.⁴³

[38] Manulife relies on paragraph 16.1 of the NRFP, which the applicant did not address. This paragraph makes no reference to the confidentiality request requirement. In my view, the paragraph suggests that BCIT and the Consortium would receive information submitted by Manulife in confidence, subject to FIPPA, whether or not Manulife made an explicit request for confidentiality.

[39] Further, s. 27 of the Declaration says that the Consortium may disclose, “on a confidential basis”, information in a proposal to certain Consortium staff. Again, there is no reference to the confidentiality request requirement. In my view, BCIT and the Consortium would not have explicitly committed, without qualification, in s. 27 to treating the Proposal confidentially when disclosing it to their staff if, as the applicant argues, the information was only confidential if Manulife requested it to be.

[40] Ultimately, I am satisfied that the disputed information was supplied in confidence. The in confidence test does not require Manulife’s expectation of confidentiality to be based on terms in the NRFP that are perfectly consistent and unambiguous. The test is whether Manulife had a reasonably-held expectation of confidentiality when it supplied the disputed information to BCIT. In my view, it did. Manulife’s expectation of confidentiality was based on a reasonable interpretation of the terms of the NRFP documents, even though that was not the only possible interpretation. I note that Order 03-33 dealt with a confidentiality clause in an RFP that is virtually identical to paragraph 16.1 of the NRFP. Former Commissioner Loukidelis found that the confidentiality clause was sufficient to satisfy the in confidence aspect of s. 21(1)(b).⁴⁴

⁴² Order F09-22, *supra* note 11 at paras. 18-23.

⁴³ See, for example, *R. v. Amer*, 2018 ABQB 7 at para. 46.

⁴⁴ Order 03-33, *supra* note 11 at paras. 31-36.

Section 21(1)(c) – Reasonable expectation of harm

[41] The final step in the s. 21 analysis is to determine whether disclosure of the disputed information could reasonably be expected to result in one or more of the harms described in s. 21(1)(c). The standard that BCIT must satisfy under s. 21(1)(c) is a “reasonable expectation of harm”; this is a “middle ground between that which is probable and that which is merely possible.”⁴⁵ The release of the information itself must give rise to a reasonable expectation of harm.⁴⁶

[42] The applicant’s only argument regarding harm is as follows:

If Manulife created their submission to the NRFP specifically so that there is nothing identifying Manulife as the author of the submission, as [the Assistant Vice-President] stated, then there would be no way for any competitor to know that the information was created by Manulife, should they manage to get a hold of it. If the information is just anonymized information, then how would it directly affect Manulife and thus be a probable material financial loss for Manulife?⁴⁷

[43] I do not see how this argument assists the applicant. The information in the Proposal is not anonymized. The Proposal includes a cover letter that identifies Manulife as its creator. If a competitor were to receive the Proposal as a result of the applicant’s access request, they would know that the information relates to Manulife. Thus, contrary to the applicant’s argument, there is at least the possibility of harm under s. 21(1)(c).

[44] The applicant did not make any other arguments about harm. As a result, I will only address BCIT’s and Manulife’s submissions below. Manulife argues that ss. 21(1)(c)(i), (ii) and (iii) apply; BCIT argues that only ss. 21(1)(c)(i) and (iii) apply. I will consider s. 21(1)(c)(ii) first, and then the other two subsections together.

Section 21(1)(c)(ii)

[45] Section 21(1)(c)(ii) states that the head of a public body must refuse to disclose to an applicant information the disclosure of which could reasonably be expected to result in similar information no longer being supplied to the public

⁴⁵ *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 170 v. British Columbia (Information and Privacy Commissioner)*, 2018 BCSC 1080 at para. 52 citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, and *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31.

⁴⁶ *British Columbia (Minister of Citizens’ Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875 at para. 43.

⁴⁷ Applicant’s submissions at para. 55.

body when it is in the public interest that similar information continue to be supplied.

[46] Manulife says it would not have provided the same level of detail in the Proposal if it knew the information would be disclosed.⁴⁸ Manulife argues that, if the disputed information were disclosed, proponents would no longer supply similar information to BCIT or the Consortium. According to Manulife, providing such information is in the public interest because it is “important” that Consortium members provide their employees with benefits.⁴⁹

[47] I am not satisfied that disclosure of the disputed information would result in similar information no longer being supplied to BCIT and the Consortium. Past orders establish that s. 21(1)(c)(ii) generally does not apply where there is a financial incentive for providing the information.⁵⁰ In the procurement context, there is clearly a financial incentive for a proponent to provide a proposal setting out in detail how it meets the RFP criteria. This improves the proponent’s chances of winning a potentially lucrative contract. Manulife says it would not have provided the same level of detail if it had known that the disputed information would be disclosed. However, I am not persuaded that other proponents would no longer supply detailed information given the clear financial incentive to provide a fulsome proposal. I conclude that s. 21(1)(c)(ii) does not apply to the disputed information.⁵¹

Sections 21(1)(c)(i) and (iii)

[48] Section 21(1)(c)(i) states that the head of a public body must refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of the third party. Significant harm under s. 21(1)(c)(i) is “material” harm “looked at in light of the circumstances affecting the third party’s competitive position or negotiating position”.⁵²

[49] Section 21(1)(c)(iii) states that the head of a public body must refuse to disclose to an applicant information the disclosure of which could reasonably be expected to result in undue financial loss or gain to any person or organization. Previous orders state that if disclosure would give a competitor an advantage effectively for nothing, the gain to a competitor will be “undue”.⁵³

⁴⁸ Manulife’s initial submissions at para. 38.

⁴⁹ *Ibid.*

⁵⁰ See, for example, Order F15-53, 2015 BCIPC 56 (CanLII) at para. 23 and Order 03-05, 2003 CanLII 49169 (BC IPC) at para. 15.

⁵¹ For similar findings, see, for example: Order F15-53, *ibid* at paras. 31-32; Order F13-19, 2013 BCIPC 26 (CanLII) at para. 40; Order F18-28, 2018 BCIPC 31 (CanLII) at para. 56.

⁵² Order 00-10, *supra* note 3 at p. 11.

⁵³ See, for example, Order 00-10, *ibid* (BC IPC) at pp. 17-19 and Order F14-04, 2014 BCIPC 4 (CanLII) at para. 61.

[50] BCIT and Manulife submit that the same evidence establishes that both ss. 21(1)(c)(i) and (iii) apply, so I will analyze these two subsections together.

[51] BCIT says Manulife is in the best position to provide evidence of harm. Nevertheless, BCIT argues that competitive bid proposals should not be disclosed because they are inherently sensitive and confidential.⁵⁴ BCIT says disclosure of the disputed information would result in unfair competition and would undermine future procurement initiatives.

[52] Manulife submits that disclosure of the disputed information could reasonably be expected to significantly harm its competitive position or negotiating position, and result in undue financial loss to Manulife, as well as a corresponding undue financial gain to its competitors.⁵⁵ Manulife relies on the evidence of its Assistant Vice-President and Chief Underwriter, who deposes:

12. Manulife operates in a highly competitive and sophisticated industry.

...

17. Manulife has spent time, money and resources in developing [its] offerings to be responsive to customer needs. The Redacted Information is not in the public domain. It is proprietary and confidential information.

18. The NRFP was developed particularly for the Consortium, and has unique features for that client. Many factors go into how Manulife approaches bids for different clients. In order for Manulife to remain competitive with its clients and potential clients, the offerings are treated as confidential.

19. The Redacted Information has significant commercial value. If disclosed to a competitor, this would cause material financial gain to the competitor and material financial losses to Manulife.

20. In particular, a competitor could use the Redacted Information to establish or improve its service offerings or pricing, without having to expend the same time and money that Manulife had to expend for the same purpose.

21. Further, the Redacted Information could be used to directly compete with Manulife for future contracts, which would prejudice Manulife's competitive position in the marketplace.

22. Manulife's ability to negotiate with future clients would also be significantly harmed as clients would have access to the service offering provided to the Consortium and put Manulife at a markedly disadvantaged position.⁵⁶

⁵⁴ BCIT's initial submissions at paras. 37 to 41.

⁵⁵ Manulife's initial submissions at paras. 20-34 and 36-43.

⁵⁶ Affidavit #1 of the AVP at paras. 12 and 17-22.

[53] Manulife says this evidence is sufficient to establish a reasonable expectation of harm under ss. 21(1)(c)(i) and (iii). Manulife says that “where the parties provide reasonable evidence to support their position, to explain how the harm could occur, the Court of Appeal has said that delegates who refuse to accept such evidence, do so at their peril.”⁵⁷

[54] For the purposes of my analysis, I will assume, as other orders have, that disclosure of the disputed information is disclosure to the world, including Manulife’s competitors, even though the applicant is not Manulife’s competitor.⁵⁸

[55] For the following reasons, I find that disclosure of some, but not all, of the disputed information could reasonably be expected to result in harm under ss. 21(1)(c)(i) and/or (iii).

[56] In my view, disclosure of the following information could not reasonably be expected to result in the harms described in ss. 21(1)(c)(i) or (iii):

- a high-level overview of the claims process, including general descriptions of the services Manulife will provide and the nature and extent of the communications between Manulife and plan members and sponsors;⁵⁹
- performance objectives and standards and Manulife’s performance results in 2014 and 2015;⁶⁰
- a table setting out the number and location of specialist resources Manulife proposed to employ;⁶¹ and
- template and example reports, as well as notification letters setting out Manulife’s appeal process.⁶²

[57] Manulife did not provide any detailed explanation or evidence as to why this specific information has the “significant commercial value” that Manulife says it has. Some of the information is the kind of general information that a plan member would know about simply by being familiar with or involved in the benefit claims process. It is not clear to me, from my review of the record, that this information is so unique to Manulife that Manulife’s competitors could derive a significant competitive advantage from copying it or using it to improve their offerings.

⁵⁷ Manulife’s initial submissions at para. 42, citing *University of British Columbia v. Lister*, 2018 BCCA 139.

⁵⁸ See e.g. Order 03-33, *supra* note 11 at para. 44.

⁵⁹ Record at pp. 2-3.

⁶⁰ Record at pp. 3 and 9.

⁶¹ Record at pp. 4 and 10.

⁶² Record at pp. 5-7 and 11-16.

[58] For example, I am not persuaded that Manulife's competitors could gain a significant competitive advantage by knowing about how Manulife's appeal process works. Manulife did not provide any evidence about whether, and if so, to what extent, appeal rights and procedures vary across benefits providers or why and when such differences could result in significant competitive advantages. None of this is obvious to me or clear from the information in the record alone. Accordingly, I cannot accept Manulife's broadly-worded evidence and argument that disclosing this information would allow Manulife's competitors to gain a significant competitive advantage, resulting in significant harm to Manulife's competitive position.

[59] In my view, similar reasoning applies to the information about Manulife's performance standards and results, as well as the information in the template and sample reports. Manulife did not explain why its competitors could gain a significant competitive advantage by knowing, for example, the general structure of its reports or the kinds of information it includes in its reports. Further, I fail to see how a competitor could derive any competitive advantage from knowing how Manulife performed on certain objectives in 2014 and 2015. That information is now outdated and, absent any explanation from Manulife, I find that it lacks commercial value.

[60] In addition, Manulife's own evidence is that certain aspects of the Proposal were tailored to the Consortium's needs.⁶³ Future procurement initiatives will concern the different needs of different organizations at different points in time. For this reason, it is difficult for me to accept that disclosure of the specific number and location of the resources Manulife proposed to employ, for example, could significantly harm Manulife in future situations where different services are required.

[61] However, I am satisfied that disclosure of the balance of the disputed information could reasonably be expected to result in harm under ss. 21(1)(c)(i) and (iii). This information is Manulife's responses to very specific questions posed by BCIT and the Consortium in the NRFP. The information is not the kind of general information listed above. I can see from the record that this information relates to core aspects of Manulife's service offerings in the benefits plan industry. In my view, this information is not so specific to one client or project that it provides limited commercial value to competitors. Rather, I find that this information, together, provides a detailed view into Manulife's inner workings, including specific information about its key systems, strategies, methods and policies.

[62] I can see how this information could provide significant commercial value to Manulife's competitors and I accept that its disclosure could reasonably be expected to result in significant harm to Manulife's competitive position. I accept

⁶³ Affidavit #1 of the AVP at para. 18.

that the information could be used by Manulife's competitors to identify and assess Manulife's current and potential service offerings. The competitors could then adjust their offerings in a way that could reasonably be expected to harm Manulife's competitive position in future RFP situations.

[63] Further, I am satisfied that the financial gain that Manulife's competitors could derive from this information would be undue. I accept Manulife's evidence that the information is not publicly known and that Manulife spent time, money and resources to develop the service offerings discussed in the information. It is apparent to me from the nature of the information itself that Manulife's offerings are detailed and sophisticated and were developed through significant efforts over time. In my view, the financial gain that Manulife's competitors could derive from disclosure of this information would be undue because it would allow them to benefit from Manulife's efforts without incurring the corresponding costs of extensive product and systems development.

CONCLUSION

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

1. Subject to subparagraph 2 below, I confirm in part BCIT's decision to withhold the disputed information under s. 21(1) of FIPPA.
2. BCIT is not required to refuse to disclose the information I have highlighted (in blue) in a copy of the records that will be provided to it with this order.
3. BCIT is not authorized to refuse to disclose the part of p. 32 of the record that is marked as "not responsive". BCIT must complete the processing of the applicant's request with respect to that information by either disclosing the information or withholding it under an exception in Part 2, Division 2 of FIPPA.
4. BCIT is required to give the applicant access to the highlighted information referred to in subparagraph 2 above. BCIT must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records.

Pursuant to s. 59(1) of FIPPA, BCIT is required to comply with this order by January 22, 2021.

December 8, 2020

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

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