ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2016-65

December 22, 2016

ALBERTA HEALTH SERVICES

Case File Number F7837

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 Alberta Health Services 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. One home care provider that received notice (the Applicant) objected to disclosure of its 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).

The Adjudicator upheld AHS's decision to disclose the information. In doing so, she noted that the Applicant was a third party 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, 16, 30, 65, 71, 72; *Nursing Homes Act* R.S.A. 2000, N-7, ss. 1, 2; *Interpretation Act* R.S.A. 2000, c. I-8, s. 28

Authorities Cited: AB: Orders 96-013, 99-018, 2000-005, F2005-11, F2008-027, F2009-007, F2009-015, F2009-028, F2010-036, F2011-001, F2011-002, F2011-018, F2012-06, F2012-17, F2013-17, F2013-37, F2013-47, F2013-48, F2014-44, F2015-03, F2015-12; **ON:** 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; *Edmonton Police Service v. Alberta (Information and Privacy Commissioner*), 2012 ABQB 595; *Aventis Pasteur Ltd. v. Canada (Attorney General)*, 2004 FC 1371; *Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231

I. BACKGROUND

[para 1] On August 1, 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. One home care provider that received notice (the Applicant) objected to disclosure of its contract. However, AHS decided that it would disclose the contract, on the following basis:

> […] paragraph 85 in IPC Order 2000-005 states that "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."
>
> […]
>
> Given the nature of the records at issue here, AHS contends that paragraphs 50 – 51 in IPC Order 2002-002 are not relevant to this FOIP request as a third party's response to a request for proposal ("RFP") was the document at issue in that Order. IPC Order 2002-002 appears to establish the rule that a response to an RFP constitutes third party commercial and financial information that is supplied in confidence to a public body.
>
> That rule bears no weight in a scenario where a FOIP request for a mutually negotiated agreement to provide services to a public body is under consideration.

[para 3] The Applicant requested review by the Commissioner of the Public Body'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 Appendix I of the Master Services Agreement between the Applicant and the Public Body is at issue.

III. ISSUES

Issue A: Is the Applicant a public body within the terms of section 1(p)(vii), 1(j)(ii) and 1(g)(ii) of the Act? If a public body, does it have the 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?

IV. DISCUSSION OF ISSUES

Issue A: Is the Applicant a public body within the terms of section 1(p)(vii), 1(j)(ii) and 1(g)(ii) of the Act? If a public body, does it have the 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)).
>
> AUPE does not know whether [the Applicant] also provides nursing home care but submits that if [the Applicant] does, it is a "public body" under the Act.

[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 [Applicant] supplies services pursuant to the Home Care Regulation and as such cannot be a public body under the Nursing Homes legislation.

> In determining whether the [Applicant] 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 [Applicant] 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 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 thrust of AUPE's argument is 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.

[para 14] There is no evidence before me that the Applicant has entered a contract with a regional health authority to provide nursing home services. As noted above, the access request that led to the Applicant's request for review is for the home care contract between the Applicant and the Public Body. 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 15] 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 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 16] To address the possibility that the Applicant may have entered a nursing home contract in addition to the home care contract that is at issue, I turn now to 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 17] 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 18] The interaction between these provisions gives rise to two interpretations. First, that 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 19] The first interpretation – that the effect of the legislation is to transform a entity into a nursing home operator and a public body with regard to all its operations is problematic if the entity is a corporation, in part because 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. The difficulty in finding that a person is an operator in all aspects is also apparent if the person operating a nursing home is an individual. 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, 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 20] 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 21] 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 22] 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 am satisfied that the Applicant is a third party in this inquiry and not a public body.

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

[para 23] 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 24] 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 25] 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 26] As this inquiry involves a request for review by a third party following a public body's decision to release a record to an applicant, the burden of proof set out in section 71(3) of the Act applies. It reads as follows:

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

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

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

[para 27] Section 16(1) does not apply to personal information, but to information harmful to business interests, 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 28] 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 29] 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 30] In an inquiry as to a public body's decision to disclose information over which a third 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 31] I turn now to the question of whether the Applicant has established that Appendix 1 of the Master Services Agreement between itself and AHS should be withheld in its entirety from the AUPE.

Does section 16(1) apply to Appendix I of 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 32] 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 33] The Applicant argues:

> The Agreement contains confidential financial, commercial, and labour relations information. In particular, the Agreement contains confidential commercial information in the form of [the Applicant's] expected revenue under the Agreement, and confidential labour relations information in the form of service rates charged for [the Applicant's] employees. Release of this information could allow an outside party to accurately infer certain other confidential facts relating to [the Applicant's] profitability and cost structure.

[para 34] 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 99-018, F2009-007, F2009-028, F2010-013, F2010-036, F2011-002, F2011-001, F2012-06, F2012-17, F2013-17, F2013-37, F2013-47, and F2013-48 also adopt the position that section 16 applies to protect the informational assets of third parties in situations where those assets have been supplied to government in confidence, and that harm could result from the disclosure of these informational assets.

[para 35] 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 36] 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 proprietary 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 37] Applying the principles adopted in these orders, commercial information of a third party within the terms of section 16 is commercially valuable information 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 38] 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 39] 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 40] 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, although I accept that this information could be construed as "commercial".

[para 41] Having found that the information could be construed as commercial information regarding the Applicant and AHS, the next question to consider is whether the information is "of a 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 "informational assets" of third parties.

[para 42] 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. 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 was not proprietary or alternatively, was not information in which the third party in that case had expended resources, such that the information could be said to have value independent of the negotiation process.

[para 43] As was the case in Orders F2015-12 of this office and Order MO-2801 of Ontario, the information the Applicant argues is its commercial information consists of mutually negotiated contractual terms which create obligations for both parties.

[para 44] From my review of Appendix I, 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 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 documents their mutual agreement. I am therefore unable to say that any information contained in the agreement *belongs* to the Applicant.

[para 45] For the foregoing reasons, I find that the information in Appendix I of the agreement is not the commercial 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 46] I have already found that the information contained in Appendix I 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 47] AHS argues that the information in this case was not supplied but mutually negotiated between itself and the Applicant. As noted above, I agree with AHS in its characterization of the terms in Appendix I.

[para 48] 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 49] 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 50] 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 51] 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 52] The Applicant argues that the information in Appendix I is "immutable information". That is, it argues that the information, which it characterizes as its "expected revenue", was not negotiated, but was information that it originally supplied and appears in Appendix I unchanged. The Applicant cites Order 2000-005, in which former Commissioner Clark recognized that some information in a contract may be supplied. 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.
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> The foregoing interpretation of section [16(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 53] 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):
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> > 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 54] 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 55] 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 56] The Court determined that scientific information commissioned by Imperial Oil and supplied to Alberta Environment would be revealed by disclosure of the provisions of 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 57] 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 <u>are not</u> 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.
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> 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 58] 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 Appendix I 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 Appendix I impose obligations on AHS, the information in the records supports finding that the information in Appendix I was *not* supplied by the Applicant.

[para 59] As the information in this case 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 60] 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 61] The Applicant makes the following argument regarding confidentiality:

> This information was supplied in confidence, as evidenced by Article 16 of the Agreement. In particular, Article 16.10 specifically states that if an application for disclosure is made pursuant to FOIP, both [the Applicant] and AHS shall take all steps to protect confidentiality.

Article 16 of the Agreement is entitled "Confidentiality and Confidential Information". This article imposes duties of confidentiality on the Applicant in relation to records and information generated in the performance of the contract. For example, in the case of health information it may collect, use, or disclose, it must comply with AHS's policies and the *Health Information Act*.

[para 62] Article 16.10 of the Agreement states:

> 16.10 Freedom of Information and Protection of Privacy
> (a) AHS is a public body that must comply with FOIP. AHS is not able to guarantee confidentiality of documents submitted to it in the normal course of business or otherwise, or to which it otherwise has a right of access. All documentation or other information submitted by the Service Provider to AHS, even those marked "confidential", may be subject to the privacy and disclosure provisions of FOIP.

> (b) The parties shall comply in all respects with the requirements of FOIP and HIA in the event that a valid application for disclosure is made, but shall take all such steps to preserve the full confidentiality or as much confidentiality as is available under the provisions of those statutes.
>
> (c) All records and other data created in connection with the provision of the Services and provided to AHS are subject to the provisions of FOIP, by which AHS is bound. All materials, documents, records or other information provided by AHS to the Service Provider or generated by the Service Provider in relation to the performance of the Services for AHS remain the property of AHS and remain under its control for the purpose of FOIP and HIA.

From my review of Article 16.10, I conclude that this provision does not address information submitted during the negotiations of the agreement, but information that is collected, used, or disclosed in the course of performing duties under the agreement. The parties in this case acknowledge that they must comply with the FOIP Act and the HIA where applicable. Further, Article 16.10 states that AHS *cannot* guarantee the confidentiality of any information supplied to it by the Applicant. While I do not interpret this provision as referring to the agreement itself, I am unable to say that there are any terms in the contract that require either AHS or the Applicant to keep the content of the agreement confidential.

[para 63] 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 64] 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 65] 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 Appendix I communicated to AHS on the basis that it was confidential and that it was to be kept confidential?

[para 66] While the Applicant argues that the information in Appendix I is confidential, it has not provided any evidence to support finding that it supplied information, or did so 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 67] I find that Appendix I does not contain information supplied to AHS on the basis that it was confidential and to be kept that way.

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

[para 68] 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 69] No evidence has been provided as to whether the information has been disclosed or is available from sources to which the public has access. I am therefore unable to conclude that the information is not available from sources to which the public has access.

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

[para 70] The [Applicant] provided no evidence or argument on this point. However, the information at issue is contained in a contract for services. In the event of a legal dispute regarding the contract, it would seem likely that the terms of the contract, including Appendix I, 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 71] 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 72] Although it is unnecessary to address section 16(1)(c) in relation to the information in Appendix I, given my conclusions under sections 16(1)(a) and (b), I have decided to do so for the sake of completeness.

[para 73] 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 74] 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 75] 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 76] The Applicant did not address section 16(1)(c) in its submissions. However, I note that it expresses concern that disclosure would allow "an outside party to infer certain facts about [the Applicant's] business." From the foregoing, I infer that it contemplates that a harm may be likely to result to its business if the information in Appendix I is disclosed. However, I am unable to correlate this harm with any of those harms enumerated in section 16(1)(c). Moreover, the Applicant has not explained how it foresees this harm is likely to result from disclosure of the information it seeks to have withheld, so that I could assess the likelihood of such harm.

[para 77] For the reasons above, I find that the terms of section 16(1)(c) are not fulfilled with regard to Appendix I.

[para 78] To conclude, I find that none of the terms of section 16(1) are met with respect to Appendix I of the agreement. I will therefore confirm AHS's decision to disclose the records and order it to provide Appendix I to AUPE.

V. ORDER

[para 79] I make this Order under section 72 of the Act.

[para 80] I confirm that the Public Body is not required by section 16 of the FOIP Act to withhold Appendix I of the Master Services Agreement between itself and the Applicant. I therefore require the head of AHS to give AUPE access to Appendix I of the Agreement.

[para 81] I order AHS to notify me in writing within fifty days of receiving this order, that it has complied with it.

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Teresa Cunningham
Adjudicator