ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2015-15

May 22, 2015

ALBERTA ENERGY

Case File Number F6260

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Summary: An Applicant made an access request to Alberta Energy (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for studies, reports or documents comparing Alberta's royalty rates and regime for non-renewable energy resources costs to royalty rates and regimes in other jurisdictions.

Some of the responsive records included information of a private sector organization (the Third Party). The Public Body decided to give the Applicant access to the requested records and the Third Party requested a review of that decision, arguing that disclosure of the records containing its information would be harmful to its business interests under section 16(1) of the Act.

The Adjudicator found that section 16(1) applied to the numerical information in graphs or charts in the records at issue, as the information was a trade secret as defined in the FOIP Act, was supplied in confidence, and could result in a harm enumerated in section 16(1)(c) if disclosed. However, the Adjudicator found that the Third Party's name could not be withheld under section 16 as it did not fall into any of the categories of information in section 16(1)(a).

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 16, 67, 71, 72.

Orders Cited: AB: Orders 98-013, F2004-013, F2005-011, F2008-018, F2009-028, F2010-036; **BC**: 00-10.

Case Cited: AB: *Canada (Prime Minister) v. Canada (Information Commissioner),* [1992] F.C.J. No. 1054, 2008**.**

I. BACKGROUND

[para 1] By letter dated December 9, 2011, an Applicant made an access request to Alberta Energy (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for "any and all studies, reports or documents comparing Alberta's royalty rates and regime for non-renewable energy resources including oil sands, natural gas, shale gas, coal bed methane, and other unconventional gas, conventional oil, and coal to royalty rates and regimes other jurisdictions." The time period for the request is 2009 to the date of the request.

[para 2] By letter dated January 4, 2012, the Public Body clarified the scope of the request. This letter stated the Public Body's understanding of the request as including (amongst other items) "records that have been prepared using the raw information (e.g., an assessment document with context that actually shows/discusses a comparison of Alberta's royalty rates to other jurisdictions)", and "any reports or assessments from third party experts regarding royalty rate comparisons."

[para 3] Some of the responsive records included information of a private sector organization (the Third Party). The Public Body decided to give the Applicant access to the requested records and the Third Party requested a review of that decision, arguing that disclosure of the records would be harmful to its business interests under section 16(1) of the Act.

[para 4] As contemplated by section 67(1)(a)(ii) of the Act, the Applicant was notified of the Third Party's request for review, as it is affected by the request. The Applicant made submissions to the inquiry.

II. RECORDS AT ISSUE

[para 5] The records at issue consist of numerous bar graphs or charts representing drilling or related costs in various regions of Alberta. There appear to be several sources of the information reflected in the graphs, including the Third Party. The information at issue in this inquiry is the Third Party's information (particular bars on the graphs), which is clearly marked, and the Third Party's name appearing on the pages.

III. ISSUES

[para 6] The Notice of Inquiry, dated March 4, 2014, set out the following issue:

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

IV. DISCUSSION OF ISSUES

Preliminary issue – Applicant's participation and responsiveness of records

[para 7] The Third Party has argued that the Applicant provided a "very short and tardy submission", and that the inquiry should be discontinued "based on the uncertainty demonstrated within the Applicant's Initial Submission" amongst other reasons. The Applicant, in its initial submission, stated:

> The [Applicant] does not know the identity of the Third Party initiating this inquiry, nor do we know what is contained in the disputed documents (though we surmise it is on energy royalties, as this was the topic of the original request for information.)

[para 8] The Applicant does not bear any burden of proof with respect to the issue in this inquiry, and the paucity of its arguments is not a relevant consideration. Further, the Applicant's uncertainty regarding the contents of the records at issue is not surprising, nor can it weigh against the Applicant's arguments in the inquiry, as the Applicant apparently does not have a copy of the records at issue (including a severed copy).

[para 9] The Third Party also argued that as the Applicant's request related to royalty rates, the information at issue in this inquiry is not responsive to that request.

[para 10] By letter dated March 20, 2015, the Public Body explained how it determined that the records at issue are responsive to the Applicant's request. The Public Body states that the records are pages from two presentations created by the Public Body. The records are responsive to the request insofar as they relate to the Public Body's energy royalty review, "which compared world-wide royalty rates based on factors such as resources and reserves, production, drilling activity, investment, costs, fiscal terms and recent developments." I agree with the Public Body that these records are responsive to the Applicant's request.

Does section 16 of the Act (disclosure harmful to business interests of a third party) apply to the information in the records which the Public Body proposed to disclose to the Applicant?

[para 11] Section 16 of the Act reads, in part, as follows:

> *16(1) The head of a public body must refuse to disclose to an applicant information*
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> *(a) that would reveal*
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> *(i) trade secrets of a third party, or*
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> *(ii) commercial, financial, labour relations, scientific or technical information of a third party,*
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> *(b) that is supplied, explicitly or implicitly, in confidence, and*
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> *(c) the disclosure of which could reasonably be expected to*
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> *(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

…

[para 12] As this inquiry involves a request for review by a third party following a public body's decision to release a record to an applicant, the burden of proof set out in section 71(3) of the Act applies. It reads as follows:

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

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

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

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

[para 13] For section 16(1) to apply to information, the requirements set out in all three paragraphs of that section must be met.

- Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party under section 16(1)(a)?

- Was the information supplied, explicitly or implicitly, in confidence under section 16(1)(b)?

- Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)? (Order F2004-013 at para. 10; Order F2005-011 at para. 9)

[para 14] The Public Body's report identifies the Third Party as the source of the information at issue in its report. The Third Party has objected to the disclosure of its name, in addition to the disclosure of its numerical data. I will consider the application of section 16 to the numerical data first, and then consider its application to the Organization's name.

Numerical data

[para 15] The Third Party argued that the information at issue is a trade secret of the Third Party. "Trade secret" is defined in section 1(s) of the FOIP Act as follows:

1 In this Act,

(s) "trade secret" means information, including a formula, pattern, compilation, program, device, product, method, technique or process

(i) that is used, or may be used, in business or for any commercial purpose,

(ii) that derives independent economic value, actual or potential, from not being generally known to anyone who can obtain economic value from its disclosure or use,

(iii) that is the subject of reasonable efforts to prevent it from becoming generally known, and

(iv) the disclosure of which would result in significant harm or undue financial loss or gain.

[para 16] The Third Party argues that the information meets this definition because:

- The information was compiled from data acquired from the Third Party's clients on a confidential basis. The information was analyzed by the Third Party using techniques it developed over 20 years.
- The data is not available to the general public; rather, it is sold to the Third Party's clients on a confidential basis. Those sales form the basis of the Third Party's business.
- The information could not be reproduced by another party because "only [the Third Party] has the confidential data of many companies from which the Information is produced and for which access is requested. It is this aspect along with the skill, knowledge, and experience of [the Third Party] that makes the Information so useful to its clients and gives it a high commercial value."
- The Third Party attempts to keep this type of information from public disclosure by informing clients that information may be used only internally by the purchaser and by including a copyright and confidentiality disclaimer on its products.
- The information would lose its commercial value if disclosed, resulting in considerable business losses to the Third Party.

[para 17] The definition of trade secret indicates that it is intended to apply to the manner in which a product (including data) has been or will be developed; it also applies to a 'compilation' or 'product'.

[para 18] In this case, the records reveal data regarding averages of drilling costs in particular areas of the province. The Third Party has stated, in its exchanged submissions, that it uses data from its clients to compile its research. It also states that it uses techniques, which it has developed over many years, to compile the research. The data itself does not appear to reveal the techniques developed by the Third Party, but the data is a compilation and/or product. The Third Party clearly uses that data for a business or commercial purpose (namely, it sells compilations of data) and derives an independent economic value from selling that data.

[para 19] Regarding the third part of the test, the Third Party has stated that it takes measures to maintain confidentiality of its products, including copyright and confidentiality notices on its products, and pursuing parties by legal means that have attempted to obtain unauthorized access

to its information. The reports provided to the Public Body included both a copyright notice and a confidentiality and non-disclosure notice.

[para 20] The remaining factor of the definition for trade secret is whether the disclosure of the information would result in significant harm, or undue financial loss or gain. This is similar to the test for harm in section 16(1)(c)(i) and (iii). In Order 98-013, the former Commissioner emphasized that the harm under section 16(1)(c)(i) must be significant, and evidence of the following must be shown:

i. the connection between disclosure of the specific information and the harm which is alleged;
ii. how the harm constitutes "damage" or "detriment" to the matter; and
iii. whether there is a reasonable expectation that the harm will occur.

[para 21] The former Commissioner also emphasized that under section 16(1)(c)(iii), a financial loss or gain must be "undue" (at para. 32). In my view, these comments are equally applicable to the fourth factor in the definition of "trade secret".

[para 22] In *Canada (Information Commissioner) v. Canada (Prime Minister)*, 1992 CanLII 2414 (FC), [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 23] The Third Party argued that disclosing its information in the records at issue would result in harm; specifically, it stated:

> [t]he information in question is part of a full cycle set of studies that we continue to market and is being sold as a package to new 2013 subscribers. The previous studies and new studies provide clients with a range of full cycle cost analysis which allows the client to better understand natural gas full cycle economics.
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> …
>
> We contend that by releasing to the public domain one entire segment of our current study package would bring us considerable economic harm as well as harm our reputation and position with our clients who have already purchased this information from us. (Request for inquiry attachment, page 1)

[para 24] It also argued:

> if the information were made freely available to any other parties or consultants the harm would be twofold:
>
> - potential clients would have access to results that they would otherwise have to purchase from [the Third Party]
> - [the Third Party's] competitors would have access to the Information for their own uses (Request for review attachment, page 8)

[para 25] On the basis of the Third Party's submissions, I understand the significant harm contemplated by the Third Party from disclosure of the information at issue to be financial loss caused by the inability of the Third Party to sell its products (information) to potential clients in the future. In other words, competitors or potential clients may not purchase the Third Party's reports if the information were disclosed for free. The Third Party also seems to indicate that the disclosure of information, for free, for which current clients have paid, would damage the Third Party's reputation with those current clients. With respect to undue financial gain, the Third Party seems to argue that competitors or potential clients would realize an undue financial gain if the records at issue were disclosed and/or that it would realize undue financial loss if the records were disclosed.

[para 26] With respect to undue financial loss or gain, the Public Body argued that "the information provided by the third party was published in 2005, almost 10 years ago – this greatly diminishes the financial value of the information, if there is any financial value remaining in the study… There is no evidence provided by the third party that release of the information would result in undue financial loss or gain by either the third party or any other entity that obtains the information." (Initial submission, paras. 33 and 34) The Third Party pointed out that one of the records was created in 2010 and is therefore not 10 years old. The Public Body acknowledged this point but stated that the record was still several years old, which affects it value. Furthermore, the information at issue "does not contain information useful to a potential competitor of the third party without first knowing what went into the document and how the information was compiled, obtained and manipulated – information of which a competitor would presumably have to contact the third party for." (Public Body's rebuttal submission, para. 9)

[para 27] Upon reviewing the records at issue, it seemed that the Third Party's information appearing in the records comprised only small snippets of the reports sold or licensed commercially by the Third Party. If competitors of the Third Party were able to use the information in the records at issue to their own advantage, without compensation to the Third Party, this would arguably result in undue financial gain to the competitors. Reports sold (or licensed) by the Third Party would likely be of great value to other organizations; however, the question in this inquiry is whether the discrete items of information in the records at issue would have value. It may be the case that the information at issue might be such a small amount of relatively innocuous information that a competitor (or potential client) would not have a use for it, absent the remainder of the Third Party's reports (or significant portions of the reports).

[para 28] By letters dated December 8, 2014, and March 30, 2015, I asked the Third Party how the disclosure of these discrete items of information (as opposed to the Third Party's research more generally) would lead to significant harm or undue financial gain or loss. I also asked it to

explain exactly how a competitor or potential client could use the specific items of information such that they would enjoy an undue financial gain from the disclosure of that information and/or the Third Party would realize an undue financial loss or significant harm.

[para 29] The Third Party provided two submissions to the inquiry, and responded to my letters; it was not until its response to my last letter that the Third Party fully explained how the information at issue would be valuable to other organizations (such as competitors or potential clients) such that those organizations could realize a financial gain from the disclosure of the information. It seems likely that the Public Body did not have the benefit of this information when it made its initial decision to disclose the information, nor when it made its submissions regarding whether disclosing the information at issue could result in harm for the purposes of section 16. (The Public Body did not respond to the Third Party's final explanation regarding the value of the information in this final submission although it had an opportunity to do so). The Third Party stated:

> … [T]he process [of providing periodic actual cost benchmarks] requires many peer oil and gas companies to provide numerous discreet [sic] items of interest to an independent service company so that a comprehensive cost database can be compiled, processed, and reported. The Undisclosed Third Party has established a unique service that does that. The service is so unique that most companies only use this specific service and have done so for many years. The requirement of gaining access to the valuable insight is only available to participants in individual annual cost studies.
>
> Transportation, industrial, governmental, and other non-producing companies wanted to gain some insight on the full-cycle cost of producing oil or natural gas. An additional study service was formulated less than 10 years ago to allow non-participants access to average full-cycle cost data based on averages from existing studies and/or based on detailed and laborious research of public files. This average fullcycle cost data and research is compiled into an economic ranking study by geographic region so that similar costs for similar regions can be compared. Note that this actual average cost insight or assessment from this research is not readily available to others without a subscription to a specific study. The average full-cycle cost data, which is a discreet [sic] item of information, provides a non-producer with great insight as to the oil and natural gas costs incurred in a region for a specific time period in a specific oil and gas price environment. Undertaking these secondary study services is a huge undertaking taking over a year to compile the most recent study. Since the secondary service has generated cost reports in 2008, 2010, and 2014, getting access to the discreet [sic] items of interest (average costs for a region) via a subscription service allows a non-producing company direct access to several years' worth of valuable research.
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> To clarify "valuable", the Undisclosed Third Party means a firm can use the discreet [sic] items of interest to their benefit. Some examples could be:
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> - Negotiate a better market price with a producer for a contract to purchase oil or gas as the subscribing party has an unfair advantage over a non-subscriber as they know the average cost structure for producers in that specific region… **These full-cycle unit costs for specific geographic regions, which are the exact discreet [sic] items of information sought through this [inquiry] process, are the items of highest value in the study** (discreet [sic] items of information) and it is these discreet [sic] items of information that were extracted and shown to the public in violation of the copyright and restriction provisions of the study purchased by the subscriber. As an

aside, this [inquiry] would not be underway if the copyright provisions were respected.

- An oil or gas company can adjust a purchase price of acquiring all oil and gas assets of a producer by adjusting its purchase price based on the average full-cycle cost obtained from the study. Conceptually, why pay more than the full-cycle cost of the oil and gas assets? Savings by having direct access to these discreet [sic] items of information can greatly assist to shape the final purchase price of the assets. That is why companies chose to purchase the report as they can reap the rewards of accessing discreet [sic] items of information that take up to a year to assemble into a detailed assessment.
- Conversely, if a firm is selling its oil and gas producing assets, and if the company's actual cost is lower than average full-cycle cost for the region, then the company can truthfully boast that it is indeed a low full-cycle cost producer and therefore ask and capture a premium for the oil and gas production assets based solely on the simple value of a discreet [sic] item of information that the study contains.
- There are many examples that companies have as to the reason to purchase the studies, though **the essential information that companies are seeking is just these simple discreet [sic] items of information**. The full report adds in explanations, comparisons, maps, and tables, though it is the simple discreet [sic] items of information, the full-cycle cost, that the subscribers cherish and that is exactly the information that Alberta Energy has chosen to release. (April 10, 2015 letter, emphasis mine)

[para 30] In BC Order 00-10, former BC Commissioner Loukidelis considered the meaning of "undue financial loss or gain" appearing in the BC equivalent of section 16. He reviewed Orders from Alberta and Ontario (the Ontario legislation refers only to undue loss or gain, it is not limited to financial loss or gain). He noted (at page 18):

> In any case, it is plain that the Ontario and British Columbia provisions both protect against financial gain or loss that is undue. Ontario decisions consistently show that if disclosure would give a competitor an advantage, usually by acquiring competitively valuable information, effectively for nothing, the gain to the competitor will be undue. See, for example, Ontario Orders 125, P-561, P-1105 and M-920.

[para 31] He concluded that undue financial or gain in BC's Act encompasses situations in which the information at issue has value to competitors, and the gain a competitor might experience from disclosure would be unfair and inappropriate. He stated (at page 19):

> The gain to Pacific Western from having that information would be undue because it would be unfair, and inappropriate, for Pacific Western to obtain otherwise confidential commercial information about two of its competitors and thereby reap a competitive windfall.

[para 32] Regarding undue financial loss of the third parties in that case, he stated (at page 19):

> Further, the resulting financial loss to Labatt and to Molson would be undue. As was discussed earlier, the evidence shows that the loss to Molson, at least, can reasonably be expected to be in the "millions of dollars". Although the tests of significant harm to competitive position and undue financial loss or gain may in some cases overlap, the tests

> differ. In this case, the expected loss would be undue both because of its size, or significance, and because it would be inappropriate and unfair. Although it will not necessarily always be true, in this case, at least, the same considerations establish the undue nature of the expected financial loss and the gain.

[para 33] I agree with the above analysis: in order to find that another organization may experience undue financial gain from the disclosure of the record, I must be satisfied that the organization would gain information that has value and that the gain would be inappropriate or unfair.

[para 34] The Public Body has noted that "the public document created by the [Public Body] using the third party information also combined information from other sources – the third party information is only a small part of the document being requested by the Applicant." (Public Body Initial submission, para. 33) The other sources cited are ADOE and NEB (presumably Alberta Department of Energy – the Public Body – and the National Energy Board). I do not know why the information from these sources is less valuable (or even if it is less valuable) than the information from the Third Party, and the Third Party has not addressed this point.

[para 35] Nevertheless, I find the Third Party's arguments sufficiently persuasive to conclude, on a balance of probabilities, that the Third Party's information in the records has value such that its disclosure to a potential customer or competitor would result in undue financial gain to that organization. In my view, gaining information for nothing when other parties pay for that information, meets the test for undue financial gain.

[para 36] Regarding the Public Body's argument that the information does not have sufficient value to meet the test for harm because of the age of the information, the Third Party argues that this is a misunderstanding of the information. It argues that information about past energy 'cycles' remains valuable because it can still be used to predict future costs; I accept this argument. Regarding the Public Body's argument that the information at issue is not valuable without context such as how the information was compiled, obtained and manipulated, I accept the Third Party's explanation that while its full reports add explanations etc., the numerical cost values (the information at issue) are valuable by themselves because of their use to potential clients or competitors for assessing pricing and costs.

[para 37] I do not know how the Applicant plans to use these particular items of information, if at all. Nevertheless, once the information is disclosed to the Applicant, the Applicant may use and disseminate that information however it sees fit. Even if the Applicant has no use for this particular information, the information may find its way to a potential customer or competitor in any event. Therefore, the final factor in the definition of "trade secret" is met regarding the numerical data. I will consider below whether the tests for section 16(1)(b) and (c) are met.

Third Party's name

[para 38] In order for the Third Party's name to be withheld under section 16, it must also meet the test set out in section 16(1). It is not clear how the name of the Third Party does so; by letter dated December 8, 2014, I asked the Third Party to address the disclosure of its name. The Third Party responded as follows:

1. Releasing the Undisclosed Third Party's name to the public suggests the Undisclosed Third Party has sanctioned the release - and that is not true. In fact, harm occurs as the Undisclosed Third Party does not allow that to happen anywhere and if the Public Body staff were to have asked the Undisclosed Third Party if they can breach the subscription agreements by disclosing confidential information, the Undisclosed Third Party would have declined to allow use of the Undisclosed Third Party's name. Nowhere in the public domain is the Undisclosed Third Party name used concurrently with this discreet [sic] information. The Undisclosed Third Party name is confidential when using the discreet [sic] information in the public. The Public Body was aware of this as agreed to when they subscribed to the multiclient studies.
2. The Undisclosed Third Party studies were supplied in confidence and the Undisclosed Third Party name was not to be released. The Undisclosed Third Party's good reputation rests on the basis that the Undisclosed Third Party only allows clients to use our confidential information internally, thus harm occurs as other prospective clients will simply await access to 'free' use when the Public Body [breaches] its Undisclosed Third Party subscription agreements.

[para 39] This does not address how the Third Party's name meets the requirement of section 16(1). Commercial information is information *about* an organization's buying and selling; financial information is information *about* an organization's monetary resources; technical and scientific information is information *about* an organization's use of scientific and/or technical methodologies etc. (see Orders F2009-028 and F2010-036).

[para 40] The Third Party's name is not commercial, financial, scientific, or technical information, or a trade secret, as described above; the Third Party has not argued that the information could be characterized as labour relations information and there is no indication from the records themselves that it could be. As such, it does not meet the requirements of section 16(1)(a) and cannot be withheld under section 16. I therefore do not need to consider the application of sections 16(1)(b) or (c) to the Third Party's name appearing in the records.

Section 16(1)(b) – Information supplied in confidence

[para 41] In order for section 16(1)(b) to apply, the information must be supplied by the third party to the public body, explicitly or implicitly in confidence or would reveal information that was supplied in confidence.

[para 42] As noted above, the Third Party states that it goes to considerable lengths to keep its information confidential. The reports provided to the Public Body included both a copyright notice and a confidentiality and non-disclosure notice; the latter limits the use of the report to Public Body internal use. The Third Party also argued that had the Public Body honoured it copyright, the inquiry would not have been necessary.

[para 43] The Public Body acknowledges that the information was provided by the Third Party explicitly in confidence.

[para 44] With respect to the Third Party's claim that honouring the copyright notice would have made an inquiry unnecessary, I note that copyright does not negate a public body's duty to respond to a request for access made under the FOIP Act. In this case, the Public Body determined that information from reports of the Third Party were responsive to an access request; it was required under the FOIP Act to consider whether it must grant access to that information under the Act.

[para 45] In Order F2008-018, the adjudicator considered the relevance of a copyright to the application of section 16(1)(b). She said (at paras. 81-82):

> I do not find the copyright warning on Record 125, or the record referred to in ACS's *in camera* submissions (discussed below) to be relevant to the issue of confidentiality. Rather, these warnings caution the user that the work is copyrighted and that the owner of the copyright is asserting those rights against unauthorized copying and distribution. The copyright warning does not mean that the right of access to the copyrighted work is restricted. In fact, section 32.1 of the *Copyright Act* permits copying of copyrighted works for the purpose of complying with federal and provincial access to information legislation.
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> I agree with the reasoning of the Information Commissioner of the United Kingdom, when he said in Decision FS50083358:
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> > …the fact that information may be someone's intellectual property does not of itself preclude its legitimate availability to others. Just as library books may be protected by copyright, their public availability is not restricted because of that status.

[para 46] That said, at the time the Third Party provided its reports to the Public Body, it clearly intended that the information remain confidential. The Public Body agrees that the information was provided explicitly in confidence and the confidentiality notice is evidence of this. I therefore find that section 16(1)(b) is met.

Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)?

[para 47] I noted above that the part of the definition of "trade secret" that requires that the disclosure of the information at issue result in significant harm, or undue financial loss or gain, is similar to the test for harm set out in section 16(1)(c)(i) and (iii). I have found that the disclosure of the Third Party's information in the records at issue could reasonably be expected to result in undue financial gain for another organization; it follows that I find the disclosure of the information could reasonably be expected to result in undue financial gain to another organization for the purposes of section 16(1)(c).

Conclusion regarding the application of section 16(1)

[para 48] The numerical data appearing in the records at issue is information to which section 16 applies, and therefore must be withheld. However, the Third Party's name is not information to which that exception applies, and cannot be withheld under section 16.

V. ORDER

[para 49] I make this Order under section 72 of the Act.

[para 50] I find that section 16(1) of the Act applies to the Third Party's numerical data appearing in the records at issue. I order the Public Body to withhold that information from the Applicant.

[para 51] I find that section 16(1) of the Act does not apply to the Third Party's name appearing in the records at issue. I uphold the Public Body's decision to disclose the Third Party's name, and I order the Public Body to disclose it to the Applicant.

[para 52] I further order the Public Body to notify me and the Third Party in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

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Amanda Swanek
Adjudicator