ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2011-002

July 28, 2011

TOWN OF PONOKA

Case File Number F5438

Office URL: www.oipc.ab.ca

Summary: The Applicant requested access to records containing information about the costs associated with a sanitary sewer line and water main upgrade from the Town of Ponoka (the Public Body).

The Public Body located responsive records, but withheld information regarding fees and services on the basis that section 16 of the *Freedom of Information and Protection of Privacy Act* (disclosure harmful to business interests) required it to withhold this information.

The Adjudicator found that as the information withheld by the Public Body was negotiated between the Public Body and the organizations that submitted the records, it was not "supplied" for the purposes of section 16. In addition, she found that it had not been established that the information in the records had been supplied in confidence. The Adjudicator ordered the Public Body to disclose the information it had withheld from the records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 16, 72

Authorities Cited: AB: Orders 96-013, 96-018, 99-018, F2005-011, F2005-030, F2009-028 **ON:** Orders MO-2496, P-489, PO-2226,PO-2435, PO-2843

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 March 24, 2010, the Applicant requested records from the Town of Ponoka (the Public Body) containing information about the costs associated with a sanitary sewer line and water main upgrade.

[para 2] The Public Body responded to the access request on May 21, 2010. The Public Body identified the following records as responsive: a progress payment certificate, two invoices and a bylaw cost allocation document. The Public Body severed information relating to the names of third party service providers, descriptions of services, and the costs of the services, under section 16 of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act).

[para 3] On June 25, 2010, the Applicant requested that the Commissioner review the Public Body's response to his access request. The Commissioner authorized mediation to resolve the dispute. As mediation was unsuccessful, the matter was scheduled for a written review.

[para 4] Descon Engineering and Nikiforuk Construction were identified as parties affected by the request for review as the Public Body had withheld information relating to services they had provided from the records at issue. Although both parties were invited to participate, only Descon Engineering chose to participate in the inquiry.

II. INFORMATION AT ISSUE

[para 5] The following information is at issue in this inquiry: information regarding names of third parties, fees, and services that was severed under section 16 from the following records:

- Progress Payment Certificate No. 2
- Invoice 08-24
- Descon Engineering Bylaw Cost Allocation,
- Invoice No. 08-27

III. ISSUE

Issue A: Does section 16 (disclosure harmful to the business interests of a third party) apply to the information withheld by the Public Body?

IV. DISCUSSION OF ISSUE

Issue A: Does section 16 (disclosure harmful to the business interests of a third party) apply to the information withheld by the Public Body?

[para 6] 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 7] 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.

Section 16 is intended 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. Section 16 does not protect information *about* businesses, but information *belonging to* businesses.

[para 8] 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 9] The Public Body argues that the information severed from the records at issue under section 16 consists of the financial or commercial information of Descon Engineering and Nikiforuk Construction and of other third parties.

[para 10] 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 11] In Order 96-018, the former Commissioner said the following regarding "financial information" for the purposes of section 16:

> 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 12] 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 13] 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 14] As noted above, the information severed from the records consists primarily of information about the fees Descon and Nikiforuk charge for services. The progress payment certificate contains information regarding revised prices in relation to services performed by Nikiforuk for the Public Body. The invoices and the bylaw cost allocation form contain information relating to prices for services performed by Descon.

[para 15] I find that the list of services and the fees for services contained in the records at issue are the commercial information of Nikiforuk and Descon, given that the information is about the terms under which these companies performed and sold services to the Public Body.

[para 16] The Public Body also severed the name of a third party contractor that appears in Schedule H of the progress payment certificate without any associated information. I find that the name alone, in the absence of other information about the contractor, is not information to which section 16 can apply, as a company name alone, absent the presence of other information belonging to it, does not have the character of information falling under section 16(1)(a).

[para 17] To summarize, I find that the fees tendered or charged by Nikiforuk and Descon, and the services for which the fees were tendered or charged are their commercial information for the purposes of section 16(1)(a). However, I find that the

name of the third party contractor referred to in Schedule H is not information subject to section 16(1)(a).

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

[para 18] 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 19] 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 20] 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 21] Order PO-2226 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 22] In *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No.3475, the Ontario Divisional Court upheld the decision of an Adjudicator that 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. [my emphasis]

[para 23] 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.

[para 24] In Order F2009-028, I addressed the argument that information in an accepted bid is supplied as it would enable one to learn commercial or financial information, and said:

> 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 25] 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) as negotiated information reveals the intentions of both parties to a contract. Moreover, once a public body accepts a bid or tender, even if it accepts the terms of the bid or tender unaltered, its acceptance constitutes a form of negotiation, given that it is free to reject the bid or accept another bid. Once a public body

accepts a bid or tender, the bid or tender represents the intentions of both parties, and is therefore not information that can be said to have been supplied by one party or the other.

[para 26] Descon characterizes the information in issue in the following way:

> DESCON policy is to reveal to the public only the lump sum tendered price. Contractors provide their itemized tender prices "in confidence" to the engineer to determine if there is an unbalanced pricing. Our specification [is] explicit that the contractor shall not provide unbalanced tender pricing. The tendered prices are not available to the public or other contractors only to the client.

Descon describes the fees and services in the records as "tendered".

[para 27] The Public Body states:

> As with industry practice in both the tendering and carrying out of contracts there was an implicit understanding between Town and the Third Parties that the information provided by Descon and Nikiforuk pertaining to commercial aspects of their business was to be kept confidential. The information requested was prepared and submitted to the Town for the administrative purpose of payment for materials and services provided through the contract for the Project.
>
> These documents were not prepared by the Third Parties in any manner which would expect or anticipate disclosure in the hands of the Town. These documents were prepared as part of a transaction for services, materials and equipment between the Town and the Third Parties and were not available through any other public source.

The Public Body agrees that the information in the records was tendered and accepted for payment by the Public Body as part of a transaction.

[para 28] The evidence and arguments of Descon and the Public Body establish that the fees and the description of services for which the fees were charged were submitted to the Public Body and accepted for payment.

[para 29] In essence, the information about fees and services withheld by the Public Body from the records is information about negotiated terms between the third parties and the Public Body, given that the terms were offered by Descon and Nikiforuk and accepted by the Public Body. I also note that Nikiforuk revised figures at the request of the Public Body, which again, indicates that the Public Body could agree to the third parties' terms or not. As a result, I find that the information at issue is not information that can be said to have been supplied by a third party for the purposes of section 16(1)(b), as the information was negotiated between the Public Body and the contractors.

[para 30] I note that Descon and the Public Body both argue that the information in the records at issue was submitted in confidence. If I am wrong that the fees and services severed from the records cannot be said to have been "supplied" by Descon or Nikiforuk, it is necessary to consider whether the confidentiality requirement of section 16(1)(b) has been met and I will therefore do so.

[para 31] As cited above, the Public Body argues that the third party did not "prepare the records in a manner which would expect or anticipate disclosure." It also argues that there is an implicit understanding between itself and third parties that information about the commercial aspects of third party businesses will be kept confidential.

[para 32] Descon argues that the Applicant has requested information that is confidential and which is not provided by the professional engineering industry. Nikiforuk made no submissions for the inquiry, although the Public Body argues on its behalf that it does not consent to the release of information because the information was supplied in confidence.

[para 33] As the parties argue that the information withheld by the Public Body was submitted with an implicit understanding that the information would be kept confidential, and as there are no indicia in the records that confidentiality was explicitly required by the parties, I will consider the argument that the information was supplied implicitly in confidence.

[para 34] In Order 99-018, the former Commissioner considered the following factors in assessing whether a third party had an objectively reasonable belief that information has been implicitly supplied in confidence:

> In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:
>
> (1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.
> (2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the Third Party prior to being communicated to the government organization.
> (3) Not otherwise disclosed or available from sources to which the public has access.
> (4) Prepared for a purpose which would not entail disclosure.

I agree that these factors are relevant when assessing whether an expectation that information will be kept confidential is reasonably held.

[para 35] In relation to the first factor set out in Order 99-018, there is no evidence before me that the third parties communicated to the Public Body that distribution of the information withheld by the Public Body was to be restricted. I accept that Descon and Nikiforuk may have thought or expected that the Public Body would not distribute the information; however, there is no evidence that the third parties imposed limits on the Public Body's use or disclosure of the information to ensure that this was so. In addition, there is no indication that the Public Body assured Nikiforuk or Descon that information in successful tenders or invoices would be held in confidence or that the Public Body's conduct would have led these parties to conclude that this was so.

[para 36] Nikiforuk and Descon have not explained the steps taken to preserve the confidentiality of the information they submitted to the Public Body for the purposes of the second factor. While Descon states that tendered prices are available only to the client, it does not explain the measures it takes to ensure that its clients will not disclose its tendered prices to others.

[para 37] Descon suggests in its rebuttal submissions that its relationship to its clients is like the relationship between doctor and patient, or lawyer and client. However, while doctors and lawyers are required to keep the information of their patients or clients confidential, the reverse is not true.

[para 38] For the purposes of the third factor, Descon argues that the information in the records is not available to the public. However, Descon also indicates that it provides the kind of information present in the records at issue to its clients without any indication as to whether it constrains the potential for disclosure of this information by a client. For example, a client might conceivably disclose the pricing information of Descon to another for the purpose of recommending Descon's services, or a client might disclose Descon's prices to a competitor to see whether the competitor could match or beat those prices. While I accept that Descon itself does not provide information of the kind contained in the records to the public in general, it is unclear that its pricing information is not available to members of the public from other sources, such as Descon's clients.

[para 39] The information in the records was prepared with the expectation that the Public Body would accept the terms within and provide payment in accordance with the terms. In my view, this is not a purpose that would, of necessity, exclude the possibility of disclosure. I say this partly because if there were a dispute over the work to be performed or payment for services, litigation could potentially result and such a dispute would turn on the terms between the parties. The records at issue document the terms between both Descon and Nikiforuk and the Public Body. In the situation of litigation, one could anticipate that the information in the records would be likely to be disclosed in court. Consequently, while the Public Body has not disclosed the information in the records in this instance, it is conceivable that in some circumstances it would be necessary for it to do so, so I find that it has not been established that the invoices were submitted to the Public Body for a purpose that would not entail disclosure for the purposes of the fourth factor.

[para 40] Having reviewed the factors set out in Order 99-018, I find that it has not been established that the information in the records at issue was supplied with an objectively reasonable expectation of confidence, such that I would find that the records had been supplied in implicit confidence. I therefore find that it has not been established that the information in the records was provided to the Public Body in confidence.

[para 41] For the reasons above, I find that the information in the records was not supplied in confidence 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 42]   As I have found that the information at issue was not supplied in confidence, I need not consider whether the requirements of section 16(1)(c) are met.

Conclusion

[para 43]   For the reasons above, I find that section16 does not apply to the information withheld by the Public Body. I will therefore order the Public Body to disclose the information it withheld under this provision.

V.   ORDER

[para 44]   I make this Order under section 72 of the Act.

[para 45]   I order the Public Body to disclose the records to the Applicant in their entirety.

[para 46]   I further order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Teresa Cunningham
Adjudicator