

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER F2014-35

August 29, 2014

#### ALBERTA HEALTH SERVICES

Case File Numbers F6212, F6213, F7523

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

**Summary:** A union, the Alberta Union of Provincial Employees (AUPE), made a request to Alberta Health Services (AHS) for access to the audited financial returns of nursing home operators.

AHS provided notice to the nursing homes as third parties under section 30 of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) regarding AUPE's request. AHS decided to sever some information under section 16 (disclosure harmful to business interests of a third party) but to disclose other information. Two nursing home operators, Park Place Seniors Living (Park Place) and Shepherd's Care Foundation (Shepherd's Care), objected to AHS's decision to disclose information from their audited returns and requested review by the Commissioner.

Subsequently, AHS decided that the nursing home operators were public bodies under the FOIP Act and that section 16 could not apply. It decided to apply section 25 (disclosure harmful to economic and other interests of a public body) to withhold the information to which it had previously applied section 16. It communicated this decision to AUPE, and AUPE requested review by the Commissioner of this decision.

After the inquiry commenced, it became apparent that there were other nursing home operators affected by the Applicant's access request. Extendicare, Revera Inc. (Revera), Touchmark at Wedgewood (Touchmark), Carewest, The Good Samaritan Society, and St. Joseph's Auxiliary Hospital were also invited to participate at the inquiry.

The Adjudicator found that the Public Body and the third parties had failed to establish that interference to their negotiating positions was reasonably likely to result from disclosure of the information in the audited returns under either section 16 or section 25. The Adjudicator ordered disclosure of the information the Public Body had withheld and the information the nursing home operators sought to have withheld.

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 3, 4, 6,16, 17, 25, 30, 12, 67, 71, 72; *Nursing Homes Act*, R.S.A. 2000, c. N-7 s. 1, 2, 21; *Nursing Homes General Regulation*, A.R. 232/85 s. 2; *Labour Relations Code*, R.S.A. 2000, c L-1, s. 60

**Authorities Cited: AB:** Orders 96-016, F2005-009, F2005-011, F2006-023, F2010-009, F2010-037 **ON:** M-284

**Cases Cited:** *Canada (Prime Minister) Canada (Information Commissioner) v. Canada (Prime Minister)*, [1992] F.C.J. No. 1054; *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Agriculture Financial Services Corporation v Alberta (Information and Privacy Commissioner)*, 2012 ABQB 397; *Alberta Teachers' Association v. Buffalo Trail Public Schools Regional Division No. 28*, 2013 ABQB 283; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3; *Imperial Oil Limited v Calgary (City)*, 2013 ABQB 393; *Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231; *International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge NO D359 v. Lehigh Inland Cement*, [2011] Alta L.R.B.R. Ld-011

## I. BACKGROUND

[para 1] The Alberta Union of Provincial Employees (AUPE) made an access request to Alberta Health Services for the audited financial returns of fifteen continuing care contractors for the fiscal years 2009 – 2010 and 2010 – 2011.

[para 2] Alberta Health Services (AHS) contacted the continuing care contractors to obtain their views regarding disclosure of the audited financial returns. Of these, Shepherd's Care Foundation / Kensington (Shepherd's Care) and Park Place Seniors Living / Hardisty Care Centre Ltd (Park Place) objected to disclosure of their audited financial returns on the basis of section 16 of the FOIP Act (disclosure harmful to business interests of a third party). Although Alberta Health Services agreed to withhold some information under section 16, it also decided to disclose some of the information in the audited returns to the Applicant.

[para 3] Shepherd's Care and Park Place requested review by the Commissioner of AHS's decision to disclose some of the information in the audited returns. The Commissioner authorized mediation to resolve the dispute between Alberta Health

Services, Shepherd's Care, and Park Place. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 4] Once the Commissioner delegated authority to me to conduct the inquiry, I noted that the Public Body had made decisions to withhold some of the information in the records from AUPE, but had not yet communicated that decision to AUPE. In order to address all the issues arising from AUPE's access request, I asked the Public Body to meet its duty to AUPE under section 12 of the FOIP Act by responding to its access request and indicating that it had decided to sever and withhold information in the records.

[para 5] The Public Body responded to the Applicant's access request and stated that it was applying section 25 (disclosure harmful to economic and other interests of a public body) of the FOIP Act to withhold information from the Applicant. The Public Body also confirmed that it was not withholding any information under section 16 of the FOIP Act.

[para 6] The Applicant requested review of the Public Body's decision to withhold information under section 25 of the FOIP Act

[para 7] After the inquiry had begun and the parties had exchanged their submissions, it became apparent that the Public Body had not provided this office with all the records it had identified as responsive and from which it had severed information. It also became apparent that there were other third parties potentially affected by AUPE's request for review or, in the alternative, other public bodies concerned by the request for review, within the terms of section 67 of the FOIP Act. Carewest, Extendicare, The Good Samaritan Society, Revera, St. Joseph's Auxiliary Hospital and Touchmark were invited to participate in the inquiry. The original parties exchanged their previous submissions with these newly identified parties, and the newly identified parties were provided the opportunity to make submissions for the inquiry.

## **II. RECORDS AT ISSUE**

[para 8] The audited financial returns of Shepherd's Care, Park Place, Carewest, Extendicare, the Good Samaritan Society, Revera, St. Joseph's Auxiliary Hospital and Touchmark at Wedgewood are at issue.

## **III. ISSUES**

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

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

**Issue C: Personal Information**

#### IV. DISCUSSION OF ISSUES

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

[para 9] Section 16 of the FOIP Act requires the head of a public body to withhold specific kinds of information that could harm a third party's business interests if it is disclosed. Section 16 states, in part:

*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 10] Both Shepherd's Care and Park Place requested review of AHS's decision not to apply section 16 to all of the information in their audited returns. After these parties requested review, AHS decided that section 16 did not apply to any information in the audited returns on the basis that neither Shepherd's Care or Park Place is a "third party" within the terms of the FOIP Act. It is now AHS's position that the application of section 16 is limited to information supplied by a *third party*; however, the information requested by AUPE is information submitted to it by *public bodies* within the terms of

the FOIP Act. It reasons that public bodies are not “third parties” under the FOIP Act, as section 1(r) of the FOIP Act excludes public bodies from the definition of “third party”.

[para 11] Shepherd’s Care maintains that it is not a nursing home or a public body, but a third party organization. It argues that it is engaged in many other business activities beyond operating a nursing home, and that this aspect of its business would be revealed by disclosing information from its audited returns. It reasons that section 16 applies to its audited returns in their entirety as the audited returns would reveal information about its activities that are not nursing home activities.

[para 12] Revera argues that it is a fully owned subsidiary of the Public Sector Pension Investment Board, a federal crown corporation. It reasons that it is governed by the *Privacy Act* RSC 1985, c. P-21, and therefore cannot be considered a public body under provincial legislation.

[para 13] Touchmark also relies on section 16 in its arguments that the information in its audited returns should be withheld from the Applicant.

[para 14] As Shepherd’s Care, Touchmark, and Revera take the position that section 16 applies to the information they seek to have withheld from the Applicant, I will consider whether this provision requires AHS to withhold the information these three parties seek to have withheld.

[para 15] Although Shepherd’s Care, Touchmark and Revera all argued that they are third parties within the terms of the FOIP Act, and may therefore rely on section 16 to require AHS to withhold the information in their audited returns from AUPE, I find, below, that their arguments and evidence fail to establish that the requirements of section 16(1)(c) are met. It is therefore unnecessary to determine whether these entities are third parties within the terms of the FOIP Act or public bodies.

[para 16] 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 turn now to the question of whether the information Shepherd’s Care, Revera, and Touchmark seek to have severed under section 16 meets the requirements of sections 16(1)(a), (b), and (c) such that section 16(1) requires the information to be withheld.

*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 17] I accept that the information Shepherd's Care, Touchmark and Revera seek to have severed from their audited returns is the financial information of Shepherd's Care, Touchmark, and Revera within the terms of section 16(1)(a).

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

[para 18] As I find below that the conditions of section 16(1)(c) have not been met, it is unnecessary for me to address section 16(1)(b). However, if I am wrong in that finding, it would be necessary to decide whether the information Shepherd's Care, Touchmark, and Revera seek to have withheld could be said to have been supplied 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)?*

[para 19] Section 16(1)(c), reproduced above, describes the harms that must reasonably be expected to result from disclosure of information before section 16 can be said to apply. Section 16(1)(c) contains an exhaustive list of harmful outcomes; as a result, it is not open to me to find that section 16(1)(c) is met on the basis of harms that parties anticipate will result from disclosure, if those harms are not enumerated in section 16(1)(c). Section 16(1)(c) lists only four potential harms arising from disclosure that section 16 is intended to protect against. To qualify, disclosure of information meeting the requirements of section 16(1)(a) and (b) must be reasonably 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 20] Shepherd's Care, Touchmark and Rivera each argue that disclosing the information in the records to AUPE would harm their negotiating positions in ongoing negotiations with that union, and that the requirements of section 16(1)(c)(i) are therefore met.

[para 21] Shepherd's Care states:

The harm to SCF by disclosing the Financial Records is significant in nature. It affects, or could affect, future bargaining with unions, individuals and contractors if they have the information in the Financial Records as it give them an upper hand or advantage in negotiations. Disclosure

could also result in increased labour and operations costs at Kensington Village and at SCF's other facilities in the future, and disadvantages SCF in negotiations with third parties if the Financial Records are revealed. The usual position of SCF in negotiations with the third parties is that it looks at costs on a global basis or some similar position. In short, in the past, SCF has not been revealing the financial / costing information in the Financial Records to third parties in negotiations it has with them. In brief, in accordance with s. 16(1)(c)(i) of the Act disclosing the Financial Records interferes significantly with the negotiating position of SCF.

The Financial Records is information SCF would not provide to unions or individuals or contractors.

The Financial Records are used for business purposes internally by it and by AHS for funding.

There is a reasonable probability of harm to SCF if the Financial Records are disclosed.

[para 22] Touchmark argues:

Finally, the disclosure of Touchmark's financial data to AUPE could reasonably be expected to interfere significantly with Touchmark's negotiating position in collective bargaining vis-à-vis AUPE. Indeed, it is difficult to imagine information that would interfere more with a party's negotiating position than detailed disclosure of financial data to the opposing party. It is reasonable to conclude that the legislature included this exception in FOIPPA because it did not want access to information to upset the established balance of competing interests at the bargaining table. Maintaining that balance is in the public's interest.

Touchmark approved the release of AHS program revenue to the applicant when asked for comment by AHS in March, 2012. Touchmark maintains now, as it did then, that the disclosure of cost data and private room revenue would significantly interfere with its negotiating position.

[para 23] Revera argues:

As well, as Revera is currently in labour negotiations with AUPE who comprise approximately 75% of the staff in each of South Terrace Care Centre, Jasper Place Continuing Care Centre, and Miller Crossing Care Centre, Revera's negotiating position will be harmed because disclosing the detailed financial information will allow AUPE to derive information valuable to its negotiating position and harmful to the position of Revera. This kind of significant interference with labour relations will also cause harm to its competitive position and result in undue financial loss to its business.

[para 24] In *Canada (Prime Minister) Canada (Information Commissioner) v. Canada (Prime Minister)*, [1992] F.C.J. No. 1054; Rothstein J., as he then was, made the following observations in relation to the evidence a party must introduce in order to establish that harm to will result from disclosure of information. He said:

While no general rules as to the sufficiency of evidence in a section 14 case can be laid down, what the Court is looking for is support for the honestly held but perhaps subjective opinions of the Government witnesses based on general references to the record. Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it

would be for a court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged. [my emphasis]

[para 25] In the case of section 16(1)(c)(i) of the FOIP Act, the harm that must be established is significant harm to a third party's competitive position or significant interference with a third party's negotiating position. Following the approach set out in the foregoing case, a third party seeking to establish the likelihood of significant interference with negotiating position arising from disclosure must establish a direct linkage between the information at issue and the risk of significant interference that it projects.

[para 26] In *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515, the Court upheld a decision of the Commissioner requiring evidence to support the contention that there was risk of harm if information was disclosed.

The Commissioner's decision did not prospectively require evidence of actual harm; the Commissioner required some evidence to support the contention that there was a risk of harm. At no point in his reasons does he suggest that evidence of actual harm is necessary.

The evidentiary standard that the Commissioner applied was appropriate. The legislation requires that there be a "reasonable expectation of harm." Bare arguments or submissions cannot establish a "reasonable expectation of harm." When interpreting similar legislation, courts in Ontario and Nova Scotia have held that there is an evidentiary burden on the party opposing disclosure based on expectation of harm: *Chesal v. Nova Scotia (Attorney General)* 43, at para. 56 *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)* 44 at para. 26.

[para 27] In a recent decision, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, the Supreme Court of Canada confirmed that when access and privacy statutes refer to reasonable expectations of harm, that a party must demonstrate that disclosure will result in a risk of harm that is beyond the merely possible or speculative. The Court stated:

It is important to bear in mind that these phrases are simply attempts to explain or elaborate on identical statutory language. The provincial appellate courts that have not adopted the "reasonable expectation of probable harm" formulation were concerned that it suggested that the harm needed to be probable: see, e.g., *Worker Advisor*, at paras. 24-25; *Chesal v. Nova Scotia (Attorney General)*, 2003 NSCA 124, 219 N.S.R. (2d) 139, at para. 37. As this Court affirmed in *Merck Frosst*, the word "probable" in this formulation must be understood in the context of the rest of the phrase: there need be only a "reasonable expectation" of probable harm. The "reasonable expectation of probable harm" formulation simply "captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm": para. 206.

Understood in this way, there is no practical difference in the standard described by the two reformulations of or elaborations on the statutory test. Given that the statutory tests are expressed in identical language in provincial and federal access to information statutes, it is preferable to have only one further elaboration of that language; *Merck Frosst*, at para. 195:



I am not persuaded that we should change the way this test has been expressed by the Federal Courts for such an extended period of time. Such a change would also affect other provisions because similar language to that in s. 20(1)(c) is employed in several other exemptions under the Act, including those relating to federal-provincial affairs (s. 14), international affairs and defence (s. 15), law enforcement and investigations (s. 16), safety of individuals (s. 17), and economic interests of Canada (s. 18). In addition, as the respondent points out, the “reasonable expectation of probable harm” test has been followed with respect to a number of similarly worded provincial access to information statutes. Accordingly, the legislative interpretation of this expression is of importance both to the application of many exemptions in the federal Act and to similarly worded provisions in various provincial statutes. [Emphasis added in original.]

This Court in *Merck Frosst* adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. [my emphasis] As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”: *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40.

[para 28] Section 16(1)(c) of the FOIP Act incorporates the phrase, “could reasonably be expected to”, discussed in the foregoing excerpt from *Ontario (Community Safety and Correctional Services)*. It is therefore incumbent on the party seeking to have information withheld from an applicant to submit or adduce evidence that disclosure of the information could reasonably be expected to result in probable harm. In this case, the harm in question is significant interference to the third parties’ negotiating positions.

[para 29] Additionally, section 71(3)(b) of the FOIP Act imposes the burden of proof on a third party seeking to have information excluded under section 16.

[para 30] Shepherd’s Care, Touchmark and Revera did not explain how disclosure of specific information in their audited financial returns could be expected to create significant interference with their respective negotiating positions in collective bargaining. Moreover, they did not explain how their negotiating positions would be interfered with, or point to the information in the records that could be expected to result in that harm.

[para 31] As was the case in *Canada (Prime Minister)* and in *Qualicare*, (*supra*), I have been provided with essentially bare statements that significant interference to their negotiating positions will result from disclosure, should the information be disclosed, but no argument or evidence to establish the nature of the harm, its relation to the information in the records, or the likelihood that such a harm would result from disclosure of the specific information. The records have been left to speak for themselves; however, the harm that the parties foresee is not evident from the contents of the records.

[para 32] It is possible that Shepherd's Care, Touchmark, and Revera are concerned that AUPE would use the financial information contained in the records to attempt to negotiate better wages or benefits for employees than they are paid currently. However, assuming that this is the outcome these parties project, it is unclear to me how the outcome that AUPE would use the information in the records to attempt to negotiate higher wages -- if indeed this is the concern -- could be reasonably expected to result in significant interference to the third parties' own negotiating positions, or require them to adopt a different position in collective bargaining than they would normally adopt. If Shepherd's Care typically approaches collective bargaining on a "global basis" as it states it does, no explanation has been provided to explain why disclosure of the information in the records would prevent it from doing so again.

[para 33] While it is conceivable that information could exist that is beneficial to a union and harmful to management, it is not the case that all information useful to a union would be correspondingly harmful to management. It is conceivable that information could be helpful to a union's case, but not harmful to management's case. To establish that information will significantly interfere with negotiating position, it is necessary to point to the information in the records that will have this effect, and explain why disclosure of this information this outcome could be expected. However, there is no evidence before me regarding the subject matter of prospective negotiations that would enable me to infer the use that could be made of the information, such that I could even find that the information would be useful to AUPE in negotiations. Moreover, there is insufficient evidence or explanation regarding the information the third parties anticipate could result in significant interference to their negotiating positions if disclosed to allow me to draw an inference regarding the likelihood of such harm arising.

[para 34] This point is made in Order M-284, in which an inquiry officer with the Ontario Office of the Information and Privacy Commissioner noted that bare arguments do not amount to detailed and convincing evidence that disclosure of information could reasonably be expected to significantly interfere with a party's negotiating position.

To support its position that disclosure of Records 1 to 6 would significantly interfere with its contractual negotiations with the appellant, the affected party submits that:

... the disclosure of information to the [appellant] will significantly prejudice the [affected party's] position with respect to contract negotiations with the [appellant], particularly with respect to the negotiation of monetary items. The [affected party] submits that there is a reasonable expectation that the information contained in this record would be used by the [appellant] to interfere with the management of the [affected party] and to extract higher wage settlements.

I find that these representations do not present detailed and convincing evidence of a reasonable expectation that the affected party's contractual negotiations with the appellant will be significantly interfered with if the subject records are disclosed. A party must not just present evidence of the expectation of interference to satisfy the third part of the test; it must present evidence that disclosure could reasonably be expected to *significantly* interfere with contractual negotiations. In this appeal the affected party has not done so. [emphasis in original]

Both the appellant and the affected party state that their collective agreement negotiations came to an end when they entered into a collective agreement which took effect on March 31,

1993. In my opinion, the fact that the relevant negotiations are now at an end would make it even more difficult for the affected party to satisfy the third part of the section 10 test on the basis that disclosure of the records would significantly interfere with its contractual negotiations. To do so, the party claiming the section 10 exemption would have to link, again with "detailed and convincing" evidence, some potential *future* negotiations to the specific information subject to disclosure. [emphasis in original] Given the current status of the appellant, it is possible that this argument is now moot.

[para 35] In M-284, the inquiries officer found that it was not enough to establish interference, but significant interference to a third party's negotiating position. With regard to future negotiations, she found that it would be necessary to tie the potential for significant interference to negotiating position in future bargaining to the specific information in the records. The inquiries officer found that an expectation of interference did not satisfy the requirement to show that disclosing information could reasonably be expected to result in significant interference.

[para 36] While the third parties in the case before me anticipate commencing collective bargaining with the Applicant in the future, their evidence indicates that they have not yet begun collective bargaining. It is unclear from their evidence what impact, if any, the specific information in their financial returns for the 2010 / 2011 fiscal period would have on any future collective bargaining. As was the case in M-284, the parties have indicated that they expect interference with their negotiations, but at this point in time, there is insufficient information about the upcoming negotiations to enable me to evaluate the risk of interference to any such negotiations as a result of disclosure. There is no obvious connection between information regarding the 2010 / 2011 fiscal period and harm to future negotiations and none has been stated to me.

[para 37] In finding that the evidence does not establish that there is any likelihood that the negotiating positions of the parties will suffer significant interference, I acknowledge that both Shepherd's Care and Revera provided affidavit evidence for the inquiry. The affidavit evidence of Revera's senior vice president states:

The AUPE collective agreement with the facilities in Alberta expired March 31, 2014, and our expectation is that shortly we will be involved in labour negotiations with the AUPE. Our negotiation position will be harmed because disclosure of the detailed financial information will allow the union to derive information valuable to its negotiating position and harmful to the position of Revera. This kind of significant interference with labour relations will also create harm to the competitive position of Revera and result in undue financial loss to its business.

[para 38] The evidence of the senior vice president does not correlate the specific information in Revera's audited returns for the period ending March, 2010 with the potential for significant interference to its negotiating position in future negotiations. Section 16(1)(c)(i) requires evidence of significant interference to negotiating position, rather than labour relations in general. Moreover, I have not been told which information would result in the harms the senior vice president anticipates, or why that outcome could be expected.

[para 39] The affidavit from Shepherd's Care's director of human resources states:

SCF also has a concern that the release of the Financial Records could potentially negatively impact its management and contractual rights in labour relations and the negotiation of collective agreements. SCF has refused to provide financial information to unions previously.

The evidence of the director of human resources fails to explain how the information in the audited returns from March 2010 could affect its management and contractual rights in labour relations or the negotiation of collective agreements. I am told that Shepherd's Care has a concern, but I am not told the specific details of that concern.

[para 40] I am unable to conclude that the information in the audited returns could be expected to have a negative impact on Shepherd's Care's management or contractual rights in labour relations, or the negotiation of collective agreements such that disclosure of the information could result in significant interference to its negotiating position. I am unable to say that the disclosure of any of the information in the records could reasonably be expected to have any effect on Shepherd's Care's management rights or labour relations in 2014. Even if the information in the records were more recent, I would be unable to draw an inference, on the evidence before me, that its disclosure would result in harm to management rights or labour relations, given that the nature of the interference to collective bargaining or management rights has not been described for the inquiry, or attributed to the release of any of the particular information in the records. I have been told that the information in the audited returns is financial information and confidential, but I have not been told what it is about the information that could reasonably be expected to result in *significant interference* to the parties' negotiating positions within the terms of section 16(1)(c)(i).

[para 41] Both Revera and Shepherd's Care also argued that disclosure of the information in the records would significantly harm their competitive positions. I turn now to those arguments.

[para 42] The senior vice president for Revera states:

Revera competes with a number of other organizations in Alberta for provision of seniors housing including Retirement Concepts, Park Place Seniors Living and Carewest. In the course of competing for opportunities, Revera's financial information, such as information on its audited financial statements, could be used by its competitors unfairly and to take advantage of Revera. Revera treats such information as confidential internally, and information about its audited financial statements is not disclosed except pursuant to contract or as described herein.

[...]

If information about the audited financial returns was publicly disclosed, the result would be that it would interfere significantly with the competitive position of Revera or interfere significantly with its negotiating position in bidding for new projects. It would allow competitors to unfairly compete with Revera by providing them with information that they would not otherwise be able to obtain.

[para 43] The director of human resources for Shepherd's Care states:

SCF is concerned that disclosure of the Financial Records has a real prospect of causing harm to SCF with respect to SCF's commercial, economic or financial relations with third parties,

including financial institutions, providers of services and merchandise, employees and contractors. If the information in the Financial Records is disclosed there is potential that it could negatively affect the good reputation of SCF and/or negatively affect the position of SCF in negotiations with others for contracts for services and operations.

SCF has a real concern that disclosure of the Financial Records will affect the competitive position of SCF with third parties, and which may negatively affect the services provided to the residents of SCF. Such services which may be affected by disclosure of Financial Records include: operational services, recreation services, pastoral/ spiritual services, food services. Continuing care at the Kensington Village is a small part of the services provided by SCF. SCF has a reasonable expectation that disclosure of Financial Records could have a negative effect on the operations of SCF, apart from and including Kensington.

While the Financial Records are used for funding purposes with AHS, the Financial Records are also used for business purposes of SCF. For example, SCF uses the Financial Records for obtaining funding from lending facilities.

SCF also has a concern that the release of the Financial Records could potentially negatively impact its management and contractual rights in labour relations and the negotiation of collective agreements. SCF has refused to provide financial information to unions previously.

[para 44] In Order F2010-009, the Adjudicator rejected an argument that statements regarding the competitive nature of the livestock industry were sufficient to establish a reasonable expectation of probable harm to competitive position from disclosure of information. In *Agriculture Financial Services Corporation v Alberta (Information and Privacy Commissioner)*, 2012 ABQB 397 Gill J. denied judicial review of Order F2010-009, finding the Adjudicator's analysis to be reasonable. He said:

The Adjudicator here concluded there was insufficient information and evidence before her to prove the existence of significant harm, noting that the only evidence on the point was AFSC's affidavit, sworn by Ms. Merle Jacobsen, Vice President of AFSC. She deposed that third party's names and aid amounts could reasonably be expected to significantly harm the competitive position of a third party under s. 16(1)(c)(i) because the livestock industry is highly competitive, the livestock industry has faced severe economic challenges stemming from a high Canadian dollar, low livestock prices and high fuel, feed and fertilizer costs, and because information regarding the financial aid could be valuable information to a competitor leading to significant harm to the Third Parties.

The Adjudicator held that these assertions in the affidavit "in and of itself" [were] insufficient. She further found that the information did not adequately address how a competitor could use information regarding a Third Party's receipt of financial aid to harm a Third Party's competitive position. She also noted that although the Alberta Pork Producers stated that the disclosure of this information could cause "a great deal of personal and business harm to the individuals named", this organization also did not provide sufficient further explanation or evidence in that regard.

The Adjudicator also rejected AFSC's assertion that a competitor could use information regarding the size of a Third Party's livestock operation to the third party's detriment, finding there was insufficient information and evidence before her as to how this information could be valuable to a competitor. She concluded that she was required to base her decision on the information and evidence before her, and that it was not enough for AFSC to simply state that this type of information is valuable to a competitor. She continued:

Lastly, in coming to my conclusion under section 16(1)(c)(i), I took into account that the information relates to the financial aid issued in the years 2007 and 2008.

Although I accept the Public Body's argument that this information may provide some information to a competitor regarding a Third Party's operation in 2011, in coming to my decision, I was also mindful that, the value and relevance of this information will diminish as the information ages.

[...]

She concluded that that although the information at issue fulfilled sections 16(1)(a) and 16(1)(b), the information did not meet the requirements under s. 16(1)(c). Therefore, the information could not be withheld under s. 16(1), and ordered AFSC to disclose this information to the Applicant.

Under s. 71(1) of the Act the burden is on the head of public body (AFSC) to prove that the Applicant had no right of access to the records. The Adjudicator held that the AFSC did not meet the evidentiary burden necessary to establish the requirements of s. 16(1) (c)(i) and (ii).

AFSC suggests that its evidence, the Jacobsen affidavit, was sufficient evidence of “significant harm”, pointing to the fact that the affidavit was unchallenged. In [its] written brief AFSC also suggests that potential harm is a “foregone conclusion” and “self evident” based “on common sense and the normal operations of a competitive market place”. AFSC did not provide any evidence of “harm” but suggests that the adjudicator could or should have speculated as to potential harm.

In *Qualicare Health Services Corporation v Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515 (CanLII), 2006 ABQB 515 the Court considered the issues of the burden of proof, evidence and the “harm”. Madam Justice Topolniski's comments in that case are applicable to this case (at paras. 45, 5960, and 63):

Here, the Privacy Commissioner described the “harm test” for a document to be excepted from access under sections 20(i)(a) and 25(i)(c), referring to previous Orders issued by his Office. The challenge at bar is twofold: what is the burden of proof, a question of law, and whether the evidence is sufficient to meet the burden, a question of mixed fact and law. The Privacy Commissioner's finding that there was insufficient evidence or acceptable argument to meet each of the elements of the applicable tests. Assigning weight to evidence is a factual conclusion that attracts a deferential standard of review.<sup>33</sup> Determining the appropriate burden is a question of law, but one deep within the expertise of the Commissioner. Accordingly, the Privacy Commissioner's decision should be afforded deference.

...

In my view, the Privacy Commissioner's requirement for an evidentiary foundation withstands a somewhat probing examination. As discussed, the scope and intention of *FOIPP* presumes access to information, subject only to limited exceptions, and the responsibility for establishing an exception rests with the party resisting access to the information.

...

The requirement of some cogent evidence permits the Privacy Commissioner to discharge his duty of balancing competing interests and policy considerations by rationally assessing the likelihood of reasonable expectations of harm. To suggest that requiring some evidence is unreasonable means that access to information could be denied based solely on hypothetical possibilities, and that only the most preposterous theoretical risks could be rejected by the Commissioner.

...

In *Toronto Star v. Ontario*, the Supreme Court of Canada ruled that speculative risks are insufficient to justify a denial of access to court documents and hearings:

Even then, however, a party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise investigative efficacy. If such a generalized assertion were sufficient to support a sealing order, the presumption would favour secrecy rather than openness, a plainly unacceptable result.

I find that AFSC did not provide any evidence of “harm”, but rather expected that the adjudicator could, or should, have speculated as to potential harm. Generalized assertions as to harm are not evidence. The Adjudicator's decision is entitled to deference. ACFC did not meet the burden of proof under s. 71(1) of the Act.

[para 45] In *Agriculture Financial Services Corporation*, the Court confirmed that a party seeking to establish harm to competitive position within the terms of section 16(1)(c)(i) must do more than make generalized assertions. I am unable to find anything in the submissions of Shepherd's Care or Revera that explains how disclosure of the kinds of information in the records, which relates to the period ending in March 2010, could be used by a competitor to harm their competitive position in 2014 and beyond. I have essentially been called on to speculate on the harm to competitive position that may result from disclosure, but I am unable to do so, as the records and the submissions of the parties do not lead me to conclude that there is any likelihood that Shepherd's Care's or Revera's competitive positions could be harmed by disclosure.

[para 46] Shepherd's Care also argues that disclosure of the records may damage its reputation, which in turn may negatively affect its position in negotiations for contracts for services and operations. As Shepherd's Care does not point to the information in the records it believes would damage its reputation or explain how such information could lead to this damage. I am therefore unable to find that disclosure of the information in the records at issue could have this effect.

### *Conclusion*

[para 47] As I find that the requirements of section 16(1)(c) have not been met, I find that section 16 does not require AHS to withhold the records at issue from AUPE. If I am wrong in my conclusion that the requirements of section 16(1)(c) are not met, it would be necessary to determine whether Shepherd's Care, Touchmark, and Revera are public bodies or third parties under the FOIP Act such that their information could be considered the information of a third party, as required by section 16(1)(a). It would also be necessary to determine whether the information they seek to have withheld from the Applicant was supplied in confidence within the terms of section 16(1)(b).

### *Does the Personal Information Protection Act apply rather than the FOIP Act?*

[para 48] Turning to Shepherd's Care's argument that the *Personal Information Protection Act* applies rather than the FOIP Act, I find that the FOIP Act governs in this

case. Section 4 of the FOIP Act establishes that the Act applies to all records in the custody or control of a Public Body. The Applicant has made an access request to AHS, which is a public body, for Shepherd's Care's audited returns, which are records in AHS's custody. As a result, the FOIP Act applies to the records, regardless of the status of Shepherd's Care as third party organization or public body.

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

[para 49] AHS originally decided to withhold the information under section 16 to which it has now applied section 25. However, once it decided that the entities whose information is the subject of the access request are public bodies, rather than third parties, it elected to rely on section 25(1)(c) rather than section 16.

[para 50] Section 25(1)(c) states:

*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:*

- (a) trade secrets of a public body or the Government of Alberta;*
- (b) financial, commercial, scientific, technical or other information in which a public body or the Government of Alberta has a proprietary interest or a right of use and that has, or is reasonably likely to have, monetary value;*
- (c) information the disclosure of which could reasonably be expected to
  - (i) result in financial loss to,*
  - (ii) prejudice the competitive position of, or*
  - (iii) interfere with contractual or other negotiations of,**the Government of Alberta or a public body;**

[para 51] 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 52] Section 25(1) recognizes that there is a public interest in withholding information that could reasonably be 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, 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 53] 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 54] AHS argues:

[AHS] has severed information that if disclosed could reasonably be expected to harm [its] economic interest. In particular, the information if disclosed could reasonably be expected to prejudice the competitive position of or interfere with the contractual or other negotiations of [AHS] (section 25(1)(c)).

In order to determine whether there is a reasonable expectation of harm the following test must be satisfied:

- 1) there must be a clear cause and effect relationship between the disclosure and the harm which is alleged;
- 2) the harm caused by the disclosure must constitute "damage" or "detriment" to the matter and not simply hindrance or minimal interference; and
- 3) the likelihood of harm must be genuine and conceivable (Order F2006-023 paragraphs 2 and 39).

AHS considered the evidence presented by the Third Parties that was initially submitted by them regarding the applicability of section 16 and subsequently considered this information when formulating its view with regard to section 25. The Public Body therefore relies on Third Parties' evidence in this regard. Further it is the position of AHS that release of the confidential financial information may lead [...] the Third Parties or other service providers to decline to tender for such further work.

The "damage" caused by such disclosure is not speculative but genuine and conceivable. If AHS wishes to replicate such services knowledge of the financial arrangements in place in the past

for such service would prejudice the Public Body's competitive position by giving an interested party the financial information Public Body has accepted in negotiations (Order F2006-023 paragraph 36).

[para 55] AHS projects two harmful outcomes: 1) that the nursing home operators will cease to enter contracts with it to operate nursing homes if the affected parties' audited returns are disclosed, and 2) AHS's competitive position would be harmed in future negotiations by disclosing the terms it has accepted in prior negotiations.

[para 56] I reject the argument that nursing home operators will no longer contract with AHS if the information that is the subject of the inquiries is disclosed. There is no indication that disclosure of the information would be likely to result in the affected nursing home operators terminating their contracts with AHS and ceasing to provide nursing home care. Under section 21 of the *Nursing Homes Act*, it is mandatory for a nursing home operator to enter a contract with AHS. A nursing home operator would have to cease carrying on business if it chose not to contract with AHS.

[para 57] AHS did not explain in its initial submissions the basis of its theory that parties will decline to contract with it to provide nursing care if the information is disclosed and it chose not to make rebuttal submissions. As AHS uses the word "confidential" to describe the information to which it has applied section 25, I infer that its concern is that the affected nursing home operators have expectations that their audited financial returns are to be kept in confidence and that disclosing information from the returns would possibly violate this expectation or understanding that the information in the returns will be kept confidential.

[para 58] In Order 96-016, former Commissioner Clark rejected the view that agreements to keep information confidential bring information within the scope of section 25 (then section 24). He said:

To determine whether the particular information, or any of it, could reasonably be expected to cause the harm specified in section [25(1)], the public body must examine the information. If the public body does not examine the information, it cannot say that it correctly applied section [25(1)] to except all the information.

In the present case, the public body claimed an exception for the entire record. I carefully reviewed the public body's evidence to determine if it examined the information contained in the record. There is no evidence that the public body examined the information to determine whether that particular information could reasonably be expected to cause the alleged harm, if disclosed. Instead, the public body appears to have focused on protecting the contractual relationship which produced that information. To the public body's way of thinking, if (i) there's a contractual relationship in place, (ii) the relationship produces information that could be disclosed under the Act, and (iii) the information is subject to a confidentiality clause, then "harm at large" or "indirect harm" to this or any other contractual relationship is sufficient for the purposes proving harm under section [25(1)].

The alleged harm to AEC's and ARC's potential contractual relationships does not result from disclosing the specific information in the record. There is no clear and direct linkage between allegations of harm and disclosure of these 845 specific pages. It is the fact of disclosure in general which is said to cause the harm. The consideration in applying section [25(1)] must be

whether it's reasonable to expect the alleged harm from the disclosure of the specific information. Since the public body did not examine the information, it is precluded from claiming that there is a reasonable expectation of harm from disclosure.

Furthermore, the main object and purpose of the Act is access, subject to limited and specific exceptions. The public body's focus on protecting contractual relationships is not one of the objects or purposes of the Act. If the legislature had intended to protect those relationships, it would have said so. Nowhere in section [25(1)], or anywhere else in the Act, can I find that intent. As stated by the court in *Air Atonabee Ltd. v. Canada (Minister of Transport)*, [1989] F.C.J. No. 453 (Fed. T.D.), "...if the relationship between the parties...is to be treated as one of confidence and the records arising in it are to be wholly exempt from disclosure, that decision rests with Parliament or with the executive under the Act..." I adopt that reasoning for the purposes of interpreting section [25(1)] to exclude a general protection for contractual relationships, unrelated to the harm resulting from the release of the specific information in question.

[para 59] Former Commissioner Clark decided that an agreement or understanding that information is to be kept confidential does not bring the information within the terms of section 25. He found that harm must arise from the substance of the information in the records in question to fall within the terms of section 25. He further stated that it is an error for a public body to apply section 25 without assessing the information under consideration to determine whether its disclosure could reasonably be expected to result in economic harm to a public body or the Government of Alberta.

[para 60] AHS's concern appears to be that the affected nursing home operators have expectations that their audited returns are confidential, and that disclosing the information in the records will violate that confidentiality, with the result that the nursing home operators may cease to enter contracts with AHS to provide nursing home care in the future. This argument is essentially the same as that rejected by former Commissioner Clark in Order 96-016. The harm that AHS may foresee does not arise from the substance of the information, but from the fact of disclosing it in contravention of an agreement not to do so. AHS's arguments do not address the substance of the information to which it has applied section 25, or provide a correlation between that information and the harms it states would be likely to result from disclosure. Moreover, its arguments do not address the terms of section 21 of the *Nursing Homes Act*, which makes it mandatory for nursing home operators to contract with it.

[para 61] As discussed above, and as previous orders of this office have stated, before section 25 can be said to apply, it must be established that a harm recognized by section 25 would result from disclosure of the information in question, and not merely from the contravention of an agreement to keep information confidential.

[para 62] I turn now to the argument that AHS's competitive position would be undermined by disclosure of the information in the records.

[para 63] In Order F2005-009, former Commissioner Work summarized past orders interpreting section 25(c)(ii). He said:

Section 25(1) is a discretionary exception that is comprised of a general rule and several specific subsections that are examples of the general rule. The Public Body or Qualicare must demonstrate that disclosure of the information could reasonably be expected to harm the economic and other interests of a public body. [...]

Order 98-020 established that speculative losses do not meet the economic interest harms test with respect to the second part of the test concerning damage.

In Order 97-005, the phrase “prejudice the competitive position” found in section 25(1)(c)(ii) means a public body must have a “reasonable expectation that disclosure of the information is capable of being used by an existing or potential competitor to reduce the public body’s or the government’s share of the market.”

[para 64] Paragraph 36 of Order F2006-023, to which AHS drew my attention, states:

It has been held that the competitive position of a public body may be prejudiced if the disclosure of information will reveal sufficient internal information about its operations and strategic plans (Order 98-019 at para. 29). Even if some of the information requested by an applicant will inevitably be made public, a public body’s competitive position may still be prejudiced if others know what the public body thinks about its options, the priority that is assigned to each option, what options have been or are being discounted, and the attention that each option is receiving or has received (Order 98-019 at para. 31). Here, the Applicant’s knowledge of what is actually occurring in the marketplace (e.g., what books are for sale once that information becomes publicly available) is not that same as knowing what might occur (e.g., what books may or may not be needed by students, depending on instructors’ selections). The Public Bodies are entitled to withhold information about their strategies and options regarding book selections, purchases and sales, even if they eventually make their decisions public.

[para 65] In Order F2006-023, the Adjudicator determined that it would undermine the competitive position of university bookstores if their strategic information regarding the books they intended to order, and the quantities, were disclosed to their competitors. The harm to the bookstores that the Adjudicator accepted would likely result from disclosure, was that competitors could make use of the strategic information developed by the universities’ bookstores in order to compete against them. He reasoned that disclosure of this information could prejudice the competitive position of the bookstores.

[para 66] The information that the Applicant seeks in this case, is not information regarding the future plans or strategies of AHS, or the third parties, or information that would reveal such, but the contents of the nursing home operators’ audited financial returns for the 2010 / 2011 fiscal year. AHS has not suggested that it is in a competition for market share, as was the case of the bookstores in Order F2006-023. AHS has not made arguments or provided evidence to suggest that disclosure of the information could be expected to have the effect of reducing its share of the market or would make it vulnerable to competitors. On the contrary, review of the *Nursing Homes Act* and its attendant regulations indicates that AHS has no competitors. As the sole regional health authority in Alberta, a nursing home operator or a prospective nursing home operator must contract with AHS in order to operate a nursing home by operation of section 21 of the *Nursing Homes Act*.

[para 67] Despite AHS's arguments, the information to which AHS applied section 25 does not appear to reveal anything about the terms AHS accepted in negotiations with the nursing home operators, other than the fact that there are reporting requirements for the nursing home operators. As the parties have acknowledged this reporting requirement in their open submissions, it appears that this contractual term is not one that any of the parties anticipate will result in harm if its existence is disclosed.

[para 68] In explaining the basis of its decision to apply section 25, AHS stated:

AHS considered the evidence presented by the Third Parties that was initially submitted by them regarding the applicability of section 16 and subsequently considered this information when formulating its view with regard to section 25. The Public Body therefore relies on Third Parties' evidence in this regard.

[para 69] AHS states that it relied on the evidence the affected nursing home operators submitted to it regarding the applicability of section 16 in making its decision under section 25. In making its decision, it appears to have considered only potential harms to its own position. However, it was open to it to consider whether a reasonable expectation of probable harm to the nursing home operators as public bodies was demonstrated by their arguments and submissions. Section 25 is not restricted in its application to harms that could reasonably be expected to result to the public body that responds to an access request. Rather, harms within the terms of section 25 that could reasonably be expected to result to *any* public body, including nursing home operators, may be considered.

[para 70] As public bodies are not given the right to request review of a public body's decision regarding access under section 65 of the FOIP Act, it is unclear to what extent public bodies have standing to make arguments in relation to the application of a discretionary exception, such as section 25, when they are not the public bodies making the decision. Although AHS claims to have considered the objections of the nursing home operators when it arrived at its decision under section 25, their specific objections were not presented in its analysis for the inquiry and it does not refer to their reasoning. Rather, AHS confined its arguments in relation to section 25 on the basis of harms it claimed could potentially befall *itself* if these parties ceased to provide nursing home services in the province. However, none of the third parties in this inquiry have argued that disclosure of their audited returns could reasonably be expected to have this result.

[para 71] While it would appear that the scheme of the FOIP Act is such that a public body that does not respond to an access request cannot challenge the decision of a public body that does, or argue a different factual basis for the responding public body's decision, I have decided to address the arguments of the nursing homes in relation to section 25. I do so because AHS states that it adopted their evidence, even though it does not refer to it in its submissions. If AHS adopted their submissions, the submissions must be addressed for the inquiry, even though AHS did not reproduce them or appear to use them in the analysis it provided.

[para 72] Park Place and Extencicare argue that section 25 should be applied to the information in their audited returns.

[para 73] Park Place argues:

This section states that a public body may refuse disclosure of information “*if the disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta*” [emphasis added by Park Place]. The disclosure of the information and potential harm is not limited to AHS, the public body that received the request, but includes other public bodies that may be affected. This would include Park place, which as a result of being an operator contracted with AHS pursuant to the *Nursing Homes Act* is a public body for the purposes of the Act.

The OIPC has held that the harm contemplated by section 25(1) must be a direct harm or a harm that would result from the disclosure of the particular information requested. The test is the same as that required for section 16(1)(c).

The OIPC has held that, in order to establish that the disclosure of information would harm significantly the economic interest of a public body, the following must be established:

- 1) There must be a clear cause and effect relationship between the disclosure and the harm which is alleged;
- 2) The harm caused by the disclosure must constitute “damage” or “detriment” to the matter and not simply hindrance or minimal interference; and
- 3) The likelihood of harm must be genuine and conceivable.

In Order F2009-028, the former Alberta Information and Privacy Commissioner recognizes that the harm test does not require evidence of actual harm, but merely requires there to be evidence to support the contention that there is a risk of harm should the information be disclosed.

Having regard to the nature of the records and the Applicant’s past labour disputes with Park Place, Park Place submits that the criteria of the harm test is satisfied and that there is a reasonable expectation of harm. That is, Park Place (which has been established to be a public body for the purposes of the Act) would clearly experience economic harm and interference with contractual negotiations of the public body, if the record were disclosed to the Applicant. In particular, this harm relates to Park Place’s ongoing and future labour negotiations with the Applicant, which represents a group of Hardisty Care’s employees.

In 2012, the Applicant was in a labour dispute with Park Place. The Applicant served a strike notice to its employer, Park Place, resulting in more than 100 licensed practical nurses and health care aides going on strike. Some of the demands raised by the Applicant included higher wages and greater benefits for the employees. The strike lasted two months, after which Park Place and the Applicant came to a tentative three year agreement (which expires in 2015) that resulted in higher wages for the Hardisty Care employees. Notwithstanding, there still exists the possibility that the parties will have future collective bargaining negotiations with the Applicant.

It is submitted that should the Applicant become aware of the various information contained in the audited financial statements, that such information could be misinterpreted and manipulated in future labour disputes and collective bargaining negotiations.

If the Applicant is aware of the confidential financial and business information of the operation of Hardisty Care contained in the records, Park Place will be at a disadvantage in future collective bargaining negotiations which may result in financial loss to Park Place as a result of

not being able to negotiate its optimal situation. Such financial information, if disclosed, would undermine Park Place's effectiveness and limit its options in future negotiations with the Applicant. That is, the Applicant's advantage in the knowledge from the audited financial returns, if disclosed, is to the disadvantage of Park Place, the public body.

Park Place further submits that such harm could be caused if such information in the audited financial returns constitutes damage or detriment to Park Place as operator of Hardisty Care, and is not simply a hindrance or minimal interference. It is submitted that the Applicant would be able to manipulate the information contained about the operations, revenues and expenses of Hardisty Care in order to gain an advantage over Park Place a party adverse in interest, during future collective bargaining and labour disputes.

Further, it is submitted that the likelihood of such harm is genuine and conceivable. The Applicant has a history of labour concerns with Park Place, including reliance on striking actions. Given this, Park Place submits that the Applicant can be an active union and there is the probability that the Applicant would attempt to manipulate and use the information contained in the audited financial returns to their advantage in future labour negotiations and disputes to the detriment of Park Place.

The OIPC in Order F2010-37 recognized that the information of a public body that can be utilized by an employee union in future collective bargaining negotiations (even after a collective bargaining agreement has been reached) can satisfy the harm test and be properly withheld from disclosure pursuant to section 25(1)(c)(iii) of the Act. Park Place submits that the case currently before the OIPC is a similar situation with similar facts.

[para 74] Extendicare also anticipates that its negotiating position in its labour relations will be harmed by disclosure of its audited financial returns. It states:

The Applicant has requested audited or related financial information from Extendicare during past collective bargaining negotiations. These requests have consistently been denied by Extendicare in the past. Further, the Records do not constitute "records" to which the Applicant is necessarily entitled at this time pursuant to section 60 of the *Alberta Labour [Relations] Code* ("Code") which requires Extendicare to collectively bargain in good faith.

In a 2011 Alberta Labour Relations Board decision, a Union was seeking disclosure of the employer's financial information for the purpose of evaluation whether certain concessions requested by the employer were financially necessary. While the Board understood that this information would be helpful to the Union, it held that in the circumstances the employer's refusal to provide this information did not amount to a s. 60 Code violation. *International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge NO D359 v. Lehigh Inland Cement*, [2011] Alta L.R.B.R. Ld-011, at para. 7

Extendicare submits that the information contained in the Records is not information the Union is entitled to under the current labour negotiations context (particularly given that the rationale for the duty to disclose information in the context of good faith labour [negotiations] does not support / facilitate fishing expeditions by unions.) *United Food and Commercial Workers International Union (UFCW Canada) v. PPG Canada Inc.* 2008 CanLII 331 (ON L.R.B.) at para. 8

While Extendicare is a public body for the purposes of the *Act*, Extendicare is a privately owned and operated for profit corporation and is not a department of the Provincial Government. Extendicare does not publish the financial information that is otherwise contained in the requested records and it is otherwise not available to the public.

In light of the Applicant's previous disclosure request, Extencicare submits it is reasonably foreseeable the Applicant would use the Records to use this information to create a strategic advantage in future bargaining. This would create significant harm for Extencicare, especially in light of the fact that Extencicare is a "for profit" business.

Extencicare is required to provide the Records to AHS in order to satisfy its obligations within the continuing care service agreements ("Agreements") that Extencicare has entered into with AHS for each of its nursing homes in Alberta and in order to receive payment for the services Extencicare provides pursuant to the agreements. The intent of the collection of this information by AHS is to ensure that Extencicare has used public health funding and resident collected accommodation fees according to the establish[ed] staffing accountabilities set out by AHS and all applicable legislation. Extencicare provides this information to AHS for those specific purposes and expects this information will remain private and confidential. (General Note: there is a contractual provision in the agreement which requires the existence and content of the agreements to remain confidential.)

These records were created specifically for AHS using AHS's reporting format and were not intended for any other purpose than to satisfy Extencicare's obligations pursuant to the Agreements. But for the Agreements, AHS would not otherwise be in possession of the Records. And, but for the AHS contractual requirement, Extencicare would not have created the Records in the particular format utilized.

In a 2007 [*sic*] decision of the Alberta Court of Queen's Bench, in an analysis of s. 25 of the Act, Justice Stevens recognized the importance to maintain the confidentiality of records that were provided in a confidential mediation process. Extencicare submits the same principles, namely that the protection of the expectation of confidentiality, should extend to the circumstances in this matter and be a relevant consideration in the application of s. 25 of the Act.

Having regard to the information contained in the Record, the Applicant's past labour relations, including labour disputes with Extencicare and the prior history of the Applicant attempting to obtain Extencicare's financial information through collective bargaining, Extencicare submits that it has demonstrated that the disclosure of its audited financial statements could reasonably be expected to harm its economic interests. More particularly if the Records were disclosed to the Applicant, this could foreseeably cause interference with future collective bargaining negotiations with the Applicant.

With the utmost of respect, the current disclosure request is perhaps an attempt by the Applicant to obtain what it would otherwise not be entitled to through the collective bargaining process.

In Alberta, long term nursing care is a highly regulated industry and the bulk of Extencicare's prices for services are set by the Provincial Government (in relation to regulated accommodation paid by residents) and by AHS (in reference to resident care funding). In order to be profitable, Extencicare must manage its costs carefully. Accordingly, the negotiating advantage that the disclosure of the record would provide the Applicant, would have a serious impact on the financial position of Extencicare and could foreseeably affect Extencicare's ability to carry on operations in Alberta.

[para 75] In its reply submissions, Extencicare states:

At paragraph 20, the Applicant disputes that confidentiality is a relevant consideration under section 25 of the Act. While section 25(1) does not expressly state that confidentiality is a relevant consideration, the "harms test" involves a contextual analysis of the relevant circumstances of each instance of disclosure. Extencicare submits that when applying the "harms test", matters such as confidentiality are relevant contextual factors to consider. This



position is supported by the 2007 [sic] decision of the Alberta Court of Queen's Bench wherein the importance of maintaining the confidentiality of records that were provided in a confidential process was recognized and as more particularly set out in the Initial Submissions. *Imperial Oil Ltd. v. Calgary (City)*, 2013 ABQB 393

[para 76] AUPE argues that none of the affected third parties have met their burdens in this inquiry. It states:

The Applicant submits that none of the Affected Third Parties have met the evidentiary threshold required to establish that there is a reasonable expectation that they will suffer harm should the requested record be disclosed in their entirety. Speculation and the potential for misinterpretation are not legitimate reasons for refusing access. The Act presumes disclosure, and the Affected Third Parties, as [...] public bodies operating nursing homes, are responsible for the expenditure of public funds. Disclosure is in accord with the purposes of the Act, which seeks to make the business and financial transactions of government transparent.

[para 77] Park Place, Extendicare, and Revera all argue that disclosing the information in their audited returns for the fiscal year 2010 / 2011 will interfere with future negotiations with AUPE. These parties also point to previous strike action by AUPE as supporting their position that AUPE will use the information in the audited returns to advance its position in collective bargaining which will harm their own positions. These parties rely on analysis in Order F2010-037 as support for the position that the previous conduct of a union in collective bargaining is evidence of the harm that could result to an employer's negotiating position from disclosing information to a union. In that case, the Adjudicator stated:

The records at issue also consist of financial information of the SBEBA, the Public Body and the Affected School Boards, such as invoices and expense claims. The Applicant could use this information in order to gain a better understanding of the SBEBA's operations, and thereby gain an advantage over the SBEBA and the Public Body in the course of future collective bargaining. It could disseminate the financial information in order to criticize the operations of the SBEBA, which would in turn harm the Public Body's bargaining position.

The Applicant questions, in particular, how disclosure of the SBEBA's constitution and bylaws would undermine the Public Body's negotiating position. In my view, they fall within the terms of section 25(1)(c)(iii) because they reveal how the SBEBA is organized and operates. As is to be expected, the constitution and bylaws set out eligibility for membership in the SBEBA, membership fees and obligations, how meetings are to be carried out, and the powers and duties of the directors, among other things. I find that disclosure of this information could reasonably be expected to permit the Applicant to interfere with the SBEBA's collective bargaining negotiations on behalf of the Public Body, in that the Applicant could use or disseminate the information in an effort to undermine the efficacy of the SBEBA.

The Applicant submits that, because it has already concluded collective agreements with the Public Body and other members of the SBEBA, it is already aware of the negotiating tactics that the Public Body says would be revealed by the records at issue. It questions how negotiation in the future will be affected by disclosure of the records, which are from a past period. I accept the Public Body's response, which is that the Public Body and the SBEBA, as its bargaining agent, have various positions and strategies that might be utilized during collective bargaining, which have been discussed internally but not necessarily implemented during the previous round of bargaining. It is also likely that the records at issue consist of much greater detail about the Public Body's negotiating strategies than have been revealed during any collective bargaining itself.

As for the second branch of the harm test, the harm that would be caused by the disclosure of the records at issue constitutes damage or detriment, and not simply hindrance or minimal interference. If the Applicant, a party adverse in interest to the Public Body in matters pertaining to labour relations, were to become aware of the views of the various School Boards when the SBEBA was being formed, learn the personnel and financial information of the Public Body and Affected School Boards, or find out the negotiation strategies considered by the SBEBA on behalf of the Public Body and the Affected School Boards once the SBEBA was formed, the Applicant would be in a position to use or disclose the information in order to gain an advantage over the opposing side during future collective bargaining. The Applicant's advantage would be the Public Body's disadvantage. Further, as required under section 25(1), the harm would be economic, given that the outcome of collective bargaining has significant financial implications.

Finally, the likelihood of the harm is genuine and conceivable. I find that there is a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue. Specifically, there is a probability of harm from disclosure of the records at issue in view of the past conduct of the Applicant in relation to the SBEBA as bargaining agent for the Public Body. As excerpted above, the Labour Relations Board concluded that the Applicant had no "logical or reasonable basis for continuing to engage in its deliberate attempts to avoid recognizing the SBEBA as the authorized agent of its employer members for purposes of collective bargaining". The Board found that, in making the public statements about the SBEBA that the Applicant had made, the Applicant "hoped the individual school jurisdictions who were members of the SBEBA might be persuaded to change their mind and withdraw from the organization" and "wanted to ensure the teachers of the affected school boards were firmly opposed against showing any support for the SBEBA."

I find it reasonable to expect that the Applicant, which has attempted in the past to interfere with the ability of the SBEBA to represent the interests of its member School Boards, and has disseminated information in an effort to undermine the credibility and efficacy of the SBEBA as a bargaining agent, will use or disseminate the information in the records at issue in order to interfere with the Public Body's negotiation of future collective agreements. There is more than mere speculation that the Applicant will use the information in the records at issue to thwart the SBEBA's future negotiations on behalf of the Public Body.

In response to the Public Body's submissions, the Applicant says that many persons who have been critical of public bodies have subsequently sought disclosure of records from those same public bodies. It accordingly argues that the Public Body has not raised a valid objection to disclosure. While it is true that a person critical of a public body may request and be entitled to records from that public body, my finding here is not simply that the Applicant has been critical of the SBEBA, and indirectly the Public Body. My finding is that the Applicant has shown that it wants to undermine the SBEBA, and is prone to disseminate statements about the SBEBA so as to diminish its credibility and efficacy as a bargaining agent, the result being that disclosure of the records at issue could reasonably be expected to interfere with the Public Body's collective bargaining negotiations in the future.

[para 78] In *Alberta Teachers' Association v. Buffalo Trail Public Schools Regional Division No. 28*, 2013 ABQB 283 the Alberta Court of Queen's Bench overturned the decision of the Adjudicator in Order F2010-037 and ordered the disclosure of many of the records the Adjudicator had found to be subject to section 25. The Court concluded that the Adjudicator's decision was unreasonable where the information in the record did not support finding that economic harm could result to the public body by its disclosure.

[para 79] Order F2010-037 is ambiguous as it is not entirely clear whether the Adjudicator meant that the past conduct of a party could ground the application of section 25, or whether he meant that the contents of the records in that case could be said to ground the application of section 25. Regardless, in my view, it is the nature of the information in the records that is determinative as to whether section 25 applies, and not extraneous considerations, such as the past conduct of an applicant. As discussed by former Commissioner Clark in Order 96-016, cited above, the harms contemplated by section 25 must result from the information at issue, and not external factors.

[para 80] Park Place's primary concern and objection to disclosure is that its audited financial returns may be open to misinterpretation and possible manipulation to its detriment if it does not provide clarification of the figures in the audited financial returns. It also pointed to some information that it considered to be open to manipulation or misinterpretation. That a party may misinterpret or manipulate information is not a harm recognized by section 25. If a party assigns meaning to information that is not supported by the information, or presents information to the public inaccurately, then any resulting harm or interference is not derived from the nature of the information, but the actions of the party reading and interpreting the information.

[para 81] Section 25 applies only to information the disclosure of which could result in one of the harms recognized by this provision, regardless of the intentions or perceptions of the applicant. It is for this reason that I consider the intentions or perceptions of an applicant to be external factors.

[para 82] To illustrate the point, information containing derogatory opinions attributed to the public body about a party with whom a public body is negotiating could reasonably be expected to result in interference with negotiations with that party within the terms of section 25; however, an opinion that is not derogatory, but for the misrepresentation or manipulation of the opinion, may not fall within the terms of section 25.

[para 83] In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, the Supreme Court of Canada rejected the potential for misinterpretation of information as a legitimate reason for refusing access. Cromwell J., speaking for the majority, stated:

Moreover, M's submission that the release of some of the information could give an inaccurate perception of the product's safety cannot be accepted. Courts have often — and rightly — been skeptical about claims that the public misunderstanding of disclosed information will inflict harm. Refusing to disclose information for fear of public misunderstanding undermines the fundamental purpose of access to information legislation; the public should have access to information so that they can evaluate it for themselves.

Applying this reasoning to the facts of this case, AUPE is entitled to the information in the audited returns so that it, and other members of the public, may evaluate it for itself, unless a harm recognized by section 25 applies to the information.

[para 84] Any harm to their negotiations with AUPE that Extencicare and Park Place have argued will result from disclosure of the audited returns requires AUPE to

manipulate or misrepresent the information. However, I am unable to find on the evidence before me that there is any information relevant to Extendicare's or Park Place's future negotiations that is of such a kind that it would interfere with them if it is interpreted accurately.

[para 85] Extendicare also argues that its contract with AHS contains a confidentiality provision. It drew my attention to *Imperial Oil Limited v Calgary (City)*, 2013 ABQB 393, in which Stevens J. overturned the Commissioner's decision that section 25 did not apply. The Commissioner had concluded that a confidentiality provision in a remediation agreement did not found the application of section 25 to the agreement and ordered the record to be disclosed to the applicant, the City of Calgary. Stevens J. concluded:

I agree with the EAB and IOL. The importance of confidentiality cannot be undermined and is integral to the willingness of the parties to engage in mediation and in the success of the process. I find that the Commissioner's decision is unreasonable on this point.

Stevens J.'s decision is based on the fact that the record under review was a mediation agreement and that the parties had agreed between themselves that it would be kept confidential as a term of the agreement. He was concerned that disclosure would undermine the success of the mediation process, and held that the Commissioner was unreasonable for that reason. In *Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231, the Alberta Court of Appeal upheld Stevens J.'s decision to quash the Commissioner's order on other grounds.

[para 86] Extendicare did not provide a copy of the confidentiality clause to which it refers, or cite it. I am therefore unable to find that such a clause applies to the contents of the audited financial returns, or to make a finding as to what kinds of information this clause is intended to apply or in what circumstances. In any event, I understand from Extendicare's arguments and evidence that the contract between it and AHS is not the result of mediation and does not settle a litigious dispute between them. I therefore find that the rationale of Stevens J. in *Imperial Oil* does not apply on the facts before me.

[para 87] Extendicare also argues that AUPE's access request is an attempt to obtain "what it would otherwise not be entitled to through the collective bargaining process". Extendicare cited *International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge NO D359 v. Lehigh Inland Cement*, [2011] Alta L.R.B.R. Ld-011, at paragraph 7 as authority for its position that unions are not entitled to obtain the financial information of an employer through the collective bargaining process. This case states at paragraph 7:

At the hearing, the Union noted the Employer's business appears to be thriving. It views some of the Employer's proposals as seeking concessions. It believes the financial and other documents will show whether the Employer in fact requires the concessions. But, the Employer has never disputed the suggestion that its business is doing well and has never suggested to the Union that its proposals are motivated by any concern about the viability of its business. It has explained to the Union that its proposals are simply based on its desire to be as competitive as possible in a marketplace that may soon have more competition. We have no doubt it would be

helpful to the Union to have the requested information – it wants to get the best deal possible for its members. However, the Employer’s refusal to provide it does not amount to a violation of section 60 in the circumstances.

[para 88] Section 60 of the *Labour Relations Code* R.S.A. 2000, c L-1 states:

*60(1) When a notice to commence collective bargaining has been served under this Division, the bargaining agent and the employer or employers’ organization, not more than 30 days after notice is served, shall*

- (a) meet and commence, or cause authorized representatives to meet and commence, to bargain collectively in good faith, and*
- (b) make every reasonable effort to enter into a collective agreement.*

*(2) The bargaining agent and the employer or employers’ organization shall exchange bargaining proposals within 15 days after the first time they meet for the purpose of collective bargaining or within any longer time agreed on by the parties.*

*(3) No employer, employers’ organization or bargaining agent and no authorized representative acting on behalf of any of them, after having served or having been served with a notice to commence collective bargaining pursuant to this Division, shall refuse or fail to comply with subsections (1) and (2).*

[para 89] In the foregoing case, the Alberta Labour Relations Board found that it was not a violation of section 60(3) for an employer to withhold its financial information from a union where the employer was not challenging the position that its business was successful. Because the employer had not suggested that there was anything wrong with its business, it was unnecessary for the employer to provide its financial information to meet the duty to make reasonable efforts to enter a collective agreement. I am unable to agree that this case stands for the more general proposition that unions are not entitled to obtain financial information regarding employers under the *Labour Relations Code*. Further, whether or not that is so, the case does not speak to whether and when a public body that is an employer must provide disclosure of records under the FOIP Act.

[para 90] Section 6 of the FOIP Act creates a right of access to information in the custody or control of a public body, subject to limited and specific exceptions. If an exception to disclosure to information does not apply, then a requestor is entitled to the information, even if the requestor is a union, and even if the duty to take reasonable measures to enter a collective agreement does not require an employer to give the information to the union in negotiations. Moreover, section 3 of the FOIP Act states that the FOIP Act is *in addition to* other procedures for access to information or records. Making a complaint under the *Labour Relations Code* is therefore only one way to obtain information; it is also possible to make an access request under the FOIP Act for the information if it is in the custody or control of a public body.

[para 91] I find that section 60 of the *Labour Relations Code* does not prevent the AUPE from requesting access to the audited returns at issue in this inquiry.

[para 92] Returning to the question of whether the parties have established that disclosure of the records they seek to have withheld could result in interference with their negotiations, I note that the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services)*, (*supra*), stated that when access to information statutes use the phrase “could reasonably be expected to”, the provisions are to be interpreted as requiring a public body or third party to prove that disclosure could reasonably be expected to result in probable harm. Section 25(1)(c), on which Extendicare and Park Place rely, uses this language.

[para 93] I am unable to find that disclosure of the information in the records could reasonably be expected to interfere with the negotiations of a public body or the Government of Alberta. I make this finding on the basis that any negotiations are taking place in the future, and the economic conditions and priorities in the negotiations are either unknown at this time, or have not been stated to me in the inquiry. The parties have not drawn a correlation between the information they seek to have withheld and a risk of interference to negotiations. While I have been told that AUPE has taken strike action previously, and that the information in the records may be useful to AUPE in future collective bargaining, this evidence falls short of establishing that interference with Extendicare’s or Park Place’s negotiations could be reasonably be expected to result from disclosure of the audited returns at issue. In any case, even if the subject and emphasis of future negotiations were known, the information at issue is for the 2010 / 2011 fiscal year, and it is unclear how it could have a bearing on negotiations in the future, particularly in the absence of explanation on this point from the parties seeking to withhold the information.

[para 94] While Park Place has referred to information that would require clarification if it were misinterpreted or manipulated, I do not accept that section 25 encompasses the situation where a party misinterprets or manipulates information, as discussed above.

[para 95] Revera, Touchmark, and Shepherd’s Care focused their arguments on the application of section 16 to the information. All three however, raised the application of section 25 as an alternative argument and argued that the information in their audited returns could be withheld under this provision. For the same reason that I found their arguments failed under section 16, I find that they fail under section 25: the evidence and arguments of these parties does not establish that there is a reasonable expectation that their negotiations would be interfered with if the information in the records at issue is disclosed.

[para 96] I find that section 25 does not apply to the information to which AHS applied this provision, or to the information Park Place and Shepherd’s Care seek to have withheld under this provision. I will therefore order disclosure of the records.

## **Issue C: Personal Information**

[para 97] The Good Samaritan Society attached a letter it had sent to AHS when it was provided notice under section 30 of AUPE's access request. The Good Samaritan Society did not comment on the severing AHS proposed in relation to section 16, but proposed severing from some of the information on the basis that the information was personal information. Good Samaritan stated that it was concerned that information in the "salaries" column of its audited return could reveal salary information in cases of positions with a limited number of incumbents.

[para 98] AHS did not apply section 17 to the records, but subsequently applied section 25 to the information. As AHS did not apply section 17, there is no decision to withhold information as personal information for me to review. If I considered there to be personal information in the records, it would be open to me to order AHS to consider whether the mandatory requirements of section 17 apply and weigh in favor of withholding or disclosing personal information.

[para 99] However, I am unable to identify personal information in the records that would require AHS to withhold it. While there is a column entitled "salaries" in the records, there is no corresponding information about the number of employees who earn the salaries or their identities. As a result, one cannot determine a specific salary amount or salary range and associate it with a specific individual from the information in the records.

[para 100] Assuming that AUPE did have information about the number of employees performing particular kinds of responsibilities, at best it could only estimate a salary range within which an employee may fall. As noted by AUPE in its reply submissions, information about an employee's salary range is information to which section 17(2)(e) applies. When a provision of section 17(2) applies to information, it is not an unreasonable invasion of personal privacy to disclose the information, and it cannot be withheld under section 17(1).

[para 101] For the reasons above, I find that section 17 does not require AHS to withhold information from Good Samaritan's audited returns.

## **V. ORDER**

[para 102] I make this Order under section 72 of the Act.

[para 103] I order AHS to disclose the audited financial returns to the Applicant, AUPE, in their entirety.

[para 104] I further order AHS to notify me, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order.

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Teresa Cunningham  
Adjudicator