ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2017-01

January 12, 2017

ALBERTA HEALTH SERVICES

Case File Number F8441

Office URL: www.oipc.ab.ca

Summary: Pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act), Alberta Health Services (the Public Body) received an access request for records relating to air ambulance services. It contacted the Third Party which is a business that provides air ambulance services and advised the Third Party that the Public Body intended to disclose a contract between the Third Party and the Public Body to the applicant. The Third Party objected and the Public Body severed some information from the contract pursuant to section 16 of the Act but determined that the remaining information would not cause harm to the Third Party as contemplated by section 16(1)(c) of the Act. The Third Party then asked for the Office of the Information and Privacy Commissioner (our Office) to review the Public Body's decision.

The Adjudicator found that section 16 of the Act did not require the Public Body to withhold the information at issue from the applicant because the Third Party failed to meet its burden and prove that it met the harms test articulated in section 16(1)(c) of the Act. Therefore, the Adjudicator ordered the Public Body to disclose the information at issue to the applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 16, 30, 71, and 72.

Authorities Cited: AB: Orders 96-003, F2004-006, F2004-013, F2007-032, and F2014-44.

Cases Cited: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515.

I. BACKGROUND

[para 1] Pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act), on April 24, 2014 Alberta Health Services (the Public Body) received an access request from an applicant for all records relating to contracts for air ambulance services or air evacuation services. The Public Body conducted a search and found responsive records which included information about the Third Party, a business. The Public Body provided the Third Party with notice pursuant to section 30 of the Act. On July 22, 2014, the Third Party received a letter from the Public Body asking for its consent to disclose the responsive records. This request was declined on July 30, 2014. In response, the Public Body decided to sever some information from the records pursuant to section 16 of the Act but to disclose other information in the responsive records. The Public Body advised the Third Party of its intentions on August 15, 2014.

[para 2] On September 4, 2014, the Third Party requested that our Office review the Public Body's decision to release information to the applicant. Mediation was authorized but did not resolve the issues between the parties and on October 14, 2015, the Third Party requested an inquiry. The applicant was invited to participate in this inquiry but did not respond to our request. I received submissions from both the Third Party and the Public Body.

II. ISSUE

[para 3] The Notice of Inquiry dated June 20, 2016 states the issue in this inquiry as follows:

> Does section 16 of the Act (disclosure harmful to business interests of a third party) apply to the information the Third Party seeks to have severed from the records?

III. DISCUSSION OF ISSUE

Does section 16 of the Act (disclosure harmful to business interests of a third party) apply to the information the Third Party seeks to have severed from the records?

[para 4] The portions of section 16 of the Act which are relevant to this inquiry state:

> *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 5] In its Request for Inquiry, the Third Party stated that the responsive records:

> …include very specific negotiated financial and contractual information. We felt that to release the requested information would result in great financial loss and put [the Third Party] at a severe disadvantage in terms of future negotiations. We refused to give access to our private financial information as doing so could severely jeopardize our position in securing a contract, and would consequently be harmful to our company's business interests as our income and bargaining position would be disclosed, resulting in undue financial loss to our company.

[para 6] The Public Body submits it followed the following three part test set out in Order F2004-013 when it made the determination as to whether section 16 of the Act applied:

> 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 be reasonably expected to bring about one of the outcomes in section 16(l)(c)?
>
> [Order F2004-013 at para 10]

[para 7] The Public Body further submits that according to section 71(3) of the Act, the Third Party has the burden to prove that the applicant has no right of access to the record or any part of it. Citing various orders issued by our Office, the Public Body cited the specific standard of proof in this case as follows:

> In Order F2007-032 an Adjudicator reviewed the standard of proof necessary to engage section 16 at paragraphs 31 and 32:
>
> > [para 31] ln *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner),* 2006 ABQB 515 the Court clarified evidentiary requirements for discharging the burden of proof. The Court said:
> >
> > > ln my view, the Privacy Commissioner's requirement for an evidentiary foundation withstands a somewhat probing examination. As discussed, the scope and intention of FOIPP presumes access to information, subject only to limited exceptions, and the responsibility for establishing an exception rests with the party resisting access to the information.
> > >
> > > The requirement of some cogent evidence permits the Privacy Commissioner to discharge his duty of balancing competing interests and policy considerations by rationally assessing the likelihood of reasonable expectations of harm. To suggest that requiring some evidence is unreasonable means that access to information could be denied based solely on hypothetical possibilities, and that only the most preposterous theoretical risks could be rejected by the Commissioner.
> >
> > [para 32] The Third Party therefore bears the burden of submitting cogent evidence to establish that its expectation that the information at issue was supplied in confidence is reasonable. It must also establish through evidence, that disclosure of information supplied in confidence will result in harm within the meaning of section 16(1)(e). [TAB #2]
>
> The words "could reasonably be expected to" in section 16(1)(c) have been interpreted to mean that evidence of a reasonable expectation of probable harm is required. The word "probable" means proof "on a balance of probabilities". Proof "on a balance of probabilities" means that the evidence must involve more than speculation and more than a mere possibility of harm. [Order F2008-031b paragraph 54 [TAB #3]

[para 8] The Public Body applied the test noted above to the information that the Third Party objected to disclosing, and concluded that portions of the records were financial and commercial information of the Third Party, but other portions, which were internal, general contract requisitions and documentation applicable to all air ambulance operations, were not.

[para 9] When the Public Body turned to part two of the test noted above, it concluded that the information submitted by the Third Party was supplied explicitly or implicitly in confidence.

[para 10] Finally, the Public Body turned its mind to the third part of the test and found that, other than the information it redacted, the information did not meet the harms test articulated in Order F2007-32. In its submission, the Public Body stated:

> In Order 96-003, the Commissioner stated that in order for a public body to meet the "harm" test under section 15(1)(c)(i) (now 16(1)(c)(i)) ... "[The] evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue." *(Canada (Information Commissioner) v. Canada (Prime Minister),[1992]* F.C.J. No. 1054 (Fed.T.D.)" In that Order the Commissioner also stated that the public body must provide evidence of the following to prove significant harm to the third party's competitive position under section 15(1)(c)(i) (now 16(1)(c)(l)):
>
> > (i) the connection between disclosure of the specific information and the harm which is alleged;
> >
> > (ii) how the harm constitutes "damage" and "detriment" to the matter; and
> >
> > (ii) whether there is a reasonable expectation that the harm will occur. [TAB # 6 Order 96-003 page 6]
>
> In Order F2014-44 at paragraph 61 an Adjudicator stated that:
>
> > ... a third party seeking to establish the likelihood of significant interference with negotiating position arising from disclosure must establish a direct linkage between the information at issue and the risk of significant interference it projects.
>
> Finally, in Order F2004-006 the Adjudicator indicated that in order to determine whether a third party's negotiating or competitive position would be harmed by disclosure, evidence of the nature of the market in which the third party operates would be useful. [TAB # 7 Order F2004-006 paragraphs 34 and 35]
>
> In this instance the Privacy Coordinator after reviewing the Third Party's submissions concluded that there was insufficient evidence to demonstrate that the harms test was met. The evidence presented by the Third Party during the section 30 consult was more speculative than substantive. lt pointed more to a possibility of harm rather than a direct link between disclosure and harm.
>
> (Public Body's initial submissions at paras 11-14)

[para 11] As a result, the Public Body decided that some of the information at issue would be disclosed to the applicant because all three parts of the test were not met. However, the Public Body did withhold some information, such as pricing information,

estimate uplifts and COLA because it felt, given the small market, that there was a likelihood that disclosure of this information could harm the Third Party.

[para 12] Whether the Public Body properly applied section 16 to the information it plans to sever is not an issue in this inquiry. Once the Public Body has responded to the applicant's access request, the applicant will have the ability to request that our Office review that response. This may also include a review of the Public Body's application of section 16 of the Act. Therefore, I will not be making any findings regarding the information that the Public Body has severed from the records at issue.

[para 13] In its submissions, the Public Body properly cited the applicable test in determining if section 16 applied to the information in the records. Given the view of the Public Body regarding the commercial and confidential nature of the information and the submissions of the Third Party quoted above, it seems the main point of contention between the Public Body and the Third Party in this inquiry is whether the disclosure of the information at issue could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of the Third Party (section 16(1)(c)(i) of the Act). I am alive to the idea that information appearing in a negotiated contract may not be "supplied" but rather negotiated, and therefore may not meet the test in section 16(1)(b) of the Act, and that this is an idea that the Public Body does not appear to have considered. However, because all three parts of the test need to be met in order for section 16 of the Act to apply, and because I find below that disclosure of this information at issue would not meet the harms test set out in section 16(1)(c) of the Act, it is not necessary for me to make any findings whether the information at issue meets section 16(1)(a) or 16(1)(b) of the Act. Therefore, I will confine my findings, set out below, to section 16(1)(c) of the Act.

Section 16(1)(c):

[para 14] The Public Body properly cited the test that is to be applied when determining if the harms test under section 16(1)(c) of the Act has been met. As the Supreme Court stated in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31:

> 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, [2008] 3 S.C.R. 41, at para. 40.
>
> *(Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31)

[para 15] The Public Body was also correct in asserting that the burden to provide evidence to meet this test rests with the Third Party. As the Court of Queen's Bench decided in *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner),* 2006 ABQB 515:

> The Commissioner's decision did not prospectively require evidence of actual harm; the Commissioner required some evidence to support the contention that there was a risk of harm. At no point in his reasons does he suggest that evidence of actual harm is necessary.
>
> The evidentiary standard that the Commissioner applied was appropriate. The legislation requires that there be a "reasonable expectation of harm." Bare arguments or submissions cannot establish a "reasonable expectation of harm." When interpreting similar legislation, courts in Ontario and Nova Scotia have held that there is an evidentiary burden on the party opposing disclosure based on expectation of harm: *Chesal v. Nova Scotia (Attorney General),* at para. 56 *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)* at para. 26.

[para 16] Therefore, the Third Party must provide adequate evidence to establish a reasonable expectation of significant harm. This will require the Third Party to provide evidence and not simply bare arguments or submissions.

[para 17] The submissions/evidence that the Third Party put before me on the harm that could occur if the information is disclosed was:

- From the initial letter to the Commissioner dated September 3, 2014 (attached to Request for Review):

> …We are requesting this review of the request for release of information regarding our confidential contract application information from [the Public Body] which we, [the Third Party] feel would jeopardize our company.
> …
> We feel strongly justified in our denial of their request. We kindly ask that you review the attached information and sincerely trust you will agree with our position.

- From a letter to the Commissioner dated September 2, 2014 (attached to Request for Review):

> …
> [The Third Party] declined [the Public Body's initial request] on July 30, 2014 as these records include very specific financial and contractual information. We felt that to release the requested information would result in great financial loss and put [the Third Party] at a severe disadvantage in terms of future negotiations. We refused to give access to our private financial information as doing so could severely jeopardize our position in securing a contract, and would consequently be harmful to our company's business interests as our income and bargaining position would be disclosed, resulting in undue financial loss to our company.

[The Public Body] responded on Aug. 15, 2014 stating that they will redact a *very minute* portion of the private and confidential financial information requested to be released.

[The Third Party] is strongly opposed to the disclosure of this information. We are outraged that our exclusive, restricted, finite corporate financial information could so easily be released to a third party, despite our strong opposition and could result in extensive financial loss, jeopardize our position in terms of the ability to negotiate and secure future contracts, all results being detrimental to our company and those in our employ.

[The Third Party] is requesting a review of the decision to the disclosure of these records based on the following reasons:

- The information was supplied explicitly and in confidence.
- The release of the information would harm significantly our competitive position and/or interfere with out negotiating position.
- The disclosure is an invasion of our privacy.
- The disclosure reveal financial and other details of our contract to supply services to a public body.
- The information requested relates to contracts that have been awarded to [The Third Party].

All of the aforementioned reasons are imperative to the sustainability and continued operation of [the Third Party]. We are a small, family owned business. We pride ourselves on professionalism, dedication and a strong commitment to serve. Please do not allow the release of this information and the potential to jeopardize the future of our company.

- From a letter dated October 13, 2015 (attached to the Third Party's Request for Inquiry):

[The Third Party] declined [the Public Body's initial request] on July 30, 2014 as these records include very specific negotiated financial and contractual information. We felt that to release the requested information would result in great financial loss and put [the Third Party] at a severe disadvantage in terms of future negotiations. We refused to give access to our private financial information as doing so could severely jeopardize our position in securing a contract, and would consequently be harmful to our company's business interests as our income and bargaining position would be disclosed, resulting in undue financial loss to our company.

[The Public Body] responded on Aug. 15, 2014 stating that they will redact a *very minute* portion of the private and confidential financial information requested to be released. There still remains a large portion of confidential information that they wish to disclose…

- From an email to our Office dated June 23, 2016:

Further to your letter of June 21, 2016, we, [the Third Party], are secure in the knowledge that we have successfully supplied the necessary information throughout the proceedings

> and applications of the Request for Inquiry and the Request for Review and therefore, choose not to supply any further information or documentation.

[para 18] The Third Party opted not to provide a rebuttal submission despite the fact that the Public Body's initial submission indicated that it felt that the Third Party did not meet its burden under section 16(1)(c) of the Act.

[para 19] The evidence provided by the Third Party (as cited above) does not establish to an adequate level that the disclosure of the information at issue could be reasonably expected to cause significant harm to the Third Party. The Third Party did not explain how the information at issue could cause harm, and it is not evident or obvious to me on the face of the records how disclosing the information at issue could cause harm as contemplated in section 16(1)(c) of the Act. The Third Party simply provided bare submissions and assertions without evidence or explanations as to how the financial losses or competitive disadvantages would be caused. This does not establish that there was a reasonable expectation of probable harm if the information at issue was disclosed. As a result, I find that section 16 of the Act does not require the Public Body to sever the information at issue and that that information ought to be disclosed to the applicant.

IV. ORDER

[para 20] I make this Order under section 72 of the Act.

[para 21] I confirm the Public Body's decision and find that section 16 of the Act does not apply to the information the Public Body decided to disclose to the applicant. I order the Public Body to disclose that information to the applicant.

[para 22] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

_____
Keri H. Ridley
Adjudicator