ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2010-026

March 24, 2011

ALBERTA GAMING AND LIQUOR COMMISSION

Case File Number F4842

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Summary: Under the *Freedom of Information and Protection of Privacy Act* (the "Act"), Costco Canada Liquor Inc. (the "Applicant") asked the Alberta Gaming and Liquor Commission (the "Public Body") for a third party's written complaint that had precipitated the Public Body's audit of the Applicant's operations. The Public Body gave access to some of the requested information, but withheld other information under sections 16(1) (disclosure harmful to the business interests of a third party), 20(1)(d) (disclosure could reveal a confidential source of law enforcement information) and 20(3)(a) (disclosure could expose a third party to civil liability).

The Adjudicator found that the Public Body properly withheld some of the records at issue under section 20(1)(d). He accordingly confirmed the Public Body's decision to withhold that information. The Adjudicator found that the Public Body did not properly withhold the remaining information under section 16(1) or 20(3)(a). He accordingly ordered the Public Body to disclose the remaining information to the Applicant.

The Applicant argued that, when the Public Body responded to the access request, it did not comply with section 12(1)(c)(i) of the Act, which required it to tell the Applicant the reasons for the refusal to grant access to the information and the provision on which the refusal was based. The Adjudicator found that the Public Body complied with section 12(1)(c)(i) with respect to its refusal to disclose information under section 20(1)(d), but that it did not give sufficient reasons for its decisions to withhold information under sections 16(1) and 20(3)(a). However, because the Public Body's decisions were

reviewed in the inquiry, the Adjudicator found it unnecessary to order the Public Body to re-prepare its response to the Applicant.

Statutes and Policies Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(h)(ii), 2, 12(1), 12(1)(a), 12(1)(b), 12(1)(c)(i), 12(1)(c)(ii), 12(1)(c)(iii), 16, 16(1), 16(1)(a), 16(1)(a)(i), 16(1)(a)(ii), 16(1)(b), 16(1)(c), 16(1)(c)(i), 16(1)(c)(ii), 16(1)(c)(iii), 16(1)(c)(iv), 16(2), 20, 20(1), 20(1)(d), 20(3), 20(3)(a), 20(5), 24(1), 27(1)(a), 30, 67(1)(a)(ii), 71(1), 72, 72(2)(a), 72(2)(b) and 72(3)(a); *Gaming and Liquor Act*, R.S.A. 2000, c. G-1, ss. 91(2), 100 and 106(1); Alberta Gaming and Liquor Commission, *Retail Liquor Store Operating Guidelines* (date not provided), s. 1.8; Alberta Gaming and Liquor Commission, *Inspectors' Handbook* (February 1, 2007), section 16.3.2.

Authorities Cited: AB: Orders 96-004, 96-019, 99-010, 2000-014, 2000-021, 2001-041, F2004-026 and F2007-013; *Alberta Liquor Store Association v. Alberta (Gaming and Liquor Commission)*, 2008 ABQB 595.

I. BACKGROUND

[para 1] In a letter dated January 7, 2009, the Alberta Gaming and Liquor Commission advised Costco Canada Liquor Inc. that it had received a complaint, and that it was conducting a review of the operations of a Costco Liquor Store in Sherwood Park, and its relationship to an immediate shareholder, to ensure compliance with the terms and conditions of the applicable liquor licence. Citing and reproducing its authority under section 100 of the *Gaming and Liquor Act* and section 1.8 of the *Retail Liquor Store Operating Guidelines*, the Alberta Gaming and Liquor Commission requested information from Costco Canada Liquor Inc. for the purpose of the audit. On August 10, 2009, the Alberta Gaming and Liquor Commission notified Costco Canada Liquor Inc. that it had completed its audit, concluding that there was full compliance with the applicable licence requirements.

[para 2] In a "Request to Access Information" dated January 15, 2009, Costco Canada Liquor Inc. (the "Applicant") made an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the Alberta Gaming and Liquor Commission (the "Public Body"). The Applicant asked for the written complaint of the third party (the "Affected Party") that had precipitated the Public Body's audit request set out in the letter of January 7, 2009.

[para 3] In a letter dated January 23, 2009, the Public Body told the Applicant that the requested information may affect the interests of the Affected Party, and that the Public Body had therefore provided the Affected Party with written notice under section 30 of the Act, and an opportunity to consent to release of the information or to explain why disclosure would harm the Affected Party's business interests.

[para 4] In a letter dated February 23, 2009, the Public Body told the Applicant that the Affected Party had objected to the release of a portion of the responsive records,

but that the Public Body had nonetheless decided to grant the Applicant access to some of the requested records, subject to exceptions to disclosure permitted or required by the Act. The Public Body advised the Applicant that it would release the information, subject to the Affected Party's right to request a review of the Public Body's decision by the Commissioner. The Affected Party did not request a review.

[para 5] Noting that the Public Body intended to apply exceptions to disclosure to some of the requested information, the Applicant asked the Commissioner to review the Public Body's decision to refuse access, by letter dated March 5, 2009.

[para 6] By letter dated March 16, 2009, the Public Body released nine pages of records to the Applicant. It withheld three pages under provisions of sections 16 and 20 of the Act.

[para 7] The Commissioner authorized a portfolio officer to investigate and try to settle the matter. This was not successful, and the Applicant requested an inquiry, by letter dated June 18, 2009. A written inquiry was set down.

[para 8] In accordance with section 67(1)(a)(ii) of the Act, I arranged for this office to notify the Affected Party of the Applicant's request for review. The Affected Party participated in the inquiry. I permitted the Affected Party to do so without disclosing identifying information to the other parties, as the identity of the Affected Party is part of the information that is at issue in the inquiry.

II. RECORDS AT ISSUE

[para 9] The Public Body released nine pages to the Applicant in response to its access request. For context, they consist of a six-page magazine article with information about the Applicant's product margins underlined, and three pages of charts setting out other information about its product margins.

[para 10] The records at issue consist of three pages. Page 1 is a letter from the Affected Party to the Public Body, which precipitated the Public Body's review of the operations of the Applicant. Pages 11 and 12 are two attachments to that letter.

III. ISSUES

[para 11] The Notice of Inquiry, dated July 20, 2010, set out the following issues, although I have placed them in reverse sequence for the purpose of discussion:

> Did the Public Body properly apply section 20 of the Act (disclosure harmful to law enforcement) to the records/information?
>
> Does section 16 of the Act (disclosure harmful to the business interests of a third party) apply to the records/information?

[para 12] By letter dated September 28, 2010, I added the following issue to the inquiry, which had been raised by the Applicant in its initial submissions:

> Did the Public Body meet the requirements of section 12(1) of the Act (contents of response)?

[para 13] Finally, there is a preliminary issue that I will discuss first, which is whether or not I should accept *in camera* submissions of the Affected Party.

IV. DISCUSSION OF ISSUES

Preliminary Issue: Should I accept *in camera* submissions of the Affected Party?

[para 14] The Affected Party made submissions *in camera* as part of initial submissions received by this office on September 21, 2010. The submissions are in relation to the issues under sections 16 and 20 of the Act. The Affected Party also made initial submissions that were exchanged with the Applicant and Public Body. In a letter dated September 28, 2010, I advised the parties that I was reserving my decision regarding whether to accept all or part of the Affected Party's *in camera* submissions, until after I received and reviewed the parties' rebuttal submissions. I believed that the parties' remaining arguments and evidence in relation to the issues in the inquiry would be relevant to my decision.

[para 15] On my review of the submissions of the parties in relation to the three issues in the inquiry, as well as their arguments on whether I should accept or refuse the *in camera* submissions, I have decided to accept the Affected Party's *in camera* submissions.

[para 16] The Affected Party argues that the *in camera* submissions cannot be provided to the Applicant because they discuss the information that was severed by the Public Body and the Affected Party needs to discuss that information in order to make full representations. The Affected Party says that providing the Applicant with the information that it is seeking will negate the need for the inquiry and will disclose information protected by the Act.

[para 17] I find that parts of the Affected Party's *in camera* submissions disclose the information being withheld from the Applicant, or would otherwise reveal the information at issue, and I therefore accept those parts *in camera* on that basis. In particular, there is contextual information that could reasonably be expected to reveal the identity of the Affected Party.

[para 18] I find that other parts of the Affected Party's *in camera* submissions do not directly or indirectly reveal the records at issue. However, one of the questions to be resolved in this inquiry is whether section 12(1) of the Act required the Public Body to give better reasons, in its initial response to the Applicant, as to why it was refusing to grant access to some of the information, particularly under section 16. I see from the

Affected Party's *in camera* submissions that the Affected Party does not wish to reveal details about the nature of the business information in question, or the nature of the harm that allegedly would result on disclosure. In my view, it would have been procedurally unfair to require the Affected Party to exchange the very information that the Affected Party argues did not have to be indicated to the Applicant in the Public Body's response.

[para 19] Further, if I had required the Affected Party to reveal greater detail to the Applicant about the nature of the information in question under section 16(1)(a), or the outcome alleged to occur under section 16(1)(c), I would have prematurely affected resolution of the issue to be decided under section 12(1). Essentially, I would have required the Applicant to be given, during the inquiry, more detailed reasons for the Public Body's application of section 16 before actually deciding what section 12(1) required the Public Body to tell the Applicant in the first place. I therefore found it appropriate to accept the *in camera* submissions of the Affected Party on the application of section 16, even though I found that parts of those submissions did not, in the end, reveal the identity of the Affected Party or other information at issue.

[para 20] At the same time, I was mindful of my duty to be procedurally fair to the Applicant. The Applicant argues that I should not accept the *in camera* submissions of the Affected Party because the Applicant must be given an adequate opportunity to know the case to be met and to respond to that case.

[para 21] With respect to the Affected Party's *in camera* submissions on the application of section 20(1)(d) of the Act, as well as on the Public Body's exercise of discretion to withhold the records at issue, I again note that some of the information could reasonably be expected to reveal the identity of the Affected Party, which is part of the information at issue in the inquiry. The *in camera* submissions refer to information that could be used to ascertain the Affected Party's identity (e.g., paragraph 28). Such submissions are therefore properly made *in camera* and I accept them on that basis.

[para 22] The remaining *in camera* submissions of the Affected Party regarding the application of section 20(1)(d) are either repeated in the submissions of the Affected Party or Public Body that were exchanged with the Applicant, or are adequately summarized in those submissions, so as to give the Applicant an opportunity to know the case to be met and to make representations in response. For example, *in camera* submissions of the Affected Party regarding confidentiality are repeated or summarized in the open submissions where the Affected Party submits that four particular criteria for establishing confidentiality have been met. They are also sufficiently summarized, in my view, in the Public Body's initial submissions where it states (at page 6) that the Affected Party expressly requested confidentiality when making the complaint about the Applicant's operations.

[para 23] With respect to the Affected Party's *in camera* submissions on the application of section 16 of the Act, I would have found, under different circumstances, that most of them should have been exchanged with the Applicant. An applicant is generally disadvantaged, and unable to fully respond to an issue under section 16, if the

applicant does not have sufficient information about the nature of the third party's business interests that are at stake. In a different inquiry, an applicant would have been entitled to know greater details about the nature of the information being withheld under section 16, and why it was being withheld. In this case, the Applicant also cannot challenge definitions articulated in previous orders and cited by the Affected Party if it does not know what those orders and definitions are. In a different inquiry, an applicant would have been entitled to know the orders and definitions on which the opposing party was relying.

[para 24] However, I have already explained that an exchange of the Affected Party's *in camera* submissions relative to section 16 would have improperly affected resolution of the issue relative to section 12. For instance, the definitions and paragraphs of orders cited by the Affected Party refer to the nature of the business information in question, which the Applicant argues should have been specifically indicated in the Public Body's response to its access request, but which the Public Body and Affected Party argue did not have to be indicated.

[para 25] More importantly, in terms of procedural fairness in relation to the Applicant, my conclusions in this Order result in the Applicant not being prejudiced, in the end, by its inability to fully respond to the Affected Party's submissions regarding the application of section 16. The same is true for its inability to respond to the Affected Party's *in camera* submissions on the application of section 20(3)(a). The Applicant is not prejudiced because I conclude in this inquiry that some of the information at issue was properly withheld under section 20(1)(d) – submissions in relation to which were properly and adequately made available to the Applicant – and this conclusion makes it unnecessary for me to review the Public Body's application of sections 16(1) and 20(3)(a) to that same information. In terms of responding to arguments in relation to the remaining information at issue, the Applicant is not prejudiced because I find that neither section 16(1) nor 20(3)(a) applies, and I therefore order disclosure of the information to the Applicant.

A. Did the Public Body properly apply section 20 of the Act (disclosure harmful to law enforcement) to the records/information?

[para 26] Section 20 of the Act reads, in part, as follows:

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
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> …
>
> *(d) reveal the identity of a confidential source of law enforcement information,*
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> …
>
> *(3) The head of a public body may refuse to disclose information to an applicant if the information*

(a) is in a law enforcement record and the disclosure could reasonably be expected to expose to civil liability the author of the record or an individual who has been quoted or paraphrased in the record, or

…

(5) Subsections (1) and (3) do not apply to

(a) a report prepared in the course of routine inspections by an agency that is authorized to enforce compliance with an Act of Alberta, or

(b) a report, including statistical analysis, on the degree of success achieved in a law enforcement program unless disclosure of the report could reasonably be expected to interfere with or harm any of the matters referred to in subsection (1) or (3).

…

[para 27] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it withheld under section 20. In order to meet this burden, the Public Body can be assisted by the Affected Party.

1. Do the records at issue fall within a category of information that may be withheld under section 20?

[para 28] The Public Body relied on section 20(1)(d) of the Act, and alternatively on section 20(3)(a), to withhold all of the information on the three pages forming the records at issue. Section 20(5) says that a public body cannot apply section 20(1) or 20(3) to two kinds of reports, but neither kind of report exists here.

[para 29] To correctly apply section 20(1)(d), it must be established that (i) law enforcement information is involved, (ii) there is a confidential source of law enforcement information, and (iii) the information in question could reasonably be expected to reveal the identity of that confidential source (Order 96-019 at para. 12; Order 99-010 at para. 19).

[para 30] I find that law enforcement information is involved in this inquiry. Under section 1(h)(ii) of the Act, "law enforcement" means "a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred". Here, the Public Body was conducting an administrative investigation into whether the Applicant was complying with its liquor licence, as contemplated by section 100 of the *Gaming and Liquor Act*. A licensee that does not comply with the conditions of its licence is subject to penalties and sanctions under the *Gaming and Liquor Act*, such as seizure and removal of liquor acquired or kept in contravention of the licence under section 106(1), and various penalties that may be imposed by the board of

the Public Body under section 91(2). "Law enforcement" expressly includes the complaint giving rise to the investigation, and part of the Affected Party's written complaint to the Public Body is what is at issue in this inquiry.

[para 31] I also find that the Affected Party was a confidential source. The Affected Party expressly requested confidentiality when making the complaint to the Public Body by marking the cover letter "Confidential". Section 16.3.2 of the *Inspectors' Handbook* submitted by the Public Body states that the name of a complainant shall not be revealed unless the complainant has given prior consent, which demonstrates that the Public Body likewise considered the Affected Party to be a confidential source.

[para 32] As for whether the information at issue could reasonably be expected to reveal the identity of the Affected Party, the Public Body submits that the pages that it withheld "contain significantly detailed information that could reasonably be seen as identifiable of the complainant", but it does not specify which information. The Affected Party says that "[t]he identity of the confidential source of the law enforcement information is contained in the [s]evered [i]nformation", but the Affected Party likewise fails to be more specific – with the exception of referring to two items of information in paragraph 28 of the *in camera* submissions (which information I agree could reveal the Affected Party's identity).

[para 33] On my review of the records and submissions of the parties, I find that disclosure of some – but not all – of the information at issue could reasonably be expected to reveal the identity of the Affected Party as the confidential source of law enforcement information. This includes, obviously, the Affected Party's name and contact information. It also includes other information about the Affected Party that I find could be used to ascertain the identity of the Affected Party, including the information in the second column on pages 11 and 12 of the records.

para 34] The information that I find could not reasonably be expected to reveal the identity of the Affected Party consists of information solely about the Public Body or about the Applicant. It also consists of information already known to the Applicant by virtue of the Public Body's letter of January 7, 2009 in which it advised that it was conducting the audit, and by virtue of the pages that were released to the Applicant. In other words, some of the information withheld by the Public Body describes or summarizes what has already been disclosed to the Applicant, and it has not resulted in the Applicant knowing the identity of the Affected Party. Finally, the information that does not fall within section 20(1)(d) includes non-identifying information such as the word "Confidential".

[para 35] I considered whether pronouns, words in the singular or plural and statements about the Affected Party's views, understanding or activities – which appear on page 1 of the records – could reasonably be expected to reveal the identity of the Affected Party. I fail to see how they would, and neither the Public Body nor the Affected Party specifically argues that they would. If the name of the Affected Party is removed from the statements, I find that the remaining information will be non-

identifying. There are many third parties to whom the pronouns and words in the singular or plural could refer, and many who could have had the views, had the understandings or performed the activities in question. I reach the same conclusion regarding the remaining content of pages 11 and 12, including the information in the first column on those pages, which merely reveals the general nature of the more detailed information in the second column.

[para 36] Turning to whether the information not falling under section 20(1)(d) falls, in the alternative, within the category of information that may be withheld under section 20(3)(a), I find that it does not. Because the remaining information at issue could not reasonably be expected to identify the Affected Party or anyone else (apart from the Applicant and the representative of the Public Body to whom the complaint was sent), the information does not identify the author of the written complaint or any individual being quoted or paraphrased in it, whether on pages 1, 11 or 12. A third party cannot be exposed to liability if the third party's identity is not known.

[para 37] Even if the identity of the Affected Party, the author of the complaint or a third party quoted or paraphrased in the complaint were known, I have an insufficient basis on which to find that any of them would be exposed to civil liability. The Affected Party effectively submits that the complaint was legitimate, as does the Public Body given its decision to commence an audit of the Applicant's operations. To rely on section 20(3)(a), there should be a detailed explanation of how disclosure of information is connected to civil liability (Order 96-004 at p. 4 or para. 19). Neither the Public Body nor the Affected Party has explained to me how any third parties would be exposed to civil liability for their conduct in relation to making the complaint, or for a decision to release the information being requested by the Applicant.

[para 38] The underlying suggestion appears to be that the Applicant might commence a legal action against the Affected Party if the Applicant were to learn that the Affected Party made the complaint against it. However, exposure to civil *proceedings* is not what is contemplated in section 20(3)(a). The objective of the provision is to protect information if its disclosure could give rise to *liability* on the part of a third party. No explanation has been given to the effect that a third party would be exposed to liability, as opposed to litigation, if the information at issue were disclosed to the Applicant.

2. Did the Public Body properly exercise its discretion in refusing to disclose the records at issue?

[para 39] A public body exercising its discretion relative to a particular provision of the Act should consider the Act's general purposes, the purpose of the particular provision on which it is relying, the interests that the provision attempts to balance, and whether withholding the records would meet the purpose of the Act and the provision in the circumstances of the particular case (Order F2004-026 at para. 46).

[para 40] Here, the Public Body submits that it considered the purposes of the Act set out in section 2 – which includes the purpose of allowing access to records – and that

it balanced this against the purpose of section 20(1)(d). It notes that the general purpose of section 20 is to protect information where its disclosure would be harmful to law enforcement, and that the specific intent of section 20(1)(d) is to protect confidential sources of law enforcement information. The Public Body submits that the sensitive nature of the complaint against the Applicant made it necessary to keep the records at issue confidential in the particular case, especially given that the Affected Party had expressly requested confidentiality. The Public Body says that it also considered that disclosure of the identity of the Affected Party as the complainant would discourage other persons with legitimate industry concerns from coming forward to the Public Body with such concerns, for fear of reprisal from the party being complained about. The Public Body believes that disclosure of the identity of the Affected Party would be harmful to its law enforcement mandate under the *Gaming and Liquor Act*, particularly with respect to assuring the confidence and trust of informers and whistleblowers.

[para 41] The foregoing satisfies me that the Public Body properly exercised its discretion to withhold the information that I have found to fall within section 20(1)(d). It has provided sufficient detail about the factors that it considered, and has adequately explained why it refused to grant access, bearing in mind both the Act and the particular provision.

[para 42] The Applicant submits that the Public Body did not provide any evidence of the "sensitive nature" of the complaint by the Affected Party. In response, the Public Body notes the importance of preserving its investigative resources and re-emphasizes the Affected Party's express request for confidentiality. I find this to be an appropriate explanation, in and of itself, for the exercise of the Public Body's discretion. Therefore, even if the Public Body meant something additional by its reference to sensitivity, it is not necessary for it to provide evidence to the Applicant about the sensitive nature of the Affected Party's complaint.

[para 43] The Applicant believes that the Affected Party is one of its competitors connected to a previous legal action in relation to the Applicant, and that the complaint that gave rise to the audit of the Applicant's operations was made for an improper purpose or motive. The Applicant submits that the Public Body failed to consider this alleged improper motive on the part of the Affected Party, and ignored relevant background regarding earlier challenges to the Applicant's liquor licenses, when it exercised its discretion to withhold information under section 20(1)(d). The Applicant notes that, while the Act gives a public body a degree of flexibility in the exercise of discretion, the course of action chosen must be for good reasons and in good faith, and based on the applicable law and relevant facts and circumstances (Order 2000-021 at paras. 49 and 50).

[para 44] The Applicant explains that, when the Public Body was considering liquor licences for two of the Applicant's locations in 2006, some of its competitors challenged the issuance of the licences on the basis that the Applicant had not satisfied the "separate business requirement" provided for in the *Gaming and Liquor Act* and the *Retail Liquor Store Operating Guidelines*. In particular, the competitors alleged that the purpose of the

Applicant's liquor store was to make and maintain a profit for its affiliated business, the liquor store was likely to have cross-marketing and joint advertising with its affiliated business, the liquor store would not be operating a separate business contrary to various factors, and the sale of liquor products in the liquor store was primarily for the purpose of enhancing the sale of non-liquor products in the affiliated business. The challenges by the competitors were rejected by the Public Body and the liquor licences were issued to the Applicant.

[para 45] Some of the competitors then brought applications for judicial review in order to quash the Public Body's decisions to issue the liquor licences. The Court of Queen's Bench dismissed the applications, and upheld the Public Body's decisions to issue the liquor licences to the Applicant, in a decision dated September 26, 2008: *Alberta Liquor Store Association v. Alberta (Gaming and Liquor Commission)*, 2008 ABQB 595. The Applicant notes that the Public Body made its request to audit the operations of the Applicant on the basis of a complaint only a few months later on January 7, 2009, and it submits that the audit related to the same financial and operational aspects of its liquor business that was the subject-matter of the challenges previously made by its competitors.

[para 46] The Applicant then argues that the Public Body improperly exercised its discretion to withhold information under section 20(1)(d) because this is not an appropriate case in which to protect the identity of the Affected Party as the person complaining to the Public Body about the Applicant's operations. The Applicant submits that the records at issue appear to have been given to the Public Body by a business competitor of the Applicant in the context of an ongoing commercial dispute, as a further attempt to interfere with the Applicant's business operations. It says that protecting the identity of the Affected Party does not serve the public interest and falls outside the purpose of section 20(1)(d), which is to ensure that legitimate law enforcement activities are not compromised, as opposed to law enforcement activities initiated by a complaint made for a collateral, anti-competitive or nuisance purpose.

[para 47] I will obviously not indicate whether the Affected Party is a business competitor of the Applicant and/or participated in the previous challenges of the Applicant's liquor licences. However, assuming for the sake of discussion that the Affected Party is a competitor who previously challenged the Applicant's liquor licences, I would not find that the complaint was made for an improper purpose or motive, or that the Public Body improperly exercised its discretion to withhold the identity of the Affected Party on that basis.

[para 48] First, the point of the "separate business requirement" as part of a liquor licence is to ensure fair competition, so there is no reason, generally, why a party would not be entitled to complain to the Public Body for a commercial or competitive reason. Second, with respect to the Applicant's more specific argument that it would be improper for a party to essentially complain about the Applicant's liquor licence a third time after being unsuccessful twice already (i.e., once before the Public Body and once in court),

the Court of Queen's Bench effectively contemplated such a complaint in its judicial review decision.

[para 49] Specifically, one of the issues in the case was whether the Public Body was wrong to issue the Applicant the liquor licences before the Applicant had actually set up functioning liquor stores and demonstrated that it was complying with the licensing requirements. The Court concluded that the Public Body was entitled to grant a licence on a prospective basis, in other words on the basis of anticipated compliance. At the same time, the Court noted that "[i]f a licencee does not comply with requirements after being granted a licence, a complaint may be filed" [*Alberta Liquor Store Association v. Alberta (Gaming and Liquor Commission)* at para. 54]. It seems to me that, if the Affected Party happens to be a business competitor of the Applicant and was unsuccessful in challenging the liquor licences, essentially on the basis that the Applicant did not have to prove advance compliance with the "separate business requirement", the Affected Party would be entitled to complain about the Applicant's compliance once the Applicant had set up its functioning liquor stores.

[para 50] I agree with the Applicant that there may be cases where a complaint is frivolous, vexatious or a nuisance, in which case this could be a relevant factor for a public body to consider in determining whether the complainant's identity should be disclosed notwithstanding confidentiality. However, I see no evidence that this inquiry is such a case.

B. Does section 16 of the Act (disclosure harmful to the business interests of a third party) apply to the records/information?

[para 51] Section 16(1) of the Act reads as follows:

> *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 52] Although the Public Body applied section 16(1) to only part of pages 11 and 12, the section sets out a mandatory exception to disclosure, so I will review its application to all of the remaining records at issue. I concluded earlier that the Public Body properly withheld some of the information at issue under section 20(1)(d). The remaining information consists of information that I found could not reasonably be expected to identify the Affected Party.

[para 53] I find that section 16(1) does not apply to the remaining information. Disclosure of information cannot be harmful to the business interests of a third party under section 16(1) if the third party's identity is not known. Further, the information that I found not to fall under section 20(1)(d) is not any of the types of information contemplated in section 16(1)(a). This includes the information, to which I referred earlier, about the Affected Party's views, understandings and activities revealed on page 1 of the records. It also includes the information in the first column on pages 11 and 12. The first column merely sets out the general nature of information without any detail that causes it to reveal information falling within section 16(1)(a).

C. Did the Public Body meet the requirements of section 12(1) of the Act (contents of response)?

[para 54] Section 12(1) of the Act reads as follows:

12(1) In a response under section 11, the applicant must be told

(a) whether access to the record or part of it is granted or refused,

(b) if access to the record or part of it is granted, where, when and how access will be given, and

(c) if access to the record or to part of it is refused,

(i) the reasons for the refusal and the provision of this Act on which the refusal is based,

> *(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and*
>
> *(iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.*

[para 55] The Applicant specifically argues that the Public Body did not comply with section 12(1)(c)(i). The Applicant does not raise concerns in relation to the other requirements set out above. In any event, I find that the Public Body's response of March 16, 2009 met the requirements of section 12(1)(a), 12(1)(b), 12(1)(c)(ii) and 12(1)(c)(iii).

[para 56] As for telling the Applicant the reasons for the Public Body's refusal to grant access to some of the information and the provisions of the Act on which the refusal was based, as required by section 12(1)(c)(i), the relevant parts of the Public Body's response are as follows:

> *There were 12 records responsive to your FOIP request. Some of the records you requested contain information that is withheld from disclosure under the FOIP Act. We have severed (removed) the excepted information so that we could disclose the remaining information to you.*
>
> *Pursuant to section 20 of the FOIP Act, pages 1, 11 and 12 were severed in their entirety. The disclosure of this information could reveal the identity of a confidential source of law enforcement information. In addition, pursuant to section 16 of the FOIP Act, information was severed on pages 11 and 12 as it also contained information which, if released, would be harmful to business interests of a third party.*

[para 57] With the letter of March 16, 2009, the Public Body enclosed copies of sections 16 and 20 of the Act. Further, notations in the set of redacted records provided to the Applicant indicated that page 1 was being withheld under sections 20(1)(d) and 20(3)(a), and that pages 11 and 12 were being withheld under sections 16(1)(a), (b) and (c), 20(1)(d) and 20(3)(a).

[para 58] In Order F2004-026 (at paras. 98 and 99), the Commissioner explained the requirements of section 12(1)(c)(i) as follows:

> … In my view, the language of section 12 does not imply that a reason must in every case be given *in addition to* the naming (or quoting or summarizing) of a particular statutory exception. There are some circumstances in which both parts of the requirement in subsection (i) can be fulfilled by naming the section number (or describing the provision). While in some circumstances more in the way of an explanation may be called for, in others there would be nothing more that could usefully be

> said by way of providing a reason than what the provision creating the exception says. […]
>
> However, I do read into section 12(1)(c)(i) the requirement that in a response, responsive records that are being withheld be described or classified insofar as this is possible without revealing information that is to be or may be excepted, and that the reasons be tied to particular records so described or classified. At a minimum, it would, at least in most cases, be possible to set out the number of records being withheld under a particular subsection without disclosing the contents. […]

In a footnote to one of the sentences above, the Commissioner added that Order 2000-014 (at para. 81) held, in a different context, that public bodies should be as specific as possible about records to which they have decided to grant access and not grant access.

[para 59] In Order F2007-013 (at para. 26), the Commissioner elaborated as follows:

> Section 12 requires a public body to provide the following (see Order F2004-026):
>
> > (i) A description of the responsive records – The public body must describe or classify the responsive records without revealing information that is to be or may be excepted. At a minimum, a public body should disclose the number of "records", or in other words the number of documents, withheld and the number of pages within each document.
> >
> > (ii) The statutory exception applied – A public body must provide the statutory exception for withholding the pages of records and tie those exceptions to the particular records. However, a public body does not, in every case, have to provide reasons in addition to a statutory exception. There are circumstances in which section 12[1](c)(i) may be fulfilled by naming the section number or describing the provision, as nothing more could be said without revealing information that may be excepted.

[para 60] The Applicant submits that the Public Body's response did not meet the requirements of section 12(1)(c)(i) because it should have provided more than simply a reference to the general statutory provisions. The Applicant says that this is a case where a more fulsome explanation was called for. In particular, given the broad range of information that falls within the purview of sections 16(1)(a), (b) and (c) of the Act, the Applicant submits that it was incumbent upon the Public Body to specify the sub-paragraphs on which it was relying to withhold the records at issue. The Applicant submits that sections 16(1), 20(1)(d) and 20(3)(a) provide exceptions to disclosure of different kinds of information and that it is impossible, based on the Public Body's

response, to determine the general nature of the information contained in the records at issue, or the reasons for the refusal to disclose such information.

[para 61] The Public Body submits that its response of March 16, 2009 was reasonably sufficient to satisfy the requirements of section 12(1)(c)(i), and complied with the spirit and intent of the provision, in that the Public Body told the Applicant that it was granting access to nine out of twelve pages, and provided the relevant exceptions to disclosure under the Act, including the reasons underlying those exceptions. The Public Body says that it considered the reasons already contained in the applicable provisions to be sufficient in this case.

[para 62] The Affected Party argues that it was permissible for the Public Body's reasons for withholding the records at issue to be a reference to the applicable exception provision or a summary of the provision. The Affected Party submits that it was sufficient for the Public Body to tell the Applicant that disclosure of information on pages 1, 11 and 12 could reveal the identity of a confidential source of law enforcement information, and that disclosure of information on pages 11 and 12 would be harmful to the business interests of a third party.

[para 63] The Affected Party cites Order 2001-041 (at para. 55), in which the Commissioner stated that "the Act does not require a public body to disclose the nature or contents of withheld records in a response to an access request". However, the Commissioner has since clarified, in Orders F2004-026 and F2007-013 cited above, that a public body does not have to disclose the nature or contents of withheld records *if doing so would reveal information that is to be or may be excepted from disclosure*. A public body is required to describe or classify the withheld records – in other words disclose something about their nature or content – to the extent possible without revealing the information that is subject or may be subject to non-disclosure.

[para 64] The Public Body withheld information from the Applicant in reliance on sections 16(1), 20(1)(d) and 20(3)(a) of the Act, each of which was reproduced earlier.

[para 65] With respect to describing or classifying the records, and indicating the number of pages being withheld, I find that the Public Body met the requirements of section 12(1)(c)(i). It told the Applicant that three pages were being withheld in their entirety. Because the Applicant had asked for the "written complaint" that precipitated the audit of its operations, the pages were obviously part of that written complaint. The Public Body was not required to provide greater detail about the nature or content of the three pages being withheld, as it was reasonable for the Public Body to believe that doing so would risk revealing the information being withheld, including the identity of the Affected Party. While the Public Body would not have risked revealing the identity of the Affected Party, or other information being withheld, if it had specified that page 1 was a letter and pages 11 and 12 were attachments to that letter, it was not necessary to explicitly identify the nature of the records in this way. Again, it was obvious that the records consisted of a portion of the Affected Party's written complaint, and therefore some form of correspondence. Finally, the Public Body specifically tied the refusal to

disclose information under the particular sections to each of the three pages, as the package of redacted records provided to the Applicant indicated which sections were being applied to which pages.

[para 66] As for telling the Applicant the reasons for refusing to grant access, and indicating the provision of the Act on which the refusal was based, the Public Body met the requirements of section 12(1)(c)(i) insofar as its application of section 20(1)(d) is concerned. It cited section 20(1)(d) in the set of redacted records provided to the Applicant, reproduced the language of the provision in its letter of March 16, 2009, and enclosed a copy of section 20. It also wrote that the withheld information "could reveal the identity of a confidential source of law enforcement information". In this particular case, I find that no more of an explanation was necessary. The "confidential source" in question was obviously whoever had made the complaint to the Public Body about the Applicant's operations. Given the Public Body's letter of January 7, 2009 to the Applicant, and to which the Applicant referred in its access request, the "law enforcement" in question was obviously the Public Body's review and audit of the Applicant's operations in order to ensure compliance with its liquor licence, under the terms of the *Gaming and Liquor Act* and *Retail Liquor Store Operating Guidelines*. Finally, the "law enforcement information" in question was obviously whatever the confidential source had included in the written complaint. Given the context and the Applicant's obvious knowledge, this is a case where nothing more could usefully be said by way of providing a reason other than what section 20(1)(d) already says.

[para 67] On the other hand, I find that the Public Body did not provide sufficient reasons under section 12(1)(c)(i) for its refusal to disclose information in reliance on section 20(3)(a). The Public Body cited section 20(3)(a) in the package of redacted records provided to the Applicant, but its letter of March 16, 2009 to the Applicant provided no information whatsoever regarding its reasons for applying that section. While the Public Body's letter made reference to the content of section 20(1)(d), it made no reference to anything in relation to section 20(3)(a). It is not sufficient for a public body to merely cite a section of the Act in the package of records provided to an applicant, and expect the applicant to infer the reasons for withholding information by reading the particular section. In addition to indicating the provision being applied, section 12(1)(c)(i) requires a public body to give reasons for its refusal to grant access, which reasons mean at least some form of substantive explanation.

[para 68] Optimally – although I will leave it to be decided in a different case as to whether section 12(1)(c)(i) of the Act requires it – a public body should also provide an applicant with some indication as to why it is exercising its discretion in a particular way when it is relying on a discretionary exception to disclosure. Where a public body has the option of disclosing information but has decided not to, an applicant may specifically wonder why the decision was not to disclose. I do not mean that a public body should explicitly refer to its "exercise of discretion", or provide a lengthy explanation. There will be times where the reason for the exercise of discretion will be obvious and nothing further will need to be said. For instance, given the context in this case, the Public Body adequately indicated why it was exercising its discretion to withhold information under

section 20(1)(d), as it was obviously doing so to protect the confidences of the third party complainant. In a different case, it may be desirable to give more of an explanation regarding the exercise of discretion, depending on the context and circumstances such as the nature of the records requested, the existing knowledge of the applicant and the particular provision being applied. For example, the reason for exercising discretion to withhold information under section 27(1)(a) on the basis of solicitor-client privilege is self-evident, given the importance of that type of legal privilege, whereas the reason for exercising discretion to withhold information under any of the provisions of section 24(1) is much less clear, as it can depend on a variety of factors considered by the public body.

[para 69] I leave the question of whether a public body must explain, in some form or another, its exercise of discretion in its response to an applicant under section 12(1)(c)(i) – that is, as part of its "reasons" for relying on a discretionary exception to disclosure – because I do not actually have to decide that question in this inquiry. Here, the Public Body met the requirements of section 12(1)(c)(i) insofar as its application of section 20(1)(d) is concerned, regardless of whether it was required to indicate the reason for its exercise of discretion, as it adequately explained its exercise of discretion in any event. Also regardless of whether section 12(1)(c)(i) requires some indication of the reasons for exercising discretion, the Public Body did not meet the requirements of section 12(1)(c)(i) insofar as its application of section 20(3)(a) is concerned, as it failed to provide any reasons whatsoever, resulting in non-compliance with section 12(1)(c)(i) in any event. Finally, a public body's application of section 16(1) does not involve any discretion, so the foregoing discussion is not relevant in that context.

[para 70] With respect to its refusal to disclose information under section 16(1), I find that the Public Body did not meet the requirements of section 12(1)(c)(i). The Public Body's general reference to section 16(1) and its statement that disclosure of information "would be harmful to business interests of a third party" were not sufficient. It was also not sufficient for the Public Body to cite paragraphs 16(1)(a), (b) and (c) in the package of redacted records provided to the Applicant. Because information must meet the requirements of all three of those paragraphs in order to be withheld under section 16(1), the notations add nothing. They do indicate that section 16(1) rather than 16(2) was being applied, but section 16(2) was already obviously not being applied by the Public Body, as that section refers to information collected for tax purposes.

[para 71] Under section 16(1), there are a variety of types of information contemplated, and a variety of potential consequences that require a public body to withhold information that would reveal it. Therefore, to meet the requirements of section 12(1)(c)(i), a public body should give some detail about the way in which section 16(1) applies in the circumstances of the case. Unless it would reveal the information being withheld, a public body should generally give an indication of the nature of the business information that it believes would be revealed on disclosure of records to the applicant, for instance in reference to the general categories set out in section 16(1)(a) (i.e., trade secrets, commercial information, financial information, labour relations information, scientific information and/or technical information). It should also indicate the harm or consequence under section 16(1)(c) that it believes would arise on disclosure of the

information being requested (i.e., whether disclosure could reasonably be expected to harm significantly the competitive position of a third party, interfere significantly with the negotiating position of a third party, 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, result in undue financial loss to a person or organization, result in undue financial gain to a person or organization, and/or 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 72] In order to provide proper reasons under section 12(1)(c)(i), insofar as the application of section 16(1) is concerned, a public body may choose to cite or incorporate the language of specific sub-paragraphs of section 16(1) – that is, sub-paragraphs 16(1)(a)(i), 16(1)(a)(ii), 16(1)(c)(i), 16(1)(c)(ii), 16(1)(c)(iii) and/or 16(1)(c)(iv). Alternatively, it may provide its own wording that adequately explains its application of section 16(1). A public body is free to determine the specific content of its reasons for refusing access, provided that the reasons provide a minimum level of detail, in one form or another, as to how or why it applied section 16(1). In this case, by merely saying that disclosure of information would harm the business interests of a third party, enclosing a copy of section 16, and citing paragraphs 16(1)(a), (b) and (c) in the package of redacted records provided to the Applicant, the Public Body did not give the minimum explanation required by section 12(1)(c)(i).

[para 73] Again, a public body is not required to identify the nature of the business information being withheld, the harm or consequence that would occur on disclosure and/or specific sub-paragraphs of section 16(1) if doing so would reveal information that is to be or may be excepted from disclosure. However, those would be rare cases, and this is not one of them.

[para 74] Here, I do not believe that citing particular sub-paragraphs of section 16(1) in the response to the Applicant, or otherwise setting out the type of business information and harm in question, could reasonably be expected to reveal the identity of the Affected Party or the information that the Public Body was withholding under section 16. There are many third parties who could possibly have made the complaint to the Public Body about the Applicant's operations, and whose business information would fall within the categories set out in sub-paragraphs 16(1)(a)(i) or 16(1)(a)(ii), as the case may be. Likewise, the various consequences set out in sub-paragraphs 16(1)(c)(i), 16(1)(c)(ii), 16(1)(c)(iii) or 16(1)(c)(iv) could occur regardless of which particular third party made the complaint. I fail to see how the Affected Party is the only third party fitting the "general description" that would be conveyed through an indication of the particular sub-paragraphs of section 16 on which the Public Body relied to withhold information from the Applicant, or through some other better explanation as to why the section applied in the circumstances.

[para 75] In summary, to meet the requirements of section 12(1)(c)(i) in this case, the Public Body should have provided more adequate reasons as to why it was applying sections 16(1) and 20(3)(a). Having said this, I do not believe that the content of a

response under section 12(1)(c)(i) must be so detailed that it would require a great amount of additional effort on the part of the representative of a public body processing an access request. I recognize that some public bodies receive a great number of access requests and that resources are limited. I also note that section 12(1)(c)(ii) contemplates that, if an applicant has questions or requires further explanation, the public body may be contacted for more information about how or why a particular exception to disclosure was applied in the particular case.

[para 76] Still, section 12(1)(c)(i) requires proper reasons for withholding information to be in a public body's response to an applicant in the first place. Further, I do not believe that including a few sentences about why a public body is applying a section of the Act is an onerous requirement, particularly given the overall amount of time and effort used to respond to an access request and the fact that some form of response (i.e., a letter) is prepared in any event. The point of section 12(1)(c)(i) is to give an applicant an adequate understanding of the rationale for a public body's decision to withhold information. A practical benefit is that an applicant who understands why information was withheld may be less likely to request a review of the public body's decision. When a review is requested, a response under section 12(1) that contains fuller reasons for a public body's decision may assist in resolution between the parties. Another possible advantage is that a public body that indicates its reasons for withholding information, at the time of its response, will have more carefully considered its reasons and the way that they meet the object and purposes of the Act – all with a view to properly applying the particular provision.

[para 77] At paragraphs 50, 51 and 72 of its initial submissions, the Applicant submits that, in the Public Body's decision of March 16, 2009, it should have provided evidence of the confidentiality of the information given by the Affected Party. However, section 12(1)(c)(i) requires a public body to provide reasons, not evidence, regarding its refusal to grant access to information. In my view, there is no requirement that evidence be provided to the applicant in order to support the public body's reasons, although this might be encouraged so as to give applicants a better understanding of the decision.

[para 78] I considered whether the Public Body should have at least indicated, in its response to the Applicant, whether it considered the information to have been supplied by the Affected Party "explicitly" or "implicitly" in confidence under section 16(1)(b). I decided that nothing really turns on that distinction in terms of conveying a public body's reasons for withholding information under section 16. Of course, specifying whether information was supplied explicitly or implicitly in confidence will become necessary if an applicant challenges a decision and the matter proceeds to a review or inquiry. It is also at inquiry that parties will be required to adduce factual evidence to support their arguments.

[para 79] I conclude that the Public Body did not meet the requirements of section 12(1) of the Act with respect to its refusal to grant the Applicant access to information under sections 16(1) and 20(3)(a) of the Act.

[para 80] Under section 72(3)(a), I may require that a duty imposed by the Act be performed. I therefore considered whether to order the Public Body to comply with its duty under section 12(1)(c)(i), in other words to prepare and provide another response to the Applicant that fully meets the requirements of section 12(1)(c)(i) in relation to all of the exceptions to disclosure that the Public Body applied.

[para 81] I decided that ordering the Public Body to go back and redo its response to the Applicant would be a pointless and unnecessary exercise, given that this inquiry has taken place and I have found that the records at issue were either properly withheld or should be disclosed. Moreover, I have found that the Public Body adequately told the Applicant its reasons for withholding information under section 20(1)(d), and this is the particular section that was properly applied to some of the information at issue. Although I have found that the Public Body did not adequately give its reasons for withholding information under sections 16(1) and 20(3)(a), I have concluded that these sections do not apply to the remaining information at issue, and I order it to be disclosed to the Applicant.

V. ORDER

[para 82] I make this Order under section 72 of the Act.

[para 83] I find that the Public Body did not meet the requirements of section 12(1) of the Act, as it did not provide proper reasons to the Applicant, under section 12(1)(c)(i), for its refusal to grant access in reliance on sections 16(1) and 20(3)(a). However, for the reasons set out above, I find it unnecessary to order the Public Body to comply with its duty under section 12(1)(c)(i).

[para 84] I find that the Public Body properly applied section 20(1)(d) of the Act to some of the records at issue, on the basis that disclosure could reasonably be expected to reveal the identity of a confidential source of law enforcement information. Under section 72(2)(b), I confirm the Public Body's decision to withhold the following information:

> Page 1 – everything above the word "Confidential", the fifth to ninth words in point 2, the third to sixth words in point 4, the last three words in point 4, and everything below "Yours truly";
>
> Page 11 – the seventh to tenth words in the sentence at the top, the second column of information, and the information in footnote 3; and
>
> Page 12 – the seventh to ninth words in the sentence at the top, and the second column of information.

[para 85] I find that the Public Body did not properly apply section 16(1) or section 20(3)(a) to the remaining records at issue, as I see no basis on which to conclude that disclosure would be harmful to the business interests of a third party or expose a third

party to civil liability. Under section 72(2)(a), I order the Public Body to give the Applicant access to the remaining information on pages 1, 11 and 12 of the records.

[para 86] 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.

Wade Riordan Raaflaub
Adjudicator

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ADDENDUM to ORDER F2010-026

April 26, 2011

ALBERTA GAMING AND LIQUOR COMMISSION

Case File Number F4842

Application for Reconsideration

[para 1] I issued Order F2010-026 on March 24, 2011 under the *Freedom of Information and Protection of Privacy Act* (the "Act"). In a letter dated March 30, 2011, the Affected Party provided a clarification regarding part of the records at issue, and expressed concern over a possible oversight in the Order. I invited the Affected Party to make a formal application, on notice to the other parties, that I reconsider part of this matter. I asked the Affected Party to explain the basis on which I have authority to reconsider the matter, explain why a reconsideration is warranted, and address the merits of the substantive issue regarding the perceived oversight. I indicated that I would accept the letter of March 30, 2011 as an *in camera* portion of the application, as it revealed the identity of the Affected Party and other information that was at issue in the inquiry.

[para 2] On April 5, 2011, the Affected Party made an application requesting that I amend Order F2010-026 or issue a subsequent order. The Applicant contested the application. The Public Body chose not to make any submissions.

[para 3] In Order F2010-026, I concluded that the Public Body properly applied section 20(1)(d) of the Act to some of the records at issue, on the basis that disclosure could reasonably be expected to reveal the identity of the Affected Party as a confidential source of law enforcement information. The Affected Party submits that portions of footnotes on pages 11 and 12 of the records could reasonably be expected to identify the Affected Party, yet I did not confirm the decision of the Public Body to withhold that information. The Affected Party argues that I have the ability to reconsider this matter on the basis that there has been an accidental slip, error or omission, or on the basis that there is an ambiguity that requires clarification.

[para 4] The Applicant submits that I did not make a mistake in Order F2010-026, that I was not unclear in it, and that I did not fail to make a decision with respect to the records under review. It notes that, at paragraph 84 of the Order, I carefully indicated which portions of the records were properly withheld by the Public Body by specifically setting out those portions, including the content of one footnote. The Applicant argues

that the proper procedure for dealing with the Affected Party's disagreement with my initial Order is for the Affected Party to bring an application for judicial review.

[para 5] The Affected Party responds that this is not a *de facto* attempt to appeal any finding of law made by me, to fundamentally shift my decision, or to broaden the rights granted in Order F2010-026. The Affected Party cites *N.B. Publishing Co. Ltd. v. New Brunswick (Executive Director of Assessment)*, 2002 NBQB 160 ("*N.B. Publishing Co. Ltd.*"), at para. 34, for the proposition that a tribunal may address an accidental slip or oversight "to obviate the need for an appeal".

[para 6] In the application for reconsideration, the Affected Party alternatively requests that I reconsider my decision in Order F2010-026 on the basis that I failed to dispose of an issue, being whether the particular portions of the footnotes in question could identify the Affected Party. The Applicant responds that the fact that I did not specifically list which footnotes were *not* properly withheld does not mean that I did not dispose of the issue. In other words, I disposed of the issue of which information would identify the Affected Party by describing that information, which already included one footnote, and I disposed of the issue of which information would not identify the Affected Party by ordering the Public Body, at paragraph 85 of the Order, to give the Applicant access "to the remaining information on pages 1, 11 and 12 of the records".

[para 7] On my review of the submissions of the parties, I have decided that I have the ability to reconsider this matter, that it is appropriate for me to reconsider the matter, and that I should amend Order F2010-026 following my reconsideration.

[para 8] In *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 ("*Chandler*") at p. 861 or para. 20, Sopinka J. of the Supreme Court of Canada set out the ability to reopen or reconsider a matter as follows:

> I do not understand Martland J. [in *Grillas v. Minister of Manpower and Immigration*, [1972] 2 S.C.R. 577] to go so far as to hold that *functus officio* has no application to administrative tribunals. Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp*…

[para 9] The Applicant correctly notes that I have no express statutory authority to reopen or reconsider this matter. In *Paper Machinery Ltd. v. J. O. Ross Engineering*

Corp., [1934] S.C.R. 186 [cited in *Chandler* at p. 861 or para. 19], two circumstances under which a decision could be reopened were laid out as follows:

> 1. where there had been a slip in drawing it up, and,
> 2. where there was an error in expressing the manifest intention of the court [or tribunal].

In *Chandler*, at p. 862 or para. 23, Sopinka J. further stated that "if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task".

[para 10] At paragraph 84 of Order 2010-026, I confirmed the Public Body's decision to withhold information in one footnote because I found that the information would identify the Affected Party. The footnote referred to a line in a column of information about the Affected Party. At the time, I believed that all other footnotes would not identify the Affected Party, on the basis that they did not apply uniquely to the Affected Party in such a way that the Affected Party would be identifiable by referring to them.

[para 11] In the letter of March 30, 2011, the Affected Party provided me with a clarification regarding two footnotes. I cannot reveal the details set out in that *in camera* letter, but on my consideration of the clarification provided by the Affected Party, I find that the last five words of two additional footnotes could reasonably be expected to reveal the identity of the Affected Party as a confidential source of law enforcement information under section 20(1)(d) of the Act. My earlier understanding was based on the content of the footnotes themselves, but that content was misleading.

[para 12] In McCauley and Sprague, *Practice and Procedure before Administrative Tribunals*, vol. 3 (Toronto: Carswell) at section 27A.4(b)(ii) (looseleaf), the authors explain the notion of an accidental slip or omission as follows:

> The term "accidental slip or omission" has a slightly broader meaning than clerical error. The type of mistake is one in which the decision as recorded does not reflect the intent of the decision-maker. The purpose of the "corrected" decision is always simply to put the order in the form the decision-maker originally intended it to be. If the order accurately reflects the original intent no rehearing power exists under this heading.

In Order F2010-026, my overall intent, in terms of resolving the issues between the parties and making an order, was to confirm the decision of the Public Body to withhold information that would serve to identify the Affected Party. That intent has been frustrated in light of the Affected Party's clarification of the records.

[para 13] Because I issued Order F2010-026 on the basis of my understanding of the records at the time, and the Affected Party has drawn a clarification to my attention, the

Applicant might characterize the slip or omission as one on the part of the Affected Party, rather than on my part. In this regard, McCauley and Sprague write as follows:

> In *Chessum & Sons v. Gordon*, [1901] 1 K.B. 694 (C.A.), the accidental slip rule was applied to allow a taxing master to issue a second taxation assessment when by error *the applicant* had failed to include in his expenses being assessed one expense item. Two earlier decisions were cited in support of this ruling, *Fritz v. Hobson* 14 CH. D. 542 and *Barker v. Pruvis* 56 L.T. 131, where the accidental slip rule had been applied to cases where the applicant had accidentally misled or failed to provide a decision-maker with the correct facts. It is important to note that in these cases the substance of the decision-maker's decision was not being changed. In each case it could be argued that the decision-maker had intended to, or had, awarded the thing in question which had been omitted from the implementation of the court's intention by error. In *Chessum* the Court expressly noted that the accidental slip rule was not to be applied where an applicant had further information which showed the original decision to be wrong and was seeking a change. This aspect of the accidental slip exception was more recently applied in the decision of the Ontario Divisional Court *Grier v. Metro International Trucks Ltd*. [(1996), 28 O.R. (3d) 67 (Div. Ct.)].

[para 14] Here, the Affected Party is not trying to change the substance of my decision. In Order F2010-026, I intended to confirm the decision of the Public Body to withhold information that could identify the Affected Party. The Affected Party is asking me to make an amendment that will reflect that intention. I find that reconsideration is available and warranted, and that I should amend Order F2010-026 to reflect my original intention. The amendment is perhaps even more justifiable than in the cases noted above. The present matter is not one involving an award of something additional which, if not awarded, still means that a party receives what has already been awarded. If I were not to amend Order F2010-026 so as to permit the Public Body to withhold the additional identifying information of the Affected Party, the entire point of my decision would be defeated. The Affected Party would effectively "lose" all that I have already "awarded".

[para 15] Moreover, the Affected Party notes *N.B. Publishing Co. Ltd.* at para. 30, [which in turn cited *Chandler* at p. 862 or para. 21] for the proposition that the Supreme Court of Canada has come to favour a "more flexible and less formalistic" approach to the correction of errors by administrative tribunals, rather than the strict enforcement of the principle of *functus officio*. *N.B. Publishing Co. Ltd.*, at para. 32, also noted that a broad view of the use of the "slip rule" was adopted by the New Brunswick Court of Appeal in *Brennan v. Henley Publishing Ltd.* (1997), 188 N.B.R. (2d) 338, at pp. 354-55 or para. 31.

[para 16] Given all of the foregoing, I find that there has been an accidental slip or omission in Order F2010-026 that falls within the scope of that particular exception to the

functus officio principle. It is not necessary for me to decide whether I may also reconsider this matter on the basis that I failed to dispose of an issue.

[para 17] I conclude that the Public Body properly applied section 20(1)(d) of the Act to the portions of the footnotes in question on pages 11 and 12 of the records, as disclosure could reasonably be expected to reveal the identity of a confidential source of law enforcement information. I therefore amend Order F2010-026 by inserting the following paragraph after paragraph 84:

> [para 84.1] Under section 72(2)(b) of the Act, I also confirm the Public Body's decision to withhold the following information:
>
> Page 11 – the last five words in footnote 4; and
>
> Page 12 – the last five words in footnote 3.

All other content in Order F2010-026 remains the same.

Wade Riordan Raaflaub
Adjudicator