ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2015-12

April 30, 2015

SERVICE ALBERTA

Case File Number F7273

Office URL: www.oipc.ab.ca

Summary: The Alberta New Democratic Party (the Applicant) made a request for access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Service Alberta (the Public Body). The Applicant requested:

> All records pertaining to the cost of developing the Alberta Baby Names app for iPhone, iPad, and Android devices.

The Public Body located invoices containing the amounts the Public Body had been charged by two third party vendors (the third parties).

The Public Body severed as nonresponsive information about costs appearing in the invoices that related to the Alberta Baby Names app, but were shared with other projects. The Public Body also severed information about the third parties' rates, at the request of the third parties.

The Adjudicator determined that the information the Public Body had severed as nonresponsive was responsive. She ordered the Public Body to take steps to clarify the access request and to conduct a new search for responsive records if it had not yet located all responsive records. She found that section 16 did not apply to the information regarding the rates appearing in the records. The Adjudicator ordered disclosure of the records in their entirety.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10, 16, 68, 72

Authorities Cited: AB: Orders 96-018, 99-018, F2004-026, F2005-011, F2007-029, F2011-016, F2015-03 **ON:** Orders MO-2496; MO-2801

Cases Cited: *Edmonton Police Service v. Alberta (Information and Privacy Commissioner*), 2012 ABQB 595; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Canada (Information Commissioner) v. Canada (Prime Minister)*, [1992] F.C.J. No. 1054

I. BACKGROUND

[para 1] The Alberta New Democratic Party (the Applicant) made a request for access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Service Alberta (the Public Body). The Applicant requested:

> All records pertaining to the cost of developing the Alberta Baby Names app for iPhone, iPad, and Android devices.

[para 2] The Public Body responded to the Applicant's access request on July 4, 2013. It stated that it was granting "partial access" to the records the Applicant had requested. It severed information as non-responsive because it was "not specific to the Baby Names app", while it severed other information under section 16 (disclosure harmful to business interests of a third party).

[para 3] The Applicant asked the Commissioner to review the Public Body's decision. The Commissioner authorized a mediator to investigate and attempt to settle the matter. Mediation was unsuccessful and the matter was scheduled for a written inquiry.

[para 4] Two organizations – "Robots and Pencils" and "Quercus Solutions Inc." – were identified as affected parties and given the opportunity to participate in the inquiry. Both these parties made submissions in support of the Public Body's decision to apply section 16 to information relating to the rates they had charged.

II. INFORMATION AT ISSUE

[para 5] All information severed from the records is at issue.

III. ISSUES

Issue A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?

Issue B: Did the Public Body properly withhold information as non-responsive to the Applicant's request?

Issue C: Does section 16 (disclosure harmful to business interests of a third party) apply to the information to which this provision was applied?

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?

Issue B: Did the Public Body properly withhold information as non-responsive to the Applicant's request?

[para 6] Section 10 of the FOIP Act imposes a duty on public bodies to assist applicants. It states:

> *10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*
>
> *(2) The head of a public body must create a record for an applicant if*
>
> *(a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and*
>
> *(b) creating the record would not unreasonably interfere with the operations of the public body.*

[para 7] Prior orders of this office have determined that the duty to make every reasonable effort to assist applicants includes the duty to conduct a reasonable search for responsive records.

[para 8] Whether the duty to conduct a reasonable search for responsive records is met is, in most cases, dependent on the manner in which a public body interprets an applicant's access request. If a public body adopts an overly narrow interpretation of an access request, it may fail to search for records properly falling within the scope of the request. If it interprets an access request overly broadly, it may spend time and expense locating records that an applicant has not requested.

[para 9] In F2004-026, former Commissioner Work noted that public bodies may have to clarify access requests in some circumstances in order to meet the duty to assist. He said:

> Finally, in its oral submission, the Applicant argued that the Public Body failed in its duty to assist by failing to clarify with the Applicant what it meant by "implementation" in the context of its original request. The Public Body suggested it did not do this because it assumed that it already understood the request. It explained that it thought it would not be reasonable for the

> Applicant to ask for the numbers of records that would be involved on the other understanding (that the request included all records in 2003 created by the Public Body relative to Bill 27 after the Bill's passage - which the Public Body described as "11 cubic feet of records"). While I have some sympathy with the Public Body's point, I have also been advised by the parties that the Applicant has since clarified this aspect of the request, which suggests that clarification was possible, and that there is indeed some further information relative to this aspect that is being sought. Thus I agree that the Public Body should have asked for clarification as to the part of the request that was ambiguous in its wording, rather than relying on its assumption, and that its failure to take this step was a failure to assist the Applicant.

[para 10] In Order F2011-016, the Adjudicator considered previous orders of this office commenting on the duties of public bodies to interpret access requests reasonably. He said:

> The Applicant submits that the Public Body was too restrictive in its interpretation of the information that he requested and therefore overlooked responsive records. Previous Orders of this Office have said that a record is responsive if it is reasonably related to an applicant's access request and that, in determining responsiveness, a public body is determining what records are relevant to the request (Order 97-020 at para. 33; Order F2010-001 at para. 26). The Applicant argues that applicants should be given some latitude under the Act when framing their access requests, as they often have no way of knowing what information is actually available. I note Orders of this Office saying that a broad rather than narrow view should be taken by a public body when determining what is responsive to an access request (Order F2004-024 at para. 12, citing Order F2002-011 at para. 18).

[para 11] In that order, the Adjudicator found that Alberta Health Services had taken too restrictive an approach in its interpretation of the kinds of information requested by the applicant. As a result, the Public Body had failed to meet its duty to assist the applicant, because it had not searched for the records the applicant had requested.

[para 12] If a public body has adopted an overly restrictive interpretation of an access request without consulting the applicant, and other interpretations are possible and better reflect the kinds of records the applicant is seeking, then the public body may fail to meet its duty to assist the applicant, by failing to search for, or produce, responsive records. If it is found that a public body has failed to conduct an adequate search for responsive records because of an overly narrow interpretation of an access request, the public body will be ordered to conduct an adequate search for responsive records that includes the kinds of records sought by the applicant. As the way in which a public body determines whether information is responsive may result in it either meeting, or failing to meet, its duty to assist an applicant, I have decided to address the question of whether the Public Body properly withheld information as nonresponsive in the course of answering the question as to whether the Public Body met its duty to assist the Applicant.

[para 13] The Applicant argued in its request for an inquiry:

> I am requesting an inquiry into Service Alberta's decision that documents related to costs for the 'Baby Names App', the original *Freedom of Information and Protection of Privacy Act (FOIPPA)* request, are non-responsive. The future intentions or applications of the app have no impact on whether or not the costs associated with developing it should be considered part of the request. The original *FOIPPA* request was not limited in terms of the application of the app and the standard applied by Service Alberta unfairly reads in a limit.

Furthermore, I am proceeding to inquiry to seek clarity on Service Alberta's conflicting statements regarding the completeness of the record they have provided. Continued public trust in *FOIPPA* requires openness and transparency and I submit that any confusion regarding the completeness of a record necessitates a thorough investigation.

[para 14] The Public Body argues:

On June 4, 2013 the Public Body received the FOIP request from the Applicant. The request was specific and limited to records pertaining to one particular app. The Applicant specifically asked for:

> *"All records pertaining to the cost of developing the Alberta Baby Names app for iPhone, iPad, and Android devices*."

[Emphasis added in the Public Body's submissions]

The time frame for the request was for records from January 2011-June 4, 2013.

On June 5, 2013 the Public Body's acknowledgement letter to the Applicant provided the wording above and invited it to clarify or modify the request, and to confirm its scope if the request's wording was not correctly described.

The Applicant provided no added clarification. Accordingly, the Public Body commenced the search for records and processed the request based upon this understanding of the request's wording and scope.

On July 4, 2013 the Public Body provided the Applicant partial access to the records, withholding some information pursuant to section 16 of the FOIP Act (disclosure harmful to the business interests of a third party) and other information as non-responsive because it was not specific to the Alberta Baby Names App as the Applicant specifically requested.

OIPC Review

The OIPC initiated a review for this file by a letter dated July 12, 2013 (received by the Public Body July I5, 2013).In requesting a review, the Applicant stated:

> *I am requesting a review of the decision to partially and entirely withhold records. The government should be able to release records pertaining to all costs associated with the development of these apps, regardless of whether these costs are not specific only to this app* and regardless of the government's stated plans to "leverage" the "knowledge, standards, and processes" across ministries. [Emphasis added by the Public Body in its submissions]

This wording represented a substantive expansion of scope from what was originally requested. The original request asked for all records related to the cost of developing the "Alberta Baby Names app". *The Applicant did not request all records related to the development or cost for multiple apps.* [Emphasis in the Public Body's submissions]

By the time of the Applicant's request for the review, the Public Body's Access and Privacy Advisor who processed the original request was no longer employed with the Government of Alberta. Another Advisor, unfamiliar with the request or the records, liaised with the OIPC Manager. The Advisor agreed to consult further with the Affected Third Parties and the program area to consider the disclosure of additional information.

> Before providing information beyond the scope of the original request, the Public Body's FOIP Coordinator sought clarity from the OIPC that the Public Body had properly withheld the information as non-responsive under the request's original scope.
>
> Paragraphs 26 to 31 in the attached affidavit, including the attached exhibits thereto, clearly demonstrate the efforts made by the Public Body to seek clarification from the OIPC.
>
> Despite these attempts to follow up with the OIPC Manager, the Public Body's concerns were never addressed by the OIPC Manager.
>
> The OIPC Manager closed the mediation/investigation process without ever meeting with the Public Body and addressing the Public Body's concerns, despite it being the *"mediation"* stage.

[para 15] The affidavit of the Public Body's Manager of FOIP Services states:

> On June 4, 2013 Service Alberta, The Public Body, received a request for information under the *Freedom of Information and Protection of Privacy Act* (FOIP) from the Applicant, Alberta's NDP Opposition. The request was specific and limited to records pertaining to one particular app. The Applicant specifically asked for:
>
> > *"All records pertaining to the cost of developing the Alberta Baby Names app for iPhone, iPad, and Android devices."*
>
> The timeframe for the request was for records from January 2011 – June 4, 2013.
>
> […]
>
> On June 5, 2013, the Public Body sent an acknowledgement letter to the Applicant, and provided the Applicant the wording above. The Public Body invited the Applicant to clarify or modify the request, and confirm its scope if it was not already correctly described.
>
> […]
>
> On July 4, 2013 the Public Body provided the Applicant partial access to the records, withholding some information under section 16 of the Act (disclosure harmful to the business interests of a third party) and other information as non-responsive *because it was not specific to the Alberta Baby Names app as the Applicant specifically requested* [my emphasis].

[para 16] The Public Body provided the following explanation of its decision to sever information from the records as nonresponsive:

> However, the total amount that was billed on the first pages of these invoices (0005 and 0007) was primarily work for the overall iOS/Android app development program of which the Baby Name iOS app was a prototype and one component. That is, the Baby Name iOS app represented only a portion of the amount billed on these invoices.
>
> Due to the totals on the first pages of these invoices reflecting the overall iOS/ Android app development program and not only information specific to the Baby Names app, these invoice pages (0005 and 0007) were considered to be beyond the scope of the original request while the remainder of the invoice pages (0006 and 0008) were severed under section 16 of the FOIP Act to protect third party business interests.

[para 17] As set out in its access request, the Applicant requested all records pertaining to the cost of developing the Alberta Baby Names app for iPhone, iPad, and Android devices.

[para 18] I note that the Public Body did not ask the Applicant whether it considered its request to be limited to those records containing costs "*specific* to the Alberta Baby Names app" even though it states that this is what the Applicant requested. Further, the Public Body did not explain to the Applicant that it had interpreted its access request as one for records pertaining to costs that were specific to the development of the app.

[para 19] The Applicant's access request is for records "pertaining to the cost of developing the Alberta Baby Names app for iPhone, iPad, and Android devices." On its face, the request is broad enough to encompass *all* information about costs incurred in developing the app, in the sense that this particular app would not have been developed without expending that cost. If the information is about a cost associated with the development of the app, then the information is responsive, regardless of whether the cost also pertains to another project.

[para 20] The Public Body's interpretation of the access request is that it is limited to only those costs specifically allocated to the development of the App and no other. It therefore withheld information as nonresponsive where the information pertained to the costs of development of the App, but the cost was shared by other projects.

[para 21] The Public Body's interpretation may be a possible, narrow interpretation of the access request, although I note that this interpretation requires reading in the phrase "specific to" as modifying the phrase, "the costs of developing the Alberta Baby Names app," as the words "specific to" do not appear in the access request. The Public Body's interpretation is narrower than the interpretation put forward by the Applicant, with the result that less information would be responsive if the Public Body's interpretation is accepted as defining the scope of the request, and more information would be responsive if the plain, ordinary meaning of the terms used in the Applicant's request is accepted.

[para 22] The Public Body did not notify the Applicant of its interpretation of the access request. Rather, the Public Body quoted the Applicant's access request verbatim and indicated to the Applicant that it would search for records meeting the Applicant's criteria unless it heard otherwise from the Applicant. In my view, given that the Public Body was adopting a narrow interpretation of the request that involved reading in the criterion that costs be "specific to" development of the app, it was necessary for the Public Body to contact the Applicant and confirm that the Public Body's interpretation of the access request corresponded with the Applicant's.

[para 23] The Public Body argues that the Applicant has changed the scope of the access request in its submissions for the inquiry and argues that the Applicant's "wording represented a substantive expansion of scope from what was originally requested". However, I find that the Applicant's access request as written, is consistent with its discussion of the request as contained in its requests for review and inquiry. Its

interpretation remains the same and is consistent with its wording in the access request. The Applicant argues that its access request encompassed all costs pertaining to developing the app, regardless of whether some of the costs were also associated with, or shared by, other projects. This interpretation is consistent with the wording of the access request and does not represent a change in intent.

[para 24] The Public Body's arguments that this office failed in some way to provide satisfactory clarification are not persuasive. Under section 10 of the FOIP Act, the duty to assist an applicant belongs to a public body, not the Commissioner or a mediator appointed under section 68. As set out above, previous orders of this office have held that when more than one interpretation of an access request is possible, with the result that more or fewer records would be responsive depending on the interpretation adopted, a public body must take steps to determine which interpretation the Applicant intends. The Public Body did not do so, but adopted its own narrow interpretation without confirming with the Applicant that this interpretation was intended. As a result, the Public Body failed to produce responsive information and its response was not complete within the terms of section 10.

[para 25] I note that the Public Body submitted the mediator's findings letter and provided extensive argument and evidence regarding what it considered to be deficiencies in the mediation process for the inquiry. I find these arguments and evidence to be irrelevant to the issues before me. A mediator's findings letter is typically not accepted into evidence at inquiry because the findings letter may contain admissions by the parties against interest and because the parties may not participate in the mediation fully if they are concerned that their statements made in the course of mediation will appear in an order. In this case, I reviewed the findings letter because the Public Body relied on it heavily in its submissions. However, the statements in the findings letter with which the Public Body takes issue are entirely irrelevant to the issue of whether it met its duty to the Applicant under section 10 and to the other issues for inquiry. I therefore disregard it and the Public Body's submissions regarding mediation.

[para 26] The next question to consider is whether the Public Body conducted a reasonable physical search for responsive records.

[para 27] The Public Body states:

> Since the Applicant originally requested records about one specific mobile application ("app"), the Public Body was able to identify precisely the location of the requested records. Nonetheless, while in the mediation/investigation process the Public Body's FOIP Office had multiple discussions with its program area to clarify the content of the identified records and to be confident all of the records that met the original scope of the request were identified.
>
> The Public Body found no additional records that were responsive to the Applicant's original request and the Public Body assures the Office of the Information and Privacy Commissioner ("OIPC") that no more responsive records exist.

[para 28] The affidavit of the Public Body's Manager, FOIP Services, states:

> Given the limited and specific scope of the Applicant's requests, the Public Body was able to identify where the records would be found and directed the search for records accordingly.
>
> On June 5, 2013 the Public Body issued a request for records to Service Modernization (then called Enterprise Services). The Public Body provided the program area contact the verbatim wording of the request and instructed it how to send all responsive records to the Public Body's FOIP Office.
>
> The Public Body issued the same request for records to Consumer Services Division. Executive Assistants to the Assistant Deputy Ministers for these program areas were also included in the request for records email.
>
> The Public Body did not identify any other program areas for a records search.
>
> On June 6, 2013 [an employee] of Service Modernization confirmed the Baby Names app was developed within her program area, and she searched for records that were potentially responsive to the request of the Applicant. [The employee] provided the Public Body with the *Record Search and Retrieval* form (Exhibit A).

[para 29] In Order F2007-029, former Commissioner Work described the kinds of evidence that assist in determining whether a search has been adequately conducted:

> In general, evidence as to the adequacy of a search should cover the following points:
>
> - The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
> - The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
> - The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
> - Who did the search
> - Why the Public Body believes no more responsive records exist than what has been found or produced

[para 30] The Public Body has addressed the question of who performed the search and partially answered the question of the scope of the search conducted. (I say partially, as it is not clear to what extent the Consumer Services Division conducted a search, and no details have been provided as to the search conducted by the Consumer Services Division or by Service Modernization.) The Public Body has not explained the specific steps it took to identify and locate responsive records, the steps taken to locate all possible repositories of relevant records, or explained why it believes no more responsive records exist than those it has located.

[para 31] As discussed above, the access request is for "*all records pertaining to the cost of developing the Alberta Baby Names app for iPhone, iPad, and Android devices*." The word "pertaining" normally means "relating to" or "having reference to". Unless the Applicant had another interpretation of this term in mind, it effectively requested all records relating to the cost of developing the app. It appears possible that there are records in existence that relate to the costs of developing the app other than those that have been produced by the Public Body. For example, it would seem possible

that there is a request for proposals or a contract between the Public Body and the vendors that may contain information that could be said to relate to the costs of developing the app. If a project manager or other employee was responsible for overseeing the development of the app, it is possible that such a person created records referring to the costs or projected costs of developing the app.

[para 32] I am unable to say definitively whether a contract or other information pertaining to costs was generated in the course of developing the app. As the Applicant did not explain in its submissions why it considered the records gathered by the Public Body to be incomplete, I am also unable to say that the Applicant intended to obtain such information when it made the access request. I am also unable to find that the Public Body conducted an adequate search for responsive records, not only because it adopted an overly narrow interpretation of the Applicant's access request, but also because it has not satisfactorily explained the steps it took to locate responsive records or explained why it does not believe any other responsive records can be produced.

[para 33] As I find that the Public Body did not take reasonable steps to clarify the kinds of information the Applicant is seeking, I will order it to contact the Applicant in order to do so. If the Applicant is seeking additional records pertaining to the costs of developing the App that the Public Body has not yet produced, then the Public Body must search for those records and produce those records, subject to the application of any exceptions to disclosure under the FOIP Act. I also intend to order the Public Body to disclose the information it severed from the records as nonresponsive, as I find this information to be responsive to the access request.

Issue C: Does section 16 (disclosure harmful to business interests of a third party) apply to the information to which this provision was applied?

[para 34] 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 35] In Order F2005-011, former Commissioner Work 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)?

To meet the requirements of section 16, information must meet each of the requirements of section 16(1)(a), (b), and (c). These requirements are incorporated into the test set out by former Commissioner Work.

[para 36] I turn now to the question of whether the information severed by the Public Body under section 16 (information about the third parties' rates that appeared in the invoices) meets the requirements of the three part test set out in Order F2005-011.

[para 37] The Public Body argues:

> On July 4, 2013 Service Alberta provided the Applicant partial access to the records, withholding some information under section 16 of the FOIP Act (disclosure harmful to the business interests of a third party).
>
> Invoices revealing the Affected Third Parties' vendor rates appear within the records. The Third Party vendor rates were not explicitly found within the records but may be derived from the invoice cost totals and the hours worked. These vendor rates meet the three-part test of section 16 of the FOIP Act.

The Public Body applied section 16 to withhold from the Applicant any information that would enable the Applicant to learn the rates Quercus Solutions Inc. and Robots and Pencils charged the Public Body for providing services.

[para 38] Quercus Solutions Inc. argues:

> Quercus, incorporated in 2005, is an Edmonton based Information Technology company that provides software application development services. The market for businesses focused on application development services is competitive. One of the key factors clients used to select a vendor includes the price point and for this reason, it's vital that our rates remain confidential.
>
> While Quercus understands the requirement for our Government to be transparent, releasing our rates would provide our competitors an advantage when responding to [requests] for proposals.
>
> We respect the Freedom of Information and Protection of Privacy [Act] and trust the Government also understands the need for all business to remain competitive and thrive in Alberta.

[para 39] Robots and Pencils argues:

> This letter is written in response to your letter dated October 31, 2014 and further telephone conversations regarding Inquiry #F7273 to formally express our objection to the additional release of information within that file, particularly commercially sensitive information that would disclose Robots and Pencils Inc.'s ("R&P") rates for a particular client.
>
> R&P is a mobile application development company that works within locally, regionally and internationally competitive environments. We have offices located within various markets, including in Canada (Alberta & Manitoba), the United States (Colorado and Texas) and the UK. The clients that we serve in turn work within various industries and markets, all of which require varying rates across different client markets, whether they are geographically or industry specific, and sometimes depending on the size and complexity of a particular project. As such, the rates that R&P negotiates with each of its clients are unique and must take into account these various factors.
>
> R&P's rate information is therefore materially sensitive from a commercial and financial standpoint for a number of reasons, not the least of which is that it would be made available to our competitors and give them a competitive advantage-to R&P's detriment. Additionally, making this commercially sensitive information available to the public would make it available to R&P's other clients that R&P has individually negotiated rates with. The sharing of this information would result in financial harm to R&P, and reputational challenges if a client believes they are not getting the best rate, even though rates are negotiated based on unique file and application considerations.
>
> Based on the foregoing, we respectfully request that R&P's contract hourly rates not be made available to the public at large and remain redacted on any public release of R&P documents.

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 40] To fall within the terms of section 16(1)(a) of the FOIP Act, information that is a trade secret, or commercial, financial, labour relations, scientific

or technical information must be "of" a third party. Section 16(1)(a) does not apply to information that is not "of a third party" i.e. information that only affects a third party, or relates to it in some way, but does not belong to it, is not information that is "of a third party".

[para 41] In Order 96-018, former Commissioner Clark adopted the following definition of "financial information" and determined that information is not the financial information of a third party for the purposes of section 16(1)(a) if the information does not allow an applicant to draw an accurate inference about a third party's assets or liabilities, past or present:

> In keeping with my decision in Order 96-013, I attribute ordinary meaning to the word "financial". I also reiterate that careful consideration must be given to the content of the document in determining whether or not the information falls within this section. Financial information, in my opinion, is information regarding the monetary resources of the third party and is not limited to information relating to financial transactions in which the third party is involved.
>
> As such, the information in the record is not of a "financial" nature because it reveals nothing of the third party's financial capabilities beyond its commitment to raise the dollar amount specified. Similarly, I find that the record reveals nothing of the third party's assets or liabilities, either past or present.

[para 42] Former Commissioner Clark considered financial information to be information about a third party's financial capabilities.

[para 43] I note that in Order MO-2496-I, an order of the Office of the Information and Privacy of Commissioner of Ontario, the Adjudicator considered the meaning of "commercial" and "financial" information as they appear in Ontario's equivalent of the FOIP Act's section 16 and stated:

> These terms have been defined in previous orders of this office as follows:
>
> …
>
> Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

[para 44] Information falling within the scope of section 16(1)(a) must also be "of a third party" in addition to falling within one of the categories of information enumerated in the section.

[para 45] Applying the definitions in Orders 96-018 and Order MO-2496-I in the context of the requirement that information be "of a third party" results in the

following interpretations: “Commercial information” is information belonging to a third party about its buying, selling or exchange of merchandise or services. “Financial information” is proprietary information, or information belonging to a third party, about its monetary resources and use and distribution of its monetary resources. If information indicates that a third party may be able to raise a certain amount of money, or will earn a certain amount of money from a particular source, such information does not necessarily reveal the third party’s financial capabilities, nor does it reveal its use and distribution of its monetary resources. Such information, therefore, does not fall within the definition of “financial information” set out in previous orders of this office and those in other jurisdictions.

[para 46] The Public Body and the two third parties take the position that information regarding the rates the third parties negotiated with the Public Body to provide services is commercial or financial information within the terms of section 16(1)(a).

[para 47] I accept that the information about rates contained in the records may reveal something about the terms under which the third parties and the Public Body were prepared to do business with each other, and can be construed as “commercial information” in that sense. The information therefore reveals something about the terms the third parties (and the Public Body) were prepared to accept in order to obtain contracts with the Public Body.

[para 48] However, the rates in this case were generated by the Public Body and the third parties through negotiations. As a result, it cannot be said that the information belongs to a third party or the Public Body in the sense of being proprietary information, given that it is the result of their mutual agreement. I am therefore unable to say that the information *belongs* to the third parties.

[para 49] I note that the Ontario Office of the Information and Privacy Commissioner took a similar position in Order MO-2801, following previous orders of that office. The Adjudicator stated at paragraphs 187 and 188:

> As stated above, the only representations about section 11(a) by Peel was that the records contain financial information that was negotiated between the affected party and Peel and that this information is confidential business information i.e. unit pricing information.
>
> Adjudicator Laurel Cropley in Order PO-2620, relying on Order PO-1736 discussed part 2 of the test under section 11(a) as follows:
>
> > Based upon my review of the records and representations, I conclude that the information contained in the records does not “belong to” the OLGC. I find that I have not been provided with sufficient evidence to demonstrate that the mutually-generated, agreed-upon terms which formed part of a negotiation process constitute the intellectual property of the OLGC or are a trade secret of the OLGC. Other than a statement that the information was created at the expense of the OLGC and the other contracting parties, I have not been provided with evidence to indicate how the OLGC expended money, skill or effort to develop the information. Therefore, I find that the information sought to be withheld does not “belong to” the OLGC

> within the meaning of section 18(1)(a) of the [Freedom of Information and Protection of Privacy Act (the provincial Act), the equivalent to section 11(a) of the Act]. Part 2 of the test under that section has not, therefore, been met.
>
> I agree with this reasoning and find that the negotiated unit pricing information of the affected party's product in pages 1002-1003, 1005-1017, 1019-1020, 1023-1025, 1027-1031, and 1033-1044 of the records does not "belong to" Peel. I find that I have not been provided with sufficient evidence to demonstrate that the mutually-generated, agreed-upon terms which formed part of a negotiation process constitutes the proprietary information of Peel. I have not been provided with evidence to indicate how Peel expended money, skill or effort to develop this information. Part 2 of the test under section 11(a) has not been met. As no other exemptions have been claimed for these pages, I will order this information disclosed.

[para 50] With regard to the argument that the information is financial information of the third parties, I accept that the information in the invoices provides some information about the third parties' accounts receivable. However, neither of the third parties argues that the Public Body is their only client, such that I could draw an inference as to the extent of their financial resources from this information. There is also no information before me as to whether the Public Body paid the rates charged as billed. As a result, the invoices do not provide a complete or accurate picture of the third parties' monetary resources or capabilities within the terms of Order 96-018, not do they indicate anything about the third parties' use and distribution of their monetary resources. On this account I am not persuaded the information is the third parties' financial information.

[para 51] In any event, even if the information is considered to be financial information, the harms asserted by Robots and Pencils are commercial harms (to competitive position) associated with the commercial, rather than the financial, aspect of the information. In my view, to find that disclosure of information is likely to cause impermissible commercial harm, the resulting harm must be associated with the commercial aspects of the information, not unrelated financial ones. No argument was made that disclosure of the financial fact that the organization had an account receivable of a particular amount could cause the organization any of the harms set out in section 16(1)(c). On this account, the financial aspect of the information, if any, is irrelevant to the section 16 question overall.

[para 52] I am not satisfied that the information regarding the third parties' rates is financial or commercial information of a third party within the terms of section 16(1)(a). However, my decision that section 16 does not apply to the rate information does not rest on this conclusion, as I find below that the requirements of sections 16(1)(b) and (c) are not met in any case.

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

Was the information supplied?

[para 53] In Order F2015-03, the Adjudicator considered whether unit prices and hourly rates negotiated by two parties could be said to be "supplied" within the terms of section 16(1)(b). She said:

> The unit prices and hourly rates making up part of the contract were agreed to between those two parties. Many past Orders of this Office, as well as from the Ontario Office and the BC Office have held that a contract is negotiated between a public body and third party, and therefore cannot be found to have been supplied by the third party. This is true even where the contract price is the same as the bid price (see Alberta Order F2009-028, BC Order F11-27, and Ontario Order PO-226). This approach has also been upheld by the Ontario Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. 2851 and *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475, and the BC Supreme Court in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603. There are limited exceptions to this principle: where the information is immutable, or where disclosure of the information in the contract would permit an accurate inference about underlying non-negotiated confidential information supplied by the third party to the public body (Order F2013-47, citing Ontario Order PO-3176).

[para 54] Previous orders of this office have held that information that is negotiated between a public body and a third party is not information that can be said to have been supplied by a third party to the public body.

[para 55] As discussed above, the evidence of the third parties is that they negotiated the rates in question with the Public Body. Rates negotiated between two parties do not constitute immutable information, (discussed in Order F2015-03) as the agreed to rates reflect what the parties were prepared to accept at a given moment. The amount that a party may be prepared to accept may change with circumstances, and is therefore not immutable. In addition, there is no evidence before me to suggest that the rates reflect non-negotiated confidential information supplied by the third party to the public body on another occasion.

[para 56] I acknowledge the invoices themselves were supplied by the third parties. However, the invoices reflect rate amounts that were negotiated previously. For these reasons, I find that the rate information was not supplied by the third parties to the Public Body.

Was the information supplied explicitly or implicitly in confidence?

[para 57] In Order 99-018, former Commissioner Clark decided that the following factors should be considered in determining whether information has been supplied in confidence:

> In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:
>
> (1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.
> (2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the Third Party prior to being communicated to the government organization.

> (3) Not otherwise disclosed or available from sources to which the public has access.
> (4) Prepared for a purpose which would not entail disclosure.

[para 58] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner*), 2012 ABQB 595, Ross J. denied judicial review of Order F2008-027, in which the four factors set out above had been applied. Ross J. stated:

> The Adjudicator held that the evidence supported a subjective expectation of confidentiality on the part of the parties, while the law requires an objective determination in all of the circumstances that information was communicated on a confidential basis […]
>
> I am satisfied that the Adjudicator's Decision is intelligible and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." In the result, I hold that her conclusion that the information in question was not supplied in confidence is a reasonable decision based on the law and the evidence before her.

As the Court has considered the test adopted in Order 99-018 to be a reasonable measure in determining whether information has been supplied in confidence, I will apply this test to determine whether the information at issue was supplied in confidence.

1. Was the information severed from the invoices communicated to the Public Body on the basis that it was confidential and that it was to be kept confidential?

[para 59] The invoices prepared by the Third Parties contain no statements to indicate that their contents were to be kept confidential. The Third Parties do not state that they supplied the invoices to the Public Body with the expectation that their contents, more specifically, the rates to be paid by the Public Body, would be kept in confidence. No restrictions were imposed as to the extent the Public Body could distribute information in the records. It does not appear from the evidence before me that the Third Parties or the Public Body ever turned their minds to the issue of confidentiality.

[para 60] The third parties request that I treat the information as confidential; however, that is not the same thing as providing evidence that the information was supplied to the Public Body in confidence.

[para 61] I find that the information was *not* communicated to the Public Body on the basis that it was confidential and to be kept that way.

2. Was the information treated consistently in a manner that indicates a concern for its protection from disclosure by the Third Party prior to being communicated to the government organization?

[para 62] There is no evidence before me to establish how the information about the rates the third parties charge the Public Body has been treated by the third parties, before or after communicating them to the Public Body. I am therefore unable to say that the information has been treated consistently in a manner that indicates a concern for its protection.

3. Has the information been otherwise disclosed or available from sources to which the public has access?

[para 63] No evidence has been provided as to whether the information has been disclosed or is available from sources to which the public has access. I am therefore unable to conclude that the information is not available from sources to which the public has access.

4. Was the information prepared for a purpose which would not entail disclosure?

[para 64] The third parties provided no evidence or argument on this point. However, the information at issue is contained in invoices. In the event of a legal dispute regarding the invoice, it would seem likely that the invoices would form part of the evidence in legal proceedings. As a result, I am unable to draw an inference from the nature of the information that the purpose for which it was created would not entail disclosure.

[para 65] For the reasons above, I am unable to find that the information at issue was supplied by the third parties to the Public Body 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 66] Although it is unnecessary to address section 16(1)(c) in relation to the information regarding the third parties' rates, given my conclusion under section 16(1)(b), I have decided to do so in the event that I am wrong that the information was not supplied in confidence.

[para 67] Section 16(1)(c) 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 result in one or more of the four following outcomes:

> *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 68] Quercus Solutions Inc. did not explain what harm it considered would be likely to result from disclosure of the rates it charges the Public Body, or explain how it believed disclosure of rate information would result in that harm.

[para 69] Robots and Pencils argues that its rates vary across different client markets and geographical locations and that each agreement it enters is "unique". It states that for this reason, if the information about the rate it negotiated with the Government of Alberta is disclosed to its competitors, that the competitors will gain a competitive advantage. Robots and Pencils also argues that its reputation would be damaged if its clients formed the opinion that they were not receiving its best rates.

[para 70] 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 71] 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 supporting the conclusion 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 party's competitive position within the terms of section 16(1)(c)(i).

[para 72] In *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 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 73] 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. Following the approach set out in the foregoing case, a third party seeking to establish the likelihood of significant harm to competitive position arising from disclosure must establish a direct linkage between the information at issue and the risk of significant interference it projects.

[para 74] Robots and Pencils points to specific information – the rates it has agreed to charge the Public Body – but does not provide sufficient detail or explanation to ground its argument that disclosure of this information would result in significant harm to its competitive position. It argues that each agreement it negotiates is unique and it is for this reason that disclosure would benefit its competitors; however, it is unclear why disclosing the rates negotiated in a unique contract would provide any competitive advantage to competitors.

[para 75] Robots and Pencils has already entered a contract with the Public Body, and so it appears that the existing contract with the Public Body itself could not be

obtained by a competitor. For the information regarding the Public Body's rates to benefit a competitor with respect to future contracts (presumably enabling the competitor to undercut Robots and Pencils) there would have to be a substantially similar request for proposals to develop a similar app or apps for the same or a similar client in a very similar economic situation. However, I have not been given any information regarding other requests for proposals or competitions in which Robots and Pencils is likely to engage, or who its competitors are likely to be, with the result that I am unable to assess the likelihood that Robots and Pencils' competitive position would be harmed by disclosure.

[para 76] Robots and Pencils also argues that its reputation may be harmed by disclosure of the rates it negotiated with the Public Body. It is unclear to me from its arguments how reputational harm would be likely to result from disclosure of the unique rates it negotiated with the Public Body. Moreover, damage to reputation is not a harm specifically enumerated in section 16(1)(c). As discussed above, section 16(1)(c) contains an exhaustive list of harms, and it is not open to me to consider harms not enumerated in this section.

Conclusion

[para 77] As I find the requirements of section 16(1)(b) and (c) are not met, I find that section 16 does not apply to the information to which the Public Body applied this provision. I will therefore order the Public Body to disclose the information it severed from the records.

V. ORDER

[para 78] I make this Order under section 72 of the Act.

[para 79] I order the Public Body to disclose the information it severed from the records at issue to the Applicant in its entirety.

[para 80] I order the Public Body to take steps to clarify the scope of the access request by contacting the Applicant to determine whether it has produced all responsive records, or must conduct a new search in order to meet its duty to assist the Applicant. Any new decision regarding the scope of the access request and any new search conducted for responsive records, are subject to review by this office.

[para 81] I order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

_____

Teresa Cunningham
Adjudicator