

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2006-023

January 17, 2008

**UNIVERSITY OF ALBERTA
AND UNIVERSITY OF CALGARY**

Case File Numbers 3346 and 3349

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Summary: The Applicant made a request to the University of Alberta and the University of Calgary (the “Public Bodies”) under the *Freedom of Information and Protection of Privacy Act* (the “Act”). She asked for information, as it exists at specified points in time, regarding the required and recommended books for each of the courses and classes offered by the Public Bodies, and the maximum and current number of students enrolled in those courses and classes.

Section 25(1)(c)(ii) of the Act allows a public body to refuse to disclose to an applicant information the disclosure of which could reasonably be expected to prejudice the competitive position of the public body. The Public Bodies presented evidence that the Applicant intended to open a used bookstore and that her proposed operations would negatively impact the sale of used books from their own bookstores. The Adjudicator found that the Applicant was an existing or potential competitor of the Public Bodies and that disclosure of certain information would reduce the Public Bodies’ respective shares of the student market. He found that there was a reasonable expectation of economic harm.

The Applicant argued that the Public Bodies could not claim prejudice to their competitive position because much of the requested information is eventually made public. The Adjudicator found that the Applicant also wished to obtain information that was not yet, or never would be, in the public domain. He found that the information that

the Public Bodies wished to withhold under section 25 was sufficiently different from the information eventually made public. It was advance information regarding the supply and demand for university books and internal information about operations and strategic plans.

The Adjudicator concluded that the Public Bodies had the authority, under section 25(1)(c)(ii) of the Act, to withhold unpublished information regarding the required and recommended books for their courses and classes. If the information were published, disclosure to the Applicant could not be said to prejudice the competitive position of the Public Bodies. However, the Adjudicator concluded that, once information regarding books becomes available through the websites of the Public Bodies, they could rely on section 29(1)(a) of the Act to refuse to disclose the information on the basis that it is readily available to the public.

The Adjudicator found that course and enrolment information requested by the Applicant, as opposed to book information, was not excepted from disclosure under section 25 of the Act, as there was an insufficient link between disclosure of that specific information and economic harm to the Public Bodies. However, he found that the Public Bodies were not required to disclose the course and/or enrolment information remaining in records also containing book information, as the course and/or enrolment information was available and more complete elsewhere.

The Applicant requested course and enrolment information alone (i.e., without accompanying book information) from the University of Alberta (the “U of A”). It indicated that its course and enrolment information is constantly updated on its website, which is accessible to the public. Even though there may be a short gap between the time that certain information is known to the Public Body and made available online, the Adjudicator found that the U of A could refuse to disclose its course and enrolment information under section 29(1)(a) of the Act on the basis that the information is readily available to the public.

The Adjudicator concluded that the Public Bodies properly exercised their discretion under sections 25 and 29 of the Act in refusing to disclose all of the information requested by the Applicant.

The U of A’s website indicates maximum enrolment in a class and spaces remaining but does not expressly state actual enrolment, which was requested by the Applicant. Because actual enrolment may be calculated by way of subtraction, the Adjudicator found that the publicly accessible information was responsive to the Applicant’s request. Alternatively, he concluded that section 10(2) of the Act did not require the U of A to create a record of actual enrolment for the Applicant, as it would unreasonably interfere with the operations of the public body. The amount of time and effort involved would not be fit and appropriate under the circumstances, as the Applicant may obtain the requested information indirectly online, and the online information is more current than any record that would be prepared by the U of A.

Statutes and Regulations Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 2(a), 6(1), 6(2), 9, 9(2), 9(2)(b), 10(1), 10(2), 10(2)(a), 10(2)(b), 25, 25(1), 25(1)(b), 25(1)(c), 25(1)(c)(i), 25(1)(c)(ii), 29, 29(1)(a), 29(1)(b), 29(2), 29(3), 71(1), 72 and 93(1); *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 200/95, s. 10(4) and Schedule 2.

Authorities Cited: **AB:** Orders 96-012, 96-013, 96-014 (External Adjudication Order No. 1), 96-016, 97-005, 98-002, 98-005, 98-019, 2000-009, 2000-031, 2001-016, 2001-025, 2001-033, F2004-014, F2005-009 and F2005-27.

I. BACKGROUND

[para 1] In a request to access information dated April 20, 2005, the Applicant requested the following from the University of Alberta (the “U of A”):

Complete list of Classes being offered per session (Fall, Winter, Spring and Summer) and required and recommended books for each of those classes. I request this information commencing August 1, 2005 on a weekly basis for two years commencing August 1, 2005.

Complete list of Courses offered, the maximum enrollment per course and the actual enrollment per course for each session of the 2005/2006 University year and the 2006/2007 University year. I request this be provided August 1, 2005, December 1, 2005, April 1, 2006, June 1, 2006, August 1, 2006, December 1, 2006, April 1, 2007, June 1, 2007, August 1, 2007 and December 1, 2007.

This information could be on CD format or e-mailed to me provided that it was in standard readable format.

I require this information, as it is my intention to open a used book store to provide students with an opportunity to sell their books that they may not otherwise be able to sell. I would like to establish a good working relationship with the University Book store to achieve this end.

[para 2] By letter dated May 11, 2005, the U of A refused to provide access to the requested information, on the basis that the information was readily available to the public and may therefore be excepted from disclosure under section 29(1)(a) of the *Freedom of Information and Protection of Privacy Act* (the “Act”).

[para 3] By letter dated June 29, 2005, the Applicant’s agent clarified that she was requesting the information 75 to 90 days prior to the start of each university session and therefore prior to the time that it is readily available to the public.

[para 4] By letter dated July 4, 2005, the U of A’s agent reiterated its position that section 29 of the Act applied and added that access was also being refused on the basis

that disclosure could reasonably be expected to harm the economic interest of the public body under section 25(1)(c) of the Act. The agent further stated that the U of A refused to create a record of the requested information for the Applicant, on the basis that it would unreasonably interfere with the operations of the public body under section 10(2)(b) of the Act.

[para 5] In a request to access information dated June 13, 2005, the Applicant requested the following from the University of Calgary (the “U of C”):

A list of all books adopted for use at the University of Calgary for the fall semester 2005, including the following information: (i) department/course; (ii) section; (iii) professor; (iv) estimated/actual enrollment; (v) author; (vi) title; (vii) edition; (viii) publisher; (ix) ISBN [international standard book number]; and (xi) status (required, recommend[ed], optional).

Copies of individual adoption request forms as submitted by professors to the bookstore.

I request this information by June 17, 2005.

It is my understanding that the University compiles and maintains the foregoing information in electronic form. I request that the University provide the information in the same electronic format in which the University maintains it.

[...]

I understand that this information is not and cannot be finalized at this point in time, as a result I would like to receive notice of any changes to the original rough draft and receive updates on a weekly basis up until the point in time which the information becomes readily available to the students. I would like this information in the same fashion as outlined above over the course of the next two years. Commencing June 17, 2005 and ending June 16, 2007.

I require this information, as it is my intention to open a used bookstore to provide students with an opportunity to sell their used books. It is my intention to act in good faith in order to establish a solid working relationship with the University of Calgary.

[para 6] By letter dated June 15, 2005, the U of C refused to provide access to the requested information, on the basis that disclosure could reasonably be expected to harm the economic interest of the public body under section 25(1)(c) of the Act.

[para 7] By letter dated June 29, 2005, the Applicant’s agent asked this Office to review the decision of the U of C to refuse access. By letter dated July 7, 2005, the

Applicant's agent asked this Office to review the decision of the U of A to refuse access. Mediation was authorized but was unsuccessful. The matters were therefore set down for written inquiries.

[para 8] As the inquiries involve overlapping issues, it was agreed that the U of A and U of C (collectively, the "Public Bodies") could make joint submissions in respect of both inquiries. The Applicant also made one set of submissions in respect of both inquiries.

II. RECORDS AT ISSUE

[para 9] Although the Applicant's request to the U of C was more specific, the types of responsive records in the case of both Public Bodies are essentially the same, as the U of A's responsive records would include the specified information. The responsive records fall into four categories: (i) electronic course, class and student enrolment information, available from an online search engine (called "Bear Tracks" in the case of the U of A and "InfoNet" in the case of the U of C); (ii) electronic information regarding the books required or recommended for specific courses and classes, available from an online search engine accessible from the Public Bodies' respective bookstore websites; (iii) electronic information regarding the books required or recommended for specific classes, available on individual faculty and department websites; and (iv) requested information that is not yet available, or never available, through the aforementioned sources.

[para 10] In the case of both Public Bodies, the last category of records includes book requisition (adoption request) forms from individual instructors, and amendments to those requisitions, which may be on paper or in e-mails. In the case of either or both Public Bodies, information that never becomes available through the online search engines includes certain enrolment information (such as expressly stated actual enrolment in a class) and certain book information (such as ISBNs). Some of this missing information would be available through other records, both paper and electronic, held by the Public Bodies' respective offices of the registrar and bookstores.

[para 11] For the purpose of the inquiries, all of the records described above are the records at issue, as the Applicant was refused access to all of them. Given the volume of requested information, the Public Bodies attached samples of the records at issue to their written submissions.

III. ISSUES

[para 12] The issues in the inquiries are the following:

- A. Did the Public Bodies properly apply section 25 of the Act (economic interest of a public body) to the records/information?

- B. Did the Public Bodies properly apply section 29 of the Act (information available to the public) to the records/information?
- C. Does section 10(2) of the Act require the Public Bodies to make a record for the Applicant?

[para 13] Although the Notice of Inquiry in respect of the U of C set out only the first issue above, the parties' submissions address all three issues in respect of both Public Bodies.

IV. DISCUSSION OF ISSUES

A. Did the Public Bodies properly apply section 25 of the Act (economic interest of a public body) to the records/information?

[para 14] Section 25 of the Act gives the head of a public body the discretion to refuse to disclose information on the basis that it would harm the economic interest of the public body. The specific provisions of section 25, on which the Public Bodies rely to refuse the Applicant's requests for information, are as follows:

25(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:

...

(b) financial, commercial, scientific, technical or other information in which a public body or the Government of Alberta has a proprietary interest or a right of use and that has, or is reasonably likely to have, monetary value;

(c) information the disclosure of which could reasonably be expected to

(i) result in financial loss to,

(ii) prejudice the competitive position of...

...

the Government of Alberta or a public body...

[para 15] Under section 71(1) of the Act, it is up to the Public Bodies to prove that the Applicant has no right of access to the records at issue. In the context of section 25, this means that they must establish that the information fulfils the general rule set out in subsection 25(1) in that disclosure of the information could reasonably be expected to harm their economic interests. Information may fall within the general rule if it is one of

the specific types of information set out in the paragraphs of subsection 25(1) (Order 96-013 at para. 43).

[para 16] The Public Bodies submit that the information falls under more than one paragraph of section 25(1). First, they submit that the records at issue consist of financial or commercial information in which they have a proprietary interest or a right of use and that has, or is reasonably likely to have, monetary value [paragraph 25(1)(b)]. Second, they submit that the records at issue consist of information the disclosure of which could reasonably be expected to result in financial loss [paragraph 25(1)(c)(i)]. Third, they submit that the records at issue consist of information the disclosure of which could reasonably be expected to prejudice their competitive position [paragraph 25(1)(c)(ii)].

1. Prejudice to competitive position

[para 17] The Applicant's requests to the Public Bodies are for information, as it exists at specified points in time, regarding the reading materials associated with the Public Bodies' courses and classes, and the maximum and current number of students enrolled in those courses and classes. I construe the requests as continuing requests under section 9 of the Act, although the maximum period of a continuing request is two years and, if the request is granted, it is up to the Public Bodies to set the response dates. The continuing nature of the requests are such that the Applicant would obtain periodic "advance" information regarding the books that are required, recommended and optional for all of the Public Bodies' courses and classes.

[para 18] The Public Bodies sell both new and used books. They submit that disclosure of the information in the records at issue could reasonably be expected to prejudice their competitive position. In support, they point to the Applicant's statements in her requests for information that she intends to open a used bookstore. They argue that the Applicant wishes to use the Public Bodies' own information resources to compete with them. They say that the Applicant's business will negatively affect their own book sales by reducing the number of purchases from the Public Bodies' bookstores by students, who comprise a finite market. They indicate that their bookstores are enterprises that must have profitability in order to recover costs, pay occupancy charges, contribute to the Public Bodies' central overhead expenses and maintain reserves.

[para 19] The Applicant submits that the Public Bodies cannot rely on section 25 of the Act to withhold the information in the records at issue, as there is no clear cause and effect relationship between disclosure and the alleged economic harm. She argues that any loss is merely speculative. She states that the Public Bodies' primary activities are education and research, not the sale of books. She submits that the Public Bodies allow third party wholesale book companies to operate what she refers to as "buy back" programs within the Public Bodies' own bookstores, so it is not understandable that they would be concerned about any economic harm caused by the Applicant's proposed operations. She further argues that her target market and that of the Public Bodies differ, as her intention is to primarily buy and sell *used* books whereas the Public Bodies primarily sell *new* books.

a) *Meaning of “prejudice the competitive position”*

[para 20] The phrase “prejudice the competitive position” found in section 25(1)(c)(ii) of the Act means that a public body must have a reasonable expectation that disclosure of the information is capable of being used by an existing or potential competitor to reduce the public body’s share of the market (Order F2005-009 at para. 56). I find that this statement applies generally to the information in the records at issue, although I will discuss which information specifically in a later section of this Order.

[para 21] The Applicant wishes to obtain periodic information regarding the books that are intended to be required, recommended or optional reading for the courses and classes offered by the Public Bodies. I find that she is an existing or potential competitor of the Public Bodies. Given her intention to open a used bookstore, her requests are so that she may determine what used books students are likely to want to buy and sell in respect of each university session. She requests continuing disclosure in order to obtain the most up-to-date information, presumably so that she may continually modify her own decisions regarding what books to buy and sell, and at what prices.

[para 22] I find that disclosure of information in the records at issue may reasonably be expected to reduce the Public Bodies’ respective shares of the market. Although it has been found that there cannot be prejudice to a public body’s competitive position if there is no competition for the same thing (Order 97-005 at para. 26), the Public Bodies and the Applicant would be competing for the same thing, namely purchasers of used books, and even more specifically, students of the Public Bodies who wish to purchase used books.

[para 23] The potential loss to the Public Bodies is not speculative. The Applicant’s intended sale of used books to students will impact the same sales by the Public Bodies, given the finite number of students purchasing course materials. I find that the Public Bodies have established a reasonable expectation of harm, in that they have shown a clear and direct linkage between the disclosure of the information and the harm alleged, and have explained how or why the harm alleged would result from the disclosure of the information (Order 96-016 at para. 14; Order 2001-025 at para. 49). If the information regarding the books intended to be read by students for upcoming courses were disclosed to the Applicant, she would know what used books to buy and sell, and would be in a position to adjust her prices, all in order to compete with them.

[para 24] The Applicant argues that the Public Bodies are confusing total sales with profitability. She submits that, through economic efficiency and the competitive process, a reduction in sales does not necessarily mean a reduction in profit. While this may be true in certain situations, I do not find it to be a likely consequence in the present matter. It is more probable that a reduction in the sale of used books by the Public Bodies will result in a reduction of profit. The Public Bodies indicate that, in 2005, the U of A sold used books valuing approximately \$1,120,000 and the U of C sold used books valuing approximately \$1,320,000. They indicate that there is a higher profit margin for the sale of used books than for the sale of new books. I have no evidence to suggest that the

Public Bodies, through other economic factors, will be in a position to offset or recuperate their predicted losses resulting from a reduction in the sale of used books.

[para 25] The fact that the Public Bodies' primary activities are education and research, or that they sell both new and used books and the Applicant intends only or primarily to sell used books, does not affect my conclusion that disclosure would prejudice the competitive position of the Public Bodies. The bookstores of the Public Bodies are in the business of selling books and must turn a profit, even though other parts of the Public Bodies carry out entirely different operations and activities. It is not necessary for the Public Bodies and the Applicant to be competing for all of the same things; it is sufficient for them to be competing for the purchase and sale of used books. As indicated above, the number of used books sold annually by the Public Bodies is not insignificant.

[para 26] The Public Bodies state that they do not know what the Applicant means when she submits that they allow third party wholesale book companies to operate "buy back" programs within their bookstores. The Applicant does not fully explain this particular submission. In any event, I do not believe that the alleged business arrangements between the Public Bodies and other companies would affect my conclusion regarding competitive position vis-à-vis the Applicant. There would presumably be business reasons for such arrangements, and I have no evidence with which to compare the possibly existing operations of other companies with the proposed operations of the Applicant. I believe that it is open to the Public Bodies to allow particular booksellers or buyers onto their premises, for whatever advantage that may bring to the Public Bodies and their students, and still assert that their competitive position would be prejudiced if the Applicant obtained the information that she has requested.

b) *Desirability of competition and access to information generally*

[para 27] The Applicant does not really deny that she wishes to obtain the information in order to compete with the Public Bodies. She states in her submissions: "If granted access to this information I would move to further improve student access to educational resources by offering a more affordable access channel." She indicates that she wishes to establish a used bookstore in order "to lower the financial burden on students attending post secondary institutions." However, she argues that competition would have a good outcome because students would be able to obtain books more cheaply and the Public Bodies themselves would be forced to become more streamlined and efficient. While the Applicant's intentions may be noble, I must still apply section 25 of the Act, which leads me to conclude that disclosure of the information requested by the Applicant would prejudice the competitive position of the Public Bodies.

[para 28] Certain of the Applicant's submissions are more of an objection to the exception to disclosure based on economic interest and prejudice to a public body's competitive position than they are a contention that the exception does not apply in the present inquiries. She argues that it was not the intention of the Legislature to eliminate

competition and give monopolies to public bodies. She submits that a cornerstone principle of our western economic system is competition, which fosters efficiency and has a positive effect on overall profitability. I do not accord much weight to these arguments, as they appear to question the existence or appropriateness of the exception to disclosure set out in section 25(1)(c)(ii) of the Act in the first place. While legal tests have been developed to ensure that a public body properly applies its discretion under section 25, that section expressly allows information to be withheld if disclosure could reasonably be expected to prejudice a public body's competitive position.

[para 29] The Applicant argues that the information in the records at issue should be disclosed because one of the purposes of the Act, set out in sections 2(a) and 6(1), is to allow a person a right of access to the records in the custody or under the control of a public body. However, section 2(a) states that this right is subject to limited and specific exceptions set out in the Act, and section 6(2) states that the right of access does not extend to information excepted from disclosure. In other words, the Act clearly provides for exceptions to the general right of access to records, and one such exception is under section 25.

[para 30] The Applicant also cites the Public Bodies' duty to make every reasonable effort to assist her under section 10(1) of the Act. However, that duty does not extend to providing access to information where it may be withheld under the Act.

c) *Information eventually made public*

[para 31] The Applicant submits that she is entitled to the requested information because it eventually becomes public information, so the issue is merely a matter of timing. She argues that the intent of section 25 of the Act is to protect confidential information that will never be disclosed to the public.

[para 32] I note that it is not reasonable to expect that harm will result from disclosure of information already in the public domain (Order 96-016 at para. 22; Order 2001-025 at para. 49). However, in these inquiries, the Applicant wishes to obtain certain information that is *not yet* in the public domain (e.g., advance notice of book selections) and certain information that will *never* be in the public domain (e.g., book requisitions submitted by instructors).

[para 33] Section 25 of the Act may apply even where some of the information requested by an applicant has already been made public, or will be made public, as the disclosed information may not necessarily be similar to the undisclosed information (Order 98-019 at para. 31). Here, the advance information requested by the Applicant is information regarding the supply and demand for university books, as determined by course offerings, reading materials chosen by instructors, and the number of students enrolled or expected to be enrolled in classes. This information is not necessarily the same information that is eventually made public when the required and recommended reading for courses is approaching finalization. The Public Bodies may adjust book

selections, depending on current inventories, availability from publishers and amendments by instructors.

[para 34] The Public Bodies acknowledge that more and more information regarding courses and book selections becomes publicly available as the beginning of a university session approaches. However, the information requested by the Applicant is not publicly available further in advance of a university session, when the Public Bodies are still in the preliminary process of choosing and ordering books. Certain information, such as book requisitions from instructors, is never made public. I find that the information that the Public Bodies wish to withhold and the information that they eventually make public is sufficiently dissimilar that the Applicant cannot successfully assert that she is entitled to the information because it eventually becomes public.

[para 35] It is not necessary for information to be intended to remain confidential in order for it to fall under section 25(1)(c)(ii) of the Act. The fact that the Public Bodies eventually make book selections known to the public, and students in particular, does not detract from my conclusion that providing this information in advance to the Applicant would prejudice their competitive position. Businesses must necessarily advise their target markets at some point of the items they have for sale. However, until that time, businesses are perfectly justified in keeping information confidential as they set their strategies. Here, the Public Bodies indicate that during the book requisition process, buyback quantities and inventories are reviewed, used book wholesalers and publishers are contacted, and purchase orders are generated. To provide the Applicant with the book requisition forms submitted by instructors, or disclose to her the books intended for purchase before that information is also disclosed to the target market of students, would reduce the Public Bodies' competitive advantage.

[para 36] It has been held that the competitive position of a public body may be prejudiced if the disclosure of information will reveal sufficient internal information about its operations and strategic plans (Order 98-019 at para. 29). Even if some of the information requested by an applicant will inevitably be made public, a public body's competitive position may still be prejudiced if others know what the public body thinks about its options, the priority that is assigned to each option, what options have been or are being discounted, and the attention that each option is receiving or has received (Order 98-019 at para. 31). Here, the Applicant's knowledge of what is actually occurring in the marketplace (e.g., what books are for sale once that information becomes publicly available) is not that same as knowing what might occur (e.g., what books may or may not be needed by students, depending on instructors' selections). The Public Bodies are entitled to withhold information about their strategies and options regarding book selections, purchases and sales, even if they eventually make their decisions public.

[para 37] In short, it is disclosure of the "advance" and never published information requested by the Applicant that I find has a reasonable expectation of prejudicing the competitive position of the Public Bodies, although I discuss which information in particular in a later section of this Order. Once the information becomes publicly accessible, the Public Bodies may then rely on section 29(1)(a) of the Act to refuse to

disclose the information to the Applicant on the basis that the information is readily available to the public. I also discuss this in greater detail in a later section of this Order.

2. The general rule under section 25

[para 38] I have concluded that information in the records at issue falls within section 25(1)(c)(ii) of the Act on the basis that disclosure could prejudice the competitive position of the Public Bodies. However, even where evidence has been presented to show that information falls within one of the paragraphs of section 25(1), the public body must still present evidence to show that the information falls within the general rule under section 25(1) (Order 96-013 at para. 43; Order 96-012 at para. 53). The Public Bodies must establish that the disclosure of the information could reasonably be expected to harm their economic interests.

[para 39] The party who is asserting harm under section 25 of the Act must provide objective evidence of three things: (i) there must be a clear cause and effect relationship between the disclosure and the alleged harm; (ii) the disclosure must cause harm and not simply interference or inconvenience; and (iii) the likelihood of harm must be genuine and conceivable (Order F2004-014 at para. 42).

[para 40] I find that the Public Bodies have met the general test. The Public Bodies benefit commercially from their bookstores and therefore have an economic interest in them. There is a direct link between disclosure of the particular records and prejudice to their competitive position (Order 97-005 at para. 25), in that the Applicant's knowledge of the books intended for sale by the Public Bodies will allow her to offer the same books to the same finite market of students. This will give her a competitive advantage and give the Public Bodies a competitive disadvantage.

[para 41] I find that disclosure will cause more than interference or inconvenience, as it may reasonably be expected to diminish the Public Bodies' sale of used books, which is a significant part of the operations of their bookstores. The bookstores must make a profit in order to meet their fiscal obligations.

[para 42] The likelihood of harm is genuine and conceivable in that the prejudice to the Public Bodies' competitive position is more than a possibly chance occurrence, and they have provided detailed evidence to support the link between disclosure and harm (Order 96-014 (Adjudication Order No. 1) at p. 21 or para. 33). I find that the evidence demonstrates a probability for harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever (Order 98-005 at para. 57; Order 2000-009 at para. 44). It is genuine and conceivable that disclosure of the requested information to the Applicant will cause economic harm by cutting into the Public Bodies' sales of used books and reducing their profit margins.

[para 43] With the exception of certain information that I discuss in the next section of this Order, I conclude that the information in the records at issue falls generally within paragraph 25(1)(c)(ii) of the Act because it is information the disclosure of which could

reasonably be expected to prejudice the competitive position of the Public Bodies. I also conclude that the general rule in section 25(1) has been met, in that there is a reasonable expectation of harm to the economic interest of the Public Bodies.

[para 44] Given the foregoing conclusions, it is not necessary for me to determine whether the records at issue also consist of financial or commercial information in which the Public Bodies have a proprietary interest or a right of use and that has, or is reasonably likely to have, monetary value [paragraph 25(1)(b) of the Act], or consisting of information the disclosure of which could reasonably be expected to result in financial loss [paragraph 25(1)(c)(i)].

3. The specific information excepted from disclosure

[para 45] The test for disclosure of records under section 25(1) of the Act is not a “class test” in that each record must be judged on its own (Order 97-005 at para. 51). In other words, I must determine what information in the records at issue is specifically excepted from disclosure under section 25, and whether the Applicant may remain entitled to other information.

a) Types of information in the records at issue

[para 46] The information in the records at issue consists of what I shall call “course information,” “enrolment information” and “book information.” “Course information” is information regarding the courses and classes being offered by the Public Bodies. “Enrolment information” is the maximum/estimated and actual student enrolment in a particular course or class. “Book information” is information regarding the required, recommended and optional books associated as reading for a particular course or class. In the Applicant’s request to the U of C, book information specifically includes the author, title, edition, publisher and ISBN (international standard book number).

[para 47] Due to the volume of requested information, the Public Bodies provided samples of the responsive records. They primarily consist of printed web pages showing the results of sample online searches for course information, enrolment information and book information, through the main search engines of the Public Bodies (“Bear Tracks”, “InfoNet” and the respective bookstore search engines). The Applicant specifically requested the information in electronic format, but I do not believe that this affects my analysis of what specific information falls under section 25 of the Act, as the contents of the electronic information would be the same as or sufficiently similar to the information in the printed samples.

[para 48] The records that result from the searches for information and that are responsive to either or both of the Applicant’s access requests (whether in printed or electronic format) fall into three main categories: they show course information alone (e.g., a list of courses or classes being offered), they link course information to enrolment information (e.g., indicate how many spaces were originally available or remain in a

particular class), or they link course information to book information (e.g., indicate what books are required, recommended or optional for a particular class).

[para 49] Other responsive records submitted by the Public Bodies are sample electronic and paper book requisitions submitted by instructors, as well as follow-up amendments to those requisitions.

[para 50] Although the Public Bodies did not provide samples, I understand that responsive records would also include information available on various faculty and department websites, which information may be the same as, or supplement, the information available through the main search engines. Further, I understand that the bookstores and offices of the registrar of the Public Bodies would have electronic and paper records of certain information requested by the Applicant that has not yet or will never become available online. However, I do not believe that I need to specifically see any of the aforementioned records, as in order to be responsive to either or both of the Applicant's requests to the Public Bodies, they would necessarily consist of course information alone, course information linked to enrolment information, or course information linked to book information.

b) Application of section 25 to the information

[para 51] I find that unpublished book information falls under section 25(i)(c)(ii) of the Act (prejudice to competitive position), as it would disclose to the Applicant the books that the Public Bodies are intending to acquire or have acquired with the intention of selling to students generally or students enrolled in particular courses and classes. The information would allow the Applicant to sell and advertise for the same books expected to be needed by students for an upcoming term. Some of the book information also shows the price the Public Bodies charge for particular used books, the disclosure of which would enable the Applicant to competitively determine or adjust her prices for the same books.

[para 52] With respect to course and enrolment information, it may be argued that knowledge of these categories of information, without accompanying book information, would still enable the Applicant to compete more advantageously with the Public Bodies, as she may also know book information from other sources or can predict what books students will need for a particular upcoming course.

[para 53] However, it is the specific information itself that must be capable of causing the harm if disclosed (Order 96-016 at para. 13). I do not find that disclosure of course or enrolment information itself would prejudice the competitive position of the Public Bodies. There is an insufficient link between the Applicant's knowledge of the courses being offered, or the number of students enrolled in them, and a reduction in the sale of books from the bookstores of the Public Bodies. I find that the harm from that disclosure is not genuine and conceivable. Disclosure of course and/or enrolment information alone therefore does not fulfill the general rule in section 25(1) of the Act, as it could not reasonably be expected to harm the economic interests of the Public Bodies.

[para 54] I conclude that the specific information that is excepted from disclosure under section 25(1)(c)(ii) of the Act is book information contained in any record that is not publicly available. The record must not be publicly available, as otherwise disclosure to the Applicant cannot be said to prejudice the competitive position of the Public Bodies.

[para 55] As I defined above, “book information” is information regarding the required, recommended and optional books associated as reading for a particular course or class. Although records containing book information, such as book requisition (adoption request) forms, also contain the related course information, and possibly enrolment information as well, I find that the entire record does not have to be disclosed. Where a record links book information to course and/or enrolment information, it is the Applicant’s knowledge of the link between those types of information that prejudices the Public Bodies’ competitive position.

[para 56] More importantly, the course and/or enrolment information that responds to the Applicant’s specific request (e.g., for a “complete list of classes being offered”) is available in other records so that it would be superfluous to provide her with the course and/or enrolment information remaining in a record that also contains book information. The Applicant asked for certain *information*, as opposed to every *record* containing that information. This means that, assuming the Applicant were entitled to course and/or enrolment information, the Public Bodies could provide the information in another record. Moreover, the course and/or enrolment information remaining in records containing book information would not fully respond to the Applicant’s request for a “complete list” of course and enrolment information. The Public Bodies’ course and enrolment information is not always found in a record linking that information to book information. For instance, not all instructors submit book requisitions for the classes that they are teaching.

4. The Public Bodies’ exercise of discretion

[para 57] Section 25(1)(c)(ii) of the Act is a discretionary (“may”) provision in that, even if the section applies, a public body has a choice as to whether to disclose or withhold the information. To exercise its discretion properly, a public body must show that it considered the objects and purposes of the Act and that it did not exercise its discretion for an improper or irrelevant purpose (Order 2000-031 at para. 26; Order F2005-027 at para. 35).

[para 58] The Public Bodies indicate that their respective access and privacy advisors/coordinators carefully considered the nature of the information requested by the Applicant, and the object and purposes of the Act, when determining whether the Public Bodies should disclose or withhold the information under section 25. They state that they did not withhold the information for an improper or irrelevant purpose but instead to protect their legitimate economic interests. On review of the affidavit evidence presented by the Public Bodies and the factors that they suggest weigh in favour of withholding the information, I am satisfied that the Public Bodies properly exercised their discretion to withhold the information falling within section 25(1)(c)(ii) of the Act.

[para 59] I conclude that the Public Bodies were authorized and properly exercised their discretion to refuse to disclose their unpublished book information under section 25(1)(c)(ii) of the Act, on the basis that disclosure could reasonably be expected to prejudice their competitive position. They have discharged their burden under section 71(1) by proving that the Applicant has no right of access under the Act to that requested information.

5. Course and/or enrolment information alone

[para 60] I concluded above that course and enrolment information is not excepted from disclosure under section 25(1)(c)(ii) of the Act. I also found, however, that the Public Bodies are not required to disclose the course and/or enrolment information remaining in records also containing book information, as the course and/or enrolment information is available and more complete elsewhere. I must now determine the extent to which the Applicant is entitled to records containing course and/or enrolment information alone. The answer depends on what information she asked to obtain from each of the Public Bodies.

[para 61] The two separate inquiries have been treated jointly thus far, as the question of whether there would be economic harm to the Public Bodies under section 25 of the Act, if information were disclosed, raised the same considerations in respect of both of them. The responsive records of the Public Bodies were sufficiently similar to address that particular issue. It is at this point, however, that I find that the analyses in the inquiries diverge. The Applicant's entitlement to course and enrolment information from the two Public Bodies differs because she asked for different information from each of them.

[para 62] In her information request to the U of C, the Applicant asked for the following:

A list of all books adopted for use at the University of Calgary for the fall semester 2005, including the following information: (i) department/course; (ii) section; (iii) professor; (iv) estimated/actual enrollment; (v) author; (vi) title; (vii) edition; (viii) publisher; (ix) ISBN [international standard book number]; and (xi) status (required, recommend[ed], optional).

Copies of individual adoption request forms as submitted by professors to the bookstore.

[para 63] I have already concluded that the adoption request (book requisition) forms do not have to be disclosed by the Public Bodies. As for the other requested information, the Applicant asked for a list of all books adopted for use at the U of C for each particular semester and then included specific information associated with that main request. She did not, however, ask for course and/or enrolment information by itself (i.e., without any book information). Her entire request was tied to book information so that every responsive record would contain book

information. I therefore find that records containing course and/or enrolment information alone would not be responsive to her request to the U of C. The U of C therefore has no obligation to provide them.

[para 64] In her information request to the U of A, the Applicant asked for the following:

*Complete list of Classes being offered per session (Fall, Winter, Spring and Summer) and required and recommended books for each of those classes.
[...]*

Complete list of Courses offered, the maximum enrollment per course and the actual enrollment per course for each session... [...]

[para 65] The above request may be divided into three parts in that the Applicant asks for (1) a complete list of classes being offered per session, (2) the required and recommended books for each of those classes, and (3) a complete list of courses with the maximum and actual enrolment per course. I have already concluded that unpublished information regarding the required and recommended books for each class is excepted from disclosure. Unlike the request to the U of C, however, I cannot construe the request to the U of A, as a whole, as necessarily requiring book information in each responsive record. The Applicant specifically requested course and enrolment information alone without any accompanying book information. She requested a complete list of courses/classes offered and the maximum and actual enrolment per course.

[para 66] I will therefore address the U of A's records containing course and/or enrolment information alone in the next section of this Order.

B. Did the Public Bodies properly apply section 29 of the Act (information available to the public) to the records/information?

[para 67] I have already concluded that the Public Bodies properly applied section 25 of the Act (economic interest of a public body) in refusing to disclose unpublished information regarding the required, recommended and optional books associated as reading for a particular course or class. I have also concluded that records of the U of C that contain only course and/or enrolment information do not have to be disclosed, as they are not responsive to the Applicant's specific information request to that public body.

[para 68] It is now necessary for me to consider whether the Public Bodies properly applied section 29 of the Act (information available to the public) to the remaining records/information. The relevant provisions of section 29 are as follows:

29(1) The head of a public body may refuse to disclose to an applicant information

(a) that is readily available to the public,

...

(b) that is to be published or released to the public within 60 days after the applicant's request is received.

(2) The head of a public body must notify an applicant of the publication or release of information that the head has refused to disclose under subsection (1)(b).

(3) If the information is not published or released within 60 days after the applicant's request is received, the head of the public body must reconsider the request as if it were a new request received on the last day of that period, and access to the information requested must not be refused under subsection (1)(b).

1. Application of section 29 to the information

[para 69] I will first address the application of section 29 of the Act to records containing book information (which are responsive to the Applicant's requests to both Public Bodies) and then to records containing course and/or enrolment information alone (which are responsive to the Applicant's request to the U of A only).

a) Book information

[para 70] The Public Bodies indicate that their bookstore websites contain information regarding the books associated with each course or class starting weeks in advance of a university session, and that the information is constantly updated over the course of the next several weeks. Individual faculty and department websites may also show book information.

[para 71] The book information on the bookstore, faculty and department websites is accessible to any member of the public. I therefore find that this information is readily available to the public under section 29(1)(a) of the Act. Accordingly, once records containing book information are available online, the Public Bodies may rely on section 29(1)(a) to refuse to disclose them to the Applicant. Until that time, as I concluded earlier, the Public Bodies may rely on section 25(i)(c)(ii) (prejudice to competitive position) to withhold the book information. This means that, regardless of the point in time, the Public Bodies may refuse to disclose to the Applicant any of their book information.

[para 72] The Applicant specifically requested each book's ISBN (international standard book number) from the U of C. I note that the U of C's website does not indicate ISBNs. However, I already concluded that unpublished book information may be withheld by the Public Bodies under section 25(1)(c)(ii) of the Act (prejudice to competitive position). The Applicant is not entitled to obtain the ISBNs from the U of C,

as disclosure of that information would prejudice the U of C's competitive position by making it easier for her to order the same book from the publisher and then compete for the sale of that book. Even if I am wrong in concluding that disclosure of this specific information would prejudice the U of C's competitive position, I find that it may also be withheld under section 29(1)(a) (information available to the public). If an individual knows the author and title of a book, which is information indicated on the U of C website, he or she may conduct an internet search or telephone a library or publisher in order to obtain the ISBN.

b) Course and/or enrolment information

[para 73] I concluded earlier that the Applicant did not request course and/or enrolment information alone (i.e., without any accompanying book information) from the U of C. I therefore do not need to consider whether section 29 of the Act applies to that category of information in respect of that Public Body.

[para 74] The Applicant requested that the U of A provide course and enrolment information four times a year and, in a subsequent letter dated June 29, 2005, added that she wished to receive notice of the changes and updates on a weekly basis. She argues that section 29 cannot be used to refuse disclosure because section 29 requires the information to be published or released within 60 days, and at certain times she would like the information more than 60 days in advance of the time that she believes it becomes public.

[para 75] I do not accept this argument. First, section 29 of the Act does not require information to be publicly available within 60 days in order for a public body to refuse to disclose it. It requires the public body to reconsider the request if the information is not published or released within 60 days, in which case the public body cannot again refuse to disclose the information on the basis that it will become publicly available [subsection 29(3)].

[para 76] Second, the Applicant's argument incorrectly assumes that she is entitled to obtain the information within 60 days of the dates that she herself selects. It is not up to an applicant to set the response dates for a continuing request under section 9 of the Act. Under section 9(2), the head of a public body granting a request that continues to have effect for a specified period of up to two years must provide the applicant a schedule showing dates on which the request will be deemed to have been received and explaining why those dates were chosen. Here, if the U of A were to grant the Applicant's request, it would be able to choose response dates that coincide with the times that the requested information is readily available to the public and then advise the Applicant that she may obtain the information herself on those dates. It is not obligated to provide the Applicant with the requested information on her chosen dates, although she may ask the Commissioner to review the Public Body's proposed schedule, as indicated in section 9(2)(b).

[para 77] Third, I find that the U of A's course and enrolment information is always readily available to the public, within the meaning of section 29(1)(a) of the Act, so that the timing of the request for that particular information is irrelevant. (Book information, by contrast, is not always publicly available, but I have already found that unpublished book information is excepted from disclosure under section 25(1)(c)(ii).)

[para 78] The U of A states that, as course information is received from faculty or decisions regarding course offerings are made, its registrar's office continuously updates the information available online through "Bear Tracks". Enrolment information is instantaneously updated when students add and drop courses through the same website. The updating happens throughout the year, although there is more activity as a university session approaches.

[para 79] The website showing the U of A's course and enrolment information is accessible to the public, as not only students, but "guests" too, may access the information. I understand that all of the course and enrolment information requested by the Applicant is available through "Bear Tracks", even though some of it may be repeated on individual department and faculty websites. In other words, an individual needs only to access "Bear Tracks" in order to obtain the most current course and enrolment information.

[para 80] Through the search engine, an individual may obtain a complete list of all of the sections of a particular course being offered by the U of A. The search results indicate the spaces remaining in a class and a link provides the maximum enrolment. The U of A acknowledges that actual student enrolment in a particular class is not expressly stated online, but it can be calculated if an individual subtracts the spaces remaining in each class from the maximum enrolment indicated. As the desired information is ascertainable from the stated information itself, with no need for any additional information or resources, I find that the existing information is sufficiently responsive to the Applicant's request for "actual enrolment." In other words, actual enrolment information is readily available to the public. Alternatively, I conclude that the U of A is not required to create a record of that information for the Applicant, as discussed in the next section of this Order.

[para 81] Given the continuously updated and therefore current course and enrolment information to which the public has online access throughout the year, I find that the U of A's course and enrolment information is readily available to the public under paragraph 29(1)(a) of the Act. This is so, regardless of the response dates that might be set for the Applicant's continuing request under section 9 of the Act. In other words, I find that the most current course and enrolment information requested by the Applicant is continually publicly available. If the information is not publicly available (courses and classes are just being contemplated for instance), then it is not information about the courses and classes being "offered", as requested by the Applicant. For a course or class to be offered, it must necessarily be known to the public.

[para 82] There may be a short gap between the time that certain information, such as the existence of a new course, is received by the registrar's office and the time that it is entered online. However, I do not find that this affects my conclusion that the U of A's course and enrolment information is "readily available to the public." Where information changes daily, a public body must be accorded some time to prepare the information for public access without the information instead falling within paragraph 29(1)(b) of the Act, on the basis that it is not readily available but will be published or released within 60 days. It would be nonsensical to require the U of A to notify the Applicant, under section 29(2), that a small amount of the course and enrolment information that she wishes to obtain will be publicly available within a day or two.

2. The Public Bodies' exercise of discretion

[para 83] Section 29(1)(a) of the Act is a discretionary ("may") provision in that, even if the section applies, a public body has a choice as to whether to disclose or withhold the information. To exercise its discretion properly, a public body must show that it considered the objects and purposes of the Act and that it did not exercise its discretion for an improper or irrelevant purpose (Order 2000-031 at para. 26; Order F2005-027 at para. 35).

[para 84] The Public Bodies indicate that their respective access and privacy advisors/coordinators considered the extent to which the information requested by the Applicant is available on their websites when determining whether the Public Bodies should disclose or withhold the information under section 29. On review of the affidavit evidence presented by the Public Bodies, I believe that the Public Bodies considered the object and purposes of the Act and did not withhold the information for an improper or irrelevant purpose. I am therefore satisfied that they properly exercised their discretion to withhold the information falling within section 29(1)(a) of the Act.

[para 85] I conclude that the Public Bodies were authorized and properly exercised their discretion, under section 29(1)(a) of the Act, to refuse to disclose their book information that is available online, on the basis that it is readily available to the public. The U of A was also authorized to refuse to disclose its course and enrolment information under section 29(1)(a) on the basis that it is readily available to the public. The Public Bodies have discharged their burden under section 71(1) by proving that the Applicant has no right of access under the Act to the requested information.

C. Does section 10(2) of the Act require the Public Bodies to make a record for the Applicant?

[para 86] As I have concluded that the Public Bodies properly applied section 25 (economic interest of a public body) and section 29 (information available to the public) in refusing to disclose all of the information in the records at issue, it only remains necessary for me to consider whether section 10(2) of the Act requires the U of A to create a record for the Applicant of the number of students actually enrolled in courses, in the event that I am wrong in concluding above that the information available online is

responsive to the Applicant's request. It will be recalled that the publicly accessible information online shows the maximum number of spaces in a course and the number of remaining spaces, but does not expressly indicate the actual enrolment.

[para 87] Section 10(2) of the Act reads as follows:

10(2) The head of a public body must create a record for an applicant if

- (a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and*
- (b) creating the record would not unreasonably interfere with the operations of the public body.*

[para 88] The public body has the burden of proving that it does not have a duty to create a record under section 10(2) of the Act (Order 2001-016 at para. 34). The U of A indicates that if actual enrolment figures were to be provided in a record for the Applicant, it would take an estimated two days of staff time within the registrar's office to program and test a query of the database, and a download of the information would take several hours to run and verify. The U of A adds that, after the application of fixes or upgrades to the information management system, further programming and testing would be required.

[para 89] I find that a record of the actual enrolment of students in courses can be created using the U of A's normal computer hardware and software and technical expertise under paragraph 10(2)(a) of the Act. However, I do not find that paragraph 10(2)(b) is satisfied, as creating the record would unreasonably interfere with the operations of the public body.

[para 90] The amount of time and resources that would be required to create the record in question is not as great as in other inquiries where it was found that creating a record would unreasonably interfere with the operations of the public body. However, I must consider what is reasonable in the circumstances of this inquiry. "Reasonable" means "fair, proper, just, moderate, suitable under the circumstances; fit and appropriate to the end in view; not immoderate or excessive" (Order 98-002 at para. 88).

[para 91] The Applicant may indirectly obtain the actual number of students enrolled in a particular class from the U of A's website by subtracting the spaces remaining in each class from the maximum enrolment indicated. I believe that the creation of a record that provides the information directly would unreasonably interfere with the U of A's operations, as the amount of time and effort involved would not be fit and appropriate to the end in view and would be immoderate or excessive under the circumstances.

[para 92] To require registrar staff to spend approximately two days preparing the record is not reasonable when the Applicant can obtain the specific information that she requires in respect of a particular class much more quickly online by making a calculation herself. (It might also be noted that if the Public Body were to create a record for the Applicant, it would be entitled to charge her fees in accordance with section 93(1) of the Act and section 10(4) and Schedule 2 of the *Freedom of Information and Protection of Privacy Regulation*.) Moreover, given continuous enrolment changes made by students online, the information that the Applicant may obtain online is current, whereas any record prepared by the registrar's office would soon be outdated.

[para 93] I recognize that the Applicant requested a "complete list" of courses and accompanying enrolment information whereas the samples of responsive records provided by the U of A are in respect of individual courses or classes. It appears that the course and enrolment information requested by the Applicant may have to be obtained by her from more than a single web page or set of search results. However, section 10(2) of the Act does not require that a record be created in the format or manner requested by an applicant (Order 2001-033 at paras. 17 and 18). Here, I find that the Applicant already has access to a "complete list" of course and enrolment information, and therefore a record of it, in a reasonable format online. The same might even be said for the information regarding actual enrolment, in that information regarding course capacity and space remaining might simply be presented in a different format or manner than information expressly stating actual enrolment.

[para 94] I conclude that section 10(2) of the Act does not require the U of A to create a record for the Applicant indicating the actual number of students enrolled in each of its courses and classes.

V. ORDER

[para 95] I make this Order under section 72 of the Act.

[para 96] I find that the Public Bodies properly applied section 25 of the Act (economic interest of a public body) in refusing to disclose to the Applicant information regarding the required, recommended and optional books associated as reading for their courses and classes and that is not yet, or never will be, available to the public.

[para 97] I find that the Public Bodies properly applied section 29 of the Act (information available to the public) in refusing to disclose to the Applicant the remaining information.

[para 98] I accordingly confirm that the Public Bodies were authorized to refuse the Applicant access to the records/information.

[para 99] In the event that the absence of online information expressly indicating the actual number of students enrolled per course at the U of A means that the publicly available information is not sufficiently responsive to the Applicant's request, I find that

section 10(2) of the Act does not require the U of A to create a record of that information for the Applicant.

Wade Riordan Raaflaub
Adjudicator