ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2019-R-01
(RECONSIDERATION OF ORDER F2013-47)

March 31, 2019

ALBERTA HEALTH

Case File Number F5903

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Summary: This Order is a reconsideration of Order F2013-47. On judicial review of that Order, the Court of Queen's Bench held that parts of the Order by which the previous Adjudicator reasoned that the records did not meet the terms of section 16(1)(b) were unreasonable. The Court remitted the matter for reconsideration as to whether the withheld records meet the criteria of sections 16(1)(b) and 16(1)(c) of the Act.

In the present inquiry, heard by a different Adjudicator, Alberta Health provided further information about the records, including that some of them were already in the public realm. It also took the position for some of the records that Alberta Health rather than ABC had been the source of the information contained in them. Based largely on the information provided by Alberta Health, the Adjudicator held she was unable to find that the records meet the criteria of section 16(1)(b) of the Act. In relation to the remaining records, the Adjudicator accepted, or in some cases assumed, that the criteria of section 16(1)(b) are met.

However, the Adjudicator concluded that neither ABC nor Alberta Health had established that any of the records meet the harms test set out in section 16(1)(c). She ordered that all the records be disclosed to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, sections 5, 6, 16, 16(1)(a), 16(1)(b), 16(1)(c), 17(5)(c), 25, 72; *ABC Benefits Corporation Act*, R.S.A. 2000, c. A-1.

Authorities Cited: AB: Orders 99-018, F2009-015, F2009-021, F2009-028, F2010-036, F2011-001, F2011-002, F2012-15, F2013-47; **BC:** Order 01-39; **ONT:** Orders MO-2465, MO-2889, MO3372, PO-2435, PO-2859.

Court Cases Cited: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII); *Canada (Information Commissioner) v. Canada (Prime Minister)*, 1992 CanLII 2414 (FC), [1992] F.C.J. No. 1054; *UCANU Manufacturing Corp. v. Defence Construction Canada*, 2015 FC 1001 (CanLII); *Imperial Oil Limited v. (Alberta) Information and Privacy Commissioner*, 2014 ABCA 231; *ABC Benefits Corporation v. Alberta (Information and Privacy Commissioner)*, 2015 ABQB 662 (CanII).

I. BACKGROUND

[para 1] On March 28, 2011, the Applicant submitted the following access request under the *Freedom of Information and Protection of Privacy Act* ("the FOIP Act" or "the Act") to Alberta Health "(the Public Body" or "the Respondent"):

> I would like a copy of the contract that Alberta Health has with Alberta Blue Cross to administer the provincial drugs plans (group 66, group l, social services) on behalf of the government, I would also like to know how much Alberta Blue Cross is paid to administer these plans.

As the Access Request was submitted on March 28, 2011, Alberta Health determined the time period of the request to be March 28, 2006 to March 28, 2011.

[para 2] The records consist of the master agreement with ABC with respect to the payment of supplementary benefit expenses for plan members, as well as the agreement for the specific service respecting drug plans, and subsequent amendments to both these documents. [I refer to these documents cumulatively within as "the Agreement", as did the Court in the judicial review decision, though the parties sometimes referred to them as "the agreements".]

[para 3] Alberta Health produced parts of the Agreement. However, it severed and withheld some information relying on FOIP Act sections 16 (disclosure harmful to business interests) and 25 (disclosure harmful to economic and other interests). The Applicant requested a review of Alberta Health's decision to refuse access to the information it had withheld, and an inquiry was held. ABC Benefits Corporation (operating as Alberta Blue Cross) ("ABC") was invited to participate as an affected party, and did so.

[para 4] In Order F2013-47, the Adjudicator found that some of the information did not meet the requirements of section 16(1)(a), as it could not be said to be information

belonging to ABC. The Adjudicator also determined that none of the information in the Agreement could be said to have been supplied by ABC, and was therefore not subject to section 16 for that reason as well.

[para 5] The Adjudicator also found that Alberta Health had not established that disclosure of the information withheld from the Applicant under section 25 could result in harm within the terms of section 25.

[para 6] She ordered Alberta Health to disclose the Agreement in its entirety.

[para 7] ABC sought judicial review of Order F2013-47. The matter was heard before Justice Moreau of the Court of Queen's Bench of Alberta on September 11, 2015.

[para 8] In her decision in *ABC Benefits Corporation v. Alberta (Information and Privacy Commissioner)*, 2015 ABQB 662, Justice Moreau agreed with the Adjudicator that section 25 did not apply to the undisclosed information. With respect to the records withheld in reliance on section 16, she held that the Adjudicator's findings that none of the records had been supplied within the terms of section 16(1)(b) was unreasonable. Justice Moreau declined ABC's request that the Court make its own findings as to whether the undisclosed information should be withheld under s. 16(1), but remitted the matter back to the Adjudicator for reconsideration as to whether the withheld records met the criteria of sections 16(1)(b) and 16(1)(c) of the Act.

[para 9] In accordance with the direction of Justice Moreau, a Notice of Reconsideration was issued on October 11, 2017.

[para 10] Upon receipt of the decision of Justice Moreau and the Notice of Reconsideration, Alberta Health undertook a further review of the records. It concluded that the initial severing had not taken into account several relevant factors which, if taken into account, should in its view have resulted in the disclosure of some of the records that it had previously withheld in reliance on section 16(1). Alberta Health redacted the records a second time and provided a copy of the records redacted in this way to this Office.

[para 11] ABC was notified by Alberta Health of its new conclusions, and was given a copy of the records in their newly-redacted form. However, while it agreed that the fact some of the information was publicly available on the Queen's Printer site meant that such pages (1 to 42 and 46 to 47) should be disclosed, ABC continued to object to disclosure of the remaining parts of the Agreement that had been withheld, and took the position that Justice Moreau's direction that there be a reconsideration of the severing of the withheld records must be followed.

II. INFORMATION/RECORDS AT ISSUE

[para 12] The Records at Issue consist of the portions of the Agreement originally redacted and withheld by Alberta Health. While Alberta Health has now changed its

position with respect to whether some parts of the Agreement that it formerly withheld should have been withheld, it has not released additional records to the Applicant. ABC continues to object to the release of some of these records. Accordingly, I will make determinations about all of the records that were withheld by Alberta Health originally.

III. ISSUES

Issue A: Does Section 16(1)(b) of the Act (information supplied in confidence) apply to the information in the withheld records?

Issue B: Does Section 16(1)(c) of the Act (harm to business interests) apply to the information in the withheld records?

[para 13] I have noted ABC's argument in its most recent submission that the manner in which the Adjudicator previously delegated to conduct this reconsideration had decided the issues in her Order F2015-03, and her interpretation in that case of the decision of the Alberta Court of Appeal in *Imperial Oil Limited v. (Alberta) Information and Privacy Commissioner)*, raised a concern that the Adjudicator could not fairly decide the issue of whether pricing information in the contract had been "supplied" within the terms of section 16(1)(b). As this reconsideration has now been delegated to me, and as I accept ABC's position that the pricing information in the records at issue was supplied by ABC to Alberta Health (see the discussion at para 50 below), I do not need to address this question of potential bias.[1]

IV. DISCUSSION OF ISSUES

[para 14] Section 16 is a mandatory exception to disclosure. Section 16(1) of this provision states:

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

[1] I believe the Adjudicator in Order F2015-03 reached her conclusion on the basis that there had been no evidence that the unit prices or hourly rates at issue in that case, even though they were contained in a bid (a response to a request for proposal), were either immutable in the sense that they could not have been different, or would allow an accurate inference to be drawn about underlying confidential information. I agree with that analysis. However, my view on this does not preclude me from accepting ABC's position that the pricing information in the records at issue in this case was supplied by ABC to Alberta Health. In para 55 below, I explain that I come to this conclusion because Justice Moreau's comments in her judicial review decision in this case possibly suggest that she regarded the rates and fees information to be "immutable" on the basis of the evidence about this question presented by ABC.

(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 15] I will deal first with the withheld records that are publicly available (pages 1 to 42 and 46 to 47). Regardless whether these records meet the criteria of sections 16(1)(a) and (b), the disclosure of records which are already in the public realm cannot cause harm of the type contemplated by section 16(1)(c). Accordingly, I agree with the parties that these records cannot be withheld under the FOIP Act.

[para 16] The remainder of this Order deals with the remaining records at issue, which are comprised by:

- pages 43 to 45 (reporting requirements for the April, 2000 master agreement)
- pages 48-51 (January, 2002 agreement for provision of particular services)
- Schedule A (page 52) describing the services that are the subject of the January, 2002 agreement (transferring Group 66 data for the Pharmaceutical Information Network "PIN")
- Schedule B (page 53) setting out payment information for the January, 2002 agreement, and amendments to Schedule B (pages 54, 56, 58, 60)[2]
- pages 62-65[3] (an agreement to amend the schedules to the April, 2000 master agreement), and attached revised Schedules (Schedule 3, description of services, pages 66 to 72; Schedule 3 Appendix, description of processes, pages 73 to 78; Schedule 4, compensation information, pages 79 to 81)

[para 17] Of these latter records, Alberta Health recommends disclosure of all but pages 73 to 78, and the monetary amounts in pages 79 to 81.

Issue A: Does Section 16(1)(b) (information supplied in confidence) of the Act apply to the information in the withheld records?

[2] Pages 55, 57, 59, and 61 were previously released to the Applicant.

[3] Pages 63 and 65 were previously released to the Applicant.

[para 18] In her decision in the judicial review of Order F2013-47, Justice Moreau (as she then was) reviewed the comments and findings of the Adjudicator who issued the Order, relating to whether information in a contract has been supplied.

[para 19] In the course of this review, she noted that if terms in a contract were supplied and are immutable, the fact that they were accepted by the other side during negotiations does not, by virtue of the negotiation, have the effect that such terms were not supplied.

[para 20] As well, Justice Moreau stated her view that the fact a contract is to be performed in the future, or that the tasks to be performed have no prior existence, does not mean that contract terms relating to that performance (assuming them to be immutable and to have been supplied by the third party) do not meet the requirement of having been supplied. She similarly rejected the idea that the fact that compensation was to be paid in the future rather than prior to signing the Agreement also meant the compensation information (assuming it to reveal immutable information or fixed costs) was not supplied.

Was information as to process and methodologies contained in pages 43 to 45, 48 to 52, 62 and 64[4], and 66 to 72 "supplied in confidence"?

1. *Was the information on these pages "supplied" within the terms of section 16(1)(b)?*

[para 21] With regard to information about ABC's methodologies for providing the services, Justice Moreau noted that the former Adjudicator had failed to refer to evidence that the methodology "was offered for use in an 'immutable' state". As an example of such evidence she referred to ABC's Affidavit, that "noted, …, that ABC as a licensee of the Canadian Association of Blue Cross Plans [CABCP], must operate under a strict set of requirements, like financial and auditing procedures that cannot be subject to negotiation".[5]

[para 22] While ABC's Affidavit does not itself claim that the "strict set of requirements" created by the CABCP are ABC's own proprietary information, possibly Justice Moreau was referring to the idea, to which she referred at para 75 of her decision, that to be "of the third party" the information need not be owned by the third party in the strict sense but that "[i]t is the information as applied to the business of the third party that would be "of the third party". Thus, she may have regarded information about ABC's

[4] Pages 63 and 65 were previously released to the Applicant

[5] ABC's Affidavit stated that "[Blue Cross] Plans must comply with specific financial reporting and auditing procedures established by the CABCP [Canadian Association of Blue Cross Plans]". (Affidavit para 5(b)) Financial and auditing procedures are also strictly governed by the *ABC Benefits Corporation Act* and Regulation, which are public.

methodologies that reflected these external audit and financial requirements as immutable information of ABC about its methodologies that it had supplied to Alberta Health.[6]

[para 23] The only other comment on the information as to methodologies made *in the Affidavit* of ABC is that competition with its competitors is keen, and the protection and confidentiality of "ABC's *business processes, technology*, rates, prices and contractual provisions is essential for the continued successful operation of [its] businesses", and that"[i]f the agreements are required to be produced, ABC would be reluctant in future to provide certain information to Alberta Health, especially information like the rates, fees, *services and audit information*". [emphasis added]

[para 24] ABC made further statements about the methods and processes that are described in the records in its initial submission. It provided the following unsworn statements that these sections of the withheld records (which it describes as Schedules 1, 3, 5 of pages 21-45, Schedule 6 at pages 46-47 [audit provision], 1(a) page 62 [amendment to Schedule 1], 1(g) page 64 [amendment to Schedule 6] and Schedule 3 – Appendix pages 66-78)[7]:

- "contain significant technical information in that they set out how ABC receives, processes and stores the information on its system, as well as the methodology by which the services will be delivered which is a particular craft or technique employed by ABC."
- "contain trade secrets as it sets out the methodology by which ABC provides its services which are unique to the way ABC does business with Alberta Health and is something that ABC has developed over the years.
- "contain information supplied by ABC to Alberta Health as they contain trade secrets which by their very nature cannot be negotiated and thus must be supplied."

In its more recent submission, ABC also said the following about this information:

> These sections relate to terms that contain trade secrets, and as such, were supplied and could not have been negotiated. They were also "immutable" as it was information ABC needs to administer the plan, discusses the services it is capable of providing, the reports it is able to provide and with what frequency and the audit it is to perform. This information was not subject to negotiation.

[para 25] In relation to particular portions of the records, ABC said:

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[6] The auditing provisions under the Agreement (pages 46 to 47) are among the records that have already been made public, though amendments to these are made in the amending agreement (page 64). The financial reporting provisions (pages 43 to 45) also remain at issue, but Alberta Health says that the details of these requirements are imposed by itself rather than created by ABC (see below at para 30 for Alberta Health's submissions about this).

[7] ABC has since conceded that some of these sections should be released because they have already been made public. The specific arguments with respect to the sections that ABC made that it now concedes should be released are not included within.

- With regard to pages 49, 50 and 51 (clauses setting out the term of the relationship and the rights of termination): "[t]he term of the agreements, rights of early termination and transitional period following notification of termination are all immutable terms as, without them, ABC would not, and could not, have entered into the agreements with Alberta Health.
- "Schedule 3, and the amendments to Schedule 3, contains the services that ABC is able to provide and the methodology by which those services are provided. Again, as it sets out the services that ABC is capable of providing, it is immutable and could not be the subject of negotiation."
- "Schedule 5 sets out what reports ABC is able to provide and the frequency with in which the reports can be provided. Again, as the Schedule sets out the services that ABC is capable of providing, it is immutable and could not be the subject of negotiation."
- "Schedule 6, and the amendments to Schedule 6, contains the audit provisions which ABC performs not only for Alberta Health sponsored programs but also for other ABC business involving the employer-sponsored benefit plans ABC administers, and therefore was provided to Alberta Health, as well as other plan sponsors based on past dealings."

[para 26] ABC made additional statements regarding methodology in its arguments pertaining to confidentiality. It stated:

- "… the listing of services in Schedule 3 identify ABC's capabilities … . The reports listed in Schedule 5 and audits in Schedule 6 speak again to ABC's capabilities… ."
- "All of Schedule 3 should be severed as it … discloses the business and technological skills of ABC. No private entity should be or is required to disclose to the world the depth and extent of its business and technological skills."
- "The audit reports address specific proprietary controls and procedures performed by ABC, including its information technology controls (security measures) which could be used by ABC's competitors, or independent third parties, to override and undermine ABC's business processes and security measures."

[para 27] ABC made similar assertions with respect to parts 1, 2 and 3 of Schedule A on page 52. At page 16 to 17 of its initial submission it said that these sections of the Agreement disclose methodology by which certain information is provided as well as the particular technique by which information is provided, and the frequency by which information can and will be provided; it added that information about what ABC is capable of is immutable in the sense that it cannot and was not varied. ABC also characterized this information as its 'trade secrets' on the basis that the methodology by which ABC provides services is "unique to the way ABC does business with Alberta Health and is something that ABC has developed over the years". [8] It makes similar arguments in its recent submissions in the table on page 7.

[para 28] In its most recent submissions, ABC commented on methodologies described in the Agreement and its Schedules as follows (at paras 46 and 47):

> As stated in *Imperial Oil:*

[8] The FOIP Act defines"trade secret" to include a "method, technique or process" used in business for a commercial purpose.

> ... The expression "of the third party" calls for some interpretation, and the Commissioner's interpretation is entitled to deference. The expression must be interpreted in its context as set out in *Merck Frosst,* the section talks about private commercial or financial information relating to the business or affairs of that private party that has been supplied in confidence. The exception does not necessarily require ownership in the strict sense; the private party supplying the information would not have to prove that it had a patent or copyright on the information. If the private entity took scientific, financial, or commercial information that was in the public realm. and then applied that information to its specific business, property, and affairs, the resulting data would still be "of the third party". In other words, it is the information as applied to the business of the third party that would be "of the third party", not the background scientific or economic principles underlining that information.
>
> **[Tab 1)** *Imperial Oil* al para. 70, emphasis added [by ABC].

> In accordance with *Imperial Oil,* ABC either supplied the Information to Alberta Health or took scientific, financial or commercial information provided by Alberta Health, such as the services required to be provided, the audits required to be performed, the information that was to be exchanged and so on and applied this information to the specific capabilities, methodologies, security measures and unique business practices that ABC employs. The resulting terms of the Agreement are still ABC's information that it supplied to Alberta Health as part of the Agreement.

[para 29] Alberta Health's recent submissions about the methodology-related information dispute that much of the information under this present heading[9] is the proprietary information of ABC. Though at the earlier stage of this matter, Alberta Health had argued that the information it had then withheld met the tests under section 16, in its more recent submissions, it takes the opposite view for much of the information. I believe I must accept these most recent submissions as representing Alberta Health's position.

[para 30] With respect to pages 43 to 45 Alberta Health now says:

> The Respondent [Alberta Health] recommends full release of pages 43 to 45 in their entirety in that they do not meet any of the requirements of s. 16(1)(b) and s. 16(1)(c).
>
> These pages relate to a list of the reports to be provided to the Respondent per page 42 of the responsive records by ABC to confirm ABC's compliance with the obligations set out in pages 1 to 42 of the responsive records. *The reports are to be provided per standards established by the Respondent and to its satisfaction. It cannot be said this information is supplied by ABC to the Respondent since it is the case that it is the Respondent which identifies the reports it requires in order to determine compliance with the agreement.* As a result of the reporting being requested for the benefit of the Respondent they cannot be said to be supplied by ABC as contemplated by s. 16(1)(b). [emphasis added]

[9] As indicated by the heading, the present section deals with "information as to process and methodologies contained in pages 43 to 45, 48 to 52, 62 and 64, and 66 to 72". (Pages 63 and 65 were previously released to the Applicant.)

[para 31] With respect to pages 48 to 53 Alberta Health says:

> The pages further provide a general description of services to be provided by ABC to the Respondent which does not include particulars as to how ABC is to organize its work to provide these services or any significant details that would, if released, result in significant harm to ABC's current competitive or negotiating position(s) or a financial gain or loss to ABC or other persons as per s. 16(1)(c)(i) or (iii).[10]

[para 32] With respect to page 62, Alberta Health notes that this page merely references an effective date. It makes the same comment with respect to page 64. It does not comment on the amendment to Schedule 1 (the required data elements for the enrollment record) on page 62, or the audit process amendment set out on page 64.

[para 33] With respect to pages 66 to 72, Alberta Health says:

> Pages 66 to 72 are a replacement for the pages that were pages 34 to 39 of the original ABC Agreement attached to OC 351/2000.[11] The Respondent recommends full release of pages 66 to 72 in that they were not supplied by ABC per s. 16(1)(b) and otherwise do not meet any of the requirements per s. 16(1)(c).
>
> The contents of these pages are general in nature and provide high level information as to the contractual obligations of ABC in regards to the ABC Agreement. The information includes legal obligations, general file management requirements, and general client service requirements that ABC is to maintain as part of its contractual agreements with the Respondent. There is no indication that any of the information in these pages was supplied by ABC as per s. 16(1)(b) but are contractual conditions *that were supplied by the Respondent.* [emphasis added]

[para 34] I note that Justice Moreau commented that information of another organization may still be transformed into the information of a third party where the latter takes the former information and applies it to its own business.[12] I also note ABC's assertions that it "took scientific, financial or commercial information provided by Alberta Health, such as the services required to be provided, the audits required to be performed, the information that was to be exchanged and so on and *applied this*

[10] The only parts of pages 48 to 51 that were redacted were those setting out the term of the agreement, and the manner in which the agreement could be terminated. As already noted, ABC argues these provisions are immutable, as it could not have entered into the agreement on less favourable terms. Page 52 ("Schedule A") contains information as to processes for providing the services in the agreement, and page 53 ("Schedule B") contains the related payment information.

[11] These pages are publicly available on the Queen's Printer website.

[12] See para 21 and 22 above, and Justice Moreau's comments at para 75 of her decision, wherein she said: "… s. 16(1)(a) does not necessarily require ownership of the information in the strict sense. It is the information as applied to the business of the third party that would be "of the third party"." However, Justice Moreau did not positively state that in her view, the methodology information in this case consisted of information created by ABC in this way.

information to the specific capabilities, methodologies, security measures and unique business practices that ABC employs".[emphasis added][13]

[para 35] However, beyond making the assertion noted above in its most recent submission, none of the submissions or evidence of ABC explain which parts of the information in the records consists of methodologies for providing the service contained in these pages that were independently developed by it, and which parts consisted of statements or incorporations of Alberta Health's requirements or other external requirements.

[para 36] For pages 43 to 45 and 66 to 72, *Alberta Health's* submissions directly contradict the idea that the information on these pages does constitute the information of ABC (whether commercial, or "scientific and technical", or "trade secrets"). Rather, as set out above, Alberta Health characterizes the process requirements in these pages as having been supplied *by itself*. The fact Alberta Health regards itself as the source of the information in the Agreement (a point which was possibly not made before Justice Moreau) significantly detracts from the argument that the process sections consist of the commercial, or scientific/technical/methodological, information, or "trade secrets" *developed and added by* ABC in response to the information Alberta Health brought forward about its requirements.

[para 37] Had ABC provided evidence or an explanation of how it expended resources to create the methodologies, or pointed to specific processes that it had independently developed, I may have been able to conclude that the process information in pages 43 to 45, and 66 to 72, was either commercial or technical or scientific information, or trade secrets, of ABC, which it had supplied to Alberta Health. However, ABC simply made very general assertions that the withheld records consisted of such information, without more. On a review of ABC's Affidavit evidence relative to these pages together with its unsworn statements about them in its submissions, and taking into account the conflicting statements about the source of the information made by Alberta Health in its recent submissions, I believe I have insufficient grounds for finding this information was ABC's information that it supplied to Alberta Health. I similarly reject that information which I cannot accept as being ABC's information which it supplied to Alberta Health can be said to be "immutable" from ABC's standpoint as not subject to negotiation.

[para 38] With respect to the information redacted from pages 48 to 51 (term and termination clauses), accepting the assertion that this information was "immutable" for the reasons given by ABC, it is not clear to me that this information is the organization's "commercial" information (the only available category for such information under section 16(1)(a)). However, since Alberta Health did not directly contradict the idea that characterizing the withheld information in this way meant that the information had been "supplied" to it, I will accept that it had been for the purposes of the present discussion.

[13] ABC made no mention in this context of the requirements of its Association or of legislated requirements underlying the methodologies. However, these were presumably also taken into account when the processes for providing the services to Alberta Health were included in the Agreement.

[para 39] With respect to the amendments to Schedules to the April, 2000 agreement that were redacted from pages 62 and 64, I note that the original (unamended) Schedules are already in the public realm. Possibly, since Alberta Health does not support withholding this information (as to the requisite data elements or the manner in which audits are to be done), its position with respect to it is that it is not information that was supplied to it by ABC. Nevertheless, it did not expressly say this or comment on whether it was itself the source of the information. I further note that Justice Moreau mentioned that there are external audit requirements, and that such external requirements, when applied to an organization's business, can result in the creation of information "of the organization". Thus I will accept for the purposes of the present discussion that the amendments on pages 62 and 64 were "technical" information that was "supplied" to ABC.

[para 40] With respect to the redacted portion of page 52 (Schedule A), which describes the service that is the subject of the agreement in pages 48 to 51, since Alberta Health did not comment in its most recent submission on ABC's assertion that this information was immutable, nor on its source, I will accept that it was "technical" information supplied to Alberta Health by ABC.

2. *If supplied, was the information on pages 43 to 45, 48 to 51, 52, 62, 64*[14]*, and 66 to 72 supplied "in confidence"?*

[para 41] Even if I concluded that all the information in the foregoing discussion had been supplied, before section 16(1)(b) could be said to apply, it would also have to be established that the information had been supplied *in confidence*.

[para 42] With respect to pages 43 to 45, and 66 to 72, in my view, the fact Alberta Health said at this present stage of the Inquiry that it regards the information in these pages as its own information suggests that it would not regard itself as bound to keep the information confidential on account of its being ABC's proprietary information. Thus it could not be said that this information was "prepared for a purpose that would not entail disclosure".[15] Accordingly, the better view may be that I have insufficient grounds for concluding that the information in pages 43 to 45, and 66 to 72, was commercial or technical or scientific information, or trade secrets, of ABC, supplied by it to Alberta Health in confidence.

[para 43] In any event, it is not necessary for me to conclusively answer whether this information was provided "in confidence", because I have found above that there is insufficient evidence on which to base the conclusion that the process and methodology

[14] Pages 63 and 65 were previously released to the Applicant

[15] See also the discussion below at para 62 and the accompanying footnotes, regarding whether confidentially depends on the intentions only of the party supplying the information, or also of the party receiving the information.

information in these pages consisted of the proprietary information of ABC that it *supplied to* Alberta Health.

[para 44] The question of "in confidence" also arises with respect to the information redacted from pages 48 to 51, 52, 62 and 64, which I have accepted was "supplied". This raises a number of issues, including whether not only ABC intended that the information was being provided in confidence, but also whether the Minister understood this and received it in this way, as well as whose intentions are determinative under section 16(1)(b). I will return to this question after canvassing those issues more fully in paras 56 to 80 below.

Was the compensation information (rates and fees)"supplied in confidence"?

1. *Was the compensation information "supplied" within the terms of section 16(1)(b)?*

[para 45] Compensation information not already in the public realm appears on the following pages: page 53 (payment terms for computer systems relating to a database and maintenance of the database); the amendments to that amount on page 54, 56, 58, 60, and; the amounts on pages 79 to 81.[16] (ABC's submissions do not mention pages 79 to 81, but I assume this was an oversight and that it intended to include these pages in its discussion of rates and fees.

[para 46] With respect to whether the compensation information (rates and fees and global payment amounts) in the contracts consisted of or revealed "immutable information", or "fixed costs", Justice Moreau noted that the previous Adjudicator had

> [60] … clearly rejected, at para 79, the idea that "immutable" information embraces contractual terms that one party regards as non-negotiable, thereby narrowing the application of the "immutability" exemption to disclosure.

Justice Moreau went on to comment as follows:

> [64] While [the former Adjudicator] acknowledged that immutable terms may be considered to have been "supplied", she defined immutable, at para 50, as proprietary information appearing in a contract that remains essentially the same as that which was originally supplied by a third party, regardless of negotiations, *which she distinguished from information that must be accepted to make it viable for that party to enter into the Agreement. In that regard, her interpretation of immutable is so narrow as to eliminate, for example, fixed costs.* These are costs that would be originally supplied by a third party AND which must be accepted by the public body for the third party to enter into the Agreement. If merely accepting the fixed costs implies a negotiation, fixed costs would never be considered immutable. Similarly, if the exemption is defeated because fixed costs, for example, are only to be interpreted as reflecting cost of services "in the future"

[16] Alberta Health recommended in its recent submissions that the information on pages 54 to 60, and the information on pages 79 to 81 other than the compensation amounts, should be released to the Applicant.

> and not information as to calculations pre-dating the contract, it is difficult to conceive of "fixed costs" ever being subject to exemption. [emphasis added]

[para 47] ABC's Affidavit evidence regarding whether the compensation rates and fees were immutable, or were 'fixed costs', and thus met the "supplied" test consisted of the following:

> [9.] … as required by its licensing as a Blue Cross plan, ABC operates as a not-for-profit organization on a cost-recovery basis.
>
> [16.] As ABC is a not-for-profit organization, the rates and fees set out in the agreements were determined by identifying administrative services provided to Alberta Health under the agreements and then determining the costs for providing the services including staffing requirements, equipment and overhead.
>
> [17.] The rates and fees in the agreements are based on the projected costs of delivering the administrative services requested by Alberta Health over the term of the agreement and are based on the costs of delivering the services required.
>
> [18.] Further, any changes to the rates and fees set in the agreements were determined in the same manner set out above.

[para 48] As well, in its initial submissions (at paras 66), ABC asserted that

> … the rates and fees are based solely on ABC's costs for administering Alberta Health's plans and handling Alberta Health's claims. These amounts are clearly fixed costs and meet the requirements of having been supplied."

[para 49] At para 89 of its submission ABC again asserted that the global compensation amounts for particular services that are set out in Schedule B of the Agreement (page 53), as amended on pages 54, 56, 58 and 60 *are* a "fixed cost".[17] In its most recent submission, ABC made very similar submissions about these rates and fees, and said they are "immutable terms, without which, ABC would not/could not have entered into the contract". (See the table on page 7; para 36 on page 9.)

[para 50] It is not clear to me from the italicized portion of Justice Moreau's statements quoted above in para 46 whether she would regard a party's global or "bottom line" price for services as necessarily equivalent to or revealing its "fixed costs". While Justice Moreau noted that ABC's evidence about this had not been addressed by the Adjudicator, she did not positively state that in her view, the compensation figures (rates and fees) contained in the contract that ABC says are based on its calculations as to the costs of

[17] In support of this assertion, ABC cites British Columbia OIPC Order 01-39, which contains the following statement: "Information that might otherwise be considered negotiated nonetheless may be supplied in at least two circumstances. First, the information will be found to be supplied if it is relatively "immutable" or not susceptible of change. 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)… . [emphasis added]

supplying the services (including, in a global way, its staffing requirement, equipment and overhead) consist of or reveal ABC's "fixed costs".

[para 51] I note in this regard that ABC relied in its submission about this issue on the fact that it operates as a not-for-profit entity. Although a third party may operate as a non-profit, this does not in itself establish that the compensation it seeks for providing its services is directly related to or discloses its fixed costs in the sense of representing what it costs to provide a particular service. Non-profits may make a profit in one area of their enterprise, and use these funds to support some other aspect of their goals.

[para 52] As well, while ABC made statements that the pricing is its "bottom line" in its Affidavit and submissions, the fact that compensation costs represent a "bottom line" is a fact that would not necessarily be known to a requestor for the information. In the absence of submissions such as have been made by ABC in this inquiry, the requestor might have no reason to equate the global payment amounts with ABC's "bottom line".

[para 53] I note as well that the cases holding that "fixed costs" meet the "supplied" test have generally contained far more detailed information about costs (such as referred to in the British Columbia case Alberta Health cited in footnote 17, that is, "overhead or labour costs already set out in a collective agreement") than are disclosed by the compensation terms of the contract at issue. The contract contains no such details, but rather, sets the compensation amounts as global amounts to be paid, in the case of some of the classes of services, as a cumulative annual, biennial, or part-year payment, and in the case of other classes of services, either as an annual flat rate plus a rate per described unit of service, or as a monthly rate. Some of the preceding cases dealing with pricing information have rejected the idea that a total or cumulative or per-unit price meets the test of revealing fixed costs or allowing them to be inferred.[18]

[para 54] I acknowledge, however, that although a bottom-line price or prices may not reveal any *components* of the bottom line – i.e., the particular costing items that contribute to the overall price – a price that is directly based on such factors *may* still be immutable. Though I am unaware of any precedents that treat the question in this way, possibly the fact that contract pricing is immutable, even though it does not reveal any detailed information about the organization, is sufficient to make the information meet the "supplied" test.

[para 55] In any event, in view of Justice Moreau's direction that the evidence of "immutability" should have been taken into account, and without further direction as to what significance is to be attributed to it, I will accept that ABC's attestation that the compensation amounts are non-negotiable from its perspective because they represent its

[18] See, for example, Order F2009-021 at para 34, Ontario Orders MO-2889 at para 37 (rejecting that the pricing information in that case would allow insight into underlying fixed operating costs), PO-2859 at page 10 of 19 (CanlII) (holding that an annual bottom-line rent rate did not meet the "supplied" test, but the breakdown of the individual costs associated with the annual rent rate, including net rent, realty taxes and operating costs, did meet the test); MO-3372 at para 49 (noting the third party "did not specifically explain how other companies could actually use the specific pricing information in the invoices, such as unit prices and quantities, to make a reasonable inference as to the company's costs and margins".

"bottom line" beneath which it would not be possible for it to enter the contract, as well as that the amounts of compensation are "based on the costs of delivering the services required", are sufficient evidence on which to conclude this rates and fees information is "immutable" information meeting the "supplied" test.

2. If supplied, was the compensation information supplied "in confidence"?

[para 56] It is therefore also necessary to address whether the supply of the pricing information was done "in confidence".

[para 57] 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.

ABC adopted this test in its initial submission at the earlier stage of this matter before this office.

[para 58] In. *Imperial Oil Limited v. (Alberta) Information and Privacy Commissioner*, 2014 ABCA 231, the Court of Appeal stated that the test for confidentiality in section 16(1)(b) is a subjective one. It said (at para. 75):

> The exception in s. 16(1)(b) is that the information was "supplied, explicitly or implicitly, in confidence". That is substantially a subjective test; if a party intends to supply information in confidence, then the second part of the test in s. 16(1) is met. It follows that while no one can "contract out" of the *FOIPP Act*, parties can effectively "contract in" to the part of the exception in s. 16(1)(b). It also follows that the perceptions of the parties on whether they intended to supply the information in confidence is of overriding importance. No one can know the intention of the parties better than the parties themselves. It is therefore questionable whether the Commissioner can essentially say: "You did not intend to implicitly provide this information in confidence, even if you thought you did".

[para 59] ABC provided significant evidence in its Affidavit attached to its initial submissions regarding *its own practices* for maintaining confidentiality of the Agreement (which it is obliged to do in any event by the terms of Article 11 of the

contract)[19], and some evidence that ABC intended that the Minister keep the information confidential. It said (at para 13 of the Affidavit):

> The agreements that are the subject of the within inquiry have always been treated as being supplied in confidence by ABC to Alberta Health. Evidence of this is demonstrated by the fact that ABC has:
> (a) always maintained that the agreements are confidential to anyone outside of ABC or Alberta Heath;
> (b) always treated the agreements as being confidential
> (c) never made the agreements available to the public or anyone else outside of Alberta Health or ABC
> (d) demonstrated a concern for the protection from disclosure of the agreements by:
> (i) making sure that no one outside of ABC or Alberta Health receives a copy of the agreements;
> (ii) storing the agreement in a vault and restricting access to only three people within ABC; and
> (iii) only allowing employees within ABC access to specific portions of the agreement only as necessary but never the fees or rates:
> (e) made sure that the agreements are not available from any other source that the public has access to;
> (f) always provided the documents directly to their legal counsel or, if sent electronically, protected by a password; and
> (g) entered into the agreements on the basis and understanding that the agreements were confidential. [20]

[para 60] Specifically with respect to rates and prices, ABC said (at para 14 of the Affidavit):

> To the best of my knowledge, in the 65 years that ABC and its predecessors have been in this business, it has never disclosed the rates and prices that it has charged to customers, either private or public.

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[19] Article 11 states:

> 11.1 Alberta Blue Cross acknowledges and agrees that all Information and Records are and remain the property of the Minister.
> 11.2 Alberta Blue Cross further acknowledges that the provisions of the Freedom of Information and Protection of Privacy Act, the Health Information Act or the Alberta Health Care Insurance Act may apply to the Information and Records and agrees that it shall, and it shall cause all of its officers, employees, agents and contractors to:
> a) comply in all respects with the applicable provisions of the said enactments
> b) hold such information and Records in confidence; and
> c) not cause or permit the disclosure of such information or Records except in accordance with the provisions of the said enactments and with the prior written consent of the Minister or his delegate.

[20] Justice Moreau adverted to this evidence and commented that there had been no evidence filed in the prior stage of this case to contradict ABC's factual assertions regarding confidentiality.

[para 61] The statement by ABC that it "entered into the agreements on the basis and understanding that the agreements were confidential" might be taken as a suggestion that the intention of supplying the information confidentially was *communicated to the Minister* and that the *Minister agreed* that the Agreement (which include the pricing information) would be treated as confidential. However, the Affidavit does not say this directly, and, there is no direct evidence as to any position taken by the Minister on this question at the time the information was supplied, nor argument about how the terms of the Agreement bear on this question. Neither was any direct evidence presented by Alberta Health about the Minister's intentions in either its submissions before the former Adjudicator[21] or in its recent submissions.[22]

[para 62] In saying this I note that ABC argues in its recent submissions (at paras 50 to 53), relying on the decision of the Alberta Court of Appeal in the *Imperial Oil* case, that it is the intention of the party providing the information that is determinative. I agree that some parts of the statements made by the Court of Appeal might, taken in isolation, be read in this way.[23] However, other of the Court's statements might be taken as contradicting that interpretation[24], and a significant aspect of the decision was the Court's interpretation of the contract in that case as an agreement *between the parties* that the disputed information would be kept confidential. It seems unlikely the Court of Appeal meant to say that the subjective intention of the supplying party can be the sole determinant of the question when the subjective intention of the receiving party is unknown, or there are other factors making it clear that the receiving party probably did not intend to receive the information "in confidence", or it is clear the receiving party had no such intention. To put this another way, it might be more reasonable to require that the supplying party's subjective intention must be reasonable, or to require, under the fourth element of the test quoted at para 57 above, that the information be prepared for a purpose that it is reasonable for the supplying party to believe will not entail disclosure.

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[21] Alberta Health did say that the content of the information was "confidential and significant proprietary commercial and technical information" in one of the paragraphs of Tab 4, page 7 of its submission to the previous Adjudicator, and also said that the records were "provided in confidence" (Tab 4, page 8). However, it provided no evidence or other basis for this idea.

[22] In its submissions for the present stage of this case, Alberta Health made direct claims that the information was supplied confidentially only for pages 73 to 78, and then only by way of an assertion that the information on these pages was supplied "per s. 16(1)(b)".

[23] The Court of Appeal said at para 75: "The exception in s. 16(1)(b) is that the information was "supplied, explicitly or implicitly, in confidence". That is substantially a subjective test; if a party intends to supply information in confidence, then the second part of the test in s. 16(1) is met."

[24] Later in the same paragraph the Court of Appeal said, *"*… the perceptions of *the parties* on whether they intended to supply the information in confidence is of overriding importance. No one can know the intention of the parties better than the parties themselves." [emphasis added]

[para 63] I also note there is a substantial body of case law to the effect that there is a lowered expectation of confidentiality in relation to the payment terms of a contract with a public body that expends public funds.[25] While this principle might not detract from ABC's affidavit evidence about its own intentions, it might have some bearing on the intentions of the Minister in this regard.

[para 64] Neither ABC nor Alberta Health made direct submissions on the issue of the intentions respecting confidentiality of the Minister as a party to the Agreement, either with respect to the pricing information or the Agreement generally, nor on the question of *which parties'* subjective intentions are determinative. I therefore considered asking these parties whether there is evidence to support the view that at the time the pricing information (accepting it to have been "supplied") was given to Alberta

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[25] Several Federal Court decisions make statements to this effect. See, for example, *UCANU Manufacturing Corp. v. Defence Construction Canada*, 2015 FC 1001 (CanLII) in which the Court said:

> This question was expressly canvassed by this Court in *Canada Post Corp. v Canada (Minister of Public Works and Government Services)*, 2004 FC 270 (CanLII), at paragraphs 38-40, relying on the decision in *Société Gamma Inc. v. Canada (Department of Secretary of State)* (1994), 79 F.T.R. 42:
>
> > [38] In *Société Gamma, supra*, the Court also dealt with records that had been submitted to a government institution in response to a call for proposals for a government contract for the provision of services. The Court said as follows at paragraph 8:
> >
> > > […] One must keep in mind that these Proposals are put together for the purpose of obtaining a government contract, with payment to come from public funds. While there may be much to be said for proposals or tenders being treated as confidential until a contract is granted, once the contract is either granted or withheld there would not, except in special cases, appear to be a need for keeping tenders secret. In other words, **when a would-be contractor sets out to win a government contract he should not expect that the terms upon which he is prepared to contract, including the capacities his firm brings to the task, are to be kept fully insulated from the disclosure obligations of the Government of Canada as part of its accountability.** The onus as has been well established is always on the person claiming an exemption from disclosure to show that the material in question comes within one of the criteria of subsection 20(1) and I do not think that the claimant here has adequately demonstrated that, tested objectively, this material is of a confidential nature […][Emphasis added]
> >
> > [39] In the present case, the Applicant provided information to Public Works for the purpose of expressing its interest in bidding on a government contract. It was ultimately successful in obtaining the contract as part of a consortium. The reasoning in *Société Gamma, supra*, is equally applicable here.
> >
> > [40] The public policy rationale underlying the Act is that the disclosure of information provided to a government institution is the rule not the exception. The tendering process for government contracts is subject to the Act. A potential bidder for a government contract knows, or should know, when submitting documents as part of the bidding process that there is no general expectation that such documents will remain fully insulated from the government's obligation to disclose, as part of its accountability for the expenditure of public funds. In this context, the Applicant's claim that it held an "expectation" that its records would be held in confidence, based on the disputed letter, is unreasonable.

Health, Alberta Health understood or agreed that this information was to be kept confidential. I also contemplated asking the parties whether the appropriate test for "supplied in confidence" is the intention of only the supplying party, or also depends on the intention of the receiving party (a question on which ABC has already commented).

[para 65] However, requiring answers to these questions would take further time for a matter that has taken a great deal of time to reach its present stage. I have therefore decided that in view of my conclusions set out below at paras 118 to 130 as to whether disclosure of the payment information would cause harm to ABC within the terms of section 16(1)(c) – (I find that it would not) – I have decided to assume for the purposes of that discussion that the payment amounts were provided by ABC to Alberta Health in confidence, rather than to try to answer these questions conclusively based on further submissions from the parties. I will therefore consider below the second of the questions remitted to this office by Justice Moreau for the compensation information (which appears on page 53 and the amendments to that amount on page 54, 56, 58, 60, as well as on pages 79 to 81).

Were the methodologies in the final pages of the Agreement (pages 73 to 78) "supplied in confidence?

[para 66] Alberta Health takes a different approach with respect to the remaining pages that contain processes or methodologies. While it does not characterize the contents of these pages as scientific or technical information or trade secrets, it says the following with respect to pages 73 to 78:

> The Respondent does <u>not</u> recommend release of any of pages 73 to 78. As such the Respondent has determined that the requirements of ss. 16(1)(b) and 16(1)(c)(i) and (iii) have been met.
>
> The listing of ABC's services in these pages identifies in detail the capabilities of ABC and identifies how ABC organizes its work activities to deliver the services to the Respondent per the agreement. This would be considered ABC's commercial information per s. 16(1)(a) and was supplied by ABC to the Respondent per s. 16(1)(b).[26]

[para 67] I take this to mean that Alberta Health regards ABC, rather than itself, as having been the source of the processes or methods contained in these pages, and that

[26] Alberta Health adds the following comments with respect to the harms the disclosure of this information would cause, as follows:

> "The details of this commercial information could reasonably be used by competitors to undermine ABC's competitive position and interfere with ABC's current and future negotiating positions, as it relates to ABC's private business. This could reasonably be expected to harm ABC's competitive position and result in undue financial loss for their supplemental benefit administration business. As such the Respondent has determined that the requirements of s. 16(1)(c)(i) and (iii) have been met."

it regards ABC as having developed them for the purposes of effectively delivering the service.[27]

[para 68] Assuming this to be the case, the question that arises is whether the detailed methodology that presumably relied on ABC's expertise, developed for the purposes of carrying out a service that is being purchased, is information "of the third party", or is information of the party buying the service.

[para 69] Where a contract does not expressly specify who owns information, contained in the contract (or a schedule to it), that is created for the purpose of providing a product or service, it may be necessary to interpret the contract to decide whether information that contains technical specifications about the product or its development, or the details of the methodology for providing a service, belongs to the seller or the purchaser – in other words, is this information part of what was being bought and sold?

[para 70] In the present case, as was noted by the previous Adjudicator, Article 11 of the Agreement, which has been disclosed to the Applicant, contains provisions relating to the ownership of information relating to the Agreement.[28] Article 11(1) states:

> 11.1 Alberta Blue Cross acknowledges and agrees that all Information and Records are and remain the property of the Minister.

[para 71] The term "information and records" is defined in Article 1 of the contract. This definition states:

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[27] Alberta Health refers to this information as ABC's commercial information. I agree that what ABC *is selling* to Alberta Health is its commercial information. However, a number of cases before this office have questioned earlier statements made in orders of this office as to whether methodologies, or the details as to *how a party organizes its work* in order to create its product or service, is the party's "commercial information". The latter term refers to information relating to the *buying, selling or exchange* of merchandise or services" (presumably in contrast to information relating to the *creation of* the product or service that will be sold). I believe, therefore, that a detailed methodology developed by a third party is more aptly termed "scientific or technical information" than commercial information, in the sense that it is "technical information … of a third party regarding its designs, methods, and technology" (Order F2013-37), or a "trade secret", which is defined in the FOIP Act to include a "method, technique or process" used in business for a commercial purpose .

[28] This contractual term also addresses confidentiality. Article 11.2 states:

> 11.2 Alberta Blue Cross further acknowledges that the provisions of the Freedom of Information and Protection of Privacy Act, the Health Information Act or the Alberta Health Care Insurance Act may apply to the Information and Records and agrees that it shall, and it shall cause all of its officers, employees, agents and contractors to:
> a) comply in all respects with the applicable provisions of the said enactments
> b) hold such information and Records in confidence; and
> c) not cause or permit the disclosure of such information or Records except in accordance with the provisions of the said enactments and with the prior written consent of the Minister or his delegate.

> "Information and Records" means information, records, files, manuals, computer disks, or other materials or documents relating to Benefits or Alberta Blue Cross Services provided pursuant to the terms of this Agreement whether received or obtained from the Minister or created, generated or collected by Alberta Blue Cross; excluding always system software […].

[para 72] In her Order, the previous Adjudicator noted these provisions and then said:

> Given these terms of the agreement, it appears that any information created or generated by ABC in relation to the provision of services under the Agreement, such as the information appearing in clause (g)(i) of record 64 and the information appearing at the top of record 73 of Schedule 3 – Appendix, is the property of the Minister, not of ABC. To be supplied by ABC, information must be property "of" ABC. Any information ABC has created [the information sic] for *the Minister*, as part of, or for the purposes of, fulfilling its part of the agreement, cannot be said to be information "of ABC". The information in Schedule 3, in particular, its Appendix, appears to be information created by ABC for the purpose of fulfilling the agreement. It is "information relating to benefits or services provided pursuant to the agreement" [within the terms of Article 1]. In other words, it appears that the information as to methodologies that is contained or appended to the agreement is itself information that is part of what ABC is providing, and for which it is receiving consideration, in fulfilling its part of the agreement. Disclosure of information that is not its own information is not a matter about which ABC can make claims under section 16.

[para 73] In her judicial review decision, Justice Moreau commented on the effect of Article 11. She said (at paras 74-75):

> As for the application of article 11, I agree with ABC that the article is not a full answer to whether the information in question had been "supplied". As pointed out by ABC, the effect of deeming all information to be the property of the Minister would be to contract out of the application of the *FOIPP Act* and the exemptions it prescribes. As noted in ***Imperial Oil***, at para 75:
>
> > The Commissioner made the obvious point that no public body can "contract out" of the *FOIPP Act.*

[para 74] It is not clear to me why Justice Moreau made the statement that "deeming all information to be the property of the Minister would be to contract out of the application of the *FOIPP Act* and the exemptions it prescribes". Contractual provisions that are contrary to public policy may be held to be invalid, and a contract term that tried to contract out of the provisions of the FOIP Act might not be upheld for this reason. However, in the present case, Article 11.1 does not on its face have the result that the Minister, as owner of the information, need not follow the terms of the FOIP Act, and the present case necessarily involves an application of the Act's terms. Article 11.2 [quoted in footnote 19 above] is an acknowledgement of this fact by ABC, as well as an agreement by ABC to keep what by virtue of Article 11.1 becomes the Minister's property in confidence, unless required to disclose it in accordance with the provisions of

the FOIP Act.[29] Nothing in this Article exempts the Minister from complying with the access provisions of the Act or from upholding its exceptions, and therefore I must proceed on the basis that Justice Moreau did not regard Article 11 to be an invalid and unenforceable term of the contract. To put this another way, I do not believe Justice Moreau meant that the FOIP Act prevents a Minister from entering contracts with private parties by which (s)he maintains ownership of information, or acquires information as property.[30]

[para 75] In this case, Article 11 can be read such that information that

- consists of information, records, files, manuals, computer disks, or other materials or documents
- relates to benefits or services provided pursuant to the terms of the Agreement
- is either received or obtained from the Minister or created, generated or collected by ABC

becomes the property of the Minister.

[para 76] Despite the breadth of the phrase "relates to" in Article 11.1, there is room for the argument that the information referred to is information generated during the course of the provision of the services (such as, for example, the personal information of the persons being provided the service, or information about the services or benefits they receive, or data about the latter) in contrast to information generated or created so that services may be provided (such as the methodologies at issue here). I note that the inclusion of the word "manual" weakens this argument to some degree. Nevertheless, it might be possible to interpret the contract in this way – that is, that it is a contract for the purchase and sale of the services, but not of information setting out the detailed method or mechanism of their delivery (the property in which is retained by the seller). Under

[29] The terms of Article 11.2 are not entirely apt, since access requests under the FOIP Act are made to public bodies and not to private ones. ABC's involvement in an access request under the FOIP Act would be limited to providing information in its custody that is in Alberta Health's control to Alberta Health for the purposes of the request, as well as making submissions, as it has in the present case, as to whether the information at issue is its proprietary information, and if so, as to how disclosure of such information would affect its business interests. ABC would have no direct role in disclosing information that is at issue in an access request.

[30] The fact that the property in the information was transferred to the Minister would also not preclude an agreement with respect to such information that becomes the Minister's property that the Minister would keep the information confidential, other than when there is an access request (in which latter case the terms of the Act would govern the question of access). There are no such terms in the present contract, however. The requirements for confidentiality are imposed upon ABC rather than upon the Minister. (Thus, while, as Justice Moreau commented, the 'confidentiality' terms of a contract are an element to be considered in determining whether information was supplied in confidence, here they are of assistance in determining only the intentions of ABC rather than of both of them.) In any event, the part of Article 11 of significance in the present part of this Order discussing whether the information was "supplied" is not the provision respecting confidentiality (Article 11.2), it is the term as to who owns the information once the terms of the contract take effect (Article 11.1).

this interpretation "Information and Records" means information and records generated once the Agreement takes effect.

[para 77] I have noted that in its recent submission (at para 45), ABC supports such a reading, arguing that Article 11 is not meant to cover "information contained within the Agreement", but is only meant to cover information *arising from* the provision of services. However, "arising from" is a narrower concept than "relating to", and the clause uses the latter phrase. Possibly in ABC's view, the phrase "provided pursuant to the terms of the agreement" in the context of the clause

> "Information and Records" means information, records, files, manuals, computer disks, or other materials or documents relating to Benefits or Alberta Blue Cross Services provided pursuant to the terms of this Agreement …

should be read as modifying "information" rather than modifying the phrase "Benefits or Alberta Blue Cross Services" which immediately precedes it, with the result that Article 11 covers only information "provided pursuant to" the Agreement. If this were the intended meaning, however, the modifying phrase would have been more aptly placed after the word "documents", and therefore the sentence structure argues against ABC's position.

[para 78] I have also noted ABC's argument that the *Imperial Oil* case stands for the position that the *only* relevant consideration for deciding whether information is "supplied" is the original source of the information (recent submission, para 41). However, it would follow from this that a provision in a contract in which the parties agreed, for example, that information in it could be made public, or made public on request, (i.e. that it would not be treated as confidential), could have no bearing on the outcome in a FOIP request.

[para 79] However, either interpretation is possible. If the appropriate interpretation is that the information as to methodologies that is still at issue does become the property of the Minister by reference to Article 11 (even if at the time it was transferred it may more appropriately have been characterized as the proprietary information of ABC), the questions arises:

> Does the phrase "of the third party" apply at the time the information is created or supplied, or, at the time the access request is made?

[para 80] As the question of whether Article 11 applies to the information that is still at issue, as well as the question of which time period comes into play in deciding if information was "supplied" (i.e., the time at which the information is provided, or the later time at which the request is made) are both questions that had not been addressed by all the parties in this inquiry[31] I contemplated asking Alberta Health and

[31] It appears they may have addressed them in the judicial review. However, while Justice Moreau commented on Article 11, she did not address whether information generated as part of fulfilling the terms of a contract, that is, creating what is sold (in *contrast to* information generated and put before a public

the Applicant to answer them, and to respond to ABC's position respecting Article 11. In particular, I considered asking them to explain:

- why Article 11 would not apply to the information that remains at issue, given that it can be read as falling within the terms of "information, records, files, manuals, computer disks, or other materials or documents relating to Benefits or Alberta Blue Cross Services provided pursuant to the terms of this Agreement whether received or obtained from the Minister or created, generated or collected by Alberta Blue Cross; excluding always system software"[32], and if it does apply,
- why, where a contract transfers the property in information to a purchaser, "supplied" in the context of section 16 should be referable to the point in time at which the information is given over rather than to the later point in time (at which the access request is made) when the contract has taken effect and the information has by virtue of specific terms to this effect become the proprietary information of the buyer.

[para 81] As discussed in relation to the payment information (at paras 64 and 65 above), I also considered asking these parties whether there is evidence to support the view that at the time the information was provided to Alberta Health, Alberta Health/the Minister understood or agreed that it was to be kept confidential[33], and which parties' subjective intentions are determinative.

[para 82] However, as with the question regarding the Minister's position on confidentiality of the payment information, requiring answers to the questions just stated would further prolong the resolution of this case. I have therefore decided that in view of my conclusions set out below (at paras 94 to 111) as to whether disclosure of pages 73 to

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body in order to obtain a contract which then includes it) can be said to be information of a third party that is "supplied to" Alberta Health within the terms of section 16.

[32] I note that Justice Moreau also said (at para 75):

> It was also noted in ***Imperial Oil***, at para 70, that s. 16(1)(a) does not necessarily require ownership of the information in the strict sense. It is the information as applied to the business of the third party that would be "of the third party".

I agree that who originally owned information is not necessarily determinative under section 16(1)(a), since, as Justice Moreau said, scientific/technical information of a public body that is applied by a third party can result in the creation of information that is the third party's. However, Justice Moreau did not address whether in her view the information as to methodology that remains at issue was the result of the application of other information "to the business of the third party".

[33] Alberta Health might be taken as having asserted the information was supplied in confidence when it said (in its recent submission at page 9):

> The listing of ABC's services in these pages identifies in detail the capabilities of ABC and identifies how ABC organizes its work activities to deliver the services to the Respondent per the agreement. This would be considered ABC's commercial information per s. 16(1)(a) *and was supplied by ABC to the Respondent per s. 16(1)(b)*. [emphasis added]

Alberta Health also said of pages 73 to 78 that this information "relates to ABC's private business". However, these are rather oblique statements to take as evincing an intention by Alberta Health when it received the information that it would be kept confidential.

78 would cause harm to ABC within the terms of section 16(1)(c) – (I find that it would not) – I have decided to assume for the purposes of that discussion that section 16(1)(b) ("supplied in confidence") has been met for this information rather than to try to answer these questions conclusively based on further submissions from the parties.

[para 83] I will therefore consider below the second of the questions remitted to this office by Justice Moreau for the process/methodology information on pages 73 to 78.

Was the information in pages 48 to 51, 52, 62 and 64 supplied "in confidence"?

[para 84] I take the same approach with the information in these pages. Pages 48 to 51, and 52, are parts of a different agreement than the April, 2000 master agreement that contains Article 11, and I am uncertain whether Article 11, and the related considerations discussed above, apply to the information in these pages. (I believe they do apply to pages 62 and 64, which appears to amend the audit provisions of the April, 2000 master agreement).

[para 85] Even if the Article 11 considerations do not apply with respect to pages 48 to 51 and 52, the questions remain whether the Minister as a party to the Agreement intended to receive the information in confidence, and which parties' subjective intentions are determinative.

[para 86] Again, rather than trying to ascertain the facts and solicit arguments relative to these questions, I will assume the redacted information on pages 48 to 51, 52, 62 and 64 was "supplied in confidence", and consider below whether it also meets the terms of section 16(1)(c).

Issue B: Does Section 16(1)(c) of the Act (harm to business interests) apply to the information in the withheld records?

[para 87] In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), the Supreme Court of Canada 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 (CanLII), [2008] 3 S.C.R. 41, at para. 40.

[para 88] 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 89] In his initial submission, the Applicant argued as follows:

> In reality, Alberta Blue Cross does not have any competitors as this contract has never been open to other companies through an RFP process. Disclosure of the information cannot hurt Alberta Blue Cross when no other company can possibly get this contract.

[para 90] ABC disputed this assertion in its rebuttal submitted at the earlier stage of this matter (paras 19 and 20), stating:

> In relation to whether or not ABC has competitors, the Applicant doesn't understand the nature of ABC's business and its relationship with the GOA. ABC does compete with not-for-profit health benefits providers with respect to the services that ABC provides to the GOA and the GOA has put out request for proposals in the past. This is obvious in that ABC does not have all of the government contracts that relate to the provision of benefit services on behalf of the GOA.
>
> Further the Applicant has not provided any evidence to refute the Affidavit of [the Affiant] sworn September 13, 2013 in the within matter which sets out that ABC does compete directly with "for-profit and private business organization [sic]"… .[34]

[34] ABC also says the following at para 19 of its recent submission:

> In addition, as context, the GOA and ABC have had discussions with the Pharmacy Association of Alberta regarding how pharmacies are compensated for the services that they provide as outlined in the Alberta Blue Cross Pharmacy Agreement. Access to the Agreement between Alberta Health and ABC could be used as an indirect attempt by the pharmacies to try and gain leverage in the negotiations with the GOA. This is evident in the fact that several pharmacies banded together in an attempt to challenge the agreements between ABC and various pharmacies in which the production of the Agreement was sought in the Court of Queen's Bench of Alberta Judicial District of Edmonton Action No. 13-03 06224 9T (the "Other Pharmacies Action").
>
> Interestingly, [the Applicant] provided the redacted version of the Agreement arising out of the initial FOIP Act request to the applicants in the Other Pharmacies Action to be used against ABC.

It is not clear how this information provided "as context" informs the questions in this inquiry. Although the phrase "as context" might suggest otherwise, possibly the quoted statement is meant to suggest that access to the Agreement by the Applicant in this access request and its provision by him to pharmacies

[para 91] The Applicant made further comments about this question in his rebuttal submission at the earlier stage of this matter, asserting again that for the provision of benefits on behalf of the Government of Alberta, ABC has no true competitors because there are no "not for profit" health benefits providers besides ABC, and that the contract for this government service is not awarded through a competitive process.[35]

[para 92] Alberta Health's submission for the present stage of this Inquiry supports the Applicant's position to some extent where it says (at page 6) that "there are no contracts to be negotiated for [the services in the master agreement set out at pages 1 to 47] in the imminent future". However, I do not know if this is also the case for the agreement of a later date respecting the particular service that is contained in pages 48 to 51.

[para 93] In its recent submission (at para 18) ABC again states (as it had in its Affidavit) that it "competes directly with for-profit public and private business organizations (such as Great-West Life, Manulife, Sun Life, Telus Health and so on)".

Harm with respect to pages 73 to 78 (methodologies and processes)

[para 94] Both ABC and Alberta Health submitted that disclosure of the information on these pages would cause the harms set out in section 16(1)(c) to ABC.

[para 95] I begin this discussion by noting that with respect to one portion of the withheld records (Schedule A, page 52), Justice Moreau stated the following in her discussion:

> [89] The Adjudicator pointed out, at paras 97- 99, that ABC made conflicting arguments. First, *ABC pointed to the harm to it that may result from a competitor learning about the services being provided to Alberta Health under the Agreement,* yet under s. 25, it characterized the harm to Alberta Health from disclosure being an increased likelihood that other parties would not contract with it given their concerns as to their own security. At para 99, the Adjudicator found, however, that no evidence had been provided to establish either outcome as likely. In light of those comments, I reject ABC's argument that the Adjudicator made a fact finding in the absence of evidence. *What she found, not unreasonably, was that there was no evidence to establish either outcome as likely.* I do not interpret her words to mean there was no evidence whatsoever

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would or would have in the past "significantly interfered with" the negotiating position of ABC (and Alberta Health) in their referenced discussions/negotiations with pharmacies concerning prices for generic drugs. If that is ABC's purpose in providing this information in its submission, no explanation is given as to what sort of "leverage" could be gained by the pharmacies through access to the Agreement, or how the terms of section 16(1)(c) might be met, and I cannot conclude that it would. Further, Schedule 2.1 of the Agreement (pages 24 and 25), which contains information regarding payment for drug benefits, is already in the public realm.

[35] The Applicant also raised arguments in his rebuttal submission concerning section 32 of the FOIP Act and section 9.1 of the ABC Benefits Corporation Act. I will not address these arguments as they were not properly part of a rebuttal and are not among the issues remitted to this office for reconsideration.

> in relation to each outcome, simply that there was no evidence sufficient to establish either outcome.[36] [emphasis added]

[para 96] While these comments by Justice Moreau were made under the heading of the applicability of section 25, they reveal her opinion that there was not enough evidence to establish "harm to [ABC] that may result from a competitor learning about the services being provided to Alberta Health under the Agreement". Justice Moreau's comments were made in the context of a discussion of a methodology set out on a particular page (Schedule A, page 52). However, as will be seen below, essentially the same claim was made by ABC and Alberta Health with respect to the methodologies on pages 73 to 78, yet no more evidence to support this claim was provided relative to the latter methodologies than was provided relative to that set out in Schedule A.

[para 97] As just noted, the arguments ABC made in its initial submissions with respect to the information in records 73 to 78 are similar to those it made respecting Schedule A. ABC also made the same arguments for pages 73 to 78 as it made for pages 21 to 45 (most of which are already in the public realm [pages 43 to 45 are not]), for pages 46 to 47 (already in the public realm), for parts of pages 62 and 64, for Schedule 3 (pages 34 to 39, already in the public realm), and for revised Schedule 3 (pages 66 to 72) (to which Schedule 3 Appendix pages 73-78 is attached). These arguments (at paras 53 and 58) are as follows:

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[36] The part of the Adjudicator's decision (at paras 96 to 99) to which Justice Moreau was referring was as follows [emphasis added to the Adjudicator's text]:

> When ABC described the harm to itself within the terms of section 16 from the disclosure of Schedule A, ABC stated:
>
> > These sections identify ABC capabilities and the associated information security risks. Knowledge of this proprietary information would be used by competitors to undermine ABC's current and future negotiating positions, including the renewal, extension and / or amendment of the contractual relationship and could be used to provide an unreasonable and unfair commercial advantage.
> >
> > This could reasonably be expected to harm ABC's competitive position and result in undue financial loss for ABC as one of ABC's competitors could use this information in an RFP or in approaching Alberta Health *with a proposal to provide the same, or similar, services as those provided by ABC and undercut or offer more favourable terms* than those set out in these sections.
>
> The foregoing presents the risk to ABC resulting from the disclosure of Schedule A as the harm that might result if a competitor learned about the services ABC has agreed to provide to the Public Body, and recognized that it too had the capacity to provide similar or better services and could then use that information to contract with the Public Body to the detriment of ABC.
>
> In contrast, with regard to the application of section 25, ABC characterizes the harm that would result from disclosure as an increased likelihood that other third parties will *not* contract with the Public Body if the information in the records is disclosed, because of their concerns about the likelihood that their own security will be undermined should they enter a contract with the Public Body.
>
> These are conflicting arguments: under section 16, ABC argues that there would be an increased likelihood that other parties would attempt to contract with the Public Body to its detriment; however, in relation to section 25, it argues that the opposite would result from disclosure of some of the same information. *No evidence has been provided to establish either outcome as likely.*

> 53. This information would be used by competitors to interfere with the renewal, extension and/or amendment of the contractual relationship and would be used to provide an unreasonable and unfair commercial advantage.
>
> …
>
> 58. All of this proprietary information would be used by competitors to undermine ABC's competitive position, to interfere with ABC's negotiations with Alberta Health and its other customers, such as the employer-sponsored benefit plans. ABC's *competitors would know exactly what services, and the methodology by which those services are provided, by ABC. ABC's competitors could then use this information to provide additional services, additional reports or require less information*. Disclosure would allow ABC's competitors to *effectively out bid* ABC. ABC would lose its existing clients and would be unable to gain clients that ABC would otherwise have been able to acquire. This will lead to significant undue financial loss for ABC. [emphasis added]

[para 98] With respect specifically to Schedule 3 (the early version of this Schedule is already public information but the more recent revised (2009) version [pages 66 to 72] and the Appendix attached to the latter [pages 73 to 78] are not public), ABC said the following in its initial submission:

> 55. All of Schedule 3 should be severed as it forms the substance of the business relationship between the two parties, and, most importantly, it discloses the business and technological skills of ABC. No private entity should be or is required to *disclose to the world the depth and extent of its business and technological skills*. [emphasis added]

[para 99] In its most recent submission at the present stage of this matter, ABC repeats these arguments with respect to "Schedules 1 et. al."[37]

[para 100] Alberta Health says the following with respect to pages 73 to 78:

> The listing of ABC's services in these pages identifies in detail the capabilities of ABC and identifies how ABC organizes its work activities to deliver the services to the Respondent per the agreement. This would be considered ABC's commercial information per s. 16(1)(a) and was supplied by ABC to the Respondent per s. 16(1)(b).

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[37] ABC says:

> Schedules 1 et. al.: The information contained therein (respecting ABC business processes and services, capabilities and securities risks which would also disclose ABC business and technological skills, and ABC proprietary controls and procedures that apply not just to Alberta Health but other ABC clients) could be used by competitors to interfere with the contractual relationship and negotiations between ABC and Alberta Health and other customers of ABC (who would be able to know if Alberta Health is receiving preferential treatment). It would then give those competitors an unfair commercial advantage. The information would also disclose ABC business and technological skills, list the services ABC was willing and able to provide, and its security measures (which could be used by competitors or other third parties). Using this information, ABC could be outbid by competitors and it may impact ABC relationships with clients outside of Alberta Heath, leading to significant undue financial loss.

Schedule 1 has already been made public, but an amendment to it on page 62 has not, neither has revised Schedule 3 and its Appendix (pages 66 to 78).

> The details of this commercial information could reasonably be used by competitors to undermine ABC's competitive position and interfere with ABC's current and future negotiating positions, as it relates to ABC's private business. This could reasonably be expected to harm ABC's competitive position and result in undue financial loss for their supplemental benefit administration business. As such the Respondent has determined that the requirements of s. 16(1)(c)(i) and (iii) have been met."

[para 101] The primary thrust of ABC's arguments with respect to pages 73 to 78 (which are part of its more general arguments about all the information in the Agreement that reveals methodology) is that if ABC's competitors were to learn exactly what services ABC is providing and the methods by which it is providing them, the competitors could then use this information "to provide additional services, additional reports or require less information", and to outbid ABC.

[para 102] Pages 73 to 78 disclose a methodology for providing some of the services, (in contrast to setting out reporting requirements or the amount of information Alberta Health is required to provide). Thus, only the part of the aforementioned argument that relates to enabling competitors to "provide additional services", could conceivably apply to these records.[38] The reference to outbidding is presumably meant to suggest that the additional services could be provided at the same total cost at which the existing level of service is being provided, or that all services, including additional ones, could be provided at a lower rate.

[para 103] There is no explanation for the idea that ABC is not already providing all the services relating to the subject of the contract that Alberta Health needs (or that there might be other significant "vulnerabilities" in the contract that competitors could identify[39]). Even if that is the case, no party has suggested a reason why Alberta Health would not contract with ABC, with which it has a long-standing and established business relationship, rather than with competitors, to provide such additional services if and when it needs them, and address any existing vulnerabilities. (As already noted, the Applicant and ABC have offered contrary assertions about which organizations, if any, might be competitors with ABC to provide comparable services to Alberta Health. I am unable to decide on the basis of the opposing assertions which of these positions is correct, but I reach my conclusions on the assumption that there are such potential competitors, and also that there are competitors with respect to the provision of services to non-government entities.)

[para 104] With respect to the services ABC provides to Alberta Health, possibly, there are additional services that Alberta Health needs but that it cannot purchase because of

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[38] The provisions about what information Alberta Health is required to provide to ABC are information which Alberta Health says is its own information or information about its requirements rather than information provided by ABC.

[39] This language was used both by ABC with respect to particular withheld information in its initial submission at para 39, and its most recent submission at para 56, under the heading "Sections 3.1 et. al.", and by Alberta Health in its initial submission at Tab 4, page 7.

the rates and fees ABC would charge. However, as will be discussed in more detail below in the part of this order dealing with whether harm from disclosing rates and fees has been established, neither ABC nor Alberta Health has provided any evidence or reason for believing that competitors could provide more services and still charge Alberta Health the same price that ABC is charging it, or that a competitor could provide better rates overall. Moreover, with respect to the services ABC currently provides using the existing methodologies, ABC already has the existing associated technical resources and experience working with these particular methodologies that competitors would lack.

[para 105] With respect to the concern that knowing the details of the services ABC provides to Alberta Health would interfere with ABC's ability to compete with respect to the non-governmental parts of its business, neither ABC nor Alberta Health explain whether or to what degree the same or similar types of services or methodologies are utilized in both the public and private aspects of ABC's business.[40] Even if this were the case, there is no suggestion or reason to believe that competitors do not already have methodologies by which they provide such services, that they would prefer and substitute or adapt ABC's methodologies in favour of their own, or that if they did so, customers for these services would prefer to receive them from the competitors rather than from ABC. This argument does not meet the tests set by the Court cases cited above (at paras 87 and 88 of "a clear and direct linkage between the disclosure of specific information and the harm alleged" or of "an explanation of how or why the harm alleged would result from disclosure of specific information", nor is it evidence "well beyond" or "considerably above" a mere possibility of harm.

[para 106] I turn to ABC's point that disclosing the information at issue would "disclose to the world the depth and extent of its business and technological skills". While the Agreement provides an indication of some of the work ABC is able to perform, and some of the processes by which it performs it, this does not necessarily reveal "the depth and extent of its technological skills". A large portion of this information is already in the public realm. As well, there is no indication how another organization's knowing ABC's business and technological skills, to the extent the Agreement reveals them, would enable it to match these skills so as to effectively compete with ABC.

[para 107] ABC also argues that disclosure of the methodology information "may also discourage [ABC] from providing information to a public body in the future even though its supply may be in the public interest". In situations in which in it is in the public interest for a public body to know the details of how an organization will provide services, I presume a public body would refuse to contract or continue to contract with an organization that refused to supply such details.

[40] Alberta Health did assert at the earlier stage of this matter [initial submission, Tab 4, page 8], that "the technical layout of ABC's system structure … also reverts to the private sector of their business, not only the public sector", and ABC said that the audit provisions "address specific proprietary controls and procedures performed by ABC" and they also "apply to other ABC clients including the employer-sponsored benefit plans it administers on behalf of several large employers at the provincial and municipal level" (initial submission, para 56 and recent submission para 56 under the heading "Schedule 1 et. al.). However, neither supplied any detail or evidence to support these very general assertions.

[para 108] Finally, ABC argues that disclosure of the information will "discourage innovation and development from the third party". I presume ABC means that if its methodologies are going to become known to competitors, and possibly be utilized by them, it will be less inclined to itself develop better methodologies for providing its services than those it is already using. However, this presumes that ABC's internal motivations for being able to provide its services in innovative or more efficient ways would be outweighed by the prospect other organizations might take advantage of such development. This is speculative, as is the idea that other organizations would be in a position to do this or be inclined to do it.

[para 109] Alberta Health's arguments as to harm, quoted above, are similar to those just mentioned – that the information identifies in detail the capabilities of ABC and identifies how ABC organizes its work activities to deliver the services. Alberta Health gives no indication as to how it believes competitors could use this information to successfully undermine ABC's competitive position to such a degree that they would be able to secure the contracts with Alberta Health or ABC's other customers that ABC presently has.

[para 110] Having regard to Justice Moreau's comments as to insufficiency of evidence regarding the very similar arguments made specifically with regard to Schedule A (page 52), and taking all the foregoing factors into account, I find that neither ABC nor Alberta Health have provided sufficient evidence or explanation to enable me to conclude that the test for harm under section 16(1)(c) from disclosure of methodologies in pages 73 to 78 has been met.

[para 111] (With respect to pages 43 to 45 and 66 to 72, had I found that information to be "supplied" within the terms of section 16(1)(b), I would regard the comments in this present section as applying with greater force to these pages, especially given Alberta Health's stated view with respect to those pages that none of this general and dated information could cause the kinds of harms ABC alleges.)

Harm with respect to pages 48 to 51 (term and termination clauses of January 2002 agreement; page 52 (Schedule A, description of services)

[para 112] With respect to the redactions on pages 48 to 51 (terms and termination clauses), ABC argues in its most recent submission (para 56) that these clauses "could be used by competitors to identify and exploit vulnerabilities in the Agreement and allow them to outbid ABC in the future, especially in consideration of the short term of the Agreement itself. … Thus ABC's competitive position would be harmed, resulting in undue financial loss …".

[para 113] I do not see how the length of the term or the manner in which the contract can be terminated could be used to "identify vulnerabilities in the contract". Neither does anything in these provisions suggest that competitors who learn of these provisions would be likely to be able to achieve more favourable terms with regard to the length of the

contract, or the termination provisions, and ABC presents no explanation or evidence that they would be. Therefore I do not accept that section 16(1)(c) applies to this information.

[para 114] Page 52 (Schedule A) has already been discussed above, as well as in the judicial review decision.

Harm with respect to page 62 (amendment to Schedule 1 (enrollment data).

[para 115] The redacted data on this page possibly provides some information as to the types of services ABC is to provide to Alberta Health and how it will provide them. However, for the same reasons as are outlined at paras 101 to 110 above, I do not accept that this information could cause the types of harms that ABC asserts would arise from disclosure of information about the services being provided.

Harm with respect to page 64 (amendment to the audit provisions).

[para 116] ABC has said that the audit provisions "address specific proprietary controls and procedures performed by ABC" and they also "apply to other ABC clients including the employer-sponsored benefit plans it administers on behalf of several large employers at the provincial and municipal level" (initial submission at the earlier stage of this matter, para 56, and most recent submission at para 56 under the heading "Schedule 1 et. al.).

[para 117] The information in page 64 is not significantly different in kind from that in pages 46 to 47 (already in the public realm). I agree with Alberta Health in its most recent submission where it describes the audit provisions on pages 46 and 47 (at page 7), that this type of information, though 'technical' to some degree, provides only "a general description", lacking significant detail, of the audit services to be provided. Though there is a reference to external auditing standards, the information is straightforward and there is nothing in it to suggest ABC expended significant technical or scientific knowledge or resources in developing this information or in applying the external standards, or that it could be utilized by competitors. It is important to remember that under section 16, harm is considered only with respect to the commercial, financial, scientific or technical nature of information. I find disclosure of the information on this page would not cause the kind of harms contemplated by section 16(1)(c).

Harm with respect to rates and fees

[para 118] In its initial submissions to the former Adjudicator, ABC argued as follows with respect to the disclosure of payment information (rates and fees) (which includes the payment information for the April, 2000 master agreement (pages 40 and 41), and the payment information in Schedule B (page 53), as amended on pages 54, 56, 58, and 60):

> 69. All of the above financial information would be used by competitors to undermine ABC's competitive position and interfere with ABC's current and future negotiating positions, including the renewal, extension and/or amendment of the contractual

relationship. This could reasonably be expected to harm ABC's competitive position and result in undue financial loss for its government program administration business.

70. The potential harm is obvious when it comes to the rates and fees. If any of ABC's competitors had this information, they could either undercut ABC in any RFP or even approach Alberta Health with a proposal to provide the same, or similar services, as those provided by ABC at a lower rate or fee. This would drastically harm ABC's competitive position, decrease its negotiating position with Alberta Health and result in significant financial loss to ABC if it lost its largest client, Alberta Health. The harm this would cause is significant and would be directly related to the disclosure of the information. It is highly probable that many competing for-profit organizations would jump at the chance to gain this business.

71. The harm is also obvious when you consider ABC's over 5000 other plan sponsors who would know the rates and fees that ABC charges to Alberta Health. ABC's other customers would demand that they be charged the same rates and fees as Alberta Health. If ABC doesn't agree to the reduction, which it likely couldn't economically do, then it would lose the customer. Further, ABC's other customers could terminate their contracts simply because they feel slighted that the same rate wasn't offered to them in the first place. The end result is that ABC would lose a significant portion of its business.

(ABC does not specifically mention the payment information in pages 79 to 81 when it makes these arguments, but I assume it meant to include them in its discussion of the compensation information in Schedule 4, which pages 79 to 81 amend.)

[para 119] In its most recent submissions, ABC says:

> **Schedule B et. al.:** The information contained therein provides payment amounts and cost structure that can be used by ABC to undermine ABC's competitive and negotiating position by offering the same or more favorable terms, which would reasonably be expected to harm their competitive position and result in undue financial loss. [41]

[41] Schedule B (which appears on page 53) and is amended in the amending agreements that follow (on pages 54, 56, 58 and 60) relates specifically only to the cost of development of computer systems for the purposes of providing the services described in Schedule A (page 52) and the provision of related database maintenance services.

ABC's recent submission also refers to "Sections 18. et. al." (on pages 6 and 7) and to "Sections 18.1 et. al." (on page 14) as containing compensation information and "rates and fees", and discusses the associated potential harms, but the associated pages in the table on page 6 (which includes compensation information regarding the April 2000 master agreement in Schedule 4 on pages 40 to 41) are all records that have already been made public. Pages 79 to 81 amend Schedule 4. Although ABC does not mention pages 79 to 81 in the table on page 6 or in the list of records for which it seeks exemption from disclosure at pages 4 to 5, (nor, as noted above, did it do so in its submission in the earlier phase of this matter), I assume it meant to include the payment information on these pages when it made the following comments on page 14 of its submission about "Sections 18.1 et. al.":

> The information contained therein (relating to rates and fees ABC charges to Alberta Health) could be used by competitors to undermine ABC's competitive position and negotiating power, resulting in undue financial loss. ABC's other customers would also be privy to the terms offered to Alberta Health (ABC's largest client) and could terminate their business with ABC based on being charged different rates and fees, causing a further loss of business to ABC.

[para 120] The parts of pages 79 to 81 which Alberta Health maintains should be withheld are the rates and fees.[42] It says:

> The financial components which set out the rates ABC is to be paid for services could reasonably be expected to cause significant harm to ABC's competitive position per s. 16(1)(c)(i) by allowing its competitors to historically know the rates that it charges for the services rendered and better able to bid lower as against both government health benefit contracts and as a baseline for which ABC may charge other health benefit plans.

[para 121] With respect to whether the foregoing submissions establish the harms test has been met, I begin by noting again that Justice Moreau agreed with the former Adjudicator that evidence is required to support arguments of this sort, and that there was insufficient evidence to establish ABC's stated concern that information contained in Schedule A would allow "one of ABC's competitors [to] use this information in an RFP or in approaching Alberta Health *with a proposal to provide the same, or similar, services as those provided by ABC and undercut or offer more favourable terms* than those set out in these sections". [emphasis added] Again, no more evidence has been provided as to the detriment to competitive position or the gaining of an unfair competitive advantage with respect to disclosure of the rates and fees in the Agreement than has been provided with respect to such consequences arising from disclosure of Schedule A.

[para 122] Further, ABC has said that it operates at cost, but it refers to its competitors (which it lists) as, or primarily as, for-profit organizations (see para 11 of its Affidavit submitted at the initial stage of this matter, which ABC also quoted in its recent submission at para 18). (There is also a suggestion by ABC in its rebuttal at the initial stage of this matter that it has other not-for-profit competitors (see the quote in para 90 above), but none are named. In order for a for-profit competitor to successfully outbid ABC, there would have to be some factor which both permits the making of a profit for providing the service, and providing it for rates and fees that are lower than ABC's bottom-line, cost-recovery business model. This is not impossible in theory, assuming factors such as possible economies of scale, or more advanced technologies than possessed by ABC. However, to make this a viable argument, in my view, ABC would at a minimum need to show, or show the likelihood, that the organizations it says might compete with it (for-profit or otherwise) are or might be in possession of such advantages. No such explanation has been given or likelihood established. Merely knowing what services an organization is providing to a public body and at what rate would not in itself permit a different organization to outbid the first one.

[42] Alberta Health does not make arguments to support withholding of the payment information in Schedule B (page 53) and the associated amendments on pages 54, 56, 58, and 60. On the contrary, it says the financial information contained therein does not divulge any significant information as to the financial capabilities or resources of ABC, and comments on the significant age of this information. It also does not accept that disclosure would deter ABC or other organizations from supplying such information in the future.

[para 123] I acknowledge that the information in pages 73 to 78 is detailed and somewhat technical, so that its development by ABC as a methodology may have required the expenditure of resources. One might speculate the explanation for potential "out-bidding" to be that development of this methodology required so significant an expenditure of resources that it has diminished the resources ABC now has available to provide the services relative to its competitors, and/or that competitors who acquired this information might be sufficiently advantaged by being spared the time and expense of developing this methodology as to be enabled to provide the related services to ABC or ABC's other customers at a lower cost. However, to make this argument more than speculative, ABC would have to provide at least some evidence of the resources expended on the methodology, and of the impact this expenditure has had on the overall functioning of the company, or evidence that avoiding this expenditure would benefit competitors to a sufficient degree. ABC has neither offered such an explanation, nor given any such evidence.

[para 124] I have also noted ABC's argument that if other customers of ABC discover that ABC is providing better rates or "preferential treatment" to Alberta Health, they will terminate or not continue their contracts with ABC. (Rebuttal submission, para 21) This assumes that there is no reasonable explanation for the lower rates and fees charged to Alberta Health (ABC's largest customer), such as economies of scale or the scope and ongoing nature of the service being provided. It is also not clear to me whether the services to ABC's other customers are or for some reason ought to be also provided "at cost", for the same or similar reasons as those for which ABC provides services to Alberta Health "at cost". Without pointing to something more specific or substantive to support the idea that any disparity in rates and fees is not understandable, unavoidable or justifiable, I find this argument is also merely speculative.

[para 125] I also note that the most recent date on the compensation information in the withheld records is February 1, 2010 (with an end date of March 31, 2011 for a portion of the services). The parties' submissions do not appear to indicate whether the rates and fees have been amended since, but this seems likely.[43] Earlier orders from this and other offices have held that outdated contract terms do not meet the harms test in section 16.[44]

[para 126] Further, even if disclosure of the rate and fee information gave potential competitors the advantage of being able to outbid ABC in a future contract

[43] Alberta Health does say that pages 1 to 42 and 46 to 47 of the records have been superseded by OC 210/2017. However, I cannot tell from this statement nor from OC 210/2017 itself whether new rates apply.

[44] See, for example, Orders F2009-021 at para 34, F2012-15 at para 123. See also Ontario Order MO-2465, in which the adjudicator stated: **"**In the circumstances of this appeal, the contract term is for ten years. Ten years is a lengthy period of time and it is reasonable to assume that the economy and market conditions are likely to alter considerably in unpredictable ways during that period. I find that the Town has not provided any detailed or convincing evidence to demonstrate how ten years from now, price unit details from today could reasonably be expected to cause either of the harms contemplated in sections 10(1)(a) or (c) of the *Act* [the provision parallel to section 16].

competition, I am inclined to agree with orders from the Ontario Information and Privacy Commissioner's office which hold that it does not harm a party or cause it undue financial loss to place it in a position of having to compete with others who may be able to provide services to government at more competitive rates than the rates at which the party is providing them. In Order MO-2465, the adjudicator said:

> The Town also submits that were the corporation's price details disclosed it could reasonably be expected to result in a "very real financial loss to [the corporation] and corresponding gain to [the corporation's] competitors" because competitors would be aware of its most competitive offer which would hinder its competitiveness with respect to future tenders submitted in response to similar RFPs issued by other institutions. However, as noted above, Assistant Commissioner Beamish stated in Order PO-2435:
>
> > [T]he fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.
>
> In keeping with the reasoning expressed in Order PO-2435, I do not accept that a mere statement by the Town that disclosure of the price details contained in the proposal submitted by the winning proponent amounts to the requisite detailed and convincing evidence of harm required to outweigh the need for public accountability and transparency with respect to the spending of public funds.

[para 127] ABC also argues that disclosure of some of the disputed information "may also discourage [ABC] from providing information to a public body in the future even though its supply may be in the public interest".[45] As pointed out by Alberta Health (at page 8 of its recent submission), I do not see that an organization can avoid letting a public body know what rates and fees it is proposing to charge.

[para 128] I turn finally to ABC's argument that the inclusion in the *ABC Benefits Corporation Act* and regulations of specific financial disclosure requirements means that the FOIP Act should be interpreted in this case such that the former legislation should be held to indirectly define the limits of ABC's obligations respecting financial disclosure. In this regard, I note first that the FOIP Act is paramount over the Alberta Benefits Corporation legislation to the extent of any inconsistency.[46] Second, financial reporting requirements imposed by one statute would not in any case override the right of access to the same or other kinds of information conferred by section 6. Many decisions of this office have held that the access provisions of the

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[45] See ABC's recent submission at para 57. This point was also made in ABC's Affidavit, wherein it said (at para 15):

> If the agreements are required to be produced, ABC would be reluctant in the future to provide certain information to Alberta Health, especially like the rates, fees, services and audit information.

[46] Section 5 of the FOIP Act provides as follows:

> *If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless*
>
> > *(a) another Act, or*
> >
> > *(b) a regulation under this Act*
>
> *expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.*

Act are intended to be independent of, or parallel to, other legislation providing for disclosure of information, and that provisions in other legislation that permit access or require disclosure of the same information do not diminish access rights under section 6.[47] The same principle applies with greater force to other statutes that require disclosure of similar, but not the same, information.

[para 129] Taking all the foregoing factors into account, I find that neither ABC nor Alberta Health has provided sufficient evidence or explanation to enable me to conclude that the test for harm under section 16(1)(c) from disclosure of the rates and fees in pages 79 to 81 of the Agreement, or the other rates and fees for the database in Schedule B and the associated amendments, has been met.

[para 130] I turn finally to disclosure of the information on pages 79 to 81 other than the compensation amounts (which primarily provides details about the kinds of services that can be invoiced and how invoices will be paid). Given the absence of evidence that disclosure of this information could cause harm, and my agreement with Alberta Health's recent arguments that there is no reason to withhold similar information (such as is found on pages 40 and 41, already in the public realm) that does not reveal anything about ABC's financial capabilities or resources, I have no basis for concluding that disclosure of this information on these pages will cause the kinds of harms claimed by ABC in relation to "rates and fees".

V. ORDER

[para 131] I make this Order under section 72 of the Act.

[para 132] I order Alberta Health to disclose the information/records at issue to the Applicant.

[para 133] I further order Alberta Health to notify me in writing, within 50 days of its receipt of a copy of this Order, that it has complied with my Order.

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Christina Gauk, Ph.D.
Director of Adjudication

[47] See, for example, Order F2009-015 at paras 67 to 69. This case also holds that where information relevant to court processes is available through other means such as examinations for discovery, one of the factors favouring disclosure listed in section 17(5)(c) – that information is required for the purpose of fairly determining an Applicant's rights – may be diminished on account of the availability of the information from other sources. (See F2009-015 at para 58.) However, that factor has no bearing in the present case.