ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2009-007

August 14, 2009

ALBERTA HOUSING AND URBAN AFFAIRS

Case File Number F4280

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request to Alberta Seniors and Community Supports, for copies of records containing information about a grant under the Affordable Housing Program in 2003/2004 to Sundance Housing Cooperative Ltd (Sundance). Alberta Housing and Urban Affairs now administers this program and is the Public Body for this inquiry. The Public Body identified responsive records and determined that the records contained the information of a third party, Sundance. The Public Body provided notice to Sundance that it was considering disclosing some of the information in the records. Sundance objected to the Public Body's decision to disclose some of the records on the basis that section 16 (disclosure harmful to the business interests of a third party) applied and requested review by the Office of the Information and Privacy Commissioner.

During the inquiry, Sundance raised issues relating to the identity of the Applicant and the jurisdiction of the Commissioner to conduct the inquiry. The Adjudicator determined that it was unnecessary for Sundance to learn the identity of the Applicant to make its case and decided that the Commissioner had not lost jurisdiction to conduct the inquiry.

The Adjudicator found that the Public Body had not made decisions to disclose some of the records at issue, and so she did not have jurisdiction to review the Public Body's decision in relation to those records. The Adjudicator confirmed the decision of the Public Body to disclose the remaining records at issue and ordered it to give the Applicant access to them.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 16, 17, 30, 31, 40, 59, 65, 67,69, 72, 77, 78 **ON:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 s. 17

Authorities Cited: AB: Orders 99-018, F2003-004, F2004-013, F2005-011, F2005-030, F2007-032, F2008-018 **BC:** Order No. 01-36 **ON:** PO 2490

Freedom of Information and Protection of Privacy: Guidelines and Practices Edmonton: Government of Alberta, 2005

Cases Cited: *Canada (Information Commissioner) v. Canada (Prime Minister)*, [1992] F.C.J. No. 1054

I. BACKGROUND

[para 1] On August 13, 2007, the Applicant made a request to the Public Body for copies of records containing information about a grant under the Affordable Housing Program in 2003/2004 to Sundance Housing Cooperative Ltd. (Sundance) for a proposed affordable housing project on 101 Avenue at 88th Street in the Riverdale neighbourhood in Edmonton, Alberta. The Applicant explained that the request included records relevant to the grant, including:

- the application form and any amendments to the application form in respect of the above grant dated on or about 2003

- all additional correspondence between Sundance and Alberta Seniors and Community Supports in respect of the application and grant from 2003 to July 2007

- a copy of the Grant Funding Agreement and any amendments thereto dated in 2003 or 2004

- copies of all budgets presented by Sundance in respect of the grant details concerning the amount of the original grant and any increases or decreases to that grant and all details in respect of the amount of the grant that has been funded to date and details relating to the balance of the grant monies yet to be funded along with all past, present and future conditions relating to the initial grant and future funding for the grant.

[para 2] The Public Body identified responsive records. On September 18, 2007, the Public Body provided notice to Sundance that the responsive records contained information about Sundance to which section 16 of the Act potentially applied. The Public Body sought Sundance's submissions on this issue under section 30 of the Act.

[para 3] On October 5, 2007, Sundance objected to the disclosure of some of the Records on the basis that section 16 applied to them. Specifically, Sundance argued that

the records contained its financial and commercial information, that this information was implicitly confidential, and that disclosure would harm its competitive position, as disclosure would harm the completion of the housing project and other property or projects under Sundance's control. Sundance further argued that the applicant was adverse in interest to it and that this circumstance would also lead to damage to the housing project and Sundance's investments in the project.

[para 4] On October 16, 2007, the Public Body wrote a letter to Sundance, advising it of the decision it had made in relation to the records. The Public Body decided that access would be given to some records, but that section 16 required it to withhold other records. This notice was given under section 31(1) of the Act. The Public Body included an appendix that provided a brief description of the records, the page numbers, and its decision as to whether it would disclose or withhold each record. The Public Body did not provide a copy of the decision or the appendix to the Applicant.

[para 5] On November 1, 2007, Sundance requested review by this office of the Public Body's decision that section 16 did not apply to all the information in the records.

[para 6] The Commissioner authorized mediation to resolve the dispute. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 7] This office sent a copy of Sundance's request for review with the attached decision and appendix to the Public Body and to the Applicant, along with the Notice of Inquiry, pursuant to section 67 of the Act.

[para 8] The Public Body, Sundance and the Applicant provided submissions. For the reasons discussed under the heading "*in camera* submissions", below, the Applicant's submissions were accepted *in camera*, but the Public Body's and Sundance's submissions were returned to them. The Public Body and Sundance were provided the opportunity to make arguments as to why their submissions should be accepted *in camera*, to exchange their submissions, or to rework the submissions so that some submissions could be exchanged and the remainder accepted *in camera*. In my letter of February 18, 2009 to Sundance, I made decisions in relation to some of Sundance's *in camera* applications. As the applications were made *in camera*, my decision to deny these applications was provided only to Sundance at that time.

[para 9] On February 27, 2009, Sundance made new *in camera* arguments as to why all its submissions should be accepted *in camera* and resubmitted its submissions *in camera*. The Public Body exchanged some of its submissions and resubmitted the remainder *in camera*. I accepted the submissions of the Public Body and Sundance *in camera* for the sake of expediency, as requiring these parties to resubmit or redo their submissions would delay the inquiry, but I advised both Sundance and the Public Body that I would make reference to their *in camera* submissions in the order where this was necessary to express my reasons, as long as the submissions did not reveal the information contained in the records at issue or the Act does not authorize or require withholding the information in the submissions.

[para 10] In their *in camera* submissions, Sundance and the Public Body objected to the decision of this office to share the request for review and its attachments with the Applicant. Sundance raised the issue of whether the Commissioner lost jurisdiction when he provided a copy of Sundance's request for review to the Applicant. Sundance also argues that it must know the Applicant's identity if it is to make its case, and, in addition, argues that the Public Body did not make a decision under section 31 in relation to all the records before me. It argues that I lack jurisdiction to review records about which the Public Body has not made a decision under section 31. I will answer Sundance's jurisdictional and preliminary issues in this order.

RECORDS AT ISSUE

[para 11] Portions of records 90, 146, 193, 196, 213, 206-1, 207 -1, 208 -1 to 212-1, 260, 261, 261-1, and 306, and, in their entirety, records 3 – 9, 13, 70, 77, to 79, 85, 88, 147 – 148, 174, 176 – 177, 179 – 180, 181, 187, 192, 194, 195, 197, 199 – 205, 214 – 226, 336 – 337 are at issue, as the Public Body made a decision under section 31 to disclose these records and Sundance has requested review of that decision.

III. ISSUES

Issue A: ***In Camera*** **Submissions**
Issue B: **Has the Commissioner lost jurisdiction and should an external adjudicator be appointed?**
Issue C: **Has the Public Body made decisions in relation to all the records under section 30 of the Act?**
Issue D: **Is it necessary for Sundance to learn the identity of the Applicant?**
Issue E: **Did the Public Body properly apply section 16 of the Act (business interests) to the records / information?**
Issue F: **Did the Public Body properly apply section 17 of the Act (personal information) to the records / information?**

IV. DISCUSSION OF ISSUES

Issue A: *In Camera* Submissions

[para 12] As noted above, I accepted the February 27, 2009 *in camera* submissions of the Public Body and Sundance for the sake of expediency. I explained to each party that I would accept them *in camera* and that they would not be provided to the other parties, but I indicated that I would refer to their submissions in this order where the Act does not authorize or require withholding the information in the submissions, or would not reveal the information withheld by the Public Body. As the revised *in camera* submissions of both the Public Body and Sundance do not contain information normally accepted *in camera*, and were accepted only to avoid further delay in conducting the inquiry, I have decided to set out for the parties this office's requirements for *in camera* submissions.

[para 13] Practice Note 8 of this office, which is available on the Commissioner's website and was provided to the parties, provides guidance regarding *in camera* submissions. It states, in part:

> Sometimes a party asks to provide part or all of its written submission "in camera", meaning that part or all of the submission is provided for the Commissioner only and is not to be exchanged among the other parties. A party should provide reasons as to why part or all of a written submission should not be exchanged among the other parties. The Commissioner decides whether to accept some or all of a written submission "in camera". Generally, the Commissioner will accept "in camera" the records or information a public body withholds under the FOIP Act. The Commissioner will also accept "in camera" the personal information or confidential business information of other parties. If the Commissioner refuses an "in camera" request, he will return the submission to the party, so that the party can decide what can be exchanged among the other parties.

[para 14] The basis for accepting representations *in camera* is section 69(3) of the Act. The ability to provide submissions *in camera* afforded by section 69(3) of the Act is intended to enable public bodies and third parties to make detailed submissions and to provide evidence in support of their position without disclosing the information they seek to withhold in order to make their case. Section 69(3) states:

> *69(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.*

This provision ensures that the Commissioner may comply with his duty under section 59(3), which states that the Commissioner must not disclose information the head of a public body would be authorized or required to withhold if the head received an access request for the information.

[para 15] While no one has a right to have access to or to comment on representations made to the Commissioner by another person, it does not follow that parties have a right to make representations without making them exchangeable with the other parties. In general, only those submissions that would reveal the information at issue, or that contain information that a provision of the *Freedom of Information and Protection of Privacy Act* (the Act), such as section 17, would require or authorize to be withheld, are accepted *in camera*.

[para 16] Submissions that do not reveal the substance of information withheld by a public body and to which an exception to disclosure does not apply should not be submitted *in camera*.

[para 17] The *in camera* submissions of the Public Body contain a general description of the Public Body's reasoning, a general description of the records that does not reveal anything substantial about the contents of the records, and a general discussion

of the meaning of "commercial information" in section 16. Nothing in these submissions reveals information that the Act authorizes or requires to be withheld or reveals the contents of the records at issue. Consequently, there was no reason to supply them *in camera*.

[para 18] The Public Body also made arguments *in camera*, as to why I should accept its submissions *in camera*. The argument itself is an example of a submission that should not be supplied *in camera*, as it does not reveal information that the Act authorizes or requires withholding, and does not reveal the information contained in the records at issue. Submitting arguments such as these *in camera* limits the ability of other parties to respond to them, which, if the argument had any bearing on the issues at inquiry, would affect the fairness of the inquiry. Further, submitting these kinds of arguments *in camera* limits my ability to give reasons for accepting or rejecting submissions.

[para 19] Sundance takes the position that its name cannot be disclosed under the Act, and argues, in part, that its submissions must be accepted *in camera* for this reason. Sundance relies on the September 2000 edition of the *Freedom of Information and Protection of Privacy Guidelines and Practices*, published by the Government of Alberta for the position that disclosing its name is a violation of its privacy.

[para 20] I note that page 170 of the 2000 edition of the manual, which Sundance brought to my attention, states:

> The identity of the applicant must not be included in the notice sent to the third party, unless the applicant has consented to this disclosure…
> The identity of the third party is not included in the notice sent to the applicant.

This statement relates to Government of Alberta policies and guidelines in place in 2000 in relation to third party notice under sections 30 and 31.

[para 21] The March 2005 edition of the *Freedom of Information and Protection of Privacy: Guidelines and Practices* supersedes the 2000 edition, as well as the 2002 edition. At the time Sundance made its submissions, this was the most current manual. It states on page 205:

> The third party notice must be in writing. A verbal notice is not satisfactory for the purposes of section 30. The identity of an individual applicant must not be included in the notice sent to the third party, unless the applicant has consented to this disclosure. (See IPC Investigation Report 98-IR-009). The notice must include the name, job title and telephone number of the person within the public body that the third party may contact for more information.

The current manual makes no reference to a requirement to exclude the identity of all third parties from requestors or applicants as a matter of course. Rather, it states that the identity of an individual applicant or requestor should not be given to a third party unless the individual applicant or requestor consents.

[para 22] Even if the current manual contained a requirement to withhold the identities of all third party cooperatives or corporations from an applicant in section 30

notices or section 31 decisions, I would find that provisions of the manual are not binding on me and do not have the ability to amend provisions of the Act. The introduction to the manual states:

> The manual is intended to offer guidelines and to suggest best practices, not binding rules… All examples used are provided as illustrations only and should not be used as authority for any decisions made under the Act. This publication is not to be used as a substitute for legal advice.

The manual itself indicates that it is not intended to be binding or relied on in legal proceedings.

[para 23] Section 17 of the Act requires personal information about identifiable individuals to be withheld if it would be an unreasonable invasion of personal privacy to disclose the information. However, the Act does not authorize or require withholding the name of a cooperative or corporation, such as Sundance, which is not an individual. Consequently, it is the practice of this office not to sever the names of corporations from the request for review or from an order. The fact that submissions contain the name of a third party corporation or cooperative is insufficient, in and of itself, for accepting submissions *in camera*.

Issue B: Did the Commissioner lose jurisdiction and should an external adjudicator be appointed?

[para 24] In its original *in camera* submissions, Sundance argued that the Commissioner has lost jurisdiction because the Commissioner had provided a copy of its request for review and attachments to the Applicant. It therefore requested that an external adjudicator be assigned to hear this inquiry. I note that I cannot address this issue or provide reasons for my decision unless I refer to Sundance's *in camera* submissions, as Sundance did not provide exchangeable submissions.

[para 25] I communicated the following decisions to Sundance in relation to its application in my letter of February 18, 2009: the Commissioner did not lose jurisdiction to conduct the inquiry by providing a copy of the request for review and attachments to the Applicant and an external adjudicator could not be appointed under the legislation.

[para 26] In its *in camera* submissions of February 27, 2009, Sundance restated its position that the Commissioner disclosed its financial information and has lost jurisdiction. It requested again that an external adjudicator be appointed.

[para 27] Section 59(3) describes the types of information that the Commissioner and his delegates may not disclose. It states:

> *59(3) In conducting an investigation or inquiry under this Act and in a report under this Act, the Commissioner and anyone acting for or under the direction of the Commissioner must take every reasonable precaution to avoid disclosing and must not disclose*

(a) any information the head of a public body would be required or authorized to refuse to disclose if it were contained in a record requested under section 7(1), or

(b) whether information exists, if the head of a public body in refusing to provide access does not indicate whether the information exists.

[para 28] Section 67 imposes a requirement on the Commissioner to provide copies of the request for review to persons affected by the request for review. It states:

> *67(1) On receiving a request for a review, the Commissioner must as soon as practicable*
>
> *(a) give a copy of the request*
>
> *(i) to the head of the public body concerned, and*
>
> *(ii) to any other person who in the opinion of the Commissioner is affected by the request,*
>
> *and*
>
> *(b) provide a summary of the review procedures and an anticipated date for a decision on the review*
>
> *(i) to the person who asked for the review,*
>
> *(ii) to the head of the public body concerned, and*
>
> *(iii) to any other person who in the opinion of the Commissioner is affected by the request.*
>
> *(2) Despite subsection (1)(a), the Commissioner may sever any information in the request that the Commissioner considers appropriate before giving a copy of the request to the head of the public body or any other person affected by the request.*

[para 29] The discretion to sever information from a request for review under section 67(2) enables the Commissioner to comply with section 59(3), while promoting transparency and fairness to all parties affected by the request for review. However, the Act does not authorize or require withholding the name of a cooperative or corporation and so the Commissioner does not exercise discretion so as to withhold the names of cooperatives or corporations.

[para 30] Sundance argues that the information attached to the request for review is not general but specific. I am aware that the names of institutions appear in the attachments. However, the information in the index does not indicate that Sundance has made arrangements with these institutions. The information suggests, at most, that there may be a relationship between Sundance and these institutions, but does not establish that there is a relationship or explain what that relationship may be, as it does not reveal the information contained in the records other than the names of the institutions. The name of an institution does not reveal specific arrangements with an institution, as Sundance argues. In addition, I note that section 16 does not apply to information unless the disclosure of information could reasonably be expected to result in the harms set out in section 16(c), as discussed below. Consequently, I find that disclosure of the names of institutions appearing in the index is not contrary to section 59(3) of the FOIP Act and is in compliance with section 67.

[para 31] In my letter of February 18, 2009 to Sundance, I communicated the Commissioner's decision in relation to the appointment of an external adjudicator under the Act. As I noted in that letter, sections 77 and 78 of the Act establish the only circumstances in which an external adjudicator may be appointed under the Act. As neither of those circumstances apply, an external adjudicator cannot be appointed.

[para 32] For these reasons, I find that the Commissioner has not lost jurisdiction to conduct the inquiry.

Issue C: Has the Public Body made decisions in relation to all the records under section 30 of the Act?

[para 33] Sundance raised this issue in its submissions and requests that the Public Body make a decision under section 30 of the Act in relation to records 81, 154 – 65 and 177. Although Sundance has only made this argument *in camera*, I will refer to the issue it raised in this order so that the parties can know about this issue, my decision in relation to the issue, and my reasons.

[para 34] Section 30 of the FOIP Act establishes the procedure that a Public Body must follow when it is considering disclosing information that may affect the interests of a third party under section 16 or a third party's personal privacy under section 17. Section 30 states, in part:

> *30(1) When the head of a public body is considering giving access to a record that may contain information*
>
> *(a) that affects the interests of a third party under section 16, or*
>
> *(b) the disclosure of which may be an unreasonable invasion of a third party's personal privacy under section 17,*
>
> *the head must, where practicable and as soon as practicable, give written notice to the third party in accordance with subsection (4).*
>
> …
>
> *(3) If the head of a public body does not intend to give access to a record that contains information excepted from disclosure under section 16 or 17, the head may give written notice to the third party in accordance with subsection (4).*
>
> *(4) A notice under this section must*
>
> *(a) state that a request has been made for access to a record that may contain information the disclosure of which would affect the interests or invade the personal privacy of the third party,*
>
> *(b) include a copy of the record or part of it containing the information in question or describe the contents of the record, and*
>
> *(c) state that, within 20 days after the notice is given, the third party may, in writing, consent to the disclosure or make representations to the public body explaining why the information should not be disclosed.*

(5) When notice is given under subsection (1), the head of the public body must also give the applicant a notice stating that

(a) the record requested by the applicant may contain information the disclosure of which would affect the interests or invade the personal privacy of a third party,

(b) the third party is being given an opportunity to make representations concerning disclosure, and

(c) a decision will be made within 30 days after the day notice is given under subsection (1).

[para 35] Section 31 establishes the process that a Public Body must follow when it makes a decision about disclosing information referred to in section 30. It states:

31(1) Within 30 days after notice is given pursuant to section 30(1) or (2), the head of the public body must decide whether to give access to the record or to part of the record, but no decision may be made before the earlier of

(a) 21 days after the day notice is given, and

(b) the day a response is received from the third party.

(2) On reaching a decision under subsection (1), the head of the public body must give written notice of the decision, including reasons for the decision, to the applicant and the third party.

(3) If the head of the public body decides to give access to the record or part of the record, the notice under subsection (2) must state that the applicant will be given access unless the third party asks for a review under Part 5 within 20 days after that notice is given.

(4) If the head of the public body decides not to give access to the record or part of the record, the notice under subsection (2) must state that the applicant may ask for a review under Part 5.

[para 36] Section 65(2) of the Act sets out the circumstances in which a third party given notice under section 31 may request review by the Commissioner. It states:

65(2) A third party notified under section 31 of a decision by the head of a public body to give access may ask the Commissioner to review that decision.

[para 37] Section 65(2) of the Act gives a third party the ability to request review of a decision to give access, but not to request review of decisions that have not yet been made. The scope of an inquiry is limited to the decision made by the Public Body that is the subject of the request for review.

[para 38] Sundance points to records that it contends are in the custody or under the control of the Public Body to which the Public Body did not refer in its decision of

October 16, 2007. It argues that it was not provided notice under section 30 in relation to records 81, 154 – 165 and 177.

[para 39] I have jurisdiction in this inquiry to review the October 16, 2007 decision of the Public Body to give the Applicant access to the records at issue by virtue of Sundance's request for review. If the Public Body makes a decision to give access to the Applicant to additional records containing Sundance's information, then that would be the subject of a new request for review by Sundance under section 65(2). Alternatively, any decisions made by the Public Body to withhold information, including the information it has already decided to withhold under sections 16 and 17, could be the subject of a request for review by the Applicant under section 65(1), once the Public Body responds to the Applicant.

[para 40] I agree with Sundance that I do not have jurisdiction to address a decision made by the Public Body in relation to records 81, 154 – 165, and 177, as these records are not referred to in the Public Body's decision of October 16, 2007, and were therefore not the subject of Sundance's request for review of November 1, 2007.

Issue D: Is it necessary for Sundance to learn the identity of the Applicant to make its case?

[para 41] In my letter of February 18, 2009, I addressed Sundance's initial request for the identity of the Applicant as follows:

> You also made the argument that Sundance is unable to make arguments under section 16 or exchange submissions as it does not know the identity of the Applicant. However, section 16 does not require a third party to establish that the harms set out in section 16(1)(c) will likely result only if a specific applicant obtains the records. Rather, a third party may meet its burden by establishing that sections 16(1)(a) and (b) apply and that disclosure of the records at issue to any person, such as a competitor or adversary, would result in the harms set out in section 16(1)(c).

[para 42] However, in its submissions of February 27, 2009, Sundance again requested the identity of the Applicant and repeated its position that it could not make arguments without learning this information. Its arguments also suggest that it takes the position that disclosure of its identity necessitates disclosure of the Applicant's identity. Section 17(4)(g) of the Act creates a presumption that it is an unreasonable invasion of an individual's personal privacy to disclose the individual's name in the context of other personal information about them. It states:

> *17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
> *(g) the personal information consists of the third party's name when*
>
> *(i) it appears with other personal information about the third party, or*
> *(ii) the disclosure of the name itself would reveal personal information about the third party,*

There is no corresponding provision relating to the name of a cooperative. Consequently, while there is a presumption that disclosing the Applicant's name would be an unreasonable invasion of a third party's personal privacy, disclosing the name of a cooperative would not be an invasion of its privacy under the Act because a cooperative is not an individual..

[para 43] It is true that the Commissioner could request the consent of the Applicant to disclose the Applicant's personal information; however, the Applicant's identity is irrelevant to this inquiry. As I noted in my letter of February 18, 2009, a third party may meet its burden to establish that an applicant has no right of access by establishing that sections 16(1)(a) and (b) apply and that disclosure of the records at issue to any person, such as a competitor or adversary, would result in the harms set out in section 16(1)(c). A third party does not need to prove that an adversary or competitor has requested the information in order to establish that section 16(1)(c) applies to information; it need only show that the disclosure of records, including to a competitor or adversary, will result in one of the harms set out in section 16(1)(c). As disclosure by a public body may result in the information in the records becoming public, a third party may assume that a competitor or adversary would gain access to the records if they are disclosed, and it may make arguments in relation to the harms that would result from such disclosure accordingly. As a result, the identity of an applicant is irrelevant to the application of section 16. I note that Sundance assumed that competitors or other adversaries could obtain the information from the records at issue when it made its arguments that disclosure of the records at issue would result in significant harm to its competitive position.

[para 44] For these reasons, it is unnecessary for the purposes of this inquiry for Sundance to learn the identity of the Applicant.

Issue E: Did the Public Body properly apply section 16 of the Act (business interests) to the records / information?

[para 45] Section 16 is a mandatory exception to disclosure. It states, in part:

> *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 46] In Order F2005-011, the Commissioner adopted the following approach to section 16 analysis:

> According to section 71(3)(b) [now 72(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 47] Sundance argues that records 3 – 9, 13, 70, 77 – 79, 85, 88, 90, 146 – 148, 174, 179 – 180, 181, 188 – 226, and 336 – 337 contain its commercial and / or financial information.

[para 48] I find that these records contain information that is the financial and commercial information of Sundance, as they contain information about Sundance's financial resources, commercial structure, and commercial activities.

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

[para 49] 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 approach was adopted by the former Commissioner of Alberta in Order 99-018. I also applied this approach more recently in Order F2008-018.

[para 50] The Public Body argues that the information contained in records 13, 81, 151, 154 – 165, 166, 171, 174, and 181 was not "supplied" to the Public Body by Sundance, but was generated by the Public Body.

[para 51] The Public Body also argues that the information in the records at issue does not meet the requirement of confidentiality, and takes the position that there is no evidence that Sundance supplied its financial or commercial information in confidence. The Public Body supplied the affidavit of an employee that states the following:

> The Agreement was based on the standard grant template used by Alberta Seniors in 2003-2004. To the best of my recollection, the Agreement, other than the Schedule, does not differ from the template except where amounts and dates have been provided. I am informed by my colleagues at Housing and Urban Affairs who have been involved in administering this grant, and do verily believe, that no explicit assurances were ever made to Sundance that the information they provided as part of the grant application process and reporting on the grant were confidential.

[para 52] Sundance made the following argument:

> The financial and commercial information in the Responsive Records is implicitly confidential because the records were supplied to Alberta Municipal Affairs and Housing as part of confidential financial and organizational disclosure required under the Affordable Housing Funding Agreement entered into by Sundance and Alberta Seniors.

[para 53] Records 154 -165 are a contract between the Province of Alberta and Sundance. As noted above, the decision of the Public Body under review does not include a decision in relation to records 81, 154 – 165, or 177. Therefore, I will not make a finding as to whether section 16 applies to these records. However, as records 13, 151, 166, 171, 174, and 181 are letters from the Public Body to Sundance communicating decisions and information about the grant, and it is this information that is arguably financial or commercial information of Sundance, I will consider the Public Body's arguments and evidence in relation to records 154 - 165 in order to make a decision about whether the references to the agreement in records 12, 151, 166, 171, 174, 181 were

supplied by Sundance in confidence. In addition, I will consider records 154 – 165 as relevant evidence in relation to the issues of supply and confidentiality.

[para 54] In Order F2005-030, the Commissioner commented that information that is negotiated between a public body and a third party is not information that has been *supplied* to the public body by a third party.

> Order 2000-005 held that, generally, information in an agreement that has been negotiated between a third party and a public body is not information that has been *supplied to* a public body. There are exceptions, where information supplied to the public body prior to or during negotiations is contained in the agreement in a relatively unchanged state, or is immutable, or where disclosure of information in an agreement would permit an applicant to make an accurate inference about information supplied to the public body during the negotiations (See Order 2000-005 at para 85; see also an extensive discussion of this topic in British Columbia Order 03-15.) In this case, the information the Public Body seeks to withhold is part of a contract negotiated between itself and the Affected Party. With respect to most of the Agreement, there is no evidence before me that any of the information that the Affected Party has described as its commercial or financial information was supplied to the Public Body by the Affected Party for the purpose of or prior to the negotiations of the contracts, or that any inferences can be drawn from the requested information about information that was so supplied. Accordingly I cannot conclude that most of this part of the requested information was information *supplied to* a Public Body as contemplated by section 16(1)(b).

The evidence of the Public Body is that the agreement contained in records 154 – 165 is based on a standard template used by Alberta Municipal Affairs and Housing at the time the agreement was entered. I find that the amount of the grant referred to in the agreement, which is arguably the financial information of Sundance, was not "supplied" by Sundance, but granted by the Government of Alberta. Consequently, I find that disclosing information about the grant would not disclose financial or commercial information *supplied* by Sundance. As a result, I find that the references to the grant in records 12, 151, 166, 171, 174, 181 are not "supplied" by Sundance.

[para 55] In addition, the agreement contains a requirement that the funding provided by the Minister's department will be acknowledged on signage and printed material. The affidavit provided by the Public Body states that the details of the grant were made public by a news release.

[para 56] I find that Sundance has not established that the remaining records at issue contain information that was supplied by Sundance either explicitly or implicitly in confidence. These records do not contain any caution or warning that they are to be treated as confidential. Consequently, they were not explicitly supplied in confidence. I find that these records were also not implicitly supplied in confidence. The records were provided to the Public Body as part of the application or reporting requirements under the agreement in records 154 – 165. While Sundance argues that the records are confidential because they were part of the reporting process, the agreement does not contain any assurances or requirements of confidentiality in relation to reporting. Further, the affidavit supplied by the Public Body establishes that Sundance was never assured by the Public Body that any of the records it supplied as part of the grant or reporting process would be held in confidence.

[para 57] I find that any belief held by Sundance that it was supplying the information in the records at issue in confidence is not objectively reasonable, as it did not take any steps to ensure that the Public Body knew that it was submitting records in confidence and the Public Body did not provide Sundance any assurances that it would hold these records in confidence. Sundance did not impose any conditions on the distribution of information it supplied to the Public Body and has not provided any evidence as to the manner in which it has protected the information from disclosure. Further, as noted above, records 154 – 165 indicate that Sundance was required to make public the fact that it had received the grant. As a result, I find that in considering the factors set out in Order 99-018, Sundance has not established that the information in the remaining records was supplied 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 58] Although I have found that the financial or commercial information in the records at issue was not supplied in confidence by Sundance, I will also consider whether disclosure of the information could be reasonably be expected to bring about one of the harms in section 16(1)(c).

[para 59] In *Canada (Information Commissioner) v. Canada (Prime Minister)*, [1992] F.C.J. No. 1054, Rothstein J. 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.

[para 60] 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. In the case before me, Sundance has provided a description of the records and categorizes the information they contain as financial, technical or commercial. However, Sundance does not explain how the disclosure of each piece of financial, technical, or commercial information is likely to result in the harms set out in section 16(1)(c). The mere classification of information as financial, technical or commercial does not establish that the harms set out in section 16(1)(c) will necessarily result from disclosure.

[para 61] As noted above, the Public Body has provided evidence that details of the grant referred to in the records at issue were published in a news release. The Public Body submits that Sundance has not met the burden of establishing that harm within the meaning of section 16(1)(c) would result from disclosure of the records at issue.

[para 62] Sundance argues that disclosure of the information in the records at issue could harm its competitive position, which would result in financial loss, as it would be unable to complete its housing projects. Further, it argues that disclosure could result in significant damage to its housing project and investments because the Applicant may be involved in contested proceedings. Further, it argues that the information could be used by competitors against Sundance because of its confidential nature. It argues that business and development plans could be used to create co-operatives or other housing projects to compete directly with Sundance.

[para 63] From my review of the records, I am unable to conclude that disclosure of the information in the records would result in the harms Sundance foresees. There is no evidence that Sundance has competitors, or that competitors could or would create co-operatives or other housing projects based on the information contained in the records. I find that the records themselves do not contain information that would enable another company to establish a cooperative in direct competition with Sundance.

[para 64] Sundance's main concern is reflected in its request for review of November 1, 2007, in which it states:

> The organization behind the FOIP request is directly adverse to the housing project that is the subject of Sundance's application for a grant under the Affordable Housing program.
>
> The organization that made the FOIP request has been attempting to defeat Sundance's housing initiative for several years through ongoing proceedings. It is Sundance's belief that they are

> attempting to use the FOIP legislation for improper purposes in order to thwart Sundance's housing project.

Not only does this letter suggest that Sundance is confident as to the identity of the Applicant, but it is clear that Sundance's main concern is that an adversary might be able to use the information from the records in litigation against Sundance. I interpret the references to "opponents" in paragraph 25 of Sundance's submissions as referring to opponents in litigation. Sundance's concern, as expressed in this part of its submission, is that its housing project may not be completed. This harm it foresees appears to be based on the potential outcome of litigation, rather than fear that competitors will use the information in the records to compete with it commercially.

[para 65] The list of harms set out in section 16(1)(c) is exhaustive. Consequently, the requirements of section 16 will not be met if harms other than those listed in clause (c) result from disclosure of third party information. The harm that Sundance appears to foresee is that the information will be used in litigation, and that the litigation might result in Sundance being unable to complete its project. However, this outcome is not the same thing as "significant harm to competitive position" or "significant interference with negotiating position" as contemplated by section 16(1)(c)(i) or "undue financial loss or gain to any person or organization" as contemplated by section 16(1)(c)(iii), and if it would have this result, it has not been explained how it would. Further, Sundance has not explained what it is about the information it foresees would enable adversaries to succeed in litigation, or to thwart its housing project, or how this outcome corresponds to a harm set out in section 16(1)(c). In addition, even if Sundance were to be the unsuccessful party in litigation, there is no evidence that the information in the records could lead to this result of that this result would be "undue", as required by section 16(1)(c)(iii).

[para 66] In Order PO 2490, a decision of an Adjudicator of the Office of the Information and Privacy Commissioner of Ontario, the Adjudicator decided that "competitive position" in section 17 of the *Freedom of Information and Protection of Privacy Act* of Ontario, which is equivalent to section 16 of the FOIP Act, does not include a litigant's competitive position, as the provision is intended to protection confidential informational assets of businesses. He said:

> In my opinion, the reference to "competitive position" in section 17(1)(a) of the *Act* was not intended to include a litigant's competitive position in civil litigation. As noted above, previous orders of this office have found that section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions, and the Divisional Court endorsed this view in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade),* [2005] O.J. No. 2851 (Div. Ct.). In my view, this is aimed at protecting such assets in the competitive context of the marketplace, rather than before the courts…
>
> The interpretation that "competitive position" does not include the position of the parties to civil litigation is further supported by the legislative history of section 17. The Williams Commission report entitled Public Government for Private People (Toronto: Queen's Printer, 1980) (the Williams Commission report) described the purpose of the third party information exemption found in section 17 of the Act and made the following comment:

> ... It is accepted that a broad exemption for all information relating to businesses would be both unnecessary and undesirable .... Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be preserved. Business information is collected by governmental institutions in order to administer various regulatory schemes, to assemble information for planning purposes, and to provide support services, often in the form of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should as far as is practicable, form part of the public record.
>
> ...
>
> The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information.

It is clear from a review of the discussion in the Williams Commission report that the intent of the provision was to protect the information assets of business that might be exploited by competitors in the marketplace, rather than other litigants.

Previous orders of this office have consistently adopted this view. For example, in Order PO-2293, former Assistant Commissioner Tom Mitchinson stated:

> Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the Act is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, and MO-1706].

Even if I had concluded otherwise, and found that litigation qualified as a suitable venue for "competition" in the context of section 17(1)(a), I would not have found that the appellant had established this harm in the present circumstances. In my view, the appellant's representations on this point do not explain how its position would be harmed by disclosure. Beyond providing a basic description of the litigation, and saying that the records "in part respond" to the requester's claim, no explanation is provided of how disclosure of these particular records could reasonably be expected to harm the appellant's competitive position. In addition, such a reasonable expectation is not self-evident from even a careful review of their contents…

I agree with the reasoning of the Adjudicator in that order, and find that harm to competitive or negotiating position within the context of section 16 refers to harm to competitive or negotiating position in commercial or business transactions, as opposed to litigation. Further, in the case before me, I have been told that Sundance is involved in litigation, but I have not been told how the information in the records at issue could be expected to harm Sundance's position in that litigation, nor is the likelihood of harm to its position in litigation resulting from disclosure evident from the contents of the records. Therefore, even if I were to consider section 16 as applying to litigation, I would be unable to find that Sundance had established harm to its negotiating position in litigation.

[para 67] For these reasons, I find that Sundance has not established that any of the outcomes listed in section 16(1)(c) could reasonably be expected to result from disclosure of the information in the records at issue.

[para 68] For all these reasons, I find that that section 16 does not apply to the records at issue.

Issue F: Did the Public Body properly apply section 17 of the Act (personal information) to the records and information?

[para 69] The Public Body argues that the issue of whether section 17 applies to the records and information is not properly before me and I agree. Any decision the Public Body makes in relation to giving access to personal information in records would require notice under section 30 and a decision under section 31 in relation to that information. A request for review of such a decision could only be made by the individual whose personal information is at issue, and not by another party. If the Public Body makes a decision to withhold personal information of a third party when it responds to the Applicant, only the Applicant could request review of that decision. Essentially, if the Public Body has made a decision to disclose or withhold personal information, that decision is not before me and I lack jurisdiction to address it at this time.

V. ORDER

[para 70] I make this Order under section 72 of the Act.

[para 71] This Order does not address decisions made by the Public Body to withhold records and information under sections 16 or 17, nor does it address records 81, 154 – 165, or 177.

[para 72] I confirm the decision of the Public Body to disclose portions of records 90, 146, 193, 196, 213, 206-1, 207 -1, 208 -1 to 212-1, 260, 261, 261-1, and 306, and to disclose records 3 – 9, 13, 70, 77, to 79, 85, 88, 147 – 148, 174, 176, 179 – 180, 181, 187, 192, 194, to 195, 197, 199 – 205, 214 – 226, 258 – 266, 336 – 337 in their entirety. I therefore order the head of the Public Body to give access to portions of records 90, 146, 193, 196, 213, 206-1, 207 -1, 208 -1 to 212-1, 260, 261, 261-1, and 306 and to records 3 – 9, 13, 70, 77, to 79, 85, 88, 147 – 148, 174, 176, 179 – 180, 181, 187, 192, 194, to 195, 197, 199 – 205, 214- 226, 258 - 266, 336 – 337 in their entirety.

[para 73] I 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.

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Teresa Cunningham
Adjudicator