

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2014-15**

February 28, 2014

**CITY OF CALGARY**

Case File Number F5732

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** An Applicant made an access request to the City of Calgary (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act* (the “Act”) for a DVD recording of her pre-employment polygraph interview with a Third Party engaged by the Public Body to conduct the interview. The Public Body decided to give the Applicant access to the DVD. The Third Party requested a review of that decision, arguing that disclosure of the recording would be harmful to its business interests under section 16(1) of the Act.

The Adjudicator found that section 16(1) applied to the DVD recording and required the Public Body to refuse the Applicant access to it.

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(s), 6, 6(1), 6(2), 16, 16(1), 16(1)(a), 16(1)(a)(i), 16(1)(a)(ii), 16(1)(b), 16(1)(c), 16(1)(c)(i), 16(1)(c)(iii), 16(3)(a), 17(1), 17(5)(i), 20(1), 26, 67(1)(a)(ii), 71(3), 71(3)(b), 72 and 72(2)(c); *Personal Information Protection Act*, S.A. 2003, c. P-6.5.

**Orders Cited: AB:** Orders 96-003, 96-013, 99-018, 2000-017, F2002-002, F2002-014, F2004-013, F2005-011, F2008-018, F2008-028, F2008-031, F2009-023, F2009-028, F2010-013, F2010-017 and F2012-06.

**Case Cited: AB:** *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515.

## **I. BACKGROUND**

[para 1] An individual (the “Applicant”) was a prospective employee with Public Safety Communications, or PSC, a communications centre operated by the City of Calgary (the “Public Body”). She applied for a position requiring a pre-employment polygraph interview, which was conducted by Musker Consulting Ltd. Polygraph Services (the “Third Party”). The Applicant was not successful in obtaining the employment. In a form dated April 30, 2010, she made an access request to the Public Body, under the *Freedom of Information and Protection of Privacy Act*, for “all taped conversations between [the Third Party] and myself during a polygraph test for City of Calgary PSC employment”.

[para 2] The Public Body initially withheld the information requested by the Applicant in reliance on section 26 of the Act (testing procedures, tests and audits). However, it subsequently took the position that section 26 was not applicable and therefore considered releasing the information to the Applicant. The Public Body invited the Third Party to make representations to it as to whether the information may be disclosed, and the Third Party did so in correspondence dated February 23 and March 22, 2011. Although the Third Party wrote that the information requested by the Applicant should not be released, the Public decided to release it to her. It informed the Third Party by letter dated March 25, 2011.

[para 3] In a form dated April 11, 2011, the Third Party requested a review of the Public Body’s decision to release the information. Mediation was authorized but was not successful. The Third Party then requested an inquiry in a form dated April 4, 2012. A written inquiry was set down.

[para 4] As contemplated by section 67(1)(a)(ii) of the Act, I arranged for the Applicant to be notified of the Third Party’s request for review, as I considered her to be affected by it. On the application of the Calgary Police Service (the “CPS”), I allowed it to participate as an intervener, as it uses pre-employment polygraph tests extensively and I considered it to have unique expertise or insight in relation to the subject-matter of this inquiry.

## **II. RECORD AT ISSUE**

[para 5] The record at issue is a DVD recording of the Applicant’s pre-employment polygraph interview (the “DVD”). It is approximately three and a half hours in length.

## **III. ISSUES**

[para 6] The Notice of Inquiry, dated March 20, 2013, set out the following issues:

Is the record/information in the custody or under the control of the Public Body under section 6(1) of the Act, such that the Applicant has a right of access to it under the Act (subject to any exceptions to disclosure)?

Does section 16(1) of the Act (disclosure harmful to the business interests of the Third Party) apply to the record/information?

Does section 17(1) of the Act (disclosure harmful to the personal privacy of the Third Party) apply to the record/information?

Does section 20(1) of the Act (disclosure harmful to law enforcement) apply to the record/information?

Does section 26 of the Act (testing procedures, tests and audits) apply to the record/information?

[para 7] The Applicant raises certain concerns about the Public Body's response to her access request, but they are outside the scope of this inquiry. For instance, she requested and received other information not relating to the Third Party, such as a copy of notes prepared by an employee of Public Safety Communications, but says that other information is missing. However, this inquiry deals only with the Third Party's request for review of the Public Body's decision to release information relating to the Third Party. While the Applicant also requested a review of the Public Body's decision in response to her access request, that matter is the subject of a different case file number assigned by this Office. I will therefore not be dealing with any of the Applicant's other concerns in this Order.

[para 8] Although the Third Party is a limited company, it is operated by a single individual. For the purpose of discussion in this Order, I will often refer to the Third Party as "he" rather than "it", as did the parties in their submissions.

#### **IV. DISCUSSION OF ISSUES**

##### **A. Is the record/information in the custody or under the control of the Public Body under section 6(1) of the Act, such that the Applicant has a right of access to it under the Act (subject to any exceptions to disclosure)?**

[para 9] Section 6 of the Act reads, in part, as follows:

*6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.*

*(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.*

...

If the Public Body has custody or control of the DVD, the Applicant has a right of access to it in accordance with section 6(1), subject to any exceptions to disclosure as noted under section 6(2).

[para 10] "Custody" refers to the physical possession of a record whereas "control" refers to the authority of a public body to manage, even partially, what is done with a record (Order F2002-014 at para. 12). Having said this, "bare" possession of information does not amount to custody, as the word "custody" implies that there is some right or obligation to hold the

information in one's possession (Order F2009-023 at para. 33). In order for the Act to apply to a record, it is sufficient for a public body to have custody *or* control of it; the public body does not have to have both custody *and* control (Order F2002-014 at para. 13).

[para 11] The Third Party and the Public Body disagree on whether the DVD is in the custody or under the control of the Public Body. The Public Body submits that it has custody or control of the DVD on the basis of clauses 13.1 and 13.4 of a Master Consultants Agreement signed by the Third Party on December 19, 2006. Clauses 13.1 and 13.4 of the Agreement read as follows:

13.1 The Consultant assigns to The City all worldwide rights, title and interest, including reversionary interests and rights of renewal, and other rights, in and to, the Materials including the right to create derivative works which modify or alter the Materials. "Materials" means everything produced by the Consultant in the course of this Agreement, including, without limitation, notes, reports, documentation, drawings, computer programs (source code, object code and listings), customer lists, inventions, creations, works, devices, models, work-in-progress and deliverables.

...

13.4 To the extent that the Consultant has property rights which are incorporated or necessary to the use of the Materials in this Agreement, (the "Consultant's Related Rights"), the Consultant grants The City a royalty-free, irrevocable, worldwide, non-exclusive licence to use, disclose, reproduce, modify licence and distribute the Consultant's Related Rights.

[para 12] The Third Party says that his company was not hired under a Master Consultants Agreement but instead engaged to carry out services under a Purchase Order. However, the Third Party signed the Master Consultants Agreement. I note that clause 2 of the Agreement states that it is in effect for one year but is subject to renewal. The Public Body explains that the Agreement with the Third Party was renewed for four additional one-year periods, ending in 2011, which was after the Applicant's access request. The Third Party does not actually dispute the fact that he signed the Agreement or that it was renewed. In his request for review, he acknowledges that he was awarded a contract with the Public Body in January 2007, which was shortly after he signed the Master Consultants Agreement.

[para 13] Instead, the Third Party submits that the terms of his services were set out in the Purchase Order. Indeed, the preamble and clause 1 of the Agreement refer to the need for a Purchase Order, which would describe the services to be performed. However, this does not mean that the Purchase Order alone governs the relationship between the Third Party and the Public Body. The general terms set out in the Master Consultants Agreement also apply.

[para 14] On my review of clauses 13.1 of the Agreement, I find that the DVD is in the custody or under the control of the Public Body. It falls within the definition of "Materials", in that it was something produced by the Third Party in the course of performing the services in question, being the polygraph interview of the Applicant. Under the terms of clause 13.1, the Third Party assigned all of his rights in the DVD to the Public Body.

[para 15] The Third Party explains that he does not normally provide a copy of a polygraph recording to the employer engaging his services and that this was the first such occurrence. He

says that a recording “has never left the control of the examiner”. He normally arranges for an employer to view certain areas of concern about a job applicant that might be reflected in the polygraph interview. I presume that he means that he normally shows the recording to the employer, whether on its or his premises, but then immediately takes it with him or retains it, not leaving any copy with the employer. He says that, in this rare case, he gave the Public Body the DVD when it asked to independently view it in order to determine the Applicant’s employment suitability. I note that the Public Body’s FOIP Disclosure Officer indicates in an affidavit that she asked for the DVD because the Applicant had requested access to it.

[para 16] The reason that the DVD came into the possession of the Public Body is not important. Whatever the reason, the Third Party submits that he would never have provided it had he known that the Public Body would grant the Applicant, or anyone else, access to it. In his request for review, he argues that the Public Body should have returned the DVD to him, and should have informed him of the ability of the Third Party, being an organization subject to the *Personal Information Protection Act* (“PIPA”), to possibly refuse to provide the Public Body with the DVD in the first place. Indeed, PIPA permits access to records containing someone’s personal information only, and there is no personal information of the Public Body in the DVD. The Public Body cannot have personal information at all.

[para 17] The foregoing does not alter my conclusion that the Public Body has custody or control of the DVD. The Public Body has possession of it and, given the terms of the Master Consultants Agreement, has a right to possess it. I would go so far as to say that, as a result of clause 13.1, the Public Body would have had control of the DVD even if it had only been in the possession of the Third Party. While he may not have realized that he had done so, he assigned to the Public Body his rights in the DVD as a record produced by him in the course of performing his services. This means that, while it is true that the Public Body has no right of access to the DVD under PIPA, the Public Body would have a contractual right to obtain it from the Third Party.

[para 18] Finally, if I am wrong in that clause 13.1 of the Master Consultants Agreement does not actually apply to the DVD, I would still find that the Public Body has custody of it. If the clause does not apply, it may mean that the Public Body does not have an overall right of control over the DVD as a record produced for it by the Third Party in the course of performing his services. However, the DVD in this case is in the possession of the Public Body and, while the Third Party explains that his normal practice is to retain the polygraph interview recordings that he makes, he submitted no evidence, such as some other agreement or document, to establish that he retains all custody and control of a polygraph recording when he happens to give it to an employer. I would therefore find that, even if clause 13.1 is not engaged in this inquiry, the Public Body’s possession of the DVD also amounts to custody of it, and the Public Body is not merely holding the DVD on behalf of the Third Party. Such custody of the DVD on the part of the Public Body would be sufficient for the Act to apply.

[para 19] I conclude that the DVD is in the custody and/or under the control of the Public Body under section 6(1) of the Act. The Applicant therefore has a right of access to it, subject to any exceptions to disclosure, which I will now consider.

**B. Does section 16(1) of the Act (disclosure harmful to the business interests of the Third Party) apply to the record/information?**

[para 20] Section 16 of the Act reads, in part, as follows:

*16(1) The head of a public body must refuse to disclose to an applicant information*

*(a) that would reveal*

*(i) trade secrets of a third party, or*

*(ii) commercial, financial, labour relations, scientific or technical information of a third party,*

*(b) that is supplied, explicitly or implicitly, in confidence, and*

*(c) the disclosure of which could reasonably be expected to*

*(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*

*...*

*(iii) result in undue financial loss or gain to any person or organization,*  
*or*

*...*

*(3) Subsections (1) and (2) do not apply if*

*(a) the third party consents to the disclosure,*

[para 21] The Public Body writes that, based on the evidence and representations provided to it by the Third Party when it was considering giving the Applicant access to the DVD, it was unable to conclude that the DVD fell within the terms of section 16(1) of the Act. The Public Body makes no argument as to whether, based on the more thorough submissions of the Third Party in this inquiry, the DVD is subject to section 16(1).

[para 22] As this inquiry involves a request for review by a third party following a public body's decision to release a record to an applicant, the burden of proof set out in section 71(3) of the Act applies. It reads as follows:

*71(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,*

*(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and*

*(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.*

Section 16(1) does not apply to personal information, so the Third Party has the burden, under section 71(3)(b), of establishing that the Applicant has no right of access to the DVD by virtue of section 16(1). The Third Party may be assisted by the CPS.

[para 23] For section 16(1) to apply to information, the requirements set out in all three paragraphs of that section must be met. In other words, the information in the DVD must satisfy the following three-part test:

- 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 under section 16(1)(a)?
- Was the information supplied, explicitly or implicitly, in confidence under section 16(1)(b)?
- Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)?

(Order F2004-013 at para. 10; Order F2005-011 at para. 9)

I will now consider each of the above questions.

**1. Would disclosure of the DVD reveal one of the types of information set out in section 16(1)(a)?**

[para 24] The Third Party explains that a pre-employment polygraph interview is one stage of a multi-stage process, which assists in identifying job applicants who are not suitable for the particular type of employment due to issues of integrity, dishonesty, criminal activity or involvement with illegal drugs. He says that, in 1997, he developed a specialized interview technique called the Reverse Control Interview Technique, which is seen in the DVD.

[para 25] The Third Party does not specify what type of information under section 16(1)(a) of the Act he believes to be contained in the DVD. It certainly does not contain any financial information or labour relations information. As for the other possibilities, “commercial information” has been defined as information belonging to a third party about its buying, selling or exchange of merchandise or services (Order F2009-028 at para. 42; Order F2010-013 at para. 19). While the Third Party sold his services to the Public Body, the DVD does not contain any information in relation to that transaction, but instead shows the services being performed. “Scientific information” has been defined as information exhibiting the principles or methods of science (Order 2000-017 at paras. 31-32; Order F2012-06 at para. 56), but I do not characterize the information in the DVD as being scientific.

[para 26] I do, however, characterize the information as “technical information” within the terms of section 16(1)(a)(ii), as this has been defined as information belonging to a third party regarding the applied sciences, proprietary designs, methods and technology (Order F2012-06 at para. 57, citing Order F2002-002 at para 35 and Order F2008-018 at para. 67). Here, the statements made and questions posed by the Third Party in the course of his interview with the Applicant, and the manner in which he responds to her answers with further statements and questions, amounts to a method. The Reverse Control Interview Technique developed by the Third Party involves a polygraph examiner’s method of interacting with another individual, as exhibited in the DVD.

[para 27] The CPS submits that the contents of the DVD constitute a “trade secret” and therefore fall within the terms of section 16(1)(a)(i). A “trade secret” is defined, as follows, in section 1(s) of the Act.

*1(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 28] The definition above determines whether section 16(1)(a) is engaged on the basis of the existence of a trade secret. However, the definition is somewhat circular for the purpose of determining whether section 16(1) applies overall. Part (iii) of the definition means that the particular third party must treat the information relating to the trade secret as confidential, which is effectively the requirement set out in section 16(1)(b). Part (iv) of the definition essentially repeats the requirement set out in section 16(1)(c), in that the disclosure of the information revealing the trade secret must cause harm to the third party, such as the very kind contemplated in section 16(1)(c)(iii) itself. In other words, even if information initially appears to be a trade secret within the terms of section 16(1)(a), the information may actually not be a trade secret on consideration of the criteria set out in sections 16(1)(b) and 16(1)(c).

[para 29] Thus, for the purpose of discussion, I am prepared to say, at this point in the Order, that the DVD would reveal the Third Party’s trade secret to the extent that I consider the contents of the DVD to show a method, technique or process for conducting pre-employment polygraph interviews that is used in business or for a commercial purpose, within the terms of part (i) of the definition of “trade secret”, and the method, technique or process derives independent economic



value from not being generally known, within the terms of party (ii). Whether the information in the DVD also meets parts (iii) and (iv) of the definition above depends on my findings below.

[para 30] Regardless, it is sufficient for me to find that the DVD contains the Third Party's technical information within the terms of section 16(1)(a)(i) in order to conclude that the first criterion for withholding information under section 16(1) is met in this inquiry.

**2. Was the DVD supplied, explicitly or implicitly, in confidence under section 16(1)(b)?**

[para 31] Section 16(1)(b) of the Act requires a reasonable and objective expectation of confidentiality on the part of the supplier of the information in question. In deciding whether there was an expectation of confidentiality based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was communicated to the public body on the basis that it was confidential and to be kept confidential, treated consistently in a manner that indicates a concern for its protection from disclosure by the third party prior to being communicated to the public body, not otherwise disclosed or available from sources to which the public has access, and prepared for a purpose that would not entail disclosure (Order 99-018 at para. 37; Order F2005-011 at para. 19).

[para 32] I note that clause 12 of the Master Consultants Agreement between the Public Body and the Third Party addresses confidentiality, and the application of the Act, with respect to certain information shared between the parties. Clause 12(a) indicates that information of the Public Body, not the Third Party, is confidential, so has no bearing on whether the Third Party supplied the DVD in confidence. Clause 12(b) notes that records submitted to the Public Body by the Third Party are subject to the protection and disclosure provisions of the Act, including section 16(1), but the very question at this point in the Order is whether section 16(1) applies. Finally, clause 12(c) reads as follows:

The Consultant should identify appropriate parts of any proposal or submission as confidential, since this will clearly establish its expectations towards the document, both to The City as a public body and to the Information and Privacy Commissioner in any review of or refusal of access. The City, however, may not be able to meet these expectations in every instance.

[para 33] It is possible that clause 12(c) does not apply to the DVD, as it is not a "proposal or submission", or a "document". On the other hand, the clause serves as general reminder that the Third Party should explicitly indicate that records are confidential, if that is the case, when he provides them to the Public Body. In the end, however, I find that clause 12(c) of the Agreement does not answer the question of whether the Third Party supplied the DVD to the Public Body in confidence, as he may also have done so implicitly.

[para 34] In its letter of March 25, 2011 to the Third Party, the Public Body wrote that it did not consider that the DVD had been supplied to it in confidence. Conversely, as noted above, the Third Party says that he never would have given the Public Body the DVD if he knew that its contents would be disclosed to others. I accept the Third Party's assertion when he essentially says that he had an expectation of confidentiality in relation to the DVD, even though he did not

expressly communicate that expectation to the Public Body. The Public Body's FOIP Disclosure Officer also suggests that there was an element of confidentiality in relation to the DVD, as she acknowledges in her affidavit that the recording of polygraph interviews are normally stored with the Third Party, and that the Public Body normally receives only a job candidate's screening test result in a report prepared by the Third Party. Because it is the normal practice of the Third Party not to give copies of his polygraph interview recordings to the employers engaging his services, or to anyone else, I find that the recordings are treated consistently in a manner that indicates a concern for their protection from disclosure, are not available from sources to which the public has access, and are prepared for a purpose that would not entail disclosure.

[para 35] In view of the foregoing, I am satisfied that the Third Party implicitly supplied the DVD to the Public Body in confidence, within the terms of section 16(1)(b).

**3. Could disclosure of the DVD be expected to bring about one of the outcomes set out in section 16(1)(c)?**

[para 36] Section 16(1)(c) of the Act contemplates four types of harms arising from disclosure of information, at least one of which must reasonably be expected to occur in order for the DVD to be subject to section 16(1). In order for information to fall under section 16(1)(c), there must be a clear cause and effect relationship between disclosure of the withheld information and the outcome or harm alleged; the outcome or harm that would be caused by the disclosure must constitute damage or detriment, and not simply hindrance or minimal interference; and the likelihood of the outcome or harm must be genuine and conceivable (Order 96-003 at p. 6 or para. 21). The test regarding a reasonable expectation that a particular harm or outcome will occur must be satisfied on a balance of probabilities, meaning that the evidence must involve more than speculation or a mere possibility (Order 96-013 at para.. 31). The requirement for an evidentiary foundation for assertions of harm, within the terms of the Act, was upheld in *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515 (at paras. 6, 59 and 60).

[para 37] The Third Party explains that his Reverse Control Interview Technique has been endorsed by the Canadian Police College Polygraph School and the Canadian Association of Police Polygraphists. In addition to providing services to employers, he taught the technique to other pre-employment polygraph examiners from 1997 to 2012. He says that his Reverse Control Interview Technique is extremely successful in ferreting out new admissions and disclosures by job applicants, which in most cases had been deliberately concealed by the applicant up to that point in the hiring process. He notes that the technique is used across Canada, in the United States and around the world by not only employers such as the Public Body in this case, but by law enforcement agencies and security agencies, including the Royal Canadian Mounted Police (RCMP), the Canadian Security Intelligence Service and the Canadian Security Establishment.

[para 38] In an affidavit sworn by a member of the CPS, being a Detective and Senior Polygraph Examiner who routinely conducts both forensic (criminal) and pre-employment polygraph examinations, the Detective writes that it is his understanding that the Third Party operates the only company instructing the Reverse Control Interview Technique in the world.

He also notes the uniqueness and effectiveness of the technique, and the fact that it is endorsed and used by many agencies. A second member of the CPS, being a Superintendent who oversees the recruiting process for all sworn and civilian members of the CPS, makes similar points in another affidavit, adding that the Third Party used his expertise to assist the CPS in revamping its pre-employment polygraph process and works as a consultant for a variety of other entities. Finally, the Third Party included letters with his submissions, in which an Inspector with the CPS's Human Resources Operations Section, an Inspector with the RCMP's Truth Verification Section, the President and Vice-President of the Canadian Association of Police Polygraphists, and a Course Instructor with the Canadian Police College Polygraph School each attest to the specialized nature, value and utility of the Reverse Control Interview Technique developed by the Third Party.

[para 39] In view of the foregoing, I first find that the Reverse Control Interview Technique is unique and effective, and that it provides income and a competitive advantage to the Third Party, who developed it. I now turn to whether disclosure of the DVD to the Applicant could reasonably be expected to harm significantly the competitive position of the Third Party as referenced in section 16(1)(c)(i), or result in undue financial loss to the Third Party as referenced in section 16(1)(c)(iii).

[para 40] The Third Party submits that, if the Applicant were to obtain a copy of her pre-employment polygraph interview, there is a potential for it to be further disclosed to someone, for instance on the internet, who could adopt and teach the specialized technique. He also submits that existing competitors could adapt their own interview techniques, reducing the Third Party's competitive position and, in turn, reducing the future income of the Third Party. The CPS agrees that disclosure of the information in the DVD could reasonably be expected to harm or interfere with the competitive position of the Third Party, in that the Applicant would not be limited in her further disclosure of the DVD. It argues that the techniques revealed in the DVD could reasonably become available to anyone in a competitive position with the Third Party, significantly interfering with his business interests.

[para 41] The Third Party says that, if one were to query the term "Reverse Control Interview Technique" on the internet, one would learn no details about the technique. Conversely, the Applicant submits that an internet search on her part revealed various forms of questioning and techniques used in polygraph examinations, and that she located information on how to beat a polygraph. She adds that she has specifically come across information about the Reverse Control Interview Technique developed by the Third Party. For his part, the Third Party does not say that there is no information whatsoever about his Reverse Control Interview Technique online, and acknowledges that there is publicly available information about other types of polygraphs used in contexts other than pre-employment screening. He does say, however, that he knows of no case in which a video recording of an actual pre-employment polygraph interview has been made available for all to see online. The CPS similarly submits that, while there is a great deal of information on the internet about polygraphs, little of it is about the Reverse Control Interview Technique. The Superintendent who swore one of the aforementioned affidavits on behalf of the CPS states that, while other methods of conducting pre-employment polygraph interviews have been publicly described and their weaknesses

exploited, the Third Party's Reverse Control Interview Technique has so far been protected from scrutiny and dissection in any public forum.

[para 42] Taking into account the competing assertions of the Third Party and the Applicant, I find that detail about the Reverse Control Interview Technique is not publicly available. I further find that there is a reasonable likelihood that, if the DVD were to be released to the Applicant, the information in it would be further disseminated. I distinguish a contrary finding that I made in Order F2010-017. There, an applicant had likewise requested a copy of a recording of his polygraph interview, but the polygraph was conducted in a forensic or law enforcement context, not in an employment context. I found it highly unlikely that the applicant in that inquiry would disseminate the recording, given that it revealed sensitive criminal allegations that he had sexually assaulted someone (see para. 95). Because the polygraph interview in the other case addressed the single issue of whether the applicant was involved in the criminal matter, virtually every part of the recording reflected very badly on him. In this inquiry, the Applicant's approximately three and a half hour polygraph interview involves statements, questions and answers that are not harmful to her reputation, with the exception of one portion in which she admits to a particular past event.

[para 43] Moreover, with respect to the video recording at issue in Order F2010-017, I found that, even if it were to fall into the public domain, there would be no clear cause and effect relationship between disclosure of its contents and the particular harm alleged by the public body in that case, which was that members of the public, and future suspects, would learn how to use countermeasures in order to defeat polygraph examinations (at para. 96). Given what was actually revealed by the recording, I found that the public body was overstating the harm that would occur on disclosure (see paras. 97 to 102). The countermeasures that the public body believed to be used by the applicant in order to undermine his polygraph, and the type or nature of possible countermeasures more generally, were never indicated in the video recording, and I did not see how most individuals watching the recording would be able to ascertain what they were, or could be.

[para 44] In this inquiry, the main question in relation to the application of section 16(1) is not whether general members of the public might be able to recognize techniques in the DVD and then use what they learn to their advantage should they become the subject of a polygraph. This is notwithstanding that the Third Party, the CPS and some of the individuals who wrote letters in support of the Third Party's position submit that disclosure of the DVD would enable individuals to beat a pre-employment polygraph interview involving the Reverse Control Interview Technique, which in turn might affect law enforcement, given that law enforcement professionals are often subjected to pre-employment polygraphs. This submission relates more closely to the possible application of section 20(1) of the Act (disclosure harmful to law enforcement), which the Public Body did not apply in this case. I acknowledge the possibility that, if a significant number of individuals learned how to use countermeasures against the Reverse Control Interview Technique, this might reduce its effectiveness and marketability, and therefore the competitive position and income of the Third Party. To me, however, the more important question or determining factor with respect to the application of section 16(1) to the information in the DVD relates to whether the Third Party's competitors would gain an advantage if they were to obtain the information.

[para 45] In my view, they would. It is reasonably likely, and more than merely speculative, that polygraphists competing with the Third Party, whether as instructors or examiners, would be able to recognize the techniques exhibited in the DVD, and then use, adopt or adapt them to their advantage and to the detriment of the Third Party. Unlike members of the general public, competitors of the Third Party would presumably be experts in their field and far more likely to understand the subtleties of the Reverse Control Interview Technique developed and used by the Third Party.

[para 46] In view of my findings that the DVD is reasonably likely to fall into the public domain if it were released to the Applicant, and that competitors of the Third Party would gain a competitive advantage on viewing it, I find a sufficient cause and effect relationship between disclosure of the information in the DVD and the harm alleged by the Third Party. I also find the harm to the Third Party's business interests, in the form of a reduced competitive position and accompanying financial loss, to constitute more than a hindrance or minimal interference. The Third Party has accordingly met his burden of establishing that the disclosure of information in the DVD could reasonably be expected to bring about the harms set out in sections 16(1)(c)(i) and 16(1)(c)(iii).

#### **4. Conclusion regarding the application of section 16(1)**

[para 47] I have found that the information in the DVD was supplied by the Third Party to the Public Body implicitly in confidence within the terms of section 16(1)(b), and that disclosure of the information could reasonably be expected to harm significantly his competitive position under section 16(1)(c)(i) and result in undue financial loss under section 16(1)(c)(iii). Given my findings to the effect that the information shown in the DVD is the subject of reasonable efforts to prevent it from becoming generally known, and that its disclosure would result in significant harm or undue financial loss to the Third Party – which are the requirements set out in parts (iii) and (iv) of the definition of “trade secret” – I also find that, in addition to revealing technical information within the terms of section 16(1)(a)(ii), the contents of the DVD reveal a trade secret within the terms of section 16(1)(a)(i). I conclude that disclosure of the information in the DVD would be harmful to the business interests of the Third Party. Section 16(1) of the Act therefore applies, and the Public Body must withhold the information in the DVD from the Applicant.

[para 48] The Applicant suggests that the DVD cannot be withheld from her because the Public Body apparently promised that all personal information collected during the hiring process would be returned to unsuccessful candidates. The DVD indeed contains the Applicant's personal information, but even if the Public Body did promise to return her personal information and this included that collected in the DVD, the Public Body cannot agree to release information the disclosure of which would be contrary to the Act.

[para 49] Section 6(2) of the Act, which was reproduced earlier in this Order, states that, if information that is excepted from disclosure can reasonably be severed from a record, an applicant has a right of access to the remainder of the record. I therefore considered whether there were portions of the DVD that do not fall within the terms of section 16(1). I decided that there were no such portions. The DVD contains the Third Party's explanation of the interview process and its objective, how it will unfold, and how it differs from other polygraph tests and

interviews. It also includes statements made by the Third Party, question posed by him, and his reaction or follow-up to the answers given by the Applicant. Because all of the foregoing forms part of the pre-employment polygraph interview and reveals the overall interaction between the Third Party and the Applicant, I consider that all of it would reveal, directly or indirectly, information about the Reverse Control Interview Technique. In turn, disclosure of even part of the information in the DVD sufficiently risks harming the business interests of the Third Party so as to fall within the terms of section 16(1). Even if a particular portion of the DVD might not appear to exhibit the technique *per se*, the overall methodology of the Third Party includes the way in which he interacts with the Applicant in order to set up the use of his Reverse Control Interview Technique. As described by him in a short submission that I accepted *in camera*, he does this throughout a polygraph interview by considering various facts, possibilities, questions and answers, all of which specifically relate to the particular individual and arise out of the specific conversation with that individual.

[para 50] I note that the Third Party and some of those in support of his overall position in this inquiry are not entirely against releasing a portion of the DVD to the Applicant, such as the portion about a particular incident in which she was involved in the past. However, this does not mean that parts of the information in the DVD do not fall within the terms of section 16(1) at this point in time. If the Third Party were to consent to disclosure of some of the information in the DVD, section 16(1) would no longer be applicable to that information. Section 16(3)(a) states that section 16(1) does not apply if the third party consents to the disclosure.

**C. Does section 17(1) of the Act (disclosure harmful to the personal privacy of the Third Party) apply to the record/information?**

[para 51] Section 17 of the Act reads, in part, as follows:

*17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*

...

*(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*

...

*(i) the personal information was originally provided by the applicant.*

[para 52] Given my conclusion that the information in the DVD must be withheld by the Public Body under section 16(1), it is not strictly necessary for me to address the above issue. However, because section 17(1) sets out a mandatory exception to disclosure that may be applicable regardless of the Public Body's decision not to apply it – unlike the discretionary exceptions to disclosure set out in sections 20(1) and 26 – I will briefly address the issue.

[para 53] I find that the DVD is not subject to section 17(1). Indeed, the Third Party did not argue that the section applies in this inquiry. Musker Consulting Ltd. Polygraph Services is an organization having no personal information to which section 17(1) can apply. The individual operating the Third Party likewise has no personal information in the DVD, as he was carrying out work-related activities. Work-related information is normally not personal information, and its disclosure is therefore normally not an unreasonable invasion of personal privacy (Order F2008- 028 at para. 53; Order F2008-031 at para. 129). I find that to be the case here.

[para 54] There is a small amount of information in the DVD about individuals mentioned by the Applicant, such as her husband and colleagues. However, the Applicant provided the information herself, which is a relevant circumstance to consider under section 17(5)(i). I find that this circumstance sufficiently weighs in favour of a conclusion that disclosure of the information back to her would not be an unreasonable invasion of anyone's personal privacy. Section 17(1) therefore does not apply.

**D. Does section 20(1) of the Act (disclosure harmful to law enforcement) apply to the record/information?**

**E. Does section 26 of the Act (testing procedures, tests and audits) apply to the record/information?**

[para 55] Given my conclusion that the information in the DVD must be withheld by the Public Body under section 16(1) of the Act, it is not necessary for me to address the two issues above. Moreover, sections 20(1) and 26 set out discretionary exceptions to disclosure, the first of which the Public Body did not choose to apply and the second of which the Public Body initially chose to apply but then decided not to. While I might comment on whether the contents of the DVD hypothetically fall within the terms of sections 20(1) and/or 26, there is no practical point in doing so. Even if the DVD falls within the terms of either or both of those sections, the Public Body did not rely on them, so I would be unable to conclude that the DVD can be withheld from the Applicant on the basis of them.

[para 56] It is different with respect to section 17(1) because, as I noted above, that section sets out a mandatory exception to disclosure. There is a practical benefit in my deciding above that section 17(1) does not apply to the information in the DVD because, if I am wrong and the DVD actually does not fall within the terms of section 16(1), then I have already decided that it cannot be withheld under section 17(1) and may be released to the Applicant, despite the Third Party's objection.

## **V. ORDER**

[para 57] I make this Order under section 72 of the Act.

[para 58] I find that the DVD is in the custody or under the control of the Public Body under section 6(1) of the Act. The Applicant therefore has a right of access to it, subject to any exceptions to disclosure.

[para 59] I find that section 17(1) of the Act does not apply to the information in the DVD, as disclosure would not be harmful to the personal privacy of the Third Party, the individual operating it, or any other third party individual.

[para 60] I find that section 16(1) of the Act applies to the information in the DVD, as its disclosure would be harmful to the business interests of the Third Party. Under section 72(2)(c), I require the Public Body to refuse the Applicant access to the DVD.

Wade Raaflaub  
Adjudicator