ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2009-028

March 31, 2010

ALBERTA HEALTH SERVICES

Case File Number F4236

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request for access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Capital Health (now Alberta Health Services), (the Public Body), for records containing information about a contract between the Public Body and the Katz Group to provide outpatient pharmacy services at two hospitals.

The Public Body identified responsive records. It severed information under sections 16 (information harmful to business interests) and 25 (information harmful to the economic interests of a public body).

The Applicant requested a review of the Public Body's response, including its decision to sever information under sections 16 and 25, the adequacy of its response and the timing of its response.

The Adjudicator found that the Public Body had not conducted an adequate search for responsive records and ordered the Public Body to conduct a new search. She found that the Public Body had not complied with the time limits for responding to an access request, but decided that there would be no benefit to ordering the Public Body to comply with the time limits in the Act. The Adjudicator determined that sections 16 and 25 did not apply to the information in the records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10, 11, 14, 6, 25, 30, 31, 71, 72

Authorities Cited: AB: Orders 96-013, 96-018, F2005-011, F2005-030, F2006-023 **ON:** Orders PO-2226, PO-2435, PO-2843, PO-2872; MO-2496-I

Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980, vol. 2 (Toronto: Queen's Printer, 1980)

Cases Cited: *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. 2851; *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No.3475

I. BACKGROUND

[para 1] On February 13, 2007, the Applicant made a request for access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Capital Health (now Alberta Health Services), (the Public Body), for records containing the following information:

> Any correspondence, proposals, contracts and other records, from January 1, 2003 to April 1, 2006, relating to the Capital Health Region's requests for expressions of interest to provide outpatient pharmacy services at the University of Alberta Hospital or Royal Alexandra Hospital, including, expressions of interest or proposals received by the Capital Health Region in respect of such services and agreements with the service providers selected to provide such services.
>
> In particular, I am seeking access to any records relating to which service providers were invited to submit an expression of interest or proposal, how many of such service providers responded to such invitation, how and on what basis were the successful service providers chosen, the nature and terms of the agreements entered into by the Capital Health Region with the successful service providers, and the nature and terms of any amendments, modifications, waivers or extensions to such agreements.

The Public Body responded to the Applicant on July 26, 2007. The Public Body indicated that it was providing records to the Applicant, but that some information was severed under sections 16(1), 17(1), 25(1) and 27(1)(a) of the FOIP Act.

[para 2] On September 25, 2007, the Applicant requested review by the Commissioner of the Public Body's response to his access request. The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 3] The Katz Group (the Third Party) was identified as a person affected by the request for review and was provided notice of the inquiry. The third party elected to participate at the inquiry. Shoppers Drug Mart was also identified as a person affected by the request for review, as information relating to it is contained in the records at issue. Shoppers Drug Mart was provided with notice of the inquiry but did not participate as a third party.

[para 4] The parties provided initial exchangeable submissions. The Third Party and the Public Body also provided *in camera* affidavit evidence, which I decided I would not accept *in camera*. The Third Party and the Public Body then elected to submit exchangeable affidavit evidence. The Third Party also provided additional *in camera* affidavit evidence, which I did accept *in camera*. The Applicant also provided rebuttal submissions.

[para 5] In its submissions, the Public Body explained that it was no longer relying on sections 17 and 27(1)(a) to withhold information. The Public Body made arguments only in relation to its application of sections 16 and 25 to the information in the records.

II. RECORDS AT ISSUE

[para 6] Portions of a lease agreement, a master concession agreement, a services agreement, a memorandum of understanding, an expression of interest, a proposal, and a memorandum are at issue. I understand that the portions of records highlighted in pink are at issue, while those highlighted in gray only are no longer at issue, given that those portions are not referred to in the indices or the arguments of the Public Body or the Third Party.

III. ISSUES

Issue A: Did the Public Body meet its duty to assist the Applicant under section 10(1) of the Act?

Issue B: Did the Public Body meet its duty under section 11 of the Act (time limit for providing a response)?

Issue C: Does section 16 of the Act (disclosure harmful to the business interests of a third party) apply to the information in the records?

Issue D: Did the Public Body properly apply section 25 of the Act (disclosure harmful to the economic interest of a public body) to the information in the records?

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body meet its duty to assist the Applicant under section 10(1) of the Act?

[para 7] The Applicant argues that the Public Body has not met its duty to assist him as "significant amounts of information that we would expect to have been included in the records remain missing..." Essentially, the Applicant argues that the Public Body has not conducted an adequate search for responsive records.

[para 8] The Public Body argues that it has met its duty to assist the Applicant. It notes that it located responsive records after its initial search, but states:

> With regard to the adequacy of the search for records section 10 requires that a public body make every reasonable effort, an effort which does not require perfection. In this context, it only became apparent when the request was reviewed by the head of the Public Body, who as CFO was an individual who had an overview of all Capital Health corporate and contracting operations that additional records may have been in existence. The fact that the Public Body found additional records should not prevent a finding that the Public Body made every reasonable effort…

[para 9] Section 6 of the FOIP Act establishes an applicant's right to access information. It states, in part:

> *6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.*
>
> *(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.*
>
> *(3) The right of access to a record is subject to the payment of any fee required by the regulations.*

[para 10] An applicant has a right to access to information in the custody or under the control of a public body unless an exception under Division 2 applies to the information.

[para 11] Section 10 of the FOIP Act explains a public body's obligations to respond to an applicant when an applicant makes an access request for records. It states, in part:

> *10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[para 12] The Public Body has the onus of establishing that it has made every reasonable effort to assist the Applicant, as it is in the best position to explain the steps it has taken to assist the Applicant within the meaning of section 10(1).

[para 13] Previous orders of this Office have established that the duty to assist includes conducting an adequate search for records. In Order 2001-016, the Commissioner said:

> In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request to discharge its obligation under section 9(1) [now 10(1))]of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1) [now 10(1)].

> Previous orders ... say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) [now 10(1)] of the Act. An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion about what has been done.

[para 14] In Order F2007-029, the Commissioner described the kind of evidence that assists a decision-maker to determine whether a public body has made reasonable efforts to search for records. He said:

> In general, evidence as to the adequacy of a search should cover the following points:
>
> - The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
> - The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
> - The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
> - Who did the search
> - Why the Public Body believes no more responsive records exist than what has been found or produced

[para 15] The Public Body provided the affidavit of the information and privacy advisor who responded to the Applicant's access request. This affidavit describes the correspondence sent by the Public Body to the Applicant, but does not describe any of the steps taken to locate responsive records. The records at issue themselves are silent as to the search conducted by the Public Body. As a result, there is no evidence as to the search conducted by the Public Body.

[para 16] I note that records 227 and 228 refer to evaluations of information in the records by representatives of various departments of the Public Body and to an attached business plan, which are not included as records at issue. As the Applicant's access request indicates that "records relating to the basis by which successful service providers were chosen" would be responsive, it is unclear why these records were not included among the records at issue. It is possible that the information referred to never existed, or was never recorded, or was recorded but no longer exists; however, the Public Body has not explained whether it took steps to locate this potentially responsive information or why it believes no more responsive records exist than what it has located.

[para 17] In *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 89, the Court found that duty to assist reasonably includes, as part of its informational component, a public body's reasons for concluding that no more responsive records exist than what is has located. The Court said at paragraphs 42 and 43:

> The University's submissions set out the information it provided, and argues that it is not necessary in every case to give extensive and detailed information, citing, *Lethbridge Regional*

> *Police Commission*, F2009-001 at para. 26. This is not an entirely accurate interpretation as to what the case holds. While the Adjudicator indicated that it was not necessary in every case to give such detailed information to meet the informational component of the duty to assist, it concluded that it was necessary in this case. In particular, the Adjudicator said (at para. 25):
>
> > In the circumstances of this case, I also find that this means specifically advising the Applicant of who conducted the search, the scope of the search, the steps taken to identify and locate all records and possible repositories of them, and **why the Public Body believes that no more responsive records exist than what has been found or produced**. [emphasis in original]
>
> Similarly here the Adjudicator reasonably concluded that the informational component of the duty to assist included providing the University's rationale, if any, for not including all members of the Department in the search, for not using additional and reasonable keywords, and, if it determined that searching the records of other Department members or expanding the keywords would not lead to responsive records, its reasons for concluding that no more responsive records existed.

As the Public Body has not communicated in its correspondence to the Applicant or in its submissions for the inquiry the steps it took to locate responsive records, and as the records at issue indicate that other responsive records may potentially exist, I am unable to conclude that the Public Body conducted an adequate search for responsive records or responded to the Applicant openly, accurately and completely.

[para 18] For the reasons above, I find that the Public Body has not met its duty to assist the Applicant. I will therefore order the Public Body to conduct a new search for responsive records and to make a new response to the Applicant that addresses the factors set out in Order F2007-029, discussed above.

Issue B: Did the Public Body meet its duty under section 11 of the Act (time limit for providing a response)?

[para 19] The Applicant argues that the Public Body failed to respond to his access request within the time limit imposed by section 11 of the FOIP Act. This provision states:

> *11(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless*
>
> > *(a) that time limit is extended under section 14, or*
> > *(b) the request has been transferred under section 15 to another public body.*
>
> *(2) The failure of the head to respond to a request within the 30-day period or any extended period is to be treated as a decision to refuse access to the record.*

[para 20] The Public Body submits that it properly extended the time for responding to the Applicant's access request under section 14 and has accordingly met the duty imposed by section 11.

[para 21] Section 14 explains the circumstances in which a public body may extend the time for responding to an access request and establishes the formal requirements of an extension of the time for responding. This provision states:

> *14(1) The head of a public body may extend the time for responding to a request for up to 30 days or, with the Commissioner's permission, for a longer period if*
>
> *(a) the applicant does not give enough detail to enable the public body to identify a requested record,*
>
> *(b) a large number of records are requested or must be searched and responding within the period set out in section 11 would unreasonably interfere with the operations of the public body,*
>
> *(c) more time is needed to consult with a third party or another public body before deciding whether to grant access to a record, or*
>
> *(d) a third party asks for a review under section 65(2) or 77(3).*
>
> …
>
> *(3) Despite subsection (1), where the head of a public body is considering giving access to a record to which section 30 applies, the head of the public body may extend the time for responding to the request for the period of time necessary to enable the head to comply with the requirements of section 31.*
>
> *(4) If the time for responding to a request is extended under subsection (1), (2) or (3), the head of the public body must tell the applicant*
>
> *(a) the reason for the extension,*
> *(b) when a response can be expected, and*
> *(c) that the applicant may make a complaint to the Commissioner or to an adjudicator, as the case may be, about the extension.*

[para 22] The Applicant's access request indicates that it was received by the Public Body on February 15, 2007. On March 16, 2007, the Public Body wrote a letter to the Applicant which states:

> The requested records contain information that, if disclosed, may affect the interests of another person or organization. We have contacted the affected party, as required under section 30 of the Act, to provide them with an opportunity to consent to disclosure or to make representations

> explaining why the documents should not be disclosed. We will notify you of our decision regarding your request by April 16, 2007.
>
> If you have any questions, please write to me or call me at [phone number]

This letter does not state that the Applicant has the right to complain to the Commissioner regarding the extension of time until April 16, 2007.

[para 23] On April 16, 2007, the Public Body wrote the Applicant and stated the following:

> Further to our letter of March 16, 2007, Capital Health has decided to give access to the records you requested, subject to exceptions permitted or required under the *Freedom of Information and Protection of Privacy Act*.
>
> The affected party has 20 days to request the Information and Privacy Commissioner to review this decision. If the affected party does not request the Commissioner to review this decision, we will give you access to the records on May 7, 2007.
>
> If you have any questions, please write to me or call me at [phone number].

[para 24] On May 4, 2007, the Public Body wrote the Applicant and stated the following:

> In our letter to you dated April 16, 2007, we had indicted that we would release the documents with respect to your request on May 7th, 2007. However since that letter was sent to you, further documents have been brought to our attention.
>
> In limited circumstances, the *Freedom of Information and Protection of Privacy Act* provides that a public body may extend the time limit for responding to a request for information. We will require a time extension of 30 days so that we may review the additional documents. This extension will allow Capital Health to provide you with a response to your request by June 4, 2007.

This letter indicates that the Applicant has the ability to request review of the extension.

[para 25] On June 4, 2007, the Public Body wrote the Applicant and stated the following:

> Further to our letter of May 4, 2007, we wish to advise that the additional documents that have come to our attention contain information that, if disclosed, may affect the interests of another person or organization. We have contacted the affected parties, as required under section 30 of the Act, to provide them with an opportunity to consent to disclosure or to make representations explaining why the documents should not be disclosed. We will notify you of our decision regarding your request as soon as possible and no later than July 4, 2007.

This letter does not indicate that the Applicant has the right to complain to the Commissioner about the extension.

[para 26] On July 4, 2007, the Public Body wrote the Applicant and stated:

> Further to our letter of June 4, 2007, Capital Health has decided to give access to the records you requested, subject to exceptions permitted or required under the *Freedom of Information and Protection of Privacy Act.*
>
> The affected party has 20 days to request the Information and Privacy Commissioner to review this decision. If the affected party does not request the Commissioner to review this decision, we will give you access to the records on July 26, 2007.
>
> If you have any questions, please write to me or call me at [phone number].

This letter does not indicate that the Applicant has the right to complain to the Commissioner about the extension.

[para 27] The Public Body argues that the records in this instance contained the information of the Third Party and that it was therefore required to notify the Third Party of the access request under section 31 of the FOIP Act. It submits that it extended the time for responding to the Applicant under section 14 on May 4, 2007 and has therefore met the requirements of section 11. It states in its submissions:

> In this instance, initially, notice was sent to the Applicant and Affected Party on March 16, 2007 and written notice of the decision was given t both on April 16, 2007 which was within the time frame contemplated by the Act.
>
> On May 4, 2007 the Public Body wrote to the Applicant extending the time for [responding to the] request for 30 days as new records had come to light. Although that letter did not specify the section relied on given the context of the request and the nature of the information the extension was pursuant to section 14(1)(c). The Public Body then relied on the process outlined in section 14(3) wherein a second notice was given to the Applicant and Affected Party on June 4, 2007, with a decision from the Public Body being communicated to the parties on July 4, 2007. The records were released after the 20 days period as section 31(3) on July 26, 2007.

[para 28] In order to establish that it complied with section 11 in this case, the Public Body must establish that it extended the time for responding to the Applicant under section 14. In its submissions, cited above, the Public Body points to its letter of May 4, 2007 as extending the time for response.

[para 29] As noted above, the thirtieth day after February 15, 2007 was March 17, 2007. While the Public Body wrote the Applicant on March 16, 2007 to explain that it would not be able to respond to his request until April 16, 2007, the Public Body did not inform the Applicant that he had the right to complain to the Commissioner regarding this decision to extend the time. Consequently, the letter of March 16, 2007 does not comply with section 14. I also note that the Public Body did not respond to the Applicant on April 16, 2007, as it proposed.

[para 30] I find that the letter of May 4, 2007 does not meet the requirements of section 14. While the Public Body argues that it extended the time in order to give notice to a third party as contemplated by section 14(3), the letter itself indicates that the time was extended so that the Public Body could review additional documents, which is not a permissible reason for extending time under section 14. If the Public Body's purpose in extending the time was to provide notice to the Third Party regarding the additional

documents, then section 14(4)(c) required the Public Body to communicate that reason to the Applicant.

[para 31] I find that none of the correspondence sent by the Public Body to the Applicant meets the formal requirements of section 14, given that the letters either do not contain a reason for extending the time contemplated by section 14, or do not state that the Applicant has the right to complain to the Commissioner about the extension. Further, as some of the reasons given for extending the time do not meet the requirements of section 14(3), i.e. time was extended to review records, rather than to provide section 30 notice, the Public Body was not entitled to extend the time beyond 30 days without first obtaining the Commissioner's permission under section 14(1). However, the Public Body extended the time to a period exceeding four months, without first obtaining the permission of the Commissioner. For all these reasons, I find that the Public Body did not extend the time for responding to the Applicant for the purposes of section 11(1)(a) and I find that the Public Body did not meet its duty to the Applicant under section 11, given that it did not respond to the Applicant by March 17, 2007.

[para 32] Although I find that the Public Body did not meet its duty to the Applicant, I do not consider it necessary or appropriate to make an order in relation to section 11 in this case. The Applicant has not requested that I reduce fees, nor is there any evidence relating to the fees charged by the Public Body, in the event that I considered this to be an appropriate case to order a reduction in fees for the purposes of section 72(3)(c). Further, as the Public Body responded to the Applicant and granted access to portions of records, this is not a case where it would be appropriate or necessary to deem the Public Body to have refused access to the Applicant for the purposes of section 11(2). Nothing can be gained by ordering the Public Body to comply with its duty to the Applicant under section 11, as it would be impossible for it to do so at this point in time. However, I draw to the Public Body's attention that section 14 has formal requirements that must be met before a Public Body can be said to have extended the time under the FOIP Act for the purposes of section 11.

Issue C: Does section 16 of the Act (disclosure harmful to the business interests of a third party) apply to the information in the records?

[para 33] The Public Body's index of records indicates that it is withholding portions of records 23 – 27, 35, 37, 39, 40, 42, 46, 47, 54, 55, 66 – 68, 72 – 76, 81 – 83, 86 – 87, 91 – 92, 113 – 114, 116 – 117, 120, 122 – 127, 130 – 132, 149, 173, 178, 183 – 184, 187 – 188, 190 – 192, 194, 194a, 194b, 198, 202, 210 – 218, 222 – 225, 227 – 228 under section 16 of the FOIP Act.

[para 34] The Public Body's argument in relation to its decision to apply section 16 to information in the records is the following:

> With regard to section 16, the Public Body sent a section 30 notice to the Affected Party after the Public Body had decided to give access to the records. The Affected Party subsequently objected to release. The Public Body therefore relies on the Affected Party's evidence in support

> of the application of section 16 and consequently relies on the Affected Party's evidence in order to discharge the burden of proof under section 16(1).

I understand the Public Body to say that it has withheld information under section 16 of the FOIP Act for the sole reason that the Third Party objected to disclosure and relies on the Third Party's submissions and evidence to meet the burden imposed by section 71(1) of the FOIP Act.

[para 35] 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 36] The purpose of mandatory exceptions to disclosure for the commercial information of third parties in access to information legislation is set out in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* at page 313:

> The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information.

The purpose of provisions like section 16 is to protect specific types of proprietary information or "informational assets" of third parties from disclosure, so that businesses may be confident that they can continue to invest in this kind of information, and to encourage businesses to provide this kind of information to government when required.

[para 37] In Order F2005-011, the Commissioner adopted the following approach to section 16 analysis:

> 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 withheld by the Public Body under section 16 meets the requirements of sections 16(1)(a), (b), and (c) and therefore falls under section 16(1).

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?

[para 38] The Public Body argues that the information severed from the records at issue under section 16 consists of its financial or commercial information.

[para 39] In Order 96-013, the former Commissioner adopted the following definition of "commercial information" from Order P-489, a decision of the Information and Privacy Commissioner of Ontario:

> The Ontario Commissioner has also made some specific additions to the ordinary dictionary definition of "commercial information", which I wish to adopt. The category of "commercial information" includes "contract price" and information, "...which relates to the buying, selling, or exchange of merchandise or services..." (Order P-489 [1993] O.I.P.C. No. 191).

[para 40] In Order 96-018, the former Commissioner adopted the following definition of "financial information" and determined that information is not the financial information of a third party for the purposes of section 16(1)(a) if the information does not allow an applicant to draw an accurate inference about a third party's assets or liabilities, past or present:

> In keeping with my decision in Order 96-013, I attribute ordinary meaning to the word "financial". I also reiterate that careful consideration must be given to the content of the document in determining whether or not the information falls within this section. Financial information, in my opinion, is information regarding the monetary resources of the third party and is not limited to information relating to financial transactions in which the third party is involved.

> As such, the information in the record is not of a "financial" nature because it reveals nothing of the third party's financial capabilities beyond its commitment to raise the dollar amount specified. Similarly, I find that the record reveals nothing of the third party's assets or liabilities, either past or present.

[para 41] In Order MO-2496, an order of the Office of the Information and Privacy of Commissioner of Ontario, the Adjudicator considered the meaning of "commercial" and "financial" information as they appear in Ontario's equivalent of the FOIP Act's section 16. The Adjudicator stated:

> These terms have been defined in previous orders of this office as follows:
>
> > …
> > Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
> >
> > Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

[para 42] In my view, Orders 96-013 and 96-018 of this office, and Order MO-2496 of the Office of the Information and Privacy Commissioner of Ontario, are essentially stating the same thing. "Commercial information" is information belonging to a third party about its buying, selling or exchange of merchandise or services. "Financial information" is information belonging to a third party about its monetary resources and use and distribution of its monetary resources.

[para 43] In addition, legislative provisions must be read in context. In my view, section 16(1)(b) limits section 16(1)(a) in the sense that the information supplied under section 16(1)(b) must have the character of information falling under section 16(1)(a) at the time of supply.

[para 44] The Third Party made the following argument in relation to section 16(1)(a):

> In deciding whether the information in question falls within one or more of the categories enumerated in section 16(1)(a), one must not examine solely the title, but consider the content of the records, taking into account he nature of the information and the context in which it appears… The Confidential Documents, looking at each as a whole, is clearly commercial in nature and consists of, explicitly and implicitly, commercial and financial information as each document is either an agreement relating to a commercial transaction between the Public Body and the Katz Group or a communication directly related to such commercial transaction, which directly or indirectly reveals the terms upon which the third party is prepared to do business, which even if not directly overt, reveals financial capability.
> … .

> In preparing the Proposal and subsequent documentation, the Katz Group carried out and relied upon extensive financial modelling based upon internal competitive information including a large number of variables and assumptions. Disclosure of the severed portions of the Confidential Documents would reveal aspects of the Katz Group's modeling and permit analysis and "reverse engineering" to determine its competitive information and assumptions.

[para 45] I will deal first with the document appearing on records 221 – 226 that is referred to by the Third Party as the "proposal". (The full title is: "Proposal for the Establishment of Katz Group Pharmacies in the University of Alberta Hospital ("UAH") and the Royal Alexandra Hospital ("RAH")".) This document contains terms for a contractual arrangement that the Third Party offered to the Public Body. The Third Party says the following, by way of affidavit, concerning this document:

> Following the analysis and modeling described above, the Katz Group formalized and submitted its proposal to Capital Health through a letter agreement dated January 25, 2005 (the "Proposal"). This Proposal included a detailed submission regarding the financial and commercial terms on which the Katz Group was prepared to enter into a "strategic relationship" with Capital Health related to the provision of retail pharmacy and other services in the above mentioned hospital locations. The Proposal was accepted by Capital Health.

[para 46] I have reviewed this document. I note that it contains several numerical amounts (appearing on record 22), and that one of these figures arguably discloses something about the Third Party's financial resources at the time the proposal was given to the Public Body. However, beyond this, the proposal merely discusses various proposed elements of the contract, in a general way. It does not contain information that could be construed as trade secrets, or "commercial, financial, labour relations, scientific or technical information" within the terms of section 16(1)(a) of the FOIP Act. The proposal looks forward to a time when a commercial arrangement will be entered, which, should this happen, and after the terms have been finally established and documented, will contain information that will then become its commercial information. However, but for the exceptions noted, this document, at the time it was supplied to the Public Body, did not contain the Third Party's commercial or financial information.

[para 47] The Third Party's affidavit also included the following assertions (which speak largely to the information in the final agreements listed at the bottom):

> In early to mid 2004, the Katz Group began to develop a proposal intended to be provided to Capital Health related to the potential provision by the Katz Group of certain retail out-patient pharmacy and other services in two of Capital Health's facilities namely the University of Alberta Hospital and the Royal Alexandra Hospital. Through extensive internal consultation and financial modeling, the Katz Group developed a detailed outsourcing plan based upon a specific financial model.
>
> More specifically, the Katz Group utilized competitive cost and other information internal to the Katz Group to prepare what it considered to be a competitive financial model for the operation of outpatient pharmacies at the two hospitals mentioned above. Other than those specifically included in the documents in question, the underlying assumptions utilized by the Katz Group in the modeling were not disclosed to Capital Health.
>
> The information provided to Capital Health and the assumptions that underlie the information were and remain sensitive from a competitive perspective and include the following and their

> interrelationship to each other: staffing levels, purchasing contracts, growth estimates , including the growth of over-the-counter products, net income expectations, purchase price (acquisition) expectations, sales margins, the anticipated impact of visiting patients on Katz Group pharmacies beyond the hospitals, advertising expense, salary and benefit costs and the ability to attract hospital employees as customers.
>
> Following the analysis and modeling described above, the Katz Group formalized and submitted its proposal to Capital Health through a letter agreement dated January 25, 2005 (the "Proposal"). This Proposal included a detailed submission regarding the financial and commercial terms on which the Katz Group was prepared to enter into a "strategic relationship" with Capital Health related to the provision of retail pharmacy and other services in the above mentioned hospital locations. The Proposal was accepted by Capital Health.
>
> Subsequently, based upon the Proposal, the MOU and the financial modeling described above, the Katz Group, through Pharmx, then entered into the following agreements dated March 9, 2006 with Capital Health:
>
> (a) a lease agreement (the "Lease");
> (b) a master concession agreement (the "Concession Agreement"); and
> (c) a services agreement (the "Services Agreement)

[para 48] I agree with the Third Party that the information in the lease agreement, the master concession agreement, the services agreement, the memorandum of understanding and the attached schedules, is now the commercial information of the Third Party, as it contains information about a commercial transaction it entered with the Public Body. However, as will be discussed more fully below, the information in the concluded agreements was not supplied to the Public Body; it was negotiated with it. In other words, it did not achieve the status of commercial information until the negotiation process was concluded. Section 16 addresses only commercial information that is supplied to the Public Body, and information that becomes commercial information only after a contract is concluded does not fall within the section.

[para 49] The Third Party's argument possibly acknowledges or concedes that the information in the contractual documents themselves is not supplied to the Public Body and does not, *in itself*, fall within section 16. However, it does assert that the contractual terms must themselves be withheld, and it says:

> Disclosure of the severed portions of the Confidential Documents would reveal aspects of the Katz Group's modeling and permit analysis and "reverse engineering" to determine its competitive information and assumptions.

When the Third Part speaks of "financial modeling", I take this to refer to the terms on which, based on its resources and its internal knowledge and experience, it was interested in entering into an agreement. The Third Party appears to argue that the contractual terms themselves would reveal the terms on which it was prepared to enter into a contract, and the reasons therefor, that on this basis, the contractual terms must be withheld.

[para 50] It is necessarily the case that what a party has agreed to is what it was prepared to agree to, and that it determined what it would agree to through some process of analysis of its resources and situation. That is the case with all contracts. Despite this, however, the cases are clear that negotiated contractual terms cannot be withheld under

section 16. Partly, this is because, as discussed below, the contractual terms were not supplied by a third party, but were negotiated between the parties. This position can also be explained on the basis that, to the extent proposed contractual terms can be deduced from the final contractual terms, the former are not themselves commercial or financial information (other than what can be deduced from them about a party's financial capabilities), but only become such if they are transformed into the final contractual terms.

[para 51] If, alternatively, the Third Party is saying that the final contractual terms disclose the fact that the Third Party had the resources to enter into such a contract, while that is in likelihood true, I find that this is not "commercial or financial information" of a sufficient degree of specificity as to fall within the terms of section 16(1)(a).

[para 52] The Public Body also created a memorandum evaluating the expressions of interest it received. I find that this proposal arguably contains the financial information of the Third Party and Shoppers' Drug Mart, in the sense that it reveals something about the financial resources of these two organizations.

Part 2: Was the information supplied, explicitly or implicitly, in confidence?

[para 53] In Order F2005-030, the Commissioner commented that information that is *negotiated between* a public body and a third party is generally 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).

[para 54] Similarly, in Order PO-2843, an order of the Office of the Information and Privacy Commissioner of Ontario, the Assistant Commissioner said:

> The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional

> Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above. [See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan*, [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No.3475 (Div Ct.)]

[para 55] In determining that an agreement negotiated between parties did not constitute or reveal information supplied by third parties, the former Information and Privacy Commissioner of Ontario made the following finding in Order PO-2226:

> Record 1 in this appeal is a complex, multi-party agreement for the purchase of the assets of a large corporation. Records 2 and 3 are agreements that flow from Record 1, and they are also detailed and complex. All three contracts are multi-faceted and contain customized terms and conditions. None of the parties resisting disclosure have provided representations supporting the position that the agreements or any specific provisions in them were "supplied" to the Ministry or that they would reveal information actually supplied to the Ministry and, in my view, it is simply not reasonable to conclude that contracts of this nature were arrived at without the typical back-and-forth, give-and-take process of negotiation. I find that the records at issue in this appeal are not accurately described as "the informational assets of non-governmental parties", but instead are negotiated agreements that reflect the various interests of the parties engaged in the purchase and sale of "the de Havilland business".

[para 56] Order PO-226 was upheld by the Ontario Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. 2851. The Ontario Divisional Court said the following regarding negotiated information:

> The Commissioner took the view that the records before him did not contain information which was supplied to the Ministry because the information was found in complex contracts which were the subject of agreement by a number of parties, in the case of the Asset Purchase Agreement, and between the government and Bombardier with respect to the other two agreements. His conclusion that complex and detailed agreements like the ones before him were the result of negotiations was a reasonable one. While the Ministry has suggested that its role was passive with respect to the Asset Purchase Agreement, it was reasonable for the Commissioner to conclude that the agreement was, nevertheless, negotiated and that it reflected all the parties' interests.
>
> During argument before us, counsel for the applicants did not point to anything in the sealed records ("the Private Record") which showed that the Commissioner erred in concluding that there were no informational assets in the three agreements. Having examined the Private Record, I find that the Commissioner reasonably concluded that the agreements were the subject of negotiations between the parties, and that they do not reveal information of the applicants actually supplied to the Ministry. The Asset Purchase Agreement in the Private Record contains neither the exhibits nor the schedules to which Boeing referred in its factum, and which might have disclosed information supplied by it.

[para 57] In *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No.3475, the Ontario Divisional Court upheld the decision of an Adjudicator which held that a memorandum of understanding (MOU) did not contain information "supplied" by a third party. The Court said:

> In any event, the French version of s.17(1) may be read in a way that implicitly includes the notion of "supplied", as the purpose of s.17(1) incorporates the idea that the exemption is designed to protect information "received from" third parties, a notion that conforms with the

> concept of "supplied". Thus, the presence or absence of the verb "supplied" in the French version is not determinative, and the English and French versions may be read harmoniously.
>
> We see no merit in the distinction made by the Applicants between conventional supply contracts and the agreement in question here. It should be noted that in *Boeing* none of the contracts were, in fact, conventional supply contracts. They consisted of an asset purchase agreement, a shareholders agreement and a share purchase agreement.
>
> Although the CMPA would like to characterize the 2000 and 2004 MOUs as being "in essence information sharing agreements", the evidence before the Adjudicator indicated that it provided for much more. The CMPA expressly agreed to provide various services, including malpractice coverage. Provisions of the 2004 MOU itself provide that the CMPA agrees "to continue to work together" with the other two parties and to take certain steps and provide certain services.
>
> Moreover, there was nothing immutable about the information provided by the CMPA. The language of Appendix 2 clearly contemplates that the information is subject to change. It should also be pointed out that the issue of immutability was not raised before the Adjudicator. In any event, immutability is just one factor, and the onus is on those resisting disclosure to show immutability and they have not done so.
>
> The Adjudicator explained that while the information in Appendix 2 may have been originally provided by the CMPA, the methodology had come to represent the negotiated intention of all the parties. In so concluding, the Adjudicator appropriately considered the entirety of the evidence, the relevant jurisprudence with respect to the interpretation and application of s.17(1) of FIPPA and expressed a reasonable line of analysis to reach this conclusion. Therefore, there is no basis to interfere with her decision.

[para 58] In Order PO-2435, an order of the Office of the Information and Privacy Commissioner of Ontario, the Adjudicator noted that even where a contract is preceded by little or no negotiation, the information in a contract is mutually generated, rather than supplied by a third party. The Adjudicator said:

> The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP released by MBS, the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a VOR agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry, or SSHA, to claim that the per diem amount was simply submitted and was not subject to negotiation.
>
> It is also important to note that the per diem does not represent a fixed underlying cost, but rather, it is the amount being charged by the contracting party for providing a particular individual's services.

[para 59] Previous orders of this office, and orders and judgments of other jurisdictions establish that "negotiating contractual terms" is not "supplying information" for the purposes of section 16(1)(b).

[para 60] The Third Party makes the following argument regarding the information it seeks to have withheld:

> While in certain instances it has been held that the terms of agreements entered into between public bodies and third parties do not consist of information supplied by the third party as this is information generated through negotiation, it has also been held that where:
>
> 1. the third party has provided original or proprietary information that remains relatively unchanged in a contract; or
> 2. disclosure of the information in a contract would permit an applicant to make an "accurate inference" of sensitive third-party business information that would not in itself be disclosed under the Act.,
>
> the information is viewed as having been supplied by the third party. [Order 98-015, F2003-004, F2004-014, F2005-030, F2009-007]
>
> The Proposal consists of information supplied by the Katz Group and contains the terms on which the Katz Group was prepared to enter into, or at least discuss entering into, a relationship with the Public with respect to retail out-patient pharmacies in certain hospitals. The Proposal then formed the framework for all future discussions and content of the subsequent documents, namely the Memorandum, the MOU, the Services Agreement, the Concession Agreement and the Lease.
>
> As a result, the severed information from the Confidential Documents consists of or contains information that remains unchanged, such as certain financial terms, and other information supplied by the Katz Group which would allow for accurate inference of sensitive commercial and financial information. Where either is seen to occur, information has been viewed to have been supplied by the third party. [Orders 96-013, 99-040, and 2000-003]

[para 61] The Third Party argues that the proposal, a record created by the Third Party and appearing on records 221 - 226 consists of its financial or commercial information. Further, it reasons that if I were to find the proposal to contain its commercial or financial information, as this information was supplied, I must then find that the information contained in the agreements it entered with the Public Body was supplied rather than negotiated, given that the proposal was intended by the Third Party to be a starting point for negotiations.

[para 62] I have already found that the proposed amount in the proposal can be construed as the financial information of the Third Party; however, I have found that the remaining information in the proposal is not. Consequently, it is not strictly necessary that I consider whether the remaining information in the proposal was supplied. However, if I am wrong in my finding that the information other than the proposed one-time fee amount is not the financial or commercial information of the Third Party I will consider whether this information was supplied in confidence by the Third Party.

[para 63] I find that the information in the proposal does not appear in the negotiated agreements. Rather, the agreements contain different terms. For example, there are differences between the amount and terms of the initial fee in the proposal, and the initial fee referred to in the agreements and the memorandum.

[para 64] I find that none of the information in the agreements, or in the memorandum appearing on record 227 was supplied by the Third Party. I find that the only information that can be said to be information of the Third Party meeting the requirements of subsection 16(1)(a) that can be said to have been "supplied" by the Third Party is the amount, referred to above, contained in the proposal. All other information in the agreements and the schedules to the agreements is negotiated between the parties, and was not supplied by one party or the other.

[para 65] In relation to the memorandum, I am unable to conclude that the information in it was supplied in confidence by the Third Party. There is no evidence as to the source of the information regarding the Third Party's offer in the memorandum. As the proposal contains different terms than those referred to in the memorandum, I find that the proposal is not the source of the information. Further, as the memorandum predates the agreements, the agreements are not the source of the information either. I therefore find that the evidence does not establish that the Third Party supplied the information in the memorandum for the purposes of section 16(1)(b).

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

[para 66] The Third Party argues that significant harm to its competitive position or significant interference with its negotiating position would result from disclosure of the information it seeks to have withheld and that the requirements of subclause 16(1)(c)(i) are therefore met. It argues:

> On their face, the Confidential Documents, directly or by inference, set out specific financial information and contractual terms with respect to a unique business arrangement which, in the future, could be expanded with the Public Body or may be utilized in connection with similar transactions or arrangements with other entities. In addition, the severed information would also permit analysis and "reverse engineering" of the Katz Group's underlying strategic and financial modelling demonstrating the "blueprint' for the basis on which the Katz Group is prepared to do and can do business in relation to this and similar types of arrangements.
>
> Similar to what has been accepted in Order 2001-021, 2001-008 and 2001-019, if the information in question were disclosed, the Katz Group's competitors and potential or other current customers or "partners" would have specific information regarding pricing and commercial terms that the Katz Group is willing to accept as well as the underlying financial blueprint. If this information were disclosed, other public bodies or private entities would have advance notice of the specific outcomes and positions taken by the Katz Group in respect of this type of arrangement.
>
> The retail pharmaceutical business is intensely competitive and small changes in prices, terms, volume, location and other factors can result in significant changes in overall profitability and sustainability. Moreover, there is a good probability that past strategies, negotiating positions, instructions, and pricing will be used in the future for potential similar projects with the Public body and/or private health or similar facilities or entities.
>
> As a result of the foregoing, disclosure of the severed information would result in unfair competition and an uneven playing field, particularly when competitors and potential parties to other transactions are not required to disclose their information with such specificity. In turn, this would significantly harm with the Katz Group's [*sic*] competitive position *vis a vis*

> competitor's knowledge of its "blueprint" in bidding / RFP / RFQ processes and also significantly interfere with the Katz Group's negotiating position with other public bodies and private entities in the future. In each case, loss of future contracts and / or entering into contractual arrangements that are less financially or contractually beneficial would not result but for the disclosure of the severed portions of the Confidential Documents.

I have already found that the only information of the Third Party meeting the requirements of sections 16(1)(a) and (b) is the proposed amount contained in the proposal.

[para 67] The Third Party's arguments indicate that it is concerned that, if the terms it negotiated with the Public Body are disclosed, significant harm will result to its negotiating position and competitive position. That may be the case; however, section 16 does not apply to negotiated information, but to proprietary information meeting the requirements of section 16(1)(a) that has been supplied to a public body. As I have found that the information withheld from the agreements and the proposal, but for the proposed initial fee amount in the proposal, does not meet the requirements of section 16(1)(a) or (b), it follows that the harm projected from disclosure of this information is not the harm addressed by section 16(1).

[para 68] However, if I am wrong that the requirements of section 16(1)(a) and (b) are not met, I must consider whether the Third Party has established that a harm contemplated by section 16(1)(c) could reasonably be expected to result from disclosure.

[para 69] In *Canada (Prime Minister) Canada (Information Commissioner) v. Canada (Prime Minister)*, [1992] F.C.J. No. 1054; Rothstein J., as he then was, 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

[para 70] In *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515 upheld a decision of the Commissioner requiring evidence to support the contention that there is risk 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)*43, at para. 56 *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)44* at para. 26.

[para 71] I find that the evidence of the Third Party does not establish that the harm projected by the Third Party would result from disclosure of information in the records, including the amount in the proposal to which I found section 16(1)(a) potentially applied. The evidence of the Third Party's affiant does not establish a direct linkage between the harm the Third Party predicts and the information in the records. I have not been given a clear explanation as to why the harm alleged would result from disclosure of the specific information in the records at issue. I have been told that the contractual terms are unique, bespoke, or are specific to the transaction, or may enable a competitor to determine the Third Party's financial capability and cost structures, but I have not been told what it is about the information that would lead a competitor to determine the Third Party's financial capability or cost structures, or how this would result in the harms contemplated by section 16(1)(c)(i). Further, given that the contractual terms are bespoke and unique to the transaction, it is unclear how the contractual terms would have any effect on the Third Party's negotiations with other parties, or its competitive standing with its competitors.

[para 72] For these reasons, I find that section 16 does not apply to the information in the records relating to the Third Party that the Public Body withheld under this provision.

Information about Shoppers' Drug Mart

[para 73] The Public Body applied section 16 to information on records 173 and 178, which are records forming part of an expression of interest prepared by Shoppers' Drug Mart (Shoppers'). It also applied section 16 to information about Shoppers' appearing in a memorandum. As noted above, the Public Body has not made submissions in relation to the application of section 16 to the records and Shoppers' Drug Mart has elected not to participate as a third party. As a result, there is no evidence before me, other than the severed information, as to whether section 16 applies to this information.

[para 74] As there is no evidence as to whether the information in these records was supplied in confidence or would result in one of the harms enumerated in section 16(1)(c), I find that section 16 does not apply to the information about Shoppers' withheld by the Public Body from records 173 and 178 and from the memorandum.

Conclusion

[para 75] For all these reasons, I find that section 16 does not apply to the information in the records at issue.

Issue D: Did the Public Body properly apply section 25 of the Act (disclosure harmful to the economic interest of a public body) to the information in the records?

[para 76] The Public Body's index of records indicates that it is withholding portions of records 23 – 27, 35, 37, 39, 40, 42, 46, 47, 54, 55, 66 – 68, 72 – 76, 81 – 83, 86 – 87, 91 – 92, 113 – 114, 116 – 117, 120, 122 – 127, 130 – 132, 149, 173, 178, 183 – 184, 187 – 188, 190 – 192, 194, 194a, 194b, 198, 202, 210 – 218, 222 – 225, 227 – 228 under section 25 of the FOIP Act

[para 77] Section 25 creates an exception to the right of access in situations where disclosure of information would result in harm to economic and other interests of a public body. It states, in part:

> *25(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy, including the following information…*
>
> *(c) information the disclosure of which could reasonably be expected to*
> *(i) result in financial loss to,*
> *(ii) prejudice the competitive position of, or*
> *(iii) interfere with contractual or other negotiations of, the Government of Alberta or a public body…*

[para 78] In Order 96-016, the former Commissioner considered the meaning of section 25(1)(c), [then section 24(1)(c)]. He said:

> The public body claims that section [25(1)] should be interpreted so that the harm to a public body does not have to result directly from disclosing the specific information, but can be "harm at large" or "indirect harm" (my interpretation of the public body's claim). The essence of the public body's argument is this: The information in the record was produced under a contract between a division of a public body and an organization independent of government. There was a confidentiality clause in that contract, which restricts publication of the information. Releasing this information under the Act, contrary to the confidentiality clause, will affect AEC's and, consequently, ARC's contracts with this and other organizations, thereby causing harm to both AEC and ARC. Harm will result from cancelled contracts, and from other organizations bypassing AEC and ARC, knowing they are subject to the Act. That harm is quantifiable.
>
> However reasonable the public body's argument sounds, I do not think that section [25(1)] can or should be interpreted as the public body claims. Section [25(1)]focuses on the harm resulting from the disclosure of *that specific information* (my emphasis). The wording of section [25(1)] implies that it is the specific information itself that must be capable of causing the harm, if that information is disclosed. When I look at the kinds of information listed in section [25(1)(a)-(d)], two things are clear to me: (i) the legislature had very specific kinds of information in mind when it was contemplating what information had the potential to cause harm if disclosed; and (ii) there must be a direct link between disclosure of that specific information and the harm resulting from disclosure; in other words, there must be something in the information itself capable of causing the harm.

[para 79] Section 25 recognizes that there is a public interest in withholding information that could harm the economic interests of the Government of Alberta or a public body or the Government of Alberta's ability to manage the economy. Sections 25(1)(a) – (d) contain a non-exhaustive list of information, the disclosure of which could be reasonably expected to result in harm of this kind.

[para 80] A public body seeking to withhold information under section 25 must establish a direct link between the disclosure of information and a reasonable expectation of harm to the Government of Alberta's or its own economic interests.

[para 81] The Public Body makes the following argument in support of its application of section 25 to the information in the records:

> The Public Body has severed information that if disclosed could reasonably be expected to harm its economic interest. In particular, the information if disclosed could reasonably be expected to prejudice the competitive position of or interfere with the contractual or other negotiations of the Public Body (sections 25(1)(ii) and (iii)).
>
> In order to determine whether there is a reasonable expectation of harm the following test must be satisfied:
>
> 1. there must be a clear cause and effect relationship between the disclosure and the harm which is alleged;
> 2. the harm caused by the disclosure must constitute "damage" or "detriment" to the matter and not simply hindrance or minimal interference; and
> 3. the likelihood of harm must be genuine ad conceivable (Order F2006-023 paragraphs 23 and 29)
>
> The services for which the records relate are the provision of in-house pharmacy services. The … affidavit of … the Senior Vice President, Contracting Procurement and Supply Management for the Public Body sets out the market conditions that exist for such services and demonstrates that if the severed records are disclosed how the information contained therein is capable of causing harm to the Public Body's competitive position. The information contained in the records although relating to an existing, long term strategic arrangement if known widely will genuinely impact upon the competitive position of the Public Body in the negotiation and creation of future similar arrangements across the province. From the division of risk factors that is contained within those severed records a party will be able to infer the internal options AHS has with regard to its strategic plans of creating similar services elsewhere (Order 98-019 paragraph 31).
>
> The "damage" caused by such disclosure is not speculative but genuine and conceivable. If AHS wish [sic] to replicate such services knowledge of the financial and risk arrangements currently in place for such service would prejudice the Public Body's competitive position by giving an interested party the options the Public Body has used in negotiations, the priority assigned to each option and what options have been or are being discounted (Order F2006-023).

[para 82] The affidavit evidence provided by the Public Body in support of its position states:

> It is my belief that if the severed portions of the records were disclosed that the release would cause prejudice to AHS' competitive position and interfere with contractual or other negotiations of AHS. This belief is based on the fact that there is an active RFP exercise for

> outpatient pharmacy services in Calgary currently being undertaken with other such RFP exercises being contemplated for the province. The information currently severed includes: the division of contractual risk between the parties (i.e. who will take on legal and financial responsibility on the occurrence of various contractual events), the amount of rent payable, the amounts and financial details as to the concession payments and specific remedies for failure to meet performance measures. Release of such severed information would lessen the opportunity for AHS to obtain increased cost savings as an RFP participant would have the information of what was deemed commercially acceptable to AHS in a similar tender exercise. The RFP participant would have little incentive to cost its bid at a lower price and with different a different [sic] division of risk than what had been previously accepted. Accordingly, AHS would be at a competitive disadvantage in this RFP or in future RFP exercises.
>
> Further, the number of potential service providers who may be able to tender for such services remains low. While, there are many retail pharmacy chain outlets in Canada, there are few potential service providers who can provide the in situ logistics and services in an acute care setting. The last RFP exercise for such services (and which is the subject of this inquiry) identified only two potential service providers. I believe the market has not significantly changed in this respect since no new entrants have entered the Alberta market. To negotiate further cost saving in such a market depends on maintaining the confidentiality of the terms already agreed in the previous RFP exercise.

[para 83] The affiant also made arguments in relation to specific records, which I will not reproduce here. However, the following statements summarize the affiant's arguments in relation to the harm he considers will result from disclosure of the contractual terms:

1. If the agreements are disclosed, existing tenants of the Public Body would seek better terms for themselves when they negotiate with the Public Body.
2. Disclosure of the terms in the agreement and the unsuccessful bid would create a "roadmap" for other parties seeking to negotiate with the Public Body, which would prejudice new negotiations.
3. Disclosing concessions made by the Public Body would prejudice the Public Body in future negotiations because the Public Body does not normally make concessions such as those made in the agreements in the records at issue.

[para 84] As noted above, the Public Body has applied subclauses 25(1)(c)(ii) and (iii) to all the information it withheld from the records. I will first consider whether subclause 25(1)(c)(ii) applies, and then, if necessary, consider whether subclause 25(1)(c)(iii) applies.

Subclause 25(1)(c)(ii)

[para 85] The phrase "prejudice the competitive position" found in subclause 25(1)(c)(ii) of the Act means that a public body must have a reasonable expectation that disclosure of the information is capable of being used by an existing or potential competitor to reduce the public body's share of the market (Order F2005-009 at para. 56 and Order F2006-023 at para. 20).

[para 86] In Order 2006-023, to which the Public Body drew my attention, the Public Bodies operated bookstores. The Adjudicator in that case determined that

disclosure of the information requested by the Applicant would give an advantage to bookstores in competition with the Public Bodies' bookstores for market share and could potentially reduce the profitability of the bookstores operated by the Public Bodies. In the case before me, the Public Body has not suggested that it is in a competition for market share. Moreover, the Public Body has not made arguments or provided evidence to suggest that disclosure of the information could be expected to have the effect of reducing its share of the market or would make it vulnerable to competitors. There is no evidence to support a finding that the Public Body has competitors, which, in this case, would be competitors who lease space in hospitals to pharmacies. I therefore find that the Public Body has not established that subclause 25(1)(c)(ii) applies to the information it has withheld.

[para 87] The Public Body's arguments and evidence primarily relate to harm it projects will result to its future negotiating position if the information to which it applied sections 25(1)(c)(ii) and (iii) is disclosed. I will therefore consider whether information that may potentially harm or undermine future negotiating positions is information to which section 25(1)(c)(iii) applies and whether the Public Body has established that its negotiating position has been harmed or undermined. I note that the affidavit evidence of the Public Body indicates that the affiant is concerned that negotiating further cost savings in the future could result if the contractual terms are disclosed.

Section 25(1)(c)(iii)

[para 88] In Order F2005-030, the Commissioner considered the argument that disclosure of particular positions adopted by a Public Body in one contract would harm its position to negotiate with other parties in similar matters:

> I will deal with one other possible basis for relying on section 25 - that disclosures of particular positions taken by the Public Body in the contract would harm its ability to negotiate with other persons or organizations relative to similar matters. I am not sure section 25 applies to such situations. It does not necessarily follow from the fact a position is taken in one case that it would be obliged to take it in another, or that there would be pressure on the Public Body to take it that it could not resist.

In that case, while the Commissioner expressed some discomfort with the idea that disclosing contractual terms could result in interference with negotiations, the Commissioner was able to resolve the issue on other grounds. I agree with the Commissioner that the fact that a Public Body has agreed to particular terms in one case does not necessarily mean it is bound to accept them in all cases.

[para 89] The Public Body argues that disclosing information about the proposals and the terms it agreed to will prejudice it in future negotiations. However, the evidence of the Public Body is that there are only two potential service providers who can tender the services required by the Public Body: Shoppers' and the Third Party. While the Public Body argues that disclosing information regarding the proposals of these organizations, which appears in the records at issue, would prejudice the Public Body, both Shoppers' and the Third Party are already aware of the terms they proposed to the

Public Body. For example, the Third Party knows what it offered to the Public Body in the past, while Shoppers' is also aware of the terms it proposed. It is unclear how it would be detrimental to the negotiations of the Public Body if both bidders learned what the other had bid previously. For example, the successful bidder would not necessarily seek to emulate the unsuccessful bidder, while the unsuccessful bidder would be more likely to improve on the offer of the successful bidder if the information were disclosed. Neither outcome would be likely to result in harm to the Public Body's negotiating position.

[para 90] The fact that the other party to negotiations may seek a better terms for itself does not necessarily mean that the negotiating position of the Public Body is undermined. The other party to negotiations would likely attempt to do so in any event. Further, knowledge of the terms to which the Public Body has agreed in the past is more likely to lead the other side to improve their terms if it wishes to negotiate successfully. In Order PO-2843, a decision of the Office of the Information and Privacy Commissioner of Ontario, the Adjudicator made the point that disclosure of rates paid by service providers is more likely to lead parties seeking to negotiate with a public body to improve their offers, rather than reduce them:

> Having considered the representations of the University and the appellant and carefully reviewed the records, I do not accept the argument put forward by the University. In my view, the University's position ignores the reality of how a competitive marketplace functions. In such a marketplace, the disclosure of the rates of an existing service provider would more likely lead to a competitor lowering its rates in order to secure a new agreement. The new lower cost would then be an economic benefit to the University. Senior Adjudicator Higgins, in addressing a similar argument by the University in Order PO-2758, stated:
>
> > McMaster's arguments ignore an absolutely fundamental fact of the marketplace. That is to say, if a competitor (or renewing party) truly wishes to secure a contract with McMaster, it will do so by charging lower fees to McMaster than its competitor, resulting in a net saving to McMaster. Similarly, in circumstances where McMaster is receiving payment, a competitor or renewing party would attempt to secure a contract by paying more than its rivals, resulting in financial gain for McMaster. To argue that disclosure of the rate information at issue would produce the opposite result flies in the face of commercial reality.

I agree with this reasoning. I note that in the case of a lease, a potential lessee may be prepared to pay more to the lessor in order to secure the contract, rather than less.

[para 91] Finally, even if other tenants or potential tenants were to seek the same terms as the Third Party, there is no reason to expect that the Public Body would agree to those terms unless satisfied with them. As the Commissioner noted in Order F2005-030, cited above: "It does not necessarily follow from the fact a position is taken in one case that [a party] would be obliged to take it in another." The Public Body has not established that it would be bound to take the same positions that it took in negotiations with the Third Party in future negotiations with the Third Party or any other party, nor that it would lose cost savings, or otherwise suffer a financial loss if the information in the records at issue is disclosed. I find that the Public Body has not established a linkage

between disclosure of the information to which it applied section 25(1) and the harms it projects would result from disclosure.

[para 92] For all these reasons, I find that the Public Body has not established that section 25(1) applies to the information in the records.

V. ORDER

[para 93] I make this Order under section 72 of the Act.

[para 94] I order the head of the Public Body to conduct a new search for responsive records. If, in the course of conducting the new search, the Public Body concludes that responsive records in relation to the first part of the access request, other than those it has already located, do not exist, the Public Body must communicate that conclusion and its basis to the Applicant. The new response must contain the steps taken to locate additional records and the results of the new search.

[para 95] I order the head of the Public Body to give the Applicant access to the records at issue in their entirety.

[para 96] Although I find that the Public Body did not meet its duty under section 11 of the Act, I make no order in this regard.

[para 97] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

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Teresa Cunningham
Adjudicator