ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 99-008

April 27, 1999

ALBERTA ENVIRONMENTAL PROTECTION

Review Number 1523

I. BACKGROUND

[para. 1] The Public Body needed a contractor to supply catering and support services for the firefighters who were working to extinguish a forest fire. Because of the emergency situation and the urgent need for support services to assist the firefighters, the Public Body did not use a public tendering process. Instead, the Public Body contacted the Third Party and asked the Third Party to supply the required services. The Third Party accepted the Public Body's offer. The Third Party began providing the catering and support services on May 4, 1998, but did not sign a written agreement until June 7, 1998. The written agreement was never signed by the Public Body.

[para. 2] On June 2, 1998, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") for information regarding companies who provided the catering and support services during the fire. One of the responsive records was the catering and support services agreement between the Public Body and the Third Party.

[para. 3] On July 6, 1998, the Public Body sent a section 29 notice to the Third Party stating that the Public Body was considering giving the Applicant access to the agreement. In response to this notice, the Third Party consented to the disclosure of the body of the agreement with the exception of the monetary information found in Schedule B. The monetary information included the itemized dollar amounts charged to

the Public Body for the provision of various catering and support services as well as the percentage above cost that was charged to the Public Body for the provision of water, sewer and garbage disposal.

[para. 4] On July 29, 1998, the Public Body disclosed the body of the agreement to the Applicant, but withheld the "monetary information" found in Schedule B. The Public Body cited section 15(1) as the authority to withhold the severed information.

[para. 5] On November 2, 1998, the Applicant requested a review of the Public Body's decision. The matter was set down for a written inquiry.

[para. 6] On December 15, 1998, the Public Body reversed its position, and decided to disclose the severed information.

[para. 7] On December 18, 1998, the Third Party requested this office review the Public Body's decision to disclose the severed information. The Third Party cites section 15(1) of the Act as the authority under which the severed information should be withheld.

II. RECORD AT ISSUE

[para. 8] The record at issue is Schedule B of the Memorandum of Agreement No. 99-NEB04-10, dated June 1, 1998 between the Public Body and the Third Party. The information at issue are the itemized dollar amounts charged for the provision of various catering and support services and the percentage above cost that was charged to the Public Body for the provision of water, sewer and garbage disposal.

III. BURDEN OF PROOF

[para. 9] The relevant portion of section 67 states:

> *67(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.

[para. 10] This inquiry relates to the Public Body's decision to give the Applicant access to records that contain information about the Third Party. Since personal information is not involved, the Third Party has the burden of proof as per section 67(3)(b).

IV. ISSUES

[para. 11] There are two issues in this inquiry:

A. Does the section 15(1) exception (harm to the business interests of a Third Party) apply to the record?

B. Does section 15(3)(c) apply to the record?

V. DISCUSSION

Issue A: Does the section 15(1) exception (harm to the business interests of a Third Party) apply to the record?

[para. 12] Section 15(1) 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 resolved or inquire into a labour relations dispute.*

[para. 13] Section 15 is a mandatory exception. This means that if a head of a Public Body determines the information falls within the exception, he/she must refuse access.

[para. 14] For information to fall under section 15(1), the Third Party must satisfy the following three-part test:

> Part 1: The information must reveal 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: The information must be supplied, explicitly or implicitly, in confidence (Section 15(1)(b)); and
>
> Part 3: The disclosure of the information could reasonably be expected to bring about one of the outcomes set out in section 15(1)(c).

<u>Part 1- Do the records reveal trade secrets of a Third Party, or commercial, financial, labour relations, scientific or technical information of a Third Party?</u>

[para. 15] In order to fulfill part 1 of the section 15(1) test, three criteria must be fulfilled:

a) The records must contain trade secrets, or commercial, financial, labour relations, scientific or technical information;

b) The disclosure must reveal this type of information. This means that the severed information must not already be in the public domain; and

c) The records must contain information that is "of a Third Party".

[para. 16] In my opinion, the severed information fulfills all three criteria.

[para. 17] In Order 96-013, I stated that the dictionary definition should be used to define the term "commercial information" and adopted part of Ontario Order P-489 (1993) which defined the term as including a "contract price" and information "… which relates to the buying, selling or exchange of merchandise or services." In this inquiry, the severed information consists of itemized dollar amounts charged for the provision of various catering and support services and the percentage above cost that was charged to the Public Body for the provision of water, sewer, and garbage disposal. In my view, all of this severed information clearly fulfills the definition of "commercial information".

[para. 18] Furthermore, it is my opinion that a disclosure of the severed information would "reveal" this commercial information as there is no evidence before me that this information is already in the public domain.

[para. 19] In regards to the third criteria, the Public Body and the Applicant argue that the severed information cannot be considered to be "of the Third Party", or in other words "belonging to" the Third Party because the severed information was developed jointly by the Public Body and the Third Party. Conversely, the Third Party submits an affidavit that states that the severed information should be considered "of the Third Party" because the information was entirely developed by the Third Party.

[para. 20] After reviewing the submissions and evidence of the parties, I find that the information should be considered to be "of the Third Party" or, in other words, original or proprietary information solely developed by the Third Party. While I acknowledge that there is some dispute between the parties as to whether the rates were negotiated, I am generally inclined to attach greater evidentiary weight to assertions that are supported by affidavit material where a conflict exists. In this inquiry, the Third Party submitted an affidavit that stated repeatedly that the severed information was solely developed by the Third Party and was not

negotiated in any manner. I accept this evidence. In addition, the fact that the Third Party supplied the contract services on an emergency basis and the fact that the Public Body never signed the contract is, in my view, also indicative that there was no negotiation in the development of these rates.

Part 2 – Was the information supplied, explicitly or implicitly in confidence?

[para. 21] In the Third Party's affidavit, the Third Party states that in the Third Party's discussion with the Public Body's Office Manager, the Public Body's Office Manager told the Third Party that the payment and rate schedules would be kept confidential. The Third Party states that as a result of this conversation, the Third Party believed that all the severed information would be kept confidential. The Public Body does not dispute that the severed information was submitted in confidence.

[para. 22] After reviewing this affidavit evidence, as well as the written arguments of all the parties, I find that the rates were original or proprietary information that the Third Party supplied in confidence to the Public Body. I therefore find that the severed information fulfills Part 2 of the Section 15(1) test.

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

[para. 23] The Third Party argues that a disclosure of the severed information could reasonably be expected to significantly harm the competitive position or interfere significantly with the negotiating position of the Third Party under section 15(1)(c)(i). In addition, the Third Party argues that a disclosure could reasonably be expected to result in undue financial loss or gain to any person or organization under section 15(1)(c)(iii).

[para. 24] The Third Party states that the rate information was developed through years of business planning and experience and that if these rates are disclosed, competitors would be able to by-pass the work the Third Party has invested in developing the numbers and simply adjust their rates to place themselves in a superior bargaining position. The Third Party also states that it believes the Public Body is currently developing the process to accept proposals for accommodation and heavy equipment services for the 1999 fire season and if the severed information is disclosed, the Third Party will be in an inferior position because its competitors will know the rates that the Third Party will be submitting. Once the severed information is in the hands of its competitors, the competitors could use the information to outbid the

Third Party for a contract with the Public Body, which would result in an undue financial loss to the Third Party. In addition, the Third Party's affidavit states that due to a decrease in last winter's revenue, the Third Party will be relying substantially on the income it receives during the 1999 fire season.

[para. 25] Conversely, the Public Body argues that a disclosure of the information could not reasonably be expected to significantly harm the competitive position or interfere significantly with the Third Party's negotiating position under section 15(1)(c)(i), or result in undue financial loss or gain to any person or organization under section 15(1)(c)(iii).

[para. 26] In particular, the Public Body states that the elements of section 15(1)(c) are not fulfilled. The Public Body emphasizes that to fulfill this section, the Third Party must fulfill a harms test and not a fairness test, and that in this inquiry, the Third Party has not established the probability of harm, nor the link between the disclosure of severed information and a probable harm.

[para. 27] In particular, the Public Body states that a disclosure of information could not reasonably be expected to significantly harm the Third Party because the information does reflect the Third Party's actual costs. Furthermore, the Public Body states that the contract is spent, and it is unclear how a disclosure of the information relating to the 1998 forest fire season will impact any future competitive bids. The Public Body argues that at the time of the inquiry, it had not requested tenders for future similar contacts, and in any event, the circumstances surrounding a 1999 fire season may be different than those in 1998. This means the costs, location and extent of materials supplied as well as the method of awarding contracts may be different. The Public Body also argues that if a future contract is awarded on a direct contract basis, the Third Party would not be impacted by a release of the severed information.

[para. 28] In addition, the Public Body refers to a July 16, 1998 letter from the Third Party to the Public Body. In that letter, the Third Party states that the Third Party would have "*no problem with disclosure of the rate details to other interested parties (as is the normal Government contract process) who had tendered bids for the service*" if the contract had been awarded through the public tender process. The Public Body argues that because the Third Party stated in this letter that the Third Party would not object to the disclosure of rate details in a public tender process, the Third Party cannot successfully argue that the disclosure of rate information outside the public tender process could reasonably be expected to significantly harm their competitive position or interfere significantly with their negotiating position.

[para. 29] The Applicant agrees with many of the Public Body's arguments regarding section 15(1). The Applicant also states that this information should be made available in order to encourage public awareness, increase competitiveness, promote accountability and promote responsibility. The Applicant refers to the County of Parkland, and the Town of Slave Lake as examples of jurisdictions that routinely disclose similar information.

[para. 30] In order to satisfy the three-part test under section 15, the Third Party must establish that the disclosure could reasonably be expected to bring about one of the outcomes listed in section 15(1)(c) on a balance of probabilities. Only one of the outcomes has to be proven to satisfy this part of the section 15 test.

[para. 31] In my opinion, the Third Party has met the harms test under section 15(1)(c)(i).

[para. 32] In Order 96-003, I stated that in order to meet the harms test under section 15(1)(c)(i), "…[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 stated that evidence of the following must be provided to prove harm under section 15(1)(c)(i):

> (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 reasonable expectation that the harm will occur.

[para. 33] After reviewing all the arguments and evidence presented, I find that the Third Party has met these three criteria.

[para. 34] While I acknowledge that the contract at issue is spent and the circumstances surrounding a future bid may be different than those in the 1998 fire, a disclosure of the information could, nevertheless, reasonably be expected to significantly harm the Third Party's competitive position in regards to any future bids. I accept the Third Party's affidavit evidence that states that the disclosure of the severed information into the public domain would provide the Third Party's

competitors with valuable base-line information that they could use in their bid proposals. Furthermore, while the severed information does not delineate the Third Party's costs of providing the services, in my opinion, the disclosure of the total fees (cost plus profit) charged for the various services would nevertheless give the Third Party's competitors a competitive advantage.

[para. 35] Furthermore, I do not agree that the July 16, 1998 letter from the Third Party to the Public Body establishes that there is no reasonable expectation of significant harm to the competitive position or significant interference with the negotiating position of the Third Party. There are two reasons for my view.

[para. 36] First, the Third Party stated in that letter that the Third Party would have had no problem with the disclosure of "rate details" in a public tender process. The letter did not define the term "rate details" and there is no evidence before me that, by using this term, the Third Party was referring to the same type and amount of detailed information that is at issue in this inquiry.

[para. 37] Second, the Third Party stated in the letter that the Third Party would have no problem with the disclosure in the context of a "public tender process". The Third Party did not state that they would have no problem disclosing the rate information outside a public tender process. In my opinion, the level of harm that accrues to the Third Party in each of these situations differs. Arguably, the disclosure of a Third Party's rate information in the public tendering process, would not significantly harm the Third Party's competitive position or interfere significantly with the Third Party's negotiating position, because all of the companies who bid on a project would have to disclose the same type and amount of information to one another. However, the disclosure of a Third Party's rate information when the Third Party is the sole contractor would arguably harm the Third Party because the Third Party's competitors would have access to the Third Party's rate information, but the Third Party would not have access to their competitor's rate information.

[para. 38] I agree with the Applicant that it is important that the public have access to information that will assist them in reviewing the actions of a Public Body. In fact, the right to access information is one of the fundamental principles upon which the Act is based. Section 2(a) of the Act states that one of the purposes of the Act is to allow any person a right of access to the records in the custody or control of a Public Body. However, this right is not unlimited. Section 2(a) also states that the right of access is limited by specific exceptions, including mandatory exceptions such as section 15(1). While I acknowledge the importance of

an Applicant's access rights, I also believe that by including exceptions such as section 15(1) in the Act, the Act has struck an appropriate balance between the rights of all parties.

[para. 39] Furthermore, I do not dispute the Applicant's contention that other government bodies such as the County of Parkland or the Town of Slave Lake, may be disclosing similar information. However, these government bodies are currently outside the jurisdiction of the Act, and I cannot order the disclosure of information based on the established practice of such an organization. One of my mandates under the Act is to review the decisions of a Public Body. In deciding whether a Public Body properly applied an exception to information, the established practice of another organization outside the jurisdiction of the Act is irrelevant.

Conclusion regarding section 15(1)

[para. 40] I find that the severed information fulfills the three-part test under section 15(1).

Issue B: Does section 15(3)(c) apply to the record?

[para. 41] Section 15(3)(c) states that if information relates to a non-arm's length transaction between the Government of Alberta and another party, the Public Body cannot withhold that information under section 15(1). Section 15(3)(c) reads:

> *(3) Subsections (1) and (2) do not apply if*
>
> > *(c) the information relates to a non-arm's length transaction between the Government of Alberta and another party*

[para. 42] In the Applicant's initial submission, the Applicant alleged that the contract at issue was obtained under "less than proper circumstances" and raised several allegations that I believed warranted a review of whether this was a non-arm's length transaction. Therefore, I requested that the parties provide me with additional submissions regarding the applicability of section 15(3)(c).

[para. 43] The parties differ in their opinions as to the applicability of section 15(3)(c). Both the Public Body and the Third Party submitted additional submissions, which stated that they believe the contract at issue was negotiated at arm's length. Conversely, the Applicant

submitted an additional submission which stated that he believes the agreement relates to a non-arm's length transaction. The Applicant did not, however, provide evidence in his additional submission to support his view.

[para. 44] In Order 98-013, I held that the term "non-arm's length" in section 15(3)(c) should be defined according to the common law definition. In that Order I held that a transaction is deemed to be at non-arm's length when the interests of the parties can not, for a number of possible reasons, be considered separate. In that Order I relied on the decision of *Re Tremblay (1980) 36 B.C.R. 11 (Que. S.C.)* that held a transaction will be at non-arm's length where one party has exerted control, influence or moral pressure on the free will of the other.

[para. 45] After carefully reviewing the submissions from the parties as well as the record at issue, I conclude that the transaction between the Public Body and the Third Party was at arm's length and that section 15(3)(c) is therefore not applicable. While I acknowledge the Applicant's concern regarding the circumstances surrounding the awarding of the contract outside the public tendering process, there is insufficient evidence to conclude that the parties are "related" or that either party was not acting in its own interest. In other words, there is insufficient evidence to conclude that either party exerted "control, influence or moral pressure" over the other in the process of negotiating the terms of the contract.

VI. ORDER

[para. 46] I make the following Order under section 68 of the Act.

[para. 47] I find that the severed information fulfills section 15(1) of the Act.

[para. 48] In addition, I find that section 15(3)(c) of the Act does not apply to the severed information.

[para. 49] I therefore order the Public Body to refuse the Applicant access to the severed information.

Robert C. Clark
Information and Privacy Commissioner