ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2008-018

January 12, 2009

EDMONTON POLICE SERVICE

Case File Number F3801

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Summary: The Applicant requested copies of records relating to the operation of red light cameras and records containing criticisms of red light cameras from the Edmonton Police Service (the Public Body). The Public Body provided some records but withheld a record entitled the "Red Light Client Training Manual" (the manual) under section 16 of the *Freedom of Information and Protection of Privacy Act* (the Act). The Public Body challenged the jurisdiction of the Commissioner to conduct the inquiry.

The Adjudicator found that she had jurisdiction to conduct the inquiry. The Adjudicator found that the manual contained the technical information of a third party. However, the Adjudicator found that section 16 of the Act did not apply to the technical information in the manual, as the evidence did not support a finding that the manual had been supplied in confidence or that significant harm to the competitive position of the third parties could reasonably be expected to result from disclosure of the manual. She ordered the Public Body to disclose the manual to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 2, 16, 20, 21, 53, 67, 69, 72; *Personal Information Protection Act* c. P-6.5, s. 50(5) *Police Act* R.S.A. 2000 c. P-17, s. 44; Police Service Regulation Alberta Regulation 356/1990 s. 7; *Interpretation Act* c. I-8, s. 10 **Canada:** *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, s. 3; *Copyright Act* R.S.C. 1985 c. C-42, ss. 3, 32.1

Authorities Cited: AB: Orders 99-018, 2000-017, F2004-013, F2005-011, F2006-031, F2007-031 **BC:** Order No. 01-36 **UK:** Decision FS50083358

Cases Cited: *Kellogg Brown and Root v. Alberta (Information and Privacy Commissioner)*, 2007 ABQB 499; *Manyfingers v. Calgary (City) Police Service*, 2006 ABCA 162; *Bridgeland-Riverside Community Association v. City of Calgary* [1982] A.J. No. 9692; *BMG Canada Inc. v. Doe*, 2005 FCA 193; *Canada (Information Commissioner) v. Canada (Prime Minister)*, [1992] F.C.J. No. 1054; *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515

I. BACKGROUND

[para 1] On May 11, 2006, the Applicant requested copies of the Public Body's records relating to the operation of traffic light cameras and criticisms of the operation of these cameras. He clarified on June 21, 2006 that the aspect of the request relating to "criticisms of the operation of these cameras" referred to information about the reliability or accuracy of these cameras in terms of capturing drivers who do not stop for red lights.

[para 2] The Public Body responded to the Applicant on July 31, 2006. The Public Body provided four pages of record entitled "Automated Traffic Enforcement Training Guidelines" and five pages of responsive records from the EPS Policy and Procedures manual. The Public Body withheld the records at issue on the basis of section 16 and subsections 20(1)(a) and (c) of the *Freedom of Information and Protection of Privacy Act* (the Act).

[para 3] On August 24, 2006, the Commissioner received the Applicant's request for review of the Public Body's decision. On August 25, 2006, the Commissioner advised the Public Body and the Applicant that he was authorizing mediation and that he anticipated that the review would be completed by November 23, 2006, 91 days following receipt of the request for review.

[para 4] Mediation was unsuccessful. On March 4, 2007, the Applicant requested that the matter be scheduled for inquiry.

[para 5] On May 1, 2007, the Director of Adjudication advised the Public Body that the Applicant had requested that the matter be scheduled for inquiry.

[para 6] The Commissioner formally extended the time for completing the inquiry on August 3, 2007. The anticipated date of completion was February 1, 2009.

[para 7] On September 6, 2007, the Public Body advised the Commissioner that it wished to rely on section 21(1)(b) at the inquiry. On February 28, 2008, the Public Body advised the Commissioner that it would not be relying on section 20 of the Act in its arguments.

[para 8] On January 24, 2008, a notice of inquiry was sent to the Public Body and to the Applicant.

[para 9] On February 29, 2008, ACS Public Sector Solutions (ACS) requested standing as a person affected by the request for review under section 67 of the Act on the basis that disclosing its information may disclose information within the meaning of section 16 of the Act. ACS chose to participate and is a party to this inquiry.

[para 10] Gatsometer B.V. was identified as a person potentially affected by the request for review and was sent a copy of the request for review.

[para 11] On March 4, 2008, a notice of inquiry was sent to ACS. The notice states:

> Extension of Time Limit
> As provided by section 69(6) of the *Freedom of Information and Protection of Privacy Act* the Commissioner has authorized me to notify you that he is extending the time for completing the review in this case. The anticipated date for completion of the review is February 1, 2009.

[para 12] On March 18, 2008, the Public Body requested that a preliminary issue relating to the Commissioner's jurisdiction be added to the issues of inquiry. The Public Body requested additional time to prepare submissions on the issue.

[para 13] On April 15, 2008, a notice of inquiry was sent to Gatsometer B.V. This notice also explained that the Commissioner was extending the time for completion of the inquiry and that the expected date of completion was February 1, 2009.

[para 14] ACS, the Public Body, and the Applicant provided initial submissions. The Applicant and ACS also provided rebuttal submissions. Although provided with notice of the inquiry, Gatsometer B.V. did not provide submissions or participate. However, ACS made submissions on its behalf.

[para 15] In its submissions, the Public Body advised that it was no longer relying on sections 20 or 21 of the Act to withhold the manual.

II. RECORDS AT ISSUE

[para 16] The Red Light Camera Client Training Manual is at issue. This manual consists of materials prepared by ACS (pages 1 – 121) and Gatsometer manuals IM-E0207 and IM-E0306 (pages 123 – 263), which are about the use of the 36mST-MC-3LG and MC-3LG-115v-kmh red light camera products respectively. In this Order, I will refer to these records collectively as "the manual".

III. ISSUES

Preliminary Issue: Did the Commissioner or his delegate lose jurisdiction on the basis of alleged non-compliance with section 69(6) of the Act?

[para 17] In its submissions, ACS argued that the manual is "non-responsive" to the Applicant's access request. I will therefore consider this argument under Issue A:

Issue A: Is the Red Light Client Training Manual within the scope of the Applicant's access request?

Issue B: Does section 16 of the Act (disclosure harmful to business interests) apply to the records / information?

[para 18] As the Public Body confirmed that it is no longer relying on sections 20 or 21(1)(b), I will not consider whether sections 20 or 21(1)(b) apply to the manual.

IV. DISCUSSION OF ISSUES

Preliminary Issue: Did the Commissioner or his delegate lose jurisdiction on the basis of alleged non-compliance with section 69(6) of the Act?

[para 19] Section 69 establishes the Commissioner's authority to conduct an inquiry and the process to be followed during an inquiry. It states:

> *69(1) Unless section 70 applies, if a matter is not settled under section 68, the Commissioner must conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry.*
>
> *(2) An inquiry under subsection (1) may be conducted in private.*
>
> *(3) The person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review must be given an opportunity to make representations to the Commissioner during the inquiry, but no one is entitled to be present during, to have access to or to comment on representations made to the Commissioner by another person.*
>
> *(4) The Commissioner may decide whether the representations are to be made orally or in writing.*
>
> *(5) The person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review may be represented at the inquiry by counsel or an agent.*
>
> *(6) An inquiry under this section must be completed within 90 days after receiving the request for the review unless the Commissioner*
>
> *(a) notifies the person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review that the Commissioner is extending that period, and*
> *(b) provides an anticipated date for the completion of the review.*

[para 20] The Public Body and ACS argue that the Commissioner or his delegate has lost jurisdiction to conduct this inquiry. They take the view that inquiries must be completed within 90 days after receiving a request for review unless the Commissioner extends the 90-day period within that time frame. Further, they contend that the Commissioner did not extend the 90-day period for completing the inquiry within the 90-day period. The Public Body and ACS rely on *Kellogg Brown and Root v. Alberta (Information and Privacy Commissioner)*, 2007 ABQB 499 as authority for the position that the Commissioner has lost jurisdiction.

[para 21] The Public Body also brought to my attention a number of cases, in addition to *Kellogg Brown and Root,* in which courts have found provisions to be mandatory or directory.

[para 22] The Applicant argues that failure to meet the time limit in section 69(6) is at most a technical delay, as there is nothing in the Act to prevent the Applicant from making another request for the information. He argues that failing to conduct the inquiry would bring the process into disrepute. He relies on *Manyfingers v. Calgary (City) Police Service*, 2006 ABCA 162.

[para 23] An important distinction between *Kellogg Brown and Root* and the present case, other than that *Kellogg Brown and Root* is a decision interpreting section 50(5) of the *Personal Information Protection Act* (PIPA), rather than section 69(6) of the Act, is that the Commissioner did not formally extend the time to complete the inquiry in that case. In the case before me, the Commissioner formally provided notice to the parties that he was extending the time to complete the inquiry on August 3, 2007 and provided an anticipated date of completion for the inquiry. The issue for me to decide, therefore, is whether the Commissioner complied with section 69(6) when he extended the 90-day period.

[para 24] In *Manyfingers v. Calgary (City) Police Service*, 2006 ABCA 162, on which the Applicant relies, the Court of Appeal considered whether the Calgary Police Commission could extend the time limit for laying charges after the statutory time limit had expired. Section 7(4) of the Police Service Regulation is silent as to whether a commission is required to extend the time limit before or after the expiry of the time limit in section 7(1).

[para 25] Section 7 of the Police Service Regulation states, in part:

> *7(1) A police officer shall not be charged with contravening section 5 at any time after 6 months from the day that a complaint is made in accordance with section 43 of the Act…*

> *(4) Notwithstanding that time limits are prescribed under this section, the commission may, if it is of the opinion that circumstances warrant it, extend any one or more of those time limits.*

[para 26] The Court of Appeal found that an overly technical approach to limitation periods did not accord with section 10 of the *Interpretation Act* R.S.A. 2000 c. I-8, which states:

> *10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.*

[para 27] Côté J.A. noted:

> The question is whether the power in the Regulations to extend the time to lay charges can be exercised after the time has expired. The appellant submits that it cannot. The Regulation is silent on the question, saying nothing about the time of such an application or decision.
>
> The appellant urges upon us the decision of the British Columbia Court of Appeal in *Cameron v. Law Society of British Columbia* (1991) 3 B.C.A.C. 35, 81 D.L.R. (4th) 484. We have two problems with it. The first is that the facts there were much more complex, and therefore we have some trouble extracting from it the propositions suggested by the appellant here. The one possibly applicable general proposition in it which we can find is its suggestion that strict, even technical construction, be given to penal statutes, citing an older English textbook. We do not believe that that is the proper approach to statutory interpretation in Canada today, particularly when the topic is a police discipline proceeding. It is also very hard to reconcile that technical approach with s. 10 of the Alberta *Interpretation Act*, especially its first eight words and its last eight words.

[para 28] The Court of Appeal found that interpreting section 7(4) as preventing a commission from extending the time limit in section 7(1) after the six-month period had expired would bring the police discipline process into disrepute. I adopt the reasoning of the Court of Appeal in *Manyfingers* to the extent that it found it appropriate to consider section 10 of the *Interpretation Act* and to adopt a purposive approach when interpreting a statutory provision that enables an administrative body to extend a limitation period.

[para 29] Section 69(6) states that an inquiry must be completed within 90 days of receiving the request for review unless the Commissioner extends the 90-day period with notice to the parties and provides an anticipated date for completion of the review. As the Commissioner notes in Order F2006-031, the provision does not explain what form notice of the extension of the 90-day period is to take, or, more importantly, *when* the Commissioner is to extend the 90-day period. The placement of the phrase "within 90 days" in the provision indicates that it refers to the completion of the inquiry, and not to the Commissioner's power to extend the 90-day period in subsections 69(6)(a) and (b). I find that there is no express requirement in the legislation for the Commissioner to extend the 90-day period within 90 days of receiving an applicant's request for review. I therefore find that it was open to the Commissioner to extend the time for completing the review and to provide an anticipated date of completion on August 3, 2007.

[para 30] Applying the reasoning of *Manyfingers*, any ambiguity in relation to when the Commissioner may extend the time to complete the inquiry under section 69(6)

should be resolved in a way as to ensure the attainment of the objects of the Act, as required by section 10 of the *Interpretation Act*. The objects of the Act are set out in section 2, which states, in part:

> *2 The purposes of this Act are…*
>
> > *(e) to provide for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act.*

As a purpose of the Act is to provide for independent reviews of decisions made by public bodies under this Act, an interpretation of section 69(6) that ensures that this object is attained is to be preferred over one that does not. Section 69(6) is silent as to when the Commissioner must extend the 90-day period and reading into the provision a requirement to extend the 90-day time period within 90 days would have the effect of defeating a purpose of the Legislature in enacting the Act.

[para 31] In addition, provisions cannot be read in isolation, but in the context of an enactment as a whole. As the Commissioner noted in Order F2006-031, reading a requirement into section 69(6) that the 90-day period must be extended within 90 days would render the Commissioner's duty to conduct an inquiry in section 69(1) nugatory. Section 69(1) states:

> *69(1) Unless section 70 applies, if a matter is not settled under section 68, the Commissioner must conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry. (Emphasis mine)*

[para 32] The Commissioner said in paragraph 120 of Order F2006-031:

> If the effect of section 69(6) is to deprive me of jurisdiction if I do not complete an inquiry within 90 days and do not extend the time, I can avoid my duty by failing to do those things. A duty to conduct an inquiry becomes potentially meaningless if it can be defeated by the decision maker simply failing to conduct the inquiry or failing to extend the time. This leads to the conclusion that my duty to conduct an inquiry under the FOIP Act remains, whether or not the time limit in section 69(6) has been exceeded.

Interpreting section 69(6) as empowering the Commissioner to extend the 90-day period after the expiry of the 90-day period avoids conflict with section 69(1) and is supported by the wording of the provision.

[para 33] The Commissioner formally extended the time limit for completing this inquiry on August 3, 2007 and I find that the Act authorized the Commissioner to do so. Consequently, I have jurisdiction to conduct this inquiry.

[para 34] Further, the Applicant and the Public Body were advised on August 25, 2006 that the Commissioner anticipated that the review would be completed on November 23, 2006. Section 69(6)(b) requires an anticipated date for completion of the

review. The review must therefore include the inquiry, since section 69(6) also speaks to completing an inquiry. I note that in *Kellogg Brown and Root*, Belzil J. said:

> The wording of s. 50(5) clearly signifies that the section was designed to give the Commissioner maximum flexibility and has a built-in saving provision in that if the inquiry cannot be completed within 90 days, the Commissioner merely has to give notice of an anticipated completion date. Not only does the Commissioner control the timing, there is no need to set a definite response time but only an anticipated response time, which provides even more flexibility.

Within 90 days of receiving the request for review, the Commissioner provided an anticipated date of completion. Consequently, I find that the Commissioner complied with the requirement set out by the Court in *Kellogg Brown and Root*, even if the August 3, 2007 letter was late in that it was not sent within 90 days of receipt of the request for review.

[para 35] I have found that the requirements of section 69(6) have been met. However, if I am wrong on my factual finding that the requirements of section 69(6) have been met in this case, or if section 69(6) imposes a duty on the Commissioner that has not been met, then I adopt the reasoning of the Commissioner in Order F2006-031.

[para 36] In that order, the Commissioner decided that if section 69(6) imposes a duty on the Commissioner that has not been met, that section 69(6) is directory rather than mandatory for the following reasons:

> The Legislature has entrusted me with the authority to protect those who deal with public bodies by ensuring that public bodies comply with the FOIP Act. There is a public interest at stake, as demonstrated by the stated objective of section 2(b) and the other objectives set out in section 2 of the FOIP Act. A decision that renders me without jurisdiction as a result of a breach of a technical timing requirement frustrates much of the intended purpose of the FOIP Act. It is difficult to imagine how the Legislature could have intended such a result. In my view, it would be contrary to the public interest to allow the purpose in section 2(b) and the other purposes in section 2 to be defeated by finding that section 69(6) is mandatory and that I lose jurisdiction if I do not comply with it.
>
> Furthermore, although the Supreme Court of Canada in *Dagg* has not yet elevated the protection of privacy to constitutional status, the Supreme Court of Canada has recognized that it is worthy of constitutional protection (see above). In my view, it would be contrary to the public interest on this ground as well to allow the protection of privacy to be defeated by a finding that section 69(6) is mandatory.

[para 37] In the case before me, sections 2(a) and (e) of the Act are relevant. These provisions state:

> *2 The purposes of this Act are*
>
> *(a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act…*

> *(e) to provide for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act.*

Two purposes in enacting the legislation are to grant a right of access to information and to provide independent reviews of decisions in relation to the right of access. These purposes, in addition to the Commissioner's authority to oversee the administration of the legislation under 53, suggest that the legislature did not intend the Commissioner to lose jurisdiction as a consequence of non-compliance with any requirement to extend the time limit within 90 days of receiving the request for review. Further, given that section 69(1) of the Act creates a duty for the Commissioner to conduct an inquiry, I do not find that any delay in extending the time limit under section 69(6) is sufficient to relieve the Commissioner of that statutory duty. Consequently, I find that the Legislature intended section 69(6) to be directory.

[para 38] In *Kellogg Brown and Root*, Belzil J. decided that the particular circumstances of the case must be considered in determining whether jurisdiction is lost. In support of applying this approach, the Commissioner considered *Society Promoting Environmental Conservation v. Canada (Attorney General)* (2003) 228 DLR (4th) 693 in paragraphs 148 and 149 of Order F2006-031:

> The court ... set out a non-exhaustive list of factors to be considered in determining whether non-compliance with an obligatory provision invalidates administrative action. Among these, the following factors are relevant in the present case:
>
> > ii) The seriousness of the breach of the statutory duty: a technical violation is an indicator that the court should not intervene, while a public authority that flouts the statutory requirement can expect judicial intervention.
> > …
> > iv) …, the more serious the public inconvenience and injustice likely to be caused by invalidating the resulting administrative action, including the frustration of the purposes of the legislation, public expense and hardship to third parties, the less likely it is that a court will conclude that legislative intent is best implemented by a declaration of invalidity.
>
> In view of these developments in the law, if I am wrong in my conclusions that the requirements of section 69(6) of the FOIP Act were met in this case and that section 69(6) is directory rather than mandatory, I have no hesitation in applying the part of the reasoning in *Kellogg* that the circumstances of the particular case come into play in deciding whether jurisdiction would be lost by reason of a breach of section 69(6). I will, accordingly, analyze the case-specific circumstances, to decide whether the Legislature intended that jurisdiction should be lost by non-compliance in this case.

[para 39] In the present case, I find that if there has been a breach of statutory duty, it is technical in nature. The Applicant's request for review was received by this Office on August 24, 2006. As noted above, on August 25, 2006, the Commissioner advised the Applicant and the Public Body, who were the parties at that time, that he anticipated completing review of the Applicant's request by November 23, 2006, 91 days after August 24, 2006. In the same letter, the Commissioner also advised the parties that he

would formally extend the date for conducting the inquiry at a later date if it were necessary.

[para 40] The Commissioner formally extended the time for completing the inquiry on August 3, 2007 and notified the parties that the anticipated date of completion was February 1, 2009. On September 7, 2007, the Public Body requested that the issue of whether section 21 applied to the records and information be added to the inquiry. The notice of inquiry was sent to the parties with this additional issue on November 6, 2007. Arguments and evidence were exchanged by the parties following this notice. On March 7, 2008, the Public Body added the additional issue of whether the Commissioner has lost jurisdiction to conduct this inquiry.

[para 41] The parties were advised in advance by the letter of August 25, 2006 that the review would take longer than 90 days to complete and that the Commissioner would extend the time for conducting the review, if necessary. As the review was not completed by November 23, 2006, the parties had notice that the Commissioner intended to extend the time. Given that the parties were apprised that the review would take longer than 90 days, and given that they had notice that the Commissioner intended to extend the time limit if necessary, I do not find that the fact that the Commissioner extended the time on August 3, 2007 rather than before November 22, 2006 (the ninetieth day following receipt of the request for review) anything more than a technical breach.

[para 42] The Public Body provided the affidavit of an employee in support of its jurisdictional argument. The employee presents the opinion that it is important for the Commissioner to extend the time for completing an inquiry within the 90 day period so that the Public Body will be better able to allocate its resources. He explains that the potential detriment to the Public Body of failure to receive notice of the extension within 90 days is uncertainty as to whether the inquiry will proceed, uncertainty in relation to the timing of written submissions, uncertainty as to whether the Public Body has correctly interpreted the Act, stress and uncertainty for members, and delay of parallel proceedings. The Public Body also submitted the following:

> Whether or not there are any alternative remedies available is not a proper factor to consider, since an examination of this factor is not helpful in clarifying legislative intent. Moreover, a consideration of this factor may lead to a situation where a legislative provision is found to be mandatory in one case, and directory in another. The legislature surely could not have intended such an absurd result.
>
> Although the EPS submits that this is not a proper factor to consider, in the present case, there is an alternative remedy available to the Applicant. In particular, if the Commissioner determines that the Commissioner has lost jurisdiction to proceed with the inquiry in this case, there is nothing precluding the Applicant from submitting another request for access for the Records in question.

[para 43] In turn, the Applicant argues that a loss of the Commissioner's jurisdiction would result in increased delay, as the Applicant would be required to make his access request again, submit a new request for review, and cause all parties and the Commissioner to recommence the inquiry process.

[para 44] The Public Body appears to argue that I am bound by the result of *Kellogg Brown and Root,* but not by the application of legal principles in that case. I disagree with that approach to applying precedent. Rather, when applying precedent, it is important to consider the legal reasoning of the decision maker and the application of that reasoning to the issues and facts in the new case.

[para 45] In paragraphs 76 - 78 of *Kellogg Brown and Root*, Belzil J. said:

> It is also necessary to inquire as to whether alternative remedies are available to the complainant and affected organizations if the provision is interpreted to be mandatory.
>
> While the complainant would lose his right under *PIPA* to have an inquiry proceed, it must not be overlooked that the complainant originally raised this issue as a human rights complaint, which can still be pursued. Moreover, as a union member, this matter could be pursued through grievance proceedings.
>
> In contrast, KBR and Syncrude have no alternative remedies if the Commissioner's arguments are accepted in that on his interpretation of s. 50(5), they must simply wait, not knowing if they are in jeopardy and should be altering policies and procedures or creating them to avoid that jeopardy.

[para 46] Belzil J. found it necessary to consider whether there were alternative remedies available if he were to interpret section 50(5) of PIPA as mandatory. He determined that as the complainant in that case was entitled to have his complaint heard by a human rights tribunal, or alternatively, to have a grievance on the same issue decided by an arbitrator, this was a factor weighing in favor of a finding that the provision was mandatory. In addition, he found that the organizations in that case did not have an alternative remedy, as they would have to continue to wait, not knowing whether their drug testing practices put them in jeopardy. He considered that this factor also weighed in favor of finding the provision mandatory.

[para 47] I do not consider reinitiating an access request to be an "alternative remedy." Rather, it is the same remedy. In addition, review of the Public Body's decision by this Office is the only remedy contemplated by the Act and is the only remedy available to the Applicant in this case. The Applicant has made a request for access to information under section 7 of the Act. There is no other means available to the Applicant to obtain the records he seeks. In contrast, the Court in *Kellogg Brown and Root* found that the complainant in that case had the opportunity to have the same complaint addressed under human rights legislation and through the grievance process.

[para 48] The fact that the same process remains available in the event of loss of jurisdiction speaks to the difficulty in adopting the Public Body's narrow interpretation of section 69(6). Little would be gained by requiring the parties to duplicate their initial requests and decisions and go to further labour and expense through repetition of the access request and inquiry processes.

[para 49] The Court in *Kellogg Brown and Root* found that the delay suffered by the organizations in that case had put those organizations in jeopardy. Jeopardy, in law, is the

risk of being convicted or punished in some way. An order of the Commissioner under the FOIP Act is not punitive in nature. While delay under the Act may prolong uncertainty as to whether a Public Body has made the right decision to withhold information when responding to an access request, this uncertainty does not amount to jeopardy in the legal sense. In the non-legal sense, jeopardy means "danger of harm or loss". I am equally unable to conclude that a period of uncertainty as to whether the Commissioner will uphold or overturn a decision made by the head of a Public Body amounts to harm or loss.

[para 50] There is also a public interest component to the Act that would not be given the consideration required by the statute were the Commissioner to lose jurisdiction. In *BMG Canada Inc. v. Doe*, 2005 FCA 193, the Federal Court of Appeal considered the interpretation of section 3 of *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (PIPEDA) and noted :

> Privacy rights are significant and they must be protected. In order to achieve the appropriate balance between privacy rights and the public interest in favour of disclosure, PIPEDA provides protection over personal information that is collected, held and used by organizations and allows disclosure of such information only in certain circumstances, enumerated in subsection 7(3). The purpose of PIPEDA, which is the establishment of rules governing the "collection, use and disclosure of personal information", is articulated in section 3, which specifically states,
>
> > 3. The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.
>
> The delicate balance between privacy interests and public interest has always been a concern of the Court where confidential information is sought to be revealed.

The Federal Court of Appeal interpreted section 3 of PIPEDA, which is substantially similar to section 3 of PIPA, as balancing individual privacy rights with the public interest. Similarly, access to information legislation serves to balance public interests. In an access request, the public interest in disclosing information to individuals to ensure transparency and accountability of government may be weighed against the public interest in withholding information recognized by the exceptions in the Act. The inquiry process is not simply a forum in which individual rights are argued and decided, as the public interest in disclosing or withholding information must always be considered. If the Commissioner were to lose jurisdiction in this case, the public interest would be unrepresented.

[para 51] In Order F2007-031, the Commissioner noted:

> I note that the 'evolved' analysis finds strong support in a decision of the Alberta Court of Appeal, *Bridgeland-Riverside Community Association v. City of Calgary* [1982] A.J. No. 9692, and subsequent decisions following that decision. In *Bridgeland*, the Court said, at paras 27 and 28:

> In my view, no concept is more sterile than that which says that a proceeding is a nullity for failure of compliance with a procedural rule and without regard to the effect of the failure…
>
> I would put aside the debate over void or voidable, irregularity or nullity, mandatory or directory, preliminary or collateral. These are only ways to express the question shall or shall not a procedural defect (whether mandated by statute or common law) vitiate a proceeding. In my view, absent an express statutory statement of effect, no defect should vitiate a proceeding unless, as a result of it, some real possibility of prejudice to the attacking party is shown, or unless the procedure was so dramatically devoid of the appearance of fairness that the administration of justice is brought into disrepute.

[para 52] I agree with the reasoning of the Commissioner and agree that *Bridgeland-Riverside Community Association v. City of Calgary* is on point.

[para 53] In the present circumstances, the parties have provided submissions and evidence to advance their cases. They have raised new issues and presented arguments in relation to them. The parties have participated at the inquiry, which is the only process set out in the Act for reviewing the decision of the head of a public body. If the Commissioner were to lose jurisdiction for failing to extend the time for completing the inquiry within the 90-day period, the resources the parties expended in preparing their cases would be wasted and the parties would be required to restart the process. A finding that there is a mandatory requirement to extend the 90-day period within the 90-day period would result in a dramatic increase in the time and resources expended by the Applicant, the Public Body, and this Office. Consequently, if section 69(6) imposes a duty on the Commissioner to extend the 90-day period within the 90-day period, I find that the Legislature would not have intended a loss of jurisdiction to result from any failure to meet this requirement.

[para 54] Applying the reasoning in *Kellogg Brown and Root*, I find that the Applicant lacks an alternative remedy, while any uncertainty experienced by the Public Body does not amount to jeopardy, whether in the legal or non-legal sense of the word.

[para 55] Applying the reasoning in *Bridgeland,* I find that section 69(6) does not prescribe loss of jurisdiction in the event that the Commissioner does not extend the time for completing the inquiry within 90 days. In addition, as noted above, I do not find that the Public Body has established that it suffered a real possibility of prejudice. Finally, I do not find that extending the time to complete the inquiry outside the 90-day period can be said to be so dramatically devoid of the appearance of fairness that the administration of justice would be brought into disrepute.

[para 56] Consequently, the facts in this case lead me to conclude that the Legislature did not intend non-compliance with section 69(6) to result in loss of jurisdiction in these circumstances.

[para 57] ACS argues that because it was not a party to the proceedings at that time, it was unable to object to the delay in conducting the inquiry. It therefore contends that it has suffered prejudice. However, as part of the delay in completing the Inquiry was the

result of providing notice to ACS and to Gatsometer and offering the opportunity to make representations at the Inquiry, and additionally, to add the issue of jurisdiction to the Inquiry so that the parties could address this additional issue, I am not satisfied that ACS has suffered any prejudice.

[para 58] ACS also argues that as it was not provided with a copy of the August 3, 2007 letter, which advised the Public Body and the Applicant that the Commissioner had extended the time for completing the request for review, I should not consider this record in my decision. However, on August 3, 2007, ACS and Gatsometer had not yet been identified as persons affected by the request for review. Once ACS and Gatsometer were determined to be persons affected by the request for review, they were provided with a copy of the request for review, as required by section 67 of the Act. They were also advised in the notice of inquiry that the Commissioner had extended the time and anticipated that the date of completion of the inquiry was February 1, 2009.

[para 59] ACS also argues that I lack jurisdiction on the basis that the Applicant made the access request in the context of section 44 of the *Police Act* as this section of the Police Act is referenced in the access request. ACS contends that the Applicant never made an access request under the Act and that I therefore lack jurisdiction for this reason as well. However, section 44 of the *Police Act* does not enable a complainant to gain access to information. On receipt of the Applicant's request, the Public Body transferred the request to its FOIP Coordinator and advised the Applicant that it was doing so on June 1, 2006. The Applicant did not disagree with this process and paid the Public Body a $25 dollar fee under the FOIP Act so that it would process his request. While the Applicant's initial access request is not explicit that he is making the request under the Act, the conduct and correspondence of both the Public Body and the Applicant establishes that both parties considered the request to have been made under the Act. I find that the reference to the *Police Act* in the access request refers to the reasons for making the request, and not to the legislation under which the access request was made.

[para 60] For the reasons above, I find that the Commissioner was authorized to extend the time limit for completing the inquiry on August 3, 2007 and I find that he did so. Further, I find that all parties were notified of the extension and were provided with the anticipated date of completion, albeit at different times during the process. Consequently, I have jurisdiction to conduct this inquiry.

Issue A: Is the Red Light Client Training Manual within the scope of the Applicant's access request?

[para 61] As noted above, ACS questions whether the manual is responsive to the Applicant's access request. ACS argues that the Applicant is only seeking information critical of red light cameras and notes that the manual is not critical of red light cameras.

[para 62] The Applicant's initial request was for records "relating to the operation of red light cameras, any criticisms of the operation of these cameras which is in the possession of the Edmonton Police Service and Edmonton Police Service Policy on these

cameras" (sic). The Public Body requested clarification of the portion of the request relating to criticism. The Applicant clarified that this portion of the access request was for information "critical about the reliability or accuracy of" red light cameras. However, the fact remains that the Applicant requested records regarding the operation of red light cameras in addition to records containing information critical of the reliability or accuracy of red light cameras.

[para 63] As the manual provides operating instructions for red light cameras, and was in the custody or control of the Public Body at the time of the request, I am satisfied that the manual is within the scope of the Applicant's access request, as it contains information that "relates to the operation of red light cameras."

Issue B: Does section 16 of the Act (disclosure harmful to business interests) apply to the records / information?

[para 64] Section 16 is a mandatory exception to disclosure. It states:

> *16(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 65] In Order F2005-011, the Commissioner adopted the following approach to section 16 analysis:

> According to section 71(3)(b) of the Act, the Third Party has the burden to show that the information should not be disclosed under section 16. This burden is to be discharged on a balance of probabilities. (See Order 2001-019.)
>
> Order F2004-013 held that to qualify for the exception in section 16(1), a record must satisfy the following three-part test:

> Part 1: 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?
> Part 2: Was the information supplied, explicitly or implicitly, in confidence?
> Part 3: Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)?

I will therefore consider whether the information at issue meets each requirement of the test set out in Order F2004-013.

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?

[para 66] ACS argues that the manual contains the scientific and technical information of Gatsometer, as it contains the product designs, system specifications, operating procedures and testing procedures for Gatsometer's proprietary technology. Counsel for ACS explained that ACS is the sole distributor of Gatsometer's proprietary technology in North America. On that basis, ACS argues that any scientific or technical information contained in the manual is also that of ACS. ACS also argued that red light cameras are owned by ACS and not the Public Body.

[para 67] In my view, technical information includes information falling under the category of applied sciences or mechanical arts, and includes such topics as construction, operation or maintenance of a structure, process, equipment or thing. I find that Records 1 - 9, 25 - 27, 36 - 41, 45 - 76, 95, and 121 - 122 do not contain technical information. Consequently, these records cannot be withheld on the basis that they contain technical information under section 16. However, I find that the remaining records contain technical information as it falls under the category of mechanical arts and addresses the operation and maintenance of equipment.

[para 68] Records 123 - 263 are comprised of two different Gatsometer manuals: Instruction Manuals IM-E0207 and IM-E0306, both copyrighted by Gatsometer BV. These records contain information that explains how to use the Gatsometer 36mST-MC-3LG red light camera and its components. I find that the information in these records is "technical information" as it is about the operation and maintenance of the red light camera. While I am satisfied that this information in these two manuals is the technical information of Gatsometer I am not satisfied that it is the information of ACS within the meaning of section 16.

[para 69] ACS argues that the technical information at issue belongs to it because it has exclusive distribution agreements with Gatsometer; however, ACS did not provide any explanation or evidence as to the terms of the licensing agreements. The licensing agreement may provide exclusive rights to distribute Gatsometer equipment in the North American market and to service it, and permit ACS to copy and distribute Gatsometer's copyrighted materials; however, it does not follow that the agreement between these companies results in Gatsometer's scientific or technical proprietary information about its designs or inventions becoming ACS's proprietary information.

[para 70] However, for the purposes of this inquiry, ACS and Gatsometer are both third parties. While Gatsometer did not inform this Office of any plans to participate at the inquiry, ACS made arguments on behalf of Gatsometer and advised in its *in camera* submissions provided highlighting from Gatsometer in relation to the inquiry. The technical information in the manual is the technical information of Gatsometer. It is a third party within the meaning of section 16. As a result, I find that the records contain the technical information of a third party within the meaning of section 16. I will now consider whether the information was supplied in confidence.

Was the information supplied, explicitly or implicitly, in confidence?

[para 71] In Order No. 01-36, the Privacy Commissioner of British Columbia considered the following factors in determining whether a third party had supplied information to a public body in confidence:

> To establish confidentiality of supply, a party must show that information was supplied under an objectively reasonable expectation of confidentiality, by the supplier of the information, at the time the information was provided… The cases in which confidentiality of supply is alleged to be implicit are more difficult. This is because there is, in such instances, no express promise of, or agreement to, confidentiality or any explicit rejection of confidentiality. All of the circumstances must be considered in such cases in determining if there was a reasonable expectation of confidentiality. The circumstances to be considered include whether the information was:
>
> 1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
> 2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;
> 3. not otherwise disclosed or available from sources to which the public has access;
> 4. prepared for a purpose which would not entail disclosure.

This test was adopted by the former Commissioner of Alberta in Order 99-018.

[para 72] The Applicant argues that the manual was not supplied in confidence. In addition, he argues that it is likely that the information in the manual is available on the internet. He noted that a "Google" search of the term "Gatso" yields 1,230,000 hits. However, the Applicant did not present any evidence from his internet search to establish that the technical information contained in the manual is available on the internet.

[para 73] ACS made the following argument in support of its position that the manual was supplied in confidence:

> In Order 2000-017, the Commissioner found that similar Gatso manuals were supplied to the EPS in confidence… The same is true today. These Manuals are not available to the public and the information contained therein is not available from any other source. These Manuals are also not available to any competitor. ACS has consistently treated these Manuals as confidential with regard to all of its clients, including the EPS. As the commissioner has previously recognized the confidential and protected nature of similar manuals, ACS reasonably expected that, if shared with the EPS, these Manuals would not be disclosed to the public. In these circumstances, ACS respectfully submits that the requirements of s. 16(1)(b) are met.

[para 74] I do not agree with ACS that the findings of the Commissioner in relation to the evidence of a party to Order 2000-017, Canadian Public Technology (CPT), about a photo radar manual it supplied to the Public Body are binding on me or are relevant to the present inquiry. Further, I do not agree that a previous order of this Office means that information was supplied in confidence if the parties have not otherwise turned their minds in the context of the present inquiry, to this issue of confidentiality when supplying and receiving information.

[para 75] In Order 2000-017, the former Commissioner stated the following:

> EPS gave evidence about who within its organization has copies of the operating manuals, the circumstances under which those individuals are permitted to use the operating manuals, the confidentiality required in regard to those manuals, and the consequences to an individual who did not observe that confidentiality.
>
> Having reviewed all the evidence, I find that the information was supplied explicitly in confidence to the Public Body…

[para 76] An affidavit supplied by a disclosure analyst for the Public Body states:

> ACS and Gatsometer B.V. are separate and distinct legal entities to the EPS. To my knowledge any information provided by ACS or Gatsometer B. V. to the EPS would have been done pursuant to a contractual relationship and provided in confidence. (Emphasis mine)

[para 77] The author of this affidavit does not state that he has knowledge that the information *was* provided by ACS or Gatsometer to EPS in confidence. Instead, his statement indicates that he believes that the information *would have been* supplied in confidence, which suggests that he lacks actual knowledge that the manual was supplied pursuant to a contractual relationship or provided in confidence. The disclosure analyst does not explain the basis for this belief that the manual was supplied pursuant to a contractual relationship or provided in confidence, and so I am unable to accept the affidavit as establishing that the manual was supplied to EPS in confidence.

[para 78] In this case, I do not have the evidence regarding confidentiality that the former Commissioner was provided in Order 2000-017. Further, I note that the Commissioner made his finding based on the evidence before him at the inquiry, and did not make his decision based on a finding or principle that operating manuals for photo radar or red light cameras are usually supplied in confidence.

[para 79] ACS also notes that Manual IM-E0207 contains the following caution on Record 125 and argues that this is an explicit indication of confidentiality:

> Copyright © 2002 – Gatsometer B. V. – The Netherlands
> No part of this manual may be reproduced or passed on in digital form or hard copy. Copies, prints and digital files may only be used when explicit written consent has been given by Gatsometer B.V.

[para 80] I find that this warning is a copyright warning, and establishes that the work is subject to copyright. Under section 3 of the *Copyright Act*, copyright is the "sole

right to produce or reproduce a work or any substantial part thereof in any material form whatever".

[para 81] I do not find the copyright warning on Record 125, or the record referred to in ACS's *in camera* submissions (discussed below) to be relevant to the issue of confidentiality. Rather, these warnings caution the user that the work is copyrighted and that the owner of the copyright is asserting those rights against unauthorized copying and distribution. The copyright warning does not mean that the right of access to the copyrighted work is restricted. In fact, section 32.1 of the *Copyright Act* permits copying of copyrighted works for the purpose of complying with federal and provincial access to information legislation.

[para 82] I agree with the reasoning of the Information Commissioner of the United Kingdom, when he said in Decision FS50083358:

> …the fact that information may be someone's intellectual property does not of itself preclude its legitimate availability to others. Just as library books may be protected by copyright, their public availability is not restricted because of that status.

In that case, it was argued before the Information Commissioner that a copyright warning contained in a Gatsometer manual was evidence that the manual had been supplied to a public authority in confidence. The Information Commissioner rejected that argument. He ordered disclosure of Gatsometer manuals IM-E9914 and IM-E9906 for Gatsometer red light camera model 36mSG-MC.

[para 83] In its *in camera* submissions, ACS argued that another warning was originally part of IM-E0207, and that the document containing the additional warning was inadvertently omitted from the manual entered into evidence by the Public Body. I am unable to give any weight to ACS' assertion that the manual contained further warnings against distribution or reproduction of the manual as counsel has not provided me with the basis for its belief that the manual supplied to the EPS originally included an extended caution. The manual supplied to EPS contains records that counsel also suggested, *in camera,* were inadvertently and improperly included in the manual. I am unable to conclude that ACS took steps to ensure that the record containing the additional caution was included in the manual, when it apparently did not take steps to ensure that the manual did not contain extraneous material. The presence of extraneous material in the manual suggests that ACS may not have reviewed the manual prior to providing it to EPS.

[para 84] In any event, I do not find that this record, had it been included, would establish that the information in the manual was supplied in confidence. Instead, this caution establishes that Gatsometer has proprietary rights in the information and that the information it contains should not be disseminated or reproduced by persons Gatsometer does not intend to observe the manual. However, EPS is an "intended observer" of the manual. Consequently, this caution would not serve to limit EPS's ability to disseminate or reproduce the manual. Rather, the *Copyright Act* would impose those limits.

[para 85] The response of ACS to EPS' inquiry as to its position in relation to disclosure of the manual does not refer to contractual terms, or to a requirement that the manual be kept confidential, but only to the fact that the manual contains proprietary information which could harm ACS's competitive position if disclosed. I am not satisfied that there was ever an explicit agreement between ACS and EPS to maintain confidentiality of the manual.

[para 86] ACS did not provide any evidence as to the manner in which it keeps information in manuals confidential, whether it is in the custody of other clients or the Public Body. In addition, I do not have a statement or affidavit from persons with actual knowledge as to the terms under which ACS supplied the manuals and the Public Body received them. The primary argument of ACS is that ACS has a reasonable expectation of confidentiality because of the Commissioner's findings in Order 2000-017, which Order I distinguished above. I am unable to give weight to ACS' *in camera* assertions that it has taken positive steps to protect the confidentiality of the manual, as ACS did not explain what those steps are.

[para 87] It was argued, *in camera,* that the manuals must be returned to ACS at the conclusion of the contract with EPS. However, a contractual provision requiring return of the manual was not entered into evidence. The manual itself does not indicate that it remains the property of ACS or Gatsometer. I am therefore unable to conclude that it is the case that all copies of the manual are returned to ACS on conclusion of the contract.

[para 88] In some instances, the information contained in the records at issue supports a finding that it could only have been supplied in confidence. However, I do not find that any of the information in the manual is additional evidence or leads to a finding that that the manual was supplied in confidence. As noted above, the technical information in the manual is about installing, setting up, calibrating, and using equipment – information one would also expect to find in a user's manual that is not intended to be confidential. The fact that the information is about installing, setting up, calibrating and using equipment does not, in and of itself, indicate that the information was implicitly intended to be kept confidential. I do not find that there is anything about the nature of this particular information that necessitates a finding that it was supplied in confidence.

[para 89] For the reasons above, I find that ACS or Gatsometer did not supply the information in the manual in confidence.

Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)?

[para 90] In *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515, the Court agreed with the Commissioner that a party alleging that it will suffer harm if information is disclosed must establish, through evidence, a reasonable expectation of harm:

> The Commissioner's decision did not prospectively require evidence of actual harm; the Commissioner required some evidence to support the contention that there was a risk of harm. At no point in his reasons does he suggest that evidence of actual harm is necessary.
>
> The evidentiary standard that the Commissioner applied was appropriate. The legislation requires that there be a "reasonable expectation of harm." Bare arguments or submissions cannot establish a "reasonable expectation of harm." When interpreting similar legislation, courts in Ontario and Nova Scotia have held that there is an evidentiary burden on the party opposing disclosure based on expectation of harm: *Chesal v. Nova Scotia (Attorney General)* , at para. 56 Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner) at para. 26.

Although the foregoing was in the context of sections 20 and 25 of the Act, section 16 requires that disclosure of scientific or technical information be reasonably expected to result in the harms set out in section 16(c)(i)-(iv). In addition, section 71 of the Act places the burden of proof on the third party and the Public Body to establish that the Applicant has no right to the information at issue. I will therefore consider whether ACS, and indirectly, Gatsometer, and the Public Body have met the evidentiary burden to establish that any of the consequences in section 16(c)(i)-(iv) can be reasonably expected to result from disclosure of the technical information in the manual.

[para 91] In *Canada (Information Commissioner) v. Canada (Prime Minister)*, [1992] F.C.J. No. 1054, Rothstein J. reviewed Canadian access to information jurisprudence and identified guidelines for assessing when there is a reasonable expectation of probable harm resulting from disclosure of information. The following are relevant to this inquiry:

> The Canadian jurisprudence interpreting the *Access to Information Act* has established guidelines that can be useful in assessing whether or not there is a reasonable expectation of probable harm from disclosure in a given situation and the procedures to be followed. The following are not exhaustive:
>
> 1. The exceptions to access require a reasonable expectation of probable harm: *Canada Packers*, *supra*, at page 60…
> …
> 3. Use of the information is to be assumed in assessing whether its disclosure would give rise to a reasonable expectation of probable harm: *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 27 C.P.R. (3d) 180 (F.C.T.D.), at page 210.
> …
> 6. Evidence of the period of time between the date of the confidential record and its disclosure is relevant: *Ottawa Football Club, supra*, at page 488.
>
> 7. Evidence that relates to consequences that could ensue from disclosure that describe the consequences in a general way falls short of meeting the burden of entitlement to an exemption from disclosure: *Ottawa Football Club*, *supra*, at page 488; *Air Atonabee, supra*, at page 211.
>
> 8. Each distinct record must be considered on its own and in the context of all the documents requested for release, as the total contents of the release are bound to have considerable bearing on the reasonable consequences of its disclosure: *Canada Packers, supra*, at page 64…
> …

As these factors are also relevant in determining whether there is a reasonable expectation of probable harm arising from disclosure of the information under the Act, I will consider whether any of them apply in the circumstances of this case.

[para 92] In *Canada (Prime Minister)* Rothstein J. also made the following observations in relation to the evidence a party must introduce in order to establish that harm to will result from disclosure of information. He said:

> While no general rules as to the sufficiency of evidence in a section 14 case can be laid down, what the Court is looking for is support for the honestly held but perhaps subjective opinions of the Government witnesses based on general references to the record. Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged.
>
> In addition, allegations of harm from disclosure must be considered in light of all relevant circumstances. In particular, this includes the extent to which the same or similar information that is sought to be kept confidential is already in the public realm. While the fact that the same or similar information is public is not necessarily conclusive of the question of whether or not there is a reasonable expectation of harm from disclosure of the information sought to be kept confidential, the burden of justifying confidentiality would, in such circumstances, be more difficult to satisfy.

He also noted:

> A desirable procedure that has been found helpful is to set out on each page for which exemption from disclosure is sought, the specific injurious effect the release of that page would be likely to cause…
>
> I am not in that position with respect to these 182 pages of the record in this case. I do not have before me a page-by-page description of the harm that would be probable from disclosure of each page. In the case of these pages in the record to which only general reference has been made in the affidavits, the deponents have, to all intents and purposes, left the documents to speak for themselves as to how they are linked to the arguments made in the public affidavits and why their disclosure could result in harm to the Government.

In the foregoing, the Court found that the Prime Minister's Office had not established that harm was likely to result from disclosure of the records in question.

[para 93] ACS argues that ACS and Gatsometer would suffer significant harm to their competitive position within the meaning of section 16(1)(c)(i) if the records at issue are disclosed. It does not argue that any other provisions of section 16(1)(c) apply.

[para 94] As happened in *Canada (Prime Minister)*, I have been presented with general arguments as to the harm that may result from disclosure, but without a description of the harm that would be probable as a result of the disclosure of each piece of information or the correlation between the harm and the disclosure of the information.

Further, the harm to a third party's competitive position that could reasonably result from disclosure under section 16(1)(c)(i) must be significant. ACS has not provided any explanation as to how disclosure of specific information would result in significant harm to Gatsometer's or its own competitive position. From review of the records at issue, I do not find that the significant harm to Gatsometer's or ACS's competitive position projected by ACS is self-evident.

[para 95] The Public Body relies on the Commissioner's findings in Order 2000-017 that disclosure of the manual would harm ACS's business interests. However, as noted above, the Commissioner's findings in that order were not made in relation to the records at issue in this inquiry.

[para 96] ACS argues that the manual is detailed and that the information it contains would enable a competitor to construct ACS or Gatsometer's traffic light enforcement technology. In addition, ACS argues that the information in the manual would enable competitors to guess ACS's future proposal prices and to underbid. Finally, ACS argues that the possession of the manuals would enable competitors to improve their technology, ensure that their technology is competitive with the technology of ACS and Gatsometer, adopt solutions developed for local markets, solve problems, and criticize or disparage Gatsometer's technology.

[para 97] I note that ACS submitted copies of IM-E0207 and IM-E0306 *in camera* with highlighting provided by Gatsometer. ACS explained that the highlighting is intended to show information in these manuals that is not known to competitors or was developed to address local or client specific requirements. There is highlighting on portions of pages 3, 5, 6, 7, 12, 18, 19, 20, 31, 38, 39, 42, 44, 48, 49, 50, 7853, 54, 58, 59, 60, 62, and 63 of instruction manual IM-E0207. There is highlighting on portions of page 4, 5, 7, 9, 12, 18, 28, 30, 32, 35, 36, 37, 38, 39, 40, 41, 42, 46, 51, 56, 57, 61, 63, 64, 65, 66, 68, 69, 70, 72, 73 of instruction manual IM-E0306. While I am not bound by the rules of evidence, I am unable to give any weight to the highlighting, as ACS has not established who highlighted the instruction manual or the basis of that individual's knowledge of Gatsometer's competitors' knowledge.

[para 98] ACS did not explain how competitors would be able to calculate accurate pricing of current products or direct me to the specific information in the manual that it considered would result in this harm. I am unable to conclude from review of the information in the manual that this harm could result, as the manual does not contain reference to pricing or to materials and is copyrighted 2002. In addition, the "Declaration of Conformity" in the manual indicates that the red light camera was tested in 1996. Consequently, I am unable to conclude that disclosure of the information in the manual would have the effect of enabling competitors to calculate pricing of current products.

[para 99] ACS did not direct me to the information it believes would support its contention that disclosure of the information in the manual would enable a competitor to design its own version of Gatsometer's red light camera or to make improvements to its own designs. From my review of the information I am not satisfied that the information

in the manual, while technical, is sufficiently detailed so as to enable a competitor to create its own version of a Gatsometer red light camera or to improve its own technology or solve problems. The purpose of the manual is to enable a client to install, calibrate, maintain, and operate a red light camera. To further this purpose, the manual is written in general terms and does not contain specific or detailed information about patented technology or technical solutions for local markets. I also find that the age of the equipment, given that it was tested in 1996, would make it unlikely that a competitor could improve its competitive position in 2009 through access to the information in the manual.

[para 100] Similarly, in Decision FS50083358, the Information Commissioner of the United Kingdom determined that Gatsometer red light camera manuals IM-E9914 and IM-E9906 were not sufficiently detailed or current to allow a competitor to reproduce or improve on the technology. He said:

> In reaching a view about the supplier's comments, the Commissioner notes the age of the equipment that the Instruction Manual in question relates to - the equipment gained type approval in 1992. He also recognises the competitive international market that the suppliers operate in. In such a market, products are constantly under review and new equipment is being developed in order to retain competitiveness and to incorporate technological advances. In the Commissioner's view, competitors within the market are unlikely to gain an advantage from the information within the requested Instruction Manual as current / future products are likely to be substantially more advanced. ..
> …
> Having examined all the arguments the Commissioner considers that the public authority has not demonstrated that disclosure would or would be likely to prejudice the commercial interests of the supplier. He is not persuaded that the information is sufficiently detailed to inform the development of rival devices and even if he accepted that it was, he does not think that there is a real and significant likelihood of this occurring given the age of the equipment. Therefore the exemption at section 43 is not engaged and he is not required to explore the public interest arguments applicable to this exemption.

[para 101] With regard to ACS's argument that disclosing the records at issue would enable ACS's and Gatsometer's competitors to criticize or disparage their technology, my review of the information at issue does not lead me to conclude that competitors would criticize or disparage Gatsometer's technology if any of the information in the manual were disclosed. If ACS's argument refers to the tort of trade disparagement, in which a competitor slanders the goods of another, I am unable to conclude that the information in the manual would lead a competitor to commit this tort.

[para 102] For the reasons above, I find that disclosure of the manual could not reasonably be expected to result in significant harm to the competitive position of ACS or Gatsometer.

Conclusion

[para 103] I find that section 16 does not apply to the information in the records at issue. I make this finding because the requirements of both sections 16(1)(b) (information supplied in confidence) and 16)(1)(c) (harm) have not been met. I note that in the event

that I am wrong in relation to one, failure to meet the other provision would nonetheless mean that section 16 does not apply.

V. ORDER

[para 104] I make this Order under section 72 of the Act.

[para 105] I order the Public Body to disclose the records at issue to the Applicant.

[para 106] I further order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order.

_____
Teresa Cunningham
Adjudicator