SUPREME COURT OF NOVA SCOTIA

Citation: *Shannex Inc. v. Nova Scotia (Health and Wellness)*, 2019 NSSC 24

Date: 20190118
Docket: Hfx No. 470872
Registry: Halifax

Between:

Shannex Incorporated

Appellant

v.

Her Majesty the Queen in Right of Nova Scotia
(Department of Health and Wellness)

Respondent

Decision / FOIPOP Appeal

Judge:	The Honourable Justice Denise Boudreau
Heard:	November 5 and 6, 2018, in Halifax, Nova Scotia
Decision:	January 18, 2019
Counsel:	Joseph Herschorn, for the Appellant Agnes MacNeil, for the Respondent

By the Court:

[1] The appellant builds and operates licensed nursing homes in Nova Scotia. In 2014 and 2015 the respondent received requests for information under the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5 (the "*FOIPOP Act*") from an unknown member of the public, seeking:

1. Information on annual operations funding, adjusted by Consumer Price Index increments, on the amounts paid to the appellant for each nursing home from 2011 to 2013;

2, Budget summaries, including *per diem* rates, for each of the appellant's nursing homes as of April 2014.

[2] The respondent wishes to release the information, and has advised the applicant of its intention to do so. The appellant objects and brings the matter before this Court as an appeal of that decision.

Facts / Positions of the Parties

[3] The appellant's concerns lie, primarily, within the current competitive context of the building and operating of nursing homes.

[4] Prior to 2007, the appellant owned and operated six nursing homes in the province (known as the "legacy homes").

[5] In 2007, the Province of Nova Scotia (and more specifically, the respondent department) commenced a total of 11 competitive bidding processes (known as Requests for Proposals, or "RFPs") for the construction and operation of 11 new nursing homes in the province. This was the first time that the province had engaged in a competitive bidding process for the creation of such facilities.

[6] The appellant was very successful in these competitions, and was chosen in nine of these 11 competitions.

[7] As matters presently stand, the appellant owns and operates 15 nursing homes in Nova Scotia. It should also be noted that the appellant has been the successful bidder in four recent, and very similar, competitive processes in New Brunswick.

[8] It is in the context of other possible and future competitive bidding processes that the appellant objects to the release of the information sought. In his affidavit, Jason Shannon, president of the appellant company, advises of the following:

> 13. Special care beds in these nursing homes are funded through the payment of a *per diem* rate. For the six homes that pre-existed the 2007 RPF, Shannex has annually submitted detailed budgets to DHW (note: this is the Department of Health and Wellness, of the Province of Nova Scotia) reflecting the needs of each

> facility. To arrive at the *per diem* budgeted for each facility's subsequent operating year (the DHW's fiscal year), Shannex, as explained in Ms. Scott's affidavit, relies on detailed financial modeling and pricing formulae, which it has developed over several decades. These are proprietary to Shannex. The *per diem* rate generated from Shannex's pricing formulae is the key financial submission on which its proposals are evaluated and service agreements based.
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> 14. Similarly, for the RFP Homes, special care beds are funded based on a *per diem* rate, partially determined in accordance with DHW's Protected Envelope Funding Policy, as explained in Ms. Scott's affidavit. Significant components of the *per diem* rate for the RFP Homes are the "Unprotected funding" components, which derived exclusively from Shannex's pricing formulas and financial modeling.
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> …
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> 40. Shannex is deeply concerned that the release of the information in the Sealed Record in this matter could be used by a competitor in New Brunswick, allowing that competitor, or competitors, to tailor bids having regard to Shannex's proprietary pricing formulas and *per diem* rates. This information would allow a competitor to calculate Shannex's anticipated revenues for a nursing home and underbid Shannex in future proposals. As set out in more detail in the affidavit of Laura Scott, Shannex uses the same pricing formula when calculating *per diem* rates no matter which jurisdiction it operates in. With the information in the Sealed Record, competitors would be able to structure their future bids to have a lower *per diem* rate than Shannex, jeopardizing Shannex's main competitive asset.
>
> 41. Shannex has always provided the information in the Sealed Record, and similar information it has submitted to the government in New Brunswick, on a confidential basis and has always been treated as confidential information throughout. Shannex is greatly concerned that the release of the information would compromise its competitive position and will result in significant financial loss. Shannex's concern is particularly grave because a significant portion of its revenues are derived from service agreements with the Provinces of New Brunswick and Nova Scotia that are awarded following a competitive bidding process. Disclosure would provide competitors with information they could use to improve upon their own operations and copy the processes that Shannex has created, invested in and developed over the past 25 years.

[9] Ms. Laura Scott, VP Finance of the appellant, provided the following additional information:

> 9. With one exception (explained below), all of the financial information contained in the budget summaries found in the Sealed Record (pages 2 to 31) is

supplied by Shannex confidentially to the DHW, and all of it is the product of proprietary pricing formulae that Shannex has developed over several decades in order to make as cost-effective as possible the development, construction, and operation of nursing homes while meeting all applicable care and service standards and requirements.

10. The one exception to my statement in paragraph 9 relates to the "Protected funding" component of the *per diem* rate in the budget summaries for the RFP Homes. The RFP Homes (but not the other 6 Shannex homes) are subject to the DHW's Protected Envelope and Unprotected Envelope Funding Policies. In simple terms, the health care costs of operating the RFP Homes (e.g. nursing care) and the raw food costs for those homes are prescribed by the DHW based on the number of beds in the applicable homes. These are the "Protected" costs. All other costs, including other operations costs (e.g. food preparation and maintenance) and capital costs (e.g. mortgage expenses), are "unprotected", meaning that they were determined entirely by Shannex's ability to obtain goods and services for optimal prices in the market and formulated by Shannex (its financial model) into the components of the *per diem* rate in the best manner Shannex saw fit.

11. As for the 6 other homes, all the components of the *per diem* rate were originally formulated by Shannex in 2004 in response to the development of the 6 homes and supplied in confidence to the DHW. These components became the basis for the homes' annual *per diem* rates. They resulted from Shannex's ability to obtain goods and services for optimal prices in the market and formulate the price inputs through its financial model into the components of the *per diem* rate in the best manner it saw fit.

12. Although the financial information under the "Protected" column in the budget summaries for the RFP Homes is not Shannex's financial information (unlike all other financial information in the budget summaries), with only the Protected financial information and the financial information under the "Total" column, a simple subtraction calculation can be done to determine Shannex's *per diem* components under the unprotected envelope and, consequently, how Shannex calculates those prices. Shannex calculates those prices using proprietary financial modeling.

13. Similarly, with respect to the Summary of CPI Increments at p. 1 of the Sealed Record, knowing the "Operations" amount for a given year, the number of beds, and readily available information on the DHW's prescribed rates for Protected operations funding, would allow a competitor to determine Shannex's *per diem* component related to Unprotected operations funding and, consequently, how Shannex calculates that price using its proprietary financial modeling. For the 6 non-RFP homes, one would not have to make such a calculation to determine how Shannex formulates the price for the operations component of the *per diem* rate because there is no protected component. For these reasons, the Summary of CPI Increments could be reverse engineered to reveal Shannex's proprietary financial information.

[10] It is the belief of the appellant that both Nova Scotia and New Brunswick will continue to undertake competitive-bidding processes for additional nursing and special care homes in the future. Mr. Shannon describes these processes as having become "the norm" for government. The appellant notes the past history of the use of such processes in both provinces, and further notes the likely need for additional nursing homes in the future in both provinces, given their aging populations.

[11] In the case of New Brunswick, the appellant has provided me with various and recent newspaper clippings, reporting the New Brunswick government's intention to soon invest in the building of new nursing homes. There is no mention of any competitive bidding process in these articles, nor any details as to how the government intends to have these homes built.

[12] I do not accept newspaper clippings as evidence of the truth of their contents. Having said that, I do not doubt that these newspaper stories did appear as the appellant alleges. In my view, they can be admitted only as the source of the appellant's beliefs about the possibility of additional nursing homes being proposed in New Brunswick.

[13] In Nova Scotia, the appellant believes that future building of nursing homes will also be undertaken using competitive bid processes. In support, Mr. Shannon

provided a letter from Ruby Knowles, Executive Director of Continuing Care for the Department of Health and Wellness (Nova Scotia) dated May 30, 2014. In particular, Ms. Knowles notes:

> With respect to new long-term care beds, if at some future date additional long-term care beds are required, the Department will issue a Request for Proposals (RFP) on the government website at **www.gov.ns.ca/tenders.**

[14] It is the intention of the appellant to participate in future competitions for the building and operation of nursing homes, both in Nova Scotia and New Brunswick. The appellant points to its past successes in such competitions, and states that it would be a serious bidder in any future competition. The appellant submits that the information sought here, if provided, would allow competitors to extrapolate from that information and calculate the budget by which the appellant runs its homes. This would give those competitors an unfair advantage in future competitions, by then being able to underbid the appellant in those processes.

[15] On the other hand, it is the position of the respondent that the information should be released. In their submission, the appellant has not met the onus of showing that disclosure of the requested information would harm its competitive position, or cause it undue financial loss. The respondent notes, further, that the

information relating to the appellant's legacy homes (pre-2007) has already been disclosed (as a result of a similar court application in 2004).

FOIPOP Act

[16] The *FOIPOP Act* provides its purpose at s. 2:

> 2 The purpose of the Act is
>
> (a) to ensure that public bodies are fully accountable to the public by
>
> (i) giving the public a right of access to records;
>
> (ii) giving individuals a right of access to, and a right to correction of, personal information about themselves;
>
> (iii) specifying limited exceptions to the rights of access;
>
> (iv) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
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> (v) providing for an independent review of decisions made pursuant to this Act; and
>
> (b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to
>
> (i) facilitate informed public participation in policy formulation;
>
> (ii) ensure fairness in government decision-making;
>
> (iii) permit the airing and reconciliation of divergent views;
>
> (c) to protect the privacy of individuals with respect to personal information about themselves held by public bodies and to provide individuals with a right of access to that information.

[17] It is the position of the appellant that the information sought here should be exempt from disclosure. Exemptions may be permitted pursuant to s. 21 of the *Act*:

Confidential information

21(1) The head of a public body shall 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 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, of the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour-relations dispute.

Expert Evidence of Paul Bradley

[18] The appellant provided an affidavit from Paul Bradley, an accountant and partner of Deloitte LLP in Halifax, putting him forward as an expert witness in the field of accounting. He provided his opinion in the area of potential business losses in the context of competitive bidding processes, in cases where information such as proprietary pricing knowledge has been disclosed. From the perspective of the appellant, this evidence is put forward to show how its concerns as to future potential losses are well-founded.

[19] Mr. Bradley opines that disclosure of the information sought in this case would be detrimental to the appellant, both in harm to its competitive position and in resulting financial loss. It is the view of Mr. Bradley that disclosure would have a measurable impact on the appellant's future success, significantly reducing their chances of success in future competitions.

[20] The respondent objects to the admissibility of this evidence. While it does not dispute Mr. Bradley's qualifications in the relevant areas, it is the respondent's submission that the evidence of Mr. Bradley does not meet the second part of the *Mohan* test, in that it is not necessary to assist the trier of fact (*R v. Mohan* [1994] 2 S.C.R. 9).

[21] The *Mohan* test for admission of expert evidence is well-known: the proposed evidence must be relevant; it must be necessary to assist the trier of fact; it must not be subject to any other exclusionary rule; and the expert must be properly qualified (including impartiality, independence, and lack of bias). In addition to these four criteria, and as part of its gatekeeping function, a court must also consider whether the benefits of admitting the evidence outweigh its potential risks.

[22] The requirement for "necessity", in general terms, makes the point that a trier of fact does not always need the assistance of an expert. It is only appropriate

to admit “expert” or opinion evidence in those areas where, in the absence of such evidence, a layperson would have difficulty understanding or appreciating the evidence before them. The information would be “outside the experience and knowledge of a judge or jury” (*Mohan*, p. 23).

[23] The respondent submits that the evidence of Mr. Bradley adds nothing to the evidence before this Court. They say that his reasoning and conclusions are no different than those of Mr. Shannon and Ms. Scott (the lay witnesses presented by the appellant). The respondent further contends that no specialized knowledge is necessary to understand the evidence before this Court, nor to understand the fundamentals of the dispute between the parties. The respondent further submits that if the Court deems this evidence admissible, it should be given little to no weight, for these same reasons.

[24] The appellant disagrees. It notes that Mr. Bradley’s specialty is in the quantification of business losses and forensic accounting. The purpose of his evidence is to provide an expert opinion as to the potential financial losses to the appellant, should this information be released, in the context of a later competitive bidding process. In the submission of the appellant, these are not losses that would be obvious to a layperson who is not engaged in such a business.

[25] The appellant submits that Mr. Bradley, because of his background and experience, is able to provide the Court with specialized knowledge as to the nature of budgeting models and "proprietary pricing knowhow", specifically within the context of businesses involved in competitive bidding processes. Therefore, they say, Mr. Bradley could provide explanations as to how and why exposure of the information to a competitor could affect the appellant's ability to compete fairly in future bidding. As noted hereinabove, the exception found at ss. 21(1)(c) of the *FOIPOP Act* requires the proof of a "reasonable expectation of harm"; in the view of the appellant, the evidence of Mr. Bradley goes directly to the "reasonableness" of the appellant's expectation of harm.

[26] It should also be noted that Shannex was involved as a formal intervenor in very similar and recent litigation in New Brunswick, *Carmont et al v. PNB*, 2018 NBQB 53. That case also dealt with a request for information relating to *per diem* and budgeting information for Shannex nursing homes. I will be discussing this case further in this decision, but, for the moment, suffice it to note that the same witness, Mr. Bradley, also provided an expert opinion to the Court in that case.

[27] There does not appear to have been any objection taken to the admissibility of Mr. Bradley's evidence in the *Carmont* case. As far as I can tell, it was admitted

without comment. Having said that, I note that the Court in *Carmont* accepted the conclusions of Mr. Bradley, clearly giving his opinion great weight.

[28] In my view, the evidence of Mr. Bradley is sufficiently useful as to be admissible. There can be no doubt that a layperson to the business world (in particular, the world of competitive bidding processes) could not be expected to know how a budget for such a process would be prepared, or what information might be crucial therein. The report of Mr. Bradley is admitted.

Analysis

[29] The *FOIPOP Act* serves an important societal purpose, that of ensuring the accountability of government for public dollars; it clearly mandates, and broadly favours, the disclosure of information. The onus is on the appellant, as the entity objecting to the release of information, to show that the information fits within one or more of the exceptions noted in s. 21 the *Act*.

[30] Section 21 provides a three-part test that must be met before an exception to disclosure can be made. I will consider these three steps independently:

ss. 21(1)(a): Would disclosure of the information reveal the appellant's trade secrets or commercial or financial information?

[31] The appellant says yes. In fact, it is the appellant's view that the information at issue here meets the test of ss. 21(1)(a) in all three separate listed ways: they submit that the information would reveal its "trade secrets", and that it is also "commercial" or "financial" information.

[32] The respondent does not agree that the information at issue meets the definition of "trade secrets" of the appellant. Having said that, the respondent does agree (as noted in paragraph 43 of its brief), that the information falls within the definition of "commercial" or "financial" information. Therefore, the respondent acknowledges that the appellant has met the first test as found in ss. 21(1)(a). I agree.

[33] As a result, I see no need to turn my mind to the question of whether this information constitutes a "trade secret". I find the appellant has met the onus upon him pursuant to ss. 21(1)(a) by showing that the information is commercial or financial information. There is no need to delve into this issue further.

ss. 21(1)(b): Was the information supplied in confidence to the respondent, either explicitly or implicitly?

[34] The appellant submits that it supplied the information to the respondent in confidence. This submission is supported in the evidence. The respondent agrees

that if the information was supplied by the appellant, it was supplied in confidence (para. 46 of its brief).

[35] I find the appellant has met the onus of ss. 21(1)(b).

ss. 21(1)(c): Could the disclosure of the information reasonably be expected to harm significantly the competitive position of the appellant, or result in undue financial harm to the appellant?

[36] This last question is the crucial one to be determined. Both parties agree that the present dispute, in its essence, turns on this issue.

[37] The Supreme Court of Canada in *Merck Frosst Canada v. Minister of Health*, 2012 SCC 3 considered the standard that needed to be met when a litigant was expected to show "harm that could reasonably be expected to result from disclosure". The Court held that this standard lay somewhere between "possibility" and "probability":

> [200] As with any question of statutory interpretation, the court must interpret the words of the statute in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.
>
> [201] I begin with the English text of the provision. The words "could reasonably be expected to result" seem to avoid either the standard of mere possibility or the standard of probability. We must assume, I think, that both of those standards would clearly have been known to the drafters. This suggests that some middle ground was intended: something cannot reasonably be expected to occur if it is a mere possibility: but something may be reasonably expected even if it is not more likely than not to occur. The word "expected" derives from the verb "to expect", a primary meaning of which is to "regard as likely" (*The Canadian Oxford*

> *Dictionary* (2nd ed. 2004), at p. 523). The word "likely" is more difficult to pin down. While it can mean "probable" it may also mean "such as well might happen" (p. 889). In legal usage, the standard of proof on the balance of probabilities is often expressed by saying that something must be shown to be more likely than not. I conclude that the English text of the statute suggests a middle ground between that which is probable and that which is merely possible. The intended threshold appears to be considerably higher than a mere possibility of harm, but somewhat lower than harm that is more likely than not to occur.
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> …
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> [204] This interpretation also serves the purposes of the Act. A balance must be struck between the important goals of disclosure and avoiding harm to third parties resulting from disclosure. The important objective of access to information would be thwarted by a mere possibility of harm standard. Exemption from disclosure should not be granted on the basis of fear of harm that is fanciful, imaginary or contrived. Such fears of harm are not reasonable because they are not based on reason: see *Air Atonabee*, at p. 277, quoting *Re Actors' Equity Assn. of Australia and Australian Broadcasting Tribunal (No 2)* (1985), 7 A.L.D. 584 (Admin. App. Trib.), at para. 25. The words "could reasonably be expected" refer to an expectation for which real and substantial grounds exist when looked at objectively": *Watt v. Forests* [2007] NSWADT 197 (AustLII), at para. 120. On the other hand, what is at issue is risk of future harm that depends on how future uncertain events unfold. Thus, requiring a third party (or, in other provisions, the government) to prove that harm is more likely than not to occur would impose in many cases an impossible standard of proof. (emphasis is mine)

[38] In 2004, these parties litigated a similar dispute, in relation to budget information for the homes that the appellant then owned/operated in Nova Scotia (*Shannex Health Care Management Inc. v. Attorney General of Nova Scotia representing the Nova Scotia Department of Health*, 2004 NSSC 54, affirmed by the Court of Appeal at 2005 NSCA 52).

[39] At that time the Department of Health had received a request under the *Act* for budgets, plans and materials used in determining per diem rates for all nursing

homes in the province receiving government funding, including recent increases. The appellant, who then owned and operated five nursing homes in Nova Scotia, objected to the release of their information, claiming that such release would be an unreasonable invasion of privacy, and/or could reasonably be expected to harm their competitive position or interfere with their negotiating position. The appellant argued then that the information fit the exemption found in s. 21(1) of the *FOIPOP Act*, much as they are doing today.

[40] The Court in *Shannex* (2004) agreed that the appellant had met parts 1 and 2 of the test found at ss. 21(1). However, the Court found that the appellant had not met the onus of the third branch of the test (s. 21(1)(c)), as in 2004 the Province of Nova Scotia had never engaged in any competitive bidding processes for the awarding of new nursing home contracts. Furthermore, the Court held that there was no convincing evidence that such processes would be used in the future:

> [37] The harm that the Appellant contends would flow from release of the records is outlined primarily in the affidavit of Glenn Williams, deposed to on February 3, 2004. Inter alia, the Appellant asserts that release of such information would compromise or disadvantage their ability to:
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> > participate in "potential bidding" for additional beds in the Province,
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> > negotiate with existing and potential "private pay" residents,
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> > maintain a high occupancy rate,
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> > purchase existing facilities,
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> > maintain its alleged position as an "industry leader".

> [38] In general, DOH takes the position that the Appellant's evidence as to "harm" contemplated by Section 21(1) (c) is merely speculative and does not meet the required burden.
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> [39] In regard to "potential bidding" for additional beds in the Province, the DOH states that the figures contained in the budgets are now "old figures" from previous years and it would not be of much use to competitors for future bidding. This argument is not persuasive. Both parties at the hearing appeared to acknowledge that the nursing home "business" is a stable one with no major fluctuations from year to year. While I accept that the utility of the information may be lessened by the passage of two or three years, I am satisfied that it could still be useful to competitors for future bidding.
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> [40] I am more persuaded by the fact that the Appellant has not put forth any "detailed and convincing" evidence in respect to certain proposals or bids it wishes to participate in or knows for certain it will participate in. The evidence does not disclose that there will be competitive bidding with regard to awarding new long term care beds. The appellant must establish more than the mere possibility of harm from the disclosure. This it has failed to do.
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> [41] In regard to the four latter grounds noted above, I accept the submission of DOH that those arguments are without merit. The particulars of the financial information in the budget summaries would not be required by any competitors and/or existing or potential residents to take the particular modes of action that the Appellant says could happen if the information was released.
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> …

[41] The appellant, in the case at bar, points out that the situation has changed since 2004. Firstly, in 2007 there were competitive bidding processes set up by the province for new nursing homes in Nova Scotia; the appellant was very successful in being awarded contracts under these competitive bidding processes, being awarded nine out of 11. The use of these competitions is no longer speculative, it has happened.

[42] Secondly, the appellant believes that, in the future, competitive bidding will continue to be the process used for the building and operation of nursing homes in

this province, based on past practice and recent correspondence from the respondent. The appellant believes that Nova Scotia's aging population makes the building of additional nursing homes in the future quite likely.

[43] Thirdly, the Province of New Brunswick has also engaged in competitive bidding processes for the building and operation of nursing homes, and the appellant has also enjoyed substantial success in those processes in that province as well. The appellant believes that the Province of New Brunswick will also continue such bidding processes in the future.

[44] As noted hereinabove, the appellant intervened in similar litigation in New Brunswick very recently, in *Carmont et al v. PNB, supra*. This case involved a request for information from the Province of New Brunswick. A dispute arose in respect of disclosure of the following information, similar in nature to the information sought in the case at bar (at para 14):

> 16. The Department of Social Development (Respondent) seeks to withhold from five operation agreements with Shannex for existing nursing homes:
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> - per diems and annual budget amounts allocated by the Department of Social Development to Shannex;
>
> - total number of annual bed days; and
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> - the number of full-time equivalent staffers (FTEs) employed in each nursing home.
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> 17. The Department of Social Development (Respondent) seeks to withhold from a public-private partnership agreement for the construction of a new nursing home in Moncton:

> - per diem and annual budget amounts allocated by the Department to Shannex;
>
> - total number of annual bed days,
>
> - number of full-time equivalent staffers,
>
> - and the RFP document issued by the Department regarding the province's intent to build two new nursing home facilities.

[45] The appellant in *Carmont* argued that the information sought was subject to exemption from disclosure pursuant to the New Brunswick legislation (those exemption provisions being similar in nature to the Nova Scotian FOIPOP exemptions). It was the appellant's submission that disclosure of this information would disclose trade secrets; that it would be harmful to the company by making public their commercial, financial or technical information; and that it would affect their competitive position and generate possible financial losses.

[46] The Court of Queen's Bench of New Brunswick agreed, finding that the information was exempt from disclosure on all grounds advanced:

> 31 On a review of section 22 in regards to trade secrets, providing information on a confidential basis and whether the disclosure of the information could reasonably be expected to cause harm to a competitive position, interfere with negotiations, result in significant loss to Shannex, and perhaps result in similar information no longer being supplied to a public body, I am satisfied that the information falls within the mandatory exceptions to disclosure (I have relied upon *Merck Frosst Canada Inc v. Canada (Ministre de la Sante*), supra, and *Shannex Health Care Management Inc. v. Nova Scotia (Attorney General)* 2004 NSSC 54 (N.S.S.C.) (CanLII). The characteristics of a trade secret as set out in paragraph 25 above are met on the evidence provided by the various affidavits submitted by Shannex.

[47] Quite frankly, it is difficult to see how the *Carmont* decision can be distinguished from the present case. While I am not bound by a decision of a New Brunswick trial court, it is clear that the Court in *Carmont* concluded, quite definitively, that this same appellant would be financially harmed by the release of very similar information. Such a decision could only be highly persuasive.

[48] I also am influenced and persuaded by the earlier *Shannex* (2004) decision. Its reasoning, and its ultimate decision, rested significantly on the fact that the appellant was unable to then show that competitive bidding processes would occur in the future. As a result, the losses feared by the appellant were speculative.

[49] Such is no longer the case. Both provinces of Nova Scotia and New Brunswick have now engaged in competitive bidding (through RFPs) for the last number of new constructions, commencing in 2007. There is certainly evidence to support the suggestion that these processes will continue in the future; at the very least, such is a reasonable belief to hold.

[50] The report of Paul Bradley is further support for the appellant's position. Mr. Bradley notes that a per diem rate is a valuable piece of information in this context:

> The per diem rate is effectively a composite of: (1) the Proponent's estimated costs of delivering the services under the contracts, plus (2) return on investment, both of which are confidential pieces of information for a company. Confidentiality is particularly important when procuring entities use a competitive bidding process, where success is highly dependent on the Proponent having the lowest price. Knowledge of either

> component (cost or return on investment) would allow competitors to replicate Shannex's per diem rate, negating the advantage of Shannex's accumulated experience that has contributed to the Company's high success rate on competitive proposals. (page 4)

[51] Mr. Bradley concludes that disclosure of the information sought here would likely have a significant and measurable effect on the appellant's chances of success at future competitions. I accept his conclusions.

[52] Under those circumstances, I agree that the information, were it disclosed, could "reasonably be expected to harm significantly the competitive position of the appellant, or result in undue financial harm to the appellant", as is required by the statute. I accept that the release of the information sought could allow a competitor to effect calculations to determine Shannex's budgeted costs, and therefore allow Shannex to be undercut at future bidding competitions. This risk to the appellant's financial health is, in my view, well within the scope proposed by our Supreme Court; that is, between "that which is probable and that which is merely possible".

Conclusion

[53] In conclusion, I grant the request of the appellant. The release of this Information is prohibited, as I find it is exempt pursuant to s. 21 of the *FOIPOP Act*.

Boudreau, J.