**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER**

# ORDER F2018-25

June 15, 2018

**ALBERTA CORPORATE HUMAN RESOURCES**

Case File Number 001722

**Office URL:** www.oipc.ab.ca

**Summary:** An Applicant made an access request to Alberta Corporate Human Resources (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for a copy of a services agreement between the Public Body and Great-West Life Assurance Company.

The Public Body provided a copy of the agreement with information severed under section 16(1) (disclosure harmful to business interests of a third party). Specifically, 6 pages of the agreement, comprised of a pricing schedule, were withheld in their entirety. The Applicant requested an inquiry; Great-West Life Assurance Company participated in the inquiry as an affected party.

The Adjudicator found that section 16(1) did not apply to the Schedule, as it was not supplied in confidence within the terms of section 16(1)(b). The Adjudicator also determined that there was insufficient evidence to show that disclosure of the Schedule could reasonably be expected to result in a harm set out in section 16(1)(c).

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

**Orders Cited: AB:** Orders F2004-013, F2005-011, F2009-028, F2011-002, F2012-15, F2013-47, F2015-03, F2016-64, **BC**: Orders F11-27, **Ont**: Orders PO-226, PO-2010, PO-3176.

**Case Cited:** *Agriculture Financial Services Corporation v. Alberta (Information and Privacy Commissioner),* 2012 ABQB 397, *Boeing Co. v. Ontario (Ministry of Economic Development and*

*Trade)*, [2005] O.J. 2851, *Canada (Information Commissioner) v. Canada (Prime Minister)*, 1992 CanLII 2414 (FC), [1992] F.C.J. No. 1054, *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475, *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603, *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 (CanLII), *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31, *Park Place Seniors Living Inc. v. Alberta Health Services,* 2017 ABQB 575.

## I. BACKGROUND

[para 1] The Applicant made an access request to Alberta Corporate Human Resources (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for a copy of the "Service Agreement/Contract between GOA and Great West Life in relation to GWL being plan adjudicator for LTD Claims." The request specified that the agreement sought was the agreement in effect at the time of the request (April 29, 2015).

[para 2] A copy of the Agreement (20 pages) was provided to the Applicant, with pages 11-16 withheld in their entirety under sections 16(1) and 25(1). The Applicant requested a review of the Public Body's decision, and subsequently an inquiry.

[para 3] Great-West Life Assurance Company was invited to participate in the inquiry and it provided submissions. It will be referred to in this Order as the Affected Party.

## II. RECORDS AT ISSUE

[para 4] The records at issue consist of the Service Agreement between the Public Body and the Affected Party, with pages 11-16 withheld in their entirety under section 16(1). The parties have referred to these pages as a schedule of fees or pricing schedule (Schedule).

## III. ISSUES

[para 5] The Notice of Inquiry, dated November 30, 2017, set out the following issues:

1. Does section 16 of the Act (disclosure harmful to business interests of a third party) apply to the information in the records?

2. Did the Public Body properly apply section 25(1) of the Act (disclosure harmful to economic and other interests of a public body) to the information in the records?

[para 6] In its initial submission, the Public Body informed me that it was no longer applying section 25(1) to the information in the records at issue. Therefore, only section 16(1) remains at issue.

## IV. DISCUSSION OF ISSUES

**Does section 16 of the Act (disclosure harmful to business interests of a third party) apply to the information in the records?**

[para 7] Section 16 of the Act reads, in part, as follows:

> *16(1) The head of a public body must refuse to disclose to an applicant information*
>
> *(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*
>
> *…*

[para 8] As this inquiry involves information about a third party, 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 9] Section 16(1) does not apply to personal information, so the Affected Party has the burden, under section 71(3)(b), of establishing that the Applicant has no right of access to the records by virtue of section 16(1).

[para 10] For section 16(1) to apply to information, the requirements set out in all three paragraphs of that section must be met.

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

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

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

Section 16(1)(a)

[para 11] The Public Body describes the information at issue as "pricing information of [the Affected Party] that was provided 'in confidence' to the Public Body for the purpose of a sole-source contract" (initial submission at page 3).

[para 12] The Affected Party argues that pages 11-16 of the Agreement are comprised of a pricing schedule that reveals its commercial and financial information. It states "this information is the exact price, in dollars, at which the company is willing to provide specific services to Alberta."

[para 13] In its rebuttal submission the Applicant states (at paras. 14-15):

> The Document at Issue does not reveal financial information about [the Affected Party]. As found per Order 96-018, financial information is "information regarding the monetary resources of the third party." A fee or pricing schedule does not give any information [about] the monetary resources of [the Affected Party].
>
> As per Order F2015-12 (at paras 45-49), section 16(l)(a)(ii) requires that the commercial information or financial information belong to the third party. A fee or pricing schedule in a contract between [the Affected Party] and the Government is the proprietary information of neither, as it is simply the price points that both sides agree upon in a negotiated contract. As such, the Document at Issue is neither [the Affected Party]'s commercial nor financial information.

[para 14] Past Orders of this Office have defined "commercial information" as 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 (Order F2009-028).

[para 15] Examples of financial information listed in Order PO-2010 from the Ontario Office of the Information and Privacy Commissioner, which was cited in Order F2011-002 from this Office, include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.

[para 16] In Order F2011-002 the adjudicator found that fees for services performed by a third party for a public body, which were contained in requested records, were "commercial information" of third parties because "the information is about the terms under which [the third parties] performed and sold services to the Public Body" (at para. 15).

[para 17] I agree with the above reasoning regarding both financial and commercial information. In this case the Affected Party has referred to information in Schedule as "the exact price, in dollars, at which the company is willing to provide specific services to Alberta." It refers to the information as "financial *or* commercial" information but has not explained how this information could reveal

information about its monetary resources or distribution such that it could be financial information. However, it might be characterized as commercial information.

[para 18] In Order F2016-64, the adjudicator discussed the significance of the phrase "of a third party" in section 16(1)(a)(ii). Her conclusion is similar to the argument made by the Applicant (cited above), that information in an agreed-upon contract is not proprietary information of either party. The adjudicator said (at paras. 74 and 82):

> 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 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 19] I note that the applicant in Order F2016-64 has applied for a judicial review of that Order including the analysis of section 16(1) (the case has not yet been heard).

[para 20] In order to withhold information under section 16(1), each subsection (1)(a), (b) and (c) must be met. For the reasons discussed later in this Order, I have determined that the information in the Schedule does not meet the tests set out for subsections (1)(b) or (c) of the provision. Therefore, I do not need to make a determination as to whether the information in the Schedule is commercial information under section 16(1)(a), or whether the Applicant is correct that information in an agreement is not information 'of' either party to that agreement. The latter point of law will presumably be settled by the Alberta Court of Queen's Bench in the upcoming judicial review of Order F2016-64.

[para 21] In addition, not all of the information in the Schedule is pricing information. There are clauses or paragraphs that refer to rules of the Public Body. Even if the Affected Party itself referred to those rules, those rules cannot be characterized as information (commercial or otherwise) 'of' the Affected Party. So even if the pricing information *is* the Affected Party's commercial information, the entire Schedule is not.

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

[para 22] In order for section 16(1)(b) to apply, the information must be supplied by the third party to the public body, explicitly or implicitly in confidence or would reveal information that was supplied in confidence.

[para 23] Regarding the "in confidence" portion of the test, the Affected Party states (initial submission, at pages 2-3):

> The second part of the test is whether the information in the Pricing Schedule has been supplied, explicitly or implicitly, in confidence. In this case, the Pricing Schedule would be considered to be confidential. Pricing for the services in the contract was determined through a competitive tendering process and has not been publicly disclosed by [the Affected Party]. Similarly, our expectation was that this information would not be disclosed by Alberta, either. This understanding meets the second part of the test.

[para 24] The Public Body's initial submission supports the argument that information provided to the Public Body was provided in confidence.

[para 25] Where both parties agree that information was provided in confidence, and there are no other factors to indicate otherwise, I accept that part of the test has been met.

Section 16(1)(b) – Information *supplied*

[para 26] In order to meet the requirements of section 16(1)(b), the information must have been *supplied* by the Affected Party to the Public Body. For the reasons given below, I find that the information in the Schedule was not *supplied* by the Affected Party to the Public Body (in confidence or otherwise).

[para 27] The Affected Party argues (initial submission, at page 2):

> To be clear, we maintain that notwithstanding that the information may have resulted from participation in a competitive tendering process, or negotiation between [the Affected Party] and the Province, the information in question was nevertheless "supplied" to the Province by [the Affected Party] as it is intrinsically information about [the Affected Party] and the willingness of [the Affected Party] to supply the services at the price indicated. The Alberta Court of Appeal has recognized the principle that it is the source of the information, rather than the mere fact of its inclusion in an agreement, that is determinative of the question of whether the third party "supplied" it: *Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231.

[para 28] It is evident that in order for the Affected Party to have "supplied" the information within the terms of section 16(1)(b), it must be the source of that information.

[para 29] However, the arguments made by the Affected Party do not support finding that it is the source of the information in the Schedule. Revealing that the Affected Party is willing to accept a certain price for its services does not reveal that it was the Affected Party that was the original source of the agreed-to price. It is equally possible from the submissions before me that the Public Body 'supplied' the number it was willing to pay, or the parties mutually arrived at the price. The Affected Party's statement cited above, that the information "may have resulted from participation in a competitive tendering process, or negotiation" undermines its argument that the Affected Party is the source of the information.

[para 30] Given the submissions of the Affected Party and the records themselves, the source of the information in the Schedule is unclear. If the Schedule had included the Affected Party's fixed costs in

arriving at the pricing calculation that was ultimately accepted, or if the Schedule incorporated the Affected Party's bid, it would be clear that the Affected Party was the source of the information.

[para 31] Further, as I have already noted, the Schedule is not comprised entirely of pricing information. There are also references in pages 11-16 to rules that are not rules created by the Affected Party. At minimum, the entirety of the Schedule cannot have been supplied by the Affected Party.

[para 32] The Affected Party has argued that the information in the Schedule was supplied because it is information *about* the Affected Party; i.e. its willingness to supply the services at the price provided in the Schedule. Information *about* the Affected Party is not the same as *supplied by* the Affected Party. For example, were the Public Body to assess its satisfaction with the Affected Party's services, that would be information *about* the Affected Party but not *supplied by* the Affected Party.

[para 33] While some information is not that of the Affected Party, and the source of the information is not clear, it remains possible that the Affected Party is the source of some of the information in the Schedule but neglected to say this directly. Even if this is the case, I find that the test for section 16(1)(b) is not met for that information in any event, as it is information that was negotiated between the parties.

[para 34] Many past Orders of this Office, as well as from the Ontario Office and the BC Office have held that a contract is negotiated between a public body and third party, and therefore cannot be found to have been supplied by the third party. This is true even where the contract price is the same as the bid price (see Alberta Order F2009-028, BC Order F11-27, and Ontario Order PO-226). This approach has also been upheld by the Ontario Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. 2851 and *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475, and the BC Supreme Court in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603.

[para 35] There are exceptions to this principle: where the information is immutable, or where disclosure of the information in the contract would permit an accurate inference about underlying non-negotiated confidential information supplied by the third party to the public body (Order F2013-47, citing Ontario Order PO-3176).

[para 36] 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). Pricing amounts proposed by one party and accepted by a public body without changes is reflective only of the tendering process chosen by the public body; it does not change the nature of the information contained in the proposals. In other words, the fact that a public body may not have made a counter-offer on a proposal does not mean that the proposal prices were immutable. To say that proposal prices are immutable is to say that the bidder could not have offered numbers other than those it did, in fact, offer. 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.

[para 37] Even if the ultimate price takes the form of a bid by the third party that is accepted unchanged, the bid price may not reflect or reveal the bidder's financial or commercial realities and requirements, but may be just a starting point for negotiations, or be negotiable relative to non-pricing terms, or reflect other extraneous factors.

[para 38] The Alberta Court of Appeal discussed at length whether information in an agreement can still be 'supplied' within the terms of section 16(1)(b), in *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 (CanLII). *Imperial Oil* has been offered by parties as a decision that rejected the settled distinction between "supplied" and "negotiated" as this term is found in section 16(1). Although it has not explicitly said so, the Affected Party's submission indicate that it argues *Imperial Oil* stands for the principle that information in an agreement provided by one party and accepted by another party without change is not negotiated.

[para 39] However, as I explained in Order F2015-03, the Court in *Imperial Oil* agreed that a negotiated contract might not be "supplied" by either party to the contract. The records at issue in the case consisted of a remediation agreement between parties, as well as attachments to that agreement. The Court said (at paras. 82-83, emphasis added):

> First of all, as previously noted, it is not the Remediation Agreement itself that must be the protected information. <u>There would be room to argue that negotiated contracts themselves are not "supplied" by either party to the agreement.</u> 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. <u>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".</u>
>
> 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. <u>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.</u> It cannot be the rule that only information that is of no use to the public body is "supplied".

[para 40] The Court was concerned not with the agreement itself, but with technical reports attached to the agreement. The Court noted that these reports were created by consultants and not up for negotiation. It said (at para. 84):

> In this case it is beyond dispute that some of the information qualifies [as information [supplied to the Public Body under section 16(1)(b)]. 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…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 41] In other words, the content of those reports would not change regardless of the discussions that led to the remediation agreement. The Courts concluded that the reports attached to the remediation agreement consisted of information that was either immutable (because the content of the reports were not going to change) or that they were comprised of underlying non-negotiated confidential information supplied by the third party.

[para 42] In my view, *Imperial Oil* stands for the proposition that information that was supplied to a public body is no less 'supplied' because it ends up as an agreed term in a contract; however, it does not say that all agreed terms are supplied. Only contract terms that meet one of the two exceptions can be withheld under section 16(1); these exceptions have have been identified in precedents from this Office and other jurisdictions.

[para 43] In this case, neither of the two exceptions applies. Even if the Affected Party was the source of some of the information in the Schedule, nothing in the submissions before me or in the Schedule itself indicates that any information in the Schedule is 'immutable' as that term has been used regarding section 16(1)(b). Therefore, I conclude that none of the information is immutable.

[para 44] The other exception to the general principle that negotiated terms are not 'supplied' by one party is if disclosing the Schedule would permit an accurate inference about underlying non-negotiated confidential information supplied by the Affected Party. The Affected Party has argued that disclosing the Schedule also discloses the fact that it is willing to accept the terms in the Schedule.

[para 45] In my view, a party's "willingness" to accept terms is not information that falls within the scope of section 16(1). For this provision to apply, the information supplied by the Affected Party must be the type of information set out in subsection (1)(a) (commercial, financial, labour relations, scientific, or technical information, or trade secrets). A unit price offered in a bid may be commercial information of the bidder supplied in confidence; if so, it is the *unit price* that is the commercial information that was supplied, not the *willingness to accept* that price. The latter is certainly information about the bidder that is implied by its bid (since a bidder wouldn't offer a price it is not willing to accept) but it is not the type of information captured by section 16(1).

[para 46] Further, in order for this exception to apply, the accurate inference must be about confidential information supplied by the Affected Party to the Public Body. I do not accept that the Affected Party's willingness to accept the terms in the Schedule can be so characterized. If it could, any signatory to an agreement with a public body could argue that the agreement cannot be disclosed simply because it would reveal the willingness of the signatory to make the agreement. This would result in an absurdly broad application of section 16(1).

[para 47] I find that the information in the Schedule was not supplied by the Affected Party within the terms of section 16(1)(b). If I am wrong in that conclusion, I have also found, for the reasons given below, that the Affected Party has not provided sufficient argument to find that disclosure of the Schedule would result in one of the harms set out in section 16(1)(c).

Section 16(1)(c)

[para 48] Section 16(1)(c) requires that disclosure of the information result in one of the harms set out in subsection (i) to (iv). The Affected Party's submissions state that disclosure would harm its competitive or negotiating position; this argument relates to section 16(1)(c)(i), which states:

> *(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,*

[para 49] The Applicant correctly cited the test to be used in applying the 'harms test' wherever it appears in the Act. The Supreme Court of Canada stated in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31, stated:

> 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.

[para 50] In *Canada (Information Commissioner) v. Canada (Prime Minister)*, 1992 CanLII 2414 (FC), [1992] F.C.J. No. 1054; Rothstein J., as he then was, made the following observations in relation to the evidence a party must introduce in order to establish that harm will result from disclosure of information. He said:

> While no general rules as to the sufficiency of evidence in a section 14 case can be laid down, what the Court is looking for is support for the honestly held but perhaps subjective opinions of the Government witnesses based on general references to the record. Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged. [my emphasis]

[para 51] The Affected Party argues (initial submission, at page 3):

> Public disclosure of the Pricing Schedule would reveal the exact price at which [the Affected Party] provides the services to Alberta. Were the services in the Contract [to] be tendered by Alberta, knowledge of the Pricing Schedule could significantly assist a competitor of [the Affected Party] in preparing a bid. This could reasonably be expected to harm [the Affected Party]'s competitive or negotiating position in that process. Similarly, were [the Affected Party] to participate in a bidding or tendering process for similar services with another client, competitor knowledge of the Pricing Schedule could place [the Affected Party] at a disadvantage in that process as well. In either case, a competitor would have

inappropriate insight as to what price we might bid in that process, and derive an advantage in submitting its own bid accordingly.

[para 52] The Public Body explained that the Agreement was a result of a sole-source contract, in which the offer to provide services was made only to the Affected Party. The Public Body further explained that it has since moved to a competitive bidding process; an RFP was posted in October 2016 under that competitive process, resulting in a new contract.

[para 53] In its rebuttal submission, the Applicant argued that the Affected Party failed to provide more than mere assertions of harm to its negotiating position. It cited *Agriculture Financial Services Corporation v. Alberta (Information and Privacy Commissioner),* 2012 ABQB 397, at para. 59 and *Park Place Seniors Living Inc. v. Alberta Health Services,* 2017 ABQB 575, at paras 38-39, as stating that "bare arguments or submissions cannot establish a reasonable expectation of harm" (*Park Place Seniors Living Inc.*, at para. 39). That statement is consistent with the Federal Court's requirement for a clear and direct linkage between disclosure and the harm alleged (citation above).

[para 54] The Applicant cited the Public Body's submission that a new agreement was signed in 2016 and argued that the Affected Party has failed to explain how the Schedule in the 2013 agreement "is still relevant given the passage of time and its new contract" (rebuttal submission at para. 31).

[para 55] I agree with the Applicant in this case. The Affected Party's assertions of harm are mere statements without support. The Affected Party has said that disclosure could affect its position in a future tendering process without describing how the 2013 pricing would be relevant to a future bid. The mere assertion that disclosing the 2013 prices could harm the Affected Party's negotiating position is especially speculative given the fact that those prices were replaced with a new contract in 2016. For example, the Affected Party has not provided any reason to expect that the 2013 pricing informed the 2016 pricing given that the former agreement was the result of a sole-source process while the latter agreement was the result of a competitive bidding process.

[para 56] The Affected Party also asserted that disclosing the Schedule could harm its competitive or negotiating position "were [the Affected Party] to participate in a bidding or tendering process for similar services with another client" (cited above). However, the Affected Party did not tell me if it *does* provide similar services to other clients, whether it tenders bids to those other clients, or how the 2013 pricing in the Schedule relates to services for other clients.

[para 57] The Affected Party had an opportunity to respond to the Applicant's submission on these points but chose not to provide a rebuttal submission. The Affected Party's arguments in its initial submission amount to speculation and bare assertions. I find that it has not met its burden to show that disclosure of the Schedule could reasonably be expected to result in a harm set out in section 16(1)(c).

<u>Conclusion regarding the application of section 16(1)</u>

[para 58] I have not made a finding as to whether the information in the Schedule is commercial or financial information within the terms of section 16(1)(a). I have noted that some of the information in the Schedule refers to rules of the Public Body, which can't be information 'of' the Affected Party. However, some pricing information may be.

[para 59] In any event, the information in the Schedule does not meet the test for information "supplied in confidence" by the Affected Party under section 16(1)(b). I also found that the Affected Party failed to show that disclosure could reasonably be expected to result in a harm set out in section 16(1)(c).

[para 60] Therefore, I find that section 16(1) does not apply to the information in the Schedule on pages 11-16 of the agreement.

## V. ORDER

[para 61] I make this Order under section 72 of the Act.

[para 62] I find that section 16(1) of the Act does not apply to any information withheld on pages 11-16. I order the Public Body to disclose that information to the Applicant.

[para 63] I further order the Public Body to notify me and the Affected Party in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

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Amanda Swanek
Adjudicator