FILE NO. 2001/047

REPORT WITH RESPECT TO THE APPLICATION FOR REVIEW OF [redacted] IN RELATION TO INFORMATION REQUESTED FROM THE UNIVERSITY OF SASKATCHEWAN

[1] By an Access to Information Request form dated October 5, 2001, [redacted] (the "Applicant") requested information from The University of Saskatchewan (the "Respondent") regarding the exclusive sponsorship agreement pertaining to Coca-Cola Bottling Ltd. The detail of the requested information indicated in the Request Form was as follows:

> "Coca-Cola Bottling Ltd. exclusive sponsorship agreement – contract effective 1 Jul 98".

[2] In a letter from Tim Hutchinson, Archivist for the Respondent, dated October 30, 2001, the Respondent advised the Applicant as follows:

> "The Local Authority Freedom of Information and Protection of Privacy Act reads (emphasis added):
>
> 18(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:
> (i) result in financial loss or gain to;
> (ii) prejudice the competitive position of; or
> (iii) interfere with the contractual or other negotiations of;
> a third party.
>
> The Coca-Cola Bottling Company has notified us that 'our position is that some of the information in the agreement, if released, would cause harm to our competitive position. The information in question relates to pricing, volume and commission rates. We consent to the release of the contract, with the exception of these pieces of information.'
>
> Because the Coca-Cola Bottling Company is a third party, we are required to withhold information determined to fall in the category described in section 18.
>
> Further, the Act reads:
>
> 17(1) Subject to subsection (3), a head may refuse to give access to a record that could reasonably be expected to disclose:

(d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the local authority [or]
(f) information, the disclosure of which could reasonably be expected to prejudice the economic interest of the local authority.

Release of financial details (indicating monetary value of the agreement) could interfere with future negotiations with third parties and therefore prejudice the University's economic interest.

However, the Act also reads:

8 Where a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access.

Because of the exemptions noted above, the Exclusive Sponsorship Agreement with the Coca-Cola Bottling Company will be made available to you, with information relating to pricing, volume, commission rates, or other financial information which would indicate the total value of the contract, withheld.

The following sections or parts of sections have been withheld;

1.1 (j) Definitions – Commission
1.1 (s) Definitions – Government Buildings
1.1 (x) Definitions – Net Revenues
1.1 (mm) Definitions – Volume Expectation
4.6 Wholesale Pricing (entire section)
4.7 Retail Pricing (entire section)
4.9.4 (Availability of Cold Beverage Products) – re volume
5.1.1 (Equipment supply) – phrase re volume
5.5 (a) (Ongoing Upgrades and Supply) – phrase re volume
6.8 re consideration (monetary value of agreement)
6.9 re consideration (monetary value of agreement)
7.1 Annual Sponsorship Fee
7.2 Additional Marketing/Promotional Support
7.3 Commission and Vending Reports
7.4 re consideration (monetary value of agreement)
8.1 [Volume] Expectation
8.2 [Volume] Expectation Shortfall
12.1.2 last paragraph of Termination
12.2 Involuntary Loss of Facility
12.6 (a), (b), (d) (Force Majeure)
29 (Ambush Marketing) – percentage amounts
Schedule B-Designated Purchasers
Schedule C – Excluded Facilities
Schedule E – Vending Machines and Locations
Schedule H – Wholesale Prices, Cups and Lids Pricing, Retail (Vending Machine) Prices
Table of Contents (withholding section titles for 6.8 and 6.9)
Amending Agreement, 8 March 1999, replacing 6.8 (since 6.8 is withheld)

> You may gain access to this document in one of two ways: (1) make an appointment to view the document at the University Archives; (2) receive a photocopy (25 cents plus G.S.T. per page, as prescribed in the Act) – I would estimate that the document (not include pages not released) has about 60 pages. Please let me know which option you would like to use. (If you do make an appointment to view the document, you could always decide to arrange for a photocopy at that time.)
>
> If you wish a review of this decision, you may request one within one year of this notice. To request a review, please complete a Request for Review" form, available at the University Archives. Your request should be sent to the Information and Privacy Commissioner, 700 – 1914 Hamilton Street, Regina, Saskatchewan, S4P 3N6.
>
> If you wish to discuss this further, please feel free to call me at 966-7253."

[3] In a formal Request for Review dated December 10, 2001 addressed to me, the Applicant indicated that he had been refused access to part of the record that he had requested. In the Request for Review, he stated that:

> "The local authority has denied me access to part of the record: U of S – Coca-Cola Bottling exclusive sponsorship agreement. See attached documentation. My initial basis for my Request for Review rests on B.C. Privacy Commission of Ruling (Order 01-20) May 25, 2001, where a similar agreement between Coke and the University of British Columbia [sic]. I would refer the Commissioner to that decision."

[4] I determined that I would undertake the review as requested by the Applicant and duly advised the Respondent. I further determined that for the purposes of carrying out my review, it would be necessary for me to personally inspect the document in question. I requested that the Respondent, pursuant to the provisions of Section 43 of The Local Authority Freedom of Information and Protection of Privacy Act, provide me with a copy of the document from which portions were withheld from the Applicant. A copy of the relevant document in its complete form was duly forwarded to me by the Respondent and I have had an opportunity to review it.

[5] By letter dated February 7, 2002, the Respondent advised me that the Coca-Cola Bottling Company did not intend to make any representations to me regarding this review.

[6] The relevant provisions of The Local Authority Freedom of Information and Protection of Privacy Act are as follows:

"2(f) local authority means:

...

(xi) the University of Saskatchewan including Saint Thomas More College.

2(k) third party means a person, including an unincorporated entity, other than an applicant or a local authority.

8 Where a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access.

17(1) Subject to subsection (3), a head may refuse to give access to a record that could reasonably be expected to disclose: ...

(d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the local authority;

...

(f) information, the disclosure of which could reasonably be expected to prejudice the economic interest of the local authority;

18(1) Subject to Part V in 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:

(i) result in financial loss or gain to;
(ii) prejudice the competitive position of; or
(iii) interfere with the contractual or other negotiations of:

a third party.

...

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

(3) Subject to Part V, a head may give access to a record that contains information described in clauses (1)(b) to (d) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

> (ii) prejudice to the competitive position of; or
> (iii) interference with contractual or other negotiations of:
> a third party."

[7] As noted in his Request for Review, the Applicant refers to a ruling of British Columbia's Privacy Commissioner dated May 25, 2001, indexed as Order 01-20. I have obtained a copy of this ruling, and have reviewed it.

[8] In that case, the applicant requested a copy of a 1995 exclusive sponsorship agreement between the University of British Columbia, its Students' Society and Coca-Cola Bottling Ltd. The University withheld certain portions of the agreement from the applicant. In his ruling, British Columbia's Information and Privacy Commissioner ordered that the remaining withheld portions of the agreement were required to be disclosed because the requirements set forth in Section 17(1) and Section 21(1) of British Columbia's Freedom of Information and Protection of Privacy Act had not been met.

[9] I am of the view that to properly consider this British Columbia ruling, careful attention has to be paid to the wording of Section 17 and Section 21 of the British Columbia legislation. The British Columbia ruling sets out the relevant parts of these sections as follows (at page 8 – 9 of the ruling):

> "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 the government to manage the economy, including the following information:
>
> (a) trade secrets of a public body or the government of British Columbia;
> (b) financial, commercial, scientific or technical information that belongs to a public body or the government of British Columbia and that has, or is reasonably likely to have, monetary value;
> ...
> (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 the public body or the government of British Columbia...
>
> 21(1) The head of public body must refuse to disclose to an applicant information:
> (a) that would reveal

(i) trade secrets of a third party, or;
(ii) commercial, financial, labour relations, scientific or technical information of a third party,
(b) that is supplied, implicitly or explicitly, in confidence, and
(c) the disclosure of which could reasonably be expected to
(i) harm significantly the competitive position or interfere significantly with a negotiating position of a 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 continued to be supplied,
(iii) result in undue financial loss or gain to any person or organization, or..."

[10] In the British Columbia application, as stated in the Release which accompanied the Commissioner's ruling:

> "It was argued that release of the withheld portions would result in: competitors formulating competing agreements; pressure on Coca-Cola and the institutions to provide their respective customers with similar terms; and dissention and dissatisfaction by Coca-Cola customers who have not received the same terms.
>
> The applicants argued that the public body's evidence was speculative. They provided examples of non-confidential agreements between cold beverage companies, including Coca-Cola and U.S. universities, and argued that the public nature of those agreements demonstrates that companies continue to enter into lucrative sponsorship contracts with universities even when they know that agreements, including their financial details, will not be kept confidential.
>
> The Commissioner ruled that the argument and evidence put forward by Coca-Cola and the colleges and universities were speculative and conclusionary in nature and offered insufficient evidence of harm. He also found that the U.S. agreements lent weight to the contention that public accessibility does not stop companies from entering into such agreements and noted that Coca-Cola and the post-secondary institutions did not produce any evidence to the contrary.
>
> With respect to the argument that release of the rest of agreement would harm Coca-Cola's business interests, the Commissioner reminded the parties that information can be withheld for this reason only if all three parts of a specified test are met. Release of the information must reveal commercial or financial information of a third party, that was supplied in confidence, the disclosure of which could reasonably be expected to result in the specified harm. In these cases, the commissioner found that only the first part of the test was met. He found no evidence to support the argument that release of the agreements would reveal information supplied, as opposed to

> negotiated, by Coca-Cola and he found there was not sufficient evidence of harm as required by the legislation."

[11] It is important to note, in considering this British Columbia ruling, that the British Columbia Information and Privacy Commissioner correctly placed emphasis on the specific wording of the provisions of the Act. As an example, at page 30 of his ruling, he states that:

> "Of course the cogency of this evidence from UBC and CCB must also be assessed with reference to the existence of similar non-confidential U.S. agreements and bearing in mind the requirements for "undue" financial loss or gain to a third party in s. 17(1)(d) and s. 21(1)(c)(iii) or for "significant" harm to competitive position or interference with negotiating position of a third party under s. 21(1)(c)(i). These statutory thresholds cannot be forgotten. In this regard, the evidence concerning pressure from UBC's and CCB's other customers, and dissension from CCB's customers as a result of disclosure of the disputed information, speaks to just that – the possibility of pressure and dissatisfaction from other customers. It dwells on the challenges of explaining deal and contract differences to other customers and falls short of establishing that UBC or CCB anticipate actually making any pricing concessions as a result of disclosure of the disputed information. Nor does this establish that any such concessions would be of an "undue" or "significant" nature or magnitude. I find that the evidence from UBC and CCB regarding harm from disclosure of "price" type information is insufficient to discharge the onus of proving a reasonable expectation of any of the harms contemplated under s. 17(1) or s. 21(1) of the Act.

[12] Further, at page 32 of his ruling, he states:

> "[I]t is my view that the potential for some financial loss or other competitive impact as a result of CCB's competitors knowing the product boundaries of the exclusive sponsorship agreement ... would not constitute a reasonable expectation of harm to UBC under s. 17(1) nor an undue financial loss or gain or significant competitive harm as contemplated by s. 17(1)(d) or s. 21(1)(c) of the Act."

[13] In my view, this Review presents factual and statutory issues that are distinguishable from that situation involved in the British Columbia ruling. The wording of the relevant Saskatchewan sections relied upon by the Respondent differs in some of important respects. The British Columbia legislation provides that it is necessary to find that: "the disclosure of [the information] could reasonably be expected to (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party" (section 21(1)(c)(i)). Alternatively, it is necessary to find that: "the disclosure of [information] could

reasonably be expected to ... (iii) result in undue financial loss or gain to any person or organization" (section 21(1)(c)(iii)).

[14] In contrast, the Saskatchewan provision contains similar wording, but does not include the word "significantly" when referring to competitive position and negotiations, and does not include the word "undue" when referring to financial loss or gain. In my view, the absence of these words from the Saskatchewan legislation is of importance. It is my opinion that the disclosure of the information exempted by the Respondent could reasonably be expected to result in financial loss to, prejudice the competitive position of, or interfere with the contractual or other negotiations of a third party. Given the wording of our legislation, it is not necessary for me to be of the view that these expected results be "significant" or "undue".

[15] I have concluded that the portions of the requested document that have been withheld by the Respondent are properly exempt from disclosure pursuant to section 18(1)(c) of the Act. Thus, I recommend that the portions of the document presently not provided to the Applicant not be disclosed to the Applicant. (As was previously referred to herein, the Respondent disclosed part of the exclusive sponsorship agreement to the Applicant after his initial request.)

[16] It is also important to note that in the British Columbia ruling, the Commissioner gave consideration to the issue of whether the information in question was "supplied in confidence". In his view, this was necessary in order to determine whether this requirement of the three-part test under the British Columbia legislation had been met. British Columbia's Commissioner found that the third party involved had not "supplied" the information, because the information in question resulted from negotiations between the third party and the government entity.

[17] This issue (regarding whether the information was "supplied") is irrelevant in this Review because the wording of Section 18(1) of the Saskatchewan Act differs from its counterpart in the British Columbia statute. In this section of the Saskatchewan legislation, it is only Section 18(1)(b) that contains the requirement for information being "supplied in confidence". This requirement does not apply to Section 18(1)(c) (which is the subsection upon which I have based my finding that the requested portions of the document are exempt from disclosure) or to the remaining provisions of Section 18(1).

[18] In my view, disclosing the remaining portions of the document in question could reasonably be expected to interfere with future negotiations involving the third party. In

addition, disclosure of the requested information could reasonably be expected to impact upon the third party's financial well-being if the information was released to a direct competitor.

[19] DATED at Regina, in the Province of Saskatchewan, this 19th day of March, 2002.

GERALD L. GERRAND, Q.C.
Commissioner of Information
and Privacy for Saskatchewan