

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2012-15

June 30, 2012

ALBERTA TRANSPORTATION

Case File Number F5121

Office URL: www.oipc.ab.ca

Summary: An Applicant requested information from Alberta Transportation (“the Public Body”) related to certain highway maintenance contracts between the Public Body and a named highway maintenance contractor (a competitor of the Applicant).

The Public Body, with the consent of this office, extended its deadline to respond by 60 days. In the months that followed, the Public Body provided the Applicant with responsive records in batches. On the Public Body’s deadline for responding, the Public Body informed the Applicant that the remainder of the responsive records would be released to the Applicant on receipt of the outstanding fee. The Applicant sent the remainder of the fee to the Public Body and the remaining records were provided to the Applicant in two batches; the last of the records were provided fourteen days after the Public Body’s deadline.

The Applicant requested a review of the Public Body’s response, arguing that the Public Body had missed its deadline to provide the responsive records. The Applicant also requested a review of the Public Body’s decision to withhold information under sections 16, 24, 25 and 27. The highway maintenance contractor that was the holder of the contracts to which the requested information related was named as an Affected Party and participated in the inquiry.

In the course of the inquiry, the Public Body “re-reviewed” a large number of the records at issue, which had been withheld in their entirety, and subsequently disclosed a large

portion of these records with minimal information severed under sections 16, 24, 25 and 27.

The Adjudicator determined that the Public Body properly extended its timeline for responding to the Applicant's request but failed to meet this timeline. The Adjudicator also concluded that the Public Body had not properly reviewed the records that had been initially withheld in their entirety, when responding to the Applicant's request. As such, the Adjudicator ordered the Public Body to refund any fees associated with those records.

The Adjudicator found some of the information in the records at issue contained financial and commercial information of the Affected Party and, in a few instances, of other organizations within the terms of section 16(1)(a). Based on the limited evidence provided by the Public Body and Affected Party, the Adjudicator found that only a small portion of the information in the records at issue was supplied in confidence within the terms of section 16(1)(b). The Adjudicator also found that the Public Body and Affected Party did not provide sufficient evidence to conclude that section 16(1) applied to any of the records at issue.

The Adjudicator accepted that section 24(1) applied to a small amount of information severed in the records at issue, but found that the Public Body did not consider appropriate factors in exercising its discretion to withhold that information. The Adjudicator ordered the Public Body to re-exercise its discretion. The Adjudicator found that section 24(1) had not been properly applied to other information severed in the records, including information relating to decisions that had already been made, and instructions to Public Body employees.

The Adjudicator found that the Public Body did not provide sufficient evidence to show that the disclosure of information about contractual terms that the Public Body had agreed to in the past would interfere with the Public Body's negotiating position in the future, within the terms of section 25(1).

The Adjudicator found that section 27(2) applied to a small portion of the information in the records, but that the Public Body had not properly applied that exception in most cases.

The Adjudicator also considered the application of section 17 to some of the information in the records at issue, as it is a mandatory exception to disclosure. The Adjudicator found that some of the information that had been improperly severed by the Public Body under other exceptions to disclosure must be withheld under section 17.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 6, 11, 14, 16, 17, 24, 25, 27, 72, *Freedom of Information and Protection of Privacy Regulation*, Alberta Regulation 186/2008, s. 14. **CAN:** *Access to Information Act*, R.S.C. 1985, c. A-1, **ON:** *Freedom of Information and Protection of Privacy Act*, R.S.O 1990, c. F.31, ss. 17.

Authorities Cited: AB: Orders 96-006, 96-012, 97-007, 97-013, 98-006, 98-013, 99-228, 99-018, 99-020, 2000-003, F2002-002, F2003-004, F2004-013, F2005-009, F2005-011, F2005-030, F2006-022, F2007-012, F2008-018, F2008-028, F2008-032, F2009-021, F2009-028, F2009-038, F2010-028, F2010-030, F2010-036, F2010-037, F2012-06, **BC:** Order F11-27, **ON:** Orders M-169, PO-2435.

Cases Cited: *Agriculture Financial Services Corporation v Alberta (Information and Privacy Commissioner)*, 2012 ABQB 397, *B.C. Children's Hospital v. Air Products Canada Ltd.*, 2003 BCCA 177; *Belanger v. Gilbert* (1984), 58 B.C.L.R. 191 (C.A.), *Brainhunter (Ottawa) Inc. v. Canada (Attorney General)*, 2009 FC 1172, *Canada (Prime Minister) v. Canada (Information Commissioner)*, [1992] F.C.J. No. 1054, *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, 2010 SCC 23, *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515, *Solosky v. The Queen* [1980] 1. S.C.R. 821, *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.)*, *Local 79*, 2003 SCC 63.

Other Source Cited: Access and Privacy, Service Alberta, 2009. *Freedom of Information and Protection of Privacy (FOIP) Guidelines and Practices Manual*. Edmonton: Government of Alberta, 2009; Access and Privacy, Service Alberta. *FOIP Bulletin* (Number 1/Revised March 2009); Access and Privacy, Service Alberta. *Managing Contracts under the FOIP Act* (Rev. September 2010); Sopinka, John, et al. *The Law of Evidence in Canada* 2nd ed. Markham: Butterworths, 1999.

I. BACKGROUND

[para 1] On June 8, 2009, the Applicant requested from Alberta Transportation (“the Public Body”):

1. The highway maintenance contracts between LaPrairie Group Contractors (Alberta) Ltd. or its related entities (collectively “LaPrairie”) and the [Public Body]. For Contract Maintenance Areas 1, 2, 3, 4, 5, 12 and 13 that were in force during the time periods that include 2005 to 2007 (the “Highway Maintenance Contracts”);
2. The formal proposals submitted by LaPrairie in response to [the Public Body’s] Request for Proposals which resulted in LaPrairie receiving the Highway Maintenance Contracts (the “LaPrairie Proposals”);
3. All documents pertaining to amendments or variations to the terms of, or relief from the obligations imposed on LaPrairie by the LaPrairie Proposals or the Highway Maintenance Contracts for the period of 2005 to 2007, including but not limited to the following:

- a. any additional compensation provided by the [Public Body] to LaPrairie, but not expressly contemplated in the original LaPrairie Proposals or the Highway Maintenance Contracts, including compensation for hyper-inflation;
 - b. adjustments to the Unit Price Schedules in the LaPrairie Proposals or the Highway Maintenance Contracts;
 - c. changes in environmental obligations;
4. All documents pertaining to actual or proposed extensions to the duration of the Highway Maintenance Contracts without a requirement for a public bidding process;
 5. All documents showing that LaPrairie was relieved of any of its obligations under the LaPrairie Proposals after being selected as a Preferred Contractor, but before the execution of the Highway Maintenance Contracts;
 6. All documents showing that LaPrairie was relieved of any of its contractual obligations after the execution of any of the Highway Maintenance Contracts, or was provided with additional compensation beyond that stated in the Highway Maintenance Contracts.

[para 2] On June 30, 2009, the Applicant clarified that its request included information on penalties, demerits, performance measures and regular payments as well as all related e-mails.

[para 3] On June 30, 2009, the Public Body provided the Applicant with a fee estimate, requesting payment of 50% of the estimate. The Applicant provided the requested payment to the Public Body on July 8, 2009.

[para 4] On July 20, 2009, the Public Body advised the Applicant that it was extending the date of its response to the Applicant's request for a further 60 days (with the consent of the Office of the Information and Privacy Commissioner ("this office")). The Public Body noted that the deadline for the response was September 21, 2009.

[para 5] In the months that followed, the Applicant received batches of responsive records from the Public Body.

[para 6] On September 21, 2009, the Applicant received a letter from the Public Body requesting the remainder of the fee for processing the Applicant's request, along with a revised fee estimate. The Public Body indicated that the remainder of the responsive records would be released to the Applicant on receipt of the outstanding fee.

[para 7] On September 28, 2009, the Applicant wrote to this office requesting a review of the Public Body's response to its access request and noting that the Public Body had not fully responded to its request at that time.

[para 8] The Applicant sent the Public Body the requested funds on September 30, 2009. These funds were received by the Public Body on October 1, 2009. On October 2 and 5, 2009, the Public Body provided the Applicant with the last two batches of responsive records.

[para 9] The Commissioner authorized a portfolio officer to investigate and attempt to resolve the issues between the parties but this was unsuccessful and an inquiry was requested. As section 16 was used by the Public Body to sever some of the information requested by the Applicant, LaPrairie Group Contractors (Alberta) Ltd. (“the Affected Party”) was named as an Affected Party. Initial and rebuttal submissions were received from all parties.

[para 10] After the Public Body’s initial submission, it became clear that the Applicant and Public Body did not agree on what records remained at issue. The Public Body had provided to me only the records that it had provided to the Applicant with some information severed: pages 88, 638, 661, 1202, 1203, 1211, 1212, 1213, 1322, 1375, 1377, 1384, 1423, 1443, 1740, 1799, 2160, 2212, 2896, 2898, 2943, 2944, 3087, 3088, 3305-3322, 3464, 3465, 3468, 3484, 3499, 3501, 3502, 3506, 3507, 3610, and 3639 (which I will refer to as the first set of records). The Applicant argued that the Public Body had effectively narrowed the request, and confirmed that it had also requested an inquiry to deal with the records that were withheld in their entirety, which had been excluded from mediation with the agreement of both parties.

[para 11] I permitted all parties to provide a third submission to address the records withheld in their entirety. These records included approximately 2000 records, partly in hardcopy (in packages labeled 1, 2, 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 3, 3.1, 3.2, 4, 5, and 6) and partly on a CD (the Affected Party’s contract proposals and Mobilization Plans).

[para 12] Subsequent to these submissions, I requested clarification from the Public Body (the Affected Party and Applicant were both invited to reply as well) on the application of the cited exceptions to disclosure to the records at issue (letter dated May 18, 2011). As the Public Body did not adequately address my questions, especially with respect to the records withheld in their entirety, I sent a further letter dated December 22, 2011, in which I stated in part:

As already indicated in my earlier questions to the Public Body in this inquiry, while the Public Body has made assertions as to the application of exceptions to the records it is withholding in their entirety, it has, as I will illustrate further below, thus far not provided explanations for its application of exceptions that enable me to understand precisely which exceptions were applied to which parts of the records; neither has it provided satisfactory explanations as to how the claimed exceptions apply. Rather, it has provided the records to me and largely left it to me to try to analyse how the particular exceptions which it has cited in a general or global way might apply to particular parts of the records. Since the Public Body has the burden of proof to show that exceptions were properly applied before records can be withheld, and since, although it has been given an opportunity to do so, it has not thus far met this burden for significant parts of the

records, it is open to me to order disclosure of the parts of records for which no justification for withholding has been given.

[para 13] In response to my letter of December 22, 2011, the Public Body stated that

[i]t is unfortunate that the proposals, mobilization plans and records withheld in packages 2, 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 3, 3.1, 3.2, 4, 5, and 6 did not go through the review process and proceeded to inquiry without the benefit of a review. A review process would have provided the Public Body with the opportunity to reconsider our application of the FOIP Act.

...

Considering your comments, the records are currently being reviewed for additional disclosure. The Public Body is requesting additional time to review the records and consider additional disclosure.

[para 14] I received a new set of the records (which I will refer to as the second set of records) that the Public Body had previously withheld in their entirety, on February 8, 2012, along with additional arguments from the Public Body. The Public Body continued to withhold some of the records in their entirety (all of the records provided on the CD; all of packages 5 and 6; all but one page of package 1; and one page in package 3) but disclosed a large number of records, some in their entirety, and some with minimal severing. The Public Body continued to cite sections 16, 24, 25 and 27 to withhold information in the records at issue.

[para 15] By letter dated February 9, 2012, I received a letter from counsel now acting on behalf of the Affected Party (which had, until this time, been responding on its own behalf). The Affected Party expressed concerns about its ability to make arguments in support of the application of section 16(1) to its business information in the records at issue, as it did not have knowledge of many of the records being withheld. On my suggestion, the Affected Party requested a copy of the records at issue from the Public Body, in order to enable it to make more specific arguments. I also granted a request from the Applicant for further time to respond to the new arguments provided by both the Public Body and Affected Party.

II. RECORDS AT ISSUE

[para 16] The Public Body claims that pursuant to an agreement made in mediation, only a portion of the records requested are at issue, however, the Applicant confirmed in its submissions that all of the responsive records, including the records completely withheld by the Public Body are at issue in this inquiry.

[para 17] The Applicant sent a letter dated March 25, 2011, agreeing to narrow the records at issue in the inquiry to the following:

Pages 88, 638, 661, 1202, 1203, 1211, 1212, 1213, 1322, 1375, 1377, 1384, 1423, 1443, 1740, 1799, 2160, 2212, 2744, 2896, 2898, 2943, 2944, 3087, 3088, 3464,

3465, 3468, 3484, 3499, 3501, 3502, 3506, 3507, 3610, 3639, 4874, 4879, 4938, 4990, 4998, and all of the records withheld in their entirety (over 2000 pages).

[para 18] The Public Body had not provided records 2744, 4874, 4879, 4938, 4990 or 4998 to me per the inquiry process. Upon my requesting a copy of these records, the Public Body provided a copy, and informed me that they had not previously provided them to me as these records had already been disclosed in their entirety to the Applicant during the review process. As such, I will not consider these records in the inquiry.

[para 19] The Public Body disclosed record 4905 in its entirety to the Applicant on April 12, 2011. It also provided me with pages 3305-3322, which had been provided to the Applicant with some information severed; these pages are not listed by the Affected Party as remaining at issue. As noted, the Public Body disclosed a number of records in their entirety after again reviewing the records for disclosure. None of these records remain at issue in this inquiry.

[para 20] In its last submission, the Affected Party made arguments regarding some pages that had not been listed in the Public Body's most current index of records, nor were provided to the Applicant. The Applicant argued that these records were improperly withheld in their entirety; it cited pages 1481-1483, and 1251 and 1253 as examples. However, upon reviewing the second set of records again, in response to my December 22, 2011 letter, the Public Body stated that it found and removed a number of duplicate records. I have both versions of the second set of records: the original version in which the Public Body withheld every record in its entirety, and the version provided to both me and the Applicant in February 2012 after the Public Body had reviewed and severed the records. Comparing the two versions, I found records, which were provided to the Applicant with some severing, that are duplicates of pages *not* provided to the Applicant (pages 1759-1761 are duplicates of 1481-1483, and page 1828 is a duplicate of both 1251 and 1253). I infer that the all of the records not provided to the Applicant and not listed by the Public Body as having been withheld in their entirety were removed from the second set of records as duplicates.

[para 21] I note that pages 2123 and 2776 were not listed in the index of records but had information severed from the pages. As they were contained in the packages to which sections 16, 24 and 25 were applied as indicated by the index of records, I assumed the relevant information was severed under one or all of those provisions and considered below, the application of these provisions to those pages. Information from pages 1214 and 3445 was severed with an indication on the pages that the information was "not relevant", although the index of records indicates that sections 16, 24 or 25 were applied; I deal with this information with the other information severed as "not relevant". Page 110 is listed in the index of records but was not provided to me in the second set of records that the Public Body had re-reviewed and severed; however, I located the record in the original version of the second set of records and considered the Public Body's application of the exceptions to disclosure as indicated in the index of records.

III. ISSUES

[para 22] The Notice of Inquiry dated October 25, 2010 listed the issues for this inquiry as follows:

Issue A: Did the Public Body comply with section 11 of the Act (time limit for responding)?

Issue B: Did the Public Body properly extend the time limit for responding to a request, as authorized by section 14 of the Act (extending time limit for responding)?

Issue C: Does section 16 of the Act (disclosure harmful to business interests of a third party) apply to the records/information?

Issue D: Does section 17 of the Act (disclosure harmful to personal privacy) apply to the records/information?

Issue E: Did the Public Body properly apply section 24 of the Act (advice, etc.) to the records/information?

Issue F: Did the Public Body properly apply section 25 of the Act (disclosure harmful to economic and other interests of a public body) to the records/information?

[para 23] By letter dated April 11, I asked the parties to submit arguments with respect to the records withheld in their entirety, and added section 27 to the list of issues.

Issue G: Did the Public Body properly apply section 27 of the Act (privileged information) to the records/information?

IV. DISCUSSION OF ISSUES

Preliminary issue – Did the Public Body properly sever information from the responsive records as “not relevant”?

[para 24] The Public Body states that it considered some information in the second set of records to be “not relevant”, including information related to other highway maintenance contractors; and the names and contact information related to sub-contractors or other individuals who are not employees of the Affected Party.

[para 25] In Order 99-020, former Commissioner Clark stated that “even if an applicant requests access to a ‘record’, the public body may withhold portions as non-responsive, if those portions are clearly separate and distinct and entirely unrelated to the access request” (at para. 14).

[para 26] I agree that the information in the records relating to other highway maintenance contractors is not responsive to the Applicant's request, and that in the few pages that contain information related to other contractors, that information is separate and distinct from the responsive information. Therefore this information is not at issue in this inquiry.

[para 27] With respect to the names and contact information of various individuals, I note that some of the names and contact information *is* that of employees of the Affected Party, contrary to the Public Body's submission. Many other names and contact information is that of employees of sub-contractors and suppliers (presumably sub-contractors and suppliers of the Affected Party) as well as employees of a consulting firm hired by the Public Body to perform work related to the Affected Party's contract. Some examples include emails about work to be performed by the consulting firm, which was provided to the Applicant with the name and contact information of the particular consultant severed; and invoices from sub-contractors and suppliers with the name and signature of an employee of the sub-contractor or supplier severed. In my view, if the emails, invoices, etc. are responsive to the request, the names of the various organizations' employees are also responsive, and it is not appropriate to sever the names and contract information as "not relevant." I will consider below whether the names and contact information of these individuals should be severed under section 17.

Issue A: Did the Public Body comply with section 11 of the Act (time limit for responding)?

Issue B: Did the Public Body properly extend the time limit for responding to a request, as authorized by section 14 of the Act (extending time limit for responding)?

[para 28] Section 11 of the Act requires a public body to respond to an access request no later than 30 days after receiving the request. Section 11 of the Act states:

11(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless

(a) that time limit is extended under section 14, or

(b) the request has been transferred under section 15 to another public body.

(2) The failure of the head to respond to a request within the 30-day period or any extended period is to be treated as a decision to refuse access to the record.

[para 29] The Public Body did extend the timeline pursuant to section 14 of the Act the relevant portions of which state:

14(1) The head of a public body may extend the time for responding to a request for up to 30 days or, with the Commissioner's permission, for a longer period if

(a) the applicant does not give enough detail to enable the public body to identify a requested record,

(b) a large number of records are requested or must be searched and responding within the period set out in section 11 would unreasonably interfere with the operations of the public body,

(c) more time is needed to consult with a third party or another public body before deciding whether to grant access to a record, or

...

[para 30] The Public Body decided to exercise its discretion to extend the time for responding for 30 days because it needed to clarify the request with the Applicant, there was a large volume of responsive records, and time was needed to consult with third parties. The Public Body also asked for and was granted a further 30 day extension from this office. The Public Body advised the Applicant of this 60 day extension by letter on July 20, 2009. The Public Body indicated that the Public Body's deadline to respond to the Applicant's request was September 21, 2009. I have no further information that indicates that the Public Body requested a further extension beyond September 21, 2009 from this office at any time.

[para 31] As set out in the background section of this order, the records were sent by the Public Body to the Applicant in batches. By September 21, 2009, the Applicant had not yet received all of the responsive records but did receive a letter from the Public Body including a revised fee estimate (which related to a lower number of responsive records) and requesting the remainder of the fee. The Public Body stated that the remaining responsive records would be sent to the Applicant once the outstanding fee was paid.

[para 32] The Public Body argues that it is not required to release the records until the fees are paid. It cites section 6(3) of the Act, which states that access to records is subject to the payment of fee prescribed by the *Freedom of Information and Protection of Privacy Regulation* ("FOIP Regulation"), the FOIP regulation itself, and FOIP Bulletin (Number 1/Revised March 2009) on Fee Estimates in support of this position.

[para 33] Although the Public Body did not cite the specific section of the FOIP Regulation on which it relies, section 14 of the FOIP Regulation deals with the payment of fees. The relevant portions of those sections state:

14(1) Processing of a request ceases once a notice of estimate has been forwarded to an applicant and recommences immediately on the receipt of an agreement to pay the fee, and on the receipt

(a) of at least 50% of any estimated fee that exceeds \$150, and

...

...

(3) The balance of any fee owing is payable at the time the information is delivered to the applicant.

...

[para 34] Section 14 of the FOIP Regulation suspends the time for the Public Body's response from the time the Public Body provides the Applicant with a fee estimate, until that the Applicant agrees to pay the fee and provides 50% of the fee estimate to the Public Body. The Applicant accepted the estimate and provided 50% of the estimate to the Public Body on July 20, 2009.

[para 35] Section 14(3) of the Regulation states that the balance of the fee is owed by the Applicant to the Public Body once the information is delivered to the Applicant. The last batches of information were not delivered to the Applicant until October 5, 2009.

[para 36] Nothing in the FOIP Regulation states that the total fee must be paid before the Public Body is required to deliver the records to the Applicant. In fact, the FOIP Regulation seems to state the opposite.

[para 37] The FOIP Bulletin Number 1 referenced by the Public Body does state, "Records are not released to the applicant until the balance of the fees owing is paid." I find no support for this comment in either the Act or the FOIP Regulation. The Bulletin is not the Act or the FOIP Regulation, it is an internal publication written by the Government of Alberta to assist FOIP coordinators. Therefore, I am not bound by it.

[para 38] On my interpretation of the sections of the Act and the FOIP Regulations quoted above, the Public Body had no basis on which to conclude that it did not have to provide the Applicant with the records until the final fee was fully paid. However, even if I am incorrect and the entirety of the information did not need to be delivered prior to the Applicant being required to pay the full fee, the letter of September 21, 2009, extends the deadline previously set.

[para 39] The Public Body argues that it "...took all responsible steps necessary to respond to the access request within the time limit indicated by section 11 and properly extended by section 14 of the FOIP Act and therefore is not in breach of either section." It further stated:

The Public Body made every effort to respond to the Applicant within the time limit and as well made every effort to provide the Applicant with records as they became available. As well, the Public Body maintained regular communication with the Applicant.

[para 40] In support of its position, the Public Body cites Order F2007-012 which states that if a public body makes all reasonable steps to respond to the request in time, it is not in breach of section 11 despite missing the deadline. The Public Body also cites Order F2006-022 which defines "every reasonable effort" as an effort which is comprehensive and thorough and which a fair and rational person would find acceptable.

[para 41] On September 21, 2009 (the deadline to respond to the Applicant's request) the Public Body wrote to the Applicant and implied that it had the last responsive records and would provide those records once the full fee was paid. This, coupled with its argument that it did not have to provide this information to the Applicant until the fee

was paid, indicates to me that the only barrier in fully responding to the Applicant on September 21, 2009 was that the Applicant had not yet paid the full fee. Possibly the Public Body was relying on the FOIP Bulletin; despite this, it must comply with the legislation. I do not agree that withholding records in the erroneous belief that it did not have to provide the information to the Applicant until the fee was paid in full, is making a reasonable or any effort to respond to the Applicant within the time line set out in section 11 and extended in accordance with section 14 of the Act. If the Public Body could have responded in time but did not, that cannot be said to be making every reasonable effort.

[para 42] Therefore, I find that the Public Body properly extended its timeline set out in section 11 of the Act to September 21, 2009 but failed to meet this timeline. The Applicant requested that, if this was the finding, that its fee be returned pursuant to section 72(3)(c) of the Act. I note that the Public Body responded to the Applicant's request by October 5, 2009 (only two weeks past the deadline) and charged the Applicant a fee for 3000 pages of responsive records, when, in fact, there were 3300 pages of responsive records. Therefore, I do not find that returning the Applicant's fee is an appropriate remedy with respect to those records provided to the Applicant.

[para 43] However, I intend to order the Public Body to refund any fees associated with the second set of records that were initially withheld in their entirety and later "re-reviewed" and disclosed in part to the Applicant in February 2012. In my view, the Public Body failed to properly review those records for disclosure at the time of the Applicant's request, and the Applicant should not be charged any fee related to those records (including, but not limited to, fees for searching and locating).

Issue C: Does section 16 of the Act (disclosure harmful to business interests of a third party) apply to the records/information?

[para 44] Section 16 of the Act is a mandatory exception to disclosure. The Public Body severed information in the first set of records pursuant to sections 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i) and 16(1)(c)(iii). With respect to the second set of records, the Public Body has cited section 16(1) as applying to packages 2, 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 3, 3.1, 3.2, 5 and 6, without specifying a subsection; and section 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i) and (iii) as applying to the records provided on the CD (pages 1-1151).

[para 45] The arguments regarding the application of section 16(1) to the second set of records are fairly general; however the Public Body and Affected Party provided more specific arguments with respect to the information severed from the first set of records. I will address the specific arguments where they have been provided.

[para 46] Section 16(1) states:

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

(a) that would reveal

(i) trade secrets of a third party, or

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

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

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

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

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

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

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

[para 47] Before addressing the arguments for the application of section 16(1), I will address the Public Body's arguments for the application of section 16(3)(d). Section 16(3)(d) states:

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

...

(d) the information is in a record that is in the custody or under the control of the Provincial Archives of Alberta or the archives of a public body and has been in existence for 50 years or more.

[para 48] The Public Body stated, with respect to the application of section 16(3), that "[t]he records subject to this inquiry are dated between January 1, 2005 and December 31, 2007, and should be protected from disclosure under section 16." The Public Body also argues that although the records at issue "are not from the Provincial Archives there is an expectation that section 16 records would be protected from disclosure." I understand the Public Body's argument to be that section 16(3) creates a presumption that any records to which section 16(1) applies, which have been in existence for fewer than 50 years, should be withheld.

[para 49] The Applicant argues that section 16(3) clearly does not apply to the records at issue as they are not archive records. The Applicant also points out that the section of Service Alberta's *Freedom of Information and Protection of Privacy (FOIP) Guidelines and Practices Manual* cited by the Public Body as support of its position states that the provision "recognizes that the sensitivity of business information decreases with time, and so does the injury that might occur to the business interests of a third party as a result of disclosure", which is the argument the Applicant has been making with respect to all the information in the records at issue to which section 16(1) has been applied.

[para 50] I agree with the Applicant that section 16(3) has no application to the records at issue. The provision is an exception to an exception; in other words, even where sections 16(1) and 16(2) would normally apply to except certain information from

disclosure, they *do not* apply if section 16(3) applies. It does not follow that if section 16(3) *does not apply*, then either section 16(1) or section 16(2) *must* apply.

[para 51] Information is excepted from disclosure under section 16(1) *only* if the information reveals a type of information that under section 16(1)(a), was supplied in confidence (section 16(1)(b)), and the disclosure of which could reasonably be expected to lead to one of the outcomes listed in section 16(1)(c). Section 16(3) does not create an additional test or expectation of non-disclosure for the records at issue.

[para 52] Turning to the application of section 16(1), a three-part test for this provision was articulated in Order F2004-013:

Part 1: Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party?

Part 2: Was the information supplied, explicitly or implicitly, in confidence?

Part 3: Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)?

Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party?

[para 53] For section 16(1)(a) to apply, three criteria must be fulfilled:

1. the records must contain trade secrets, or commercial, financial, labour relations, scientific or technical information;
2. the disclosure must *reveal* this type of information. This means that the severed information must not already be in the public domain; and
3. the records must contain information that is “of a third party”

[Order F2004-013, at para. 11, quoting Order 99-008]

[para 54] The Public Body and the Affected Party both argued that the information in the records at issue includes commercial and financial information of the Affected Party. The Affected Party also refers to “strategic” and “technical” information in its submission and the Public Body applied section 16(1)(c)(iv) to most of the records in package 1 of the records withheld in their entirety. I will first consider whether the information in the records at issue is commercial, financial, labour relations or technical information.

[para 55] The Adjudicator in Order F2009-028, after reviewing orders from both this office and the Office of the Information and Privacy Commissioner of Ontario, concluded that

‘Commercial information’ is information belonging to a third party about its buying, selling or exchange of merchandise or services. ‘Financial information’ is

information belonging to a third party about its monetary resources and use and distribution of its monetary resources.

[Order F2009-028 at para. 42]

[para 56] In Order F2008-018, the Adjudicator defined technical information as including “information falling under the category of applied sciences or mechanical arts, and includes such topics as construction, operation or maintenance of a structure, process, equipment or thing” (Order F2008-018, at para. 67). The Affected Party did not specifically argue that the records contain technical information within the meaning of section 16(1)(a)(ii) other than to simply refer to technical information in its submission. I find that none of the information in the records at issue is technical information for the purposes of section 16(1)(a).

[para 57] The Affected Party described the severed information as including its unit prices for equipment and labour, site locations, costs, contract prices, price reduction rates and amounts, inflation adjustment rates, mark-up on third party invoices, certain accounts payable by the Affected Party to sub-contractors and suppliers, quoted prices from the sub-contractors and suppliers of the Affected Party, business strategy and internal corporate financial and organizational details.

[para 58] The Public Body applied section 16(1) to the proposals and mobilization plans, provided on the CD, in their entirety. In Order F2002-002, the Adjudicator considered the application of section 16(1) to entire proposals.

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

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

[Order F2002-002, at paras. 44-45]

[para 59] Similarly, the Affected Party’s proposals and mobilization plans contain information to which section 16(1) cannot be applied, such as copies of newspaper articles, resumes, and title pages.

[para 60] With the exception of the information provided to me on the CD (the Affected Party’s proposals and mobilization plans), the Public Body applied at least one other exception (24, 25 and/or 27) to the information to which section 16(1) was applied, without specifying which exception specifically applied to which severed information. Some of the severed information, such as overall cost reduction factors for all

contractors, is not information to which section 16(1) can be applied, since such overall reduction factors were not supplied by any particular contractor but rather created and applied by the Public Body.

[para 61] However, I find that much of the severed information in both sets of records, as well as much of the information in the proposals and mobilization plans on the CD, is commercial or financial information of the Affected Party: unit prices, contract prices, information about assets (monetary and non-monetary), information about insurance, accounts payable, site locations, liabilities, payment bonds, environmental management plans, demerits, fines, credit limits, inflation rates applied to the contracts, etc.

[para 62] As noted, the Public Body also withheld all but one page in package 1 (pages 1503-1514) under section 16(1)(iv) (labour relations information). I asked for clarification from the Public Body regarding these pages; however, the Public Body's response did not actually refer to labour relations information. The response is as follows:

Record 1502 is the record to which Records 1503 to 1514 is attached. These records related to the inflation factor adjustment for the third party and are not bid items in the RFP but are rather negotiated between the public body and the contractors.

Records 1503 – 1514 are not public knowledge and would not have been shared with the individual contractors.

Section 16(1)(c)(iv) applies to Records 1503 – 1514.

[para 63] I note that page 1502 was not attached to the records in package 1, but rather was found in package 3 with no indication that it was related to pages 1503-1514. Page 1502, which has been disclosed to the Applicant following the Public Body's second review of the records, is an email between Public Body employees, in which the attachment (pages 1503-1514) is referred to as a settlement agreement. Although the Public Body states that the records relate to an inflation factor adjustment negotiated between the Public Body and contractors, the Public Body was not a party to the settlement agreement in pages 1503-1514. The email (page 1502) indicates that this settlement agreement was sent to the Public Body by one of the parties to the agreement (neither party was the Affected Party or Public Body). The most reasonable interpretation of the Public Body's arguments I can see is that the settlement agreement affects the inflation factors that the Public Body negotiates with the contractors, and on this account it is "labour relations" information.

[para 64] Former Commissioner Work found in Order 2000-003, that "labour relations" includes (but is not limited to) "collective relations." As a settlement agreement connected to the collective bargaining process, I find that the information is related to labour relations and therefore may be labour relations information of the parties to the agreement. However, I find below that this information does not meet the requirement of either section 16(1)(b) and (c), so I do not need to settle this point.

[para 65] Some of the severed information, such as amounts payable by the Affected Party to sub-contractors or suppliers, is financial information of those other organizations in addition being financial information of the Affected Party. In a few instances (pages 684, 1240, and 2328), the Public Body has severed a quote supplied by another organization for a small project. It is not clear to me how this information is relevant to the request; however, as it is included in the responsive records, I assume that it is. The Public Body has not addressed or acknowledged that the records contain information of other organizations, other than the Affected Party (with the exception of the information of other highway maintenance contractors, severed as “not relevant”). However, I find that this is financial and commercial information of these other organizations and therefore falls within the terms of section 16(1).

[para 66] Pages 1202-1203 consist of an email from the Affected Party to the Public Body containing regional inflation adjustment numbers. A review of these pages indicates that the Affected Party obtained the inflation adjustments from a publicly available Government of Alberta source, which the Affected Party cites in the part of the email that was disclosed to the Applicant already. I do not see how this can be financial or commercial information of the Affected Party. Page 1203 also includes information, which the Affected Party states shows where it uses more fuel in its operations than the average highway maintenance contractor. I am not convinced that the severed information is sufficiently detailed to reveal the Affected Party’s business or operational plan for its contracted areas, or could otherwise be considered its financial or commercial information.

[para 67] Page 1799 contains the amounts to be paid to the Affected Party for location upgrades. The Affected Party asserts that the locations of its storage facilities are confidential and integral parts of its bid analysis. It states that the locations “form a part of the winter service delivery analysis and knowledge of the locations and their costs and deadhaul distances could unfairly advantage competitors.” It also argues that the price difference between two locations could be used to determine the unit amounts for those locations.

[para 68] I note that in some instances where the Affected Party argues that the disclosure of the severed information would reveal confidential storage locations, the actual locations appear to have already been disclosed to the Applicant (for example, pages 638 and 1799 severs only a dollar amount and not the locations of the Affected Party’s sites). Moreover, it is not evident how the severed information would point to the storage locations or unit prices for the storage locations.

[para 69] The Affected Party also argues that the upgrade costs could be used to underbid it in the future. It is not clear to me that the upgrade amounts on this page are the costs actually incurred by the Affected Party or simply an amount that the Public Body agreed to pay to cover part of the costs.

Conclusions regarding section 16(1)(a)

[para 70] I find that some of the information in the records at issue is commercial and financial information of the Affected Party, as well as commercial and financial information of other businesses; however, some of the information, such as site locations, and regional inflation factors, is not. As neither the Public Body nor the Affected Party have told me how the information of other businesses is responsive to the request, I can only assume that it is because the information is related to the Affected Party's highway maintenance contracts in some way.

[para 71] Pages 1503-1514 may contain labour relations information of a third party, but I do not need to decide the issue as the information in those pages does not meet the requirements of section 16(1)(b) or (c), for the reasons given below.

Was the information supplied, explicitly or implicitly, in confidence?

Information supplied to the Public Body

[para 72] In order for section 16(1) to apply, the information must be supplied by the third party to the public body, explicitly or implicitly in confidence. The Applicant argues that not all of the severed information was supplied by the Affected Party to the Public Body, but was rather the result of negotiation.

[para 73] In Order F2005-030, the Commissioner discussed the general principle that information negotiated between the Public Body and a third party is not *supplied to* the Public Body by the third party, with exceptions to that rule:

... Order 2000-005 held that, generally, information in an agreement that has been negotiated between a third party and a public body is not information that has been supplied to a public body. There are exceptions, where information supplied to the public body prior to or during negotiations is contained in the agreement in a relatively unchanged state, or is immutable, or where disclosure of information in an agreement would permit an applicant to make an accurate inference about information supplied to the public body during the negotiations (See Order 2000-005 at para 85; see also an extensive discussion of this topic in British Columbia Order 03-15.)

[Order 2005-030, at para. 24]

[para 74] The Applicant referred me to Order F2009-028, which provides a useful overview of the treatment of negotiated information under Alberta's FOIP Act and Ontario's FIPPA, which contains a similar provision to section 16(1). The Adjudicator concludes in Order F2009-028 that "previous orders of this office, and orders and judgments of other jurisdictions establish that "negotiating contractual terms" is not "supplying information" for the purposes of section 16(1)(b)" (at para. 59).

[para 75] A recent order from the BC Office of the Information and Privacy Commissioner also provides useful guidance for distinguishing between supplied and negotiated information. In F11-27, an access request was made for a contract between the public body and a third party contractor. The Adjudicator affirmed that the general

principle is that “information in an agreement negotiated between two parties does not, in the ordinary course, qualify as information that has been ‘supplied’ by someone to a public body” (F11-27, at para. 12). The Adjudicator went on to consider what is meant by ‘immutable information’:

The more specific issue here regarding the ‘supplied’ versus ‘negotiated’ test concerns whether the disputed information is immutable. Adjudicator Iyer discussed this issue in Order 01-39, a decision upheld by the Supreme Court of British Columbia on judicial review. She stated:

Information will be found to be supplied if it is relatively ‘immutable’ or not susceptible of change. ... A bid proposal may be ‘supplied’ by the third party during the tender process. However, if it is successful and is incorporated into or becomes the contract, it may become ‘negotiated’ information, since its presence in the contract signifies that the other party agreed to it.

In other words, information may originate from a single party and may not change significantly – or at all – when it is incorporated into the contract, but this does not necessarily mean that the information is ‘supplied’. The intention of s. 21(1)(b) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change, but, fortuitously, was not changed.

[Order F11-27, at para. 13]

[para 76] In Order F2009-028, the adjudicator considered whether information in an accepted bid is supplied because it would reveal commercial or financial information:

It is necessarily the case that what a party has agreed to is what it was prepared to agree to, and that it determined what it would agree to through some process of analysis of its resources and situation. That is the case with all contracts. Despite this, however, the cases are clear that negotiated contractual terms cannot be withheld under section 16. Partly, this is because, as discussed below, the contractual terms were not supplied by a third party, but were negotiated between the parties. This position can also be explained on the basis that, to the extent proposed contractual terms can be deduced from the final contractual terms, the former are not themselves commercial or financial information (other than what can be deduced from them about a party’s financial capabilities), but only become such if they are transformed into the final contractual terms.

[Order F2009-028, at para. 50]

[para 77] The “Highway Maintenance Request for Proposal Details” document, provided to me by the Public Body, expressly states that both the Unit Price Schedule and the Work Execution Plan provided by a contractor in its proposal, will form part of the contract. In many of the other records to which section 16(1) has been applied, the prices (including unit prices) proposed by the Affected Party as amendments to a contract are agreed to by the Public Body. In my view, this information is not *supplied* by the Affected Party for the purposes of section 16(1)(b).

[para 78] The Affected Party's affidavit states that information severed from pages 88, 661, 1377, 1423, 1740, 3464, 3465, 3468, 3484, 3499, 3501, 3502, 3506, 3507, and 3610 in the first set of records was the result of negotiations with the Public Body. Page 3465 also has severed out an approximate total amount of the Affected Party's applicable contracts, and the relative value of their bid price in comparison to competitors, which is the result of negotiation. In other records, the content of the records indicates that the severed information is the result of negotiations (pages 638, 2160, 2896, 2898). I therefore find that this information was not supplied to the Public Body by the Affected Party.

[para 79] As discussed above, negotiated information may be withheld under section 16(1) if it can be said to be "immutable" and would reveal information of the third party that would otherwise be withheld under the Act. The Affected Party argues that the information could be used by competitors to determine information such as unit prices, business strategy in dealing with the Public Body, and amounts tendered for two contract areas. It is not clear to me in any of the above pages how the disclosure of the negotiated information would reveal the information described. Therefore I find that this is not the type of information that falls within section 16(1)(a).

Conclusions regarding section 16(1)(b) – information supplied to the Public Body

[para 80] Information that forms part of the contract, and other negotiated information as discussed above, was not supplied to the Public Body within the terms of section 16(1)(b).

Information supplied in confidence

[para 81] With respect to the confidentiality requirement in section 16(1)(b), a test was established in Order 99-018 to determine when information is supplied implicitly in confidence. The third party must have a reasonable expectation of confidentiality with respect to the information that was supplied. Circumstances to consider include whether the information was

- Communicated to the public body on the basis that it was confidential and that it was to be kept confidential.
- Treated consistently in a manner that indicates a concern for its protection from disclosure by the third party prior to being communicated to the government organization.
- Not otherwise disclosed or available from sources to which the public has access.
- Prepared for a purpose which would not entail disclosure.

[Order 99-018 at para. 37, citing Ontario Order M-169]

[para 82] The Public Body's submission with respect to information supplied in confidence speaks mostly to information supplied during the RFP stage. However, most

of the records appear to have been created during the actual performance of the contract, as opposed to in response to the RFP.

[para 83] The Public Body cites *Managing Contracts under the FOIP Act* (a publication from Service Alberta), which states that “the Commissioner has also stated that, if proposals are required to be submitted in sealed envelopes, confidentiality is implied.” The Public Body’s RFP documents instruct contractors to provide their bids in separate sealed envelopes. I note that while the Commissioner indicates in Order 97-013 that sealed envelopes indicate confidentiality, it was only one of several factors considered. In that case, the public body also provided as evidence, an excerpt of its RFP document, which explicitly stated that information provided by bidders would be kept strictly confidential.

[para 84] The Public Body cites another excerpt from the same publication as support for its arguments:

If there is a specific provision in the Request for Proposal that states the information will be kept confidential, the Commissioner has considered information supplied in accordance with the Request for Proposal to have been supplied explicitly in confidence.

As the Public Body has failed to provide any evidence that the RFP contains a confidentiality clause, I am unable to see how the above excerpt is helpful.

[para 85] The Public Body also argues that its use of project management software that segregates data to ensure that Public Body staff and contractors can see only the financial and contract information in their area of responsibility indicates that the contractor information is treated as confidential. The Applicant responds that “the use of ‘Project Management computer software’ that apparently segregates data in some fashion is simply no answer to the important issues to be proven regarding confidentiality and harm.”

[para 86] While the use of this software indicates that contractor information is consistently treated so as to be protected from disclosure, per the second factor cited above, the fact that the software *can* protect confidential information does not mean that all information maintained by the software was in fact protected as confidential. Nor is it proof that the information was supplied in confidence or intended to be confidential.

[para 87] The Public Body states that it regards the financial and operational information provided by highway maintenance contractors in the bidding process as confidential. It then cites two provisions of the Alberta Transportation Standard Specifications for Highway Maintenance (Specifications). Section 51.2.48 states that

The Contractor shall treat data and information concerning the Minister or third parties, or the business activities of them, as confidential and not disclose, copy, use or permit the use of it at any time or in any way, other than for the purpose of performing this Contract.

The provision does not address how the Public Body is to treat the Contractor's information. The Affected Party states that this provision creates a broader expectation of confidentiality. I disagree; the Specifications are clear about to whom they apply. They do not, in this provision, address the conduct of the Public Body with respect to confidentiality.

[para 88] The other provision of the Specifications quoted by the Public Body, section 51.2.49, comes under the heading "Freedom of Information" and states the following:

Any information collected or generated by the Contractor in the course of the performance of the Contract, is the sole property of the public body and is subject to the Freedom of Information and Protection of Privacy Act as well as all other regulatory requirements governing the management of personal information. The Department when dealing with requests received under the Freedom of Information and Protection of Privacy Act, will contact the contractor prior to releasing any information to a third party under this legislation.

[para 89] The Applicant argues that this excerpt explicitly notifies contractors of the possibility that information will be disclosed under the FOIP Act. I agree with the Applicant that this excerpt does not support the Public Body's argument of confidentiality; however, neither does this excerpt necessarily negate any claim of confidentiality over information. In F2009-021, the adjudicator commented on the meaning of a similar clause in a government document:

In my view, a sentence reminding bidders that the Public Body has disclosure obligations under the Act, combined with the lack of a confidentiality clause in the RFP and covering letter, effectively put the Affected Party on notice that its business information may, in fact, *not* be kept confidential.

[Order F2009-021, at para. 22]

[para 90] However, the Applicant (which is also a highway maintenance contractor) indicates in its submissions that it accepts that proposals and unit price information for contracts currently in force is confidential information. It argues though, that an expectation of confidentiality at an early point in the tendering and negotiating process does not indicate that the information was intended to be confidential throughout the process, or that such an expectation could reasonably continue after the conclusion of the contract.

[para 91] It is possible that information may be supplied in confidence with an understanding that the confidentiality is time limited. However, the Applicant has not given me any reason to expect that such a time limit applied to information supplied to the Public Body by the Affected Party, nor do I have any other reason to expect this. The passage of time therefore is not a factor in determining whether the information in the records at issue was supplied in confidence, although it is a factor in determining whether harm would result from disclosure.

[para 92] Regarding the Affected Party's Proposals and Mobilization Plans (provided to me on the CD), there is evidence to indicate that it was implicitly supplied in confidence. Both the Affected Party and Applicant indicate that this type of information is communicated with the understanding that it would be confidential. I accept that it was protected from disclosure by the Public Body (based on the evidence provided by the Public Body regarding the sealed envelopes and contract management software, as well as its argument that it normally refuses to disclose this type of information), that it was not otherwise disclosed and that it was prepared for a purpose that does not entail disclosure.

[para 93] With respect to severed financial or commercial information of sub-contractors and suppliers in the records at issue, I have no arguments about this information or about the quotes provided by the other organizations (pages 684, 1240, and 2328) and there is no indication of confidentiality on the records, I have no basis to find that they were supplied in confidence.

[para 94] I also find that the settlement agreement (pages 1503-1514), even if it is labour relations information under section 16(1)(a), was not supplied in confidence. The agreement is between two parties, one of which supplied the agreement to the Public Body. In the email (page 1502) that refers to the agreement, there is no indication that the agreement was supplied to the Public Body in confidence or that it should remain confidential. Further, the agreement appears to have been made under the *Labour Relations Code*, which authorizes such an agreement to be provided to both parties to a dispute. There is no indication in that legislation that such an agreement would be confidential.

Conclusions regarding section 16(1)(b) – confidentiality

[para 95] I find that the information in the Proposals and Mobility Plans that was supplied to the Public Body was supplied in confidence. Regarding the remaining information severed in the records at issue, for the reasons given above, I am unable to conclude that the information was supplied to the Public Body in confidence. In the event that I am wrong, I will consider whether section 16(1)(c) applies to the information.

Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)?

[para 96] I turn to the arguments made by both the Public Body and Affected Party as to the possible harm resulting from disclosure, I find the following quote from the Assistant Commissioner of Ontario addressing arguments made on the application of section 17 of Ontario's *Freedom of Information and Protection of Privacy Act* (equivalent to Alberta's section 16) to be relevant:

Both the Ministry and SSHA make very general submissions about the section 17(1) harms and provide no explanation, let alone one that is "detailed and convincing", of how disclosure of the withheld information could reasonably be expected to lead to these harms. For example, nothing in the records or the representations indicates to me how disclosing the withheld information could

provide a competitor with the means “to determine the vendor’s profit margins and mark-ups”.

Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide “detailed and convincing” evidence to support this reasonable expectation, the point cannot be made too frequently that parties should not assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the Act.

...

While I can accept the Ministry’s and SSHA’s general concerns, that is that disclosure of specific pricing information or per diem rates paid by a government institution to a consultant or other contractor, may in some rare and limited circumstances, result in the harms set out in section 17(1)(a),(b) and (c), this is not such a case. Simply put, I find that the appellant has not provided detailed and convincing evidence to establish a reasonable expectation of any of the section 17(1)(a),(b) or (c) harms, and the evidence that is before me, including the records and representations, would not support such a conclusion.

[Order PO-2435, at p.9-10]

[para 97] The Public Body cited two provisions under section 16(1)(c), alleging that the disclosure of the information at issue could harm significantly the competitive position or interfere significantly with the negotiating position of the third party, or that it would result in undue financial loss or gain to any person or organization.

[para 98] In Order 98-013, the former Commissioner emphasized that the harm under section 16(1)(c)(i) must be significant, and that the Public Body must show evidence of the following:

- 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 99] The former Commissioner also emphasized that under section 16(1)(c)(iii), a financial loss or gain must be “undue” (at para. 32).

[para 100] In a previous order from this office, the former Commissioner found that a party claiming that disclosure would result in a harm listed under sections 20 or 25 of the Act must give evidence of a reasonable expectation of harm (Order F2005-009). This threshold is also relevant to the application of section 16, specifically in demonstrating one of the harms listed in section 16(1)(c)(i)-(iv) (see Order F2008-018 at para. 90). This threshold was upheld in *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, in which the Court stated at paragraph 66:

The Commissioner's decision did not prospectively require evidence of actual harm; the Commissioner required some evidence to support the contention that there was a risk of harm. At no point in his reasons does he suggest that evidence of actual harm is necessary.

The evidentiary standard that the Commissioner applied was appropriate. The legislation requires that there be a "reasonable expectation of harm." Bare arguments or submissions cannot establish a "reasonable expectation of harm." When interpreting similar legislation, courts in Ontario and Nova Scotia have held that there is an evidentiary burden on the party opposing disclosure based on expectation of harm: *Chesal v. Nova Scotia (Attorney General)*, at para. 56 Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner) at para. 26.

[para 101] In *Canada (Prime Minister) v. Canada (Information Commissioner)*, the Court also addressed the matter of evidence required to show harm from disclosure under the federal *Access to Information Act*:

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

[para 102] The Affected Party argues that the harm is that the Applicant will be privy to information that it can use in competition with the Affected Party for highway maintenance contracts. In an affidavit, the affiant submits that the Affected Party and the Applicant are direct competitors, and that the Applicant has in the past used contract information given to it by the Affected Party in confidence, to out-bid the Affected Party.

[para 103] The Affected Party's primary concern appears to be that disclosure would result in an unfair advantage for the Applicant in negotiating or bidding on future contracts. Specifically, the Affected Party argues that information about its confidential unit prices, site locations, costs, business strategy and internal corporate financial and organizational details would give the Applicant an unfair advantage in the future.

[para 104] The Public Body argues that highway maintenance contractors are in competition with each other and provide financial and/or commercial information only in confidence. It states further that "disclosure would provide competitors with insight into Third Party financial information" and "would allow competitors to use the unit pricing

to their advantage when bidding on future highway maintenance contracts and result in an uneven playing field when responding to an RFP.” However, the test for harm under section 16(1) is *significant* harm to the Affected Party’s competitive position, *significant* interference with the Affected Party’s negotiating position, or *undue* financial loss or gain to an organization.

[para 105] In the above-cited Ontario Order PO-2435, the Assistant Commissioner also found that

...the disclosure of this information could provide the competitors of the contractors with details of contractors’ financial arrangements with the government and might lead to the competitors putting in lower bids in response to future RFPs. However, in my view, a distinction can be drawn between revealing a consultant’s bid while the competitive process is underway and disclosing the financial details of contracts that have been actually signed. The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

[para 106] I agree with Ontario’s Assistant Commissioner in the decision cited above, that arguing against disclosure on the ground that it would result in a more competitive bidding process in a future RFP process is not sufficient to meet the threshold of “significant harm” or “undue financial loss or gain.”

[para 107] The Public Body argues that the information at issue, in conjunction with the 3000 records already disclosed or partially disclosed, provide insight into the Affected Party’s business operations. I only have the records at issue before me and the Public Body has not provided specific evidence as to the content of the records already disclosed. I agree that records need to be viewed as a whole to determine they have the aggregate effect of revealing commercial information (see Orders 98-006 and F2003-004); however, evidence must be given to support the application of section 16(1) for each record. No such evidence has been supplied.

[para 108] The Applicant argues that the bidding process is forward-looking and therefore the information at issue is “stale-dated” and “irrelevant to the competitive position of the Affected Party in future proposals or contracts.” It cites *Brainhunter (Ottawa) Inc. v. Canada (Attorney General)*, 2009 FC 1172, (“*Brainhunter*”) to support the claim that stale-dated information is not valuable. I do not interpret the Court in that case to be saying that past bidding information as a class of information has no value. In that case, the Court stated that the unredacted information at issue was not sufficiently coherent or useful to undermine the third party’s competitive position (at para. 38). Records related to the bidding process must still be considered on a case-by-case basis.

[para 109] In Order F2010-030, the adjudicator considered whether information about a livestock producer’s operation would be of sufficient value to a competitor such that the disclosure of the information could reasonably be expected to significantly harm the

producer's competitive position. In that order, the information was from 3-4 years in the past. The adjudicator stated

Lastly, in coming to my conclusion under section 16(1)(c)(i), I took into account that the information relates to the financial aid issued in the years 2007 and 2008.

Although I accept the Public Body's argument that this information may provide some information to a competitor regarding a Third Party's operation in 2011, in coming to my decision, I was also mindful that, the value and relevance of this information will diminish as the information ages.

[Order F2010-030, at para. 54]

[para 110] This Order was recently upheld in a decision of the Court of Queen's Bench, *Agriculture Financial Services Corporation v Alberta (Information and Privacy Commissioner)*, 2012 ABQB 397, in which the Court states at paragraph 59:

I find that AFSC did not provide any evidence of "harm", but rather expected that the adjudicator could, or should, have speculated as to potential harm. Generalized assertions as to harm are not evidence. The Adjudicator's decision is entitled to deference. ACFC did not meet the burden of proof under s. 71(1) of the Act.

[para 111] As evidence of harm, the Affected Party refers to an ongoing lawsuit between it and the Applicant. The Affected Party alleges that the Applicant wrongly used confidential information of the Affected Party, obtained when the Applicant was considering the purchase of some of the Affected Party's highway maintenance contracts, to undercut the Applicant in subsequent bids for the contracts. The Affected Party argues that the information allegedly used by the Applicant is the same type of information contained in the withheld records. The Affected Party provided me with its statement of claim filed by the Affected Party.

[para 112] The Applicant argues that the Affected Party's statement of claim is not persuasive in this inquiry. The Applicant states that it has filed a statement of defence denying the allegations of the Affected Party.

[para 113] The Affected Party's statement of claim does not contain arguments or evidence that are relevant to determining whether a harm contemplated under section 16(1)(c) could reasonably result from the disclosure of the information in the records at issue here. I agree with the Applicant that the fact that the Affected Party has filed the statement of claim is not evidence of harm for the purposes of section 16(1)(c).

[para 114] The Affected Party also stated that in the course of the litigation, the Applicant filed an application to extend the time limit for the filing and service of the parties' affidavits of records in order to avoid having to provide the Applicant's past bid information to the Affected Party until after the submission date for an upcoming bid process.

[para 115] The Affected Party says that the Applicant took the position that the production of its proposals for highway maintenance contracts to the Affected Party would allow the Affected Party, as a competitor, to use the information in a competing bid.

[para 116] Reviewing the document related to this litigation, provided by the Affected Party, it seems that in those particular circumstances, the Applicant was concerned about the production of its 2007 bid proposal for highway maintenance contracts in light of the fact that it, and perhaps the Affected Party, intended to bid on other highway maintenance contracts in 2008. Based on a Notice of Motion and affidavit, the Public Body was expected to publish an RFP in January 2008, with the bids due in March 2008.

[para 117] The Court subsequently issued an order that all records and information related to bids prepared by the parties for highway maintenance contracts shall be disclosed only to counsel for the parties and not the parties themselves, until after March 2008. After that date, the records and information may be treated in the same way as other information in the proceeding.

[para 118] In my view, the above fact situation is not persuasive. In the above facts, the two bids were less than a year apart; it is therefore more apparent that the 2007 bid information could be valuable for creating a bid in 2008. The Court did not amend the timeline for production, but only placed conditions on the production and only until the upcoming bid deadline closed. In the current matter, the information is five to seven years old. Moreover, I have not been told when the relevant contracts will be up for bidding again.

[para 119] As part of its arguments regarding the Court of Queen's Bench order, the Affected Party also provided me with a copy of *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63, without explanation as to the relevance of this case. The issue in that case is essentially whether a criminal conviction ought to be rebutted or taken as conclusive in a subsequent labour arbitration process. The decision concerns primarily the common law doctrines of issues estoppel, collateral attack and abuse of process. The Applicant argues that "an Order of the OIPC regarding the release of records (even assuming they include records at issue in the Queen's Bench Order) would in no way be contrary to the dictates of the Queen's Bench Order."

[para 120] It is not clear to me how the case cited by the Affected Party is relevant. The conditions placed on the provision of records by the Court of Queen's Bench expired in March 2008 and in any event, the Affected Party has not argued that the records relevant to the Court order are the same as those at issue here.

[para 121] The Applicant has provided detailed reasons for why the disclosure of the Affected Party's business information does not pose a reasonable risk of a harm set out in section 16(1)(c). Specifically, the Applicant states that expired unit price schedules and other bid information and contract costs are meaningless and irrelevant for future bids due to all of the possible changes in the contracts from bid year to bid year. The

Applicant states that there have been major revisions to the following areas since the contracts to which the records at issue relate:

- environmental requirements
- insurance coverage
- methods of payment
- hourly payment rules for snow and ice activities

[para 122] The Applicant also argues that over the course of a typical six-year contract some major expenses experience large price fluctuations. By way of example, the Applicant states that the bid value of one of the contract areas to which some of the records relate increased from \$17 million to \$28 million in six years due to expanding road networks, highway upgrades, aging roads, new technologies and government budgets.

[para 123] In contrast, the Public Body and Affected Party have failed to provide me with sufficient evidence to support their claims that the disclosure of the *specific information* in the records at issue could reasonably result in one of the harms contemplated in section 16(1)(c). The Affected Party states that although the information in the records is about contracts that are now several years old, the information may still reveal financial structure, business strategy, costs and pricing details that would impair its ability to submit competitive bids on similar contracts in the future. That may be the case; however, I do not have sufficient evidence to conclude that the disclosure of the Affected Party's financial structure or business strategy would lead to one of the results contemplated in section 16(1)(c). It is more clear how the disclosure of costs and pricing details could harm the Affected Party's position in future bidding; however, I agree with the Applicant and past orders of this office that the value of information such as that at issue here diminishes over time. Given the amount of time that has elapsed, it is unclear to me how the specific information at issue could be used by a competitor in a manner that would significantly harm the Affected Party's competitive position, or result in an undue financial loss or gain. The Applicant has provided evidence as to the number of factors that can change in the five to seven years since the information was current. More significantly, neither the Affected Party nor the Public Body, which have the burden of establishing that section 16 applies, have shown me how the information would be of value to competitors.

[para 124] The Affected Party further argued that

[i]t is obviously in the public interest that the government be able to receive information relating to matters such as these without such information becoming available for competitors such as [the Applicant] to access. Since the privatization of highway maintenance service, the public has been well served by having the government contract out to private parties such as our company. It can hardly be said to be in the public interest to detract from that.

[para 125] The Supreme Court of Canada recently address this issue with respect to the federal *Access to Information Act* in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3. The Court began its reasons with the following:

Broad rights of access to government information serve important public purposes. They help to ensure accountability and ultimately, it is hoped, to strengthen democracy. “Sunlight”, as Louis Brandeis put it so well, “is said to be the best of disinfectants” (“What Publicity Can Do”, *Harper’s Weekly*, December 20, 1913, p. 10).

Providing access to government information, however, also engages other public and private interests. Government, for example, collects information from third parties for regulatory purposes, information which may include trade secrets and other confidential commercial matters. Such information may be valuable to competitors and disclosing it may cause financial or other harm to the third party who had to provide it. Routine disclosure of such information might even ultimately discourage research and innovation. Thus, too single-minded a commitment to access to this sort of government information risks ignoring these interests and has the potential to inflict a lot of collateral damage. There must, therefore, be a balance between granting access to information and protecting these other interests in relation to some types of third party information.

The need for this balance is well illustrated by these appeals. They arise out of requests for information which had been provided to government by a manufacturer as part of the new drug approval process. In order to get approval to market new drugs, innovator pharmaceutical companies, such as the appellant Merck Frosst Canada Ltd. (“Merck”), are required to disclose a great deal of information to the government regulator, the respondent Health Canada, including a lot of material that they, with good reason, do not want to fall into their competitors’ hands. **But competitors, like everyone else in Canada, are entitled to the disclosure of government information under the *Access to Information Act*, R.S.C. 1985, c. A-1 (the “Act” or “ATI”).**

[at paras. 1-3, emphasis added]

[para 126] In that decision the Court found that while *in principle* the disclosure of information that could give a competitor an advantage in future transactions may fulfill the harms test in section 20(1)(c) of the federal *Access to Information Act* (equivalent to section 16(1)(c)), the affected party in that case failed to provide sufficient evidence to persuade the Court that the test was in fact met.

Conclusions on section 16(1)(c)

[para 127] I do not find the arguments of either the Public Body or Affected Party to be sufficient for me to find that there is a reasonable expectation of harm from the disclosure of the Affected Party’s information. I make the same finding regarding the small amount of information of other organizations, including the settlement agreement (pages 1503-1514).

Conclusions regarding section 16(1)

[para 128] I find that section 16(1) does not apply to the information severed in the records at issue.

Issue D: Does section 17 of the Act (disclosure harmful to personal privacy) apply to the records/information?

[para 129] I referred above to information the Public Body had withheld as “not relevant.” Except for the parts of this information that referred to highway maintenance contractors other than the Affected Party, I found that the severed information was responsive to the request. Much of this information consists of personal information within the terms of section 1(n) and section 17(1) of the Act.

[para 130] Section 1(n) defines personal information under the Act:

- (n) *“personal information” means recorded information about an identifiable individual, including*
 - i) *the individual’s name, home or business address or home or business telephone number,*
 - ii) *the individual’s race, national or ethnic origin, colour or religious or political beliefs or associations,*
 - iii) *the individual’s age, sex, marital status or family status,*
 - iv) *an identifying number, symbol or other particular assigned to the individual,*
 - v) *the individual’s fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
 - vi) *information about the individual’s health and health care history, including information about a physical or mental disability,*
 - vii) *information about the individual’s educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
 - viii) *anyone else’s opinions about the individual, and*
 - ix) *the individual’s personal views or opinions, except if they are about someone else;*

[para 131] The relevant portion of section 17 states:

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.

...

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

...

(d) *the personal information relates to employment or educational history*

...

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

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

(ii) *the disclosure of the name itself would reveal personal information about the third party,*

...

(5) *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...*

[para 132] There have been several orders concerning the application of section 17 to personal information about individuals acting in their professional capacities or performing work duties that is the personal information of these individuals, for example, their names and signatures. Order F2008-028 provides a helpful overview, noting that

Disclosure of the names, job titles and/or signatures of individuals acting in their *professional* capacities is not an unreasonable invasion of personal privacy (Order 2001-013 at para. 88; Order F2003-002 at para. 62; Order F2003-004 at paras. 264 and 265)

[Order F2008-028, para. 53, emphasis in original]

[para 133] The adjudicator also noted that this principle had been applied to information about employees of public bodies as well as other organizations, agents, sole proprietors, etc. He concluded that it is not an unreasonable invasion of privacy under section 17 to disclose personal information that reveals only that the individual was acting in a formal, representative, professional, official, public or employment capacity.

[para 134] Several orders of this office have also held that the disclosure of an individual's business contact information is not an unreasonable invasion of personal privacy (see Order F2009-038, at para. 46, and Order F2010-028, at para. 51).

[para 135] Most of the information that was severed as "not relevant" but which I find to be responsive to the request consists of the names, job titles, and contact information (telephone number and/or email) of employees of organizations other than the Affected Party. In one instance, the severed information was a comment made about a non-work issue (page 3468). In another instance, the severed information was a comment made about a Public Body employee's relationship with contractors (page 3413). Although the employee is not named, the detail in the comment could possibly reveal his identity. This comment is arguably about the employee's performance of his job duties. Earlier orders of this office have held that the performance of work duties is not personal information of employees unless it has a personal dimension. See, for example, Order F004-026.

[para 136] The Public Body also severed, as “not relevant” information about the salary of an unnamed former employee of the Affected Party (pages 1227 and 1992). After reviewing the records, I conclude that the unnamed former employee is not identifiable and therefore this information is not personal information to which section 17 can apply.

[para 137] Following the principles stated above, I find that the disclosure of the job titles and business contact information severed by the Public Body would not be an unreasonable invasion of the individuals’ privacy under section 17.

[para 138] The Public Body also stated with respect to the Affected Party’s contract proposals, provided to me on CD, that

[a]lthough Section 17 was not used to withhold information in the proposals for the highway maintenance contracts; section 17 records (resumes, employee workplace injuries, etc.) are contained within the proposals.

[para 139] I presume that the Public Body intends to leave it to me to apply section 17 to the appropriate information in the records. The Applicant clarified in its submission that it is not interested in obtaining employee resumes; as such, I will not consider whether the resumes could be disclosed.

[para 140] The Affected Party’s proposals include “key personnel” documents that describe the role, skills, city of residence and year of experience for certain employees of the Affected Party, much like a resume (pages 443-449 and 788-794 on the CD); a letter affirming certification of named employees (page 699); a photograph and signature of certain employees of the Affected Party on a document that relates to the Affected Party’s work (at pages 438 and 781); as well as copies of photographs and accompanying articles that had been published in some type of newspaper or newsletter relating to non-work events attended by employees of the Affected Party, and minor sports teams (one page includes “signatures” of young members of a team) (pages 650, 651, 653, 654, 655, 997, 999, 1000, and 1014).

[para 141] In the few instances where the Public Body has severed comments of a personal nature (on pages 3468 and 3413) made by or about the employee, I agree that those comments are the personal information of the respective employee.

[para 142] With respect to the photographs discussed above, they are all of poor quality, such that the faces are barely discernable. It is difficult to characterize the disclosure of copies of photographs that were previously published as an unreasonable invasion of privacy. However, I find that section 17(4)(g) applies to the photographs of the minor sport teams, which are accompanied by the children’s names, as well as the “signatures” of the young members of one of the teams (pages 650 and 655 on the CD). There are no factors that weigh in favour of disclosing this information, and so the information is properly withheld under section 17. The copies of published photographs of employees of the Affected Party relating to non-work activities do not have the names

of the employees listed. The photographs themselves are personal information of the individuals and there is no factor weighing in favour of disclosing the photographs (pages 651, 653, 654, 997, 999, 1000, and 1014 on the CD). I find that on the balance of probabilities, the disclosure would be an unreasonable invasion of privacy under section 17 and therefore cannot be withheld under this provision.

[para 143] Some of the information in the “key personnel” documents (pages 443-449, and 788-794 on the CD) relates to the individuals’ employment history, such as years of experience and lists of skills, as does the record of employee certification on page 699. Except for the name of the employee and job title on pages 443-449 and 788-794, this information is presumed to be an unreasonable invasion of privacy under section 17(4)(d). The work-related photographs (at pages 438 and 781 on the CD) reveal more than the performance of employment duties or responsibilities, and have a personal aspect, and section 17(4)(g) weighs against their disclosure. No factors weigh in favour of disclosing this information and so it is properly withheld under section 17. However, the disclosure of role and work duties listed for each individual is not an unreasonable invasion of personal information under section 17, for the reasons given above. This also applies to the signatures of the employees in the work-related document as they were presumably signing the document in their professional capacities.

[para 144] Lastly, section 17(4)(g) applies to the personal comments of or about Public Body employees on pages 3468 and 3413. There is no factor that weighs in favour of disclosure, so I find that this information must be withheld under section 17.

E: Did the Public Body properly apply section 24 of the Act (advice, etc.) to the records/information?

[para 145] The Public Body withheld information severed from page 1443 in the first set of records under section 24(1)(a), and has applied sections 24(1)(a) and 24(1)(b)(i) to all of the severed information in packages 2, 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, and 4. That section states

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

- (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
- (b) consultations or deliberations involving*
 - (i) officers or employees of a public body*

...

(2) This section does not apply to information that

- (f) is an instruction or guideline issued to the officers or employees of a public body,*

...

[para 146] In previous orders, the Commissioner has stated that the advice, proposals, recommendations, analyses or policy options under section 24(1)(a), and consultations or deliberations under section 24(1)(b) should:

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

[Order 96-006, at p.10]

[para 147] The first step in determining whether section 24(1)(a) and/or (b) were properly applied is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options (section 24(1)(a)), or consultations or deliberations between specified individuals (section 24(1)(b)). Neither section 24(1)(a) nor (b) apply to a decision itself (Orders 96-012, at paras. 31 and 37).

[para 148] In Order F2012-06, the adjudicator stated, citing former Commissioner Clark's interpretation of "consultations and deliberations", that

It is not enough that records record discussions or communications between employees of a public body; rather, a consultation takes place only when the individuals listed in section 24(1)(b) are asked for their views regarding a potential course of action, and a deliberation occurs when those individuals discuss a decision that they are responsible for, and are in the process of, making.

[Order F2012-06, at para. 115]

[para 149] In Order 97-007, former Commissioner Clark stated that

While there is some discretion exercised in choosing which facts are gathered, without more, a compilation of facts is not an analyses. Gathering pertinent factual information is only the first step that forms the basis of an analyses. It is also the common thread of "advice, proposals, recommendations, or policy options" because they all require, as a base, a compilation of pertinent facts.

[Order 97-007, at para. 44]

[para 150] This was cited in F2008-032, in which the adjudicator concluded that

'Advice' then, is the course of action put forward, while 'analyses' refers to the examination and evaluation of relevant information that forms, or will form, the basis of the advice, recommendations, proposals, and policy options as to a course of action.

[Order F2008-032, at para. 18]

[para 151] The Public Body applied section 24(1)(a) to a handwritten note on one page of the first set of records (page 1443). The note is clearly directed to an employee, although there is no indication of who authored it.

[para 152] With respect to the application of section 24(1)(a) and (b)(i) to the second set of records, the Public Body argues only that

- the records contain deliberations, advice, recommendations and actions that were taken by employees of the public body;
- the advice provided by the employees was provided as part of the work responsibilities of the employees and was directed to staff for the purpose they would take the appropriate action; and
- the records contain deliberations, advice, recommendations and approvals.

[para 153] The Public Body also provided me with excerpts from the *Annotated Freedom of Information and Protection of Privacy Act*, the FOIP Guidelines and Practices Manual, and excerpts of past Orders in which it was found that section 24 was properly applied. There is no accompanying explanation of how any of this applies to the specific records at issue.

[para 154] Most of the records in the packages to which section 24(1)(a) and (b) have been applied are internal memos written by employees of the Public Body, concerning requested changes to the Affected Party's highway maintenance contracts, as well as related internal emails. The Public Body has disclosed most of the content, but withheld prices, costs, and inflation factors.

[para 155] The Public Body has not provided me with any information regarding the employees who had written and received the memos and emails, so I have been left to determine the role of the Public Body employees involved from a review of the records.

[para 156] Many of the records are memos from a management employee to a senior management employee setting out a request from the Affected Party for a change to a contract. The memos often include other information such as whether a similar request was approved in the past or general costs for similar items or services, and close with a recommendation for approval of the request. Based on my review of the records, I accept that many of these memos recommend a course of action and were created by an employee whose responsibility it is to make the recommendations for an employee who has the authority to take the action. I made the same finding regarding the few pages of briefing notes created for other senior-level employees of the Public Body. I find that section 24(1)(a) applies to the information severed in the recommendations in those records. (I will list the corresponding pages at the end of this section of the order)

[para 157] Many of these memos have been signed by the individual tasked with making the decision. The recommendation then, becomes the decision and section 24(1)(a) no longer applies, although it will continue to apply to any information properly characterized as analysis (I will list the corresponding pages at the end of this section of the order). Similarly, one page (page 3281) consists of an email that the employee sent to himself containing notes for an upcoming meeting with the Affected Party. The notes in the email indicate the message the employee intends to communicate to the Affected Party regarding a decision that has already been made.

[para 158] In the majority of records containing recommendations that may or may not have been accepted, the additional information provided along with the recommendation is mere statements of facts, and not analyses as defined in past orders, as there is no examination or evaluation of the information. Similarly, the request for a contract amendment made by the Affected Party is not advice etc. that could be subject to section 24(1)(a). In a few cases, the severed information does not *reveal* anything more about a recommendation than the information that has already been disclosed.

[para 159] There are only a few instances in which I accept that the additional information involves an evaluation such that section 24(1)(a) would apply. (I will list the corresponding pages at the end of this section of the order)

[para 160] Some of the records are not, by themselves, records to which section 24(1)(a) or (b) could apply (e.g. a unit price schedule of the Affected Party). These *may* have been attachments to memos that contain recommendations, but if so, the memo has not been provided to me and there is no evidence that the attachment is part of such a document. Therefore section 24(1) does not apply to these records. (I will list the corresponding pages at the end of this section of the order)

[para 161] Some of the records are letters sent from one program area of the Public Body to another program area. In the letters, the content of which was mostly disclosed, the sender is requesting that the recipient arrange for a contract change to be approved, or in some instances, requesting the recipient to do some other thing. I have not been provided with any information as to the roles and responsibilities of these program areas or of the specific employees involved. I cannot determine, based on the records themselves, that the sender is providing advice or recommendations. In some instances it seems that the sender is simply passing on a decision to the program area responsible for taking the next step in the normal contract process, or requesting an action to be taken. In other instances, it seems that one employee is giving instructions to another within the terms of section 24(2)(f). I find that section 24(1) does not apply to these records. (I will list the corresponding pages at the end of this section of the order)

[para 162] Some of the records in these packages are emails and letters between Public Body employees. Some of the emails indicate deliberation between employees of various areas in the Public Body as to the appropriate course of action in a given situation. In a few instances, it is clear that one employee is requesting advice or an opinion from another employee in order to make a determination on a course of action. I agree that the disclosure of the severed information in these records would reveal advice and/or deliberations for the purposes of section 24(1)(a) and (b). Four pages of records relate to a consultation involving consultants hired by the Public Body to provide analysis and advice on behalf of the Public Body. (I will list the corresponding pages at the end of this section of the order)

[para 163] In many instances, it is not clear to me that opinions are being requested or discussed by employees who are in the process of making a decision about a course of

action; rather, many of the communications appear to be merely discussions between employees. In other cases, the severed information is merely factual information and does not reveal the substance of a deliberation or consultation. (I will list the corresponding pages at the end of this section of the order)

[para 164] Some of the pages to which section 24(1) has been applied are correspondence between the Affected Party and the Public Body, or between the Public Body and other organizations that appear to be sub-contractors or suppliers of the Affected Party. It is possible that some of these pages were attachments to memos or emails to which section 24(1)(a) or (b) may apply, but this is not evident from the records themselves, nor has it been argued. As a party to highway maintenance contracts, the Affected Party is not in a position to develop advice etc. on behalf the Public Body for the purposes of section 24(1)(a), and is clearly not an officer or employee of the Public Body for the purposes of section 24(1)(a) and (b); therefore, these provisions do not apply to correspondence from the Affected Party to the Public Body. (I will list the corresponding pages at the end of this section of the order)

[para 165] Similarly, section 24(1) does not apply to correspondence from the Public Body to the Affected party as the Public Body is not therein providing advice, recommendations etc. to one of the parties listed in section 24(1)(a), nor is there a deliberation or consultation between the parties listed in section 24(1)(b). (I will list the corresponding pages at the end of this section of the order)

[para 166] A few records seem to contain updates to senior management (pages 3346-3347 and 3349). There is nothing to indicate in the communications that the recipient has requested advice or is making a decision; rather it appears the recipient is merely being updated about a decision that has been made and action that is being taken. This does not meet the test for section 24(1)(a) or (b).

[para 167] Regarding the application of section 24(1)(a) to page 1443 in the first set of records, the Public Body argued that the severed information consists of advice from an employee of the Public Body as part of his or her work responsibilities, and was directed to other staff so that they may take appropriate action. In response to my request for further information, the Public Body added that “the severed wording supports that it is a recommendation and that it calls for a course of action and provides the rationale for the course of action.”

[para 168] I disagree. It is not clear from the record that the severed information consists of advice, proposals, recommendations, analyses or policy options. The Public Body has not given me information as to who authored the information, or to whom it was directed. Although it is obvious that the information is intended to direct a person to do something, the severed information could easily be an instruction given to a subordinate, within the terms of section 24(2)(f), or a reminder to a coworker of a past decision. I am not persuaded that this information meets the test under section 24(1)(a).

[para 169] With respect to the records to which section 24(1)(a) or (b) apply, by disclosing most of the records with minimal severing, the Public Body has, in a sense, already disclosed the recommendations and/or deliberations. However, in my view, the amounts (and other figures) severed from the records are significant such that even where all other information is disclosed, these figures still reveal the recommendations and deliberations.

Page numbers for the above-listed categories

[para 170] Information severed in a recommendation or as part of a consultation or deliberation to which section 24(1)(a) or (b) applies (described in paragraphs 156 and 162, above): 278, 361, 491-492 (except the last paragraph), 1181, 1223, 1227-1229, 1249, 1252, 1570-1571 (only the second paragraph in each), 1593, 1636, 1642, 1676, 1992-1994, 2114, 2128, 2134, 2143, 2161, 2162, 2175, 2320, 2321, 2327, 2339, 2357, 3335, 3336, 3321 (first severed item), 3394 (last paragraph), 3395, 3404, 3408, 3409, 3413-3415, 3449-3451, 3460, 3463, 3470, 3472, 3473, 3542, 3543, 3545, 3555, 3558, 3560, 3562, 3584, 3661, 3662, 3368, 3371, 3581, 3579, 711, 787, 530

[para 171] Information severed in a recommendation or as part of a consultation or deliberation where the decision has been made and section 24(1)(a) or (b) do not apply (described in paragraph 157, above): 16, 50-51, 61, 74, 108, 110, 44, 46, 47, 55, 193, 214, 223, 233, 235, 240, 249, 251, 261, 268, 283, 378, 379, 389, 392, 406, 410, 429, 447, 484, 485, 487, 1012, 1013, 1015, 1075, 1106, 1176, 1177, 1182-1183, 1257, 1258, 1261, 1276, 1280, 1299, 1301, 1305, 1306, 1313, 1314, 1316, 1337, 1338, 1340, 1350, 1353, 1357, 1358, 1360, 1363, 1364, 1367, 1379, 1380, 1382, 1395-1397, 1400, 1402, 1410, 1414, 1415, 1416, 1418, 1420, 1425, 1432, 1468, 1486, 1517, 1518, 1519-1521, 1522, 1542, 1543, 1565, 1584, 1586, 1591, 1592, 1594, 1599, 1601, 1610, 1612, 1619, 1621, 1626, 1628, 1645, 1678, 1684, 1685, 1687, 1703, 1708, 1709, 1719, 1721, 1794, 1796, 1800, 1827, 1828, 1832, 1833, 1838, 1839, 1841, 1842, 1847, 1848, 1850, 1871, 1873, 1878, 1880, 1882, 1885, 1901, 1903, 1937, 1947, 1990, 1991, 2069, 2070, 2110, 2111, 2115, 2116, 2117, 2118, 2129, 2139, 2148, 2463, 2171, 2176, 2205, 2208, 2216, 2217, 2238, 2267, 2269, 2271, 2272, 2273, 2286, 2294, 2295, 2301, 2303, 2305, 2311, 2314, 2328, 2346, 2366, 2368, 2369, 2370, 2371, 2430, 2434, 2435, 2345, 2437, 2445, 2446, 2462, 2476, 2477, 2484, 2498, 2499, 2501, 2518, 2519, 2536, 2537, 2553, 2559, 2564, 2565, 2579, 2591, 2592, 2613, 2649, 2676, 2683, 2707, 2708, 2709, 2710, 2727, 2728, 2763, 2764, 2766, 2767, 2795, 2796, 2851, 2852, 2854, 2882, 2894, 2948, 4957, 2970, 2996, 3017, 3018, 3019, 3020, 3021, 3025, 3062, 3085, 3105, 3119, 3130, 3131, 3166, 3182, 3229, 3280, 3281, 3290, 3593, 526, 527, 532, 533, 579, 583, 584, 588, 589, 664, 665, 668, 671, 678, 679, 701, 706, 728, 729, 735, 736, 757, 785, 786, 804, 806, 807, 812-814

[para 172] Information severed that would reveal the analysis or basis for the decision that has been made, and to which section 24(1)(a) or (b) applies (described in paragraph 159, above): 452-453 (except the last paragraph), 1179 (except the last paragraph), 1231-1232 (second paragraph), 1260 (chart), 1371, 1390 (last two paragraphs), 1394 (information under the “Background” heading), 27 (last paragraph), 28, 1607 (first

paragraph), 1644 (last two paragraphs), 2209, 2239, 2253 (under “Background” heading), 2276-2277 (all but the last paragraph on 2276), 2304, 2312, 2745-2746 (all but the last paragraph), 2815, 2916-2917 (second paragraph), 2921 (all except the chart), 2982, 3004, 3339, 3345, 3346 (top of the page)

[para 173] Information consisting only of background facts in a document (described in paragraph 158, above); appearing in documents that do not contain recommendations, consultations, deliberations but which *may* have been attachments to memos or similar documents (described in paragraph 160, above); or correspondence between Public Body employees that consists of discussions rather than consultations or deliberations (described at paragraph 163, above). Section 24(1) or (b) do not apply to these pages: 230-232, 416, 457-460, 855, 1180, 1195, 1233, 1239, 1240, 1254, 1265, 1268, 1365, 1372, 1403, 1405, 1484, 1485, 1494, 1498, 1553, 1557, 1597, 1606, 1801, 1942, 1961, 2045-2047, 2124, 2133, 2135, 2167, 2172, 2177, 2182, 2183, 2184, 2185, 2186-2190, 2220, 2254, 2308, 2309, 2632, 3287, 3288, 3298, 3323, 3364, 3387, 3389, 3393-3394 (except the last paragraph), 3397, 3406, 3407, 3436, 3444, 3547, 3548, 3549, 3550, 3555, 3559, 3667, 3669, 4827-4829, 4995 (first severed item), 5022

[para 174] Information in correspondence between the Public Body and Affected Party or between the Public Body and other organizations (described at paragraphs 164 and 165, above) to which section 24(1)(a) or (b) do not apply: 298, 299, 448, 856, 857, 1017, 1079, 1108, 1192, 1193, 1195-1199, 1216, 1219, 1284-1288, 1309-1311, 1355, 1369, 1370, 1759, 1760, 1915, 1917, 1919, 1920-1922, 1923, 1924, 1940, 1969, 1970, 1984, 1986, 1987, 2052, 2053, 2112, 2120-2122, 2360, 2361, 2843, 2860, 2880, 3106, 3329, 3331 (except the last paragraph), 3332, 3541, 3563, 3564, 3074, 3075, 3076, 3077, 3078, 3285, 3663, 4995 (last paragraph)

[para 175] Information in documents that consists of instructions or the communication of decisions that have already been made (described at paragraph 161, above) to which section 24(1)(a) or (b) do not apply: 118, 126, 137, 271, 291, 360, 397, 481-482, 1077, 1103, 1104, 1158, 1282, 1386, 1539, 1540, 1552, 1572, 1700, 1701, 1739, 1741-1744, 1851, 1852, 1853, 1888, 1908, 1911, 1912, 1913, 1923, 1926, 1932, 1933, 1939, 1951, 1956, 1959, 1958, 1960, 1962, 2042, 2043, 2050, 2221, 2222, 2281, 2296, 2529, 2630, 2631, 2705, 2797-2802, 2913, 2931, 2952-2954, 3274, 3275, 3278, 3283, 3292, 3293, 3295-3297, 3299, 3331 (last paragraph), 3337, 3338, 3343, 3344, 3351, 3380-3382, 3516, 3542, 3578, 3665, 4793, 503, 585, 591, 629, 680, 721, 792

Exercise of discretion

[para 176] Sections 24(1)(a) and (b) are discretionary provisions. In *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, 2010 SCC 23, the Supreme Court of Canada commented on the authority of Ontario’s Information and Privacy Commissioner to review a head’s exercise of discretion.

[para 177] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the

head of a public body. The Court also considered the following factors to relevant to the review of discretion:

- the decision was made in bad faith
- the decision was made for an improper purpose
- the decision took into account irrelevant considerations
- the decision failed to take into account relevant considerations

[para 178] In Orders F2008-032 and F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act:

While this case was decided under Ontario's legislation, in my view, it has equal application to Alberta's legislation. Section 72(2)(b) of Alberta's FOIP Act establishes that the Commissioner may require the head to reconsider a decision to refuse access in situations when the head is authorized to refuse access. A head is authorized to withhold information if a discretionary exception applies to information. Section 72(2)(b) provision states:

72(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:

(b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access...

[Order F2010-036, at para. 104]

[para 179] The adjudicator then considered how a public body's exercise of discretion had been treated in past orders of this office and concluded that

In my view, these approaches to review of the exercise of discretion are similar to that approved by the Supreme Court of Canada in relation to information not subject to solicitor-client privilege in *Ontario (Public Safety and Security)*. (at 104)

[Order F2010-036, at para. 104]

[para 180] The Public Body has stated that it considered the following factors in exercising its discretion to withhold the severed information:

- The Public Body withheld only financial information, unit pricing, inflation factors and hyper-inflation information; and accelerated payments and analysis related to these.
- The standard practice of the Public Body is not to disclosure [sic] information related to one contractor to another contractor.
- The applicant represents a competitor of the third party.
- Providing a fair playing field to all highway maintenance contractors.

- The impact the disclosure would have on the Public Body in the awarding of future highway maintenance contracts. Requests for Proposals will be issued for highway maintenance contracts on a regular basis.
- Government tenders the maintenance areas in “bundles” [30 contract maintenance areas with a value of approximately \$1.5 billion].

[para 181] I have rejected these arguments with respect to the application of section 16 (and also reject these arguments with respect to the application of section 25, below); I do not find them to be any more persuasive with respect to the exercise of discretion under section 24(1). The purpose of section 24(1) is to allow for frank discussions within the Public Body and to protect the deliberative process (Order 96-006). The Public Body has not provided an explanation of how withholding the severed information addresses these goals, especially as most of the content of the pages containing information to which section 24(1) has been applied has been disclosed. As such, I find that the Public Body did not properly exercise its discretion under this section. I will ask the Public Body to again exercise its discretion with respect to the information to which section 24(1) applies, and provide adequate reasons for withholding information under this provision, should it choose to continue to do so.

Issue F: Did the Public Body properly apply section 25 of the Act (disclosure harmful to economic and other interests of a public body) to the records/information?

[para 182] The Public Body withheld information in pages 88, 638, 661, 1202, 1203, 1211-1213, 1322, 1375, 1377, 1384, 1423, 1740, 1799, 2160, 2212, 2896, 2898, 2943, 2944, 3087, 3088, 3464, 3465, 3468, 3484, 3499, 3501, 3502, 3506, 3507, 3610 and 3639 in the first set of records, and the information severed in packages 2, 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 3, 3.1, 3.2, 4, and 5 of the second set of records under section 25(1)(c)(iii) of the Act.

[para 183] Section 25(1)(c)(iii) states:

25(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy, including the following information:

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

...

(iii) interfere with contractual or other negotiations of, the Government of Alberta or a public body

...

[para 184] In order to demonstrate that there is a reasonable expectation of harm, the following test must be satisfied:

- a) there must be a clear cause and effect relationship between the disclosure and the harm which is alleged;

- b) the harm caused by the disclosure must constitute “damage” or “detriment” to the matter and not simply hindrance or minimal interference; and
- c) the likelihood of harm must be genuine and conceivable.

[Order F2010-037, at para. 74]

[para 185] The Public Body’s arguments on the application of section 25(1)(c) are as follows:

- Information contained in the Proposals and Mobilization Plans is intertwined and reflected in the other records that were withheld. [The Public Body has since stated that it is no longer relying on section 25 to withhold the Proposals and Mobilization Plans]
- The information withheld can be correlated with contract negotiation or the management of the highway maintenance contracts themselves.
- It has met the harms test required in section 25(1)(c)(iii).
- The public body negotiates with contractors throughout the duration of the contract, e.g. regional inflation factors, unit price adjustments, contract adjustments, accelerated payments.
- The disclosure of any highway maintenance contractor’s financial and commercial information would harm the public body’s ability to negotiate fairly with the individual contractors.
- Financial and commercial information of the applicant, a competitor, has not been made public. As well, financial and commercial information of other highway maintenance contractors has not been made public.
- Request for Proposals will be issued for highway maintenance contracts on a regular basis.
- Currently six contractors are responsible for 30 contract maintenance areas with a value of approximately \$1.5 billion.
- Government tenders the maintenance areas in “bundles” because it makes logistical sense and also staggers the lengths of contracts to make the next round of bidding easier to administer.
- The applicant is a competitor and disclosure of third party financial and commercial information will allow the competitor to use the information to their advantage when bidding on future highway maintenance contracts resulting in an uneven playing field for those bidding on highway maintenance contracts.

[para 186] The Public Body also cites as support the following paragraphs from the Service Alberta publication *Guidelines and Practices Manual (2009)*:

Section 25(1)(c) provides similar protection for business enterprises in the public sector as is provided for private sector third parties under section 16(1)(c). To claim the exception, a public body must have objective grounds for believing that one of the harms listed will result from disclosure.

...

Interfere with contractual or other negotiations means to obstruct or make much more difficult the negotiation of a contract or other sort of agreement between the

public body or the government and a third party. The expectation of interference with negotiations as a result of disclosure must be reasonable and the negotiations have to be specific, not simply possible negotiations of a general kind in the future (see *IPC Order 98-005*).

[para 187] Although the Public Body has stated, in the third bullet above, that it has met the harms test required under section 25(1)(c)(iii), it has not provided me with sufficient evidence of that. The Public Body's main argument, which it provided as support for the application of section 16(1) but which is more applicable to section 25(1), is that if the information relating to regional inflation numbers was disclosed, other contractors would approach the Public Body for changes to existing contracts based on these numbers. This would interfere with the ability of the Public Body to negotiate the best terms for contracts. I assume that the Public Body's point that the financial and commercial information of other contractors has not been made public is intended to support the notion that disclosing the Affected Party's information would result in an "uneven playing field."

[para 188] In Order F2009-028 the Adjudicator considered whether the disclosure of past contractual terms harm a public body's ability to negotiate in the future:

In Order F2005-030, the Commissioner considered the argument that disclosure of particular positions adopted by a Public Body in one contract would harm its position to negotiate with other parties in similar matters:

I will deal with one other possible basis for relying on section 25 - that disclosures of particular positions taken by the Public Body in the contract would harm its ability to negotiate with other persons or organizations relative to similar matters. I am not sure section 25 applies to such situations. It does not necessarily follow from the fact a position is taken in one case that it would be obliged to take it in another, or that there would be pressure on the Public Body to take it that it could not resist.

In that case, while the Commissioner expressed some discomfort with the idea that disclosing contractual terms could result in interference with negotiations, the Commissioner was able to resolve the issue on other grounds. I agree with the Commissioner that the fact that a Public Body has agreed to particular terms in one case does not necessarily mean it is bound to accept them in all cases.

The Public Body argues that disclosing information about the proposals and the terms it agreed to will prejudice it in future negotiations. However, the evidence of the Public Body is that there are only two potential service providers who can tender the services required by the Public Body: Shoppers' and the Third Party. While the Public Body argues that disclosing information regarding the proposals of these organizations, which appears in the records at issue, would prejudice the Public Body, both Shoppers' and the Third Party are already aware of the terms they proposed to the Public Body. For example, the Third Party knows what it offered to the Public Body in the past, while Shoppers' is also aware of the terms it proposed. It is unclear how it would be detrimental to the negotiations of the Public Body if both bidders learned what the other had bid previously. For example, the successful bidder would not necessarily seek to emulate the unsuccessful bidder, while the unsuccessful bidder would be more likely to improve on the offer of the successful bidder if the information were disclosed.

Neither outcome would be likely to result in harm to the Public Body's negotiating position.

The fact that the other party to negotiations may seek a better terms for itself does not necessarily mean that the negotiating position of the Public Body is undermined. The other party to negotiations would likely attempt to do so in any event. Further, knowledge of the terms to which the Public Body has agreed in the past is more likely to lead the other side to improve their terms if it wishes to negotiate successfully. In Order PO-2843, a decision of the Office of the Information and Privacy Commissioner of Ontario, the Adjudicator made the point that disclosure of rates paid by service providers is more likely to lead parties seeking to negotiate with a public body to improve their offers, rather than reduce them:

Having considered the representations of the University and the appellant and carefully reviewed the records, I do not accept the argument put forward by the University. In my view, the University's position ignores the reality of how a competitive marketplace functions. In such a marketplace, the disclosure of the rates of an existing service provider would more likely lead to a competitor lowering its rates in order to secure a new agreement. The new lower cost would then be an economic benefit to the University. Senior Adjudicator Higgins, in addressing a similar argument by the University in Order PO-2758, stated:

McMaster's arguments ignore an absolutely fundamental fact of the marketplace. That is to say, if a competitor (or renewing party) truly wishes to secure a contract with McMaster, it will do so by charging lower fees to McMaster than its competitor, resulting in a net saving to McMaster. Similarly, in circumstances where McMaster is receiving payment, a competitor or renewing party would attempt to secure a contract by paying more than its rivals, resulting in financial gain for McMaster. To argue that disclosure of the rate information at issue would produce the opposite result flies in the face of commercial reality.

[Order F2009-028, at paras. 88-90]

[para 189] The Public Body distinguishes the circumstances in Order F2009-028 from the present case by pointing out that in Order F2009-028 there were only two bidders whereas in the present case there are six contractors for 30 contract maintenance areas and "the comparison is not the same as the contractors are not aware of each other's proposals."

[para 190] I agree with the Public Body that the circumstances in Order F2009-028 are different than those here, in that there are several contractors that bid on highway maintenance contracts. However, I do not agree that this distinction represents a flaw in the application of the basic principle being stated in that Order and the other decisions cited in that Order. It is not clear to me why the disclosure of the terms negotiated between the Public Body and the Affected Party would bind the Public Body to similar terms in the future. I accept the arguments of both the Public Body and Affected Party that competition for highway maintenance contracts is highly competitive. However, it seems to me that with such a competitive field, the disclosure of contract terms could lead to improved bids in the future, which does not harm the Public Body's negotiating position.

[para 191] I draw the same conclusion with respect to the argument that other contractors would approach the Public Body for changes to existing contracts; it is not clear to me why the Public Body would be bound to amend existing contracts if the information at issue is disclosed.

[para 192] None of these arguments meets the harms test for section 25(1) set out above. I cannot find based on these arguments that section 25(1) applies to any of the severed information in the records at issue.

Issue G: Did the Public Body properly apply section 27 of the Act (privileged information) to the records/information?

[para 193] The Public Body applied section 27(2) to all of the records in packages 5 and 6 of the second set of records. The Public Body states that these records are subject to solicitor-client privilege of the Affected Party.

[para 194] The Supreme Court of Canada stated in *Solosky v. The Queen* [1980] 1. S.C.R. 821 that in order to correctly apply solicitor-client privilege, the following criteria must be met:

- a. the document must be a communication between a solicitor and client;
- b. which entails the seeking or giving of legal advice; and
- c. which is intended to be confidential by the parties.

[para 195] None of the records in packages 5 and 6 are communications between a solicitor and client, nor do they seek or give legal advice. Therefore solicitor-client privilege cannot apply.

[para 196] The Affected Party claims that the records in package 5 are “without prejudice correspondence from counsel for [the Affected Party] to Alberta and as such [are] privileged and should not be produced.” Possibly, the Affected Party is arguing that the documents are subject to settlement negotiation privilege in relation to a litigious dispute.

[para 197] The test for settlement privilege set out in *J. Sopinka, S.N. Lederman and A.W. Bryant, The Law of Evidence in Canada* requires the following conditions be present for settlement privilege to apply:

- a) a litigious dispute must be in existence or within contemplation,
- b) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and
- c) the purpose of the communication must be to attempt to effect a settlement.

[para 198] As the Public Body referred only to solicitor-client privilege, and the Affected Party referred only to documents being “without prejudice” (I note that only two of the eight pages actually indicate that the contents are “without prejudice”), I am left to

guess whether there was a litigious dispute between the Public Body and Affected Party such that this privilege could possibly apply.

[para 199] Elsewhere in the records at issue, a reference was made to a formal dispute resolution process for disputes between the Public Body and a highway maintenance contractor. According to the *Dispute Resolution Process for Government of Alberta Construction Contracts*, which was in force during the relevant time period (2005-2007) and was provided to me by the Public Body, the dispute resolution process forms part of all highway maintenance contracts and by entering into such a contract, both the Public Body and the contractors agree to waive their rights to litigation unless all parties agree otherwise.

[para 200] Based on a review of the records, I accept that some of the information relates to a dispute for which the formal dispute resolution process had been initiated. I find that the last two paragraphs on page 4859 (one of the pages that has a reference to the communications being “without prejudice”) meet the test for settlement negotiation privilege and must be withheld under section 27(2).

[para 201] Based on the contents of the pages of packages 5 and 6, as well as the arguments provided to me, I cannot conclude that any privilege applies to the remaining information, and so I find that except in relation to the two noted paragraphs on page 4859, section 27(2) was not properly applied to the information in packages 5 and 6.

[para 202] The Public Body also applied sections 16(1) and 25(1) to the pages in these packages, but I have found above that those provisions do not apply.

[para 203] The Affected Party also argued that some of the information severed in the remaining records at issue also relates to “without prejudice” settlement discussions between the Affected Party and Public Body, pertaining to the Affected Party’s claim for additional compensation due to extra and unanticipated inflationary pressures in the contract areas. The Affected Party states that the privilege belongs to both parties to a dispute and that the Public Body cannot waive the privilege without the Affected Party’s consent.

[para 204] I note that the Public Body has not claimed privilege over the relevant information even though it is correspondence *from* the Public Body *to* the Affected Party in which the phrase “without prejudice” appears. However, jurisprudence supports the Affected Party’s statement that both parties involved in a settlement negotiation must consent to waive the privilege (see *B.C. Children's Hospital v. Air Products Canada Ltd.*, 2003 BCCA 177 at para. 16 citing *Walker v. Wilsher* (1889), 23 Q.B.D. 335).

[para 205] That said, the use of the phrase “without prejudice” does not, by itself, indicate that the communications are privileged:

[T]he rule which excludes documents marked ‘without prejudice’ has no application unless some person is in dispute or negotiation with another, and

terms are offered for the settlement of the dispute or negotiation...

[*Belanger v. Gilbert* (1984), 58 B.C.L.R. 191 at para. 6 (C.A.) citing *Re Daintrey, Ex p. Holt*, [1893] 2 Q.B. 116.]

[para 206] In the relevant records, the Affected Party has made a claim to the Public Body for extra compensation. According to the *Dispute Resolution Process for Government of Alberta Construction Contracts*, a claim may be made and may be settled prior to initiating the dispute resolution process. The Public Body noted in its submissions that there are often adjustments made to highway maintenance contracts during the course of the contract. If one party does not agree with the given compensation (e.g. if inflation rates change significantly in the middle of a contract period) one party may make a claim for additional compensation and both parties may come to an agreement. If no agreement is reached, the disputing party may initiate the dispute resolution process.

[para 207] In my view, a claim made by the Affected Party for additional compensation does not fulfill the first part of the test for settlement negotiation privilege set out above. Every request or “claim” for a contract adjustment does not mean that a litigious dispute is in contemplation. This is in contrast to the information to which I found above that settlement negotiation privilege does apply, as that information related to a dispute for which the dispute resolution process had already been initiated by one of the parties to the contract. Based on the contents of the records, I do not find that this is the case with respect to the other information the Affected Party argues was communicated “without prejudice.”

V. ORDER

[para 208] I make this Order under section 72 of the Act.

[para 209] I find that the Public Body did not properly apply section 16 to the information.

[para 210] I find that the Public Body must withhold the photos on pages 438, 650, 651, 653, 654, 655, 781, 997, 999, 1000, and 1014 on the CD, pages 443-449, 699, and 788-794 on the CD as described in paragraphs 142-144, as well as the information severed as “not relevant” on pages 3413 and 3468, under section 17. I order the Public Body to disclose information withheld as “not relevant” to which I found that section 17 did not apply, except the information about other highway maintenance contractors described in paragraph 26.

[para 211] I find that the severed information listed in paragraphs 170 and 172 falls within section 24(1). I further find that the Public Body did not properly exercise its discretion in relation to this information and direct it to re-exercise its discretion taking into account the appropriate factors and no irrelevant factors, as discussed in paragraph 181.

[para 212] I find that the Public Body did not properly apply section 24(1) to the information severed under this provision, other than as listed in paragraph 211.

[para 213] I find that the Public Body did not properly apply section 25 to any of the severed information in the records at issue.

[para 214] I find that the Public Body properly applied section 27(2) to some information on page 4859 as indicate at paragraph 200 above, but did not properly apply that section to the remaining information it severed under that provision.

[para 215] I order the Public Body to disclose the information severed from the records other than the information described in paragraphs 210, 211, and 214.

[para 216] I order the Public Body to refund the fees charged (if any) for any activity related to the second set of records.

[para 217] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Amanda Swanek
Adjudicator