ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2016-64

December 22, 2016

ALBERTA HEALTH SERVICES

Case File Number F7836

Office URL: www.oipc.ab.ca

Summary: The Alberta Union of Provincial Employees (AUPE) made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Alberta Health Services (AHS) for "all current home care contracts between [AHS] and home care providers."

AHS provided notice of the request under section 30 of the FOIP Act to the home care providers who were parties to the contracts. The Shepherd's Care Foundation (the Applicant) objected to disclosure of the contract. However, AHS decided that it would disclose the contract. The Applicant requested review of AHS's decision to disclose the information and asked that it be withheld under section 16 (disclosure harmful to business interests), section 17 (disclosure harmful to personal privacy), or alternatively, section 25 (disclosure harmful to economic and other interests of a public body).

The Adjudicator upheld AHS's decision to disclose the information. In doing so, she found that the Applicant was a third party and not a public body within the terms of the FOIP Act, but that the information it sought to have withheld was not its information within the terms of section 16(1)(a). The Adjudicator also found that the information it sought to have withheld was not supplied in confidence, and that the Applicant did not establish that disclosure of the information would be likely to result in any of the harms contemplated by section 16(1)(c) of the FOIP Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 12, 16, 17, 19, 24, 25, 30, 34, 40, 51, 65, 71, 72, 75, 78, 82, 89, 91, 94; *Nursing Homes Act*, R.S.A. 2000, c. N-7, ss. 1, 2; *Interpretation Act*, R.S.A. 2000, c. I-8, s. 28

Authorities Cited: AB: Orders 96-013, 96-018, 99-018, 2000-005, F2002-002, F2002-006, F2003-004, F2005-011, F2008-018, F2008-023, F2008-027, F2009-007, F2009-015, F2009-028, F2010-13, F2010-036, F2011-001, F2011-002, F2011-018, F2012-06, F2012-17, F2013-17, F2013-37, F2013-47, F2013-48, F2014-21, F2014-44, F2015-03, F2015-12; **ON:** P-489, MO-2496, MO-2801

Cases Cited: *F.H. v. McDougall*, [2008] 3 S.C.R. 41; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Aventis Pasteur Ltd. v. Canada (Attorney General)*, 2004 FC 1371; *Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231; *Edmonton Police Service v. Alberta (Information and Privacy Commissioner*), 2012 ABQB 595; *Slavutych v. Baker*, [1976] 1 S.C.R. 254

I. BACKGROUND

[para 1] On August 7, 2013, the Alberta Union of Provincial Employees (AUPE) made an access request to Alberta Health Services (AHS) for "all current home care contracts between Alberta Health Services and home care providers."

[para 2] AHS provided notice of the request under section 30 of the FOIP Act to the home care providers. Shepherd's Care Foundation (the Applicant) received notice and objected to disclosure of its contract. However, AHS decided that it would disclose the contract, on the following basis:

> After carefully considering your views on the disclosure of the responsive records, [AHS] wishes to advise that it is unable to withhold the responsive records under s. 16(1) of the *Freedom of Information and Protection of Privacy Act* ("FOIP Act") as Shepherd's Care Foundation did not provide that either the entire responsive records or certain provisions in them meet the three-part test established in s. 16(1) of the FOIP Act.
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> While the responsive records contain some of Shepherd's Care Foundation's commercial information, AHS, however, takes the position that the commercial information was not "supplied … in confidence" by Shepherd's Care Foundation to AHS.
>
> For a third party's business information to be considered under s. 16(1) of the FOIP Act, such business information would normally have to be supplied by that third party and not [compiled] by the public body. AHS contends that the terms of the responsive records arose from negotiations between AHS and Shepherd's Care Foundation.
>
> In view of the above, AHS takes the position that the commercial information that is sought to be protected resulted from negotiations between AHS and Shepherd's Care Foundation, hence the non-applicability of section 16(1). In IPC Order 96-013, Alberta's Privacy Commissioner concluded that section 16(1)(b) does not cover information that is generated through negotiations with the public body.

[para 3] The Applicant requested review by the Commissioner of AHS's decision to disclose the contract to the AUPE. The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

II. RECORDS AT ISSUE

[para 4] The Master Services Agreement between AHS and the Shepherd's Care Foundation is at issue.

III. ISSUES

Issue A: Is the Applicant a public body within the terms of sections 1(p)(vii), 1(j)(ii) and 1(g)(ii) of the Act? If a public body, does it have a right to request review under section 65(2) of the Act of AHS's proposal to disclose its information, having regard to section 1(r) (which excludes public bodies from the definition of "third party")?

Issue B: Does section 16 (disclosure harmful to business interests) apply to the information AHS has decided should be disclosed?

Issue C: Did AHS properly refuse to apply section 25(1) (disclosure harmful to economic and other interests of a public body) to the information it has decided should be disclosed?

Issue D: Did AHS properly refuse to apply section 17 (disclosure harmful to personal privacy) to the information it has decided should be disclosed?

IV. DISCUSSION OF ISSUES

Issue A: Is the Applicant a public body within the terms of sections 1(p)(vii), 1(j)(ii) and 1(g)(ii) of the Act? If a public body, does it have a right to request review under section 65(2) of the Act of AHS's proposal to disclose its information, having regard to section 1(r) (which excludes public bodies from the definition of "third party")?

[para 5] AUPE takes the position that the Applicant would be a public body and not a third party in this inquiry if it provides nursing home care in addition to home care. AHS takes the position that the Applicant is a third party. The Applicant made no submissions on this point, although it refers to the information it seeks to have withheld as "confidential third party information".

[para 6] AUPE states:

> A "public body" as defined under subsection 1(p)(vii) [includes] a "local public body", which includes a "health care body" under subsection 1(p)(j)(ii). A "health care body" includes "the operator of a nursing home as defined in the *Nursing Homes Act*", RSA 2000, c N-7. The *Nursing Homes Act* defines a "nursing home" as a "facility for the provision of nursing home

care" (s. 1(j)), and "nursing home care" as "basic care and care provided under an approved program" (s. 1(k)).

[para 7] AHS takes the position that the Applicant is not a nursing home operator or public body. It argues:

> Alberta's Home Care Program is governed by the *Public Health Act* and operated under the *Co-ordinated Home Care Program Regulation* (296/2003). The Home Care Program has provided both health and support service to individuals and families in the community since 1976. The mandate of the Home Care Program is the coordination and provision of a range of health and personal support services in home and community settings in order to:
>
> a) Maintain independent living in the community as long as possible;
> b) Prevent or delay admission to acute care facilities, supportive living and long term care;
> c) Support early discharge from acute care facilities; and
> d) Preserve and support the care provided by families and communities.
>
> Home Care is publicly funded personal and health care services for clients of all ages living in private residence or other private residential setting, such as suites in a retirement residence. Additionally, Home Care helps people remain well, safe and independent in their home for as long as possible. (Attachment "A").
>
> Under section 2 of the Regulation a program shall provide:
>
> (a) nursing service,
>
> (b) personal care service, and
>
> (c) homemaking service.
>
> (4) A program may provide the following services:
>
> (a) rehabilitation therapy service;
>
> (b) dressings, medications and other related preparations;
>
> (c) the temporary use of a health aid not provided under the Alberta Aids to Daily Living and Extended Health Benefits Regulation under the Act;
>
> (d) heavy housework service;
>
> (e) handyman service;
>
> (f) the services commonly known as "Meals on Wheels" and "Wheels to Meals";
>
> (g) transportation service;
>
> (h) nutrition service. (Attachment "B").
>
> While some of the services provided under the *Co-ordinated Home Care Program Regulation* ("Home Care Regulation") may overlap with the services provided by section 2 of the *Nursing Homes General Regulation* 232/1985 ("Nursing Regulation") it is submitted that both programs deal with two separate programs and just because one service falls within section 2 of the Nursing Regulation this does not mean that Home Care programs are governed by the

> Nursing Homes legislation. If it did there would be no need for the Home Care Regulation. Indeed, most of the provisions in the Nursing Homes legislation (for example the *Nursing Home General Operating Regulation* 258/1985 sets out accommodation charges and the criteria for the transfer and discharge of residents) deal with matters that have nothing to do with Home Care.
>
> The difference in the programs and the legislation underpinning them is the ability and independence of the individual obtaining the services. Home Care is for those more independent with the public goal of maintaining independence for as long as possible. Nursing Care is the provision of services where such independence is no longer possible. It is therefore submitted that the Third Party supplies services pursuant to the Home Care Regulation and as such cannot be a public body under the Nursing Homes legislation.
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> In determining whether the Third Party was a "public body" the Information & Privacy Coordinator further reviewed the list of public bodies found in Schedule l of the FOIP Regulation 186/2009 and the unofficial alphabetical index of public bodies compiled by Service Alberta. The Third Party and other similar service providers were not found to be on the lists. While this in itself is not definitive it is persuasive.

[para 8] Section 1(g)(ii) of the FOIP Act establishes that "the operator of a nursing home as defined in the *Nursing Homes Act* other than a nursing home that is owned and operated by a regional health authority under the *Regional Health Authorities Act*" is a "health care body" for the purposes of the legislation. Under section 1(j), "a local public body" includes a "health care body". Section 1(p) of the FOIP Act establishes that "a local public body" is a "public body" for its purposes. Through the operation of these provisions, a nursing home operator within the terms of the *Nursing Homes Act* is a public body.

[para 9] Section 1(r) of the FOIP Act defines the term "third party". This definition excludes both a person who has requested records and a public body. If the Applicant is a public body, then the information it seeks to have withheld under section 16 cannot be withheld under this provision because section 16 is restricted in its application to the information of third parties.

[para 10] Section 1(m) of the *Nursing Homes Act* defines an "operator" as meaning "a person who operates a nursing home".

[para 11] Section 2 of the *Nursing Homes Act* establishes the process by which a person becomes an "operator". It states:

> *2(1) Subject to this Act and the regulations, a regional health authority may enter into a contract with a person who operates or intends to operate a nursing home for the provision of nursing home care to eligible residents.*
>
> *(2) A nursing home contract shall be filed with the Minister and shall be accompanied with*
>
> *(a) any information required by the regulations, and*

(b) any other information required by the Minister.

A person becomes a nursing home operator by entering a contract with a regional health authority, and filing the contract with the Minister, accompanied by any information required by the regulations or the Minister.

[para 12] The thrust of AHS's argument is that the services the Applicant provides are not provided pursuant to a contract within the terms of section 2 of the *Nursing Homes Act*. Rather, the contract to provide home care services at issue in this inquiry is entered under the authority of the *Public Health Act*. As the Applicant is not contracted to provide nursing home services, but home care services, it is not a nursing home operator or a public body.

[para 13] The Applicant argues that it is an organization and not a public body. Like AHS, it argues that it does not provide nursing home services, but home care services. However, the Applicant takes the position that the FOIP Act does not apply to the contract at all, but rather, that the *Personal Information Protection Act* (PIPA) does. It also advances the position that AUPE should have made the access request to itself, rather than to AHS.

[para 14] AUPE argues that so long as a person has contracted to provide nursing home care services, or services that are also nursing home services as defined in the Nursing Home Regulation, the person is a public body within the terms of the FOIP Act, regardless of whether the person also happens to provide other services. It states:

> The core of [the Applicant's] argument is that because "it does not operate standalone nursing homes", it is not a public body. However SCF is a nursing home under the Act because it provides nursing home care. The definition of nursing home is […] a facility for the provision of nursing home care"; the fact that SCF facilities also provide other types of care does not mean that it is not an operator of a nursing home within the meaning of the Act.

[para 15] AUPE argues in the alternative that the Applicant is an "employee" of AHS, given that it has entered a contract to provide services to AHS. It notes that section 1(e) indicates that a person "who performs a service for the public body as an appointee, volunteer or student or under a contract or agency relationship with a public body" is an employee of the public body within the terms of the FOIP Act.

[para 16] Turning first to the argument that the Applicant is a public body on the basis that it is a nursing home operator, I note that access request that led to the Applicant's request for review is for the *home care contract* between the Applicant and the Public Body. To be responsive to the access request, the contract must be one for the provision of home care services and not for other kinds of services, such as providing nursing home care. As AHS notes in its submissions, an agreement to provide home care services under the authority of the *Public Health Act*, and an agreement to operate a nursing home for the provision of nursing home care under the *Nursing Homes Act* do not have the same legal effect, even though the services provided under these agreements may appear to be the same.

[para 17] In my view, a person does not become a nursing home operator within the terms of the *Nursing Homes Act* by providing services that are similar to, or even identical to, those provided by a nursing home operator. Rather, the *Nursing Home Act* is clear that a person becomes a nursing home operator by contracting with a regional health authority to operate a nursing home for the provision of nursing home care. In the absence of such an agreement, a person is not a nursing home operator regardless of the kinds of services the person provides.

[para 18] If it were the case that the Applicant has entered into contracts to operate nursing homes, in addition to contracting to provide home care services (although there is no evidence before me that it has done so), I must then answer the question of whether the fact that a person has contracted with a regional health authority to operate a nursing home makes the person a nursing home operator, and therefore a public body, in all aspects of the person's operations.

[para 19] As noted above, the FOIP Act establishes that the "operator of a nursing home" as defined in the *Nursing Homes Act* is a health care body and therefore a public body, while the *Nursing Homes Act* defines an "operator" as a "person who operates a nursing home". Section 28(1)(nn) of the *Interpretation Act* states that when the Legislature uses the term "person" it includes a corporation.

[para 20] The interaction between these provisions gives rise to two possible interpretations. First, that by entering such a contract, an entity, as a person, becomes an operator, and therefore a public body, or second, that the entity in question is an operator *insofar* as it operates a nursing home and is a public body in relation to *records generated in relation to operating the nursing home*.

[para 21] The first interpretation – that the effect of the legislation is to transform an entity into a nursing home operator and a public body with regard to all the entity's operations is problematic. If the entity is a corporation, making a corporation in its entirety a public body in Alberta and subject to the FOIP Act in all aspects of its business may exceed the jurisdiction of the Legislature. This is because some corporate operators may be based outside the province, or be entities that are federal in aspect. If the person operating a nursing home is an individual, then the difficulties with this interpretation are even greater. It cannot be the case that all an individual's actions, even those made in the individual's private capacity, are those of a nursing home operator and accordingly, those of a public body. In addition, there does not appear to be any coherent legislative purpose for subjecting *all* the activities of a corporation or a private individual to the provisions of the FOIP Act or the *Nursing Homes Act*, when some of the activities of these entities may not have anything to do with operating a nursing home.

[para 22] The second interpretation avoids the jurisdictional issues of the former interpretation, described above, by subjecting *only the activities that are involved in the operation of a nursing home in Alberta* to both the *Nursing Homes Act* and the FOIP Act. Section 1(m) of the *Nursing Homes Act* states that "operator" means a person who

operates a nursing home, which can also be taken to mean that it is the activity of operating a nursing home under the *Nursing Home Act* that makes an entity an operator under that Act, and a public body under the FOIP Act.

[para 23] The second interpretation is not without difficulty, as it is possible to imagine that a nursing home operator may have records and information in its custody or control, or has created records that refer to aspects of its activities as both a nursing home operator and as a private corporation or individual, and release of such records might affect aspects of its business that do not relate to nursing home operation. In such cases, there is no clear answer in the FOIP Act or the *Nursing Homes Act* as to whether a nursing home operator is a public body or third party in relation to such information.

[para 24] However, in this case, as the contract that is the subject of the access request is one to provide home care services under the *Public Health Act*, I am satisfied that it relates only to the Applicant as a party that has contracted with AHS to provide home care services. As home care service providers are not included in the definition of "public body" under section 1(p) of the FOIP Act, I conclude that the Applicant is a third party in this inquiry and not a public body.

"Employee"

[para 25] As AUPE notes, section 1(e) of the FOIP Act defines the term "employee". This provision states:

> *1 In this Act,*
>
> > *(e) "employee", in relation to a public body, includes a person who performs a service for the public body as an appointee, volunteer or student or under a contract or agency relationship with the public body.*

AUPE takes the position that because the Applicant has a contract with AHS, it is an employee within the terms of section 1(e). From this, it concludes that "as an employee of a public body, it acts as a public body when it performs services under contract and exchanges information with AHS. It is by extension therefore a public body, and not a third party under the Act." AUPE relies on Orders F2002-006 and F2014-21 as authority for this position.

[para 26] It is important to note that section 1(e) is a definition. As a definition, it establishes what the Legislature means when it employs the term "employee" in the provisions of the FOIP Act.

[para 27] In Drafting Conventions of the Uniform Law Conference of Canada, which forms Appendix I of *Sullivan and Driedger on the Construction of Statutes*, it states:

> 21.(1) Definitions should be used sparingly and only for the following purposes:

> a) to establish that a term is not being used in a usual meaning, or is being used in only one of several usual meanings;
> b) to avoid excessive repetition;
> c) to allow the use of an abbreviation;
> d) to signal the use of an unusual or novel term. [1]

The foregoing purposes illustrate the purposes for providing definitions in legislation. While definitions may be included for different reasons, their primary function is to establish what is meant when a defined term is used in legislation.

[para 28] The term "employee" is used in sections 4(1)(h), 4(1)(i), 12(1), 17(2)(e),19(2), 24(1)(b), 24(2)(f), 25(1)(d), 34(2)(c), 40(1)(h), 40(1)(i), 40(1)(o), 51(3), 75(1)(c), 75(1)(d), 78(1), 82(1), 82(3), 82(4), 82(5), 89(1), 91(1), and 94(1)(f) of the FOIP Act. Section 1(e) establishes what may be meant by use of the term "employee" where this term appears in these provisions. However, I do not accept that the definition is intended to make substantive changes to the legal relationship between a public body and a third party, such that the third party becomes part of the public body in relation to matters not referred to in the provisions I have cited.

[para 29] In Order F2002-006, the Adjudicator decided that the Alberta Forest Products Association was an employee of the then Ministry of Alberta Human Resources and Employment, through application of section 1(e) because this association had provided a report for the Ministry at its request. The Adjudicator concluded that because the Association fell within the terms of section 1(e), that this was a factor that weighed in favor of finding that the Public Body had control over the record at issue.

[para 30] In my view, while the Adjudicator's ultimate decision that the public body in that case had control over the record appears to be supported by the evidence of the public body, the Adjudicator was in error to the extent that he concluded that the definition of "employee" in the FOIP Act could be applied so as to decide matters outside the application of provisions in the FOIP Act incorporating the term "employee".

[para 31] I prefer the approach of the Adjudicator in Order F2014-21, where he relied on section 1(e) to interpret section 40(1)(i), which incorporates the term "employee". I do not interpret the Adjudicator in that case as suggesting that the application of the definition of "employee" in section 1(e) extends to provisions that do not employ this term. Rather, he determined that where the FOIP Act uses the word "employee", the definition in section 1(e) should be applied.

[para 32] In my view, the Applicant is only an "employee" of AHS to the extent that one of the provisions I have cited that contains the word "employee" is engaged. As none of these provisions is engaged in this inquiry, I find that the Applicant is not an "employee" of AHS in this inquiry.

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[1] Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, Fourth Edition, (Markham; Butterworths Canada Ltd., 2002) p. 618

The Personal Information Protection Act (PIPA)

[para 33] The Applicant argues that the AUPE's access request for the copy of the Master Services Agreement has been brought under the wrong legislation. It states:

> The financial records and contracts of the Foundation are not public records.
>
> SCF is covered by PIPA and the request for the Homecare Contracts has been brought under the wrong legislation.
>
> > a) Alternatively, if FOIPP applies to SCF, then it is only part of its facilities which it applies to and not all of them, and those not covered by FOIPP are covered by PIPA.
> >
> > b) If FOIPP applies to the Millwoods Care Centre (nursing home / long-term care) and to that part of the Kensington Village where long-term care is provided, then PIPA applies to all of the other parts of SCF facilities.
> >
> > c) Further in the alternative, if FOIPP applies to all of SCF facilities or some of them, then s. 16 of FOIPP applies as SCF is a third party' or alternatively, s. 25 of FOIPP applies as SCF is a public body and the Homecare Contracts should not be provided to the party that requested them.
> >
> > d) Additionally in the further alternative, if FOIPP applies to all of SCF facilities or some of them and the Homecare Contracts are producible, then there are many provisions in the Homecare Contracts which need to be severed and/or redacted and not provided to the [AUPE].

[para 34] Section 4 of the FOIP Act establishes the extent to which the Act applies. It states, in part:

> *4(1) This Act applies to all records in the custody or under the control of a public body, [my emphasis] including court administration records, but does not apply to the following […]*

[para 35] Section 4 establishes that the FOIP Act applies to *records* in the custody or control of a *public body*. AHS is a public body. The Master Services Agreement is a record. The position of AHS is that it has custody and control over this record.

[para 36] Under section 4(6) of PIPA, the FOIP Act prevails over PIPA when provisions of these two statutes are in conflict. Moreover, section 4(2) of PIPA establishes that PIPA does not apply "to a public body or any personal information that is in the custody of or under the control of a public body."

[para 37] Given the terms of section 4 of the FOIP Act and sections 4(2) and 4(6) of PIPA, the Applicant's argument must fail. When a record is in the custody or control of a public body, PIPA does not apply to the record, even though the record may contain personal information. (As discussed below in relation to the application of section 17 to the Master Services Agreement, I am unable to identify personal information in the record, which would also preclude the application of PIPA to the record.)

[para 38] The term "custody or control" has been interpreted in past orders of this office.

[para 39] The phrase "custody or control" refers to an enforceable right of an entity to possess a record or to obtain or demand it, if the record is not in its immediate possession. "Custody or control" also imparts the notion that a public body has duties and rights in relation to a record, such as the duty to preserve or maintain records, or the right to destroy them.

[para 40] Previous orders of this office have considered a non-exhaustive list of factors compiled from previous orders of this office and across Canada when answering the question of whether a public body has custody or control of a record. In Order F2008-023, following previous orders of this office, the Adjudicator set out and considered the following factors to determine whether a public body had custody or control over records:

- Was the record created by an officer or employee of the public body?
- What use did the creator intend to make of the record?
- Does the public body have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
- If the public body does not have possession of the record, is it being held by an officer or employee of the public body for the purposes of his or her duties as an officer or employee?
- Does the public body have a right to possession of the record?
- Does the content of the record relate to the public body's mandate and functions?
- Does the public body have the authority to regulate the record's use?
- To what extent has the record been relied upon by the public body?
- How closely is the record integrated with other records held by the public body?
- Does the public body have the authority to dispose of the record?

[para 41] Not every factor is determinative, or relevant, to the issues of custody or control in a given case. Custody or control may be determined by the presence of only one factor. If it can be said, after consideration of the factors, that a public body has an enforceable right to possess records or obtain or demand them from someone else, and has duties in relation to them, such as preserving them, it follows that the public body would have control or custody over the records.

[para 42] As discussed above, the records in this case consist of a contract to which AHS is a party. The agreement represents its rights and obligations under the contract. In my view, AHS has a right to possess this record, which is in its possession, and may be said to have custody over it. Even if this record contained personal information, by operation of sections 4(2) and 4(6) of PIPA, this record is not subject to PIPA. By operation of section 4 of the FOIP Act, this record is subject to the FOIP Act, given that it is in the custody of a public body.

[para 43] The Applicant also argues:

> [Article] 16 of the Homecare Contracts has stringent non-disclosure and confidentiality requirements. It must be observed. The request by AUPE for the Homecare Contracts does not

> trump the common law obligations of SCF and AHS related to non-disclosure / confidentiality or the obligations for them cited in the Master Services Agreement.
>
> [Article] 19 of the Homecare Contracts sets out a mandatory dispute resolution process for AHS and SCF to follow which ultimately engages arbitration. There is a dispute between AHS and SCF as to whether the Homecare Contracts should be disclosed. The provisions in the *Alberta Arbitration Act*, R.S.A. 2000, c. A-43 apply.

[para 44] Article 16 of the Master Services Agreement requires the Applicant to keep any information disclosed to it by AHS confidential. However, Article 16 contains no clause requiring AHS to keep information confidential. Moreover, Article 16 does not address the confidentiality of the agreement itself, but only information the Applicant may obtain in the performance of the agreement.

[para 45] Article 19 establishes that a dispute arising as a result of the agreement is subject to the Arbitration Act. However, as the disclosure of the Master Services Agreement is not addressed within it, I find that the dispute between the parties is not a result of the agreement. I am therefore unable to agree with the Applicant that the *Arbitration Act* has any application to this inquiry.

Issue B: Does section 16 (disclosure harmful to business interests) apply to the information the Public Body has decided should be disclosed?

[para 46] Section 16(1) of the FOIP Act requires a public body to withhold from an applicant certain types of information. It states:

> *16(1) The head of a public body must refuse to disclose to an applicant information*
>
> *(a) that would reveal*
>
> *(i) trade secrets of a third party, or*
>
> *(ii) commercial, financial, labour relations, scientific or technical information of a third party,*
>
> *(b) that is supplied, explicitly or implicitly, in confidence, and*
>
> *(c) the disclosure of which could reasonably be expected to*
>
> *(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
>
> *(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*

> *(iii) result in undue financial loss or gain to any person or organization, or*
>
> *iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[para 47] 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)?

All branches of this test must be met in order for section 16 to apply. That this is so is evidenced by the Legislature's use of the word "and" in section 16(1)(b), *supra*, to link sections 16(1)(a), (b), and (c).

[para 48] In this case, I will consider whether the information AHS has decided to release, which the Applicant believes falls within the terms of section 16, meets the requirements of each of sections 16(1)(a), (b), and (c).

[para 49] 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 states:

> *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.*

[para 50] Section 16(1) does not apply to personal information, so the Applicant has the burden, by application of section 71(3)(b), of establishing that the AUPE has no right of access to the records.

[para 51] The standard of proof imposed on an applicant seeking to have section 16 applied is not the criminal standard, which requires proof beyond a reasonable doubt, but

the civil standard, which requires proof on the balance of probabilities. In other words, the Applicant must establish that it is more likely than not that section 16 applies to all the information it seeks to have withheld.

[para 52] In *F.H. v. McDougall*, [2008] 3 S.C.R. 41, the Supreme Court of Canada described the qualities of evidence necessary to satisfy the balance of probabilities. The Court stated:

> Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[para 53] In an inquiry as to a public body's decision to disclose information over which a party claims section 16, the party (in this case the Applicant) must provide sufficiently clear, convincing, and cogent evidence to discharge its burden of proving that section 16 applies to the information it seeks to have withheld. As the Applicant seeks to have section 16 applied, it must prove that sections 16(1) (a), (b), and (c) apply to the information with evidence that is sufficiently clear, convincing, and cogent to meet this burden.

[para 54] I turn now to the question of whether the Applicant has established that the Master Services Agreement between itself and AHS should be withheld from the AUPE.

Does section 16(1) apply to the Master Services Agreement?

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 55] To meet the requirements of part 1 of the test, information must be "of a third party" and it must reveal the third party's trade secrets or commercial, financial, labour relations, or scientific or technical information.

[para 56] The Applicant states:

> The Homecare Contracts are commercial, financial and labour relations information of the Foundation under s. 16(1)(a)(ii) of the Act.

Elsewhere in its submissions, it describes the information it seeks to withhold as also including technical and business information.

[para 57] Orders of this office have taken the position that section 16 is intended to protect the informational assets, or proprietary information, of third parties that might be

exploited by competitors in the marketplace if disclosed. In Order F2009-015, the Director of Adjudication made this point at paragraphs 46 – 47. Similarly, Orders F2009-007, F2009-028, F2010-036, F2011-001, F2011-002, 2012-06, F2012-17, F2013-17, F2013-37, F2013-47, and F2013-48 also adopt the position that section 16 applies to protect the informational assets or commercially valuable information of third parties in situations where those assets have been supplied to government in confidence, and harm could result from their disclosure.

[para 58] In Order F2012-06, I said:

> The purpose of mandatory exceptions to disclosure for the commercial information of third parties in access to information legislation is set out in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* at page 313:
>
> > The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information.

[para 59] This statement of the purpose of section 16 has been adopted in Orders F2009-028, F2010-036, F2011-001, and F2011-002 and found to be the rationale behind the mandatory exception to disclosure created by section 16 of the FOIP Act. In these orders, it was determined that section 16 is intended to protect specific types of commercially valuable information or "informational assets" of third parties from disclosure, so that businesses may be confident that they can continue to invest in this kind of information, and to encourage businesses to provide this kind of information to government when required.

[para 60] Applying the principles adopted in these orders, commercial information of a third party within the terms of section 16 is information belonging to a third party about how the third party engages in commerce. Orders F2009-028, F2010-013, F2011-002, F2011-018, F2012-17, F2013-17, F2013-37, and F2013-47 have defined "commercial information" as information *belonging to a third party* about its buying, selling or exchange of merchandise or services.

[para 61] In Order 96-018, the former Commissioner said the following regarding "financial information":

> 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 62] In Order F2003-004, the Adjudicator listed examples of information that had been found to be financial information in past orders. He said:

> The Commissioner has said that "financial information" includes:
>
> - information relating to the monetary resources of the third party, such as the third party's financial capabilities, and assets or liabilities, past or present (Order 96-018)
> - information regarding financial transactions, insurance, past performance, estimated advertising costs and commission expected or proposed in respect of the sales involved (Order 98-006)
> - pricing strategy, revenues, contracts for goods and services, expenses (operating, capital and other) (Order 98-015)
> - particular forecasts, estimated value of certain operations, cash-flow before interest and principal payments, income statements, assets and liabilities, financial position, debt repayment and interest statements, assumptions regarding financial status of third parties, draft contracts, offers and make-up of funds, bank debts, loans and banking arrangements, assessment of worth, investments of third parties, sales contracts with third parties, details of cash-flow, balance sheets and financial position of third parties (Order 99-040)

[para 63] In Order MO-2496, an order of the Office of the Information and Privacy of Commissioner of Ontario, the Adjudicator considered the meaning of "commercial" and "financial" information as they appear in Ontario's equivalent of the FOIP Act's section 16. The Adjudicator stated:

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

[para 64] In my view, Orders 96-013, 96-018 and F2003-004 of this office, and Order MO-2496 of the Office of the Information and Privacy Commissioner of Ontario, are essentially stating the same thing. "Commercial information" is information belonging to a third party about its buying, selling or exchange of merchandise or services. "Financial information" is information belonging to a third party about its monetary resources and use and distribution of its monetary resources.

[para 65] In Order F2011-018, the Adjudicator reviewed previous decisions which considered the "commercial" and "labour relations" information within the terms of section 16(1)(a). He said:

> Definitions for "commercial information" and "labour relations information" were noted in Order F2010-013 (at paras. 19 and 24), being the Order that dealt with the Applicant's right of access to the AHW Notices. I refer to those same definitions for the purpose of reviewing the content of the Objection Letter. I find that the Objection Letter does not contain or reveal information about the "buying, selling or exchange of merchandise or services" (commercial information), and that it does not contain or reveal information about "employer/employee relations including especially matters connected with collective bargaining and associated activities" or "relationships within and between workers, working groups and their organizations and managers, employers and their organization" (labour relations information).

[para 66] As noted above, previous orders of this office have held that commercial information is information that refers to a third party's "buying, selling or exchange of merchandise or services" while labour relations information has been interpreted to be information about "employer / employee relations including especially matters connected with collective bargaining and associated activities" or "relationships within and between workers, working groups and their organizations and managers, employers and their organization."

[para 67] I accept that the information about rates contained in the records may reveal something about the terms under which the Applicant *and* the Public Body were prepared to do business with each other, and can be construed as "commercial information" in that sense. However, while there is reference to various occupations in Appendix 1 and rates that will be paid for services, I am unable to say that this constitutes "labour relations information" as that term has been interpreted in prior orders of this office.

[para 68] With regard to whether the information is technical, I note that the *Canadian Oxford Dictionary* 2nd Edition (Don Mills; Oxford University Press Canada, 2004) offers the following definitions of the word technical": "1. of or involving the mechanical arts and applied sciences 2. of or relating to a particular subject or craft". Previous decisions of this office differ from one another to a certain extent, given that Order F2008-018 considers technical information to refer to information relating to fields of applied sciences or mechanical arts, while Order F2002-002 holds information to be technical for the purposes of section 16(1)(a) if it relates to subjects or crafts. Reconciling these two orders, technical information is information of a third party regarding its designs, methods, or technology.

[para 69] I am unable to identify any information in the Master Services Agreement that could be termed "technical information".

[para 70] As discussed above, the Applicant also referred to the information it seeks to have withheld as business information. Section 16(1)(a) does not include "business information" among the categories of information to which it applies.

[para 71] It is also not clear to me that the agreement contains "financial information" as this term has been defined in previous orders. The agreement contains rates that AHS has agreed to pay the Applicant; however, absent the context of the extent of the services the Applicant will provide, and its costs for providing them, it does not appear to be possible to extrapolate the Applicant's monetary resources or distribution or use of its monetary resources from the information in the Master Services Agreement. While the Applicant argues that anyone reading the contract could draw accurate inferences as to its past or present assets or liabilities, it does not explain how this could be done. From my review of the agreement, I am unable to make any assumption, accurate or otherwise, as to the Applicant's past or present assets, costs, or finances. I am therefore unable to say that disclosure of the Master Services Agreement would reveal its financial information. However, as discussed above, the information in the record can be construed as commercial, in the sense that the agreement documents a commercial transaction.

[para 72] Having found that the information could be construed as commercial information regarding a contract for services entered by the Applicant and AHS, the next question to consider is whether this kind of information is "the commercial information of the Third Party" within the terms of section 16(1)(a). As discussed above, past orders of this office have held that information that is "of a third party" is information belonging to the third party, (in this case the Applicant). (See Orders 96-013, F2012-06, F2013-37, F2013-48, F2014-44, and F2015-12.) This view is consistent with the idea that section 16 is intended to protect the commercially valuable information or "informational assets" of third parties when businesses are required to supply such information to government. As noted above, commercial information has been defined in Orders F2009-028, F2010-013, F2011-002, F2011-018, F2012-17, F2013-17, F2013-37, and F2013-47 as information belonging to a third party about its buying, selling or exchange of merchandise or services.

[para 73] The Master Services Agreement does not appear to contain any information regarding the manner in which the Third Party buys, sells, or exchanges merchandise or services that could be said to "belong" to it. While the contract contains provisions in which the terms of the contract require the Third Party to conduct its business in a certain way, these terms are the result of negotiations between AHS and the Third Party (and in some cases the application of statutes), rather than the Third Party's design or investment.

[para 74] In Order F2015-12 of this office and in Order MO-2801, a decision of the Ontario Office of the Information and Privacy Commissioner following previous orders of that office, it was held that "of a third party" means that information *belongs to* a party. Negotiated contractual terms do not "belong" to one party or the other. In Order MO-2801, the Adjudicator stated at paragraphs 186 -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.

The Adjudicator in that case concluded that the information at issue, which she found was negotiated by the institution and the third party in that case, was not the proprietary of the third party, or alternatively, was not information in which the third party had expended resources. She held that such information could not be said to belong to the third party.

[para 75] As was the case in Order F2015-12 of this office and Order MO-2801 of the Ontario office, the information the Applicant argues is its commercial (and financial and labour relations) information consists of mutually negotiated contractual terms which create obligations for both parties to the contract.

[para 76] From my review of the Master Services Agreement, I am unable to say that the information it contains is commercial information *of the Applicant*. The rates and fees for services appearing in this record were generated by the Public Body and the Applicant through negotiations. The information at issue consists of duties and obligations of both parties under the Master Services Agreement and it is clear that both parties agreed to the provisions. As a result, it cannot be said that the information belongs to the Applicant or the Public Body, given that it is the result of their mutual agreement. I am unable to say that any information contained in the Master Services Agreement is commercial information belonging to the Applicant.

[para 77] In saying this, I acknowledge the Applicant's argument that previous orders have held information such as "contract price" to be information meeting the terms of section 16(1)(a), as either financial or commercial information. The Applicant

drew my attention to Order F2003-004, in which the Adjudicator relied on Order 96-013 to find that "contract price" is "commercial information."

[para 78] In Order 96-013, former Commissioner Clark said:

> The Ontario Commissioner has also made some specific additions to the ordinary dictionary definition of "commercial information", which I wish to adopt. The category of "commercial information" includes "contract price" and information, "...which relates to the buying, selling, or exchange of merchandise or services..." (Order P-489 [1993] O.I.P.C. No. 191). These are important for the purposes of this inquiry.

[para 79] In Order P-489, the former Information and Privacy Commissioner of Ontario said:

> The information contained in the records at issue relates generally to the acquisition of equipment by a certain department within the Ministry. I have reviewed the records and, in my opinion, virtually none of the information contained in the documents contains trade secrets, or qualifies as scientific, technical, commercial, financial or labour relations information. The one exception relates to the price of a contract entered into by the Ministry and a certain affected person. In my view, a contract price may be characterized as either "commercial" or "financial" information. On this basis, the contract price satisfies the first part of the section 17 test.
>
> To summarize, therefore, none of the information contained in the audit report and response, with the exception of the contract price, qualifies for exemption under part 1 of the section 17 test.
>
> I must now determine, based on the application of the second part of the section 17 test, whether the contract price was supplied to the Ministry in confidence either implicitly or explicitly.
>
> A number of orders have addressed the question of whether information contained in a contract entered into between an institution and an affected person was supplied by the affected person. In general, the conclusion reached in these orders is that, for such information to have been supplied to an institution, the information must be the same as that originally provided by the affected person (see Orders 87, 179, 203, 204 and P-251).
>
> Based on my review of the record, there is no evidence that the final contract price between the Ministry and the affected person was originally supplied by that affected person. Rather, the strong inference is that this price was arrived at through a process of negotiation undertaken between the parties and reflects a compromise position. On this basis, it cannot be said that this information was supplied by the affected person to the institution for the purpose of the second part of the section 17 test.[my emphasis]

[para 80] In the foregoing order, the former Commissioner of Ontario decided that contract price, where the contract price is negotiated and not supplied, does *not* meet the requirements of Ontario's equivalent of section 17, (the equivalent provision to section 16 of Alberta's FOIP Act). As noted above, the reasoning in Order P-489 was adopted in Order 96-013.

[para 81] Significantly, Ontario's section 17 does not contain the modifier "of a third party" in relation to the words "trade secret or scientific, technical, commercial, financial or labour relations information", as Alberta's does. However, Ontario's

jurisprudence regarding third party information holds that the information should be an "informational asset" or be the result of investment before it will fall within the terms of section 17. That Alberta's legislation actually requires that the information under consideration be "of a third party" before section 16 can be said to apply to it, reinforces the view that the information must actually *belong* to the third party, rather than be notionally associated with the party or about the party, or affect the party in some way.

[para 82] In addition, as section 16(1) requires that the information in question must belong to the third party *at the time it is supplied* (section 16(1)(b)), contract price will never fall within the terms of section 16(1) unless the contract in question is one the third party entered prior to supplying a copy of it to the public body. In such a case, the contract may reveal the third party's commercial or financial information. For example, if a third party provided a copy of a contract to a public body to satisfy the public body about its financial resources, or its ability to supply products in a particular timeframe, the prices of those contracts could satisfy the requirement that information be financial or commercial information of a third party at the time it is supplied. In contrast, financial terms negotiated between a public body and a third party that did not exist prior to the third party's dealings or negotiations with the public body are not the commercial or financial information of or belonging to either party and, as will be discussed below, are not supplied.

[para 83] For the foregoing reasons, I find that the information in the Master Services Agreement is not the commercial, financial, or labour relations information of the Applicant. As a result, the terms of section 16(1)(a) are not met.

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

[para 84] I have already found that the information contained in the Master Services Agreement was negotiated. The question becomes whether information that has been negotiated is information that is supplied within the terms of section 16(1)(b).

[para 85] The Applicant states:

> As per s. 16(1)(b) of the Act, the commercial, financial and labour relations information in the Homecare Contracts was expressly or impliedly provided to AHS in confidence by the Foundation.

[para 86] AHS argues that the information in this case was not supplied to it but mutually negotiated between itself and the Applicant. It takes the position that the information at issue does not meet the requirement imposed by section 16(1)(b) that information be "supplied" by a third party.

[para 87] The word "supply" typically means "provide or furnish what is necessary", or alternatively, "meet a need." This term does not encompass "negotiating terms" among its meanings. Moreover, the context created by the requirement that the information enumerated in section 16(1)(a) be of a certain type and be "of a third party" argues against finding that the Legislature intended the term "supplied" to incorporate the

term "negotiated". As discussed above, mutually negotiated terms do not belong to one side or the other. However, section 16(1)(a) requires that information belong to the third party.

[para 88] If the purpose of the Act is considered in determining the meaning of "supplied in confidence", this too argues against finding that negotiating and supplying are synonymous. This point is made by Klein J. in *Aventis Pasteur Ltd. v. Canada (Attorney General)*, 2004 FC 1371, where he said:

> The Federal Court of Appeal recently provided direction as to the application of the last two criteria of the test. In Canada (Minister of Public Works and Government Services) v. Hi-Rise Group Inc., 2004 FCA 99 (CanLII), the Court considered an application by a commercial landlord to prevent the disclosure of rent being paid by the Federal Government for one of the landlord's buildings, as well as the option prices at which the building could be acquired. The Court found that the information in question did not constitute "confidential information" as envisioned by the Act. Noël J.A., relying heavily on the reasoning of Strayer J. (as he then was) in Société Gamma Inc. v. Canada (Department of State) (1994), 79 F.T.R. 42 (F.C.T.D.), commented that:
>
> > [...][W]hen a would be contractor sets out to win a government contract through a confidential bidding process, he or she cannot expect that the monetary terms, in the event that the bid succeeds, will remain confidential. (paragraph 37)
> > [...]
> > [...]The public's right to know how government spends public funds as a means of holding government accountable for its expenditures is a fundamental notion of responsible government that is known to all. (paragraph 42)
>
> […]
>
> In *Canada Post Corp. v. National Capital Commission*, supra, I held that negotiated terms cannot be characterized as information "supplied to a government institution by a third party". McGillis J. came to a similar conclusion in Halifax Development Ltd. v. Canada (Minister of Public Works and Government Services), [1994] F.C.J. No. 2035. To hold otherwise would broaden the scope of the exemption and prevent the public from having access to much of the information contained in government contracts.

[para 89] In my view, the foregoing analysis applies equally to the purpose of Alberta's FOIP Act. A purpose of the FOIP Act is to lend transparency to the way in which government spends public funds. This purpose cannot be met if all the information in government contracts with third parties becomes subject to section 16 by virtue of the fact that contracts are negotiated.

[para 90] To conclude, I find that the language of section 16(1)(b), the context in which it appears, and the purpose of the FOIP Act all argue against finding that supplying information to a public body encompasses negotiating contractual terms with it.

[para 91] It is unclear from its submissions on what basis the Applicant argues that it provided the information in the contract to AHS, rather than negotiated it with AHS. As it is possible that it holds the view that the contract reveals information it supplied to AHS prior to entering negotiations I will address this possibility.

[para 92] In Order F2000-005, former Commissioner Clark said:

> Generally, information in an agreement that has been negotiated by a third party and a public body is not information that has been supplied to a public body. However, there are exceptions where the information supplied to the public body during negotiations remains relatively unchanged in the agreement or where disclosure of the information would permit an applicant to make an accurate inference about information supplied to the public body during the negotiations.
>
> The foregoing interpretation of section 15(1)(b) is different from previous Orders in which I said that the information supplied must remain relatively unchanged in the agreement, and must also allow an applicant to make an accurate inference. However, I believe my current interpretation more closely reflects the commercial reality that, to reach an agreement, a third party must supply a certain amount of information, some of which may actually appear in the agreement, and some of which may be inferred from the agreement.

[para 93] In Order F2015-03, the Adjudicator summarized decisions of this office regarding immutable information and said:

> In my view, contracts (or other agreements) are based on an offer and an acceptance; whether several offers were made and rejected before one was accepted, or whether the first offer was accepted (as was the case here) does not change the nature of the process of coming to an agreement. As stated in BC Order F11-27 (at para. 13):
>
> > In other words, information may originate from a single party and may not change significantly – or at all – when it is incorporated into the contract, but this does not necessarily mean that the information is 'supplied'. The intention of s. 21(1)(b) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change, but, fortuitously, was not changed.
>
> The adjudicator in Order F2013-47 provided an example of immutable information (at para. 36):
>
> > For example, a third party might supply a proprietary design or formula as part of its bid or during negotiations. A public body might then require the third party to use that design or formula as a term of the contract. Even though the proprietary design or formula is the subject of negotiations, and is part of the contract, the formula or design was originally *supplied* by the third party, and may meet the requirements of both section 16(1)(a) and (b).
>
> In BC Order 01-39, the former BC Commissioner gave the following examples of what may be immutable information in a contract (at para. 45):
>
> > For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of s. 21(1)(b). To take another example, if a third party produces its financial statements to the public body in the course of its contractual negotiations, that information may be found to be "supplied."
>
> In other words, immutable information is information that, by its nature and in the given context, is not susceptible to change; it is not information that *could have* changed but did not (see Order F2012-15, citing BC Order F11-27). The Third Party argues that the unit prices and hourly rates are immutable because the tender process used by the Public Body meant that the

> bid would be rejected or accepted without change. However, this is reflective only of the bidding process chosen by the Public Body; it does not change the nature of the information contained in the bids. In other words, the fact that the Public Body would not make a counter-offer on a bid does not mean that the bid prices were immutable. To say that bid prices (or the unit prices and hourly rates that comprised the bid total) are immutable is to say that the Third Party could not have offered numbers other than those it did, in fact, offer.

[para 94] I agree with the analysis of the Adjudicator in Order F2015-03 and agree that immutable information, as that term has been discussed in previous orders of this office and by the Office of the Information and Privacy Commissioner of British Columbia, is information that is not susceptible to change by its nature.

[para 95] In *Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231, an issue considered by the Court was whether all information in an agreement between a third party and a public body was negotiated rather than supplied.

[para 96] The Court determined that scientific information commissioned by Imperial Oil and supplied to Alberta Environment would be revealed by disclosure of all the provisions in the contract. The Court said:

> First of all, as previously noted, it is not the Remediation Agreement itself that must be the protected information. There would be room to argue that negotiated contracts themselves are not "supplied" by either party to the agreement. Imperial Oil did seek to prevent disclosure of the Remediation Agreement simply because it was an agreement, but that was based on it being privileged. The overlapping exemption under s. 16 was not an attempt to prevent the disclosure of the Remediation Agreement as an agreement, but rather because of the information it "would reveal".
>
> What s. 16(1) protects are documents that "may reveal" protected information that has been supplied by one of the parties. If Imperial Oil supplied protected financial, scientific and technical information to Alberta Environment in order to enable the negotiation of the Remediation Agreement, that information would still be "supplied" and therefore protected. "Supplied" relates to the source of the information, and whether information was "supplied" does not depend on the use that is made of it once it is received. If the disclosure of the Remediation Agreement "would reveal" that protected information, then non-disclosure is mandatory under s. 16. To suggest that information loses its protection just because it ends up "in an agreement that has been negotiated" is not one that is available on the facts and the law. It cannot be the rule that only information that is of no use to the public body is "supplied".
>
> In this case it is beyond dispute that some of the information qualifies. For example, the five technical letters from the environmental consultants were commissioned by Imperial Oil, and supplied to Alberta Environment by Imperial Oil. The fact that they ended up as exhibits to the Remediation Agreement cannot reasonably be found to take them outside the protection of s. 16. The Commissioner found at para. 27 that these technical reports were not "supplied" by Imperial Oil, but rather were "documents that reflected the Public Body's requirements and were *negotiated with it*, with the assistance of a third party". It is unclear whether the Commissioner was referring to the consultants or Imperial Oil as the "third party" that provided this "assistance". In any event, there is simply no evidence on the record to support this assertion. There is no indication anywhere that the consultants negotiated the contents of their reports with anybody. There is no indication that Imperial Oil and Alberta Environment "negotiated" what is in the consultants' reports. On their face, they were reports commissioned by Imperial Oil, drafted independently by the consultants, and then "supplied" to Alberta

> Environment. The fact that these reports may have been requested (or demanded, or required in the ordinary course) by Alberta Environment, or supplied by Imperial Oil as a legal, practical or tactical necessity does not change the fact that they were, in fact, supplied by Imperial Oil.

[para 97] In Order F2015-03, the Adjudicator said the following regarding this decision:

> The Public Body argued that *Imperial Oil* is distinguishable from the present case regarding whether information was supplied. It states:
>
> > [r]egarding the question of whether the records were supplied to the public body, the Court in *Imperial Oil* determined that certain information contained in the remediation agreement was 'supplied' to the public body. Specifically, the Court referred to five technical reports that were prepared for Imperial Oil by independent consultants and that were included as exhibits to the remediation agreement. It is clear that these documents were not subject to negotiations between the parties in the same manner the provisions of the remediation agreement were. These documents were not changed through the mediation process nor could they have been. Although the Court does not use the term, the records discussed in *Imperial Oil* were immutable in that they were not, *by their nature*, subject to change. Neither Alberta Environment nor Imperial Oil had the power to revise unilaterally or to persuade the other party to revise these records. In contrast to this, and as the Public Body has previously submitted, the records in issue in this Inquiry are not immutable and therefore are considered to have been negotiated, not supplied. Because the records in that case were fundamentally different in nature, the comments of the Court of Appeal in *Imperial Oil* do not affect the determination of whether the records in issue in this Inquiry were supplied to the Public Body. (Additional submission addressing *Imperial Oil*, at para. 12)
>
> I agree with the Public Body's interpretation. In the excerpt cited by the Third Party (and reproduced above) the Court of Appeal in *Imperial Oil* was not addressing whether the remediation agreement itself was supplied or negotiated; it agreed that a negotiated contract might not be "supplied" by either party to the contract.
>
> The Court of Appeal's discussion regarding supplied information was specifically concerned with reports attached to the remediation agreement, which were created by consultants and not up for negotiation. In other words, the content of those reports would not change regardless of the discussions that led to the remediation agreement. I agree with the Public Body that, although it used different language, the Court concluded that the reports attached to the remediation agreement consisted of information that was either immutable (because the content of the reports [was] not going to change) or that they were comprised of underlying non-negotiated confidential information supplied by the third party.

[para 98] I agree with the Adjudicator's analysis in the foregoing excerpt. Turning to the case before me, there is no evidence before me that the terms in the Master Services Agreement reveal immutable information of the kind falling within the terms of 16(1)(a) that was *supplied* by the Applicant. Rather, given that many of the terms in the Master Services Agreement impose obligations on AHS, the information in the records supports finding that the information in Master Services Agreement was *not* supplied by the Applicant.

[para 99] In its rebuttal submissions, the Applicant provided a list of information in the Master Services Agreement that it seeks to have severed from the Master Services Agreement in the event that I order its disclosure. I reviewed this information to determine whether it could be said to have been supplied by the Applicant. However, the information, which includes information such as headings and definitions, is information that both parties clearly agreed to in order to enter the contract.

[para 100] As the information in the Master Services Agreement consists of mutually generated contractual terms, I find that the information was not supplied by the Applicant within the terms of section 16(1)(b).

[para 101] As section 16(1)(b) also requires that information be supplied in confidence, I turn now to the question of whether the information was supplied *in confidence*.

[para 102] 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 [public body] 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 103] 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.

[para 104] 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 in the Master Services Agreement communicated to AHS on the basis that it was confidential and that it was to be kept confidential?

[para 105] The Applicant argues:

> When the Foundation provided the information in the Homecare Contracts to AHS, it was the Foundation's understanding that the information in the Homecare Contracts would be kept confidential and would not be disclosed to others than AHS, unless the Foundation gave express consent for disclosure. The Foundation does not consent to disclosure of the Homecare Contracts. Further, in the past the Foundation has never given AHS consent to disclose the information in the Homecare Contracts to third parties.

The Applicant did not provide the evidence of the individual who signed the contract on its behalf as to the individual's understanding that any agreement the Applicant entered with AHS would be confidential.

[para 106] The Applicant submitted the Affidavit of its Director of Human Resources for the inquiry. This affidavit states:

> [The Applicant] entered into the Homecare Contracts with AHS with the understanding that the provisions of the contracts would remain between AHS and SCF. SCF has treated the Homecare Contracts as confidential information. The public does not have access to the Homecare Contracts.

[para 107] While I accept that the Director of Human Resources may believe that the contract was intended to be confidential, he does not provide the source of this belief in the affidavit. He was not a signatory to the contract and there is no evidence before me to suggest he had any role in the negotiations giving rise to the Master Services Agreement. As a consequence, I am unable to assign any weight to the Director of Human Resource's statement regarding the understanding of the Applicant that AHS would keep the Master Services Agreement confidential.

[para 108] I note that there are requirements in the Master Services Agreement for the Applicant to hold information it receives from AHS in confidence and to comply with the *Health Information Act* and the FOIP Act; however, there are no provisions requiring either party to the contract to keep the contract confidential.

[para 109] Finally, as discussed above, the Master Services Agreement appears to contain negotiated provisions. If it reflects any information that belongs to the Applicant and which the Applicant provided, I am unable to say what it is and the Applicant has not pointed it out.

[para 110] While the Applicant argues that the information in the Master Services Agreement is confidential, it has not submitted convincing evidence to support finding that it supplied information on terms of confidence. As noted above, I find that the terms of the agreement do not support finding that the parties agreed in any way to keep its terms confidential.

[para 111] I find that it has not been established that the negotiations with AHS were conducted with the expectation that the resulting agreement would be confidential.

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

[para 112] There is no evidence before me to establish how the information about the rates AHS pays the Applicant is treated by the Applicant, before or after negotiating them with AHS. 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 113] The Director of Human Resources states in his affidavit that the agreement is confidential and that the public does not have access to it. However, he is unable to speak to the copy of the agreement that AHS has in its custody. With regard to this copy, there is no evidence to suggest information has not been disclosed from it. 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 114] The Applicant provided no evidence or argument on this point. However, the information at issue is a contract for services. In the event of a legal dispute regarding the contract, it would seem likely that the terms of the contract would form part of the evidence in legal proceedings or arbitration. 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 115] For the reasons above, I am unable to find that the information at issue was supplied by the Applicant to the AHS in confidence within the terms of section 16(1)(b).

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 116] Given my conclusion under sections 16(1)(a) and (b), it is unnecessary to address section 16(1)(c) in relation to the information in the Master Services Agreement. However, I have decided to do so for the sake of completeness.

[para 117] 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 sections 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 118] In a recent decision, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), 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 (CanLII), 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. 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 (CanLII), [2008] 3 S.C.R. 41, at para. 40.

[para 119] 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.

[para 120] Throughout its submissions, the Applicant makes the following points about the potential harms it foresees from disclosure of the Master Services Agreement:

> If the Homecare Contracts are provided to [AUPE], then that can interfere with the competitive position of the Foundation in the homecare services it provides to residents at its facilities, as some additional services are provided at some of the facilities which are beyond what AHS provides funding for. If costs increase, that may hamper or prohibit additional services which are provided at SCF facilities for the aged. Such includes support services, recreation services, pastoral / spiritual services, food services and the like. In addition, the Foundation has some economies of scale at its facilities, especially at the Kensington Village and the Millwoods campuses, which many smaller health care facilities for the aged do not have. Such economies of scale would, or could, be hampered if the Homecare Contracts were released to the party requesting them and the Foundation would lose or have its competitive position diminished.
>
> The information in the Homecare Contracts could be used by the [AUPE] to [the] detriment of the Foundation.
>
> Disclosing the Homecare Contracts could result in loss of reputation of the Foundation, loss of customers/residents and there is potential detriment and prejudice to the Foundation in its relations with lenders and financial institutions. Any economic uncertainty could cause lenders and financial institutions to not renew mortgages or extend lines of credit which are necessary for the operations of the Foundation to remain viable.
>
> There is a cause and effect relationship between disclosing the Homecare Contracts and the harm the Foundation would suffer if they were disclosed: *Agricultural Financial Services Corp.*, F2010-030, at para. 46, Tab 11. There is a reasonable expectation the Foundation would be harmed by disclosure. Someone could use the information in the Homecare Contracts to obtain a competitive advantage in any relations it may have with the Foundation. Such could increase the costs of the Foundation for the services it provides at its facilities.
>
> The harm to the Foundation by disclosing the Homecare Contracts is significant in nature. It affects, or could affect, future bargaining with unions, individuals and contractors if they have the information in the Homecare Contracts as it gives them an upper hand or advantage in

> negotiations. Disclosure could also result in increased labour and operations costs at the Foundation's facilities in the future, and disadvantages the Foundation in negotiations with third parties if the Homecare Contracts are revealed. The usual position of the Foundation in negotiations with third parties and unions is that it looks at costs on a global basis or some similar position. In short, in the past, the Foundation has not been revealing the financial/costing information in the Homecare Contracts to third parties in negotiations it has with them. In brief, in accordance with s. 16(1)(c)(i) of the Act, disclosing the Homecare Contracts interferes significantly with the negotiating position of the Foundation.
>
> The Homecare Contracts are information the Foundation would not provide to unions or individuals or contractors. The Homecare Contracts are used for business purposes internally by SCF and by AHS for funding.
>
> There is a reasonable probability of harm to the Foundation if the Homecare Contracts are disclosed.
>
> Disclosing the Homecare Contracts to the applicant will, or has the reasonable potential of, resulting in the Foundation being competitively disadvantaged in its contracts with third parties related to manpower, equipment and operations at the Foundation's facilities. If such parties become aware of it, they can then use it to gain an advantage in their contracts with the Foundation in the future.
>
> Section 16(1)(c)(ii) of the Act applies. Although the information in the Homecare Contracts is provided to AHS for funding purposes and a system of checks and balances, if it is disclosed, in the future, the Foundation could be reluctant to provide it unless there are express assurances it will not be disclosed to others without the consent of SCF. It is in the public interest to have a system of checks and balances in health care services for seniors with the information in the Homecare Contracts being provided to AHS by the Foundation.
>
> In the event the Homecare Contracts are provided to the applicant, then that can interfere with the contractual relations the Foundation has with parties that provide it services at its facilities, especially if they become aware of it. Such has the potential of increasing the costs of the Foundation, which then could increase the costs to AHS and the Provincial Government.
>
> Disclosing the Homecare Contracts to the applicant can result in financial loss to the Foundation in the future and give gain to the applicant in its relationship with the Foundation.
>
> Section 16(1)(c)(iii) of the Act applies. Disclosing the Homecare Contracts would, or could, result in undue financial loss to the Foundation or undue financial gain to someone else. Disclosure of the Homecare Contracts would, or has the potential of, increasing the costs of the Foundation or allow a contractor, union or other person to be given an advantage and a financial gain in its relationship with the Foundation. If such a party gets financial gain, then there is a financial loss to the Foundation.

[para 121] The Applicant argues that it benefits from economies of scale, which will be hampered by disclosure. I understand the Applicant to mean by this argument that its size gives it an economic advantage over smaller competitors, and that this economic advantage would be lost or diminished by disclosure of the Master Services Agreement. It is unclear to me how this advantage would be harmed if the Master Services Agreement were made available to competitors. Possibly, the Applicant means that it has negotiated terms with AHS that its smaller competitors cannot. However, if smaller competitors are unable to negotiate the kinds of terms that the Applicant is, it is unclear how they would become able to do so by virtue of disclosure of the Agreement.

[para 122] As discussed above, the Applicant has the burden of establishing that harm within the terms of section 16(1)(c) would be likely to result from disclosure. Here, the Applicant has not provided sufficient detail or explanation of the harm it projects in terms of competitive disadvantage to enable me to assess the likelihood of its coming to pass as a result of disclosure.

[para 123] The Applicant also argues that its reputation will be harmed by disclosure of the Master Services Agreement. Not only has the Applicant not explained how this outcome is likely to result with specific reference to the terms of the Master Services Agreement, but section 16(1)(c) does not include harm to reputation in its scope. As discussed above, section 16(1)(c) contains an exhaustive list of harms. If the projected harm to a third party is not enumerated in section 16(1)(c), then the terms of section 16(1)(c) are not met, even if the likelihood of that harm coming to pass is established. With regard to damage to reputation, the Applicant has not established that this harm is likely to result from disclosure, nor that this projected harm falls within the terms of section 16(1)(c).

[para 124] The Applicant also argues that contractors that provide assistance with its manpower, equipment and operations may use it in the future, once these contractors become aware of the terms of the Master Services Agreement. It is unclear to me how disclosure of the Master Services Agreement could be expected to result in this outcome, particularly as these contractors are not parties to the Master Services Agreement. In any event, section 16(1)(c) does not include harm to litigation (see Order F2009-015), and therefore, the terms of section 16(1)(c) are not met for this reason as well.

[para 125] The Applicant also argues that it will be reluctant to provide information to AHS for funding purposes if it does not receive express assurances that the information will not be disclosed to others in the future. As discussed above, I am unable to identify any information in the Master Services Agreement that could be said to belong to the Applicant or to have been supplied by the Applicant to AHS. If the Applicant does provide the information it describes to AHS, such information is not revealed by the content of the Master Services Agreement. I am therefore unable to say that any future reluctance to provide information to AHS for funding purposes would be related in any way to disclosure of the Master Services Agreement. Moreover, section 16(1)(c)(ii) contemplates the harm that similar information will *no longer* be supplied to a public body, as opposed to the possibility that third parties will merely be reluctant to supply necessary information. I am therefore unable to accept this argument for that reason as well.

[para 126] The Applicant also argues that it will be unable to bargain with AUPE on a global basis if the Master Services Agreement is disclosed. It also notes that in the past, it has not revealed the financial information that is contained in the Master Services Agreement in the course of negotiations. It states that on this basis, its negotiating position will be interfered with significantly. However, the Applicant has provided no explanation as to why it cannot continue to negotiate on a global basis as it prefers to do, nor has it explained why disclosure of information in the Master Services Agreement

could be expected to result in the significant interference to negotiations it projects. While it has explained that it does not typically provide this information in negotiations, it does not follow from this that significant harm to its negotiating position is likely to flow from disclosure.

[para 127] The Applicant also argues that disclosure of the Master Services Agreement would result in financial gains to contractors, unions, or other persons, and increased costs to itself. The Applicant does not explain how this projected outcome is likely to result from disclosure, or comment on the likelihood that it will occur. Possibly, the Applicant is concerned that the AUPE will seek increased wages and benefits if it becomes aware of the content of the Master Services Agreement. However, it does not appear to be the case that the Applicant would be required to agree to provide increased wages and benefits. If it is in some way required to do so, then that has not been explained for this inquiry. Finally, section 16(1)(c)(iii) requires that financial loss or gain be "undue". If the Applicant and the AUPE enter an agreement for increased wages and benefits as a result of lawful collective bargaining or arbitration, it can hardly be said that any financial gain to union members and a corresponding loss to the Applicant is "undue".

[para 128] For the reasons above, I find that the terms of section 16(1)(c) are not fulfilled with regard to the Master Services Agreement.

[para 129] The Applicant also argues that the confidential communications doctrine applies to the information in the Master Services Agreement. It relies on *Slavutych v. Baker*, [1976] 1 S.C.R. 254 in which Spence J., speaking for the Supreme Court of Canada said the following regarding confidential communications:

> Sinclair J.A. quoted Lord Denning M.R., in *Seager v. Copydex, Ltd.*, at p. 417, who, in turn had adopted the statement of Roxburgh J. in Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd. et al.3, as follows:
>
> > "As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication, and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public."
>
> I am of the opinion that that is a sound statement of the doctrine as to revelation of confidential communications when it deals with the actions of those who are parties to the confidence. The fact that that particular statement was made in reference to a commercial situation was, as pointed out, by Sinclair J.A., no reason why it should be […] confined to such situation and, indeed, *Argyll v. Argyll*, a decision of Ungoed-Thomas J., shows that it may be applied to very personal situations, in that case confidential revelations by a wife to her husband during coverture. The doctrine was applied by Turner J. in *Bell v. University of Auckland*, when what was being considered was an attempt by the plaintiff to obtain production from the defendant of certain notes and recommendations given to the defendant by persons whom the plaintiff had designated as appropriate sources from whom confidential information might be obtained. As will be seen, some of the circumstances bear a marked resemblance to the present case. Here, it is the very party who instigated the communication in confidence and stressed its confidentiality

> who desires to not produce it but to use as a basis for a charge of misconduct justifying dismissal. I quote from the judgment of Turner J. at p. 1036.
>
> > Here the parties to the present action have solemnly agreed before the action that the documents which are now in question should be brought into existence upon the solemn undertaking of both of them that the plaintiff will not be entitled to see the documents.
>
> One of those two parties was the plaintiff, and it was the plaintiff who sought the right to see the documents. In the present case, the solemn undertaking was made between the university, acting through the head of the department, and the appellant, and it is the university which seeks to use the document.

[para 130] In *Slavutych*, the Court placed particular emphasis on the fact that the University had provided assurances to the plaintiff that his assessment of another professor would be kept confidential and then destroyed once the assessment concluded. Despite this assurance, the University subsequently used the assessment to terminate the plaintiff's employment. The confidential communications doctrine, adopted in this decision, prevents a party from using confidential information obtained by providing assurances of confidentiality for other purposes that are damaging or detrimental to the person who provided the information.

[para 131] There is simply no evidence before me that AHS provided assurances of confidentiality regarding the Master Services Agreement. Certainly no such terms are present in the Master Services Agreement itself. Moreover, as discussed above, I am unable to identify any information in the Master Services Agreement that could be said to have been supplied by the Applicant to AHS. As noted above, the position of AHS is that the Applicant did not supply it with information, but negotiated an agreement with it.

[para 132] To conclude, I find that none of the terms of section 16(1) is met with respect to the Master Services Agreement.

Issue C: Did AHS properly refuse to apply section 25(1) (disclosure harmful to economic and other interests of a public body) to the information it has decided should be disclosed?

[para 133] Section 25 of the FOIP Act authorizes a public body to withhold information harmful to the economic interests of the Government of Alberta or a public body. It states, in part:

> *25(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy, including the following information:*
>
> > *(a) trade secrets of a public body or the Government of Alberta;*

(b) financial, commercial, scientific, technical or other information in which a public body or the Government of Alberta has a proprietary interest or a right of use and that has, or is reasonably likely to have, monetary value;

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

(i) result in financial loss to,

(ii) prejudice the competitive position of, or

(iii) interfere with contractual or other negotiations of,

the Government of Alberta or a public body;

(d) information obtained through research by an employee of a public body, the disclosure of which could reasonably be expected to deprive the employee or the public body of priority of publication.

[para 134] AHS has not applied in section 25 in this case. Rather, the Applicant argues that if I find that it is a public body and not a third party, that section 25 should be applied to the Master Services Agreement.

[para 135] As I have found that the Applicant is a third party and not a public body, I need not address this argument.

Issue D: Did the Public Body properly refuse to apply section 17 (disclosure harmful to personal privacy) to the information it has decided should be disclosed?

[para 136] The Applicant argues:

> Subject to some exceptions, s. 17(1) of the Act indicates that the head of a public body must refuse to disclose personal information which would be an unreasonable invasion of a third party's privacy. It would be an unreasonable invasion of SCF's privacy to disclose the Homecare Contracts to AUPE.

Section 1(n) of the FOIP Act defines "personal information" for the purposes of the Act. It states:

1 In this Act,

(n) "personal information" means recorded information about an identifiable individual, including

(i) the individual's name, home or business address or home or business telephone number,

> *(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
>
> *(iii) the individual's age, sex, marital status or family status,*
>
> *(iv) an identifying number, symbol or other particular assigned to the individual,*
>
> *(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
>
> *(vi) information about the individual's health and health care history, including information about a physical or mental disability,*
>
> *(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
>
> *(viii) anyone else's opinions about the individual, and*
>
> *(ix) the individual's personal views or opinions, except if they are about someone else;*

[para 137] "Personal information" is defined in the FOIP Act as "recorded information about an identifiable individual." While personal information is defined broadly and inclusively, it is not so broad or inclusive as to encompass an entity that is not an individual. In this case, the Applicant is not an individual. It therefore cannot have personal information.

[para 138] Section 17(1) prohibits a public body from disclosing personal information to a requestor, if doing so would be an unreasonable invasion of a third party's personal privacy. While I accept that the Applicant in this case is a third party, I find that any information about it that may be gleaned from the Master Services Agreement is not personal information, as it is not information about an identifiable individual.

[para 139] For these reasons, I find that section 17 does not require AHS to withhold the Master Services Agreement.

V. ORDER

[para 140] I make this Order under section 72 of the Act.

[para 141] I confirm the Public Body's decision that it is not required by section 16, or any other provision of the FOIP Act, to withhold the Master Services Agreement from

AUPE. I therefore require the head of AHS to give AUPE access to the Master Services Agreement in its entirety.

[para 142] I order AHS to notify me in writing within fifty days of receiving this order, that it has complied with it.

_____
Teresa Cunningham
Adjudicator