ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-47

November 8, 2013

ALBERTA HEALTH

Case File Number F5903

Office URL: www.oipc.ab.ca

Summary: The Applicant requested a copy of the agreement between Alberta Health (the Public Body) and Alberta Blue Cross (ABC) under which ABC administers the provincial drugs plan.

The Public Body produced the agreement but severed some information under sections 16 (disclosure harmful to business interests) and 25 (disclosure harmful to economic and other interests) of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act).

The Adjudicator found that some of the information did not meet the requirements of section 16(1)(a), as it could not be said to be information belonging to ABC. The Adjudicator also determined that none of the information in the agreement could be said to have been supplied by ABC, and was therefore not subject to section 16 for that reason as well.

The Adjudicator found that the Public Body had not established that disclosure of the information withheld from the Applicant under section 25 could result in harm within the terms of section 25.

The Adjudicator ordered the Public Body to disclose the agreement in its entirety.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 16, 25, 72; *ABC Benefits Corporation Act*, R.S.A. 2000, c. A-1 s. 1 **ON:** *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F.31 s. 17

Authorities Cited: AB: Orders 96-016, F2005-011, F2005-030, F2009-028, F2010-036, F2011-001, F2011-002, F2012-06, F2013-17 **BC:** 01-39, F09-04 **ON:** PO-2226, PO-2435, PO-2843, PO-3176

Cases Cited: *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. 2851; *Imperial Oil Limited v Calgary (City)*, 2013 ABQB 393

I. BACKGROUND

[para 1] The Applicant made an access request to Alberta Health (the Public Body). He requested a copy of the agreement between Alberta Health and Alberta Blue Cross (ABC) that authorizes ABC to administer the provincial drugs plan.

[para 2] The Public Body located the agreement that is the subject of the Applicant's access request. It provided notice to ABC regarding the Applicant's access request. The Public Body severed some information from the agreement under section 16 of the *Freedom of Information and Protection of Privacy Act* (the FOIP act), on the basis that disclosing the information would harm ABC's business interests, and under section 25 of the FOIP Act, on the basis that disclosure would harm its own negotiations.

[para 3] The Applicant requested review by the Commissioner of the Public Body's decision to withhold some of the information in the contract.

[para 4] The matter was scheduled for a written inquiry. The Applicant, the Public Body, and ABC exchanged submissions.

II. INFORMATION AT ISSUE

[para 5] Information severed from the contract between ABC and the Public Body is at issue, specifically: Sections 3.1, 12.1, 13.1, 15.1, 16.1 and 20.1 of pages 6 – 13, Sections 3.1, 9.1, and 9.3 of pages 49 – 51, 1(a) pages 54, 56, 58 and 60, Schedules 1, 3, 5 of pages 21 – 45, Schedule 6 at pages 46 – 47, 1(a), page 62, 1(g) page 64 and Schedule 3 and Schedule 3 – Appendix pages 66 – 78, Sections 18.1, 19.1, 19.3, 21.6, 22.1 and Schedule 4, Schedule 2.1, parts 1, 2, and 3, Schedule A parts 1, 2, and 3, Schedule B – sections 1(a) to (d), page 53, 1(b) pages 54, 56, 58, and 60

III. ISSUES

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

Issue B: Did the Public Body properly apply section 25(1) of the Act (disclosure harmful to economic and other interests of a public body) to the information in the records?

IV. DISCUSSION OF ISSUES

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

[para 6] Section 16 is a mandatory exception to disclosure. Section 16(1) of this provision 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.

This statement of the purpose of section 16 has been adopted in Orders F2009-028, F2010-036, F2011-001, F2011-002, F2012-06, and F2013-17 and found to inform the rationale behind the mandatory exception to disclosure created by section 16 of the FOIP Act. In these orders, it was determined that 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 provide it to government when required.

[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 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] ABC argues that the information it seeks to have withheld from the Applicant is properly characterized as commercial, financial, and technical information and trade secrets belonging to it. It argues that it is a third party within the terms of section 16, and it describes its business in the following way:

> ABC Benefits Corporation operating as Alberta Blue Cross ("ABC") is created under the *ABC Benefits Corporation Act*, R.S.A. 2000, c. A-1 (the "Act"), as a not-for-profit business organization, initiating, owning, participating and operating projects, plans or programs and related services that are intended or designed to improve the health and well-being of the residents of Alberta and other customers of ABC.
>
> At an operational level, ABC's purpose includes the provision of supplementary health benefit programs and related or associated benefit programs and services.
>
> A third purpose is to continue the operation of the Alberta Blue Cross Plan and, as such, ABC firstly is an independent licensee of the Canadian Association of Blue Cross Plans ("CABCP") and, secondly it operates day to day under the registered business name of Alberta Blue Cross.
>
> As an independent licensee of the Canadian Association of Blue Cross Plans, ABC is required to operate by a strict set of requirements, including:

a. All licensed Blue Cross plans must operate on a not-for-profit basis;
b. Plans must comply with specific financial reporting and auditing procedures established by the CABCP; and
c. Plan activities must be directed principally to health care financing and service delivery.

While ABC is a not-for-profit business organization it is required to make payment in lieu of tax (PILOT) to the Government of Alberta ("GOA") on certain portions of its business operations. PILOT is determined in the same manner as if ABC's business operations were taxable under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) and the *Alberta Corporate Tax Act*, R.S.A. 2000, c. A-15.

ABC does not have any share capital and shareholders and ABC is governed by an independent Board of Directors, representing a diverse cross-section of Albertans, who operate according to the Act and regulations authorized by the Act.

ABC is not owned by nor is it controlled by the GOA.

As ABC is an independent, not-for-profit organization, it is responsible for insuring its own financial viability as no other organization serves as a backstop in the event of financial difficulties. At the same time, as required by its licensing as a Blue Cross plan, ABC operates as a not-for profit organization on a cost-recovery basis.

[para 10] Section 1(r) of the FOIP Act defines the term "third party", which is a term incorporated by section 16(1)(a). Section 1(r) states:

> *1 In this Act,*
>
> *(r) "third party" means a person, a group of persons or an organization other than an applicant or a public body[…]*

As an organization, ABC is a third party within the terms of the FOIP Act and for the purposes of section 16. If information belongs to it, the information could be said to be "of a third party" within the terms of section 16(1)(a).

[para 11] I turn now to consider the kinds of information to which past orders of this office have found section 16(1)(a) to apply.

Commercial and Financial information

[para 12] In Order F2009-028, I reviewed the definitions of "financial" and "commercial" information as follows:

> In Order 96-018, the former Commissioner adopted the following definition of "financial information" and determined that information is not the financial information of a third party for the purposes of section 16(1)(a) if the information does not allow an applicant to draw an accurate inference about a third party's assets or liabilities, past or present:
>
> > In keeping with my decision in Order 96-013, I attribute ordinary meaning to the word "financial". I also reiterate that careful consideration must be given to the content of the document in determining whether or not the information falls within this section. Financial information, in my opinion, is information regarding the monetary resources of

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

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].

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 13] In determining whether information is the commercial information of ABC, I will consider whether it reveals something about its buying, selling, or exchange of merchandise and services. In determining whether information is the financial information of ABC, I will consider whether it reveals something about its monetary resources or use and distribution of its monetary resources.

Technical Information

[para 14] In Order F2013-17, I reviewed the definition of "technical information" as follows:

> The Public Body also argues that the third party homeowners expended intellectual resources to create the information to which the Public Body has applied section 16. I believe the Public Body refers to the fact that one of the third parties provided his own technical analysis of the retaining wall problems.
>
> In Order 2000-017, the former Commissioner defined "scientific information" as "information exhibiting the principles or methods of science". Scientific information for the purposes of section 16(1)(a), then, is information belonging to a third party that exhibits the principles or methods of science. In the context of section 16, which protects business interests in information, scientific information of a third party is proprietary information exhibiting principles or methods of science.

> The *Canadian Oxford Dictionary* 2nd Edition (Don Mills; Oxford University Press Canada, 2004) offers the following definitions of the word "technical": "1. of or involving the mechanical arts and applied sciences 2. of or relating to a particular subject or craft". Previous decisions of this office differ from one another to a certain extent, given that Order F2008-018 considers technical information to refer to information relating to fields of applied sciences or mechanical arts, while Order F2002-002 holds information to be technical for the purposes of section 16(1)(a) provided it relates to particular subjects or crafts. Reconciling these two orders, technical information, is the proprietary information of a third party regarding its designs, methods, and technology.
>
> The Public Body argues that the information in the records referring to scientific or technical principles is the scientific or technical information of the third parties because some of the third parties commissioned scientific or technical reports.
>
> In Order F2012-06, I found that references to scientific or technical information in records will not bring information within the terms of section 16(1)(a); rather, the information must belong to the third party and reveal something about how a third party applies science or technology in its business. I said:
>
> > With regard to those records containing references to scientific or technical principles, I find that those references are not to "the scientific or technical information of GChem", within the terms of section 16(1)(a). These records contain a discussion of well data and opinions by a consultant of GChem as to the causes of the presence of methane in a water well. The consultant apparently provided opinions as a service to MGV Energy in some cases, and to well owners in others. However, there is nothing in the records to suggest that the scientific principles referred to in the discussions belong to GChem or are associated with GChem as an organization in any way. The references to scientific or technical principles in these discussions do not refer to the ways GChem applies science or technology in its business, but were incorporated in the discussions as a service to clients.
>
> This approach to the application of section 16(1)(a) was also followed in Order F2010-036.
>
> I acknowledge that information that could be termed "scientific" or "technical" is present in the records. I say this because the third party homeowners have included analysis of soil makeup and drainage, and the composition of the retaining wall, as well as conclusions regarding the adequacy of the retaining walls in the documents they submitted to the Public Body. However, I am unable to find that the information in the records is scientific or technical information in which the third parties have a business interest.

[para 15] As discussed in the foregoing excerpt, technical information is proprietary information of a third party regarding its designs, methods, and technology.

Trade Secrets

[para 16] Section 1(s) of the FOIP Act defines "trade secret" for the purposes of the FOIP Act. This provision states:

> *1 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 17] "Trade secret" is not defined exhaustively in the FOIP Act. Rather, section 1(s) illustrates the kinds of information that may be considered trade secrets. If information meets the criteria set out in section 1(s), it is a trade secret within the terms of the FOIP Act. Meeting the criteria set out in section 1(s) requires evidence of the purposes for which a third party uses or may use information, the economic value that the information derives from not generally being known by anyone who can obtain value from its disclosure or use, the steps it takes to prevent the information from being generally known, and the harm or loss the third party would suffer should the information be disclosed.

[para 18] I will now review the information severed by the Public Body and the individual arguments of the parties to determine whether this information meets the terms of section 16(1)(a).

Sections 3.1, 12.1, 13.1, 15.1, 16.1 and 20.1 of pages 6 – 13 and Sections 3.1, 9.1, and 9.3 of pages 49 – 51, pages 54, 56, 58 and 60

[para 19] ABC argues:

> ABC maintains that: the term of the relationship (3.1 page 6, 3.1 page 49 and 1a) pages 54, 56, 58 and 60); the rights of termination (12.1 page 9, 20.1 page 13, 9.1 page 50 and 9.3 page 51); and transition period following notification of termination (13.1, 15.1, 16.1, pages 10 – 11) meet the requirements of section 16 and should not be disclosed.
>
> […]
>
> The content of these provisions contains confidential and significant proprietary commercial information as they contain information about the selling and exchange of services between ABC and Alberta Health that would allow another to determine the terms under which, and the services themselves, that ABC provides to Alberta Health. Further these provisions contain technical information as they set out the terms under which these services are provided and the methodology by which ABC is able to provide those services to Alberta Health. This information is unique to ABC as a not-for-profit health benefits provider mandated to support the health of Albertans.

[para 20] I agree with ABC that the information in these records reveals the terms of an agreement with the Public Body under which it provides services. Information of this kind can be construed as commercial information, as described in Order F2009-028. I

will discuss below whether such information can be said to have been supplied by ABC within the terms of section 16(1)(b).

Schedules 1, 3, 5 of pages 21 – 45, Schedule 6 at pages 46 – 47, 1(a) page 62, 1(g) page 64 and Schedule 3 and Schedule 3 Appendix pages 66 - 78

[para 21] ABC argues:

> These sections set out commercial information as they relate to the exchange of information that ABC requires to administer the services that it provides, the services that ABC is able to provide and the methodology by which those services will be provided, including the terms under which ABC has to carry out its audits.
>
> These sections also contain significant technical information in that they set out how ABC receives, processes and stores the information on its system, as well as the methodology by which the services will be delivered which is a particular craft or technique employed by ABC.
>
> Further these sections also contain trade secrets as it sets out the methodology by which ABC provides its services which are unique to the way that ABC does business with Alberta Health and is something that ABC has developed over the years.

[para 22] I agree with ABC that these contractual terms impart something about the methods by which it provides auditing services, and is therefore commercial information. I also agree that some of the information in these records reveals information about the specific methodology by which it provides these services such that this information could be considered technical information. I will discuss below whether such information can be said to have been supplied by ABC within the terms of section 16(1)(b).

Sections 18.1, 19.1, 19.3, 21.6, 22.1 and Schedule 4

[para 23] ABC argues:

> These sections are commercial information as they relate to the buying, selling and exchange of services and set out the specific terms upon which ABC is compensated for the services it provides, as well as the amount ABC is to be compensated for those services.
>
> These sections also contain financial information as the specific sections regarding withholding of payment, payment of interest, payment regarding benefit modifications, changes in claim volumes and compensation relate to ABC's cost structure and rates, business organization and financial accounting and overall operating costs, relating to ABC's agreement with Alberta Health.

[para 24] I disagree that the information in these provisions reveals financial information within the terms of section 16(1)(a). As discussed above, to be financial information, information must reveal a third party's monetary resources. The provisions of the agreement that ABC characterizes as its financial information do not reveal anything about its monetary resources, or use and distribution of such resources. Rather, the terms to which ABC refers relate instead to the actions the parties will take in the event that hypothetical circumstances take place. It is not possible to make an accurate inference regarding ABC's monetary resources from these provisions.

[para 25] I accept that this information may be characterized as commercial information, given that these provisions convey something about the terms under which ABC and the Public Body propose that ABC will provide services to the Public Body. It can be said that these contractual provisions impart information about the terms under which ABC is prepared to provide services, and is accordingly information about "buying, selling, or exchange of merchandize or services", as described by Order F2009-028.

Schedule 2.1, parts 1, 2, and 3

[para 26] ABC argues:

> These portions clearly identify the Alberta Blue Cross Pharmacy Agreement, a proprietary and confidential document which governs the contractual relationship between ABC and in excess of 1000 Alberta pharmacies. These portions also reference business transactions related to supplementary health benefit plans administered by ABC on behalf of the GOA, other government program sponsors, employers and individual health plan members. This information is clearly commercial information as it relates to the services that ABC is required to provide, and the contract that it will enter into, with the Alberta pharmacies.

[para 27] Despite the foregoing characterization of the information in these provisions, I find that the information severed from Schedule 2.1 does not refer to any actual business transactions. Rather, these provisions establish one of ABC's requirements under the agreement, and steps the Public Body will take in the event a specific situation arises. However, this information does impart something about the terms under which ABC will supply services to the Public Body, and is therefore commercial information. I will discuss below whether such information can be said to have been supplied by ABC within the terms of section 16(1)(b).

Schedule A – Parts 1, 2 and 3 of page 52

[para 28] ABC argues:

> ABC maintains that page 52, Schedule A – parts 1, 2, and 3, which refer to the contract for transferring Group 66 data for PIN (Pharmaceutical Information Network), meet the requirements of section 16 and should not be disclosed.
>
> […]
>
> These sections refer to the information ABC is required to provide for the purposes of PIN and the methodology by which the information is provided for the required business processes. This information would be considered trade secrets as well as commercial and technical information as it sets out the methodology […] by which the information is provided as well as the particular technique by which the information is provided.

[para 29] I agree with ABC that the information severed from record 52 imparts something about the methods by which it provides services to the Public Body. The

information can therefore be considered to be technical information. I also accept that the terms of the agreement can be very broadly construed as commercial information, given that the information reveals the services ABC undertook to provide to, and on behalf of, the Public Body. I will discuss below whether such information can be said to have been supplied by ABC within the terms of section 16(1)(b).

Schedule B – sections 1(a) to (d), page 53, 1(b) pages 54, 56, 58 and 60

[para 30] ABC argues:

> Schedule B, and the amendments thereto, are obviously commercial information and financial information as it sets out the amount which is to be paid to ABC for the services it has or will provide to Alberta Health and includes information related to those services.

[para 31] At the time the agreements were entered, the financial amounts referred to in the records constitute the consideration the Public Body agreed to pay to ABC for performing certain services. Assuming that ABC complied with the terms of the agreement, one can learn something of ABC's monetary resources after the agreement was signed and this information can be characterized as financial information.

[para 32] I also accept that these terms can be very broadly construed as commercial information, given that the information reveals the services ABC undertook to provide to, and on behalf of, the Public Body. I will discuss below whether such information can be said to have been supplied by ABC within the terms of section 16(1)(b).

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

[para 33] As I have found that the records can be said to contain commercial, financial or technical information, I turn now to the question of whether this information was supplied by ABC within the terms of section 16(1)(b).

[para 34] 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.[1]

> 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.)

[1] Order F2005-030 was overturned by the Court of Queen's Bench in *Imperial Oil Limited v Calgary (City), 2013 ABQB 393*. Stevens J. found the Commissioner's factual finding that no records had been supplied by Imperial Oil to be unreasonable.

> 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 35] "Immutable information", as described by the former Commissioner in the excerpt above, refers to information appearing in a contract that meets the requirements of section 16(1)(a) and was supplied by the third party *prior* to entering the contract.

[para 36] For example, a third party might supply a proprietary design or formula as part of its bid or during negotiations. A public body might then require the third party to use that design or formula as a term of the contract. Even though the proprietary design or formula is the subject of negotiations, and is part of the contract, the formula or design was originally *supplied* by the third party, and may meet the requirements of both section 16(1)(a) and (b).

[para 37] 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 38] 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 39] 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 40] In Order PO-2435, an order of the Office of the Information and Privacy Commissioner of Ontario, the Adjudicator noted that even where a contract is preceded by little or no negotiation, the information in a contract is mutually generated, rather than supplied by a third party. The Adjudicator said:

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

[para 41] Recently, in Order PO-3176, an Adjudicator with the Office of the Information and Privacy Commissioner of Ontario summarized the case law as it relates to the exceptions for proprietary business information and the extent to which a contract can be said to be supplied for the purposes of these provisions. She said:

> The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties. Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where

> its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.
>
> 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 has been explained as having its basis in the purpose of section 17(1), which is to protect the "informational assets" of third parties. In this context and having regard to the plain meaning of the words used in section 17(1), this office has not generally accepted that the terms of a contract constitute information "supplied" by a third party to an institution.
>
> Exceptions to this general rule have been described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products.
>
> Several of the drug manufacturers refer to decisions of the British Columbia and Alberta Information and Privacy Commissioners that consider similar legislation in those jurisdictions, and their application to negotiated agreements. It is not clear to me whether it is being suggested that the approach in those provinces differs significantly from the principles I have described above; all jurisdictions recognize that even terms of a contract may be exempt where they reveal or could be used to infer proprietary information.

While section 17(1) of Ontario's *Freedom of Information and Protection of Privacy Act* is the primary focus of the Adjudicator's analysis in the foregoing excerpt, it holds true for decisions of this office regarding section 16(1) of the FOIP Act and the extent to which a contractual provision can be withheld under it.

[para 42] Section 17 of Ontario's Act states:

> *17. (1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,*
>
> > *(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;*
> >
> > *(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;*
> >
> > *(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or*

> *(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.*

Like section 16(1) of Alberta's FOIP Act, section 17 of Ontario's legislation applies to information that has been supplied in confidence to a public body.

[para 43] The Applicant argues:

> The financial terms of the contract between Alberta Health and ABC Benefits Corporation was negotiated or mutually generated by the two parties and therefore cannot be considered to have been supplied by the Third Party for the purposes of section 16(1)(b) of the Act.

[para 44] In its submissions regarding how section 16(1)(b) has been interpreted generally, ABC states:

> In terms of whether the other information was supplied to the public body by the third party, OIPC often treated information that was negotiated between the Public Body and the Third Party as not being information supplied to the Public Body by the Third Party [Order F2012-15 at para 73].
>
> The rationale is that 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." [Order PO-2843 (Ontario OIPC); most recently referenced to in Order F2011-002 at para. 19]
>
> The corollary of this general rule is that not every provision of a contract is negotiated simply because they are present in a contract. Specifically, there are exceptions to this rule, such as:
>
> > a. information which is supplied to a Public Body and incorporated into an agreement in a relatively unchanged state, or is immutable; or
> >
> > b. where disclosure of the information would permit an applicant to make an accurate inference about the information supplied to a Public Body [Order F2012-15]
>
> ABC submits that a provision in a contract cannot be considered negotiated, and therefore not supplied, if it simply reflects information or terms that were generated by a Third Party independently and then directly provided to a Public Body.
>
> The term "negotiate" is not defined in the FOIP Act, so we must consider the plain language definition of the term to determine where a provision in a contract was in fact negotiated. The Merriam-Webster dictionary defines "negotiate" as "to arrange for or bring about through conference, discussion, and compromise. [Tab 1]
>
> An essential element of a negotiation is that there is a conference, discussion or compromise. Simply put, there must be an element of exchange or bargaining. If anyone of these elements is absent then there can be no negotiation, but simply an agreement, and any such information should be considered to have been supplied by one party to the other.

[para 45] No matter how brief a discussion, there remains an element of exchange or bargaining when mutual agreement is required to conclude a matter. Even if a party feels

compelled to accept a term, and does not believe it is in a position to argue in favor of a different term, the term is negotiated. A simple proposal and a response remains a negotiation, as mutual agreement is required for the term to become binding on the parties.

[para 46] As evidenced by the foregoing review, previous orders of this office, and orders and judgments of other jurisdictions establish that "negotiating contractual terms" is not the same thing as "supplying information" for the purposes of section 16(1)(b). However, where information meeting the requirements of section 16(1)(a) is submitted to a public body prior to entering a contract, and the information subsequently becomes a term of the contract, or the information that was supplied can be deduced from the terms of the contract, then the information meeting the requirements of section 16(1)(a) can be said to have been "supplied" within the terms of section 16(1)(b).

Sections 3.1, 12.1, 13.1, 15.1, 16.1 and 20.1 of pages 6 – 13 and Sections 3.1, 9.1, and 9.3 of pages 49 – 51, Amending agreements, pages 54, 56, 58 and 60

[para 47] ABC argues:

> These portions of the Master Agreement were supplied by ABC to Alberta Health. The term of the agreements, rights of early termination and transitional period following notification of termination are all immutable terms as, without them, ABC would not and could not, have entered into the agreements with Alberta Health. For example, if the term of the contract had been for three months, if there were no rights of early termination or no transition period then ABC could not have entered into the agreements as it is a not-for-profit organization and does not have the resources or financial ability to carry on business under less favourable terms, unlike ABC's for-profit competitors.

[para 48] I understand from these submissions that ABC views the term "supplied" in section 16(1)(b) as capable of meaning "agreed to", while it uses the term "immutable", as meaning "required" or "necessary".

[para 49] The ordinary meaning of "supply" is "provide" or "furnish". There is no reason to presume that the legislature intended "supply" to mean anything other than "provide" or "furnish" when it enacted section 16(1)(b). Moreover, it has not been established for the inquiry that the term "supply" can have the meaning of "agree to terms" or "negotiate terms".

[para 50] The term "immutable", as it has been used in previous orders, means "unchangeable," or "not subject to variation". By describing information contained in contracts as "immutable", previous orders mean that proprietary information appearing in a contract remains essentially the same as that which was originally supplied by a third party, regardless of any negotiations in relation to the information. I do not believe that "immutable" in the context of the previous orders I have reviewed can be taken to refer to terms that, from one party's standpoint, must be accepted in order to make it viable for that party to enter the agreement – in other words, terms that one party considers to be "non-negotiable".

[para 51] As discussed above, section 16(1)(b) contemplates the circumstances when a third party provides or furnishes such proprietary information falling within the terms of section 16(1)(a) to a public body. I am unable to identify any proprietary information belonging to ABC or any information about the way it conducted its business prior to entering the agreement among sections 3.1, 12.1, 13.1, 15.1, 16.1 and 20.1 of pages 6 – 13 and Sections 3.1, 9.1, and 9.3 of pages 49 – 51, or the amending agreements at pages 54, 56, 58 and 60. To the extent that these provisions reveal information about the business of ABC at all, they reveal its duties and powers *after* the agreement was entered.

[para 52] Rather, the terms severed from these records represent agreements reached by the Public Body and ABC. As discussed above when I addressed section 16(1)(a), I found that the information in the records is commercial information in the sense that the contract establishes how ABC will provide services under the agreement. However, this information does not reflect how ABC provided services prior to entering the agreement or refer to information supplied by ABC prior to entering the agreement and is not in itself information supplied by ABC prior to entering the agreement. As a result, I find that the information severed from these records was not supplied by ABC within the terms of section 16(1)(b).

Schedules 1, 3, 5 of pages 21 – 45, Schedule 6 at pages 46 – 47, 1(a) page 62, 1(g) page 64 and Schedule 3 and Schedule 3 Appendix pages 66 - 78

[para 53] ABC argues:

> All of these sections contain information supplied by ABC to Alberta Health as they contain trade secrets which by their very nature cannot be negotiated and thus must be supplied.
>
> Schedule 1, and the amendments to Schedule 1, contains the information that ABC needs in order to administer the plan on behalf of Alberta Health. ABC could not administer the plan without this information which therefore makes it immutable and could not be the subject of negotiation as without this information, ABC would not have been able to enter into the agreements.
>
> Schedule 3, and the amendments to Schedule 3, contains the services that ABC is able to provide and the methodology by which those services are provided. Again, as it sets out the services that ABC is capable of providing, it is immutable and could not be the subject of negotiation.
>
> Schedule 5 sets out what reports ABC is able to provide and the frequency within which the reports can be provided. Again, as the Schedule sets out the services that ABC is capable of providing, it is immutable and could not be the subject of negotiation.
>
> Schedule 6, and the amendments to Schedule 6, [contain] the audit provisions which ABC performs not only for Alberta Health sponsored programs but also for other ABC business involving the employer-sponsored programs and therefore was provided to Alberta Health, as well as other plan sponsors based on past dealings.

[para 54] ABC again claims that Schedules 1, 3, 5 and 6 contains "immutable" information in this case:

- The information ABC needs to administer the plan
- The services it is capable of providing (and the methodology by which they will be provided)
- The reports it is able to provide, and with what frequency
- The audits it is to perform.

[para 55] The information in Schedule 1 is a list of kinds of information that will be supplied *by the Public Body* to ABC. While the list may be immutable in the sense that it is a term of the contract and is not subject to change, for the purposes of section 16, the information must also be the information "of" – in the sense of belonging to – ABC. Here, the list is not the third party's information; it is information that is, in the abstract, necessary to perform the tasks. There is, furthermore, no indication as to who created the list, nor is there any indication that creating the list required any special expertise. There is, as a result, insufficient evidence that the list was supplied to the Public Body by ABC.

[para 56] With respect to the information described in the last two bullets, it may be plausible that when a party negotiating an agreement provides information to the other party as to what it is able to offer, after analysing its available resources and the profit it needs to make, such information might in some circumstances be said to be 'provided to' the other party. Information could be characterized as "immutable" if the terms of the agreement somehow reveal such information about the party's business processes that the party has developed. However, I have reviewed the withheld information in Schedules 3, 5 and 6, and there is no such information in them. Rather, these schedules list, with varying degrees of detail, the duties ABC is to perform, the reports it is to provide, and the audits it is to undertake under the Agreement. Other than the fact that it is implicit that ABC believes it has the capacity to perform these tasks, no information about ABC is provided to the Public Body about ABC; rather, the information about these matters is negotiated in the sense that it is what the parties to the Agreement are agreeing is to be done. The duties and tasks had no prior independent existence; their future fulfillment depended on the existence of the agreement. (There are two exceptions to this last statement – clause (g)(i) on record 64 and the information appearing in the top portion of record 73. I will deal with these below.)

[para 57] I turn to Schedule 3 and the Appendix to Schedule 3. Some of the information found in these records contains a fair amount of detail with respect to the methodologies that will be used in relation to the provision of the services by ABC. This is particularly true of the Appendix to Schedule 3, consisting of pages 73 to 78.

[para 58] Most of this information consists of enumerated steps that are written in the future tense (the exception the top part of record 73), so even though there is a detailed methodology, the precise details may have been the subject of negotiation and agreement. Had I been told otherwise – that the methodology was developed using the technical resources of ABC and was offered for use in an "immutable" state to fulfill the agreement, it might have been arguable that this was the sort of information which could be said to have been "supplied" rather than negotiated.

[para 59] However, in this case, there is a factor that precluded this kind of consideration in any event, in my view. This factor is Article 11 of the Agreement.

[para 60] Article 11 of the Agreement, which has been disclosed to the Applicant, addresses the question of whether information crated by ABC under the agreement belongs to ABC. This contractual term addresses confidentiality and states:

> 11.1 Alberta Blue Cross acknowledges and agrees that all Information and Records are and remain the property of the Minister.
>
> 11.2 Alberta Blue Cross further acknowledges that the provisions of the Freedom of Information and Protection of Privacy Act, the Health Information Act or the Alberta Health Care Insurance Act may apply to the Information and Records and agrees that it shall, and it shall cause all of its officers, employees, agents and contractors to:
>
> a) comply in all respects with the applicable provisions of the said enactments
> b) hold such information and records in confidence; and
> c) not cause or permit the disclosure of such information or records except in accordance with the provisions of the said enactments and with the prior written consent of the Minister or his delegate.

[para 61] The term "information and records" is defined in Article 1 of the contract. This definition states:

> "Information and Records" means information, records, files, manuals, computer disks, or other materials or documents relating to Benefits or Alberta Blue Cross Services provided pursuant to the terms of this Agreement whether received or obtained from the Minister or created, generated or collected by Alberta Blue Cross; excluding always system software[…][my emphasis]

[para 62] "Alberta Blue Cross Services" is also defined in the agreement. This definition states:

> "Alberta Blue Cross Services" means those services and obligations which Alberta Blue Cross undertakes to provide and comply with, as detailed in Schedule 3 of the Agreement […]

[para 63] "Benefit" is defined in the following way:

> "Benefit" means goods and services as described in Schedules 2 to 2.7 inclusive, for which an amount of money is payable by Alberta Blue Cross pursuant to this Agreement to, or on behalf of, an Eligible Resident[…]

[para 64] Given these terms of the agreement, it appears that any information created or generated by ABC in relation to the provision of services under the Agreement, such as the information appearing in clause (g)(i) of record 64 and the information appearing at the top of record 73 of Schedule 3 – Appendix, is the property of the Minister, not of ABC. To be supplied by ABC, information must be property "of" ABC. Any information ABC has created the information *for the Minister*, as part of, or for the purposes of, fulfilling its part of the agreement, cannot be said to be information "of ABC". The information in Schedule 3, in particular, its Appendix, appears to be

information created by ABC for the purpose of fulfilling the agreement. It is "information relating to benefits or services provided pursuant to the agreement". In other words, it appears that the information as to methodologies that is contained or appended to the agreement is itself information that is part of what ABC is providing, and for which it is receiving consideration, in fulfilling its part of the agreement. Disclosure of information that is not its own information is not a matter about which ABC can make claims under section 16.

[para 65] I note in this regard that parts of the agreement refer to the development and maintenance of systems (for example, numbers 2 and 6 and 12 of Schedule 3) and also speak of the Minister making payments for development and maintenance of a database (records 54 and 56, Schedule B). It is not entirely clear to me how these terms relate to the entirety of the systems and methodologies ABC has undertaken to provide, but these contractual terms do lend support to the idea that the Minister is providing consideration in exchange for the development of methodologies and supporting systems. In any event, the plain words of Article 11 refer to "all information and records" being and remaining the property of the Minister. There are no apparent exclusions, and I cannot find that the information about methodologies and systems, even if generated by ABC for the purposes of providing services, and even if appropriately considered to be technical information, can be considered to have been ABC's information that it "supplied to" the Public Body.

[para 66] As I find that the information in these records was not supplied by ABC, I find that the requirements of section 16(1)(b) are not met in relation to it.

[para 67] I note that ABC argues that some of the information constitutes "trade secrets". For the same reason that I find that the commercial and technical information contained in Schedules 1, 3, 5 of pages 21 – 45, Schedule 6 at pages 46 – 47, 1(a) page 62, 1(g) page 64 and Schedule 3 and Schedule 3 – Appendix pages 66 – 78 was not supplied within the terms of section 16(1)(b), I find the same holds true even if the information is characterized as a trade secret. That is, I find that the information was not supplied.

Sections 18.1, 19.1, 19.3, 21.6, 22.1 and Schedule 4

[para 68] ABC argues:

> The information contained within these sections, and in particular, the rates and fees set out in Schedule 4 were supplied by ABC to Alberta Health. As ABC is a not-for-profit organization, the rates and fees were determined by identifying administrative services provided to Alberta Health under the agreements and then determining the costs for providing these services including staffing requirements, equipment and overhead.
>
> The rates and fees are based on the projected costs of delivering the administrative services requested by Alberta Health over the term of the agreement and are based purely on the costs of delivering the services required.

> Further, any changes to the rates and fees were determined in the same manner set out above […]
>
> As ABC is a not-for-profit organization, and the rates and fees are determined based on the costs that ABC will incur to provide the services, these amounts are immutable in that there cannot [have been], and were not, any negotiations when determining what these amounts would be. For example if these figures could have been negotiated, which they were not, and Alberta Health determined that it was not prepared to pay the amount included in the agreement, then ABC could not, and would not, have entered into the agreement, as it would have otherwise not been able to cover its own costs for providing the services.
>
> As set out in Order 01-39, (BC OIPC) at para. 45, if information is relatively immutable, or not susceptible to change, for example, fixed costs, the information may be found to be "supplied". In this case, as ABC is a not-for-profit organization, the rates and fees are based solely on ABC's costs for administering Alberta Health's plans and handling Alberta Health's claims. These amounts are clearly fixed costs and meet the requirements of having been supplied.

[para 69] These arguments are similar to those I have rejected above. The rates and fees proposed by ABC, although they may be ABC's "bottom line", must still be either accepted or rejected by the Public Body, and therefore the proposal is part of a negotiation. Further, while the rates and related payment and compensation information may relate in some way to factors internal to ABC, the information in the documents does not reveal any such internal information.

[para 70] Moreover, I am unable to find information meeting the definition of "fixed costs" as described in Order 01-39. The former Commissioner of British Columbia refers to these costs in the following way:

> Information that might otherwise be considered negotiated nonetheless may be supplied in at least two circumstances. First, the information will be found to be supplied if it is relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of s. 21(1)(b). To take another example, if a third party produces its financial statements to the public body in the course of its contractual negotiations, that information may be found to be "supplied." It is important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it.

That order referred to "fixed costs" as items such as "overhead" or "labour costs set out in a collective agreement", or "financial statements" provided prior to entering an agreement. In other words, the order referred to information about the organization itself. The records before me, to the extent that they refer to financial amounts, refer to rates of compensation for services that ABC will receive once the agreement is entered and it provides the services. These records contain no information about ABC's financial statements, labour costs, or overhead, prior to the agreement or even after it.

[para 71] To conclude, I find that the information in these records was not "supplied" within the terms of section 16(1)(b). The terms in these records, and the rates

referred to in ABC's submissions, are prospective in application. As I noted above, these terms speak to future obligations and compensation to be paid in the future, once the agreement is in force. The terms do not refer to any information regarding specialized ways in which ABC conducted its business prior to the agreement, or resources at its disposal existing prior to the agreement, that could be said to have been supplied by ABC to the Public Body. I find that this information was not "supplied" within the terms of section 16(1)(a), but was negotiated.

Schedule 2.1, parts 1, 2, and 3

[para 72] ABC argues:

> These portions identify the Alberta Blue Cross Pharmacy Agreement, a proprietary and confidential commercial document which governs the contractual relationship between ABC and in excess of 1,000 Alberta pharmacies. These portions also reference business transactions related to supplementary health benefit plans administered by ABC on behalf of the GOA, other government program sponsors, employers and individual health plan members. This information is clearly commercial information as it relates to the services that ABC is required to provide, and the contracts that it will enter into, with the Alberta pharmacies.
>
> The existence or nature of this collateral contract between ABC and the Alberta pharmacies was supplied by ABC to Alberta Health as it is the only method by which ABC could provide the services that it does to Alberta Health.
>
> Disclosing the existence or nature of this collateral contract would also permit someone to make an accurate inference about the collateral contract between ABC and the Alberta pharmacies, which ABC is not required to disclose, regarding the manner in which the contracts have to be entered into, any control that Alberta Health has over the terms of the collateral contracts, when benefits will be paid under the collateral contracts, and what control, if any, the Minister has if a concern is raised over the terms of the collateral contracts.

[para 73] I am unable to identify any information about ABC's business in these provisions that can be said to have been supplied by ABC. While the terms contained in these records refer to the potential for collateral agreements, which, according to the submissions of ABC are presently in existence, the records say nothing about such agreements being in existence at the time the agreement was entered, and therefore reveal nothing about ABC's business at the time that could have been supplied to the Public Body.

[para 74] I do not understand ABC's argument that the fact that ABC is not required to disclose the terms of agreements it enters with pharmacies, or possibly, the fact that some agreements with pharmacies it enters require it not to disclose terms, would mean that the information in the Agreement that it seeks to withhold is supplied, or supplied in confidence, within the terms of section 16(1)(b).

[para 75] The terms severed from these records cannot be said to contain information subject to section 16(1)(a) that has been supplied by a third party within the terms of section 16(1)(b).

Schedule A, Parts 1, 2, and 3 of page 52

[para 76] ABC argues:

> These sections were supplied to Alberta Health by ABC as they set out the information that ABC is capable of providing to Alberta Health as well as the frequency within which this information can and will be provided. As it contains specific information about what ABC is capable of, it is immutable in the sense that it cannot, and was not, varied.
>
> Further, these sections also contain trade secrets as it sets out the methodology by which ABC provides the services which are unique to the way that ABC does business with Alberta Health and is something that ABC has developed over the years.

[para 77] The information severed from page 52 of Schedule A requires ABC to provide specific kinds of information to the Minister. There is also a reference to ABC already having fulfilled one of the terms of the agreement.

[para 78] In my view, the information in these records was negotiated, rather than supplied. In saying this, I include the information about ABC's prior performance of a contractual provision. As discussed above, when terms require mutual acceptance to form part of a final agreement, the terms are negotiated, rather than supplied. Even the term regarding past performance would require the Public Body to accept that a service had been performed to its satisfaction before this provision could become a term of the agreement.

[para 79] I have already rejected the idea that "immutable" information as discussed in prior orders embraces contractual terms that one party regards as non-negotiable.

[para 80] I am unable to identify any information in record 52 that ABC supplied to the Public Body prior to negotiating or entering the agreement, such that the terms could be said to have been "supplied" and not "negotiated".

Schedule B, sections 1(a) to (d), page 53, amending agreements, pages 54, 56, 58, and 60

[para 81] ABC argues:

> The information contained in Schedule B was supplied as it is based on the costs incurred, or that ABC would incur, as a not-for-profit corporation, for providing the relevant services and is therefore immutable and did not, and could not have changed, as it is a fixed cost.

[para 82] As noted above, ABC relies on Order 01-39, an Order of the Office of the Information and Privacy Commissioner of British Columbia as standing for the proposition that information about fixed costs immutable. This order, cited above, states:

> Information that might otherwise be considered negotiated nonetheless may be supplied in at least two circumstances. First, the information will be found to be supplied if it is relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of s. 21(1)(b). To take another example, if a third

> party produces its financial statements to the public body in the course of its contractual negotiations, that information may be found to be "supplied." It is important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it.
>
> In other words, information may originate from a single party and may not change significantly - or at all – when it is incorporated into the contract, but this does not necessarily mean that the information is "supplied." The intention of s. 21(1)(b) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible of change but, fortuitously, was not changed. In Order 01-20, Commissioner Loukidelis rejected an argument that contractual information furnished or provided by a third party and accepted without significant change by the public body is necessarily "supplied" within the meaning of s. 21(1) (at para. 93).

[para 83] I am unable to find any information in these records consistent with that described in Order 01-39. Rather, the financial amounts appearing in the records are an agreed-upon amount of compensation that ABC will receive once it provides a service or benefit to the Public Body and supplies an invoice. Moreover, the information is about amounts ABC would earn in the future, once the agreement was made, rather than ABC's financial information prior to entering the agreement.

[para 84] Even accepting that the amount reflects a fixed cost, it is clear from the records that the Public Body agreed to pay this amount. There is no evidence that the Public Body was required or obligated to do so. As a result, the information was "negotiated", as described in previous orders, as opposed to "supplied" within the context of section 16(1)(b).

Conclusion

[para 85] I find that the information severed from these records under section 16 is negotiated information that cannot be said to have been "supplied" by one side or the other. With regard to clause (g)(i) on record 64 and the information appearing at the top half or record 73, I have also found that this information does not meet section 16(1)(a), as this information belongs to the public body and not ABC by virtue of Article 11 of the Agreement.

[para 86] Information must meet the requirements of each of clauses (a), (b) and (c) before it can be withheld under section 16. I have found that none of it meets the requirement of section 16(1)(b). I have also found that some of it does not meet the requirements of section 16(1)(a) in the sense that it is not the information "of the third party". It follows that the information in the Agreement cannot be withheld from the Applicant under section 16 and I need not address whether the information meets the requirements of clause16(1)(c) at this time. However, if I am wrong in my conclusion that the requirements of section 16(1)(b) have not been met, then it would be necessary for me to consider whether ABC has established that harm within the terms of section 16(1)(c) would result from disclosure of the information.

Issue B: Did the Public Body properly apply section 25(1) of the Act (disclosure harmful to economic and other interests of a public body) to the information in the records?

[para 87] Section 25 creates an exception to the right of access for information that could harm economic and other interests of a public body if disclosed. This provision states, in part:

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

[para 88] In Order 96-016, former Commissioner Clark considered section 25(1)(c), (then section 24(1)(c). He said:

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

[para 89] Section 25(1) recognizes that there is a public interest in withholding information that could harm the economic interests of the Government of Alberta or a public body or the Government of Alberta's ability to manage the economy if disclosed. Sections 25(1)(a) – (d) contain a non-exhaustive list of the kinds of information, the disclosure of which could be reasonably expected to harm the economic interests of the

Government of Alberta or a public body, or the Government of Alberta's ability to manage the economy.

[para 90] A public body seeking to withhold information under section 25 must establish a direct link between the disclosure of information and a reasonable expectation of harm to the Government of Alberta's or its own economic interests.

[para 91] The Public Body acknowledged in its submissions that the onus is on a public body to provide proof of harm on the balance of probabilities, by establishing that the possibility of harm is more than mere speculation. Its argument in support of applying section 25(1) to the information it withheld under this provision, was limited to the following:

> If the contractual agreement were to be disclosed:
>
> a. Existing tenants of the Public Body would seek better terms for themselves when they negotiate with the Public Body.
> b. Disclosure of the terms in the agreement and the unsuccessful bid would create a "roadmap" for other parties seeking to negotiate with the Public Body, which would prejudice new negotiations.
> c. Disclosing concessions made by the Public Body would prejudice the Public Body in future negotiations because the Public Body does not normally make concessions such as those made in the agreement in the records at issue. (Order F2009-028 at paragraph 83)

[para 92] The excerpt above is taken from Order F2009-028. The excerpt consists of Alberta Health Services' unsuccessful submissions in that case. In that order, I rejected the argument that the Public Body has reproduced in its submission for the present inquiry. I said:

> In Order F2005-030[2], the Commissioner considered the argument that disclosure of particular positions adopted by a Public Body in one contract would harm its position to negotiate with other parties in similar matters:
>
> > I will deal with one other possible basis for relying on section 25 - that disclosures of particular positions taken by the Public Body in the contract would harm its ability to negotiate with other persons or organizations relative to similar matters. I am not sure section 25 applies to such situations. It does not necessarily follow from the fact a position is taken in one case that it would be obliged to take it in another, or that there would be pressure on the Public Body to take it that it could not resist.

[2] Order F2005-030 was overturned by the Alberta Court of Queen's Bench in *Imperial Oil Limited v Calgary (City)*, 2013 ABQB 393. The Court did not disagree with the above analysis, but found that there was a clear and unambiguous provision in the agreement at issue in that case that the agreement was to be kept confidential. In the case before me, there are no confidentiality provisions in the agreement that apply to the Public Body, other than the acknowledgement in article 11.2 that information, such as personal information, generated under the agreement may be subject to access and privacy legislation. I am unable to identify any provision in the agreement that prohibits references to the terms of the agreement, which the Court found to exist in the agreement under review in *Imperial Oil*. In addition, the Public Body's arguments refer to harm to its negotiations with others that would ensue if the information in the agreement were disclosed, not that it would be violating the confidence of ABC.

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

[…]

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

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

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

Finally, even if other tenants or potential tenants were to seek the same terms as the Third Party, there is no reason to expect that the Public Body would agree to those terms unless satisfied with them. As the Commissioner noted in Order F2005-030, cited above: "It does not necessarily follow from the fact a position is taken in one case that [a party] would be obliged to take it in another." The Public Body has not established that it would be bound to take the same positions that it took in negotiations with the Third Party in future negotiations with the Third Party or any other party, nor that it would lose cost savings, or otherwise suffer a financial loss if the information in the records at issue is disclosed. I find that the Public Body has not established a linkage between disclosure of the information to which it applied section 25(1) and the harms it projects would result from disclosure.

[para 93] In Order F2009-028, I found that disclosing the terms of a contract between Alberta Health Services and the Katz Group would not undermine Alberta Health Services' negotiating position in future contracts, as the Katz Group's competitor for the hospital space would be more likely offer to pay more than the Katz Group had bid for the space, rather than to offer to pay a lower amount, if it sought to obtain the

contract. Such a result could only be beneficial to Alberta Health Services. I must come to the same conclusion in the present case. Assuming that other health benefits providers learned the terms of the agreement the Public Body has reached with ABC, if their intent were to secure a contract to provide the same or similar services, then the other providers would likely have to agree to terms more satisfactory to the Public Body than has ABC. This outcome would not be detrimental to the Public Body.

[para 94] ABC also made arguments in relation to the application of section 25 to the information withheld by the Public Body under this provision. ABC notes that the Public Body withheld Schedule 5, Schedule 6, and Schedule A, parts 1, 2 and 3 under section 25. (The Public Body also withheld this information under section 16. As discussed above, I find that section 16 does not apply to it.) ABC argues:

> In terms of Schedule 5 and 6, they contain a listing of all reports, the frequency of the reports and the number of the reports that are required with respect to all services that ABC provides to Alberta Health as well as the auditing requirements ABC is required to undergo. This information is of a commercial and technical nature, as set out in s. 25(1)(b) of the FOIP Act, and if this information were made public it would harm the economic interests of Alberta Health's operations.
>
> The audit and reporting services are performed to meet the contractual requirements for Alberta Health sponsored programs. The audit report addresses specific proprietary controls and procedures performed by ABC, including ABC's information technology controls (security measures).
>
> If this information [were] disclosed, it would result in financial loss to Alberta Health as any party looking to enter into this type of contract with Alberta Health would refuse to do so once it learned that it would be required to disclose the confidential and significant proprietary commercial and technical information that is contained within these pages as it essentially amounts to letting your competitors know what you are capable of doing and the manner in which you can carry it out. For the same reason, it would prejudice the competitive position of Alberta Health as the companies that would be willing to submit bids for these types of services would be significantly reduced to the point of no one being willing to bid on the contract for fear of this information having to be disclosed through a FOIP request.
>
> For the same reason set out above, it would interfere with contractual or other negotiations of Alberta Health with any other service provider as they would refuse to do so rather than provide the information if it was going to be disclosed to the public.
>
> In terms of Schedule A – parts 1, 2, and 3, as it identifies specific information elements required for the business process and identifies ABC's capabilities and risks, the disclosure of this information would harm the economic interests of Alberta Health, as it contains commercial and technical information that, if disclosed, would result in financial loss to Alberta Health and interfere with contractual negotiations that Alberta Health could enter into as no other company would be prepared to provide this information if it knows that it would be opening itself to having both its capabilities and security risks made available to the public. Rather, other companies would refuse to provide this type of information.

[para 95] In essence, ABC argues that if the information severed from the agreement under section 25 were disclosed, other third parties would be be reluctant to bargain with the Public Body, lest the provisions of the agreements they enter with the Public Body be similarly disclosed. ABC's submissions put forward the position that it is the act of

disclosure itself, rather than disclosure of the particular information, that gives rise to the harm contemplated by section 25. While ABC refers to disclosure of its reporting requirements, it is not the information about its reporting requirements that it fears would dissuade others from bargaining with the Public Body, by its argument, but the fact that these requirements would be disclosed at all. However, as set out above, in the citation from Order 96-016, it is the disclosure of information that must result in harm to a public body, and not the fact of disclosure.

[para 96] When ABC described the harm to itself within the terms of section 16 from the disclosure of Schedule A, ABC stated:

> These sections identify ABC capabilities and the associated information security risks.
>
> Knowledge of this proprietary information would be used by competitors to undermine ABC's current and future negotiating positions, including the renewal, extension and / or amendment of the contractual relationship and could be used to provide an unreasonable and unfair commercial advantage.
>
> This could reasonably be expected to harm ABC's competitive position and result in undue financial loss for ABC as one of ABC's competitors could use this information in an RFP or in approaching Alberta Health with a proposal to provide the same, or similar, services as those provided by ABC and undercut or offer more favourable terms than those set out in these sections.

[para 97] The foregoing presents the risk to ABC resulting from the disclosure of Schedule A as the harm that might result if a competitor learned about the services ABC has agreed to provide to the Public Body, and recognized that it too had the capacity to provide similar or better services and could then use that information to contract with the Public Body to the detriment of ABC.

[para 98] In contrast, with regard to the application of section 25, ABC characterizes the harm that would result from disclosure as an increased likelihood that other third parties will *not* contract with the Public Body if the information in the records is disclosed, because of their concerns about the likelihood that their own security will be undermined should they enter a contract with the Public Body.

[para 99] These are conflicting arguments: under section 16, ABC argues that there would be an increased likelihood that other parties would attempt to contract with the Public Body to its detriment; however, in relation to section 25, it argues that the opposite would result from disclosure of some of the same information. No evidence has been provided to establish either outcome as likely.

[para 100] I note the following statement of the purpose of freedom of information legislation in Order F09-04, a decision of the former Information and Privacy Commissioner of British Columbia. He said:

> A central goal of FIPPA, which has been in force for over 15 years, is to make public bodies more accountable to the public through a right of public access to records, subject to only limited exceptions. FIPPA should be administered with a clear presumption in favour of

> disclosure and, as I said in Order F07-15, nowhere is the right of access more important for the accountability of public bodies to the public than in the arena of public spending through large-scale government outsourcing of public services to private enterprise. Businesses that contract with government must fully appreciate that the transparency of those dealings has no comparison in fully private transactions.

Like the *Freedom of Information and Protection of Privacy Act* of British Columbia, Alberta's FOIP Act seeks to make the business and financial transactions of government transparent. Contractual terms that do not reveal information assets of third parties that were supplied in confidence to government are therefore not exempt from disclosure. In addition, given the length of time that the FOIP Act has been in force, third parties are aware that they cannot expect the same degree of privacy from transactions with government that they can from private transactions.

[para 101] ABC also argues that financial loss to the Public Body would result from disclosing the information in Schedule A, as doing so would constitute a security risk. However, it does not explain how disclosure of Schedule A would result in this harm. I accept that if disclosing a particular kind of information would create a security risk to a public body, that section 25 would authorize a public body to withhold the information. However, no evidence or explanation has been provided to support finding that disclosure of the information to which the Public Body has applied section 25 would result in security risks. It has not been explained how disclosure of the information could enable others to know about, or exploit, any vulnerability in ABC's systems, and if it could, how this result could result in harm to the Public Body or to the Government of Alberta. I acknowledge that there is some information in the records indicating where information is stored; however, it has not been explained how possession of this knowledge would expose ABC's system to security risks, or, assuming that ABC's system was exposed to such risks, how this situation would result in harm to the Public Body.

[para 102] The Public Body has not commented on, or adopted the arguments put forward by ABC in relation to section 25. I am therefore unable to find that the Public Body shares these concerns. The Public Body would be in the best position to assess harms to itself from disclosure of the agreement; however, the Public Body has not raised any concerns regarding harm to security or a reduction in the number of parties prepared to contract with it should the information in the records be disclosed.

[para 103] I am unable to correlate a risk of harm to the security of information, or to the negotiations of the Public Body, if the information to which the Public Body applied this provision is disclosed. I am therefore unable to find that section 25 applies to the information.

V. ORDER

[para 104] I make this Order under section 72 of the Act.

[para 105] I order the Public Body to disclose the agreement to the Applicant in its entirety.

[para 106] I 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.

_____

Teresa Cunningham
Adjudicator