

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER F2002-002

July 5, 2002

### ALBERTA ENVIRONMENT

Review Number 2280

**Office URL:** <http://www.oipc.ab.ca>

**Summary:** The Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to Alberta Environment, asking for the proposal of the Third Party who responded to the Request for Proposal to provide aerial fire fighting services to the Government of Alberta. The Third Party’s proposal was successful in obtaining the contract to provide aerial fire fighting services. The Adjudicator found that most, but not all, of the information that Alberta Environment withheld in the Third Party’s proposal was confidential business information of the Third Party and must not be disclosed under section 16 [previously section 15] of the Act. The Adjudicator ordered disclosure of some information for which he found that section 16 [previously section 15] did not apply.

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(s) [previously section 1(1)(s)], 1(s)(ii) and (iii) [previously section 1(1)(s)(ii) and (iii)], 4(1) [number unchanged by R.S.A. 2000, c. F-25], 16 [previously section 15], 16(1) [previously section 15(1)], 16(1)(a), (b) and (c) [previously section 15(1)(a), (b) and (c)], 16(1)(c)(i), (ii) and (iii) [previously section 15(1)(c)(i), (ii) and (iii)], 16(3)(a) [previously section 15(3)(a)], 17 [previously section 16], 24 [previously section 23], 24(1) [previously section 23(1)], 24(1)(a), (b) and (c) [previously section 23(1)(a), (b) and (c)], 72 [previously section 68].

**Authorities Cited: AB:** Order 2000-005

## I. BACKGROUND

[para 1] A company whom the Applicant represents (the “Company”) responded to a Request for Proposal (“RFP”) to provide aerial fire fighting services to the Government of Alberta. The Company’s proposal in response to the RFP was not successful. The proposal of another company (the “Third Party”) was successful, and the Third Party was awarded the contract to provide the aerial fire fighting services.

[para 2] On February 12, 2001, the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to Alberta Environment (the “Public Body”) for access to information, as follows:

1. Complete proposal submitted by [the Third Party] in response to RFP CL-215/01
2. Financial details of [the Third Party’s] proposal, specifically:
  - a) Fixed annual price for the year 2001
  - b) Daily basing fee for each CL-215
  - c) Daily basing fee for each Birddog
  - d) Rate per flight hour for each Birddog
  - e) Daily basing fee for each CL-215 outside the normal 123 day season
  - f) Daily basing fee for each Birddog outside the 123 day season
3. With respect to [the Company’s] response to RFP CL-215/01 technical proposal, the item or items that were missed and described by the Manager of Air Operations Alberta Forest Services as “very important and which seriously affected [the Company’s] evaluation”.

[para 3] On the Applicant’s access request, the Public Body’s consultations with the Third Party resulted in the Third Party’s request for a review by this Office. After the conclusion of the Third Party’s review (which this Office settled by mediation), the Public Body provided the Applicant with access to 61 pages of records in their entirety. The Public Body severed information from and withheld the remaining 78 pages of records in whole or in part under the following exceptions to disclosure contained in the Act: section 16 [previously section 15] (confidential business information), section 17 [previously section 16] (personal information) and section 24 [previously section 23] (“advice”).

[para 4] On September 14, 2001, the Applicant requested a review of the Public Body’s decision to withhold records/information. Mediation was not successful and the matters proceeded to a written inquiry. I received initial written submissions from the Public Body, the Applicant and the Third Party. I received rebuttal submissions from the Public Body and the Applicant only.

[para 5] The revised *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, came into force on January 1, 2002. Most of the section numbers of the Act changed, but not the substance of the sections. Consequently, in this Order, I have set out the new section numbers. The previous section numbers appear in square brackets after the new section numbers.

## **II. RECORDS AT ISSUE**

[para 6] Of the total 139 pages of records, 78 pages are at issue. The Public Body severed those pages in whole or in part.

[para 7] Except for pages 136 to 139, the Records comprise the Third Party's proposal. Pages 136 to 138 contain the Public Body's rating of the Applicant's proposal. Page 139 contains the Public Body's comparative analysis of three proposals, including the proposals of the Applicant and the Third Party.

[para 8] On page 139, the Public Body properly removed the information of a person other than the Applicant and the Third Party, as being non-responsive to the Applicant's access request.

[para 9] In this Order, I will refer to the pages individually by page number, where necessary, and will refer to all the pages collectively as the "Records".

## **III. ISSUES**

[para 10] There are three issues in this inquiry:

- A. Does section 16 of the Act [previously section 15] apply to the records or information?
- B. Does section 17 of the Act [previously section 16] apply to the records or information?
- C. Did the Public Body properly apply section 24 of the Act [previously section 23] to the records or information?

## **IV. DISCUSSION OF THE ISSUES**

### **ISSUE A: Does section 16 of the Act [previously section 15] apply to the records or information?**

#### **1. Preliminary matters**

[para 11] During the inquiry, I decided to consider whether section 17 [previously section 16] of the Act (personal information) also applied to the names and some other personal information of third parties the Public Body withheld under section 16 [previously section 15] on pages 46 to 49 and pages 119 to 129 of the Records. I asked

the parties to provide me with further written submissions on the application of section 17 [previously section 16] to that information.

[para 12] Before those submissions were due, the Applicant informed me that he did not want any of the personal information contained in the Third Party's proposal. The Applicant said that he was interested only in how the contract was awarded. Consequently, my legal counsel informed the Public Body and the Third Party that further submissions on the application of section 17 [previously section 16] were no longer necessary.

[para 13] The Applicant has given instructions that he is not interested in this information. Therefore, I do not find it necessary to consider whether section 16 [previously section 15] or section 17 [previously section 16] applies to this information.

[para 14] As the Public Body refused to disclose to the Applicant the information withheld under section 16 [previously section 15] on pages 46 to 49 and pages 119 to 129 of the Records, the Applicant does not get access to that information.

[para 15] The Public Body's RFP sets out terms and conditions for proposals. The Applicant argues that the net effect of certain terms and conditions is that the exceptions in the Act do not apply to the material submitted in response to the RFP. The Applicant believes that the exceptions in the Act only come into play after a contract has been awarded. To support this contention, the Applicant relies particularly on the following term and condition, which reads:

The vendor acknowledges that the Government of Alberta has passed the Freedom of Information and Protection of Privacy Act of Alberta as amended, revised, or substituted from time to time ("FOIP") and shall abide by the requirements of FOIP in so far as applicable to its operations and the information the vendor has access to, collects, or uses, as a consequence of carrying out its obligations under the Agreement.

[para 16] In my view, the foregoing term and condition makes it clear that, if a vendor is successful on its proposal, is awarded the contract, and signs the agreement with the Government, the vendor has obligations under the Act concerning its access to, collection or use of information related to the agreement. That term and condition does not have the meaning the Applicant suggests.

[para 17] Furthermore, section 4(1) [number unchanged by R.S.A. 2000, c. F-25] does not exclude from the Act the material submitted in response to the RFP.

[para 18] Finally, if the Act did not apply to the material submitted in response to the RFP, the Applicant would not have a right to make an access request, and I would have no jurisdiction to decide the issue of access. As set out in Clause 2.14 of the terms and conditions for proposals, the Applicant would have access to only whatever summary cost information the Minister decided to publish.

[para 19] Therefore, I do not accept the Applicant's argument that the Act does not apply to the material submitted in response to the RFP.

[para 20] The Applicant makes a great deal out of the term and condition that says the Public Body will open all proposals publicly. The Applicant believes that "public opening" must have the same meaning for the material supplied in the RFP process as it does in the tender process, in which the Government reads out the cost data and contract prices at the public opening of tenders. The Applicant concludes that:

In accordance with the specific terms and conditions in the RFP the complete details of all proposals were open to the "Public" at the time of opening and should therefore now be available under the terms of FOIP.

[para 21] The Public Body's evidence is that the RFP process and the tender process are different, that the standard practice is not to announce prices during the public opening of proposals, and that the standard practice was followed in this case.

[para 22] It seems to me that the tender and RFP processes must be different, or there would be no need for two processes.

[para 23] In the tender process, the Government defines the goods or services to be provided, and calls for a dollar amount for providing those goods or services. In the public opening of tenders, the dollar amount is therefore announced.

[para 24] In the RFP process, the Government outlines the goods or services to be provided, as evidenced from the Government's draft agreement provided in the Public Body's submission and contained in the Third Party's proposal. The Government calls for proposals on how the goods or services will be provided, including the dollar amounts. In the public opening of proposals, the dollar amounts are not announced because the proposals must be evaluated, based on the dollar amounts and other established criteria, before the contract is awarded.

[para 25] Therefore, I accept the Public Body's evidence that the public opening in the RFP process and the tender process are not the same.

## **2. General**

[para 26] Section 16(1) [previously section 15(1)] reads:

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

*(a) that would reveal*

*(i) trade secrets of a third party, or*

*(ii) commercial, financial, labour relations, scientific or technical information of a third party,*

*(b) that is supplied, explicitly or implicitly, in confidence, and*

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

*(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*

*(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*

*(iii) result in undue financial loss or gain to any person or organization, or*

*(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[para 27] Only the information withheld under section 16(1) [previously section 15(1)] on the following pages of the Records is at issue:

5, 8, 9, 12, 13, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 40, 41, 42, 43, 50, 58, 62, 69, 70, 71, 72, 75, 77, 78, 80, 92, 100, 101, 104, 105, 106, 107, 108, 110, 111, 112, 115, 131, 132, 133, 134, 135, 139

[para 28] For section 16(1) [previously section 15(1)] to apply to that information, it must meet the requirements of section 16(1)(a), (b) and (c) [previously section 15(1)(a), (b) and (c)].

[para 29] The Public Body and the Third Party argue that disclosure would reveal trade secrets of the Third Party, or commercial, financial, scientific or technical information of the Third Party, which was supplied in confidence, and the disclosure of which would result in the outcomes set out in section 16(1)(c)(i) to (iii) [previously section 15(1)(c)(i) to (iii)].

[para 30] The Applicant argues generally that section 16(1) [previously section 15(1)] does not apply to pricing details for goods and services provided to the Government.

**3. Would disclosure of the information reveal trade secrets, or commercial, financial, labour relations, scientific or technical information of the Third Party (section 16(1)(a) [previously section 15(1)(a)])?**

[para 31] The Public Body and the Third Party submit that certain information withheld on pages 5, 8, 9, 12, 17, 18, 29, 30 and 72 of the Records constitutes a trade secret.

[para 32] “Trade secret” is defined in section 1(s) [previously section 1(1)(s)] of the Act, as follows:

*1 In this Act,*

*(s) “trade secret” means information, including a formula, pattern, compilation, program, device, product, method, technique or process*

*(i) that is used, or may be used, in business or for any commercial purpose,*

*(ii) that derives independent economic value, actual or potential, from not being generally known to anyone who can obtain economic value from its disclosure or use,*

*(iii) that is the subject of reasonable efforts to prevent it from becoming generally known, and*

*(iv) the disclosure of which would result in significant harm or undue financial loss or gain.*

[para 33] There is evidence before me in the written submissions that the information does not meet the criteria of section 1(s)(ii) [previously section 1(1)(s)(ii)] (not being generally known) and section 1(s)(iii) [previously section 1(1)(s)(iii)] (the subject of reasonable efforts to prevent it from becoming generally known). Therefore, I find that the information specified on pages 5, 8, 9, 12, 17, 18, 29, 30 and 72 of the Records does not meet the criteria for “trade secret”. I cannot disclose the evidence on which I base my finding because, as discussed below, that information meets the criteria for “commercial information” under section 16(1)(a) [previously section 15(1)(a)], it also meets the criteria of section 16(1)(b) and (c) [previously section 15(1)(b) and (c)], and therefore must not be disclosed.

[para 34] Both the Public Body and the Third Party argue that the information withheld is commercial, financial and technical information of the Third Party.

[para 35] In previous Orders, “commercial information” has been defined to include, among other things, information that relates to the buying, selling or exchange of merchandise or services, such as information about how a third party proposes to organize its work. “Financial information” has been defined to include the monetary resources of a third party. Finally, “technical information” has been defined to mean information that relates to particular subjects, crafts or professions that are based on a specific technique or approach.

[para 36] I find that the information the Public Body withheld on the following pages of the Records would reveal commercial, financial or technical information of the Third Party:

5, 8, 9, 12, 13, 17, 18, 19, 20, 21, 22, 23 (3<sup>rd</sup> sentence in the 3<sup>rd</sup> paragraph; 4<sup>th</sup> paragraph; 7<sup>th</sup> to 9<sup>th</sup> paragraphs), 24 (all paragraphs except the last paragraph), 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 40, 41, 42, 43, 50, 69, 70 (the paragraphs, but not the headings), 71, 72, 75 (everything except the main heading), 77, 78, 80, 92, 100, 101, 104, 105, 106, 107, 108, 110, 111, 112, 115, 131, 132, 133, 134, 135, 139

[para 37] Therefore, I find that section 16(1)(a) [previously section 15(1)(a)] applies to the foregoing information.

[para 38] I find that the information the Public Body withheld on the following pages of the Records would not reveal commercial, financial or technical information of the Third Party, because the Third Party has already revealed that information by agreeing to disclose it in other parts of the proposal, and by the Public Body’s having disclosed it, to the Applicant:

- 23 (1<sup>st</sup> and 2<sup>nd</sup> paragraphs; 1<sup>st</sup> and 2<sup>nd</sup> sentences in the 3<sup>rd</sup> paragraph; 5<sup>th</sup> and 6<sup>th</sup> paragraphs) – all revealed in the Appendices disclosed to the Applicant
- 70 (the headings) – revealed on page 9 and disclosed to the Applicant
- 75 (the main heading) – revealed on page 10 and disclosed to the Applicant

[para 39] As the foregoing information does not meet the requirements of section 16(1)(a) [previously section 15(1)(a)], I intend to order the Public Body to disclose that information to the Applicant.

[para 40] I find that the information the Public Body withheld on the pages 58 and 62 of the Records is not the commercial, financial or technical information of the Third Party. That information is part of the Government’s draft agreement, which the Government and the Third Party will sign if the Third Party’s proposal is successful and the Third Party is awarded the contract. That information refers generally to a revision the Government was prepared to make to its draft agreement.

[para 41] As the information the Public Body withheld on pages 58 and 62 does not meet the requirements of section 16(1)(a) [previously section 15(1)(a)], I intend to order the Public Body to disclose that information to the Applicant.

[para 42] I also find that the information the Public Body withheld on page 24 (last paragraph) of the Records is not the commercial, financial or technical information of the Third Party, as that information is public information. Furthermore, the Third Party agreed to disclose that information in the Appendices to the proposal, and the Public Body has already disclosed it, to the Applicant.

[para 43] As the information the Public Body withheld on page 24 (last paragraph) does not meet the requirements of section 16(1)(a) [previously section 15(1)(a)], I intend to order the Public Body to disclose that information to the Applicant.

[para 44] The Third Party nevertheless argues that its entire proposal is “proprietary” and would reveal its business plan, which is commercial information. In Order 2000-005, the former Commissioner rejected a claim that an entire agreement (Calgary Laboratory Services’ partnership agreement) fell within section 16(1) [previously section 15(1)].

[para 45] In this case, I also find that the Third Party’s entire proposal is not “proprietary”, that is, it is not all “commercial information” of the Third Party. For example, the Third Party’s proposal contains the Government’s draft agreement, referred to earlier. The draft agreement is not the Third Party’s “proprietary” (commercial) information. The Third Party must indicate only its acceptance or non-acceptance of the terms of the draft agreement.

[para 46] Furthermore, the evidence is that the Third Party and the Public Body have agreed on what provisions of the Third Party’s proposal can be disclosed to the Applicant. In effect, the Third Party has already acknowledged that its entire proposal does not meet the requirements of section 16(1) [previously section 15(1)] and is not “proprietary”.

#### **4. Was the information supplied, explicitly or implicitly, in confidence (section 16(1)(b) [previously section 15(1)(b)])?**

[para 47] Under section 16(1)(b) [previously section 15(1)(b)], I intend to consider only that information to which I have found that section 16(1)(a) [previously section 15(1)(a)] applies, with one exception, as follows.

[para 48] I want to make it clear that the information the Public Body withheld on pages 58 and 62 of the Records not only does not meet the requirements of section 16(1)(a) [previously section 15(1)(a)], but also does not meet the requirements of section 16(1)(b) [previously section 15(1)(b)], as it was not supplied by the Third Party (see the discussion under section 16(1)(a) [previously section 15(1)(a)] above).

[para 49] Other than the information withheld on pages 58 and 62, it is clear that the Third Party supplied the commercial, financial and technical information to Alberta Infrastructure, the public body responsible for the RFP process at the time the information was supplied.

[para 50] The Applicant refers to the terms and conditions, which provide for public opening of proposals, and concludes that there cannot be an interpretation that the information was supplied implicitly in confidence. The Applicant also believes that the Third Party did not supply the information explicitly in confidence.

[para 51] However, the Third Party's statement concerning confidentiality, contained in the Third Party's proposal (page 6 of the Records, which was disclosed to the Applicant), is evidence that the Third Party supplied the commercial, financial and technical information explicitly in confidence to Alberta Infrastructure.

**5. Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)(i) to (iii) [previously section 15(1)(c)(i) to (iii)]?**

[para 52] The Applicant wants to know how the Public Body can claim that cost data in the Third Party's proposal is "proprietary and highly sensitive" to the Third Party, when the exact same cost data and contract prices are read out at the public opening of tenders. The Applicant says:

Surely the Third Party and the Public Body cannot argue that the same information is "public" in a tender process but magically becomes proprietary and highly sensitive in the RFP process. Obviously, the Third Party having participated in Alberta Government tender calls where such data is made public, has not had its competitive position significantly harmed. Similarly the revealing of the Third Party's cost data in a "tender call" has not resulted in similar information no longer being supplied nor has it resulted in undue financial loss.

[para 53] I have said that the RFP process and the tender process are not the same (see the discussion earlier in this Order). Therefore, I do not find it necessary to further consider the Applicant's argument about those two processes.

**a. Harm significantly the competitive position or interfere significantly with the negotiating position (section 16(1)(c)(i) [previously section 15(1)(c)(i)])**

[para 54] There is not much evidence in the Public Body's and Third Party's submissions to support the claim that disclosure of the information could reasonably be expected to result in one of the outcomes set out in section 16(1)(c)(i) to (iii) [previously section 15(1)(c)(i) to (iii)]. Consequently, I have carefully reviewed the Records to decide whether they contain sufficient evidence to support the claim that the provisions of section 16(1)(c)(i) to (iii) [previously section 15(1)(c)(i) to (iii)] apply.

[para 55] There is evidence on the face of the Records (pages 77, 78 and 80) that disclosure of most of the Third Party's commercial, financial and technical information would harm significantly its competitive position. Therefore, I find that most of the information meets the requirements of section 16(1)(c)(i) [previously section 15(1)(c)(i)].

[para 56] I want to emphasize to the Public Body and the Third Party that the evidence on pages 77, 78 and 80 was crucial in my decision to find that the information met the requirements of section 16(1)(c)(i) [previously section 15(1)(c)(i)], as the Public Body and the Third Party provided very little other evidence in their submissions.

[para 57] However, I find that the disclosure of the information on the following pages of the Records would not harm significantly the competitive position or interfere significantly with the negotiating position of the Third Party:

- 17 (1<sup>st</sup> and 2<sup>nd</sup> paragraphs) – company history
- 21 (2<sup>nd</sup> paragraph) – general comment that the Third Party has undertaken projects
- 21 (5<sup>th</sup> paragraph) – general comment that the Third Party has a plan for taking control of the government's aircraft, etc.

**b. Result in similar information no longer being supplied (section 16(1)(c)(ii) [previously section 15(1)(c)(ii)])**

[para 58] I do not accept the Third Party's unsupported assertion that it would no longer supply the information to the Public Body if the information is disclosed. The commercial reality is that a proposal submitted in response to the RFP process is evaluated based on the information supplied. The Public Body makes it clear that not providing the information means that a party will not be successful in the RFP process. The Third Party is in the business of competing for contracts, and it will supply whatever information is required in its proposal to win the contract.

[para 59] Therefore, I find that section 16(1)(c)(ii) [previously section 15(1)(c)(ii)] does not apply to the information.

**c. Result in undue financial loss or gain (section 16(1)(c)(iii) [previously section 15(1)(c)(iii)])**

[para 60] The Public Body and the Third Party have not provided me with any evidence about undue financial loss or gain. Therefore, I find that section 16(1)(c)(iii) [previously section 15(1)(c)(iii)] does not apply to the information.

**6. Application of section 16(3)(a) [previously section 15(3)(a)]**

[para 61] The Applicant points to the terms and conditions for proposals, which say that proposals will be opened publicly and that cost information should be clearly indicated in the proposal to facilitate proposal opening. The Applicant says that those

provisions mean that the Third Party consented to the disclosure of its information, as provided by section 16(3)(a) of the Act [previously section 15(3)(a)], which reads:

*16(3) Subsections (1) and (2) do not apply if*

*(a) the third party consents to the disclosure.*

[para 62] In the absence of evidence as to what information the Third Party consented to disclose in the RFP process, I am not prepared to find that the terms and conditions the Applicant mentions constitute consent to disclosure of the Third Party's commercial, financial and technical information contained in the Third Party's proposal.

[para 63] The Applicant also believes that the term and condition concerning the Minister's right to publish summary cost information further supports the argument that the Third Party consented to disclosure. However, that term and condition is notice only to vendors that the Minister has the right to publish summary cost information and may exercise the right if he chooses. It is not consent to disclosure of the Third Party's commercial, financial and technical information. Furthermore, there is no evidence before me that the Minister has publicly disclosed information in this case.

[para 64] Therefore, I find that section 16(3)(a) [previously section 15(3)(a)] does not apply.

## **7. Conclusion under section 16(1) [previously section 15(1)]**

[para 65] I find that section 16(1) [previously section 15(1)] applies to the information the Public Body withheld on the following pages of the Records:

5, 8, 9, 12, 13, 17 (except the 1<sup>st</sup> and 2<sup>nd</sup> paragraphs), 18, 19, 20, 21 (except the 2<sup>nd</sup> and 5<sup>th</sup> paragraphs), 22, 23 (3<sup>rd</sup> sentence in the 3<sup>rd</sup> paragraph; 4<sup>th</sup> paragraph; 7<sup>th</sup> to 9<sup>th</sup> paragraphs), 24 (all paragraphs except the last paragraph), 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 40, 41, 42, 43, 50, 69, 70 (the paragraphs, but not the headings), 71, 72, 75 (everything except the main heading), 77, 78, 80, 92, 100, 101, 104, 105, 106, 107, 108, 110, 111, 112, 115, 131, 132, 133, 134, 135, 139

[para 66] I uphold the Public Body's decision to refuse to disclose the foregoing information.

[para 67] I find that section 16(1) [previously section 15(1)] does not apply to the information the Public Body withheld on the following pages of the Records:

17 (1<sup>st</sup> and 2<sup>nd</sup> paragraphs), 21 (2<sup>nd</sup> and 5<sup>th</sup> paragraphs), 23 (1<sup>st</sup> and 2<sup>nd</sup> paragraphs; 1<sup>st</sup> and 2<sup>nd</sup> sentences in the 3<sup>rd</sup> paragraph; 5<sup>th</sup> and 6<sup>th</sup> paragraphs), 24 (last paragraph), 58, 62, 70 (the headings), 75 (the main heading)

[para 68] I do not uphold the Public Body's decision to refuse to disclose the foregoing information. I intend to order the Public Body to disclose the foregoing information to the Applicant.

**ISSUE B: Does section 17 of the Act [previously section 16] apply to the records or information?**

[para 69] The Public Body says that section 17 [previously section 16] of the Act (personal information) applies to the personal information withheld on the following pages of the Records:

44, 45, 46, 47, 48, 49, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129

[para 70] In the Applicant's rebuttal submission, the Applicant says that he is not contesting information withheld under the provisions of section 17 [previously section 16] of the Act. Therefore, I do not find it necessary to consider whether section 17 [previously section 16] applies to the records or information.

[para 71] As the Public Body refused to disclose to the Applicant the information withheld under section 17 [previously section 16] on pages 44 to 49 and pages 119 to 129 of the Records, the Applicant does not get access to that information.

**ISSUE C: Did the Public Body properly apply section 24 of the Act [previously section 23] to the records or information?**

[para 72] The Public Body says that section 24(1)(a), (b) and (c) [previously section 23(1)(a), (b), and (c)] apply to the information withheld on pages 136, 137, 138, and 139 of the Records.

[para 73] The Applicant argues generally that section 24(1)(a), (b) and (c) [previously section 23(1)(a), (b) and (c)] do not apply to the final ratings which form the basis of awarding public contracts.

[para 74] The relevant provisions of section 24(1) [previously section 23(1)] read:

*24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*

*(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*

*(b) consultations or deliberations involving*

*(i) officers or employees of a public body,*

*(ii) a member of the Executive Council, or*

*(iii) the staff of a member of the Executive Council,*

*(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations.*

[para 75] The Public Body says that the information withheld on pages 136 to 139 outlines the criteria that were examined by the departmental review team in rating the proposals that were submitted to the Public Body. The Public Body says that the weight assigned to each criterion and the actual points assigned by the review team represents their evaluation, recommendation and advice to the Minister with respect to the proposals.

[para 76] The RFP process culminated in an evaluation. An evaluation team analyzed the technical details of the proposals, rated the proposals and used the ratings to compare the proposals. I find that the ratings and the comparative analysis would reveal advice, recommendations or analyses developed by or for a public body or a member of the Executive Council, as provided by section 24(1)(a) [previously section 23(1)(a)]. That information meet the criteria for section 24(1)(a) [previously section 23(1)(a)] set out in previous Orders, in that it is:

1. sought or expected, or is part of the responsibility of a person by virtue of that person's position,
2. is directed toward taking an action, and
3. is made to someone who can take or implement the action.

[para 77] The Applicant argues that the ratings are a final result that should not be protected under section 24(1) [previously section 23(1)].

[para 78] The Public Body's evidence is that the decision to accept or reject a proposal is not made until a detailed review and evaluation of the proposal has taken place. The Public Body says that the ratings are then given to the Minister, who makes the final decision on the successful proposal. As provided by Clause 2.7 of the terms and conditions for proposals, the Minister may reject the lowest cost proposal, or any or all proposals.

[para 79] Consequently, I do not agree with the Applicant that the ratings are a final result, that is, a final decision for the purposes of section 24(1)(a) [previously section 23(1)(a)]. Contrary to what the Applicant argues, section 24(1)(a) [previously section 23(1)(a)] is about protecting the decision-making process, as in this case.

[para 80] Although the Public Body did not disclose the ratings or the comparative analysis, the Public Body did disclose the criteria for the ratings. Therefore, I find that the Public Body exercised its discretion properly in withholding only the ratings and the comparative analysis.

[para 81] I find that the Public Body properly applied section 24(1)(a) [previously section 23(1)(a)] to the information the Public Body withheld on pages 136 to 139 of the Records.

[para 82] Having made this finding, I do not find it necessary to decide whether the Public Body also properly applied section 24(1)(b) [previously section 23(1)(b)] and section 24(1)(c) [previously section 23(1)(c)] to the same information.

## **V. ORDER**

[para 83] I make the following Order under section 72 [previously section 68] of the Act.

### **A. Application of section 16 [previously section 15] of the Act**

[para 84] Section 16(1) [previously section 15(1)] applies to the information the Public Body withheld on the following pages of the Records:

5, 8, 9, 12, 13, 17 (except the 1<sup>st</sup> and 2<sup>nd</sup> paragraphs), 18, 19, 20, 21 (except the 2<sup>nd</sup> and 5<sup>th</sup> paragraphs), 22, 23 (3<sup>rd</sup> sentence in the 3<sup>rd</sup> paragraph; 4<sup>th</sup> paragraph; 7<sup>th</sup> to 9<sup>th</sup> paragraphs), 24 (all paragraphs except the last paragraph), 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 40, 41, 42, 43, 50, 69, 70 (the paragraphs, but not the headings), 71, 72, 75 (everything except the main heading), 77, 78, 80, 92, 100, 101, 104, 105, 106, 107, 108, 110, 111, 112, 115, 131, 132, 133, 134, 135, 139

[para 85] I uphold the Public Body's decision to refuse to disclose the foregoing information. I order the Public Body not to disclose the foregoing information to the Applicant.

[para 86] Section 16(1) [previously section 15(1)] does not apply to the information the Public Body withheld on the following pages of the Records:

17 (1<sup>st</sup> and 2<sup>nd</sup> paragraphs), 21 (2<sup>nd</sup> and 5<sup>th</sup> paragraphs), 23 (1<sup>st</sup> and 2<sup>nd</sup> paragraphs; 1<sup>st</sup> and 2<sup>nd</sup> sentences in the 3<sup>rd</sup> paragraph; 5<sup>th</sup> and 6<sup>th</sup> paragraphs), 24 (last paragraph), 58, 62, 70 (the headings), 75 (the main heading)

[para 87] I do not uphold the Public Body's decision to refuse to disclose the foregoing information. I order the Public Body to disclose the foregoing information to the Applicant. I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that the Public Body has complied with this Order.

[para 88] Along with this Order, I have provided the Public Body with a highlighted copy of the foregoing Records, showing the information that is to be disclosed.

[para 89] The Applicant has given instructions that he is not interested in the information the Public Body withheld under section 16 [previously section 15] on pages 46 to 49 and pages 119 to 129 of the Records. Therefore, I do not find it necessary to consider whether section 16 [previously section 15] applies to that information.

[para 90] As the Public Body refused to disclose to the Applicant the information withheld under section 16 [previously section 15] on pages 46 to 49 and pages 119 to 129 of the Records, the Applicant does not get access to that information.

#### **B. Application of section 17 [previously section 16] of the Act**

[para 91] The Applicant is not contesting the information the Public Body withheld under section 17 [previously section 16] of the Act. Therefore, I do not find it necessary to consider whether section 17 [previously section 16] applies to the records or information.

[para 92] As the Public Body refused to disclose to the Applicant the information withheld under section 17 [previously section 16] on pages 44 to 49 and pages 119 to 129 of the Records, the Applicant does not get access to that information.

#### **C. Application of section 24 [previously section 23] of the Act**

[para 93] The Public Body properly applied section 24(1)(a) [previously section 23(1)(a)] to the information the Public Body withheld on pages 136 to 139 of the Records.

[para 94] I uphold the Public Body's decision to refuse to disclose that information. I order the Public Body not to disclose that information to the Applicant.

Dave Bell  
Adjudicator