Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
Catherine Tully

REVIEW REPORT FI-09-100

October 22, 2015

Nova Scotia Business Inc.

Summary: The applicant sought access to the term sheet outlining the terms and conditions of the venture capital financial transaction between Nova Scotia Business Inc. ("NSBI") and LED Roadway Lighting Ltd. NSBI said that a portion of the agreement was exempt from disclosure because it contained confidential third party business information and because the disclosure of the withheld information could reasonably be expected to harm the economic interests of the public body.

The Commissioner recommends full disclosure of the term sheet.

In order for NSBI to withhold third party business information it must satisfy the three part test set out in s. 21. The evidence established that portions of the negotiated agreement would reveal third party financial information supplied in confidence thus satisfying the first two parts of the s. 21 test. However, at best, the evidence of harm established a mere possibility of harm that was speculative in nature. As a result, the requirements of s. 21(1)(c)were not met.

With respect to potential harm to the economic interests of the public body, NSBI failed to provide detailed and convincing evidence to establish a reasonable expectation of any of the alleged harms required under s. 17(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s. 17; *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, ss. 3(1), 17, 21, 37, 45; *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s. 18(1); *Nova Scotia Business Incorporated Act*, SNS 2000, c 30, s. 16(1)(b).

Authorities Considered: Alberta: Order 99-018, 1999 CanLII 19670 (AB OIPC); **British Columbia:** Orders 00-10, 2000 CanLII 11042 (BC IPC); 00-22, 2000 CanLII 14389 (BC IPC); 03-05, 2003 CanLII 49169 (BC IPC); 03-33, 2003 CanLII 49212 (BC IPC); F08-22, 2008 CanLII 70316 (BC IPC); F13-19, 2013 BCIPC 26 (CanLII); F15-40, 2015 BCIPC 43 (CanLII); **Nova Scotia:** Review Report FI-10-59(M), 2015 CanLII 39148 (NS FOIPOP); **Ontario:** Orders P-576, 1993 CanLII 4899 (ON IPC); P-841, 1995 CanLII 6372 (ON IPC); PO-1599, 2015 CanLII 15990 (ON IPC); PO-2786, 2009 CanLII 28101 (ON IPC); PO-3042, 2012 CanLII 2819 (ON IPC); PO-3283, 2013 CanLII 83061 (ON IPC).

Cases Considered: *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (FCTD); *Atlantic Highways Corp. v. Nova Scotia (1997)* 1997 CanLII 11497 (NS SC), 162 N.S.R. (2d) 27; *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603 (CanLII); *Halifax Herald v. Nova Scotia (Workers' Compensation Board)*, 2008 NSSC 369; *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231; *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII); *O'Connor v. Nova Scotia*, 2001 NSCA 123; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, [2014] 1 S.C.R. 674.

Other Sources Considered: Crown Corporation Business Plans for the Fiscal Year 2009-2010: Nova Scotia Business Incorporated at p. 78 http://www.novascotiabusiness.com/site-nsbi/media/NovaScotiaBusinessInc/NSBI%20Business%20Plan%202009-10.pdf; *Canadian Oxford Dictionary*, (Toronto: Oxford University Press, 1991), "commerce", "undue". "monetary"; *Black's Law Dictionary* (5th Edition) (West Group Co.: St. Paul, Minn., 1979), "undue"

INTRODUCTION:

[1] On October 1, 2009 the applicant applied for access to information under the *Freedom of Information and Protection of Privacy Act* ("*FOIPOP*"). The applicant requested access to the term sheet outlining the terms and conditions of the venture capital financial transaction between Nova Scotia Business Inc. ("NSBI") and LED Roadway Lighting Ltd. The applicant also requested a statement of how many shares NSBI holds in this company and NSBI's percentage ownership position. In response, NSBI provided partial access citing the need to protect personal information, confidential business information and the financial and economic interests of NSBI. The applicant filed a request for review with this office on November 27, 2009.

ISSUES:

[2] There are two issues under consideration:

(a) Is NSBI required to refuse access to information under s. 21 of *FOIPOP* because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?
(b) Is NSBI authorized to refuse access to information under s. 17 of *FOIPOP* because disclosure could reasonably be expected to harm the economic interests of the public body?

DISCUSSION:

Background

[3] The applicant's original access to information request was filed on September 9, 2009. In that original request, the applicant sought access to contracts between NSBI and 12 identified companies as well as statements of how many shares NSBI holds in the companies and NSBI's percentage ownership position. The applicant subsequently reduced his request to a copy of the term sheet between NSBI and LED Roadway Lighting Ltd.

[4] In response to the access request, NSBI consulted with a third party, seeking the third party's views on the disclosure of the requested record. The third party objected to the release of any information contained in the record. NSBI took into consideration the third party's objections and determined that it would provide partial release of the records. That decision was communicated to the third party by way of a letter dated October 30, 2009.

[5] The third party did not file a request for review of the October 30, 2009 decision and so NSBI provided the original access applicant with a partial disclosure of the records on November 24, 2009. The applicant was not satisfied with the partial disclosure and so filed a request for review with this office on November 27, 2009.

[6] This matter was assigned for investigation September, 2014 – five years after the original request was made. In the course of the investigation, the applicant advised that he was not interested in any third party personal information. This reduced the outstanding issues to the application of s. 17 (economic interest of the public body) and s. 21 (confidential third party business information) of *FOIPOP* to the records.

[7] Section 21 of *FOIPOP* provides in part:[1]

> 21(1) The head of a public body shall refuse to disclose to an applicant information
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> (a) that would reveal
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> (i) trade secrets of a third party, or
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> (ii) commercial, financial, labour relations, scientific or technical information of a third party;
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> (b) that is supplied, implicitly or explicitly, in confidence; and
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> (c) the disclosure of which could reasonably be expected to
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> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party;
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> (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…

[8] Section 17(1) of *FOIPOP* provides in part:

> 17(1) The head of the 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 Nova Scotia or the ability of the Government or manage the economy and, without restricting the generality of the foregoing, may refuse to disclose the following information:
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> (b) financial, commercial, scientific or technical information that belongs to a public body or to the Government of Nova Scotia and that has, or is reasonably likely to have, monetary value;
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> (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;

[1] A copy of the *Freedom of Information and Protection of Privacy Act* is available on our website at foipop.ns.ca.

Burden of Proof

[9] Where a review is requested by the original access applicant, the public body bears the burden of proving that the applicant has no right to access the withheld information:

> 45(1) At a review or appeal into a decision to refuse an applicant access to all or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part.

[10] In accordance with s. 37(2)(b) of *FOIPOP* the third party was included as a party to the review. Section 45(3) of *FOIPOP* provides that in the case of third party confidential information as described in s. 21, it is the third party who bears the burden of proof:

> 45(3) At a review or appeal into a decision to give an applicant access to all or part of a record containing information that relates to a third party,
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> (a) in the case of personal information, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy; and
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> (b) in any other case, the burden is on the third party to prove that the applicant has no right of access to the record or part.

[11] Typically the burden placed on the third party arises when the third party files the request for review. In this case it is my view that because it is the access applicant who has filed the request for review, the burden of proof lies ultimately with the public body.[2]

Is NSBI required to refuse access to information under s. 21 of *FOIPOP* because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?

General Approach

[12] Nova Scotia's access legislation is unique in that it declares as one of its purposes a commitment to ensure that public bodies are fully accountable to the public. It is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada.[3] *FOIPOP* strikes a balance between the demands of openness and commercial confidentiality in two ways: it affords substantive protection of information by specifying that certain categories of third party information are exempt from disclosure and it gives procedural protection through the third party notice process.[4]

[13] As I have previously discussed, courts have recognized that the important goal of broad disclosure must be balanced against the legitimate private interests of third parties and the public interest in promoting innovation and development.[5]

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[2] This is consistent with the approach I took in NS Review Report FI-10-59(M) at para. 8.
[3] *O'Connor v. Nova Scotia*, 2001 NSCA 123 [*O'Connor*] at paras. 54 – 57.
[4] *Merck Frosst Canada Ltd. v. Canada (Health),* [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at para. 23 [*Merck Frosst*].
[5] NS Review Report FI-10-59(M) paras. 9-15, *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner),* 2014 ABCA 231 at para. 67.

(a) Reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party

[14] The document at issue is a nine page "term sheet". The term sheet is in the form of a letter to LED Roadway Lighting Ltd. and C-Vision Ltd. from NSBI. It begins by stating that NSBI has authorized an investment in LED Roadway Lighting Ltd. on the terms and conditions that follow. The bulk of the letter sets out the terms and conditions of the investment which, at the time of the letter, was subject to the issuance of an Order in Council by the Province of Nova Scotia. The Order in Council, OIC 2009-376, was issued on September 8, 2009 authorizing financial assistance in an amount not to exceed $6,000,000 to LED Roadway Lighting Ltd.

[15] The majority of information in the term sheet was disclosed to the applicant.

[16] In its submissions, NSBI divided the withheld information into nine information types as follows:

1. # of preferred shares to be issued to NSBI;
2. $ per share value of the preferred shares to be issued to NSBI;
3. % ownership of the company the NSBI VC investment represents;
4. Pre-financing financial information of the company;
5. % rate of dividends on the shares;
6. Provisions about retraction options, conversion rates, redemption conditions;
7. Size of the board to be put in place;
8. Specific risk mitigation limits; and,
9. Forward looking statements about the company's commercial outlook.

[17] The terms commercial and financial are not defined in *FOIPOP*. It has been generally accepted that dictionary meanings provide the best guide and that it is sufficient for the purposes of the exemption that information relate or pertain to matters of finance, commerce, science or technical matters as those terms are commonly understood.[6]

[18] In this case I would add that "commerce" is defined in the *Concise Oxford English Dictionary*[7] as: the activity of buying and selling, especially on a large scale.

[19] NSBI, at the time of this access request, had a mandate to render financial assistance that would "encourage, sustain, improve or develop business in the Province".[8] In its 2009-2010 business plan, NSBI stated that its venture capital team "provides equity investment to mid to late-stage Nova Scotia companies seeking growth capital. NSBI's approach is to assume a non-controlling interest and partner with entrepreneurs and investment partners."[9] Thus the venture capital activity itself served a public interest of promoting innovation and development.

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[6] *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (FCTD) at 268 cited with approval in *Merck Frosst* at para. 139.
[7] Canadian Oxford Dictionary, (Toronto: Oxford University Press, 1991), "commerce" at p. 287 [*Oxford*].
[8] *Nova Scotia Business Incorporated Act*, SNS 2000, c 30, s. 16(1)(b).
[9] Crown Corporation Business Plans for the Fiscal Year 2009-2010: Nova Scotia Business Incorporated at p. 78, online at: http://www.novascotiabusiness.com/site-nsbi/media/NovaScotiaBusinessInc/NSBI%20Business%20Plan%202009-10.pdf.

[20] NSBI takes the position that all nine of the information types listed above qualify as commercial or financial information because the withheld clauses are the commercial terms of an agreement about a financial transaction. The information relates and pertains to matters of finance and commerce. Further, NSBI states that the information is "of a third party" as required by s. 21(1) in that it is information either "belonging to" or "about" the third party.

[21] The NSBI further examines the nine information types in terms of what the withheld information could reveal about the third party. NSBI argues that some simple math could be used to disclose such things as the valuation of the company, the value of the company's shares, the number of shares of the company as well as information relating to the commercial outlook and risk information of the company.

[22] The third party characterized the withheld information slightly differently stating that it principally fell into five categories:

1. Details of the capital structure of the third party;
2. Details of the management and corporate governance structure of the third party;
3. Details of the commercial terms of the then proposed investment by NSBI including the resulting percentage ownership that would allow third parties to calculate the enterprise valuation of the third party which the third party's Board of Directors was prepared to accept at that time;
4. Detailed economic terms of the investment by NSBI which disclosed the negotiating position of the third party; and,
5. Personal information.

[23] Using this information, the third party states that competitors "could determine the performance targets, venture capital investment strategy model and future financial obligations" of the third party.

[24] It is well established that a negotiation process can take information supplied by the parties and so intertwine it and modify it that claims to a proprietary interest become clouded.[10] The term sheet provides evidence that it is a negotiated agreement between the parties. Page 9 the term sheet provides: "Accepted and agreed this 31 day of Aug, 2009" followed by signatures of representatives of NSBI and the third parties.

[25] The term sheet is a unique document unlike most negotiated contracts. Therefore, while I find that the term sheet is a negotiated document, I also find that the disclosure of the withheld information could reveal the financial and commercial information of the third party. I say this for two reasons.

[26] First, in order to determine whether or not to invest in the third party, NSBI required significant commercial information from the third party. It used that information to make decisions about the nature and extent of its investment. This commercial information is, as

[10] *Atlantic Highways Corp. v. Nova Scotia (1997),* 1997 CanLII 11497 (NS SC), 162 N.S.R. (2d) 27 [*Atlantic Highways*], p. 9; *Halifax Herald v. Nova Scotia (Workers' Compensation Board)*, 2008 NSSC 369 at para. 74 [*Atlantic Highways*].

submitted by the public body, easily revealed either directly or through some simple math. I will discuss this further below.

[27] Second, the conditions around the investment NSBI was prepared to make included decisions around the number of shares it would own, the value of the shares, the proportion of its investment in the overall ownership of the company, when and on what terms it could redeem its investment and its powers and representation on the Board of Directors of the third party. As such, these terms and conditions were all also business information of the third party.

[28] I am satisfied that as such, the term sheet contains the financial and commercial information of the third party. I find that the first requirement of s. 21(1) is satisfied.

(b) Supplied implicitly or explicitly in confidence

[29] There are two elements to evaluating whether or not the requirements of s. 21(1)(b) have been satisfied: was the information supplied and if so, was it supplied in confidence? Several general observations about the "supplied" requirement are: the public body and third party claiming the exemption must show that the information was supplied; where government officials collect information by their own observations, the information will not be considered as having been supplied and whether or not information was supplied will often be primarily a question of fact.[11]

[30] I agree with NSBI that the "supplied" requirement can be satisfied where accurate inferences can be made from a negotiated agreement of underlying, supplied confidential information or where the information is relatively immutable or not susceptible to change.[12]

[31] In this case, a portion of the withheld information directly reveals the pre-financing capitalization of the third party (on page 1 and again on page 2 of the term sheet). Withheld information could also be used to accurately infer the enterprise valuation of the third party using straightforward mathematics and the withheld information in the first clause on page 1 and the dollar value withheld in the third subparagraph of the Forced Conversion or Redemption term on page 2. Therefore I am satisfied that this information (referred to as types 1, 2, 3 and 4 by NSBI) all qualify as information "supplied" to NSBI.

[32] For the reasons set out below, I find that none of the remaining withheld information qualifies as "supplied" within the meaning of s. 21(1)(b) of *FOIPOP*.

[33] On page 1, the annual dividend percentage payable to NSBI is withheld. This is clearly a negotiated term. Neither NSBI nor the third party provided an explanation as to how this individual term could be used to accurately infer or disclose supplied information. Likewise, the manner in which preferred shares will be valued on retraction was also a negotiated term. As

[11] *Merck Frosst* at paras. 150-157. For a further discussion of the "supplied" requirement see NS Review Report FI-10-59(M) at paras. 36-46.
[12] This approach was also taken in BC Order 00-22 2000 at p. 9 (upheld on appeal) and *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner),* 2002 BCSC 603 (CanLII) at para. 73.

with all of the terms of the agreement, it reveals something of the negotiating position of both parties but this does not make it information "supplied" within the meaning of s. 21 of *FOIPOP*.

[34] The terms withheld on page 2 of the agreement are similar to the retraction term. These are negotiated terms particular to this unique agreement. They describe events that could occur and set out how NSBI's interest will be valued should those events occur. Except for two individual pieces of information (repeated from page 1), they do not disclose directly any supplied information. No evidence or argument was put forward as to how the remaining information on page 2 could be used to draw an accurate inference about confidential third party financial or commercial information. At best the information consists of negotiated terms that certainly give the reader a sense of the acceptable risks from both parties' perspectives as well as a sense of how optimistic each party was regarding the future of the third party. Of course this is true of all negotiated agreements. When considering a claim of proprietary interest in information subject to a negotiation process, only strong proof evidencing such information as a distinct and severable part of the agreement will suffice.[13]

[35] On page 3 NSBI has withheld the membership numbers of the Board of the Companies and on page 6 information regarding board meetings. Because NSBI was given one nominee (as disclosed by NSBI) the agreement itself altered the make-up of the Board at least to that extent. However, the agreement goes on to specify other types of directors. Again, this is not information supplied as it was the subject of a negotiated agreement. No evidence was provided regarding the make-up and functioning of the Board prior to NSBI's investment. Therefore, I cannot find any basis to determine that the negotiated terms with respect to the Board "reveal" any supplied third party information.

[36] On pages 3 and 4 there are 21 matters that cannot be undertaken without the unanimous consent of all the Board members. One of the 21 matters is withheld while the remainder were disclosed. In my view the withheld term is quite clearly intended to protect NSBI's interest and was not information that would have existed prior to the negotiation.

[37] While the third party argued that a competitor who had access to these details relating to management structure - which I assume was a reference to the Board terms - could determine the performance targets, venture capital investment strategy model and future financial obligations of the third party, the third party failed to provide any evidence as to how exactly knowing, for example, the number of board members or one of 21 reasons for unanimous consent to meet could lead even an assiduous reader to such information.

[38] On pages 5 and 6 two pieces of information are withheld in relation to restriction on transfer of company shares. In both cases no evidence was supplied to establish how these negotiated terms would reveal confidential financial or commercial information supplied to the public body. Likewise, on page 7 the amount of the reserve for the employee share ownership program is withheld. Nothing about the term suggests that it was or is immutable information and no evidence was supplied as to how such a term could reveal confidential financial or commercial information of the third party. I find in each of these cases the information was negotiated and not supplied.

[13] *Atlantic Highways* at para. 40.

[39] The final piece of withheld information is on page 6. Without disclosing the content of the term, suffice it to say that the words used in the term make clear that there was a meeting of minds between the two parties with respect to certain expectations. The term itself does not reveal any identifiable third party business information supplied to NSBI and is best characterized as a general expectation. On that basis I find that this term does not qualify as having been supplied.

[40] With respect to the requirement that the information be supplied "in confidence" I agree that this portion of the test is largely a subjective one.[14] The evidence here establishes that the parties intended that, particularly prior to closing, the existence of any details of the term sheet should be disclosed within their organizations only on a need to know basis and "subject to the *Freedom of Information and Protection of Privacy Act*." Both parties treated the third party business information and the agreement generally as confidential. The nature of the information and the fact that the third party business itself was not subject to any public disclosure requirements also support a finding that information was supplied in confidence.

[41] In summary, I find that only the following information was supplied (or reveals information supplied) in confidence:

1. # of preferred shares to be issued to NSBI;
2. $ per share value of the preferred shares to be issued to NSBI;
3. % ownership of the company the NSBI VC investment represents; and,
4. Pre-financing financial information of the company.

(c) Reasonable expectation of harm

[42] I have found that four types of information have satisfied the first two parts of the s. 21 test. The final part of the s. 21 test is to determine whether or not the disclosure of this information could reasonably be expected to cause harms enumerated in s. 21.

[43] For the reasons set out below, I find that NSBI has failed to satisfy the burden of proof and has not established that the disclosure of any of the withheld information could reasonably be expected to cause any of the harms enumerated in s. 21.

[44] While the burden of proof rests with the public body on the issue of whether or not s. 21 applies to the information, the third party is in the best position to provide evidence of harm to its business resulting from any disclosure. A reasonable expectation of harm requires evidence well beyond a mere possibility of harm but somewhat lower than harm that is more likely than not to occur. [15]

[45] As a practical matter, mere assertions of harm will rarely be sufficient. Independent evidence of expectations of harm or at least evidence of harm from the third party and the public body is helpful; evidence of previous harm from similar disclosures is also useful and evidence of a highly competitive market would all assist in determining whether the test has been satisfied.

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[14] *Imperial Oil* at para. 75.
[15] NS Review Report FI-10-59(M) at para. 63, citing *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, [2014] 1 S.C.R. 674.

In all cases it is evidence of a connection between the disclosure of the type of information at issue and the harm that is necessary.

[46] The parties raised three arguments in relation to potential harm from the disclosure. I have considered each below.

Section 21(1)(c)(i) significant harm to the competitive position of the third party

[47] NSBI argues that the withheld information would provide the company's competitors and suppliers with the company's dollar valuation, share capital value, structure, commercial outlook and risk vulnerabilities. NSBI says keeping the information confidential also helps protect shareholder value by guarding the company against sudden erosion of customer and stakeholder confidence during periods of financial duress.

[48] The information could be exploited by competitors to "achieve considerable and significant competitive gains". Competitors, NSBI says, could use the insights gained to decide whether to enter or expand in the company's industry sector. NSBI points out that at the time of this venture capital agreement the third party was operating in an emerging industry sector and so was more susceptible to variation in competitive forces than a mature established company would be.

[49] The information at issue here that qualifies as supplied in confidence consists of the valuation of the third party and the pre-financing capitalization information. How exactly could this information be used to "harm significantly" the competitive position of the third party? NSBI's arguments are, at best, speculation as to how information might be used to the advantage of a competitor. It is well established that the "reasonable expectation of harm" test requires evidence well beyond a mere possibility.

[50] The third party says that the enterprise valuation is of fundamental importance to venture capital equity financing. Future financings could be seriously adversely affected by the premature disclosure of this information. The third party did not say how this would occur. Presumably, the valuation of the third party could be very favourable, neutral or very unfavourable. It is unclear where the valuation revealed by the term sheet fell on this continuum. No evidence was offered on this point.

[51] I conclude that while sometimes a valuation could be a disadvantage, it could also be an advantage depending on the nature of the valuation. In addition, even if, for the sake of argument, the valuation that resulted in a $6,000,000 investment by NSBI was less than favourable, presumably any new potential investor would want to conduct its own valuation at the time of the proposed investment. The additional funds from NSBI would have had some positive impact on the financial outlook of the third party and so it is reasonable to assume the new valuation would be far more significant than the one used to support NSBI's investment.

Section 21(1)(c)(ii) similar information no longer supplied

[52] NSBI and the third party argue that the disclosure could reasonably be expected to result in similar information no longer being supplied to the public body. However, s. 21(1)(c)(ii) of *FOIPOP* will generally not apply where parties can be statutorily compelled, or have a financial incentive, to provide the information. There may be some cases, for example, where a third party has some sort of incentive to supply the information, but there is nonetheless a reasonable expectation that its disclosure will result in similar information no longer being supplied to the public body. Financial incentives, after all, differ in nature and degree.[16]

[53] In this case, the incentive for the third party to supply the information was the prospect of a $6,000,000 investment by NSBI. Presumably this was a significant motivator. The third party's evidence was not that had it known the information could be disclosed in response to a request under *FOIPOP* it would not have provided the information. Rather, the third party states only that the fact that such information would be subject to disclosure under *FOIPOP* very likely could discourage companies from entering into this sort of financing transaction with NSBI.

[54] While financial incentives may differ in degree, the circumstances around venture capital financing by NSBI are important. As the third party points out in its submission, in Nova Scotia, there has been a noted lack of venture capital equity financing available from private sector sources. The Government of Nova Scotia determined that providing a source of such financing on true commercial terms was important to the financial interests of the Province. Given the amount of the incentives and the limited sources available, I find that the evidence fails to establish that similar information would no longer be supplied. On that basis I find that s. 21(1)(c)(ii) does not apply.

Section 21(1)(c)(iii) undue financial loss or gain

[55] What is "undue"? The Concise Oxford English Dictionary[17] defines it as follows:

> Undue adj. unwarranted or inappropriate because excessive or disproportionate

[56] Black's Law Dictionary[18] states:

> Undue. More than necessary; not proper; illegal. It denotes something wrong, according to the standard of morals which the law enforces in relations of men.

[57] Decisions in other Canadian jurisdictions under equivalent access provisions agree that "undue" includes something that is unwarranted, inappropriate or improper and can also include something that is excessive or disproportionate.[19] If disclosure would give a competitor an

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[16] BC Order 03-05 at paras. 15-16, followed more recently in BC Orders F13-19 and Order F15-40. Similar principles have been established in decisions under Ontario's *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s. 18(1). See examples at: ON Orders P-576, P-841and PO-1599.
[17] *Oxford*, "undue" at p. 1575.
[18] *Black's Law Dictionary* (5th Edition) (West Group Co.: St. Paul, Minn., 1979), "undue" at p. 1370 [*Black's*].
[19] See for example BC Order 00-10 at p. 17, Alberta Order 99-018 at para. 46 citing the public body's argument that undue includes "excessive, immoderate and unwarranted".

advantage, usually by acquiring competitively valuable information, effectively for nothing, the gain to the competitor will be undue.[20]

[58] What insights would a competitor gain from the information withheld by NSBI? How can this information be used to gain a competitive advantage or competitive insight resulting in undue gain or an unfair or inappropriate competitive windfall?

[59] The third party argued that a competitor who had access to the capital and management structure of the third party and the specifics of the economic basis of the proposed investment could determine the performance targets, venture capital investment strategy model and future financial obligations of the third party. Such information could place the competitor at an advantage in competitive bid situations as a result of having greater insight into the economic circumstances of the third party including such items as the timing of required share redemptions or the amount and timing of preferred dividend obligations.

[60] No evidence or argument was provided as to how exactly any of the withheld information could lead to an accurate assessment of performance targets let alone how exactly performance targets could reasonably lead to "undue" financial loss or gain.

[61] While I have determined that information relating to share redemption and dividend obligations was not "supplied" I will briefly address the harm argument made with respect to this information. Having read the withheld provisions I cannot see how any competitor could accurately predict such things as timing of required share redemptions or amount and timing of preferred dividend obligations. Both items are subject to the occurrence of prescribed events the likelihood and timing of which is unknown. The events may or may not occur. The exact date is not known because the potential events must first occur. It would be a brilliant stroke of luck to obtain the information withheld from the term sheet at the exact moment that one of the prescribed events occur. It would only be in that circumstance that there would be a realistic possibility that the information would be of some competitive advantage and then only if there happened to be a business opportunity at the same moment.

[62] NSBI says that if the information is disclosed it would create a competitive advantage and an unlevel playing field of information and result in the harm identified in s. 21(1)(c)(iii). NSBI does not specify what exactly the competitive advantage would be. It is not enough that a competitor would have information about the third party that the third party does not have about the competitor. *FOIPOP* requires evidence well beyond a mere possibility of harm. I acknowledge that there is a chance that some competitor might possibly use the information to its advantage but I have not been provided with any evidence beyond this mere possibility.

[63] Further, NSBI says that the disclosure of information would result in proprietary information that is developed at cost and effort being made available at essentially no cost through *FOIPOP* and the result would be undue (improper, unwarranted) financial gain to the person using such information. Business valuation is a process used to estimate the economic value of an owner's interest in a business. It takes time and expertise. As such, NSBI says it has value.

[20] See for example ON Order PO-2786 at p. 24 and BC Order 03-33 at para. 52.

[64] The third party did not provide any evidence in favour of this argument. It appears that NSBI is saying that the undue harm would be caused to the professional valuator. No evidence was provided from the valuator specifying what, if any, harm would result to the valuator from the disclosure. Further, NSBI says the disclosure of the information would result "from the inherent value of its information asset being lost or diminished". Such an assertion is mere speculation. It is equally possible the information would be used to support further investment in the company – that would be a financial gain to the third party. It is possible such information would prompt a potential customer to purchase product from the third party because the valuation created confidence in the third party. Absent more persuasive information regarding how the disclosure could cause "undue" loss or gain I find that the public body has failed to meet its burden of proof.

[65] I note that the valuation information tells two stories. First, it identifies the agreed upon value of the third party at a moment in time. But it also identifies the financial basis upon which NSBI invested $6,000,000 in public funds. *FOIPOP* serves the very important purpose of subjecting public body decisions to public scrutiny. In the absence of evidence from the third party or the business valuator, and in light of the important public interest served by the disclosure, I find that the evidence does not establish that disclosure of the valuation amount would result in undue (improper, unwarranted) financial gain to the person using the information.

Is NSBI authorized to refuse access to information under s. 17 of *FOIPOP* because disclosure could reasonably be expected to harm the economic interests of the public body?

[66] NSBI withheld a portion of the record citing s. 17. The information withheld was the same information it also withheld under s. 21 except for the pre-financing financial information of the third party which it only withheld under s. 21. I have considered the application of s. 17(1) in all of the circumstances identified by NSBI.

[67] Section 17(1) begins with a general clause followed by a list of specific instances where the head of the public body may refuse to disclose information. Sections 17(1)(a) to (e) are examples of information the disclosure of which may result in harm under s. 17(1). Information that does not fit in the listed paragraphs may still fall under the opening clause of s. 17(1), "could reasonably be expected to harm the financial or economic interests of a public body or the Government of Nova Scotia or the ability of that Government to manage the economy." The intent and meaning of the listed examples are interpreted in relation to the opening words of s. 17(1), which, together with the listed examples, are interpreted in light of the purposes in s. 2 and the context of the statute as a whole.[21]

[68] As I noted earlier, detailed and convincing evidence is required to establish a reasonable expectation of harm, evidence amounting to speculation of possible harm is not sufficient. Likewise there is a need for public accountability in the expenditure of public funds as evidenced

[21] Former Commissioner Loukidelis summarized s. 17 of the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165 in the same way in BC Order F08-22 at para. 43.

by s. 2(a) of *FOIPOP* and this is an important reason behind the need for detailed and convincing evidence.[22]

[69] For the reasons set out below I find that s. 17(1) does not apply to the withheld information.

The chilling effect argument

[70] It is not uncommon for public bodies to argue that the harm that will arise from disclosure is that it will create a "chilling effect". Here NSBI argues that disclosure of the information will create a chill across existing NSBI venture capital clients who will no longer wish to supply similar information to NSBI.

[71] The evidence offered in support of the chilling effect argument was simply the statement that the disclosure would cast an immediate chill over NSBI's relations not only with the third party, but also with NSBI's venture capital client base, potential clients and co-investor partners. No companies were identified as having actually stated that the disclosure would have any effect on their willingness to supply information. In addition, the third party itself did not state that it would not be willing to supply information in the future, rather it stated that the disclosure very likely could discourage companies from entering into this sort of financing transaction with NSBI.

[72] I find that there is a lack of detailed and convincing evidence to establish a reasonable expectation of the alleged harm in the form of a chilling effect.

Section 17(1)(b)

[73] The information at issue are the terms and conditions of an investment NSBI agreed to make into the third party business. What is unique about the document at issue here is that, unlike a typical contract for goods or services whose terms will describe the details around a particular project or service, the document here describes the financial and management structure of a private company. The agreement covers such things as securities to be issued, dividends, conversion and redemption of shares, shareholder agreements, board structure and decision making processes.

[74] Section 17(1)(b) has two requirements. First, it provides that a public body may refuse to disclose financial or commercial information that belongs to a public body. Second, such information must have or be reasonably likely to have monetary value.

[75] I agree with NSBI that the information contained in the agreement consists of both the third party's commercial and financial information and NSBI's commercial and financial information. I say this because NSBI, by virtue of the agreement, became a shareholder in the third party. In addition, the terms and conditions also consist of commercial and financial

[22] I have, in previous decisions, highlighted the Nova Scotia Court of Appeal analysis of the purposes behind *FOIPOP* in *O'Connor*, which support this conclusion as well. See also ON Order PO-3042 at paras. 21-24 for a similar discussion of the purposes behind the Ontario equivalent to s. 17.

information that disclose exactly how NSBI intended to protect its $6,000,000 investment into the third party.

[76] Does this information have or is it reasonably likely to have monetary value? "Monetary" is not defined in *FOIPOP*. The Concise Oxford English Dictionary defines it as follows:

> Monetary – adj. relating to money or currency [23]

[77] Black's Law Dictionary provides:

> Monetary. The usual meaning is "pertaining to coinage or currency or having to do with money", but it has been held to include personal property.[24]

[78] Two things are clear. First, it is not any value that will do. *FOIPOP* clearly requires that the value be monetary. Second, based on the usual definitions for the word "monetary", the value is in relation to money.

[79] NSBI says the information has monetary value because it reveals NSBI's views and assessment of the company and so would have monetary value to the company's competitors and suppliers. NSBI says they stand to gain competitively and monetarily from access to and use of such information.

[80] What information, exactly, could a competitor use and how could it use it to its advantage? NSBI does not provide clear evidence on this point.

[81] In its submissions with respect to s. 21, the third party said information could be used in two ways. First, the enterprise valuation it said was of fundamental importance to venture capital equity financing. Future financings could be seriously adversely affected by the premature disclosure of this information. The third party did not say how this would occur. Presumably, the valuation of the third party could be very favourable, neutral or very unfavourable. It is unclear where NSBI's valuation fell on this continuum. No evidence was offered on this point. I conclude that while sometimes a valuation could be a disadvantage it could also be an advantage depending on the nature of the valuation.

[82] Second, the third party argued that a competitor who had access to the capital and management structure of the third party and the specifics of the economic basis of the proposed investment could determine the performance targets, venture capital investment strategy model and future financial obligations of the third party. Such information could place the competitor at an advantage in competitive bid situations as a result of having greater insight into the economic circumstances of the third party, including such items as the timing of required share redemptions or the amount and timing of preferred dividend obligations.

[83] The challenge here is that the "monetary value" element is remote at best. The evidence establishes at most that a competitor might be able to use the information to its advantage. The

[23] *Oxford*, "monetary" at p. 923.
[24] *Black's*, "monetary" at p. 906.

value of the information would depend upon the nature of the deal, the ability of the competitor to use the information effectively and the ultimate outcome of the deal. The actual monetary value is unclear and, in my view, speculative at best.

[84] I find that the evidence fails to establish that the withheld information has "monetary value" within the meaning of s. 17(1)(b).

Section 17(1)(d)

[85] Section 17(1)(d) provides, in part, that the public body may refuse to disclose information when the disclosure could reasonably be expected to "result in undue financial loss or gain to a third party". A part of the wording here is identical to s. 21(1)(c)(iii) which states: "the disclosure of which could reasonably be expected to result in undue financial loss or gain to any person or organization". The key test here in both cases is whether there is a reasonable expectation of "undue financial loss or gain".

[86] What is significantly different is that s. 17(1)(d) can apply to "information" whereas s. 21(1)(c)(iii) only applies to information that has satisfied the first two parts of the s. 21 test.

[87] In evaluating the arguments with respect to undue financial loss or gain under s. 21(1)(c)(iii) I considered all of the information withheld by the public body. Therefore, I adopt my reasoning under s. 21(1)(c)(iii) here. In summary, there is a lack of detailed and convincing evidence to establish a reasonable expectation of this harm. In my view, the submissions tendered on these harms is speculative and evidence amounting to speculation of possible harm is not sufficient.[25] Therefore, I find that s. 17(1)(d) does not apply to the withheld information.

FINDINGS & RECOMMENDATIONS:

[88] In applying the three part test set out in s. 21 of *FOIPOP* to the records at issue here, I have attempted to balance the important goal of ensuring that public bodies are fully accountable to the public with the legitimate private interests of the third party and the public interest in promoting innovation and development.

[89] I find that portions of the agreement in question contain the commercial or financial information of the third party as required by s. 21(1)(a).

[90] The evidence supports that the third party and NSBI wished to keep confidential elements of the negotiated agreement. Further, the evidence supports a finding that a portion of the withheld record was "supplied" by the third party in that it would reveal information supplied in confidence as required by s. 21(1)(b).

[91] The evidence at best establishes a mere possibility of harm that is speculative in nature. As a result, I find that the requirements of s. 21(1)(c) have not been met.

[25] ON Order PO-3283 at para. 30 makes similar observations regarding evidence of the economic value of public information.

[92] I find that there is a lack of detailed and convincing evidence to establish a reasonable expectation of any of the alleged harms required under s. 17(1).

[93] I recommend full disclosure of the term sheet outlining the terms and conditions of the venture capital financial transaction between Nova Scotia Business Inc. ("NSBI") and LED Roadway Lighting Ltd.

October 22, 2015

Catherine Tully
Information and Privacy Commissioner for Nova Scotia