ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 96-013

October 15, 1996

ALBERTA TIRE RECYCLING MANAGEMENT BOARD

(Review Number 1117)

BACKGROUND

(p. 1.) On November 9, 1995, the Applicant applied under the Freedom of Information and Protection of Privacy Act (the "Act") to the Alberta Tire Recycling Management Board (the "public body") for access to agreements made between the public body and a third party contractor (the "third party").

(p. 2.) On April 26, 1996, the requested record was provided with certain information severed. The public body claimed that the severed information fell within the exceptions to disclosure contained in sections 15(1) and 24(1)(c) of the Act.

(p. 3.) On June 26, 1996, the Applicant requested that this Office review the decision of the public body. Mediation was not successful and the matter was set down for inquiry on July 23, 1996.

(p. 4.) Representations were made both in person and in writing by the public body, the third party and the Applicant.

RECORDS AT ISSUE

(p. 5.) The records at issue are:

1. Agreement dated December 21, 1993;
2. Agreement dated December 5, 1994;
3. Letter Agreement dated December 5, 1994; and
4. Letter agreement dated February 21, 1995.

(p. 6.) All agreements are between the public body and the third party, and involve the processing of scrap tires.

ISSUE A: Burden of Proof

(p. 7.) Section 67 of the Act reads:

> *67(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*
>
> *(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,*
>
> *(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and*
>
> *(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.*

(p. 8.) It is apparent from both the written and oral submissions of the public body and the third party that there may have been a misunderstanding with respect to the burden of proof. All parties indicated that the third party to had to prove that the Applicant had no right of access. However, under section 67(1) of the Act, the burden rests with the public body because of its refusal to disclose part of the record to the Applicant. The burden of proof would only shift to the third party if the public body had decided to grant access to the Applicant and the third party had disagreed with that decision (section 67(3)(b)).

(p. 9.) However, in this case, nothing turns on this error, since the public body must rely on the third party's evidence in order to discharge its burden of proof under section 15(1). Many of the matters in issue are likely to be solely within the third party's knowledge. Moreover, since the third party objected to the disclosure, it is in the third party's best interest to give evidence supporting the public body's refusal to disclose information.

(p. 10.) The Ontario Assistant Commissioner and the British Columbia Commissioner have also considered the issue of burden of proof under sections similar to Alberta's section 15(1), and reiterated the need to have the third party's evidence, no matter who has the burden of proof: see Order P-489 [1993] O.I.P.C. No. 191 and Order 19-1994 [1994] B.C.I.P.C.D. No. 22.

ISSUE B: Section 15(1)

(p. 11.) Section 15(1) of the Act reads:

> *15(1) The head of a 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, explicitly or implicitly, 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, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

(p. 12.) First, I note that section 15(1) provides a mandatory exemption. That is, if the head of a public body determines that the records fall within the exemption, he must refuse access.

(p. 13.) For a record to qualify for exemption under section 15(1), the public body in this case, or the third party in other cases, must satisfy the following three-part test:

Part 1: Does the information contain trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party? (Section 15(1)(a))

Part 2: Is the information supplied, explicitly or implicitly, in confidence? (Section 15(1)(b))

Part 3: Could disclosure be reasonably expected to bring about one of the outcomes set out in section 15(1)(c)?

Part 1: Does the information contain trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party? (Section 15(1)(a))

(p. 14.) In the case of *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989) F.J.C. No. 453 MacKay J. considered the meanings of the words "finance, commerce, science or technical matters" and held that "...dictionary meanings provide the best guide...". This approach was followed in *Information Commissioner of Canada v. Minister of External Affairs* [1990] 3 C.F. 665. I agree that those words should be given their ordinary dictionary meanings under section 15(1).

(p. 15.) I might add that it is not sufficient for a document to simply be given the title of "commercial or financial information", for example. Careful consideration must be given to the content of the documents to decide whether or not the information actually falls within section 15(1)(a). This approach was adopted by the Ontario Commissioner in Order P-394 [1993] O.I.P.C. No. 2.

(p. 16.) The Ontario Commissioner has also made some specific additions to the ordinary dictionary definition of "commercial information", which I wish to adopt. The category of "commercial information" includes "contract price" and information, "...which relates to the buying, selling, or exchange of merchandise or services..." (Order P-489 [1993] O.I.P.C. No. 191). These are important for the purposes of this inquiry.

(p. 17.) Using the above as a guideline, I am satisfied that both the public body and the third party have provided sufficient evidence to show that Records 1 to 4 contain financial and commercial information.

Part 2: Is the information supplied, explicitly or implicitly, in confidence? (Section 15(1)(b))

(p. 18.) I now turn to the specific wording of the section 15(1)(b). The section uses the phrase "is supplied...in confidence". The use of the word "is" as opposed to "was" indicates that not only must I consider the status of the information when it was originally supplied, but also the current status of the information.

(p. 19.) The third party presented substantial evidence to show that the information was originally "supplied in confidence". Reference was made to a proposal submitted by the third party to the public body. The covering letter that accompanied the proposal included a paragraph indicating that the information contained in the proposal was supplied in confidence.

(p. 20.) An Affidavit and a Statutory Declaration regarding the information contained within the agreements were provided. The Statutory Declaration was sworn by the Executive Director of the public body who stated that he believed the severed information was supplied in confidence. The Affidavit was sworn by the General Manager of the third party who deposed that he had understood that all the terms of the proposal and the terms of the agreements were confidential.

(p. 21.) Furthermore, both agreements contain confidentiality clauses. These clauses indicate that the information is confidential, which allows me to conclude that not only was the information originally supplied in confidence, but also that the third party considers the information to be presently supplied in confidence.

(p. 22.) The concept of "supplied in confidence" has been considered by the British Columbia Commissioner in Order 26-1994 [1994] B.C.I.P.C.D. No. 29. In that case, the Commissioner adopted two requirements to determine whether or not information is supplied in confidence:

1. Where the third party has provided original or proprietary information that remains relatively unchanged in the contract; and

2. Where disclosure of the information in the contract would permit an applicant to make an "accurate inference" of sensitive third-party business information that would not in itself be disclosed under the Act.

(p. 23.) This means that if information is originally supplied in confidence during the proposal/negotiation stage and is then used relatively unaltered in the contract, that information now contained in the contract remains confidential. The information contained in the contract must also allow an Applicant to make accurate inferences about sensitive third party business information that would not in itself be disclosed under the Act. I adopt this test for the purposes of section 15(1)(b). The public body or the third party must provide evidence to meet both parts of this test.

(p. 24.) The third party's General Manager deposed in his Affidavit that the information contained in the proposal was "relatively unaltered" in the agreements.

(p. 25.) Applying these requirements to the evidence relating to Records 1 and 2 (the agreements), it is apparent that not only was the information originally supplied in confidence through the proposal stage, but was also incorporated relatively unaltered into the agreements. The second part of the test is satisfied by the in camera evidence provided by the third party to show that the disclosure of this information would allow the Applicant to make accurate inferences about sensitive third party business information that would not in itself be disclosed under the Act.

(p. 26.) Since Records 3 and 4 (the two letters) appear to be written during contract negotiations relating to the agreements, Records 3 and 4 also meet the test. Therefore, I am satisfied that all the severed information is supplied in confidence.

(p. 27.) I must now consider whether disclosure of the information supplied in confidence by one of the parties claiming confidence, as occurred in this case, affects the application of the test under section 15(1)(b).

(p. 28.) The purpose of section 15(1) is to give a third party some degree of protection regarding information it provides to a public body. This section protects, to a limited extent, the integrity of third party contractual relationships with a public body. Accordingly, my only consideration under

section 15(1)(b) should be whether the test under that section is met, or whether the third party has consented to the disclosure of the information as provided by section 15(3)(a). Since the test has been met in this case and the third party has not consented to disclosure, I believe that I should not take the disclosure by the public body into consideration when it comes to determining whether the information is supplied in confidence under section 15(1)(b). The situation would be different if the third party had either consented to or acquiesced in the disclosure, but, on the evidence, this was clearly not the case here. Were I to find that the disclosure by one party nullifies the other party's proven expectation of confidentiality, it would mean that one party could deprive the other of the protection afforded by the section by unilaterally making disclosure of the information.

Part 3: Could disclosure be reasonably expected to bring about one of the outcomes set out in section 15(1)(c)?

(p. 29.) The public body applied both sections 15(1)(c)(i) and (iii). However, only one has to be proven to satisfy part three of the test under section 15(1):

Section 15(1)(c)(i) - harm significantly the competitive position or interfere significantly with the negotiating position of the third party.

Section 15(1)(c)(iii) - result in undue financial loss or gain to any person or organization.

(p. 30.) The third party claims that disclosure of the information "*could reasonably be expected to* harm significantly the competitive position or interfere significantly with the negotiating position of the third party" (section 15(1)(c)(i)), or "*could reasonably be expected to* result in undue financial loss or gain to any person or organization" (section 15(1)(c)(iii)).

(p. 31.) I have emphasized the words *could reasonably be expected to* because those words determine the standard of proof that the public body or third party must meet under s. 15(1)(c). In *Canada Packers Inc. v. Canada (Minister of Agriculture)*, [1989] 1 F.C. 47 (Fed. C.A.), the Federal Court of Appeal interpreted those words, in a similar section of the federal access legislation, to mean that evidence of a reasonable expectation of probable harm is required. "Probable" means proof "on a balance of probabilities" (*Northern Cruiser Co. v. Canada*, [1995] F.C.J. No. 1168 (Fed. C.A.)), affirming (1991), 7 Admin. L.R. (2d) 80 (Fed. T.D.). Proof "on a balance of probabilities" means that evidence must involve more than speculation and more than a mere possibility of harm. The Ontario Court, General Division, in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* 23 O.R. (3d) 31,

has stated that "(T)here need only be evidence of a reasonable expectation of probable harm which of necessity involves some speculation." I take this to mean that, anytime you deal in probabilities, there is, by definition, some element of speculation involved. I do not take this to mean that the evidence can be speculative or that mere speculation is itself sufficient.

(p. 32.) Moreover, under s. 15(1)(c)(i), the harm or interference must be "significant", and under s. 15(1)(c)(iii), the resulting financial loss or gain must be "undue". I would interpret "harm significantly" to mean that the third party should provide evidence that tips the "balance of probabilities" scale in its favour, and that I should take into consideration the third party's ability to withstand the harm only when weighing that evidence. I would also use this same approach (determining whether the weight of evidence tips the scale in the third party's favour) when interpreting "interfere significantly" in section 15(1)(c)(i) and "result in undue financial loss" in section 15(1)(c)(iii).

(p. 33.) As to the harm test specifically under section 15(1)(c)(i), I refer to Order 96-003, in which I stated that "...[The] evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue." (Canada (Information Commissioner v. Canada (Prime Minister), [1992] F.C.J. No. 1054 (Fed. T.D.). In that Order, I also said that the public body must provide evidence of the following:

> (i) the connection between disclosure of the specific information and the harm which is alleged;
> (ii) how the harm constitutes "damage" or "detriment" to the matter; and
> (iii) whether there is a reasonable expectation that the harm will occur.

(p. 34.) In this case, the public body must meet those three tests to prove significant harm to the third party's competitive position under section 15(1)(c)(i).

(p. 35.) The evidence supplied by the third party related to both sections 15(1)(c)(i) and (iii). The Affidavit of the third party's General Manager said that the continuation of the present contractual relationship was essential to the survival of the third party. Evidence was also presented to show what the situation would be for the third party if it lost the contract with the public body. However, the connection between the disclosure of the contractual terms and the loss of the contract appears to me to be speculative.

(p. 36.) In summary, it is only speculation that the disclosure of the clauses in question will harm the competitive position or interfere significantly with the

negotiating position of the third party (section 15(1)(c)(i)) or result in undue financial loss (section 15(1)(c)(iii)) *vis a vis* the public body. No evidence was presented to weigh the balance of probabilities in the direction of harm. As stated in *Northern Cruiser Co.*, supra, "...disclosure of the clauses will in no way affect legal relations between the parties to the contract, namely, the third party and the public body." I adopt that reasoning in this case. The parties' existing rights will not be any different after disclosure. As in *Northern Cruiser Co.*, one of the premises upon which this application is founded is that the public body will behave in a different way - a way which will be less favourable to the third party - if the specific clauses in the contract become known. As in that case, I believe that the evidence is inadequate in this case to support such a conclusion and that such a conclusion is speculative.

(p. 37.) I will now consider whether disclosure will probably bring about the required harm with respect to the third party's contracts with other parties. During the inquiry, in camera evidence was submitted to show how disclosure may affect the third party's competitive position and negotiating position with regard to future contracts with parties other than the public body and also with respect to current clients. Compelling evidence about the interrelationship between the volume and the contract price met the burden of proof with respect to the reasonable expectation of significant harm to the third party's competitive position. Furthermore, evidence presented about the option price and payment of the processing fee met the burden of proof that disclosure could reasonably be expected to interfere significantly with the third party's negotiating position with other parties.

Therefore, I find that the public body properly severed and refused to disclose the following:

Record 1: Articles 1.01 (d); 4.01; 4.02 (a), 19.02 (a), (b) and (c).

Record 2: Articles 1.01 (d); 4.01; 4.02 (a); 4.02.01 (b); 18.02 (a), (b), and (c).

Record 3: Paragraphs 1 and 2 (c).

Record 4: Paragraph 2

(p. 38.) However, with respect to the rest of the severed information, the public body and the third party fell short of the burden of proof. Accordingly, I cannot uphold the public body's decision to deny access to the following severed information pursuant to section 15(1):

Record 1: Articles 2.01 Line 2, Line 4, Line 6, Line 7; 3.09 (i); 11.01 (b); 11.01 (c); 14.01; 19.05.

Record 2: Articles 2.01 Line 2, Line 3, Line 4, Line 11; 3.09 (i); 11.01 (b); 11.01 (c); 14.01; 18.05.

Record 3: Paragraph 2(a)

(p. 39.) Attached to this Order in Schedule A is a table that summarizes the severings and my conclusions under section 15(1).

ISSUE C: Section 24(1)(c)

(p. 40.) Section 24(1)(c) of the Act reads:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy, including the following information:*
>
> *(c) information the disclosure of which could reasonably be expected to*
>
> *(i) result in financial loss to,*
>
> *(ii) prejudice the competitive position of, or*
>
> *(iii) interfere with the contractual or other negotiations of,*
>
> *the Government of Alberta or a public body;*

(p. 41.) I first note that section 24(1) provides a discretionary exemption. Therefore, what I must consider is whether or not the public body properly exercised its discretion.

(p. 42.) This section again involves words that need defining. I will apply the same reasoning as used under section 15(1) and give the words "economic interest" and "economy" their ordinary dictionary meanings.

(p. 43.) As this is the first time that I have encountered section 24(1) in an inquiry, it is necessary to examine its application. I think that section 24(1) is to be considered the general rule and the information must at least fall within that part to be severed. Clauses (a) to (d) are specific cases which fall within the general rule. In other words, to apply this section a public body must show

that the information "could reasonably be expected to harm the economic interest…or the ability of the Government to manage the economy". Evidence may be presented to show that the information falls within subsections 24(1)(a)-(d). This is the same view taken by the British Columbia Information and Privacy Commissioner in Order No. 113-1996 ([1996] B.C.I.P.C.D. No. 40). A situation may arise where the severable information does not fall within any of clauses(a) to (d) but nevertheless satisfies the general rule in section 24(1); however, it will never happen that information could fall within one of (a) to (d) and not fall within the general rule.

(p. 44.) The public body relied on section 24(1)(c) only with respect to Records 1 and 2 (the two agreements). Much of the severed information relates to options that the public body may exercise under those agreements. As I have already upheld the public body's decision to sever this information under section 15(1), no discussion of this severing under section 24(1) is necessary.

(p. 45.) With regard to other information severed under section 24(1), the public body must satisfy the same burden of proof as under s. 15(1). Section 24(1) contains the words "could reasonably be expected to harm", which is the same test that is applied under section 15(1). The only difference is that under section 24(1), the public body has to prove "harm", not "significant harm".

(p. 46.) There are a few words severed, using section 24(1), in Article 2.01 of both agreements. The public body submitted that the disclosure of the information would impair its negotiating position, and that the release of the information may prevent the public body from getting more favourable terms in future negotiations. These statements are speculative. No specific evidence was presented by the public body to show a "reasonable expectation of probable harm" to the economic interest of the public body resulting from disclosure of the words covered in Article 2.01 of both agreements.

(p. 47.) I am not satisfied that the public body discharged the burden of proof, and consequently did not exercise its discretion properly under section 24(1). As a result, the following information was not severed in accordance with the Act:

Record 1: Article 2.01

Record 2: Article 2.01

ORDER

(p. 48.) For the reasons stated in this Order, I uphold the public body's decision to sever information and to refuse to disclose that information in:

Record 1: Articles 1.01 (d); 4.01; 4.02 (a), 19.02 (a), (b) and (c).

Record 2: Articles 1.01 (d); 4.01; 4.02 (a); 4.02.01 (b); 18.02 (a), (b), and (c).

Record 3: Paragraphs 1 and 2 (c).

Record 4: Paragraph 2

(p. 49.) However, for the foregoing reasons I find that the public body did not correctly apply section 15(1), and I do not uphold the public body's decision to sever information in:

Record 1: Articles 2.01 Line 2, Line 4, Line 6, Line 7; 3.09 (i); 11.01 (b); 11.01 (c); 14.01; 19.05.

Record 2: Articles 2.01 Line 2, Line 3, Line 4, Line 11; 3.09 (i); 11.01 (b); 11.01 (c); 14.01; 18.05.

Record 3: Paragraph 2(a)

(p. 50.) I also find that the public body did not correctly apply section 24(1), and I do not uphold the public body's decision to sever information in:

Record 1: Article 2.01

Record 2: Article 2.01

(p. 51.) I therefore order that the foregoing severed information be disclosed to the Applicant.

(p. 52.) I ask that the public body notify me in writing, within 30 days, that this Order has been complied with.

Robert C. Clark
Information and Privacy Commissioner

SCHEDULE A

Documents		**Section 15(1)(a)**	**Section 15(1)(b)**	**Section 15(1)(c)(i) or (iii)**	**Decision**	
Record	*Article*	*Test Met?*	*Test Met?*	*Test Met?*	*Uphold public body's decision?*	*Do not uphold public body's decision?*
1	1.01 (d)	Yes	Yes	Yes- harm significantly competitive position	✓	
	2.01 Line 2	Yes	Yes	No- Northern Cruiser case		✓
	2.01 Line 4	Yes	Yes	No- Northern Cruiser case		✓
	2.01 Line 6	Yes	Yes	No- Northern Cruiser case		✓
	2.01 Line 7	Yes	Yes	No- Northern Cruiser case		✓
	3.09 (i)	Yes	Yes	No- burden of proof not met		✓
	4.01	Yes	Yes	Yes- harm significantly competitive position	✓	
	4.02 (a)	Yes	Yes	Yes -interfere significantly with negotiating position	✓	
	11.01 (b)	Yes	Yes	No- burden not met		✓
	11.01 (c)	Yes	Yes	No- burden not met		✓
	14.01	Yes	Yes	No- burden not met		✓
	19.02 (a)	Yes	Yes	Yes -interfere significantly with negotiating position	✓	
	19.02 (b)	Yes	Yes	Yes -interfere significantly with negotiating position	✓	
	19.02 (c)	Yes	Yes	Yes -interfere significantly with negotiating position	✓	
	19.05	Yes	Yes	No- burden not met		✓

Documents		Section 15(1)(a)	Section 15(1)(b)	Section 15(1)(c)(i) or (iii)	Decision	
Record	*Article*	*Test Met?*	*Test Met?*	*Test Met?*	*Uphold public body's decision?*	*Do not uphold public body's decision?*
2	1.01 (d)	Yes	Yes	Yes- harm significantly competitive position	✓	
	2.01 Line 2	Yes	Yes	No- Northern Cruiser case		✓
	2.01 Line 3	Yes	Yes	No- Northern Cruiser case		✓
	2.01 Line 4	Yes	Yes	No- Northern Cruiser case		✓
	2.01 Line 11	Yes	Yes	No- Northern Cruiser case		✓
	3.09 (i)	Yes	Yes	No- burden of proof not met		✓
	4.01	Yes	Yes	Yes- harm significantly competitive position	✓	
	4.02 (a)	Yes	Yes	Yes -interfere significantly with negotiating position	✓	
	4.02.01 (b)	Yes	Yes	Yes- harm significantly competitive position	✓	
	11.01 (b)	Yes	Yes	No- burden not met		✓
	11.01 (c)	Yes	Yes	No- burden not met		✓
	14.01	Yes	Yes	No- burden not met		✓
	18.02 (a)	Yes	Yes	Yes -interfere significantly with negotiating position	✓	
	18.02 (b)	Yes	Yes	Yes -interfere significantly with negotiating position	✓	
	18.02 (c)	Yes	Yes	Yes -interfere significantly with negotiating position	✓	
	18.05	Yes	Yes	No- burden not met		✓

Documents		**Section 15(1)(a)**	**Section 15(1)(b)**	**Section 15(1)(c)(i) or (iii)**	**Decision**	
Record	*Para-graph*	*Test Met?*	*Test Met?*	*Test Met?*	*Uphold public body's decision?*	*Do not uphold public body's decision?*
3	1	Yes	Yes	Yes- harm significantly competitive position	✓	
	2(a)	Yes	Yes	No- burden of proof not met		✓
	2(c)	Yes	Yes	Yes- harm significantly competitive position	✓	
4	2	Yes	Yes	Yes- harm significantly competitive position	✓	