

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2000-005

June 9, 2000

CALGARY REGIONAL HEALTH AUTHORITY

Review Number 1720

I. BACKGROUND

[para 1.] On July 14, 1999, the Applicant applied to Calgary Regional Health Authority (the “Public Body”) for access under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to the following:

- audited financial statements of Calgary Laboratory Services covering the time period of January 1, 1997 to June 30, 1999;
- all contracts and other agreements between the Calgary Regional Health Authority and MDS Kasper Medical Laboratories that resulted in the formation of Calgary Laboratory Services covering the time period January 1, 1997 to June 30, 1999;
- all contracts and other agreements between the Calgary Regional Health Authority and private providers of cataract surgery services (e.g. Gimbel Eye Centre and others) covering the time period January 1, 1996 to June 30, 1999.

[para 2.] The Public Body provided the Applicant with some of the records, but withheld others, on the grounds that those records either were not in the custody or under the control of the Public Body (section 4(1) of the Act) or contained the confidential business information of third parties (section 15(1) of the Act).

[para 3.] On October 14, 1999, the Applicant asked me to review the Public Body's decision. Mediation was authorized, but was not successful with regard to the audited financial statements and the partnership agreement of Calgary Laboratory Services.

[para 4.] The matters were set down for an oral inquiry, to be held on March 21, 2000. Prior to the date set for the inquiry, I received advance written submissions from the Applicant and the Public Body. The solicitor who represented four Third Parties (Calgary Laboratory Services, MDS Kasper Medical Laboratories, MDS Inc., and Kasper Medical Laboratories Inc.) provided a written submission on behalf of MDS Kasper Medical Laboratories.

[para 5.] The Applicant's written submission raised the issue of section 31 (disclosure in the public interest) for the first time. The Applicant also said:

Finally, in light of the delay caused by the CRHA's refusal to accept this request, I request access to CLS audited financial statements to December 31, 1999, or even March 31, 2000, depending upon the length of time it takes to make a final ruling on this request.

[para 6.] The Applicant is asking for access to records other than those requested in the Applicant's original access request. Therefore, that request is outside of my jurisdiction. The Applicant would have to make a further access request to the Public Body for those records.

[para 7.] At the conclusion of the oral portion of the inquiry, I asked the parties to provide further written submissions on section 31 and other matters. I also asked the solicitor for the Third Parties to work with a Portfolio Officer from my Office to recommend what parts of the partnership agreement could properly be severed and what parts could be disclosed.

[para 8.] I received further written submissions from the Applicant, the Public Body, and Calgary Laboratory Services. My Office exchanged those among the parties. I then gave the parties an opportunity to respond, in writing, to the further written submissions. I received those responses by the April 14, 2000 deadline. I received a severed version of the partnership agreement shortly thereafter.

[para 9.] This Order proceeds on the basis of the Act as amended on May 19, 1999.

II. RECORDS AT ISSUE

[para 10.] The parties say that only the following records are at issue:

- the audited financial statements of Calgary Laboratory Services covering the time period January 1, 1997 to June 30, 1999; and
- the partnership agreement for Calgary Laboratory Services and the guarantee and covenants attached to that partnership agreement (the “partnership agreement”)

[para 11.] The Public Body withheld the foregoing records in their entirety.

[para 12.] In this Order, I will refer to the audited financial statements and partnership agreement individually, and collectively as the “Records”.

III. ISSUES

[para 13.] There are three issues in this inquiry:

- A. Are the Records in the custody or under the control of the Public Body, as provided by section 4(1) of the Act?
- B. Did the Public Body correctly apply section 15(1) of the Act?
- C. Does section 31(1) of the Act require the Public Body to disclose the Records?

IV. DISCUSSION OF THE ISSUES

ISSUE A: Are the Records in the custody or under the control of the Public Body, as provided by section 4(1) of the Act?

1. General

[para 14.] Section 4(1) of the Act provides:

4(1) This Act applies to all records in the custody or under the control of a public body...

[para 15.] A “public body” is defined to include a “local public body” (section 1(1)(p)(vi) of the Act), which is defined to include a “health care

body” (section 1(1)(j)(ii) of the Act). In turn, a “health care body” is defined to include a regional health authority under the *Regional Health Authorities Act*, S.A. 1994, c. R-9.07 (section 1(1)(g)(iv) of the Act). Consequently, the Calgary Regional Health Authority is a public body for the purposes of section 4(1) of the Act.

[para 16.] When considering section 4(1), the parties focussed their arguments on the Public Body. However, the Public Body’s submission raised the possibility that 703590 Alberta Ltd., a wholly owned subsidiary of the Public Body, might itself be a public body for the purposes of section 4(1). Consequently, during the oral part of the inquiry, I questioned the parties about that matter and asked them to provide further written submissions.

[para 17.] 703590 Alberta Ltd. and MDS Kasper Medical Laboratories, a private sector business, are partners in Calgary Laboratory Services. 793590 Alberta Ltd. has a 49.99% interest in Calgary Laboratory Services, and MDS Kasper Medical Laboratories has a 50.01% interest.

[para 18.] Under section 1(1)(g)(vi) of the Act, “health care body” is also defined to include a subsidiary health corporation as defined in the *Regional Health Authorities Act*. Section 1(i) of the *Regional Health Authorities Act* defines “subsidiary health corporation” to mean a corporation that is a subsidiary of or is controlled by a regional health authority directly or indirectly through one or more intermediary corporations. 703590 Alberta Ltd. is a wholly owned subsidiary of the Public Body. Consequently, I find that 703590 Alberta Ltd. is a “public body” for the purposes of section 4(1) of the Act.

[para 19.] Are the Records in the custody or under the control of the Public Body?

[para 20.] The Public Body admits that it has possession and therefore custody of the Records because the Records are on the Public Body’s premises. However, the Public Body argues that it does not have control over the Records and therefore does not have the authority to release the Records.

[para 21.] The Public Body argues that section 4(1) should be interpreted to require custody and control, rather than custody or control, of records. The Public Body’s rationale for this interpretation is that if a public body has both custody and control of records, then it has the authority to release the records.

[para 22.] Calgary Laboratory Services argues that, although the audited financial statements belong to and are to be provided to the

partners, including 703590 Alberta Ltd., in reality only the Management Committee, which has been given full authority under the partnership agreement to manage Calgary Laboratory Services, has custody and control of the audited financial statements. Consequently, Calgary Laboratory Services concludes that the Records are not in the custody and control of the Public Body.

[para 23.] The Public Body relies on the criteria for determining control, as set out at page five of the *Freedom of Information and Protection of Privacy Policy and Practices* manual (the “FOIP Manual”), published by the Information Management and Privacy Branch of Alberta Labour in August 1998. I referred to those criteria in Order 99-032 when discussing the issue of control of records. I have set out the Public Body’s responses to a number of those criteria, as follows:

- Were the Records created by an officer or employee of the Public Body? *No.*
- Were the Records prepared by an outside contracted consultant? *No.*
- Was the question of control specified in the contract? *No.*
- Were the Records in the custody of the Public Body? *Yes.*
- Are the Records integrated with other records of the Public Body? *No.*
- Do the Records relate to the Public Body’s mandate and functions? *No.*
- Are there regulations regarding the use and disposition of the Records? *No.*
- Has the Public Body relied on the Records to a great extent? *No.*

[para 24.] Based on the foregoing criteria, I agree that the Public Body does not have control of the Records.

[para 25.] However, I do not accept the Public Body’s argument that section 4(1) requires custody and control of records, for two reasons.

[para 26.] First, section 4(1) is not concerned with whether records can be released. The purpose of section 4(1) is to initially determine what records are subject to the Act. That determination is made on the basis of custody or control of records. Once it is determined that records are subject to the Act, then a public body looks at other exceptions under the Act to decide whether the records can be disclosed.

[para 27.] Second, I believe that a reference to “custody”, as distinct from “control”, is to recognize that it is conceivable that a public body

might not have control of records, as here, or that a public body may have control, but not custody.

[para 28.] If a public body has custody or control of records, the Act then permits a public body to apply exceptions such as section 15(1) to refuse to disclose certain information contained in the records. To require custody and control of Records before the Act could apply would remove many records from the application of the Act and make it unnecessary to consider exceptions such as section 15(1).

[para 29.] I find that the Records are in the custody of the Public Body for the purposes of section 4(1) of the Act. Therefore, the Records are subject to the Act.

[para 30.] Are the records in the custody or under the control of 703590 Alberta Ltd., which is also a public body?

[para 31.] The Third Parties argue that 703590 Alberta Ltd. does not have control over the Records because the partnership agreement has placed control in the hands of a Management Committee.

[para 32.] However, having found that the Records are in the custody of the Public Body, as provided by section 4(1), I do not find it necessary to decide whether the Records are also in the custody or under the control of 703590 Alberta Ltd. as a public body. Furthermore, the Applicant has not requested records from 703590 Alberta Ltd.

[para 33.] If it were necessary that I decide whether 703590 Alberta Ltd. has custody or control of the Records, I would find it significant to a finding of custody that Article 12.3 of the partnership agreement says that a copy of the financial statement is to be given to each of the partners, which includes 703590 Alberta Ltd. Furthermore, since 703590 Alberta Ltd. is a party to the partnership agreement, it would likely have custody of a copy of the partnership agreement, even if it is merely a “shell” corporation as the Public Body has said.

2. Conclusion under section 4(1)

[para 34.] The Records are in the custody of the Public Body for the purposes of section 4(1) of the Act. Therefore, the Records are subject to the Act.

ISSUE B: Did the Public Body correctly apply section 15(1) of the Act?

1. General

[para 35.] 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 resolve or inquire into a labour relations dispute.

[para 36.] For section 15(1) to apply, the Public Body must establish that:

(i) disclosure of the information would reveal trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party (section 15(1)(a));

(ii) the information was supplied, explicitly or implicitly, in confidence (section 15(1)(b)); and

(iii) disclosure of the information could reasonably be expected to bring about one of the outcomes set out in section 15(1)(c).

[para 37.] The Public said it would rely on the evidence and representations of the Third Parties to assist it in meeting the above criteria.

2. Would disclosure of the information reveal trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party (section 15(1)(a))?

a. Who is a “third party”?

[para 38.] The Applicant raises a preliminary matter. The Applicant questions whether Calgary Laboratory Services can be a third party for the purposes of section 15(1), by virtue of the Public Body’s 49.99% interest in Calgary Laboratory Services through 703590 Alberta Ltd., its wholly owned subsidiary.

[para 39.] Calgary Laboratory Services is a partnership. The partners in Calgary Laboratory Services are 703490 Alberta Ltd., a corporation owned by the Public Body, and itself a public body; and MDS Kasper Medical Laboratories, itself a partnership. The partners of MDS Kasper Medical Laboratories are Bow Valley Diagnostic Services Inc., a corporation owned by MDS Inc., and Kasper Medical Laboratories Inc., also a corporation.

[para 40.] Are any of the foregoing corporations, partners and partnerships “third parties” for the purposes of section 15(1)?

[para 41.] “Third party” is defined in section 1(1)(r) of the Act to mean “a person, a group of persons or an organization other than an applicant or a public body”.

[para 42.] “Person” is not defined in the Act. However, section 25(1)(p) of the *Interpretation Act*, R.S.A. 1980, c. I-7, defines “person” to include a corporation. Therefore, Bow Valley Diagnostic Services Inc. and Kasper Medical Laboratories Inc., which are corporations and the partners of

MDS Kasper Medical Laboratories, are third parties for the purposes of section 15(1). MDS Inc., which is a corporation and the owner of Bow Valley Diagnostic Services Inc., is also a third party.

[para 43.] 703590 Alberta Ltd. is a corporation and therefore a “person”. However, 703590 Alberta Ltd. is also a public body. Section 1(1)(r) says that a third party means a person other than a public body. Therefore, 703590 Alberta Ltd. is not a third party for the purposes of section 15(1).

[para 44.] Is either partnership, Calgary Laboratory Services or MDS Kasper Medical Laboratories, a “person” and therefore a “third party”?

[para 45.] Section 1(d) of the *Partnership Act*, R.S.A. 1980, c. P-2, defines “partnership” as follows:

1 In this Act,

(d) “partnership” means the relationship that subsists between persons carrying on a business in common with a view to profit.

[para 46.] Section 2 of the *Partnership Act* says:

2 Persons who have entered into partnership with one another are for the purposes of this Act called collectively a “firm”, and the name under which their business is carried on is called the “firm name”.

[para 47.] In Alberta, a partnership is not a legal person separate from the partners: see *Michel v. Lafrentz* (1992), 85 Alta. L.R. (2d) 1 (Alta. C.A.). The “firm name” is merely a label that describes the partners collectively and provides an administratively simple way of collectively naming those behind the partnership: see *International Assn. of Science and Technology for Development v. Hamza*, [1995] A.J. No. 87 (Alta. C.A.). Therefore, I conclude that a partnership is not a “person”.

[para 48.] However, the MDS Kasper Medical Laboratories partnership is made up of persons. The Calgary Laboratory Services partnership is made up of 703590 Alberta Ltd, a person, and the persons who comprise the MDS Kasper Medical Laboratories partnership.

[para 49.] Section 1(1)(r) says that a “group of persons” is also a third party. That definition makes the group the third party, and not the individual persons of the group (who may or may not be third parties).

Therefore, although each partnership itself is not a person, it is nevertheless a “group of persons”. Consequently, I find that Calgary Laboratory Services, a partnership, and MDS Kasper Medical Laboratories, also a partnership, are “third parties” for the purposes of section 15(1).

[para 50.] Even if I had found that each partnership was not a “group of persons”, I would have found that each partnership is an “organization” and therefore a “third party”. That finding is supported by Black’s Law Dictionary, Fifth Edition, which defines “organization” broadly to include organizations that are not “persons” in law, such as a partnership, two or more persons having a joint or common interest, or any other legal or commercial entity.

[para 51.] A consequence of the conclusion that each partnership is a third party by virtue of being a group of persons or an organization, with the focus being on the group or organization, is that it is irrelevant that one of the members of the group or organization is a public body that is not itself a third party.

[para 52.] Therefore, it is irrelevant that 703590 Alberta Ltd., a partner in Calgary Laboratory Services, is a public body. That fact does not disqualify the Calgary Laboratory Services partnership from being a third party. It follows that it is also irrelevant as to what percentage of partnership interest 703590 Alberta Ltd. holds in Calgary Laboratory Services.

b. Financial or commercial information of a third party

[para 53.] The Third Parties argue that the Records contain, and disclosure of the information would reveal, commercial and financial information of the Third Parties, as provided by section 15(1)(a)(ii).

i. Is there “financial information” of a third party?

[para 54.] In Order 96-018, I said that “financial information” of a third party includes information regarding the monetary resources of a third party, such as the third party’s financial capabilities, and assets and liabilities, past or present.

[para 55.] I have reviewed the two financial statements for the partnership years ending October 31, 1997 and October 31, 1998. They are standard financial statements, each containing a one-page auditor’s report, a balance sheet, a statement of income and partners’ equity, a statement of change in financial position, and notes to the financial statement.

[para 56.] The financial statements contain financial information of the partnership, Calgary Laboratory Services. I find that disclosure of the all the information contained in the financial statements would reveal the financial information of Calgary Laboratory Services.

[para 57.] To the extent that MDS Kasper Medical Laboratories is a partner in Calgary Laboratory Services, disclosure of the information contained in the financial statements would also reveal the financial information of MDS Kasper Medical Laboratories. However, I do not find it necessary to consider the interest of MDS Kasper Medical Laboratories in the financial statements because of my finding that disclosure of all the information would reveal the financial information of Calgary Laboratory Services.

[para 58.] The partnership agreement also contains financial information. I find that disclosure of the following information contained in the partnership agreement would reveal the financial information of Calgary Laboratory Services and MDS Kasper Medical Laboratories: Article 5.1, one item in each of lines 5 and 6 (page 11); Article 8.5, one item in line 13 (page 17); and the contents of Schedule E.

[para 59.] To the extent that Bow Valley Diagnostic Services Inc. and Kasper Medical Laboratories Inc. are partners in MDS Kasper Medical Laboratories, and to the extent that MDS Inc. owns Bow Valley Diagnostic Services Inc., the disclosure of the foregoing financial information would also reveal the financial information of those other Third Parties. Therefore, any reference to MDS Kasper Medical Laboratories in this Order includes those other Third Parties.

[para 60.] Consequently, all the information contained in the financial statements and that financial information contained in the partnership agreement, as set out above, meets the criteria of section 15(1)(a)(ii). That is, it passes the first test.

[para 61.] I find that disclosure of the information contained in the remainder of the partnership agreement, including information in Article 5.3 (page 12), Article 10.3 (page 21) and Article 10.11 (page 23), would not reveal the monetary resources of the Third Parties and therefore would not reveal the financial information of the Third Parties. However, I will consider whether that and other information contained in the partnership agreement would reveal commercial information of the Third Parties.

ii. Is there “commercial information” of a third party?

[para 62.] In Order 96-013, I said that “commercial information” includes the contract price, and information that relates to the buying, selling, or exchange of merchandise or services. In Order 97-013, I also found that information about how a third party proposed to organize its work was commercial information because it related to the buying, selling or exchange of merchandise or services.

[para 63.] The Third Parties initially argued that the entire partnership agreement was commercial information of the Third Parties, on the basis that the business model of the partnership was unique. This uniqueness, it is argued, is a result of the public/private arrangement and delegation of the management function to a Management Committee.

[para 64.] The Third Parties say that often their success or failure depends on the approach taken and not on the dollars brought to the table. Therefore, the concepts in the partnership agreement have commercial value because of the approach set out. In their opinion, that approach constitutes commercial information.

[para 65.] I do not accept that the Calgary Laboratory Services partnership is unique because of its public/private organization or its management structure. A search of the Canada NewsWire service turned up a number of articles on public/private partnerships across Canada: see <http://www.newswire.ca/releases> from September 1998 onward.

[para 66.] Furthermore, Calgary Laboratory Services is not unique in delegating its control and operation to a Management Committee, in permitting input into the operation of the partnership only through the Management Committee, or in restricting each partner from speaking for the partnership. Therefore, I do not accept that the partnership business model is commercial information.

[para 67.] During the inquiry, the Third Parties said they would attempt to sever the partnership agreement. Subsequently, the Third Parties provided me with a severed partnership agreement.

[para 68.] To be clear, I find that the information the Third Parties were willing to divulge from the partnership agreement would not reveal commercial information of the Third Parties. That information includes numerous Articles, Schedule F (Form of Transfer of Unit), Guarantee and Covenants, and Exhibit I (Form of Indemnity). Many of the Articles are what I call “boilerplate”, namely, standard clauses that appear in most agreements, which may or may not be modified to suit the particular agreement.

[para 69.] The Third Parties severed the following information contained in the partnership agreement:

- parts of the Table of Contents corresponding to fully severed Articles
- three entire definitions and part of a fourth definition
- parts of Articles 1.6, 4.2, 5.1, 5.3, 6.2, 7.1, 10.2, 10.3, 10.9, 10.10, 10.11, 11.4, 12.3, 14.2
- all of Articles 7.2, 8.1-8.6, 9.2, 10.5, 10.6, 10.13, 13.2, 14.4, 16.1-16.3, 17.1, 17.2, 18.1, 19.1, 22.1-22.3
- headings corresponding to fully severed Articles
- all of Schedules B, C, D, E

[para 70.] I have already found that disclosure of the following information would reveal financial information of Calgary Laboratory Services and MDS Kasper Medical Laboratories: Article 5.1, one item in each of lines 5 and 6; Article 8.5, one item in line 13; and the contents of Schedule E. Therefore, I do not intend to consider whether that same information would reveal commercial information of any of the Third Parties.

[para 71.] I have reviewed all the severed information listed above. I have also reviewed the partnership agreement as a whole to see whether disclosing the severed information would have the aggregate effect of revealing commercial information of the Third Parties: see Order 98-006.

[para 72.] I find that disclosure of the following information would reveal commercial information of Calgary Laboratory Services and MDS Kasper Medical Laboratories, as that information would reveal the specific business plans of Calgary Laboratory Services and MDS Kasper Medical Laboratories related to the buying, selling or exchange of merchandise or services: Article 8.3, the last sentence; and the contents of Schedule B and Schedule C (except personal information, discussed later in this Order).

[para 73.] The remaining severed information would not reveal commercial information of any of the Third Parties because that information relates only to the general partnership arrangements or to specific arrangements between the partners. That information does not relate to the buying, selling or exchange of merchandise or services.

[para 74.] The disclosure of Schedule D in particular would not reveal commercial information of any of the Third parties as MDS Kasper

Medical Laboratories has already put that information in the public domain through the telephone directory.

3. Was the information supplied explicitly or implicitly in confidence, as provided by section 15(1)(b)?

[para 75.] The second test, section 15(1)(b), implies that the information is to be supplied to a public body. Section 15(1)(b) also requires that the information be supplied, implicitly or explicitly, in confidence.

[para 76.] The Third Parties argue that the financial and commercial information was provided explicitly in confidence, and point to Article 21.2 of the partnership agreement. I have also looked at Article 12.3 and at Article 10.6, which is referred to in Article 21.2.

a. Was financial or commercial information “supplied” by a third party to a public body?

[para 77.] Article 12.3 of the partnership agreement requires the partnership to furnish yearly, to each partner, an audited financial statement of the partnership.

[para 78.] The Third Parties argue that the information is not furnished to the partners, but to the Management Committee members appointed by each partner. In my view, the information is nevertheless furnished to each partner.

[para 79.] Article 10.6 of the partnership agreement says that Calgary Laboratory Services gives the partner 703590 Alberta Ltd. the authority to provide the Public Body with the full financial details of the partnership's operations.

[para 80.] The Public Body says that the appointees of 703590 Alberta Ltd. are the only ones who see the financial statements. Other persons in the Public Body have not been provided with the financial statements.

[para 81.] The fact that the financial statements may be provided to the head only and may not have been provided to the individuals who appeared at this inquiry does not change the fact that the financial statements have been provided to the Public Body.

[para 82.] Consequently, I find that the financial information contained in the financial statements was supplied by Calgary Laboratory Services to 703590 Alberta Ltd. and to the Public Body.

[para 83.] There is also financial information in the partnership agreement. I have said that disclosure of information contained in Article 5.1, Article 8.5, and Schedule E of the partnership agreement would reveal the financial information of Calgary Laboratory Services and MDS Kasper Medical Laboratories.

[para 84.] I have also said that disclosure of information contained in Article 8.3, Schedule B, and Schedule C of the partnership agreement would reveal the commercial information of Calgary Laboratory Services and MDS Kasper Medical Laboratories.

[para 85.] Generally, information in an agreement that has been negotiated by a third party and a public body is not information that has been supplied to a public body. However, there are exceptions where the information supplied to the public body during negotiations remains relatively unchanged in the agreement or where disclosure of the information would permit an applicant to make an accurate inference about information supplied to the public body during the negotiations.

[para 86.] The foregoing interpretation of section 15(1)(b) is different from previous Orders in which I said that the information supplied must remain relatively unchanged in the agreement, and must also allow an applicant to make an accurate inference. However, I believe my current interpretation more closely reflects the commercial reality that, to reach an agreement, a third party must supply a certain amount of information, some of which may actually appear in the agreement, and some of which may be inferred from the agreement.

[para 87.] I do not think it can be said that Calgary Laboratory Services supplied to 703590 Alberta Ltd. or to the Public Body any commercial or financial information contained in the partnership agreement, as Calgary Laboratory Services was not created until the partners signed the agreement. It is also not sufficient for section 15(1)(b) that 703590 Alberta Ltd. may have supplied to the Public Body the partnership agreement containing the financial information of Calgary Laboratory Services.

[para 88.] The situation is different for MDS Kasper Medical Laboratories. I have no doubt that MDS Kasper Medical Laboratories originally supplied financial and commercial information to 703590 Alberta Ltd. and to the Public Body when Calgary Laboratory Services was formed. The commercial information and most of the financial information has remained relatively unchanged in the partnership agreement.

[para 89.] However, it cannot be said that some of the financial information was supplied by MDS Kasper Medical Laboratories or any of the other Third Parties. Nevertheless, that financial information is inextricably linked with the financial information supplied by MDS Kasper Medical Laboratories. In other words, that financial information would not exist if MDS Kasper Medical Laboratories had not supplied the original financial information to 703590 Alberta Ltd. and to the Public Body. Furthermore, disclosure of that financial information would permit the Applicant to make accurate inferences about the financial information of MDS Kasper Medical Laboratories that would not itself be disclosed under the Act.

[para 90.] Since disclosure of that financial information would reveal the financial information supplied by MDS Kasper Medical Laboratories, that financial information also meets the criteria of section 15(1)(b).

[para 91.] Therefore, I find that the commercial and financial information contained in the partnership agreement, as set out above, was supplied by MDS Kasper Medical Laboratories to 703590 Alberta Ltd. and to the Public Body and meets the criteria of section 15(1)(b), or otherwise meets the criteria of section 15(1)(b) because it would reveal the financial information supplied by MDS Kasper Medical Laboratories. I find that the remainder of the information contained in the partnership agreement was negotiated and therefore was not supplied by the Third Parties. Consequently, that information does not meet the criteria of section 15(1)(b).

[para 92.] The Public Body has difficulty regarding 703590 Alberta Ltd. as an entity separate from the Public Body because it is mainly a “shell” corporation with no infrastructure. However, I have treated 703590 Alberta Ltd. and the Public Body as separate public bodies because the Act treats them that way. Moreover, the partnership agreement treats 703590 Alberta Ltd. as a separate entity.

b. Was commercial or financial information supplied explicitly or implicitly in confidence?

[para 93.] Article 10.6 of the partnership agreement says the financial information is supplied to the Public Body in confidence. That provision also says that 703590 Alberta Ltd. must request that the Public Body keep the information confidential. Article 21.2 requires the partners, including 703590 Alberta Ltd., to keep all information confidential.

[para 94.] In spite of those Articles, it is my practice to independently determine whether the criteria of any of the provisions of section 15(1) have been met, including section 15(1)(b).

[para 95.] The evidence of MDS Kasper Medical Laboratories and Calgary Laboratory Services is that they are both in competition with other laboratory service providers. In particular, Calgary Laboratory Services provided evidence that it intends to “grow its business”. This, taken with the fact of the confidentiality provisions of the partnership agreement, leads me to find it reasonable that MDS Kasper Medical Laboratories, and the Calgary Laboratory Services partnership and the partners in particular, would supply commercial or financial information only in confidence.

[para 96.] Therefore, I find that the financial information of Calgary Laboratory Services, contained in the financial statements, was supplied explicitly in confidence to 703590 Alberta Ltd. and to the Public Body. I also find that the financial and commercial information of MDS Kasper Medical Laboratories, contained in the partnership agreement, was supplied explicitly in confidence to 703590 Alberta Ltd. and to the Public Body.

4. Would disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 15(1)(c)?

a. Harm significantly competitive position (section 15(1)(c)(i))

[para 97.] The Third Parties argue that disclosure of the information would harm significantly the competitive position of Calgary Laboratory Services and the other Third Parties. The Applicant argues that Calgary Laboratory Services is a public/private monopoly on laboratory services in the Calgary region, so that there is no competition.

[para 98.] Calgary Laboratory Services is a “start-up” organization, and states that it is attempting to grow its business both inside and outside of Alberta. It has provided me with lists of its customers and its competitors, as well as information about an out-of-province request for proposal to which it intends to respond and about a contract it recently lost.

[para 99.] At this early stage of its development, Calgary Laboratory Services maintains that it is in a more difficult position competitively than if it were a long established organization. In particular, it argues that disclosure of the information contained in the financial statements could reasonably be expected to harm its competitive position with respect to competing for the services of technologists and pathologists, both of which are in short supply.

[para 100.] Calgary Laboratory Services also argues that it is able to be competitive because its private sector partner provides the business acumen, technology, and expertise that enables it to stay current and provide a higher level of services in a field where laboratory testing changes rapidly. It maintains that there is a real danger that the private sector partner will pull out of Calgary Laboratory Services if financial information of the partnership is disclosed. MDS Kasper Medical Laboratories has said this, and the partnership agreement contains such a provision. Calgary Laboratory Services is convinced that the loss of its private sector partner would harm significantly its competitive position.

[para 101.] I agree that disclosure of the financial information contained in the financial statements could reasonably be expected to harm significantly the competitive position of Calgary Laboratory Services. Having come to this conclusion, I do not find it necessary to decide whether disclosure of the financial information contained in the financial statements could reasonably be expected to harm significantly the competitive position of the other Third Parties.

[para 102.] Under the next heading, I will deal with disclosure of the financial information and commercial information contained in the partnership agreement.

b. Interfere significantly with negotiating position (section 15(1)(c)(i))

[para 103.] The Third Parties argue that disclosure of the financial and commercial information contained in the partnership agreement would interfere significantly with the negotiating position of the Third Parties.

[para 104.] The Third Parties gave evidence of the scope of their operations and their competitors. They also presented evidence of pricing negotiations, lease negotiations and negotiations to expand their businesses. MDS Kasper Medical Laboratories further gave evidence of a service contract it recently lost.

[para 105.] The Third Parties argue that the information would reveal what the Third Parties have invested in Calgary Laboratory Services and would reveal some of the specific business plans of the Third Parties. That information would allow an analyst to determine the financial and business approaches taken by the Third Parties, thereby significantly interfering with the current negotiating positions of the Third Parties. As the Third Parties argue, disclosure of the information would result in an uneven playing field in negotiations, particularly when competitors are not required to disclose their information.

[para 106.] I agree that disclosure of the financial and commercial information contained in the partnership agreement, as I set out above, could reasonably be expected to interfere significantly with the negotiating positions of the Third Parties. However, I do not believe that any of the other information set out in the partnership agreement could reasonably be expected to have that result. Furthermore, I have found that the other information set out in the partnership agreement does not meet the criteria of section 15(1)(a)(i) or (ii).

c. Similar information no longer being supplied (section 15(1)(c)(ii))

[para 107.] The Third Parties argue that, if the information were disclosed, they would insist on amendments to the partnership agreement, which would result in the Third Parties' discontinuing to provide information to the Public Body and to 703590 Alberta Ltd. The Third Parties maintain that it is in the public interest that certain financial information be supplied to the Public Body to meet ministerial requests, which are specifically provided for in the partnership agreement.

[para 108.] As I have already considered the financial and commercial information of the Third Parties contained in the partnership agreement, and reached a conclusion under section 15(1)(c)(i), I do not find it necessary to consider the arguments of the Third Parties under section 15(1)(c)(ii). The information contained in the partnership agreement that does not meet the criteria of section 15(1)(c)(i) also does not meet the criteria of section 15(1)(c)(ii) and, in any event, does not meet the criteria of section 15(1)(a) or (b).

d. Undue financial loss (section 15(1)(c)(iii))

[para 109.] Calgary Laboratory Services argues that disclosure of the audited financial statements could reasonably be expected to result in undue financial loss to Calgary Laboratory Services because the pricing information would allow competitors to undercut Calgary Laboratory Services. Furthermore, the disclosure of the equity/capital investment would allow competitors to analyze the risk taken, rate of return and business value of Calgary Laboratory Services.

[para 110.] As I have already considered the financial information of Calgary Laboratory Services contained in the financial statements, and reached a conclusion under section 15(1)(c)(i), I do not find it necessary to consider the arguments of Calgary Laboratory Services under section 15(1)(c)(iii).

5. Conclusion under section 15(1)

[para 111.] The Public Body correctly applied section 15(1) to all the information contained in the financial statements of Calgary Laboratory Services. I uphold the head's decision to refuse to disclose the financial statements to the Applicant.

[para 112.] The Public Body correctly applied section 15(1) to the following information contained in the partnership agreement that created Calgary Laboratory Services: Article 5.1, one item in each of lines 5 and 6; Article 8.3, the last sentence; Article 8.5, one item in line 13; and the contents of Schedule B, Schedule C (except the personal information specified below), and Schedule E.

[para 113.] I uphold the head's decision to refuse to disclose the foregoing information to the Applicant.

[para 114.] The Public Body did not correctly apply section 15(1) to the remainder of the information contained in the partnership agreement, including the parts of the Table of Contents corresponding to fully severed Articles and the headings corresponding to fully severed Articles. I do not uphold the head's decision to refuse to disclose that information to the Applicant.

6. Miscellaneous issue

[para 115.] Article 10.2 of the partnership agreement contains some personal information, consisting of the names of persons nominated to the Management Committee of the Calgary Laboratory Services partnership by each of the partners. Schedule C, at the top and bottom only, contains bare references to the names and titles of individuals acting in formal, representative capacities. In the context of Article 10.2 and Schedule C, that personal information would not reveal commercial information of any of the Third Parties, nor any other kinds of information listed in section 15(1)(a). Furthermore, the information does not meet the criteria of section 15(1)(b) or (c) and cannot be withheld under section 15(1).

[para 116.] Consequently, I have considered whether that information should be withheld under section 16. However, I have determined that disclosure of the names and titles, as set out above, would not be an unreasonable invasion of the personal privacy of the third parties, as those persons are acting in formal, representative capacities. Therefore, those names and titles are to be disclosed.

ISSUE C: Does section 31(1) of the Act require the Public Body to disclose the Records?

[para 117.] Under section 31(1), I will consider only that information that I have found that the Public Body is not required to disclose under section 15(1), namely, all the information contained in the financial statements, and that information, set out above, that is contained in the partnership agreement.

[para 118.] Section 31(1) reads:

31(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant

(a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or

(b) information the disclosure of which is, for any other reason, clearly in the public interest.

[para 119.] The Applicant initially applied the criteria under the fee waiver provisions of section 87(4)(b) (the records relate to a matter of public interest), to support the argument that the Records should be disclosed under section 31(1)(b). In previous Orders, I have said that the criteria under section 87(4)(b) are not the criteria to be applied under section 31(1): see Orders 96-011, 98-011 and 98-019.

[para 120.] Subsequently, the Applicant argued that disclosure of the Records is required in the public interest under section 31(1)(b) because more than 90 per cent of Calgary Laboratory Services' funds come from the public purse. The Applicant says that it is not known whether safeguards exist for transparency, accountability and conflicts of interest regarding public/private monopolies such as Calgary Laboratory Services. The Applicant believes that it is in the public interest to provide the Records so that the public can determine whether or not taxpayers are well served through Calgary Laboratory Services.

[para 121.] The Third Parties argue that section 31(1)(a) and (b) must be read together. I do not accept that argument. The "or" between section 31(1)(a) and section 31(1)(b) means that those two provisions operate independently.

[para 122.] In Order 96-011, I said that for section 31(1)(b) to apply, the matter must of “compelling public interest”. Furthermore, in Order 96-014, Mr. Justice Cairns made an important distinction between information that “may well be of interest to the public” and information that is “a matter of public interest.”

[para 123.] The burden is on the Applicant to prove that there is a matter of compelling public interest, such that the Public Body should disclose information under section 31(1): see Orders 96-011, 96-014, 98-011, and 98-019.

[para 124.] In this case, although the information may well be of interest to the public, it cannot be considered a matter of public interest under section 31(1)(b). I find that the Applicant has not established that this is a matter of compelling public interest.

[para 125.] Therefore, section 31(1)(b) of the Act does not require the Public Body to disclose the information I have found the Public Body is not required to disclose under section 15(1).

V. ORDER

[para 126.] I make the following Order under section 68 of the Act.

A. Custody or control of records under section 4(1) of the Act

[para 127.] The Records are in the custody of the Public Body for the purposes of section 4(1) of the Act. Therefore, the Records are subject to the Act.

B. Application of section 15(1) of the Act

[para 128.] The Public Body correctly applied section 15(1) to all the information contained in the financial statements of Calgary Laboratory Services. I uphold the head’s decision and order the head to refuse to disclose the financial statements to the Applicant.

[para 129.] The Public Body correctly applied section 15(1) to the following information contained in the partnership agreement that created Calgary Laboratory Services: Article 5.1, one item in each of lines 5 and 6; Article 8.3, the last sentence; Article 8.5, one item in line 13; and the contents of Schedule B, Schedule C (except the personal information specified in this Order), and Schedule E.

[para 130.] I uphold the head's decision to that extent and order the head to refuse to disclose the foregoing information to the Applicant. The foregoing information consists of approximately three pages of the 61-page partnership agreement.

[para 131.] Along with this Order, I will provide the Public Body with a highlighted copy of the partnership agreement, indicating the information that is not to be disclosed.

[para 132.] The Public Body did not correctly apply section 15(1) to all the remainder of the information contained in the partnership agreement. I do not uphold the head's decision to refuse to disclose that information to the Applicant. I order the head to disclose to the Applicant the remainder of the information contained in the partnership agreement. The remainder of the information consists of approximately 58 pages of the 61-page partnership agreement.

C. Application of section 31(1) of the Act

[para 133.] Section 31(1)(b) of the Act does not require the Public Body to disclose the information I have ordered the Public Body not to disclose under section 15(1).

[para 134.] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that the Public Body has complied with this Order.

Robert C. Clark
Information and Privacy Commissioner