

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2011-011

October 28, 2011

ALBERTA SUSTAINABLE RESOURCES DEVELOPMENT

Case File Number F5351

Office URL: www.oipc.ab.ca

Summary: An applicant requested access to records relating to Alberta Sustainable Resource Development's (the Public Body's) "request for quote" (RFQ) 11AFD204. Responsive records included quotes for the provision of services submitted by companies who provide aerial fire control services.

The Public Body provided notice to Conair that it was considering disclosing the quote it submitted. Conair objected to disclosure of the specific aircraft models it had proposed using in its quote because this information would reveal that it had access to these kinds of aircraft and the use to which it was able to put them.

The Adjudicator found that the information regarding the specific aircraft models Conair proposed to use and the way it uses them met the definition of a "trade secret" as defined in the *Freedom of Information and Protection of Privacy Act* (the FOIP Act), or, alternatively, was commercial information for the purposes of section 16(1)(a). She also found that Conair had supplied the information regarding the aircraft models it intended to use to the Public Body with an explicit and objectively reasonable requirement of confidence. Finally, she found that disclosing information regarding Conair's aircraft models could reasonably be expected to result in financial gain to its competitors. The Adjudicator determined that section 16 of the FOIP Act (disclosure harmful to business interests) applied. She required the Public Body to withhold information regarding the specific types of aircraft Conair had proposed using in its quote.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 16, 30, 31, 72

Authorities Cited: AB: Orders 99-018, F2004-013, F2005-011, F2009-028, F2011-002

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)

I. BACKGROUND

[para 1] On January 29, 2010, an applicant (the Applicant) made a request to Alberta Sustainable Resources Development (the Public Body) for access to the following:

A copy of any correspondence, proposals, agreements and other records, from January 1, 2010 to present, relating to the Alberta Sustainable Resource Development's request for quote ("RFQ") to provide Land Based 2400 Airtanker Group (i.e. RFQ number; 11AFD204) including but not limited to: (i) the complete submission of every proponent, as well as (ii) any records relating to how and on what basis the successful proponent was chosen, a copy of the agreement(s) entered into by the Alberta Sustainable Resource Development with the successful proponent, and the nature and terms of any amendments, modifications, waivers, or extensions to such agreement(s).

[para 2] The Public Body provided notice under section 30 of the FOIP Act to Conair, one of the companies that had submitted a quote in response to RFQ 11AFD204. The notice indicated that it was considering giving access to some of the information in the records that had been submitted by Conair as part of its quote. Conair objected to the proposed disclosure. On April 8, 2010, the Public Body notified Conair under section 31 of the FOIP Act that it intended to disclose some of the information from the records Conair had submitted, despite its objection.

[para 3] On April 21, 2010, Conair requested review of the Public Body's decision to grant the Applicant access to some of the information that Conair had submitted in its quote. In particular, Conair argued that information regarding the specific aircraft models it had intended to use was subject to section 16 of the FOIP Act, on the basis that it was a trade secret that had been supplied in confidence.

[para 4] The Commissioner authorized mediation to resolve the issues between the parties. As mediation was unsuccessful, the matter was scheduled for a written inquiry. Although invited to participate, the Applicant did not take part in the inquiry.

II. RECORDS AT ISSUE

[para 5] Information in Conair's quote regarding the specific models of aircraft it intended to use is in issue for the inquiry.

III. ISSUE

Issue A: Does section 16 of the Act (information harmful to the business interests of a third party) apply to the information Conair seeks to have withheld?

IV. DISCUSSION OF ISSUE

Issue A: Does section 16 of the Act (information harmful to the business interests of a third party) apply to the information Conair seeks to have withheld?

[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.

[para 8] The purpose of provisions like section 16 is to protect specific types of proprietary information or “informational assets” of third parties from disclosure, so that businesses may be confident that they can continue to invest in this kind of information,

and to encourage businesses to provide this kind of information to government when required.

[para 9] In Order F2005-011, the Commissioner adopted the following approach to section 16 analysis from Order F2004-013:

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 about Conair's aircraft models meets the requirements of sections 16(1)(a), (b), and (c) and therefore falls under section 16(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 10] The Public Body made no arguments in relation to the application of section 16(1)(a) or 16(1)(c), but confined its arguments to section 16(1)(b).

[para 11] Conair argues that disclosure of the information in the records at issue would have the effect of revealing its trade secrets or commercial information. Conair points to the definition of "trade secret" set out in section 1(s) of the FOIP Act and argues that the information it seeks to withhold is encompassed by this definition. Section 1(s) states:

I In this Act,

- (s) "trade secret" means information, including a formula, pattern, compilation, program, device, product, method, technique or process
- (i) that is used, or may be used, in business or for any commercial purpose,
 - (ii) that derives independent economic value, actual or potential, from not being generally known to anyone who can obtain economic value from its disclosure or use,
 - (iii) that is the subject of reasonable efforts to prevent it from becoming generally known, and
 - (iv) the disclosure of which would result in significant harm or undue financial loss or gain.

[para 12] Conair states:

Conair recognizes that in order to be exempt, the information must contain trade secrets or commercial information that was supplied in confidence and could reasonably be expected to significantly harm its competitive position. Conair will assert that the refusal to disclose the

requested information meets those tests. Conair will also assert that it will be prejudicial to Alberta Sustainable Resource Development and the Province of Alberta if the information is released.

[para 13] Conair does not explain, in this argument, which information in the records at issue would reveal its trade secrets or its commercial information. However, in an argument appearing under the heading, “Overall Response,” it states:

By way of background, Alberta Sustainable Resource Development issued the RFQ with respect to aerial fire fighting contracts for the Alberta Government. Although the process through which this RFQ was undertaken provided a public opening of the various submitted bids and a disclosure of the price quoted for each of the five years for each aircraft type being proposed, the specific identification for the proposed aircraft, in addition to any other detail as to how the proponent was going to provide the services was never disclosed publicly.

Conair objects to the disclosure of the aircraft types it proposed using, the specific identification of the proposed aircraft, and details of how it intended to provide services in the event that the Public Body accepted its quote.

[para 14] In its letter of July 22, 2010, in which it requested an inquiry, Conair argued:

Conair submits that the use of these particular aircraft can best be characterized as an advance in the field of aerial fire control in Canada. To our knowledge, none of our competitors have either: (i) thought to use [names and types of aircraft] for the purposes described in the RFQ; or (ii) have access to use these aircraft for such purposes. More significantly, however, none of our competitors know that Conair has access to these aircraft in Alberta, and has developed the technical expertise to use them for aerial fire control. Our capacity to use these ... aircraft is a closely guarded secret.

Because there is no current competitor or public knowledge regarding the commercial availability of the aircraft proposed for utilization set out in Conair’s ... RFQ Submissions in Alberta, the disclosure of the fact that these aircraft may be available and the timing of their availability is a significant trade secret and valuable confidential information of Conair. Accordingly, the disclosure of this information would substantially harm Conair’s competitive position and market strategy for several years as such government contracts typically exceed 10 years.

[para 15] Conair’s request for an inquiry clarifies that it does not object to disclosure of *all* the information contained in the RFQ, but rather, its objection is limited to that information which would serve to reveal the specific aircraft models it intended to use in order to provide services to the Public Body. The question is whether the information it seeks to have withheld, that is, the specific aircraft models it has access to, in the context of the use it is able to make of them, is information that is either a trade secret or commercial information.

[para 16] As Conair points out, the FOIP Act defines the term “trade secret”. If information meets all the criteria of section 1(s), the information constitutes a “trade secret” under the FOIP Act. I will therefore consider whether the information Conair seeks to have withheld meets the definition set out in section 1(s).

[para 17] “Trade secret” is not defined exhaustively in the FOIP Act. Rather, section 1(s) contains a list that illustrates the kinds of information that are included in this category. I must therefore consider whether the information Conair seeks to have withheld is information that is, or is similar in nature to, a formula, pattern, compilation, program, device, product, method, technique, or process, as described in section 1(s). In my view, the information Conair seeks to have withheld may be considered a method, as revealing the specific models of aircraft it employs when controlling fires would reveal the unique uses to which Conair has put these aircraft. Moreover, as controlling fires is a commercial activity in which Conair engages, I find that the information in issue is information about a unique method that Conair uses to conduct its business for the purposes of section 1(s)(i). In addition, the information meets the requirement of “commercial information” for the purpose of section 16(1)(a).

[para 18] Conair did not directly address the issue of whether the use it is able make of specific models of aircraft has independent economic value. However, in its correspondence submitted for the purpose of requesting an inquiry, it noted that the uses it makes of specific models of aircraft amount to an advance in the field of aerial fire control, and that its competitors are unaware of this method of using these specific types of aircraft for fire control, or lack access to the specific types of aircraft used. In my view, this kind of information would reasonably be expected to have economic value to a competitor, as a competitor might be willing to pay to obtain this kind of information to improve its own business methodology. Moreover, this kind of information might also have independent value to a potential purchaser of Conair, in the sense that a purchaser might be prepared to pay more to Conair because of the value of this information. However, if this information were to become widely known, the value of the information would decrease, both to competitors and to potential purchasers. I therefore find that the information has independent economic value from not being generally known for the purposes of section 1(s)(ii).

[para 19] Conair states that it maintains the confidentiality of the aircraft models it uses, their accessibility, and the uses it makes of these models. It also states that none of its competitors know that it has access to these aircraft in Alberta or that it has developed the technical expertise to use these aircraft for the purposes of aerial fire control. Conair’s statements to this effect have not been contradicted in the inquiry, with the exception that the Public Body established through its evidence that the models were read out at the quote opening, at which one competitor was present. However, Conair’s statements regarding its specialized use of, and access to, aircraft and the knowledge of its competitors in general, are unchallenged, and I have no reason to discount these statements.

[para 20] While Conair did not specifically address how it maintains confidentiality for the purposes of section 1(s)(iii) in its arguments, I note that the quote it submitted to the Public Body, contains the following confidentiality provision:

With the exception of the information required to be disclosed at a Public Request for Quote “RFQ” Opening, Conair Group Inc. considers the contents of this Bid response, its appendices

and attachments are proprietary to Conair Group Inc. and may not be disclosed to a third party without written permission from an officer of Conair Group Inc. as described under the Privacy Act.

Conair has significant concerns with regard to the confidentiality and protection of the strategic and commercially-sensitive information detailed in this submission.

The strategic and commercial ability of Conair Group Inc. to respond to future opportunities will be substantially damaged and unfairly harmed if the identified information is released or disclosed.

It is not entirely clear what is meant by “required to be disclosed” in the foregoing, as the bid process set out in Tab 1 of the Public Body’s submissions does not indicate that any information would be *required* to be disclosed at the quote opening. However, given that Conair understood that the information in its quote would be evaluated at the quote opening, it appears that this phrase was intended to describe information that would be necessary for the Public Body to refer to for the purposes of making a decision regarding the quote. In any event, I find that the three paragraphs above establish that Conair makes efforts to protect the confidentiality of the information in issue. Requiring the Public Body not to disclose any more of its information than was necessary for meeting the purposes for which it was submitted is a reasonable measure to ensure the confidentiality of the information in the circumstances. That it took this measure supports its statements that it maintains the confidentiality of its aircraft models, their accessibility, and their uses. I therefore find that the information meets the requirements of section 1(s)(iii).

[para 21] I infer from Conair’s arguments and evidence that disclosing the aircraft models it uses or has available to it, would enable competitors to learn its specialized methodology for conducting its business. In addition, given its unchallenged statements that its specialized methodology is an advance in aerial fire control, disclosing this information, could, in turn, be reasonably expected to lead to a financial benefit to its competitors, as the information has the potential to enable them to conduct their own businesses more efficiently when they compete with Conair. I therefore find that section 1(s)(iv) is met in relation to the aircraft models and types.

[para 22] As information regarding the specific aircraft models and types that Conair uses would reveal the unique method by which it conducts its business, and this information meets all the criteria of section 1(s), I find that this information is a trade secret for the purposes of section 16(1)(a). I will therefore consider whether the information was supplied in confidence for the purposes of section 16(1)(b).

Was the information supplied by Conair?

[para 23] In Orders F2009-028 and F2011-002 I found, in accordance with earlier orders of this office, that information that has been negotiated between a third party and a public body is not information that has been supplied by a third party for the purposes of section 16(1)(b). However, in this case, I find that the information Conair seeks to withhold regarding its aircraft models is information that was supplied, rather than negotiated.

[para 24] The Public Body accepted the quote of another third party, and not Conair's. Consequently, it cannot be said that *all* the information contained in the quote is negotiated between the parties, as the Public Body did not accept Conair's terms. While some information in the quote is negotiated between Conair and the Public Body, given that Conair was required to agree to certain terms before its quote would be considered, information regarding the specific aircraft models it uses was not part of such a term. Conair, like the other third parties who supplied quotes to the Public Body, was required to have aircraft with specific minimum capabilities for its quote to be considered. However, there was no requirement for Conair, or the other third parties, to have available specific models of aircraft in order to be successful. Consequently, the information submitted by Conair to the Public Body revealing the aircraft models it intended to use was supplied, within the terms of section 16(1)(b), rather than negotiated.

If the information was supplied by Conair, was it supplied in confidence?

[para 25] The Public Body argues the following:

In order to prove that the information was supplied in confidence pursuant to section 16(1)(b), the Public Body must establish the following (OIPC Order 99-018):

- a. The information was communicated to the public body on the basis that was confidential and that it was to be kept confidential;
 - b. The information was treated consistently in a manner that indicates a concern for its protection from disclosure by the third party prior to being communicated to the public body;
 - c. The information was not otherwise disclosed or available from sources to which the public has access;
 - d. The information was prepared for a purpose that would not entail disclosure.
- ...

The Public Body submits that all of the information that is the subject of this Inquiry was information that was submitted to the Public Body in the Third Party's submission in response to the Request for Quote 11AFD204 by the Third Party and its disclosure at a public opening of submissions was expressly consented to in the Third Party's Confidentiality notice that is included in its submission...

The Public Body submits that as the disclosure of the information at the public opening of the submissions was expressly consented to by the Third Party the requirement of confidentiality is not present and therefore the second element of the three part test set out in OIPC Order 99-018 is not met, the Public Body need not consider the other elements of the three-part test.

The Public Body submits that as the required element of confidentiality set out section 16 is not present, the Public Body may disclose the information.

The Public Body submits that the information contained in all sections of the withheld records falls outside the mandatory exception of section 16(1) of the Act, as the disclosure of the information was specifically consented to by the Third Party and the information was disclosed to the public at the Public Request for Quote opening

The Public Body takes the position that Conair did not supply the information about its aircraft models in confidence within the terms of section 16(1)(b).

[para 26] The Public Body submitted an affidavit sworn by the Manager, Aviation and Geomatics, Wildfire Operations, Wildfire Management Branch, which establishes who was present at the public opening of the quotes and what was discussed at that time. This affidavit states:

On January 15, 2010, I was in attendance at the public opening of submissions relating to this RFQ, and at that time specific details of the submissions, including the type of aircraft and pricing information were read to those in attendance.

In attendance at the opening of submissions and reading of RFQ[s] on that day, in addition to [me], were [a senior vice president of Conair Group Inc; [a representative of] Air Spray Aviation Services; [the Supervisor of the Airtanker Program], Alberta Sustainable Development, and [a Contract Administrator], Alberta Sustainable Development.

The following specific information from the Conair Group Inc submission was read out those present:

One [name of airtanker model], one [name of birddog aircraft]
Airtanker for the year 2010: Daily Basing Fee: 8,000, Hourly Flying Rate: 3,700
Birddog for the year 2010: Daily Basing Fee: 2,976, Hourly Flying Rate: 1,043

One [name of airtanker model] , One [name of birddog aircraft]
Airtanker for the year 2010: Daily Basing Fee: 8,700, Hourly Flying Rate: 3,700
Birddog for the year 2010: Daily Basing fee: 2,976, Hourly Flying Rate: 1,043

[para 27] The affidavit evidence may be viewed as conflicting somewhat with Conair's argument that information about its aircraft models was never disclosed publicly, given that the affidavit indicates that this information was disclosed at the quote opening to a member of the public. However, it may be that Conair means that information about its aircraft models has not been disclosed to the public at large. The affidavit is clear that Conair's information was disclosed at the quote opening, which only one member of the public attended.

[para 28] The Public Body argues that because the names of the aircraft models Conair intended to use were announced at a public meeting at which three employees of the Government of Alberta, a representative of Conair and one of Conair's competitors were present, that the information Conair seeks to withhold was not supplied in confidence.

[para 29] Order 99-018, on which the Public Body relies, states:

The Third Party did not present evidence of any explicit statement or agreement with the Public Body concerning the confidentiality of the information in the Records. There is nothing on the face of the Records that would lead one to conclude that the Third Party was supplying the information on the condition that it remain undisclosed.

The issue then turns to the question of whether the information can be said to have been supplied implicitly in confidence. In my view, the word "implicit" denotes a particular state of understanding: a belief in a certain set of facts.

The 1998 Freedom of Information and Protection of Privacy Policy and Practices Manual published by the Information Management and Privacy Branch at Alberta Labour (now Municipal Affairs) states, at page 64:

Implicitly means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement or other physical evidence of the understanding that the information will be kept confidential. In such cases, all relevant facts and circumstances need to be examined to determine whether or not there is an understanding of confidentiality.

In Ontario Order M-169, Inquiry Officer Holly Big Canoe made the following comments with respect to the issue of confidentiality in the equivalent of section 15(1) found in the *Municipal Freedom of Information and Protection of Privacy Act* of Ontario:

In regards to whether the information was supplied in confidence, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

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.

Here, the Public Body says there was no understanding of confidentiality. Other than stating its expectations that the Records would be held in confidence, the Third Party has not provided evidence in support of this assertion. I find that the Third Party has not pointed to any particular circumstance or facts that would give rise to a reasonable expectation that the information was communicated on the understanding that it was supplied, explicitly or implicitly, in confidence.

[para 30] Order 99-018 addressed a situation in which a third party had supplied information to a public body without stating expressly that the information had been supplied in confidence. However, the third party argued that it had supplied the information in issue in implicit confidence. The former Commissioner considered whether the third party had established that it had objectively reasonable grounds for its expectation that the information it had supplied would be kept confidential, even though it had not expressly stated that it was supplying information in confidence. He determined that the third party in that case had not established that it had communicated its expectations that the information it had submitted was supplied explicitly or implicitly in confidence. He decided that making a determination as to whether information has been supplied in confidence, or not, will depend on consideration of the four factors reproduced above.

[para 31] The case before me differs from Order 99-018 in that Conair supplied its information with express restrictions on the ability of the Public Body to disclose or disseminate the information. The four factors referred to in Order 99-018, are primarily useful when determining whether information has been supplied in implicit confidence. When a third party supplies information falling under section 16(1)(a) with an express requirement of confidentiality, the only question is whether it is objectively reasonable for it to have done so. For example, if a third party submits information under a statutory regime that requires disclosure of the information beyond the restrictions imposed by the third party, or if the information is available to the public, it may not be objectively reasonable or possible to impose or maintain restrictions on the extent to which a public body may disclose the information.

[para 32] The Public Body argues that Conair consented to disclosure by the Public Body of its aircraft models at the quote opening. It argues that because of this consent, the information was not supplied in confidence. In my view, this argument fails to take into consideration the fact that Conair imposed restrictions on the ability of the Public Body to disseminate its information at the quote opening, by limiting the Public Body to disclosing only the information from its quote that was required or necessary to be disclosed at the quote opening. Conair also took the step of prohibiting the Public Body from disclosing its information in its quote at any other time without first obtaining its consent.

[para 33] I note that the Public Body's guidelines for proposals states:

The [FOIP] Act grants a right of access to records in the Department's custody or control and prohibits, amongst other things, the Department from disclosing information where disclosure would be harmful to your business interest as defined in section 16 of the Act... The Department routinely discloses information and records in its custody or control or pursuant to the [FOIP] Act. Should your proposal contain any information such as trade secrets, processes or techniques, commercial or financial, the release of which would harm your business interests, please identify such information clearly so that you may be contacted should a request be made to access the information. Please note that the Department cannot guarantee that any information submitted will remain confidential and be advised that your specifying that information is not to be released is not conclusive nor is it binding on the Department, which is subject to the Act.

[para 34] This guideline indicates that the Public Body was aware that third parties submitting quotes might supply information regarding trade secrets or commercial information, and considered that in some circumstances it would be possible to protect those trade secrets in the context of an access request, despite the quote process. The guidelines do not state that a third party will automatically have relinquished all confidentiality in its trade secrets by participating in the quote process. Rather, the excerpt above indicates that the Public Body considered that confidentiality of information could be maintained in relation to information meeting the requirements of section 16 should an access request be made, although it did not guarantee that all information marked "confidential" could be kept confidential.

[para 35] I was unable to locate anything in the Public Body's guidelines for those submitting quotes to indicate that any information submitted by third parties would be "required" to be disclosed at the quote opening, or, more specifically, that their specific aircraft models would be required to be disclosed at the quote opening. Moreover, the Public Body invited third parties to identify information they considered subject to section 16 and did not want disclosed to an applicant who made an access request. ConAir stated that it was submitting its entire quote in confidence, but permitted the Public Body to disclose information required to be disclosed at the quote opening, but at no other time.

[para 36] There is no evidence before me that it was decided at the quote opening that disclosure of Conair's aircraft models was *required*. In my view, Conair cannot be said to have consented to disclosure of its aircraft models at the quote opening, by virtue of including them in its quote, as there is nothing to suggest that any of the information that was disclosed was *required* to be disclosed. While Conair may not have objected at the quote opening to the disclosure, that is not the same thing as consenting to disclosure.

[para 37] I accept that the Public Body had to ensure that its minimum requirements were met at the quote opening; however, that alone would not necessarily entail or *require* disclosing aircraft models in detail. In saying this, I do not mean to imply that the Public Body should not have disclosed details regarding the models or lacked the authority to do so. The FOIP Act has no application to commercial information or trade secrets except in circumstances where an applicant had made an access request for this information. However, the restrictions imposed by Conair were that information could be disclosed if it were required or necessary to be disclosed. I am unable to find, on the evidence before me, that there was any requirement or necessity to disclose the information such that Conair could be said to have consented to disclosure at the quote opening.

[para 38] The information disclosed by the Public Body at the quote opening was disclosed to only one individual who was not an employee of the Public Body or Conair. I therefore find that it would not be futile for Conair to include confidentiality provisions in its quote, or unreasonable for Conair to expect that the Public Body would maintain the confidentiality of the information it submitted in its quote other than that which was required to be disclosed at the quote opening. In addition, I find that disclosing the information at the quote opening did not have the effect of making the information public or publicly available.

[para 39] For the reasons above, I do not accept the Public Body's arguments that Conair consented to the Public Body making its trade secrets public, or that the information was not supplied in confidence for the purposes of section 16 for that reason.

[para 40] I find that Conair supplied the information in its quote to the Public Body with an express requirement that it be held in confidence, subject to the single acknowledged exception. Moreover, I find that Conair supplied its trade secret to the Public Body in explicit confidence within the terms 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 41] I have already found that disclosure of the information could reasonably be expected to enable Conair's competitors to learn its specialized methods for conducting its business, which would, in turn, amount to a financial benefit to its competitors, as the information may reasonably be expected to enable them to conduct their own businesses more efficiently when they compete with Conair. It follows, then, that I find that disclosure of the information the Public Body has decided to disclose could reasonably be expected to result in undue financial gain to its competitors for the purposes of section 16(1)(c).

Conclusion

[para 42] I find that the information in issue is subject to section 16 of the FOIP Act. It therefore follows that I find that the Public Body is required to refuse access to this information.

V. ORDER

[para 43] I make this Order under section 72 of the Act.

[para 44] I require the head of the Public Body to refuse access to the Applicant to those parts of the record that would have the effect of revealing the models of aircraft that Conair intended to use if its quote had been successful.

Teresa Cunningham
Adjudicator