

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2003-004

June 23, 2005

ALBERTA RESTRUCTURING AND GOVERNMENT EFFICIENCY

Review Numbers 2456 and 2470

Office URL: www.oipc.ab.ca

Summary: The Applicant sought access under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to the SuperNet Agreements. “SuperNet” is the Alberta Government’s project to bring high-speed broadband internet service to Alberta communities. Alberta Innovation and Science, now Alberta Restructuring and Government Efficiency (the “Public Body”), decided to give the Applicant access to most of the information, but refused to disclose some of the information that the Public Body said was commercial or financial information of third parties (section 16 of the Act) and personal information of third parties (section 17 of the Act). Both the Applicant and Bell West Inc., a third party, requested a review of the Public Body’s decision. At inquiry, the Adjudicator found that some of the information was commercial or financial information and personal information of third parties, and ordered the Public Body not to give the Applicant access to that information. However, the Adjudicator ordered the Public Body to give the Applicant access to the information that was not commercial or financial information or personal information of third parties.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 1(s), 16, 16(1), 16(1)(a), 16(1)(b), 16(1)(c), 16(1)(c)(i), 16(1)(c)(ii), 16(1)(c)(iii), 16(3)(a), 17, 17(1), 17(2), 17(2)(f), 17(4), 17(4)(g), 17(4)(g)(i), 17(5), 71, 71(1), 71(2), 71(3)(a), 71(3)(b), 72, 72(1), 72(2)(c), 72(4).

Authorities Cited: AB: Orders 96-003, 96-008, 96-013, 96-018, 96-019, 97-009, 97-013, 98-006, 98-015, 98-018, 99-017, 99-018, 99-023, 99-030, 99-040, 2000-005, 2000-017, 2001-008, 2001-019, F2002-002, F2003-002.

I. BACKGROUND

[para 1] The Alberta Supernet (“SuperNet”) is the Alberta Government’s project to bring high-speed broadband internet service to Alberta communities. The SuperNet will link to the internet 4,700 libraries, schools, hospitals and provincial government offices in 422 communities across Alberta, at a cost of \$295 million. Bell Intrigna Inc., now Bell West Inc., was awarded the prime contract to build the SuperNet.

[para 2] The Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to Alberta Innovation and Science for access to information concerning the SuperNet negotiations, as well as the SuperNet contract. More specifically, the Applicant asked for “...any and all information, including, but not limited to, letters, faxes, emails, memos, minutes of meetings, correspondents [sic], contracts, and anything pertaining to the negotiations and contract that falls under the FOIP Act.”

[para 3] After consulting with and receiving representations from third parties, Alberta Innovation and Science decided to give the Applicant access to most of the information requested. However, it refused access to part of the information requested, on the grounds that section 16 of the Act (business interests) and section 17 (personal information) applied, and therefore it was required to refuse access to that information.

[para 4] The Third Party, Bell Intrigna Inc., now Bell West Inc. (“Bell West”), subsequently asked that the Commissioner’s Office review the decision of Alberta Innovation and Science to give the Applicant access to what allegedly was Bell West’s information. The Commissioner’s Office opened Review Number 2456.

[para 5] The Applicant asked that the Commissioner’s Office review the decision of Alberta Innovation and Science to refuse access to part of the information requested. The Commissioner’s Office opened Review Number 2470. During that review, the Applicant limited the access request to the SuperNet Contract Agreements (the “SuperNet Agreements”). The Applicant subsequently asked that Review Number 2470 proceed to inquiry.

[para 6] As the Applicant’s review was intertwined with Bell West’s review, the Commissioner’s Office decided to conduct one written inquiry to address both reviews. The Commissioner’s Office also identified two affected parties, Axia IP Services Ltd., now Axia SuperNet Ltd. (“Axia”) and Telus, who were given the Notice of Inquiry, along with Alberta Innovation and Science, the Applicant and Bell West.

[para 7] Alberta Innovation and Science and Bell West both provided written submissions for the inquiry. I accepted *in camera* the records at issue in the inquiry and the *in camera* submission of Alberta Innovation and Science concerning the records.

[para 8] The Applicant, Axia and Telus did not provide written submissions for the inquiry. In response to the Notice of Inquiry, Telus instead sent a letter to this Office, explaining that as a result of reviewing the information of Alberta Innovation and Science related to Telus, Telus decided that it would not make a submission in the inquiry.

[para 9] On January 7, 2005, the Commissioner's Office was notified that, as a result of the government reorganization, the requested records were now in the custody and under the control of Alberta Restructuring and Government Efficiency, instead of Alberta Innovation and Science. The notification said that "Correspondence from the Commissioner's Office regarding these requests for review [Review Numbers 2456 and 2470] should be directed to the Minister of Restructuring & Government Efficiency."

[para 10] In Parts II to IV of this Order, "Public Body" refers to Alberta Innovation and Science. In Part V of this Order, "Public Body" refers to Alberta Restructuring and Government Efficiency.

II. RECORDS AT ISSUE

[para 11] The records at issue are the SuperNet Agreements, consisting of approximately 3,496 pages of records. For the inquiry, the Public Body provided those records in 13 binders. The Public Body numbered each binder and numbered the pages consecutively within each binder. I subsequently requested and received from the Public Body two pages that were missing from Binder #1.

[para 12] The SuperNet Agreements consist of:

- SuperNet Master Agreement between the Government of Alberta (as represented by the Minister of the Public Body), Bell West and Axia (Binder #1)
- SuperNet Extended Network Engineering, Procurement and Construction Agreement between the Government of Alberta and Bell West (Binder #2)
- SuperNet Extended Network Engineering, Procurement and Construction Subcontract between Bell West and Axia (Binder #3)
- Access Management and Operations License Agreement Between the Government of Alberta, Bell West and Axia (Binder #4)
- Exclusive License Agreement between Bell West and Axia (Binder #5)
- BI Services Agreement between Bell West and Axia (Binder #6)
- Master Telecommunications Services Agreement between the Government of Alberta and Bell West (Binder #7)

[para 13] The information in Binders #8 to #13 is supplementary information to Appendices 2 and 6 of Binder #2 and Schedules 10 and 11 of Binder #3. The information in Binders #9 to #12 is also supplementary information to Appendix 9 of Binder #2.

[para 14] In this Order, I will generally refer to any particular agreement of the SuperNet Agreements according to the binder number in which it is contained.

III. ISSUES

[para 15] There are three issues set out in the Notice of Inquiry:

- A. Does section 16 of the Act (business interests) apply to the records/information?
- B. Does section 17 of the Act (personal information) apply to the records/information?
- C. What terms and conditions may be made in an Order, as provided by section 72(4) of the Act?

IV. DISCUSSION OF THE ISSUES

ISSUE A: Does section 16 of the Act (business interests) apply to the records/information?

1. General

[para 16] Section 16(1) of the Act 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.

2. Information that is not at issue under section 16(1)

[para 17] Labour relations information is not at issue under section 16(1).

[para 18] As to trade secrets of a third party, the Public Body says that there was no evidence that the SuperNet Agreements contain any trade secrets of a third party. In the inquiry, neither the Public Body nor Bell West argued that the SuperNet Agreements contain or would otherwise reveal trade secrets.

[para 19] The Public Body provided, *in camera*, copies of Bell West's and Telus' April 29, 2002 letters to the Public Body, in which Telus provided reasons for refusing consent to disclose its information, and Bell West provided reasons for refusing consent to disclose the SuperNet Agreements in their entirety.

[para 20] Bell West's April 29, 2002 letter to the Public Body states that the records contain trade secrets of Bell West. Telus' April 29, 2002 letter to the Public Body states that the records would reveal trade secrets of Telus. However, neither Bell West nor Telus provided any evidence in support.

[para 21] "Trade secret" is defined in section 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 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 22] Nothing on the face of the records assists me in deciding that the records contain or would otherwise reveal trade secrets of Bell West or Telus. In the absence of any evidence that the information meets the requirements of section 1(s) of the Act, I find that the records do not contain and would not otherwise reveal trade secrets of Bell West or Telus. Therefore, trade secrets are not at issue under section 16(1).

[para 23] As to scientific or technical information, the Public Body says that there was no evidence that the SuperNet Agreements contain any scientific or technical information. In the inquiry, neither the Public Body nor Bell West argued that the SuperNet Agreements contain or would otherwise reveal scientific or technical information.

[para 24] Bell West's April 29, 2002 letter to the Public Body states that the records contain scientific and technical information of Bell West. Telus' April 29, 2002 letter to the Public Body states that the records would reveal technical information of Telus. However, neither Bell West nor Telus provided any evidence in support.

[para 25] In Order 2000-017, the Commissioner said that "scientific information" is information exhibiting the principles or methods of science, and "technical information" is information relating to a particular subject, craft or technique.

[para 26] Nothing on the face of the records assists me in deciding that the records contain or would otherwise reveal scientific or technical information of Bell West, or technical information of Telus. In the absence of any evidence that the information meets the requirements for being scientific or technical information, I find that the records do not contain and would not otherwise reveal scientific or technical information of Bell West, or technical information of Telus. Therefore, scientific or technical information is not at issue under section 16(1).

[para 27] Finally, section 16(3)(a) of the Act is relevant. It reads:

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

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

[para 28] At Tab 13 of the Public Body's *in camera* submission, the Public Body included an April 23, 2002 letter from Axia to the Public Body. In that letter, Axia had the following to say about disclosure of its information contained in the SuperNet Agreements, when notified about the Applicant's access request:

...Axia SuperNet consents to the disclosure of the information as proposed.

Axia SuperNet has no requests for limit on information made available to the public.

[para 29] Since Axia consented to the disclosure of its information, section 16(3)(a) of the Act says that section 16(1) does not apply. Consequently, information of Axia is not at issue under section 16(1). I agree with the Public Body that the analysis of the applicability of section 16(1) to the SuperNet Agreements is limited to information of Bell West and Telus. To the extent that Axia's information would not reveal information of Bell West and Telus that falls within section 16(1), the Public Body may disclose Axia's information to the Applicant. The Public Body says that it has not disclosed anything to the Applicant, pending the outcome of these reviews.

3. Information that is at issue under section 16(1)

[para 30] The Public Body says that the SuperNet Agreements include commercial and financial information. In its initial written submission in this inquiry, Bell West says that it agrees with the Public Body's conclusion in this regard. Bell West's April 29, 2002 letter to the Public Body states that the records contain commercial and financial information of Bell West. Telus' April 29, 2002 letter to the Public Body states that the records would reveal commercial and financial information of Telus.

[para 31] Therefore, commercial and financial information allegedly of Telus and Bell West is at issue under section 16(1).

4. Burden of proof

[para 32] Section 71 of the Act sets out who has the burden of proof under section 16. The relevant provisions of section 71 read:

71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.

...

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

(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would

not be an unreasonable invasion of the third party's personal privacy, and

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

[para 33] As provided by section 71(3)(b) of the Act, Bell West has the burden of proving that the Applicant has no right of access to the record or part of the record to which the Public Body decided to give the Applicant access.

[para 34] As provided by section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the record or part of the record to which the Public Body refused to give the Applicant access. The Public Body refused access to Bell West's and Telus' information that the Public Body says meets the requirements of section 16(1).

[para 35] In previous Orders (see Order 99-017, for example), the Commissioner has said that a public body will nevertheless need evidence from a third party in order to meet the public body's burden of proof when refusing access under section 16(1). In Orders 96-013 and 97-009, the Commissioner recognized that many of the matters in issue are likely to be solely within the third party's knowledge, thereby making it necessary for the public body to rely on the third party's evidence. Moreover, when a third party objects to disclosure, it is in the third party's best interests to give evidence to support the public body's refusal to disclose information.

[para 36] In its initial written submission, the Public Body says that it will be relying on the evidence put forward by Bell West in support of the application of section 16(1). Bell West's and Telus' April 29, 2002 letters to the Public Body provide reasons for refusing consent to disclose under section 16(1).

[para 37] To meet their respective burdens of proof, the Public Body and Bell West must establish that:

- Disclosure of the information would reveal commercial or financial information of a third party (section 16(1)(a)),
- The information was supplied, explicitly or implicitly, in confidence (section 16(1)(b)), and
- Disclosure of the information could reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)(i) to (iii).

5. Information in relation to Telus and Bell West, to which the Public Body decided to refuse access

a. General

[para 38] The Public Body provided, *in camera*, evidence of what it argued was its due diligence review of the SuperNet Agreements under section 16(1) and evidence that it sought expertise to ensure a thorough review. As a result of those reviews, the Public Body decided to refuse access to what it found to be the commercial and financial information of Bell West and Telus, as follows:

- Binder #1: Schedule C (pages 71 to 75)
- Binder #2: Appendix 9 (page 48)
- Binder #7: Entire agreement

[para 39] Telus' information is contained only in Binder #7.

[para 40] In previous Orders, the Commissioner has said that “commercial information” includes:

- the contract price, and information that relates to the buying, selling or exchange of merchandise or services (Order 96-013)
- information about the third party's associations, past history, references, insurance policies held, bonding held or provided, and about how the third party proposes to organize its work (Order 97-013)
- specific business plans related to the buying, selling or exchange of merchandise or services (Order 2000-005)

[para 41] The Commissioner has said that “financial information” includes:

- information relating to the monetary resources of the third party, such as the third party's financial capabilities, and assets or liabilities, past or present (Order 96-018)
- information regarding financial transactions, insurance, past performance, estimated advertising costs and commission expected or proposed in respect of the sales involved (Order 98-006)
- pricing strategy, revenues, contracts for goods and services, expenses (operating, capital and other) (Order 98-015)
- particular forecasts, estimated value of certain operations, cash-flow before interest and principal payments, income statements, assets and liabilities, financial position, debt repayment and interest statements, assumptions regarding financial status of third parties, draft contracts, offers and make-up of funds, bank debts, loans and banking arrangements, assessment of worth, investments of third parties, sales contracts with third parties, details of cash-flow, balance sheets and financial position of third parties (Order 99-040)

b. Commercial or financial information of Telus contained in Binder #7

i. Would disclosure of the information reveal commercial or financial information of Telus (section 16(1)(a))?

[para 42] Binder #7 contains the entirety of the Master Telecommunications Services Agreement, which consists of the agreement between the Government of Alberta (as represented by the Minister of the Public Body) and Bell West (pages 2-14 of Binder #7, with page 1 being a title page only) and seven schedules (pages 15-146 of Binder #7), numbered as Schedules A-G. I note that in numbering the agreement between the Government of Alberta and Bell West, the Public Body inadvertently skipped page number 11 in its numbering sequence. However, there are no pages missing, as indicated by the original page numbers on the bottom of each page of the agreement between the Government of Alberta and Bell West.

[para 43] Schedules E, F and G (pages 22-146 of Binder #7) consist of various agreements between the Government of Alberta and Telus Communications Inc. (now “Telus”), Alberta Government Telephones Limited (“AGT”, the predecessor of Telus), Edmonton Telephones Corporation (I take notice of the fact that Edmonton Telephones Corporation no longer exists, having been purchased by Telus from the City of Edmonton), and Stentor Canadian Network Management (in which AGT and Bell Canada, among others, are listed as members). These agreements comprise the Telus Centrex Contract, the Telus MegaPlan Contract and the Telus Toll Contract (the “Telus service contracts”). In the agreement between the Government of Alberta and Bell West, the Alberta Government assigns the Telus service contracts to Bell West.

[para 44] The Public Body withheld all the information contained in Binder #7 on the basis that section 16(1) applies to the entirety of the Master Telecommunications Services Agreement. The Public Body says that Binder #7 includes commercial information of Bell West and Telus relating to the Alberta Government’s purchase of services from Bell West and Telus.

[para 45] I find that only the information on the following pages is or would otherwise reveal the commercial or financial information of Telus:

27 (term, quantity and services information only), 28-50, 52, 54-56, 58-62, 63 (term, quantity and rate calculation information only), 69 (term only), 70 (quantity only), 88-96, 98-100, 102, 104, 105 (term only), 105-106 (rate calculation information only), 108 (quantity only), 111 (term only), 111-112 (rate calculation information only), 114 (quantity only), 118 (dollar amount and term only), 122 (dollar amount and term only), 123-128 (term and access services information only), 131 (dollar amount and term only), 132 (term and access services information only), 134-137, 139 (dollar amount, rate information and term only), 141 (rate information and term only), 142 (rate information and term only), 143 (dollar amount, rate information and term only), 144 (dollar amount and term only)

[para 46] All of the foregoing information is contained in Schedules E, F and G only, and is information concerning the contract price, pricing strategies, and specific business plans related to the buying, selling or exchange of merchandise or services, among other things.

[para 47] I find that the remaining information contained in Schedules E, F and G (pages 22-146 of Binder #7) is not and would not otherwise reveal the commercial or financial information of Telus. I also find that the title page (page 1 of Binder #7), the agreement between the Government of Alberta and Bell West (pages 2-14 of Binder #7) and Schedules A-D (pages 15-21 of Binder #7) do not contain and would not otherwise reveal commercial or financial information of Telus. In coming to these conclusions, I have reviewed both the specific information in the Master Telecommunications Services Agreement and the Master Telecommunications Services Agreement as a whole, to decide whether disclosing any other information would have the aggregate effect of revealing the commercial or financial information of Telus: see Order 98-006. I find that it would not.

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

[para 48] The Public Body says that Binder #7 includes commercial information that was supplied in confidence by either Bell West or Telus.

[para 49] In Order 2000-005, the Commissioner was of the view that an agreement negotiated between a third party and a public body is not information that has been supplied by the third party to the public body. The exceptions are where the information supplied by the third party to the public body remains relatively unchanged in the agreement, or where disclosure of the information would permit an applicant to make an accurate inference about information supplied to the public body, that would not itself be disclosed under the Act.

[para 50] For the information that I have found is or would otherwise reveal the commercial and financial information of Telus, I find that only the information on the following pages is the commercial or financial information that was supplied by Telus:

27 (quantity and services information only), 28-50, 52, 54-56, 58-62, 63 (rate calculation information only), 70 (quantity only), 88-96, 98-100, 102, 104, 105-106 (rate calculation information only), 111-112 (rate calculation information only), 139 (rate information only), 141 (rate information and term only), 142 (rate information and term only), 143 (rate information only)

[para 51] It is evident from the Telus service contracts that the commercial and financial information of Telus listed above was supplied by Telus and not negotiated. That commercial and financial information remains unchanged in the Telus service contracts, as evidenced by the Telus service contracts themselves, which are standard

form contracts that remain unchanged except for schedules to which information may be added. As an example of the unchanging nature of these contracts, the Telus Megaplan Contract says that “Modification to the wording of this contract is prohibited.”

[para 52] Except for the foregoing commercial and financial information supplied by Telus, I find that the remaining commercial or financial information of Telus was negotiated between Telus and the Public Body. It is not information that Telus supplied that remains relatively unchanged in the agreement, nor would disclosure of the information permit the Applicant to make an accurate inference about the commercial or financial information Telus supplied to the Public Body, that would not itself be disclosed under the Act.

[para 53] In particular, I find that the specific access services information was supplied by the Public Body, not Telus. It is reasonable to infer that the Public Body would have supplied the information about where it wanted to receive services. In addition, page 121 says that dollar amounts and terms of the Telus Megaplan Contract are chosen by the customer (the Public Body) and are therefore supplied by the Public Body, not Telus.

[para 54] Except for the foregoing commercial and financial information supplied by Telus, the remaining information that I have found is commercial and financial information of Telus contained in Binder #7 does not meet the requirements for section 16(1)(b).

[para 55] In deciding whether the commercial and financial information of Telus was supplied explicitly or implicitly in confidence, I have considered the status of the information when it was supplied and also the current status of the information: see Order 96-013.

[para 56] There is no evidence before me that Telus supplied the commercial and financial information explicitly in confidence at the time it was supplied, such as a statement or agreement to that effect. Only the Edmonton Telephones Corporation agreement contains confidentiality provisions. Furthermore, there is nothing on the face of the records that would lead to a conclusion that Telus supplied the information explicitly in confidence. I have only Telus’ April 29, 2002 letter containing its statement to the Public Body that it considered the information to be supplied in confidence, and its refusal to disclose the information in response to the Applicant’s access request.

[para 57] Consequently, I must consider whether Telus supplied the commercial and financial information implicitly in confidence.

[para 58] In Order 99-018, the Commissioner said that, in deciding whether there was an expectation of confidentiality based on reasonable and objective grounds, it was necessary to consider all the circumstances of the case, including whether the information was:

- (i) communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
- (ii) treated consistently in a manner that indicates a concern for its protection from disclosure by the third party prior to being communicated to the public body;
- (iii) not otherwise disclosed or available from sources to which the public has access;
- (iv) prepared for a purpose that would not entail disclosure.

[para 59] Therefore, I have considered whether Telus pointed to any particular circumstances or facts that would give rise to a reasonable expectation of confidentiality, such that it could be said that the information was supplied implicitly in confidence.

[para 60] In its April 29, 2002 letter to the Public Body, Telus says that the information was prepared in connection with the pricing and service delivery of certain telecommunication services to the Alberta Government, and in the context of Telus' overall marketing plan for the Alberta Government.

[para 61] At the time the information was supplied, it appears that Telus alone provided telecommunications services to the Alberta Government. That is no longer the case. With SuperNet, Telus found itself in the position of having to bid for the contract, along with other telecommunications services providers. I take notice of the fact that Telus was not the successful bidder for SuperNet. It is evident that Telus is no longer the only telecommunications services provider in this now competitive marketplace.

[para 62] Given Telus' purposes for preparing the information, and given the now competitive marketplace, I find that Telus' commercial and financial information was supplied implicitly in confidence.

iii. 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)?

[para 63] In Telus' April 29, 2002 letter to the Public Body, Telus said that disclosure of the information could reasonably be expected to:

(a) harm significantly the competitive position and interfere significantly with the negotiating position of TELUS. The TELUS information has been prepared in the context of TELUS' overall marketing plan for the GOA, and would allow competitors to gain unfair insights to TELUS' strategic plans. This could also result in similar information no longer being supplied to the GOA in the future.

(b) result in undue financial loss to TELUS. The applicant would gain access to TELUS information, which is formulated on the basis of TELUS' business plans prepared at TELUS' expense. Moreover, the disclosure would significantly harm the bargaining position of TELUS, compared to its competitors who would have knowledge of TELUS information belonging to the company, in negotiating new arrangements with the GOA and other customers.

[para 64] I do not accept Telus' unsupported assertion under section 16(1)(c)(ii) that it would no longer supply information to the Public Body if the information in the Telus

service contracts is disclosed. As I said in Order F2002-002, the commercial reality is that a third party (Telus here) is in the business of competing for contracts, and it will supply whatever information is required to win the contract.

[para 65] Therefore, I will consider whether disclosure of Telus' commercial and financial information supplied to the Public Body in confidence could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of Telus, as provided by section 16(1)(c)(i).

[para 66] In Order 96-003, the Commissioner said that "...[The] evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue." The Commissioner then went on to say that the public body must provide evidence of the following to prove significant harm to the third party's competitive position:

- (i) The connection between disclosure of the specific information and the harm which is alleged;
- (ii) How the harm constitutes "damage" or "detriment" to the matter; and
- (iii) Whether there is a reasonable expectation that the harm will occur.

[para 67] Proof of harm must be on a balance of probabilities. This means that the evidence must be more than speculation, and more than a mere possibility of harm. Harm or interference must also be significant: see Order 99-023.

[para 68] Although Telus did not provide any evidence of harm to the Public Body or to me, I have considered Telus' arguments about harm, as set out in its April 29, 2002 letter to the Public Body. I have also considered whether, on the face of the records and other evidence presented in this inquiry, disclosure could reasonably be expected to harm Telus' competitive position.

[para 69] Bell West has provided evidence that the telecommunications industry is highly competitive (Tab 4 of Bell West's initial written submission). Again, I take notice of the fact that Telus was not the successful bidder on SuperNet.

[para 70] On the face of the records, I have no doubt that disclosure of the information I have found is Telus' commercial and financial information supplied to the Public Body in confidence would allow competitors to gain insights into Telus' business strategies when competing for contracts to provide telecommunications services.

[para 71] Therefore, on balance, I find that disclosure of the information I have found is Telus' commercial and financial information supplied to the Public Body in confidence could reasonably be expected to harm significantly the competitive position of Telus, as provided by section 16(1)(c)(i). Having made this finding, I do not find it necessary to also consider whether the second part of section 16(1)(c)(i) applies or whether section 16(1)(c)(iii) applies to that same information.

iv. Conclusion under section 16(1)

[para 72] In relation to Telus, in Binder #7, I find that section 16(1) of the Act applies to the information on the following pages:

27 (quantity and services information only), 28-50, 52, 54-56, 58-62, 63 (rate calculation information only), 70 (quantity only), 88-96, 98-100, 102, 104, 105-106 (rate calculation information only), 111-112 (rate calculation information only), 139 (rate information only), 141 (rate information and term only), 142 (rate information and term only), 143 (rate information only)

[para 73] I intend to order Alberta Restructuring and Government Efficiency to refuse to give the Applicant access to the information on the foregoing pages.

[para 74] In relation to Telus, I find that the remaining information in Binder #7 does not meet the requirements of section 16(1). However, the Public Body says that Binder #7 is the information of both Telus and Bell West. Since the Alberta Government assigned the Telus service contracts to Bell West, I will also consider whether, in relation to Bell West, the remaining information in the Telus service contracts meets the requirements of section 16(1).

c. Commercial or financial information of Bell West contained on pages 71 to 75 of Schedule C in Binder #1

i. Would disclosure of the information reveal commercial or financial information of Bell West (section 16(1)(a))?

[para 75] According to the Public Body's *in camera* submission, Schedule C in Binder #1 contains detailed financial information in the form of detailed breakdowns of projected revenues and expenses for SuperNet over the first 10 years of its operation. While the figures used in Schedule C are identified as illustrative, the Public Body says that the figures were developed based on realistic projections made at the time.

[para 76] Pages 71 and 72 of Schedule C contain the projected revenues and expenses. Except for the Public Body's information that appears under the heading entitled "Revenue", and except for the column headings that I will consider later, I find that the information on these pages is the commercial or financial information of Bell West and Axia.

[para 77] Bell West's projected revenues and expenses are set out separately. However, if Axia's and the Public Body's projected revenues and expenses were disclosed, it would be possible to calculate Bell West's projected revenues and expenses. Therefore, I find that disclosure of Axia's and the Public Body's information on pages 71 and 72 of Schedule C would reveal the commercial or financial information of Bell West.

[para 78] Pages 73-75 of Schedule C contain definitions pertaining to the calculation of the projected revenues and expenses. These definitions also appear in Binder #4. Except for the first two definitions that are the Public Body's information, I find the information on these pages is the commercial or financial information of Bell West and Axia.

[para 79] On pages 73-75 of Schedule C, it is possible to disclose Axia's and the Public Body's information, without revealing commercial or financial information of Bell West.

[para 80] Furthermore, in Bell West's April 29, 2002 letter to the Public Body, Bell West went on to say that it had undertaken the task of identifying those portions of the SuperNet Agreements that were particularly sensitive to Bell West. It enclosed a table (Appendix 1, also referred to in this Order as the "Appendix" or "Bell West's Appendix"), which sets out the provisions of the SuperNet Agreements that Bell West said were particularly sensitive and that Bell West did not wish to have disclosed under any circumstances. In Binder #1, those provisions concern only certain definitions and other information that pertains to Bell West.

[para 81] Therefore, I find that only the definitions and information pertaining to Bell West on pages 73-75 of Schedule C would reveal the commercial or financial information of Bell West. Disclosure of the remaining information would not reveal the commercial or financial information of Bell West.

[para 82] Bell West argues that I should look not only at portions of a record, but also at the nature, context and aggregate of the records as a whole, in deciding whether disclosure would have the aggregate effect of revealing Bell West's commercial or financial information: see Order 98-006. I have reviewed both the specific information and the records as a whole to decide whether disclosure of any other information on pages 73-75 would have the aggregate effect of revealing the commercial or financial information of Bell West. I find that it would not.

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

[para 83] For limited portions of the SuperNet Agreements, the Public Body says that Bell West and Axia supplied the information. In particular, the Public Body says that the Public Body, Bell West and Axia jointly developed Schedule C in Binder #1, using commercial or financial information supplied by them.

[para 84] Therefore, on pages 71 and 72 of Schedule C, I find that Bell West supplied commercial or financial information concerning its own projected revenues and expenses.

[para 85] I find that Bell West did not supply the remaining information on pages 71 and 72 of Schedule C. Axia and the Public Body supplied that information.

Furthermore, I find that Bell West did not supply the information on pages 73-75 of Schedule C. However, I find that disclosure of the information on pages 71-75 of Schedule C, which I have found would reveal Bell West's commercial or financial information, would allow the Applicant to make an accurate inference about the commercial or financial information that Bell West supplied to the Public Body. Therefore, that information meets the requirements of section 16(1)(b).

[para 86] As to whether the information was supplied in confidence, Bell West says that the SuperNet Agreements were clearly supplied in confidence to the government as throughout, the parties were subject to confidentiality obligations. Bell West says:

It should be noted that the SuperNet Agreements themselves are subject to an express condition of confidentiality. Article 12 of the Master Agreement provides for a duty of confidentiality regarding 'Confidential Information', which is defined broadly in Article 1 of the Master Agreement.

[para 87] Bell West maintains that Article 12 of the SuperNet Master Agreement applies equally to all of the other SuperNet Agreements as it is the umbrella agreement.

[para 88] The Public Body responds:

"Confidential information" as defined in Article 1 of the Master Agreement is information disclosed by one party to another after the Effective Date of the SuperNet Agreements which is July 24, 2001. (argument goes to the confidentiality not applying at the time the information was supplied for the agreement)

The SuperNet Agreements were not created or disclosed after the Effective Date and as a result, they would not be defined as confidential information and they would not be subject to the confidentiality provisions of Article 12.

[para 89] I agree with the Public Body that Article 12 of Binder #1 (the SuperNet Master Agreement) provides for a duty of confidentiality regarding "Confidential Information" disclosed by one party to another after the effective date of the SuperNet Agreements, which is July 24, 2001. Therefore, the confidentiality provision does not apply to information supplied to the Public Body in negotiating the SuperNet Agreements.

[para 90] There is no evidence before me that Bell West supplied the commercial or financial information explicitly in confidence to the Public Body. I have therefore considered whether Bell West supplied the commercial or financial information implicitly in confidence.

[para 91] In deciding whether there was an expectation of confidentiality based on reasonable and objective grounds, I have considered all the circumstances of the case, and particularly whether Bell West pointed to any particular circumstances or facts that would give rise to a reasonable expectation that the information was communicated on the understanding that it was supplied implicitly in confidence: see Order 98-018. I have

also considered the status of the information when it was supplied and also the current status of the information: see Order 96-013.

[para 92] Bell West points to the competitiveness of the telecommunications industry (Tab 4 of Bell West's initial written submission). Bell West says that the private sector parties to the SuperNet Agreements are in competition with providers of similar services and there is a confidentiality provision within the SuperNet Agreements, not unlike the situation in Order 2001-008, in which the Commissioner found it reasonable that a third party would supply commercial or financial information only in confidence when the third party is in competition with other providers of similar services and when there is a confidentiality provision between the third party and a public body. Bell West also points to evidence that the Applicant represents a company that is both a supplier to and a direct competitor of Bell West (Tab 1(C) of Bell West's initial written submission).

[para 93] Bell West says:

Upon review of this provision [Article 12 of the SuperNet Master Agreement], it is clear that the parties never intended that the SuperNet Agreements be made available to the public...

[para 94] Bell West argues this is particularly the case in relation to competitors or those engaged in business with Bell West presently, and possibly in the future, such as the company the Applicant represents. Furthermore, to date, Bell West says that the parties have consistently treated the SuperNet Agreements as confidential.

[para 95] The Public Body responds:

During the contract negotiation phase, Innovation and Science advised Bell West and Axia that the SuperNet Agreements would be released given the magnitude of the SuperNet Project and public interest in the initiative and the contracts should be structured to take this into consideration.

[para 96] I find that Bell West has pointed to particular circumstances and facts that would give rise to a reasonable expectation that the information was communicated on the understanding that it was supplied implicitly in confidence. Given the evidence about the competitiveness of the marketplace and Bell West's treatment of the SuperNet Agreements as confidential, I find that Bell West's commercial or financial information on pages 71-75 was supplied implicitly in confidence to the Public Body.

iii. 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)?

[para 97] The Public Body's experts advised that it could reasonably be expected that competitors of Bell West or Axia could use information from Schedule C to determine the financial and business approaches of Bell West or Axia and to harm the competitive position or interfere significantly with the negotiating position of Bell West or Axia, as provided by section 16(1)(c)(i) of the Act.

[para 98] Bell West has provided evidence that the telecommunications industry is highly competitive (Tab 4 of Bell West's initial written submission). It is evident that Telus is a competitor of Bell West. Bell West has also provided evidence that the Applicant represents a company that is both a supplier to and a direct competitor of Bell West (Tab 1(C) of Bell West's initial written submission).

[para 99] Bell West's further evidence is that the company the Applicant represents has publicly announced that it intends to look for future business opportunities with the SuperNet project (Tab 1 of Bell West's initial written submission).

[para 100] Bell West submits that release of the SuperNet Agreements would enable the company the Applicant represents to use Bell's confidential commercial information to its advantage, and to Bell's competitive disadvantage, in bidding on future Government of Alberta projects or other projects related to the SuperNet.

[para 101] Based on Bell West's evidence, I am satisfied that disclosure of the information I have found is Bell West's commercial and financial information supplied to the Public Body in confidence could reasonably be expected to harm significantly the competitive position of Bell West, as provided by section 16(1)(c)(i). Having made this finding, I do not find it necessary to also consider whether the second part of section 16(1)(c)(i) applies or whether section 16(1)(c)(iii) applies to that same information. The Public Body and Bell West did not argue section 16(1)(c)(ii).

iv. Conclusion under section 16(1)

[para 102] In relation to Bell West, I find that section 16(1) of the Act applies to pages 71 and 72 (except the column headings, which are dealt with below), and to parts of pages 73-75 of Schedule C in Binder #1. I intend to order Alberta Restructuring and Government Efficiency to refuse to give the Applicant access to that information.

[para 103] In relation to Bell West, I find that section 16(1) of the Act does not apply to the remaining information on pages 73-75 of Schedule C in Binder #1. I intend to order Alberta Restructuring and Government Efficiency to give the Applicant access to that information.

[para 104] The Public Body says it decided to withhold Schedule C in its entirety, as severing under section 16 would remove all information from Schedule C, with the exception of column headings. The Public Body says there would be no meaningful information left in Schedule C after severing.

[para 105] The column headings, which appear only on pages 71 and 72 of Schedule C, are "years" and "totals". In Order 96-019, the Commissioner said that if what would be left after severing is meaningless information, a public body is not required to provide that meaningless information to an applicant. I agree that the column headings would be meaningless information, given what the Applicant requested. Therefore, in relation to

Bell West, I find that Alberta Restructuring and Government Efficiency is not required to provide the Applicant with the column headings on pages 71 and 72 of Schedule C in Binder #1.

d. Commercial or financial information of Bell West contained in Appendix 9 (page 48) in Binder #2

i. Would disclosure of the information reveal commercial or financial information of Bell West (section 16(1)(a))?

[para 106] The Public Body says in its *in camera* submission that Appendix 9 in Binder #2 contains financial information of Bell West in the form of detailed projections of certain equipment to be purchased for SuperNet.

[para 107] I find that Appendix 9, including the heading (page 48), in Binder #2 is or would otherwise reveal Bell West's commercial and financial information.

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

[para 108] The Public Body says, and I find that, Bell West supplied the financial information contained in Appendix 9 (page 48) in Binder #2.

[para 109] I also find that the information was supplied implicitly in confidence, as there was an expectation of confidentiality as a result of the competitiveness of the marketplace.

iii. 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)?

[para 110] The Public Body says in its *in camera* submission that disclosure of this information could reasonably be expected to harm significantly the negotiating position or competitive position of Bell West if it were available to competitors or suppliers of Bell West. Given the evidence of Bell West (previously discussed), I agree.

iv. Conclusion under section 16(1)

[para 111] Except for the information discussed below, I find that section 16(1) of the Act applies to Appendix 9, including the heading (page 48), in Binder #2. I intend to order Alberta Restructuring and Government Efficiency to refuse to give the Applicant access to that information.

[para 112] The Public Body says it withheld the entirety of Appendix 9, as severing would leave only column headings. The Public Body says there would be no meaningful information left in Appendix 9 after severing.

[para 113] The Column headings in Appendix 9 are Product, Quantity Costed, Unit Price (US\$), Total (US\$), Total (Cdn) and the Currency Conversion Factor.

[para 114] Given what the Applicant requested, I find that this is once again meaningless information. Following Order 96-019, I find that Alberta Restructuring and Government Efficiency does not have to provide the Applicant with the column headings in Appendix 9 (page 48) in Binder #2.

e. Commercial or financial information of Bell West contained in Binder #7

i. Would disclosure of the information reveal commercial or financial information of Bell West (section 16(1)(a))?

[para 115] As previously discussed, Binder #7 contains the Master Telecommunications Services Agreement, consisting of a title page (page 1), the agreement between the Government of Alberta and Bell West (pages 2-14), and Schedules A-G (pages 15-146).

[para 116] In its *in camera* submission, the Public Body describes the agreement between the Government of Alberta and Bell West (pages 2-14 of Binder #7) as being the Alberta Government's revenue commitment to Bell West for Bell West's telecommunications services to be provided to the Alberta Government within the defined time period.

[para 117] Schedules E, F and G (pages 22-146 of Binder #7) are the Telus service contracts. I have already found that certain information in the Telus service contracts meets the requirements of section 16(1) of the Act in relation to Telus. Therefore, I do not find it necessary to consider the same information under section 16(1) in relation to Bell West. I will consider only the remaining information in relation to Bell West.

[para 118] The Telus service contracts were originally contracts between the Government of Alberta and Telus. In its *in camera* submission, the Public Body indicates that, as part of the SuperNet Agreement, the Telus service contracts will initially be assigned to Bell West.

[para 119] The effect of assigning the Telus service contracts to Bell West is that these are now contracts for goods and services between Telus and Bell West. Therefore, I find that the Telus service contracts, namely, Schedules E, F and G (pages 22-146 of Binder #7), are Bell West's commercial and financial information, as provided by section 16(1)(a).

[para 120] In its April 29, 2002 letter to the Public Body, Bell West says:

While we remain of the view that it is in the best interests of all parties that the text of the SuperNet Agreements not be released, we have undertaken the task of identifying those portions of the Agreements that are particularly sensitive to Bell. We have enclosed a table, Appendix A, which sets out the provisions of the Agreements that Bell does not wish to have disclosed under any

circumstances. We would ask that you review this submission in order to determine whether it is possible for us to work out a mutually agreeable limited disclosure of portions of the SuperNet Agreements. We look forward to working with you in this regard.

[para 121] Appendix 1 (“Bell West’s Appendix”) attached to Bell West’s April 29, 2002 letter does not list the entirety of Binder #7 as information that should not be disclosed. Instead, Bell West lists only the following information contained in Binder #7, that should not be disclosed:

Article 1.1 Definitions “Commitment Term”, “Eligible Services”; Articles 4, 5.1, 5.3, 5.5(c), 7.2, 7.3, 8, 9.3, 11.2; Schedules A, B, C, D, E, F, G

[para 122] Consequently, in reviewing Binder #7, I have paid particular attention to the specific information that Bell West believes should not be disclosed, as listed in Bell West’s Appendix.

[para 123] Of the information listed in Bell West’s Appendix, I find that all of the information listed is or would otherwise reveal the commercial or financial information of Bell West. That information includes Bell West’s forecasts; pricing strategies; revenues; contracts for goods and services; how Bell West proposes to organize its work; and specific business plans relating to the buying, selling or exchange of merchandise or services.

[para 124] I also find that the following information consists of some of the kinds of information listed above, and therefore is or would otherwise reveal Bell West’s commercial or financial information: Articles 2.1, 5.5(a), (b), (d), 5.7-5.9 and 10.

[para 125] I find that the title page (page 1) and the remaining information in the agreement between the Government of Alberta and Bell West is not and would not otherwise reveal the commercial or financial information of Bell West.

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

[para 126] The Public Body says that either Bell West or Telus supplied the commercial information contained in Binder #7.

[para 127] I find that Bell West did not supply the Telus service contracts to the Public Body, and did not supply any of the information in the Telus service contracts to the Public Body. Furthermore, disclosure of the Telus service contracts would not reveal any commercial or financial information that Bell West supplied to the Public Body, as required by section 16(1)(b) of the Act. Therefore, I find that the Telus service contracts, namely, Schedules E, F, and G (pages 22-146 of Binder #7), do not meet the requirements of section 16(1)(b) of the Act in relation to Bell West.

[para 128] Of that information listed in Bell West’s Appendix, I find that only the following information was either supplied to the Public Body by Bell West, or disclosure

would allow the Applicant to make an accurate inference about the commercial or financial information that Bell West supplied, thus meeting the criteria for section 16(1)(b): Articles 1.1 “Eligible Services”, 4.5-4.7, 5.1, 5.3, 5.5(c), 8, 9.3 and Schedules A, B, C and D (except the two lines under the page heading). As previously discussed, I further find that the Public Body is not required to provide the Applicant with the column headings in Schedule D, as the column headings are meaningless information.

[para 129] Of the remaining information in the agreement between the Government of Alberta and Bell West, I find that Article 10 also meets the criteria for section 16(1)(b).

[para 130] I find that the following information listed in Bell West’s Appendix was either supplied by the Public Body or resulted from negotiations between the Public Body and Bell West: Article 1.1 “Commitment Term”, 4.1-4.4, 7.2, 7.3, 11.2 and Schedule D (only the two lines under the page heading). As that information was not supplied to the Public Body by Bell West, nor would the Applicant be able to make an accurate inference about the commercial or financial information that Bell West supplied to the Public Body if that information were disclosed, that information does not meet the requirements for section 16(1)(b).

[para 131] Of the remaining information in the agreement between the Government of Alberta and Bell West, I find that Articles 2.1, 5.5(a), (b), (d), and 5.7-5.9 also do not meet the criteria for section 16(1)(b).

[para 132] The Public Body says that the information in Binder #7 was supplied in confidence by either Bell West or Telus.

[para 133] As previously discussed, I have found that there was a reasonable expectation of confidentiality based on the competitiveness of the marketplace and the treatment of the SuperNet Agreements as confidential. Therefore, for the commercial or financial information of Bell West that I have found that Bell West supplied to the Public Body, I find that the information was supplied implicitly in confidence.

iii. 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)?

[para 134] The Public Body says that disclosure of any portion of the Master Telecommunications Services Agreement contained in Binder #7 could reasonably be expected to interfere significantly with the negotiating position of Bell West or Telus, as current or potential customers may request terms or conditions similar to those outlined in the agreement.

[para 135] Bell West’s evidence is that the telecommunications industry is highly competitive, and that Telus and the company the Applicant represents are competitors of Bell West. Bell West submits that release of the SuperNet Agreements would enable that company to use Bell’s confidential commercial information to its advantage, and to

Bell's competitive disadvantage, in bidding on future Government of Alberta projects or other projects related to the SuperNet. The Public Body provides evidence (at Tab 1 of the Public Body's initial written submission) that the company has publicly announced that it intends to look for future business opportunities with the SuperNet project.

[para 136] Therefore, I am satisfied that disclosure of the information I have found is Bell West's commercial or financial information supplied to the Public Body in confidence could reasonably be expected to harm significantly the competitive position of Bell West, as provided by section 16(1)(c)(i). Having made this finding, I do not find it necessary to also consider whether the second part of section 16(1)(c)(i) applies or whether section 16(1)(c)(iii) applies to that same information.

[para 137] I find that disclosure of Article 10 and the remaining information contained in Master Telecommunications Services Agreement could not reasonably be expected to bring about one of the results set out in section 16(1)(c) in relation to Bell West. There is no connection between disclosure of the specific information and the harm alleged.

[para 138] Bell West nevertheless argues that release of the SuperNet Agreements would interfere with Bell's negotiations with parties considering submitting tenders in relation to the SuperNet in the future. This interference with Bell's ability to obtain acceptable financial terms on SuperNet project-related tenders and Bell's ability to conduct negotiations in the future could therefore reasonably be expected to result in undue financial loss to Bell West, as provided by section 16(1)(c)(iii).

[para 139] I do not accept Bell West's argument about the application of section 16(1)(c)(iii), as I find the argument to be unsupported and speculative at best.

iv. Conclusion under section 16(1)

[para 140] In relation to Bell West, I find that section 16(1) applies to the following information contained in Binder #7:

Article 1.1 Definition "Eligible Services"; Articles 4.5-4.7, 5.1, 5.3, 5.5(c), 8, 9.3; Schedules A, B, C and D (except the two lines under the page heading, and the column headings)

[para 141] I intend to order Alberta Restructuring and Government Efficiency to refuse to give the Applicant access to the foregoing information.

[para 142] In relation to Bell West, I find that the Public Body is not required to provide the Applicant with the column headings in Schedule D of Binder #7.

[para 143] In relation to Bell West, I find that section 16(1) does not apply to the remaining information in Binder #7. I intend to order Alberta Restructuring and Government Efficiency to give the Applicant access to the remaining information in

Binder #7, except page 133, which is a blank page, and except for the information of Telus that I have found meets the requirements of section 16(1).

6. Information in relation to Bell West, to which the Public Body decided to give access

[para 144] Except for Schedule C in Binder #1, Appendix 9 in Binder #2, and Binder #7, Bell West has the burden of proving that section 16(1) of the Act applies to the remaining information, which the Public Body decided to disclose on the basis that section 16(1) does not apply to that information.

[para 145] Bell West objects to disclosure of the entirety of the SuperNet Agreements. However, in its April 29, 2002 letter to the Public Body, Bell West went on to say that it had undertaken the task of identifying those portions of the SuperNet Agreements that were particularly sensitive to Bell West under section 16(1). It enclosed a table (Appendix 1, which I refer to as “Bell West’s Appendix” or the “Appendix”) setting out the provisions of the SuperNet Agreements in Binders #1 to #6 that Bell West says are particularly sensitive and that Bell West does not wish to have disclosed under any circumstances.

[para 146] In this Order, I have paid particular attention to the information listed in Bell West’s Appendix, and intend to follow Bell West’s Appendix in considering the remaining information in the SuperNet Agreements.

a. Binder #1

i. Would disclosure of the information reveal commercial or financial information of Bell West (section 16(1)(a))?

[para 147] Bell West argues that the following information set out in its Appendix would reveal Bell West’s commercial or financial information:

Table of Contents; Article 1.1 Definitions (j), (m), (n), (r), (t), (u), (y), (z), (cc), (ee), (ll), (ss), (xx), (yy), (ddd), (fff), (ggg), (kkk), (lll), (mmm); Articles 1.2, 2, 3.2(b), (d), (f), 4, 5, 7, 8, 9, 10, 13, 14, 15, 16.3, 16.4, 16.5, 18, 19.2, 19.8; Schedules A, B, H, I

[para 148] Schedule D contains the names and titles of the Public Body’s, Bell West’s and Axia’s key personnel and contract managers. The Public Body disclosed the name of its contract manager, but withheld the names and titles of Bell West’s and Axia’s key personnel and contract managers under section 17 (third party personal information consisting of names and titles). Bell West also claimed that section 17 applied to this information.

[para 149] Under section 16, I intend to consider the personal information withheld from Schedule D.

[para 150] Under section 16, I will not consider the personal information withheld from Schedule G, as that is clearly information originating from the Public Body. Furthermore, Bell West did not ask to have that information excluded under any provision of the Act. The personal information in Schedule G remains to be considered under section 17, as the Public Body withheld that information under section 17.

[para 151] I also do not find it necessary to consider whether section 16(1) applies to the names and titles of Axia's key personnel and contract managers, as Axia has consented to the disclosure of its commercial or financial information. I will consider that personal information under section 17, as the Public Body withheld that information under section 17.

[para 152] Bell West submits that disclosure of the SuperNet Agreements would reveal strategic commercial information of Bell West as the SuperNet Agreements represent Bell West's innovative and ground-breaking first strike into the western market ruled by Telus. Release of this information may result in Bell West losing any advantage it has in relation to this strategic first step.

[para 153] Upon examination of the SuperNet Agreements as a whole, Bell West says that the SuperNet Agreements represent a series of inter-related commercial documents that create a framework for the construction, operation and management of SuperNet and the unique and confidential details of the relationships between the Government of Alberta, Bell West and Axia. These agreements are by their very nature commercial documents, and clearly relate to "the buying, selling or exchange of merchandise or services". Bell West relies on Order 2001-019, in which the Commissioner found that section 16(1) applied to an "agreement between two business entities". Bell West says that the SuperNet Agreements are clearly also agreements between business entities. Therefore, Bell West concludes that disclosure of the SuperNet Agreements would reveal commercial information of Bell West.

[para 154] In my view, section 16(1)(a) requires consideration of the "information", not the type of record in which the information is contained: see Order 2000-017. The record is relevant only in determining whether there is information of the kind set out in section 16(1)(a), or whether disclosure of the information would reveal the kind of information set out in section 16(1)(a), ascertained from viewing the record as a whole. That means that the entirety of a record or agreement will not necessarily be commercial information. So there must be consideration not only of the particular information, but also whether the records have the aggregate effect of revealing the kind of information set out in section 16(1)(a): see Order 98-006. Each case is considered on its own merits: see, for example, Order 2000-005, in which the Commissioner reviewed all the severed information and the partnership agreement as a whole to see whether disclosing the severed information would have the aggregate effect of revealing commercial information of the third parties.

[para 155] I find that the following is or would otherwise reveal Bell West's commercial or financial information: Article 1.1 Definitions (ss), (yy), (fff), (ggg), (kkk), (lll).

[para 156] I also find that Article 1.1 Definitions (g) and (aa) are or would otherwise reveal Bell West's commercial or financial information. Those definitions are not listed in Bell West's Appendix.

[para 157] I further find that the following information listed in Bell West's Appendix is or would otherwise reveal Bell West's commercial or financial information:

Articles 2.2, 4.2(b) and (d), 4.7, 4.8, 8.1, 8.7, 14.1(a)-(c), (e) and (f), 15.2, 16.5; Schedules A (only the second last bullet on the first page), H, I

[para 158] Moreover, I find that the names and titles of Bell West's key personnel and contract managers contained in Schedule D is Bell West's commercial information, as that information relates to how Bell West proposes to organize its work. In particular, the contract manager is responsible and accountable for Bell West's obligations under the SuperNet Master Agreement and other agreements. In this context, what would otherwise be personal information can also be commercial information. See Order 99-030 for another example in which personal information meets the requirements of section 16(1).

[para 159] I find that disclosure of Article 1.1 Definitions (j), (z) and (mmm), and Articles 3.2(b), (d) and (f) would not reveal commercial or financial information of Bell West.

[para 160] Bell West has already revealed that it has contracts with Axia. In a July 22, 2002 News Release (Tab 1(B) of Bell West's initial written submission), Bell West put that information into the public domain, when it said:

The Government of Alberta will invest a maximum of \$193 million over three years to build the sustainable and scaleable network. As prime contractor for the build, Bell will invest \$102 million to build the Base Area, the portion of the network linking 27 large communities. Axia SuperNet Ltd., a wholly owned subsidiary of Axia NetMedia Corp. (TSE: AXX), has been subcontracted by Bell to build the network's Extended Area, which connects 395 small communities. Axia SuperNet Ltd. also has a 10-year renewable contract from the Government of Alberta to operate and manage the entire network...

[para 161] Moreover, in its initial written submission, Bell West has provided the Applicant with the names of all of the contracts between Bell West and Axia. Therefore, I find that disclosure of the names of and the existence of the agreements between Bell West and Axia would not reveal commercial information of Bell West.

[para 162] Furthermore, Bell West has already revealed two of the dollar amounts contained in Schedule A of Binder #1. That information also appears in the Bell West's July 22, 2002 News Release contained in Tab 1(B) of Bell West's initial written

submission. As Bell West has already put that information in the public domain, I find that disclosure would not reveal Bell West's commercial or financial information.

[para 163] I also find that the following information listed in Bell West's Appendix is not and would not otherwise reveal the commercial or financial information of Bell West:

Table of Contents; Article 1.1 Definitions (m), (n), (r), (t), (u), (y), (cc), (ee), (ll), (xx) and (ddd); Articles 2.1, 2.3, 4.1, 4.2(a) and (d), 4.3-4.6, 5, 7, 8.2-8.6, 9, 10, 13, 14.1(d) and (f), 14.2-14.4, 15.1, 15.3, 16.3, 16.4, 18, 19.2, 19.8; Schedules A (except the second last bullet on the first page), B

[para 164] There is nothing in the foregoing information that is or would otherwise reveal information that relates to the buying, selling or exchange of merchandise or services, such as specific business plans of Bell West or how Bell West proposes to organize its work. In particular, the headings (preceding both the articles and schedules) and the table of contents are not and would not otherwise reveal Bell West's commercial or financial information.

[para 165] Furthermore, such information as the following is either the Public Body's or Axia's information, and not Bell West's information: Article 1.1 Definitions (t), (ddd); Articles 2.1, 8.2(a), (b), (d), 8.3-8.5, 9.4, 14.1(d) and (f), 14.4, 15.3; Schedule A (except the dollar amounts).

[para 166] I also find that the remaining information in Binder #1 that is not listed in Bell West's Appendix is not and would not otherwise reveal the commercial or financial information of Bell West. In coming to this conclusion, I have reviewed both the specific information and the records as a whole to decide whether disclosure of any other information in Binder #1 would have the aggregate effect of revealing the commercial or financial information of Bell West: see Order 98-006. I find that it would not.

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

[para 167] The Public Body says that, except for limited portions of the SuperNet Agreements, for the most part, the SuperNet Agreements were negotiated between the Public Body, Bell West and Axia. Therefore, the information does not meet the criteria of section 16(1)(b) because it was not supplied by the Third Parties.

[para 168] Bell West says it could not have bid and negotiated the SuperNet Agreements without supplying the GOA with extensive confidential information about its business, operations and capabilities. This confidential information is reflected throughout the SuperNet Agreements, both in the agreements themselves as well as the assumptions underlying them.

[para 169] Bell West relies on Order 2000-005, in which the Commissioner said that, in order to reach an agreement, a third party must supply a certain amount of information,

some of which may actually appear in the agreement, and some of which may be inferred from the agreement. Disclosure of the SuperNet Agreements would enable the Applicant to infer confidential and proprietary information of Bell West, and such information would not ordinarily be disclosed under the Act.

[para 170] In Order 2000-005, the Commissioner said that, generally, an agreement that has been negotiated between a third party and a public body is not information that has been supplied to the public body. The exceptions are where the information supplied to the public body during negotiations remains relatively unchanged in the agreement or where disclosure of the information would permit an applicant to make an accurate inference about information supplied to the public body during the negotiations.

[para 171] Bell West says that, in deciding whether the information was supplied by Bell West to the Public Body, I must consider the “two tests”, namely, the two exceptions discussed in Order 2000-005: (i) whether the third party has supplied original or proprietary information that remains relatively unchanged, or (ii) disclosure of the information would permit an applicant to make an accurate inference of sensitive third party business information that would not in itself be disclosed under the Act.

[para 172] Bell West provided evidence that the Applicant represents a company that is both a supplier to and a direct competitor of Bell West. As such, Bell West submits that access to the SuperNet Agreements will permit the Applicant to infer sensitive business information about Bell West that would not in itself be disclosed under the Act.

[para 173] I find disclosure of the following information would allow the Applicant to make an accurate inference as to the information Bell West supplied, and therefore meets the requirements of section 16(1)(b):

Articles 4.2(b), (d), 15.2, 16.5; Schedules D (names and titles of Bell West’s key personnel and contract managers only), H

[para 174] I find that the following information was not supplied by Bell West, but was negotiated. Disclosure would not allow the Applicant to make an accurate inference about the commercial or financial information that Bell West supplied, and therefore does not meet the requirements of section 16(1)(b):

Article 1.1 Definitions (g), (aa), (ss), (yy), (ggg), (kkk), (lll); Articles 2.2, 4.7, 4.8, 8.1, 8.7, 14.1(a)-(c), (e) and (g); Schedules A (second last bullet on the first page), I

[para 175] As to whether the information was supplied in confidence, Bell West points to Article 12 of the SuperNet Master Agreement as containing an express condition of confidentiality. Bell West maintains that that provision also applies equally to all of the other SuperNet Agreements as the SuperNet Master Agreement is the umbrella agreement.

[para 176] I have found that Article 12 does not apply to information supplied to the Public Body in negotiating the SuperNet Agreements, and that there is no other express condition of confidentiality. I have therefore considered whether the information was supplied implicitly in confidence.

[para 177] In deciding whether there was an expectation of confidentiality based on reasonable and objective grounds, I have considered Bell West's evidence about the competitiveness of the marketplace and Bell West's treatment of the SuperNet Agreements as confidential.

[para 178] Given that evidence, I find that the following commercial or financial information was supplied implicitly in confidence by Bell West:

Articles 4.2(b), (d), 15.2, 16.5; Schedule H

[para 179] I find that the following information was not supplied either explicitly or implicitly in confidence by Bell West: Schedule D (the names and titles of Bell West's key personnel and contract managers only). I intend to consider the information in Schedule D under section 17.

iii. 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)?

[para 180] Bell West argues only section 16(1)(c)(i) and (iii) (paragraph 31 of Bell West's initial written submission). I will consider those provisions only in relation to the information of Bell West that I have found meets the requirements of section 16(1)(a) and (b).

(1) Application of section 16(1)(c)(i) (harm significantly the competitive position or interfere significantly with the negotiating position of Bell West)

[para 181] Bell West is authorized to operate as a telecommunications common carrier (Binder #6). Bell West submits that disclosure of the SuperNet Agreements would reveal strategic commercial information of Bell West as the SuperNet Agreements represent Bell West's innovative and ground-breaking first strike into the western market ruled by Telus.

[para 182] Bell West has provided evidence that the telecommunications industry is highly competitive (Tab 4 of Bell West's initial written submission). It is evident that Telus is a competitor of Bell West.

[para 183] Bell West cites Order 2001-019, in which the Commissioner agreed that the entirety of a contract between a third party and a public body met the requirements of section 16(1).

[para 184] Bell West submits that the SuperNet Agreements reveal the confidential strategic position of Bell West with respect to its commercial dealings with the Government of Alberta and Axia, just as the Memorandum of Understanding in Order 2001-019 set out the strategic position of Telus with respect to its business dealings with the City of Edmonton. The Agreements create the framework for the ongoing commercial relations between the Government of Alberta and Bell West. Bell West says that in Order 2001-019, the Memorandum of Understanding served as a blueprint for Telus' ongoing commercial relations with the City of Edmonton.

[para 185] I do not have the benefit here of the evidence and arguments that were before the Commissioner in making his decision that resulted in Order 2001-019, but no doubt that case was decided on its own facts. Each case must be decided on its own facts, including this one.

[para 186] In Order 96-013, the Commissioner said:

The purpose of [what is now section 16(1)] is to give a third party some degree of protection regarding information it provides to a public body. This section protects, to a limited extent, the integrity of third party contractual relationships with a public body.

[para 187] A third party will often argue that the entirety of a contract between the third party and a public body is the third party's commercial information and should not be disclosed on an access request. As the Commissioner said, section 16(1) is not about protecting the entirety of the contract between a third party and a public body. Section 16(1) is about protecting only a third party's proprietary information supplied in confidence to a public body and contained in the contract, or proprietary information supplied in confidence to a public body that would otherwise be revealed by the contract. In either case, disclosure must result in one of the enumerated outcomes set out in section 16(1)(c).

[para 188] In my view, it will be a rare circumstance in which the entirety of a contract between a third party and a public body meets all the requirements of section 16(1). If it were otherwise, section 16(1) would serve no purpose because every contract between a third party and a public body would have to be withheld under section 16(1), which is a mandatory ("must") provision. The Legislature could not have intended that result in enacting section 16(1).

[para 189] Bell West has also provided evidence that the Applicant represents a company that is both a supplier to and a direct competitor of Bell West (Tab 1(C) of Bell West's initial written submission). Bell West provides evidence of its commercial dealings with that company in relation to the SuperNet, as set out in a July 22, 2002 News Release (Tab 1(C) of Bell West's initial written submission).

[para 190] Bell West's further evidence is that the company it says the Applicant represents has publicly announced that it intends to look for future business opportunities with the SuperNet project (Tab 1(C) of Bell West's initial written submission). Bell West submits that release of the SuperNet Agreements would allow the company to use

Bell West's confidential commercial information to its advantage, and to Bell West's competitive disadvantage, in bidding on future Government of Alberta projects or other projects related to the SuperNet.

[para 191] Based on Bell West's evidence of its competitors and the competitiveness of the telecommunications marketplace, I am satisfied that disclosure of the information I have found is Bell West's commercial and financial information supplied to the Public Body in confidence could reasonably be expected to harm significantly the competitive position of Bell West, as provided by section 16(1)(c)(i). Having made this finding, I do not find it necessary to also consider whether the second part of section 16(1)(c)(i) applies.

[para 192] I further find that disclosure of the remaining information in Binder #1 could not reasonably be expected to harm significantly the competitive position of Bell West.

[para 193] Bell West nevertheless says that the SuperNet Agreements contain non-standard Bell contractual language, which departs from normal commercial terms that Bell would not generally offer in other commercial arrangements. Release of the SuperNet Agreements would enable the Applicant and others to ascertain such non-standard terms, making it difficult for Bell to come to mutually agreeable terms with other parties that Bell is doing business with in relation to the SuperNet if they knew what deal Bell had struck with the other parties.

[para 194] In Order 96-003, the Commissioner said: "...[The] evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue." Order 96-003 also said that there must be evidence of the following to prove significant harm to competitive position:

- (i) The connection between disclosure of the specific information and the harm which is alleged;
- (ii) How the harm constitutes "damage" or "detriment" to the matter; and
- (iii) Whether there is a reasonable expectation that the harm will occur.

[para 195] Proof of harm must be on a balance of probabilities. This means that the evidence must be more than speculation, and more than a mere possibility of harm. Harm or interference must be significant: see Order 99-023.

[para 196] Bell West has not provided any evidence to support its assertion that disclosure of its contractual language could reasonably be expected to harm significantly its competitive position. Saying this is so does not make it so. In my view, the assertion is speculative at best. Furthermore, there is nothing on the face of the records that would allow me to find that disclosure of the contractual language could reasonably be expected to harm significantly Bell West's competitive position.

[para 197] In a December 5, 2001 letter to the Public Body, Bell West said it was concerned about the disclosure of the SuperNet Agreements at this particular time when much of the SuperNet initiative was being put to tender (Tab 7 of the Public Body's initial written submission).

[para 198] Bell West says that much of the SuperNet construction work is still being put out to tender. If the SuperNet Agreements are released, parties considering submitting a tender will have the benefit of reviewing the commercial terms agreed to between the Government of Alberta and Bell West for the purposes of preparing tenders; such insights into the SuperNet Agreements would significantly interfere with Bell West's commercial operations and negotiations in the future. Disclosure will affect legal relations between the parties to the SuperNet Agreements, as Bell West's legal position vis-à-vis third parties will be adversely affected when negotiating future agreements relating to the SuperNet.

[para 199] SuperNet is now nearing completion. Bell West has not provided any evidence to support this assertion, which is speculative at best. There is also nothing on the face of the records that would allow me to find that disclosure of the SuperNet Agreements could reasonably be expected to harm significantly Bell West's competitive position, as asserted.

(2) Application of section 16(1)(c)(iii) (result in undue financial loss or gain to any person or organization)

[para 200] Bell West says that release of the SuperNet Agreements would interfere with Bell West's negotiations with parties considering submitting tenders in relation to the SuperNet in the future. This interference with Bell West's ability to obtain acceptable financial terms on SuperNet project-related tenders and Bell West's ability to conduct negotiations in the future could therefore reasonably be expected to result in undue financial loss to Bell West.

[para 201] In Order 99-018, the Commissioner said that "undue" meant exceeding or violating propriety or fitness; excessive, immoderate, unwarranted.

[para 202] Bell West has not provided any evidence to support its assertion under section 16(1)(c)(iii). I find that the assertion is speculative at best. There is also nothing on the face of the records that would allow me to find that disclosure of the SuperNet Agreements could reasonably be expected to result in undue financial loss to Bell West or undue gain to any person or organization.

iv. Conclusion under section 16(1)

[para 203] I find that section 16(1) applies to the following information in Binder #1:

Articles 4.2(b), (d), 15.2, 16.5; Schedule H

[para 204] I intend to order Alberta Restructuring and Government Efficiency to refuse to give the Applicant access to the foregoing information.

[para 205] Except for certain information in Schedule C (discussed earlier in this Order), I find that section 16(1) does not apply to the remaining information that Bell West listed for Binder #1 in its Appendix. I further find that section 16(1) does not apply to the remaining information in Binder #1. I intend to order Alberta Restructuring and Government Efficiency to give the Applicant access to that information, except page 276, which is a blank page, and except the personal information withheld from Schedule D and Schedule G, which remains to be considered under section 17.

b. Binder #2

i. Would disclosure of the information reveal commercial or financial information of Bell West (section 16(1)(a))?

[para 206] Bell West argues that the following information set out in its Appendix would reveal Bell West's commercial or financial information:

Table of Contents; Articles 3.1, 3.3, 5, 6, 7, 11; List of Appendices; Appendices 1, 2 – B, 3, 4, 6, 7; General Conditions Table of Contents; General Conditions 5, 8.2, 8.4, 8.5, 10.2.2, 10.2.3, 10.2.4, 13.2, 13.3, 13.4, 15.2, 18, 21, 22, 24, 26, 27, 28, 31; Schedule 4

[para 207] There is no table of contents in Binder #2.

[para 208] I find that the following information listed in Bell West's Appendix is or would otherwise reveal Bell West's commercial or financial information:

Articles 3.3, 5.1, 5.3, 5.4, 6.1, 7; List of Appendices (part of the last line only, on page 8); Appendices 2 – B (except the heading), 3, 4, 6, 7; General Conditions 10.2.4, 18; Schedule 4

[para 209] Disclosure of much of the foregoing information would reveal how Bell West proposes to organize its work.

[para 210] I further find that the following information, which is not listed in Bell West's Appendix, is or would otherwise reveal the commercial or financial information of Bell West:

General Conditions Definitions (fifth definition on page 54); General Conditions 6.3 (last sentence only), 6.4

[para 211] I find that the following information listed in Bell West's Appendix is not and would not otherwise reveal the commercial or financial information of Bell West:

Articles 3.1, 5.2, 6.2, 11; List of Appendices (everything except part of the last line); Appendices 1, 2 – B (heading only), 7; General Conditions Table of Contents; General Conditions 5, 8.2, 8.4, 8.5, 10.2.2, 10.2.3, 13.2, 13.3, 13.4, 15.2, 21, 22, 24, 26, 27, 28, 31

[para 212] As examples, disclosure of the information contained in Article 3.1 would not reveal Bell West's commercial or financial information, since Bell West has already revealed that information in the public domain (Tab 1(B) of Bell West's initial written submission). Article 7 relates to Article 4.7 of the SuperNet Master Agreement (Binder #1), to which I have found that section 16(1) does not apply. Disclosure of the information contained in Appendix 1 would also not reveal the commercial or financial information of Bell West, since Appendix 1 simply refers the reader to Schedule H of the SuperNet Master Agreement. Appendix 4 – II is not unique to Bell West. The provision says that the cost items are consistent with telecommunications practice. Appendix 7 is a form containing blank spaces, in which only the name of an insurance company is filled in. The information is not and would not otherwise reveal the commercial or financial information of Bell West.

[para 213] I also find that disclosure of Recital D, which is not listed in Bell West's Appendix, would not reveal Bell West's commercial or financial information, since Bell West has already revealed that information in the public domain (Tab 1(B) of Bell West's initial written submission).

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

[para 214] I find that the following information that is listed in Bell West's Appendix was negotiated, and not supplied by Bell West:

Articles 5.1, 5.3, 5.4, 7; Appendices 4 – I (contract price only), 4 – II; General Conditions 10.2.4, 18

[para 215] I find that the following information that is not listed in Bell West's Appendix was also negotiated, and not supplied by Bell West:

General Conditions 6.3 (last sentence only), 6.4 (everything except information in the second, third and fourth lines)

[para 216] Based on the evidence and arguments, previously discussed, I find that the following information that is listed in Bell West's Appendix was supplied in confidence:

Articles 3.3, 6.1; List of Appendices (part of the last line only, on page 8); Appendices 2 – B, 3, 4 – I (except the contract price), 6; Schedule 4

[para 217] Based on the evidence and arguments, previously discussed, I find that the following information that is not listed in Bell West's Appendix was supplied in confidence:

General Conditions Definitions (fifth definition on page 54); General Condition 6.4 (information in the second, third and fourth lines)

iii. 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)?

[para 218] Based on the evidence and arguments, previously discussed, I find that disclosure of the following information could reasonably be expected to harm significantly the competitive position of Bell West:

Articles 3.3, 6.1; List of Appendices (part of the last line only, on page 8); Appendices 2 – B, 3, 4 – I (except the contract price), 6; General Conditions Definitions (fifth definition on page 54); General Condition 6.4 (information in the second, third and fourth lines); Schedule 4

[para 219] I find that disclosure of the remaining information in Binder #2 could not reasonably be expected to bring about the result set out in either section 16(1)(c)(i) or (iii).

iv. Conclusion under section 16(1)

[para 220] I find that section 16(1) applies to the following information in Binder #2:

Articles 3.3, 6.1; List of Appendices (part of the last line only, on page 8); Appendices 2 – B, 3, 4 – I (except the contract price), 6; General Conditions Definitions (fifth definition on page 54); General Condition 6.4 (information in the second, third and fourth lines); Schedule 4

[para 221] I intend to order Alberta Restructuring and Government Efficiency to refuse to give the Applicant access to the foregoing information.

[para 222] Except for the information in Appendix 9 (discussed earlier in this Order), I find that section 16(1) does not apply to the remaining information that Bell West listed in its Appendix for Binder #2. I further find that section 16(1) does not apply to the remaining information in Binder #2. I intend to order Alberta Restructuring and Government Efficiency to give the Applicant access to that information.

c. Binder #4

i. Would disclosure of the information reveal commercial or financial information of Bell West (section 16(1)(a))?

[para 223] Bell West argues that the following information set out in its Appendix would reveal Bell West's commercial or financial information:

Recitals 4, 5; Article 1.1 Definitions (b), (e), (f), (g), (i), (j), (ee), (xx), (zz); Articles 1.2 (reference to Schedule B), 3.4, 3.21, 5.2, 5.3, 6, 7, 9.4 (last sentence); Schedules A (last paragraph on page 15), B

[para 224] I find that the following information that is listed in Bell West's Appendix is or would otherwise reveal the commercial or financial information of Bell West:

Table of Contents references to Articles 3.21, 5.2, Article 6 and Schedule B; Recitals 4, 5 (part of the second line, and the third line); Article 1.1 Definitions (b) (part only), (e), (f), (g), (i), (j), (ee) (part only), (xx) (part only), (zz); Articles 1.2 (reference to Schedule B), 3.4, 3.21 (including the heading), 5.2 (including the heading), 5.3 (part of the first and second lines), 6 (including the headings), 7.1(b) (part only), 7.2 (part of the last line), 7.3 (part of the first and last lines), 9.4 (part of the last sentence); Schedules A (last paragraph on page 15 of Schedule A, which is page 43 of Binder #4), B (including the heading)

[para 225] I also find that the follow information that is not listed in Bell West's Appendix is or would otherwise reveal the commercial or financial information of Bell West: Article 1.1 Definition (h); Articles 3.5 (last sentence), 5.6 (part of the first line), 10.1.

[para 226] Binder #4 contains certain definitions pertaining to the calculation of projected revenues and expenses for Bell West. These same definitions also appear on pages 73-75 of Schedule C in Binder #1. In this Order, I have found that certain of those definitions and information would reveal commercial or financial information of Bell West. I find that the same definitions and information pertaining to Bell West contained in Binder #4 would reveal the commercial or financial information of Bell West: Article 1.1 Definitions (b) (part only), (e), (f), (g), (i), (j), (ee) (part only) and (xx) (part only).

[para 227] In Binder #4, following my finding for Article 1.1 Definition (ggg) in Binder #1, I find that the same definition Article 1.1 Definition (zz) would also reveal the commercial or financial information of Bell West.

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

[para 228] I find that the following information that is listed in Bell West's Appendix was negotiated, and not supplied by Bell West: Article 1.1 Definition (zz); Articles 3.5 (last sentence) and 10.1.

[para 229] Much of the information in Binder #4 relates to the agreements between Bell West and Axia. Based on the evidence and arguments, previously discussed, I find that Bell West supplied the remaining information to the Public Body, implicitly in confidence.

iii. 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)?

[para 230] I find that disclosure of the following information that is listed in Bell West's Appendix could not reasonably be expected to bring about the result set out in either section 16(1)(c)(i) or (iii): Article 1.1 Definition (h).

[para 231] Much of the information relates to the agreements between Bell West and Axia. Based on the evidence and arguments, previously discussed, I find that disclosure of the information that I have found is Bell West's commercial or financial information supplied to the Public Body in confidence could reasonably be expected to harm significantly the competitive position of Bell West.

iv. Conclusion under section 16(1)

[para 232] I find that section 16(1) applies to the following information in Binder #4:

Table of Contents references to Articles 3.21, 5.2, 6 and Schedule B; Recitals 4, 5 (part of the second line, and the third line); Article 1.1 Definitions (b) (part only), (e), (f), (g), (i), (j), (ee) (part only), (xx) (part only); Articles 1.2 (reference to Schedule B), 3.4, 3.21 (including the heading), 5.2 (including the heading), 5.3 (part of the first and second lines), 5.6 (part of the first line), 6 (including the headings), 7.1(b) (part only), 7.2 (part of the last line), 7.3 (part of the first and last lines), 9.4 (part of the last sentence); Schedules A (last paragraph on page 15 of Schedule A, which is page 43 of Binder #4), B (including the heading)

[para 233] I intend to order Alberta Restructuring and Government Efficiency to refuse to give the Applicant access to the foregoing information.

[para 234] I find that section 16(1) does not apply to the remaining information that Bell West listed for Binder #4 in its Appendix. I further find that section 16(1) does not apply to the remaining information in Binder #4. I intend to order Alberta Restructuring and Government Efficiency to give the Applicant access to that information.

d. Binders #3, #5 and #6

i. Would disclosure of the information reveal commercial or financial information of Bell West (section 16(1)(a))?

[para 235] These binders contain the agreements between Bell West and Axia only. Bell West says that the entire agreements contained in Binders #3, #5 and #6 are its commercial or financial information.

[para 236] Article 3.2 of the SuperNet Master Agreement defines the agreements in these binders as “transaction agreements”. Article 3.1 says that the transaction agreements prevail if there an inconsistency or conflict between them and the SuperNet Master Agreement, unless specified otherwise.

[para 237] Furthermore, Articles 5.1 and 5.2 of the SuperNet Master Agreement acknowledge that the Government of Alberta (as represented by the Public Body) is not a party to these transaction agreements.

[para 238] Therefore, I find that the entirety of the agreements contained in Binders #3, #5 and #6 are the commercial or financial information of both Bell West and Axia. Although Axia has consented to disclosure, Bell West maintains that section 16(1) applies in relation to Bell West. Given this situation, I find that the commercial or financial information in the agreements cannot be apportioned between Bell West and Axia. That makes disclosure an all or nothing proposition, depending on whether section 16(1) applies in relation to Bell West.

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

[para 239] Binders #3, #5 and #6 are agreements that Bell West and Axia negotiated between themselves in furtherance of the SuperNet Master Agreement. The evidence before me is that the Public Body is not a party to those agreements. There is no evidence before me that Bell West and Axia negotiated those agreements with the Public Body.

[para 240] In response to Bell West’s general statement that the SuperNet Agreements were supplied in confidence, the Public Body responded that the SuperNet Agreements were developed through negotiations between the Public Body, Bell West and Axia; the agreements in their entirety were not supplied by either Bell West or Axia.

[para 241] However, the SuperNet Master Agreement provides that the Public Body is not a party to the agreements between Bell West and Axia. Therefore, I do not see how those agreements were developed through negotiations with the Public Body. I prefer to rely on the terms of the SuperNet Master Agreement, rather than the Public Body’s response to a general statement by Bell West. Consequently, I find that Bell West and Axia supplied the agreements contained in Binders #3, #5 and #6 to the Public Body.

[para 242] Bell West says that the parties were subject to confidentiality obligations throughout. It notes that the government is not a party to all of the SuperNet agreements. Bell West says that a commercial enterprise would not provide the government with a copy of a commercial agreement that the government is not a party to, without an express or implied obligation of confidentiality. Bell West cites Article 12 of the SuperNet Master Agreement as containing an express condition of confidentiality.

[para 243] I have already found that Article 12 does not apply to information that was supplied to the Public Body in negotiating the SuperNet agreements. However, given Bell West's evidence about the competitiveness of the marketplace, I find that Bell West supplied the agreements contained in Binders #3, #5 and #6, implicitly in confidence: see Order 2001-008, in which the Commissioner found it reasonable that a third party would supply commercial or financial information only in confidence when the third party is in competition with other providers of similar services and when there is a confidentiality provision between the third party and a public body.

iii. 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)?

[para 244] As previously discussed, I am satisfied by the evidence that disclosure of the agreements contained in Binders #3, #5, and #6 could reasonably be expected to harm significantly the competitive position of Bell West.

iv. Conclusion under section 16(1)

[para 245] I find that section 16(1) of the Act applies to the entirety of the agreements contained in Binders #3, #5 and #6, in relation to Bell West. I intend to order Alberta Restructuring and Government Efficiency to refuse to give the Applicant access to all the information in Binders #3, #5 and #6.

e. Binders #8 to #13

[para 246] Bell West did not make any arguments about the information contained in Binders #8 to #13. The Public Body argued that section 16(1) does not apply to the information contained in Binders #9 to #13. However, the Public Body said nothing about Binder #8.

[para 247] I have nevertheless considered all the information in Binders #8 to #13, as section 16(1) is a mandatory ("must") provision that prohibits disclosure if the provision applies.

[para 248] The information in Binders #8 to #13 is supplementary information to Appendices 2 and 6 of Binder #2 and Schedules 10 and 11 of Binder #3, all of which specifically incorporate Binders #8 to #13, by reference.

[para 249] The information in Binders #9 to #12 is also supplementary information to Appendix 9 of Binder #2.

[para 250] I find that all the information in Binder #8 relates to how Bell West proposes to organize its work and is therefore Bell West's commercial information. Based on the evidence of the competitiveness of the marketplace, I find that all the information in Binder #8 was supplied implicitly in confidence, and that disclosure could reasonably be expected to harm significantly the competitive position of Bell West. Therefore, I find that section 16(1) of the Act applies to the entirety of Binder #8. I intend to order Alberta Restructuring and Government Efficiency to refuse to give the Applicant access to Binder #8.

[para 251] The information in Binders #9 to #13 is not the commercial or financial information of Bell West. However, I find that disclosure of the information contained in these binders would reveal the commercial or financial information of Bell West to which I have found that section 16(1) applies, namely, the information in Appendices 2, 6 and 9 of Binder #2, and Schedules 10 and 11 of Binder #3. I find that disclosure would allow the Applicant to make accurate inferences about the commercial or financial information that Bell West supplied implicitly in confidence, and that disclosure could reasonably be expected to harm significantly the competitive position of Bell West. Therefore, I find that section 16(1) of the Act applies to the entirety of Binders #9 to #13. I intend to order Alberta Restructuring and Government Efficiency to refuse to give the Applicant access to Binders #9 to #13.

ISSUE B: Does section 17 of the Act (personal information) apply to the records/information?

[para 252] Section 17(1) reads:

17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[para 253] Under section 17, the Public Body decided to withhold from the Applicant what it says is personal information located on the following pages of the SuperNet Agreements:

- Binder #1 (SuperNet Master Agreement): Schedule D (pages 76, 77); Schedule G (pages 89, 93, 94, 103, 104, 109, 110, 111, 114, 115, 118, 122, 127, 128)
- Binder #3 (SuperNet Extended Network Subcontract): pages 25, 26
- Binder #5 (Exclusive License Agreement): page 18
- Binder #6 (Bell West Services Agreement): pages 8, 20, 34, 40, 47

[para 254] The Public Body withheld personal information under section 17 of the Act on pages 25 and 26 of Binder #3, page 18 of Binder #5 and pages 8, 20, 34, 40, and 47 of Binder #6. As I have found that section 16(1) of the Act applies to the entirety of the agreements contained in Binders #3, #5 and #6, I do not find it necessary to consider whether section 17 of the Act also applies to the personal information the Public Body withheld under section 17 in those agreements.

[para 255] The first consideration is whether any provision of section 17(2) of the Act applies such that disclosure of the personal information would not be an unreasonable invasion of a third party's personal privacy.

[para 256] Section 17(2)(f) of the Act reads:

17(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

*...
(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,...*

[para 257] Disclosure of the names and titles of Bell West's and Axia's key personnel and contract managers, withheld from Schedule D of Binder #1, would not reveal financial and other details of a contract to supply goods or services to the Public Body. Therefore, section 17(2)(f) does not apply to allow for the disclosure of the personal information. Section 17(2)(f) also does not apply to the personal information withheld from Schedule G.

[para 258] The Public Body says that the information for which section 17 is claimed is personal information that falls within the definition contained in section 1(n) of the Act. Under section 17(4)(g), disclosure of this kind of personal information is presumed to be an unreasonable invasion of a third party's personal privacy. The Public Body followed Orders 96-008 and 96-018 in finding that disclosure of this information would be an unreasonable invasion of third parties' personal privacy.

[para 259] The Public Body says that the head took into consideration all the circumstances described in section 17(5). However, the head was of the opinion that none of those circumstances applied to the information withheld and that there was no other circumstance that would indicate that the head should disclose the personal information withheld under section 17(4) of the Act.

[para 260] Schedule D contains the names and titles of individuals. Schedule G contains the names and addresses of individuals.

[para 261] Section 17(4)(g)(i) reads:

17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...
(g) *the personal information consists of the third party's name when*

(i) it appears with other personal information about the third party,...

[para 262] In this case, section 17(4)(g)(i) applies. Disclosure of the personal information withheld from both Schedule D and Schedule G is presumed to be an unreasonable invasion of third parties' personal privacy.

[para 263] Section 17(5) of the Act provides that, in determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances. Section 17(5) then sets out a non-exhaustive list of circumstances.

[para 264] In Orders 2000-005 and F2003-002, the Commissioner considered as a relevant circumstance under section 17(5) that the third parties were acting in formal, representative capacities or professional capacities, respectively. Under section 17(5), he found that that circumstance weighed in favour of disclosing the personal information. He concluded that disclosure of the personal information was not an unreasonable invasion of personal privacy of the third parties under section 17.

[para 265] I agree. In Schedule D, the personal information withheld is that of third parties who are acting in formal, representative capacities or professional capacities on behalf of Bell West and Axia. I find this to be a relevant circumstance that weighs in favour of disclosing the personal information, and that disclosure is not an unreasonable invasion of the personal privacy of those third parties. I intend to order the Public Body to give the Applicant access to the personal information withheld from Schedule D.

[para 266] However, Schedule G contains personal information of individuals who are not acting in formal, representative or professional capacities. In this case, section 17(4)(g)(i) applies. Disclosure of the personal information in Schedule G is presumed to be an unreasonable invasion of third parties' personal privacy under section 17(4)(g)(i), unless the Applicant proves otherwise.

[para 267] Bell West points to the Applicant's burden of proof. Bell West says that in the event that personal information may be found in the SuperNet Agreements such that disclosure would result in an unreasonable invasion of personal privacy, the SuperNet Agreements may not be disclosed.

[para 268] Section 71(2) of the Act reads:

71(2) Despite subsection (1), if the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not

be an unreasonable invasion of the third party's personal privacy.

[para 269] The Applicant has the burden of proof for the personal information withheld from Schedule G. The Applicant did not provide a written submission for the inquiry. Therefore, the Applicant has not met the burden of proof.

[para 270] Consequently, I agree with the Public Body and find that disclosure of the personal information withheld from Schedule G would be an unreasonable invasion of the third parties' personal privacy. I intend to order the Public Body to refuse to give the Applicant access to the personal information withheld from Schedule G.

[para 271] Bell West further submits that it is open to me to find that personal information can apply in respect of corporations. Bell says that the definition of "third party" is not limited to individuals, but can be an organization or corporation such as Bell West. Also, because the definition of personal information uses the word "including", which is not exhaustive, personal information could be interpreted to cover information relating to an organization such as Bell West.

[para 272] Bell West's argument ignores the definition of "personal information", which is recorded information about an identifiable individual [emphasis added] for the purposes of section 17. In Order 96-019, the Commissioner defined "individual" to mean a single human being. Since the applicant in that case was not a single human being, there was no "personal information" to which the applicant would have a right of access under the Act. Since section 17 concerns "personal information" of a "third party", section 17 can only concern an individual. In section 17, the definition of "third party" cannot be read outside of the definition of "personal information", being "recorded information about an identifiable individual", for the purposes of section 17. The same logic applies to the word "including" in the definition of personal information: it cannot be read outside of the context of "identifiable individual". Consequently, "third party" in section 17 can only be an identifiable individual.

ISSUE C: What terms and conditions may be made in an Order, as provided by section 72(4) of the Act?

[para 273] Bell West says that the SuperNet Agreements should not be disclosed. If I nevertheless decide that the Government of Alberta may release any part of the SuperNet Agreements to the Applicant, Bell West requests that I order that the SuperNet Agreements be disclosed in their entirety, as releasing only portions, or some but not all, of the SuperNet Agreements will result in the public having a misconceived view of the transaction as a whole, which would be detrimental to Bell West. However, Bell West then requests that I make the following order, requiring the Applicant to maintain the confidentiality of the SuperNet Agreements and restricting the Applicant's use of the information disclosed by the SuperNet Agreements:

(i) That the Applicant is not permitted to disclose the SuperNet Agreements, including any information disclosed by the SuperNet Agreements, to any other person, and

(ii) That the Applicant is not permitted to use the SuperNet Agreements, including any information disclosed by the SuperNet Agreements, in any way that may be detrimental to Bell West or the SuperNet project.

[para 274] Bell West relies on section 72(4) of the Act as giving me the broad discretionary authority to make the foregoing order. Section 72(4) reads:

72(4) The Commissioner may specify any terms or conditions in an order made under this section.

[para 275] The Public Body says that the head does not believe any special terms or conditions need be applied to the order sought in the Public Body's submission.

[para 276] Under section 72(2)(c) of the Act, I must, by order, require the head of a public body to refuse access to all or part of a record, if I determine that the head is required to refuse access. I have found that section 16(1) of the Act applies to certain information in the records at issue. As section 16(1) is a mandatory ("must") provision, the head must refuse access and I must order the head to refuse access.

[para 277] Furthermore, my order-making power is circumscribed by section 72. Under section 72, I can make an order only against a "public body", as defined by the Act. I do not have the powers of a court to make an order against any party. I do not have order-making power over the Applicant, who is not a public body.

[para 278] Section 72(4) is limited by section 72, which gives me the authority to set terms and conditions in an order made under section 72. I therefore have the authority to set terms and conditions only in relation to an order concerning the Public Body. I do not have the authority under section 72(4) to set terms and conditions in relation to the Applicant.

V. ORDER

[para 279] I make the following Order under section 72 of the Act.

ISSUE A: Application of section 16 of the Act (business interests)

Binder #1

[para 280] Section 16(1) of the Act applies to the following information in Binder #1. I order the Public Body to refuse to give the Applicant access to the following information in Binder #1:

- Articles 4.2(b), (d), 15.2, 16.5

- Schedule C: pages 71, 72 (except the column headings); pages 73-75 (parts)
- Schedule H

[para 281] Section 16(1) of the Act does not apply to the remaining information in Binder #1. I order the Public Body to give the Applicant access to the remaining information in Binder #1, except the following information:

- Schedule C: pages 71, 72 (the column headings only, as they are meaningless information)
- Schedules D and G: the personal information withheld from these schedules, which I have considered under section 17 of the Act
- Page 276, which is a blank page

Binder #2

[para 282] Section 16(1) of the Act applies to the following information in Binder #2. I order the Public Body to refuse to give the Applicant access to the following information in Binder #2:

- Articles 3.3, 6.1
- List of Appendices (part of the last line only, on page 8)
- Appendices 2 – B, 3, 4 – I (except the contract price), 6, 9 (except the column headings)
- General Conditions Definitions (fifth definition on page 54)
- General Condition 6.4 (information in the second, third and fourth lines)
- Schedule 4

[para 283] Section 16(1) of the Act does not apply to the remaining information in Binder #2. I order the Public Body to give the Applicant access to the remaining information in Binder #2, except the column headings in Appendix 9 (page 48), which are meaningless information.

Binder #3

[para 284] Section 16(1) of the Act applies to all of the information in Binder #3. I order the Public Body to refuse to give the Applicant access to all of the information in Binder #3.

Binder #4

[para 285] Section 16(1) of the Act applies to the following information in Binder #4. I order the Public Body to refuse to give the Applicant access to the following information in Binder #4:

- Table of Contents references to Articles 3.21, 5.2, 6 and Schedule B
- Recitals 4, 5 (part of the second line, and the third line)

- Article 1.1 Definitions (b) (part only), (e), (f), (g), (i), (j), (ee) (part only), (xx) (part only)
- Articles 1.2 (reference to Schedule B), 3.4, 3.21 (including the heading), 5.2 (including the heading), 5.3 (part of the first and second lines), 5.6 (part of the first line), 6 (including the headings), 7.1(b) (part only), 7.2 (part of the last line), 7.3 (part of the first and last lines), 9.4 (part of the last sentence)
- Schedules A (last paragraph on page 15 of Schedule A, which is page 43 of Binder #4), B (including the heading)

[para 286] Section 16(1) of the Act does not apply to the remaining information in Binder #4. I order the Public Body to give the Applicant access to the remaining information in Binder #4.

Binders #5 and #6

[para 287] Section 16(1) of the Act applies to all of the information in Binders #5 and #6. I order the Public Body to refuse to give the Applicant access to all of the information in Binders #5 and #6.

Binder #7

[para 288] In relation to Telus, section 16(1) of the Act applies to the information on the following pages of Binder #7. I order the Public Body to refuse to give the Applicant access to the information on the following pages of Binder #7:

27 (quantity and services information only), 28-50, 52, 54-56, 58-62, 63 (rate calculation information only), 70 (quantity only), 88-96, 98-100, 102, 104, 105-106 (rate calculation information only), 111-112 (rate calculation information only), 139 (rate information only), 141 (rate information and term only), 142 (rate information and term only), 143 (rate information only)

[para 289] In relation to Telus, section 16(1) of the Act does not apply to the remaining information in Binder #7. However, I have considered whether section 16(1) of the Act applies to the remaining information in Binder #7 in relation to Bell West.

[para 290] In relation to Bell West, section 16(1) of the Act applies to the following information in Binder #7. I order the Public Body to refuse to give the Applicant access to the following information in Binder #7:

- Article 1.1 Definition “Eligible Services”
- Articles 4.5-4.7, 5.1, 5.3, 5.5(c), 8, 9.3
- Schedules A, B, C and D (except the two lines under the page heading, and the column headings)

[para 291] In relation to Bell West, section 16(1) of the Act does not apply to the remaining information in Binder #7. I order the Public Body to give the Applicant access

to the remaining information in Binder #7, except the column headings in Schedule D, which are meaningless information, and except page 133, which is a blank page.

Binders #8 to #13

[para 292] Section 16(1) of the Act applies to all of the information in Binders #8 to #13. I order the Public Body to refuse to give the Applicant access to all of the information in Binders #8 to #13.

[para 293] In some cases, it was not possible in this Order to make it clear to what information the Public Body must refuse to give the Applicant access. Consequently, along with this Order, I have provided the Public Body with certain pages of the records on which I have highlighted the information that is not to be disclosed to the Applicant.

ISSUE B: Application of section 17 of the Act (personal information)

[para 294] Section 17 of the Act applies to the following information in Binder #1. I order the Public Body to refuse to give the Applicant access to the following information in Binder #1: Schedule G (the personal information withheld from the schedule).

[para 295] Section 17 of the Act does not apply to the following information in Binder #1. I order the Public Body to give the Applicant access to the following information in Binder #1: Schedule D (the personal information withheld from the schedule).

ISSUE C: Terms or conditions that may be made in an Order (section 72(4))

[para 296] I do not have the authority under section 72(4) to set terms and conditions in relation to the Applicant.

[para 297] 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.

Dave Bell
Adjudicator