

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER 2001-019

May 22, 2001

THE CITY OF EDMONTON

Review Number 2073

Office URL: <http://www.oipc.ab.ca>

Summary: Bell Nexxia Inc. applied under the *Freedom of Information and Protection of Privacy Act* (the “Act”) for access to a Memorandum of Understanding (“MOU”) between the City of Edmonton (the “City”) and Telus Communications Inc. (“Telus”). The City was prepared to disclose the record. However, Telus objected to the disclosure of the MOU, citing section 15(1) (disclosure harmful to business interests) as an exception to disclosure. The Commissioner held that Telus discharged its burden of proof, and therefore ordered the City to withhold the MOU.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c. F-18.5, ss. 15(1), 15(1)(a), (b) and (c), 15(1)(a)(ii), 15(1)(c)(i), and (iii), 29(1), 62(2), 67(3)(b), 68; *Municipal Government Act* S.A. 1994, c. M-26.1, section 217(2)(a)(iii).

Authorities Cited: **AB:** Orders 96-013, 98-006.

I. BACKGROUND

[para 1.] On November 20, 2000, the City of Edmonton (the “City”) received a request under the *Freedom of Information and Protection of Privacy Act* (the “Act”) from an employee of Bell Nexxia, who is now at Bell Intrigna Inc. (“Bell”) for:

...a Memorandum of Understanding between Telus Communications and the City of Edmonton. Financial figures are not being requested. We are simply looking

for the written terms and conditions of the agreement along with the length of the arrangement.

[para 2.] On December 4, 2000, the City sent a notice letter to Telus Communications Inc. (“Telus”) pursuant to section 29(1) of the Act, notifying Telus, as third party, that the City intended to release the MOU. Telus replied that Telus would be objecting to the disclosure of the MOU on the grounds that section 15(1) (“disclosure harmful to business interests”) of the Act applied.

[para 3.] By letter dated January 3, 2001, Telus asked me to review the City’s decision pursuant to section 62(2) of the Act.

[para 4.] Mediation was authorized but was not successful. On May 3, 2001, the matter was heard in an oral, public inquiry.

[para 5.] All parties provided written submissions prior to the inquiry. In addition, Telus provided an affidavit and an in camera supplemental affidavit. During the inquiry, the City also provided Mr. Vince Dixon’s speaking notes which were marked as in camera Exhibit A. A report authored by the City’s Corporate Services Department for City Council’s review was also entered as Exhibit B during the in camera session.

[para 6.] At the conclusion of the oral inquiry, I stated to the parties my decision that section 15(1) did apply to the MOU, and I ordered the City to withhold the MOU. This Order contains my written reasons.

II. RECORD AT ISSUE

[para 7.] The MOU is the only record at issue.

III. ISSUE

[para 8.] There is one issue in this inquiry: Does section 15 of the Act apply to the MOU?

IV. DISCUSSION OF THE ISSUE

1. General

[para 9.] Section 15(1) is at issue. The relevant parts of section 15(1) read:

15(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

...

(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,

...

(iii) result in undue financial loss or gain to any person or organization...

[para 10.] As Telus is objecting to the City's decision to give access to the MOU under section 15(1), the burden of proof is on Telus, as the third party, as provided by section 67(3)(b). In this case, Telus must establish that:

(i) disclosure of the information would reveal commercial information of Telus (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)(i) to (iii).

2. Would disclosure of the information reveal commercial information of Telus (section 15(1)(a)(i))?

[para 11.] In Order 96-013, I said that "commercial information" includes information that relates to the buying, selling, or exchange of merchandise or services. In Order 98-006, I also said that commercial information can only be ascertained from a view of the record as a whole.

[para 12.] The City and Telus have submitted that the MOU contains commercial information as it is an agreement between two business entities.

[para 13.] I am satisfied that the MOU would reveal Telus' commercial information.

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

[para 14.] Evidence at the inquiry showed that the information in the MOU was explicitly “supplied” to the City because Telus developed the MOU, and the MOU sets out the terms of what Telus is prepared to do for the City.

[para 15.] Evidence also showed that the information in the MOU was supplied in “confidence”. First, the City Council passed a motion when it adopted the MOU, “That the report and the copy of the Memorandum of Understanding, negotiated between Telus and the City, remain private as the Memorandum of Understanding stipulates that this information will be kept confidential and disclosing information could prejudice negotiations. s. 217(2)(a)(iii) *Municipal Government Act.*”

[para 16.] Upon the coming into force of the Act, section 217(2)(a)(iii) of the *Municipal Government Act*. S.A. 1994, c. M-26.1 was repealed.

[para 17.] Second, the MOU contained a clause that agreed to the confidentiality of the document between the parties. The City acknowledged that the MOU was negotiated in confidence and that the confidence was maintained.

[para 18.] Therefore, based on the above two factors, I find that the information in the MOU was explicitly supplied in confidence to the City.

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

[para 19.] Telus argued that disclosure of the MOU could reasonably be expected to significantly harm the competitive position of Telus, interfere with negotiations between Telus and the City, and cause undue financial loss to Telus.

[para 20.] Conversely, the City submitted that it did not have any evidence to show that the disclosure of the MOU would result in one of the “harms” found in section 15(1)(c).

a. Harm significantly the competitive position or interfere significantly with the negotiating position (section 15(1)(c)(i))

[para 21.] In order to satisfy the three-part test under section 15, Telus 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 22.] Telus submitted that the MOU sets out the strategic position of Telus with respect to its business dealings with the City. Evidence was also presented to show that the telecommunications business is intensely competitive and that the MOU serves as a “blueprint” for Telus’s proposed and ongoing commercial relations with the City as well

as other major municipalities. In addition, Telus invested a significant amount of time in developing this MOU.

[para 23.] The Supplementary Affidavit submitted in camera also gave persuasive evidence that the disclosure of the MOU could reasonably be expected to significantly harm the competitive position of Telus.

[para 24.] This argument is further supported by Bell's October 18, 2000 letter to the City, which stated: "The clarification provided will assist us in future business opportunities and our interactions with the City of Edmonton."

[para 25.] After reviewing all the arguments and the evidence presented, I find that Telus has met the criteria of section 15(1)(c). Therefore, I find that disclosure of the MOU could reasonably be expected to harm significantly the competitive position of Telus, as provided by section 15(1)(c)(i) because it would give Telus's competitors a competitive advantage that could reasonably be expected to significantly harm the competitive position of Telus.

[para 26.] As I have decided that disclosure of the MOU could reasonably be expected to harm significantly the competitive position of Telus, as set out in section 15(1)(c)(i), I do not find it necessary to decide whether disclosure of the information could reasonably be expected to interfere significantly with the negotiating position, or result in undue financial loss to Telus, as set out in section 15(1)(c)(i) and (iii).

5. Conclusion

[para 27.] Section 15(1) applies to the MOU. Therefore, I do not uphold the City's decision to disclose the MOU.

V. ORDER

[para 28.] I make the following order under section 68 of the Act.

[para 29.] The MOU meets the requirements of section 15(1)(a), (b) and (c). Consequently, I do not uphold the City's decision to give access to the MOU, and I order the City to withhold the MOU.

Robert C. Clark
Information and Privacy Commissioner