[May 5, 2005] [FILE NO. - 2004/055]

SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2005 – 003

Crown Investments Corporation

Summary: The Applicant made an access request for records in the possession or control of a government institution. These were exchanged between the government institution and the third party. The documents related to the third party's role in assessing the validity of features contemplated within the government institutions utility bundle proposal. The government institution withheld the record citing s. 19(1)(b) and 19(c)(ii) of *The Freedom of Information and Protection of Privacy Act*. After hearing from the parties to this review, the Commissioner found that the government institution had not satisfied the burden of proof to justify the exemptions claimed. Accordingly, the Commissioner recommends that the records be released to the Applicant.

Statutes Cited: *The Freedom of Information and Protection of Privacy Act* [S.S. 1990-91, c. F-22.01 as am], ss. 19(1)(b), 19(1)(c)(ii) and 61

Authorities Cited: Ontario IPC Order MO-1246; Ontario IPC Final Order PO-1806-F; Ontario IPC Final Order MO-1846-F; Ontario IPC Order PO-2195; British Columbia IPC Order 03-02; Saskatchewan IPC Report No. 96/002 and Saskatchewan IPC Report No. 2004-003

I BACKGROUND

[1] The Applicant made an access request to Crown Investments Corporation (CIC) on April 28, 2004 for, "*…all information prepared by or for or held by you that was provided to the firm Meyers Norris and Penny for work on the utility bundle matter [referenced by Premier Lorne Calvert on Sept. 2, 2003]. Please include all requests made of you by MNP and response to same. If the material was prepared electronically, I would be prepared to receive it that way, too.*"

[2] This request relates to: (a) an engagement letter dated March 31, 2004 prepared by Meyers Norris Penny (MNP) that summarized a proposed agreement between the firm and CIC. CIC accepted the terms of the proposal on April 1, 2004 as indicated by the signature of the CIC President found on the last page of the engagement letter; and (b) certain records produced pursuant to the engagement letter.

[3] On **June 21, 2004**, CIC responded to the Applicant as follows:

> "*Your Access to Information Request was received in our office on April 29, 2004…As indicated to you in our letter dated May 26, 2004, the information you requested affects the interests of a third party. Pursuant to Section 34 of The Freedom of Information and Protection of Privacy Act, we advised the third party of your application for access to the record and requested that the third party make representations regarding the release of the record. The third party has now made those representations and objects to the release of the record.*
>
> *Your request is denied pursuant to clauses 19(1)(b) and 19(1)(c)(ii) of the Act.*"

[4] The Applicant requested a review of our office on **June 23, 2004**. He wrote, "*This is a request for review of a decision by Crown Investments Corporation to deny access to my request for information.*"

[5] On **July 23, 2004**, CIC provided a copy of the record and its submission to our office. The accompanying letter reads, in part:

> *"On May 26, 2004, we provided notice to Meyers Norris Penney as the third party. Concurrently we advised* [the Applicant] *of this request and extended the time to respond. On May 27, 2004, we received the correspondence from Meyers Norris Penny indicating that they viewed the document to be exempt on the basis that the document is confidential and could prejudice their competitive position. Based on this representation from the third party, CIC then advised* [the Applicant] *access was refused pursuant to section 19 of The Freedom of Information and Protection of Privacy Act, (the "Act").*
>
> *CIC's position in this regard is simple. CIC asserts that section 19 of the Act applies. The third party, Myers Norris Penney claims that the document contains information that is confidential and could reasonable be expected to prejudice the competitive position of Meyers Norris Penny…"*

[6] At our invitation, the Applicant responded with a submission dated September 1, 2004. The Applicant challenged the exemptions invoked by CIC pointing to the government institution's apparent lack of substantiation.

[7] We requested that CIC provide details of the alleged harm that would flow from disclosure of the record.

[8] In response, CIC submitted, "*…that the report in question contains financial and technical information and was supplied in confidence to CIC"* and "*CIC has concluded that the information contained in the record could reasonably be expected to prejudice the competitive position of Meyers Norris Penny in relation to other accounting firms and would compromise the professional standards that Meyers Norris Penny adheres to."*

II RECORDS AT ISSUE

[9] The record consists of the following components:

1. **Engagement Letter**, dated March 31, 2004 to Ms. Kathryn Buitenhuis representing Crown Investments Corporation from Howard E. Crofts, FCA, Partner from Meyers Norris Penny (MNP) LLP summarizing details of the proposed agreement which consists of 5 pages, including Standard Business Terms (2 pages), plus;
2. **Attachments 1** (16 pages) entitled, "*Bundle Methodology for Calculating Service Costs, Auto Insurance Costs Methodology"* – 2 pages of discussion, followed by one page table entitled, "*Saskatchewan's Most Popular Vehicles Rating Profile List*", then a section entitled, "*Natural Gas Costs Methodology*", and "*Electricity Costs Methodology*" including provincial comparisons, totalling 10 pages; and
3. **Attachment 2** comprised of charts (4 pages).

III ISSUES

Did CIC properly apply section 19(1)(b) of *The Freedom of Information and Protection of Privacy Act* to the records withheld?

Did CIC properly apply section 19(1)(c)(ii) of *The Freedom of Information and Protection of Privacy Act* to the records withheld?

IV DISCUSSION OF THE ISSUE

Did CIC properly invoke section 19(1)(b) of *The Freedom of Information and Protection of Privacy Act*?

[10] We must assess any exemption claims by reference to the purposes of *The Freedom of Information and Protection of Privacy Act* ("the Act"). We have found the purposes as referenced in Saskatchewan's Information and Privacy Commissioner's (SK IPC) Report 2004-003 [10] as follows:

> *"The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by:*
>
> *(a) giving the public a right of access to records*
>
> *(b) giving individuals a right of access to, and a right to request corrections of, personal information about themselves*
>
> *(c) specifying limited exceptions to the rights of access*
>
> *(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and*
>
> *(e) providing for an independent review of decisions made under this Act*"

[11] Additionally, section 61 of the Act provides:

> *"61 In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned."*

The burden of proof is on CIC, not the Applicant.

[12] Section 19(1)(b) of the Act reads:

> *"19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:*
>
> …
>
> *(b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to a government institution by a third party;"*

a) Was the material in question <u>supplied to a government institution by a third party</u>?

[13] It is clear that CIC is a "government institution" within the meaning of section 2(1)(d) of the Act, and that MNP is a third party within the meaning of section 2(1)(j).

(i) Was the record at issue supplied to CIC from MNP?

[14] The engagement letter summarizes the proposed agreement between MNP and CIC.

[15] CIC has not provided to our office any background information as to the negotiation process undertaken between CIC and MNP that led to the acceptance of the engagement letter by the President of CIC on April 1, 2004.

[16] I note the discussion of the "supplied to" issue in a past Saskatchewan IPC Report No. 96/002 dated July 1996.

The report reads, in part, as follows:

> "[The Applicant] *applied under The Freedom of Information and Protection of Privacy Act (the "Act") for a copy of all contracts currently in effect between* [the Consultant] *and SaskTel.*
>
> …
>
> [The Applicant] *applied for a review, and for such purpose I obtained a copy of a document entitled Consulting Services Agreement between it and* [the Consultant] *dated January 24, 1996 which was entered into between the parties…It sets out the terms and conditions under which* [the Consultant] *will be retained by SaskTel to provide consulting services effective from which* [the Consultant] *will be retained by SaskTel to provide consulting services effective from March 1, 1996 including provision for payment of a monthly fee during the term of the Contract.*
>
> …

The Agreement contains a Non-disclosure Clause in the following terms:

> *"SaskTel and the Consultant agree that neither party shall divulge the terms of this contract except with the permission of the other or except as may be requested or required by any government authority within its legal jurisdiction."*

…

With respect to Section 19(1)(b), I am of the view that this section applies to confidential information supplied to a government institution such as SaskTel by a third party such as [the Consultant], *but the Agreement does not, as it appears to me, contain any such information. It is true that the Agreement contains some financial information, namely the amount to be paid to* [the Consultant] *during the term of the agreement, but this can hardly be described as "information supplied in confidence" by* [the Consultant] *to SaskTel. Rather it is a negotiated term of the Contract. Accordingly, in my opinion, subsection 19(1)(b) does not operate to prohibit disclosure of this information."*

[17] Of additional assistance is Ontario's Information and Privacy Commissioner's (Ontario/IPC) Final Order MO-1846-F. It provides:

> *"The requirement that information be "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706].*
>
> *Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].*
>
> *The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706]."*

[18] British Columbia's Information and Privacy Commissioner's Order 03-02 dated January 28, 2003, provided a summary of findings from various jurisdictions on the topic of "supplied by the third party". Some of the relevant discussion is as follows:

> "***Canadian jurisprudence – general comments***
>
> *[68] The British Columbia approach to the question of supply has regularly been applied across Canada. The leading Canadian text on access to information is C. McNairn & C. Woodbury, Government Information: Access and Privacy (Carswell: Toronto, 1992 (current)). Surveying the situation across the country, the authors say the following about the supply criterion, at pp. 4-4 and 4-5:*
>
> > *The Federal Court has confirmed, among other things, that the commercial information exemption is only available in respect of information that has been supplied by a third party, although the other categories of third party information under the federal Act are not so limited. It would not apply, therefore, to reports of government officers on what they had observed in the course of an official inspection.*
> >
> > …
> >
> > *The line of reasoning is equally applicable to the comparable exemptions in the Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Quebec and Saskatchewan Acts, all of which apply to commercial information supplied by a third party.*
> >
> > …
> >
> > *When a request is made for access to an agreement entered into between a government institution and a third party, the agreement as a whole is unlikely to be protected from disclosure by a commercial information exemption on the federal model if the institution played a significant role in developing its terms. Such protection was, for example, denied where an agreement to which access was requested was the result of negotiations and was based on the essential requirements for an agreement that were set out in the government's request for proposals, a document that was publicly available.*

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

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

Canadian jurisprudence – federal

…

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

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

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

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

> *As in this case, the applicant in Société Gamma sought to preclude the release of proposal documents that had been submitted in response to a call for tenders, although in that case the release of bid prices was not at issue. Nevertheless, the principle is applicable to the circumstances of this case and I conclude, for reasons of public policy, that the information is not confidential information within the meaning of paragraph 20(1)(b), however it may have been considered and treated by Promaxis.*

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

…

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

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

Canadian jurisprudence – Ontario

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

…

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

[88] In Order PO-1698, [1999] O.I.P.C. No. 102, Assistant Commissioner Mitchinson dealt with an agreement between Ontario Hydro and a third party for financial advice services that the third party provided to Ontario Hydro. The third party argued that because it had delivered to Ontario Hydro the engagement letter that became the contract, and the letter was more or less in the third party's standard form, the terms of that letter agreement had been "supplied" to Ontario Hydro within the meaning of s. 17(1)(b). Assistant Commissioner Mitchinson noted that, because of communications between the parties, the third party had reduced certain rates found in the record and that this meant the terms of the engagement had been negotiated and not supplied. He said the following about supply:

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

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

…

Canadian jurisprudence – Nova Scotia

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

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

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

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

> *49. The Review Officer in his written reasons for his recommendation concluded that a private company cannot expect to keep private the information contained in an agreement signed with government, particularly when public funds are involved. I confess to some difficulty with this broad statement as there may be rare circumstances where it could be in the public interest to do so. For example if such a contract also involved other protected information under the Act such as certain personal information. However, the general statement is valid in most circumstances as it reflects the right of citizens to be informed of the use of public funds. The obvious danger is the use of the protection of 'commercial information' as a shield to keep from the public the information necessary to properly assess government acts. …*
>
> *…*
>
> *51. This Act is an important part of the ongoing process of improving the democratic process in this Province. The past decisions of this jurisdiction and other jurisdictions have supported the basic purpose of this legislation, to provide protection to certain specified information that deserves privacy, and then to ensure the public has the information necessary to make an informed assessment of the performance of its government institutions. [my emphasis]."*

[19] We agree with the consistent approach taken by the other Commissioners in interpreting "supplied to". We choose to interpret section 19(1)(b) in a manner that is consistent with the decisions thoroughly reviewed by the British Columbia Information and Privacy Commissioner.

[20] Additionally, in our analysis, our office considered statements within the record itself. A statement within the engagement letter clarifies that MNP is to utilize information provided by the Saskatchewan Utility Crowns and CIC only to verify procedures as contemplated as per the engagement letter.

[21] I am not persuaded that the records at issue were provided to the government institution by the third party. Rather, the analysis contemplated by the engagement letter is based upon the materials provided by the government institution to the third party.

b) Does the material in question contain financial or technical information?

[22] In CIC's December 8, 2004 submission, it asserts, *"As a result of these communications, CIC contends that the report in question contains financial and technical information and was supplied in confidence to CIC."*

[23] Alberta's *Annotated Freedom of Information and Protection of Privacy Act* defines "financial information" as follows: "*includes information regarding the monetary resources or financial capabilities of a third party and is not limited to information relating to financial transactions in which the third party is involved (Orders 96-018 [pp.3-4], 2001-008 [42], F2002-002 [35]. Examples of "financial" information include information regarding insurance, past performance, estimated advertising costs and expected or proposed commission (Order 98-006 [61]).*"[1]

[24] Financial information within the record includes the fees and expenses proposed by MNP as necessary in completing the project. Other financial information includes the dollar amounts customers pay for utility rates.

[25] A broader explanation of what constitutes "financial information" is offered in Ontario/IPC, Order MO-1246. It reads, in part as follows:

> "*Financial information relates to money and its use or distribution and must contain or refer to specific data. Examples of "financial" information include cost accounting method, pricing practices, profit and loss data, overhead and operating costs (Orders P-47, P-87, P-113, P-228, P-295 and P-394).*
>
> …

[1] *Annotated Alberta Freedom of Information and Protection of Privacy Act*, Alberta Queens Printer: January 2005, 5-16-3 [hereinafter: "Annotated FOIP"]

Although characterized by the City as a "report", the record is actually a collection of various distinct documents relating to the towing industry in the Greater Toronto region. The record includes:

- *a press release*
- *newspaper and magazine articles*
- *advertisements and flyers designed to inform the public of the towing industry's problems and/or solicit the public's support for legislation*
- *rate schedules for GTTA members*
- *the GTTA's objections to collision reporting centres correspondence to and from various politicians on these issues, and*
- *the test of four speeches delivered on the topic.*

Although various pages or documents included in the "report" may individually satisfy the requirements of "commercial" or "financial" information, the record as a whole does not. Considered in its totality, the record does not relate to the buying and selling of goods and services, nor does it relate to money and its use or distribution. Rather, it represents a consolidation of various specific documents, created independently of each other, and presented, as the title suggests, as a summation of the state of the towing industry, as seen from the perspective of the GTTA. Each separate document must be reviewed on its own to determine if it contains commercial or financial information for the purposes of section 10(1)(a).

I find that documents containing information which relates directly to the buying or selling of towing services qualifies as "commercial" information. This includes suggested highway rates (1992), the competitive rate schedule (1993), tow truck charges, hook-up costs, waiting times, comparative hook-up costs, statistics dealing with the towing industry and operating costs. I also find that documents containing profit and loss data, revenue and expenses, price lists, hourly rates of various towing operators, information pertaining to the actual income and/or salaries of tow truck operators, monthly expenses and driver commissions qualify as both "commercial" and "financial" information. This information is found on pages 5, 7, 31, 39-48, 50-56, 58-59, 61, 69, 73-76 and 78."

[26] Ontario/IPC Final Order PO-1806-F defines "technical information" as follows:

> "*Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the Act. [Order P-454]"*

[27] Some material, particularly the proposed analysis of calculations/methodology, may be considered technical information as it pertains to the analysis that MNP will be required to undertake as part of their responsibilities under this proposal. However, this only applies to specific sections of the record only.

[28] I find that only a small fraction of the record contains financial and technical information.

[29] If the "supplied to" test had been met, we would have recommended severing of the noted financial and technical information found within the record at issue. As the test was not met, there is no need to address the question of severing portions of the record.

c) Is there evidence that this material was supplied <u>in confidence, implicitly or explicitly</u> to a government institution by a third party?

[30] There are explicit references to confidentiality within the record. The engagement letter is marked "*private and confidential*" and Attachment 2 is watermarked, "*Confidential*" with the word "*confidential*" recorded in the footer.

[31] MNP Standard Business Terms (SBT), contains an express provision on confidentiality, but makes allowances for disclosures for numerous reasons[2]. Part of Attachment 1 lists information such as web addresses that are publicly available and that should not be treated as confidential.

[32] Once again, Saskatchewan Information and Privacy Commissioner (SK IPC) Report No. 96/002 is relevant on this point providing that:

> *"Insofar as the clause in the Contract dealing with non-disclosure is concerned, in my opinion such a clause, to the extent that it is contrary to the provisions of the Act, can be of no effect. It is not competent for a government institution, in my view, to enter into a contract of non-disclosure with respect to records or information which it would otherwise be required to disclose pursuant to the provisions of the Act. Indeed, the wording of the non disclosure clause seems to recognize this."*

Did CIC properly apply section 19(1)(c)(ii) of *The Freedom of Information and Protection of Privacy Act*?

d) What test should be applied to determine whether section 19(1)(c)(ii) has been met?

[33] *"19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:*

> *(c) information, the disclosure of which could reasonably be expected to:*
> *…*
> *(ii) prejudice the competitive position of; or*
>
> *…a third party;"*

[2] Myers Norris Penny Standard Business Terms, Section 3, March 31, 2004, pages 6

[34] I note that the Alberta *Freedom of Information and Protection of Privacy Act* counterpart to this provision is similar:

> *"16(1) The head of a public body must refuse to disclose to an applicant information*
>
> …
>
> *(c) the disclosure of which could reasonably be expected to*
>
> *(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
>
> *(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
>
> *(iii) result in undue financial loss or gain to any person or organization, or*
>
> *(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute."*

[35] In Alberta, as a result of a number of Orders of the Commissioner, the public body must meet the following three part test: (a) there must be a clear cause and effect relationship between the disclosure and the harm which is alleged; (b) the harm caused by the disclosure must constitute "damage" or "detriment" to the matter and not simply hindrance or minimal interference; and (c) the likelihood of harm must be genuine and conceivable.[3]

[36] Since section 19(1)(c)(ii) of Saskatchewan's Act does not expressly require the disclosure to "*harm **significantly** the competitive position*" [emphasis added], a modification of the 3 part test is required. The three part test that should be applied in Saskatchewan consists of the following elements: (a) there must be a clear cause and effect relationship between the disclosure and the harm which is alleged; (b) the harm caused by the disclosure must be more than trivial or inconsequential; and (c) the likelihood of harm must be genuine and conceivable.

[3] Annotated FOIP, supra, note 1, page 5-16-6

[37] We were advised by CIC that the information contained within the record "*…based on the representations made by Meyers Norris Penny, CIC has concluded that the information contained in the record could reasonably be expected to prejudice the competitive position of Meyers Norris Penny in relation to other accounting firms and would compromise the professional standards that Meyers Norris Penny adheres to."*

[38] The Applicant disputes this assertion with the following:

> *"First relating to the claimed exemption of Sec. 19(1)(b) of the Act:*
>
> *MNP claims the material was provided "in confidence" to CIC. However, the section only applies to "financial, commercial, scientific, technical or labour relations information" supplied in confidential. MNP's material are quite different. By their own admission, they say their materials are "terms of engagement" and a "proposal" to provide a service. It is not enough, I submit, to simply assert that their materials were provided "in confidence", even explicitly. They must also show that their materials are – in fact, "financial, commercial, scientific, etc". They have not done so, for the obvious reason that the materials are, primae facie, quite something else.*
>
> *Second, relating to the claimed exemption of 19(1)(c)(ii) of the Act:*
>
> *As has been noted in the past, in Saskatchewan and in other jurisdictions, it is not enough for an entity – be it a government entity or third party – to merely assert that the release of information "could reasonably be expected to prejudice" a third party's competitive position.*
>
> *MNP must do more. First, is must show that the information is something that relates to its competitive position. This would be, for example, information that only MNP has, that others in the field would gain from having. It would also be information that MNP has generated at some expense, that – if disclosed – would allow others to gain at MNP's expense. MNP's terms of engagement and service proposal are nothing of the sort – not even remotely. They are documents that*

would have been generated at virtually no expense, and would contain no information exclusive to MNP. The only possible element could be detailed information on fees and charges – information that could easily be severed [Note only the "detailed" fee information could fall into that category, not the overall cost or charge…something which the government would be compelled to reveal in other ways.]

Even if MNP can show its terms of engagement and service proposal are "competitive" information, the inquiry does not end with that. It must also show that the disclosure "could reasonable be expected to prejudice" the firm's competitive competition. MNP must show what the prejudice would be, and provide evidence [beyond its merely "say-so"] on why it expects the disclosure would lead to that prejudice. If MNP supplies evidence on those two points, it must be evaluated on using the "reasonableness" test. That is, would a reasonable person, informed on the matter [that is, presented with the evidence of what the prejudice would be and the how disclosure would lead to the prejudice], come to the same conclusion as MNP.

MNP has not done anything to meet the requirements of the legislation, for the obvious reason that the materials are not competitive nor would their release lead to prejudice."

[39] The Applicant's submission is supported by decisions in other jurisdictions. For instance, Ontario/IPC Order PO-2195 provides the following:

"Under part 3, the Ministry and/or OPG must demonstrate that disclosing the information "could reasonably be expected to" lead to a specified result. To meet this test, the parties resisting disclosure must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient. [see Order P-373, two court decisions on judicial review of that order in Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.)]."

[40] The expectation of harm in this instance is purely hypothetical, as no evidence has been presented on the likelihood of harm occurring if in fact the record was disclosed.

[41] I find on the submissions from CIC that it has failed to satisfy the burden of proof of demonstrating that the disclosure of the records in question could reasonably be expected to prejudice the economic interest of MNP.

V RECOMMENDATIONS

[42] I find that the exemption in section 19(1)(b) of *The Freedom of Information and Protection Act* does not apply to the record.

[43] I further find that the exemption in section 19(1)(c)(ii) of *The Freedom of Information and Protection Act* does not apply to the record.

[44] I recommend that Crown Investments Corporation provide the Applicant with the record.

Dated at Regina, in the Province of Saskatchewan, this 05 day of May, 2005.

R. GARY DICKSON, Q.C.
Information and Privacy Commissioner for Saskatchewan