

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2023-40

September 21, 2023

CITY OF CALGARY

Case File Numbers 022579, 023210, 023302, 024205, and 025428

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Summary: The City of Calgary (the Public Body) received several access requests under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for records regarding a request for proposals (RFP) to operate e-scooter businesses in Calgary. The Public Body notified Bird Canada (the Third Party), an e-Scooter business whose proposal was successful, that it was considering disclosing information from its proposal to the requestors who made access requests. Bird made representations as to why particular information should not be disclosed. The Public Body decided to grant access to some information that was the subject of objections by Bird, but agreed to withhold other information.

Bird asked the Commissioner to review the Public Body's decision to grant access to the requestors.

The Adjudicator determined that the information at issue was subject to section 16(1). The Adjudicator confirmed that the Public Body was required by section 16(1) of the FOIP Act to withhold the information at issue.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 16, 72

Authorities Cited: AB: Orders F2004-013, F2005-011, F2009-028, F2010-036, F2011-001, F2011-002, F2012-06, F2013-17, F2015-22, F2016-64, F2017-61

I. Background

[para 1] The City of Calgary (the Public Body) received several access requests under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for records regarding a request for proposals (RFP) to operate e-scooter “mobility as a service” businesses in Calgary. The Public Body notified Bird Canada (the Third Party), an e-Scooter mobility as a service business whose proposal was successful, that it was considering disclosing information from its proposal to the requestors who made access requests. Bird made representations as to why particular information should not be disclosed. The Public Body decided to grant access to some information that was the subject of objections by Bird, but agreed to withhold other information.

[para 2] Bird asked the Commissioner to review the Public Body’s decision to grant access to the information over which it had raised an objection.

[para 3] The Commissioner agreed to conduct an inquiry and delegated the authority to conduct it to me.

[para 4] The organizations that submitted the access requests were invited to participate in the inquiry; however, they withdrew and did not make submissions for the inquiry. Bird provided exchangeable submissions as well as *in camera* submissions. The Public Body also provided submissions.

II. Issue: Does section 16(1) of the FOIP Act apply to the information the Third Party seeks to have withheld from the Applicants?

[para 5] Section 16 is a mandatory exception to disclosure. It 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 6] The purpose of mandatory exceptions to disclosure for the commercial information of third parties in access to information legislation is set out in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy*¹ at page 313:

The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information.²

[para 7] This statement of the purpose of section 16 has been adopted in Orders F2009-028, F2010-036, F2011-001, F2011-002, F2012-06, F2013-17, F2015-22, F2016-64 and F2017-61 and found to inform the rationale behind the mandatory exception to disclosure created by section 16 of the FOIP Act. In these orders, it was determined that section 16 is intended to protect specific types of proprietary information or “informational assets” of third parties from disclosure, so that businesses may be confident that they can continue to invest in this kind of information and provide it to government when required..

[para 8] In Order F2005-011, the Commissioner adopted the approach to section 16 analysis developed in Order F2004-013 to determine whether information falls within the terms of section 16(1):

Order F2004-013 held that to qualify for the exception in section 16(1), a record must satisfy the following three-part test:

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)?

¹ 1980, vol. 2 (Toronto: Queen’s Printer, 1980)

[para 9] It is not enough that information meet only one part of the test; all requirements set out in section 16(1) must be met simultaneously before section 16(1) will apply.

[para 10] I turn now to the question of whether the information Bird seeks to have withheld from the requestors meets the requirements of sections 16(1)(a), (b), and (c) and therefore falls under section 16(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?

[para 11] The Public Body states:

The challenge faced by a public body in considering the application of section 16 has been noted in Order F2003-004 at paragraph 35, where the adjudicator stated (Tab 5): In previous Orders (see Order 99-017, for example), the Commissioner has said that a public body will nevertheless need evidence from a third party in order to meet the public body's burden of proof when refusing access under section 16(1). In Orders 96-013 and 97-009, the Commissioner recognized that many of the matters in issue are likely to be solely within the third party's knowledge, thereby making it necessary for the public body to rely on the third party's evidence. Moreover, when a third party objects to disclosure, it is in the third party's best interests to give evidence to support the public body's refusal to disclose information. 36. The Public Body determined, based on the information available to it, that the unredacted information failed to meet the section 16 test.

[...]

The Public Body submits that the Third Party has not met its burden of proof as to why the applicants do not have a right to access the records at issue

[para 12] In its exchangeable submissions Bird argues:

The Redacted Record contains trade secrets and commercial information, including information relating to the specifications of Bird's products and services. In fact, the form of the Records themselves is proprietary and a trade secret.

It is important to understand the context within which the Redacted Record was delivered to the City. Bird has developed and maintains a fleet of electric scooters ("E-Scooters") and accompanying mobile phone application (the "Bird App") to target the developing "mobility as a service" ("MaaS") marketplace. Bird's E-Scooters have been deployed in certain municipalities across Canada and the world, and riders may rent and ride Bird's E-Scooters primarily by booking through the Bird App ("E-Scooter Programs"). This model of convenient alternative personal transportation is a relatively new phenomenon, both in Canada and globally, and Bird is a Canadian start-up company attempting to gain market share in a rapidly growing industry.

The Redacted Record also contains trade secrets and proprietary information relating to Bird's products and services, including important specifications that would be of interest to Bird's competitors. Information about Bird's product and service specifications has been consistently treated by Bird as a trade secret. The information contained in the Redacted Record is not available from sources otherwise accessible by the public and could not be obtained by observation or independent study by a member of the public acting on his or her own.

[para 13] From the foregoing, I understand that the e-scooter “mobility as a service” or “MaaS” industry is new and highly competitive. In its *in camera* submissions, Bird provided specific and detailed arguments as to why it believes the information the Public Body has elected to disclose constitutes its trade secrets or confidential commercial information within the terms section 16(1).

[para 14] As Bird argues that the information at issue is a trade secret within the terms of the FOIP Act, I will first address this argument.

[para 15] Section 1(s) defines “trade secret” for the purposes of the FOIP Act. This provision states;

1 In this Act,

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

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

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

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

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

[para 16] As Bird argues that the information it seeks to have withheld is a trade secret, I will first consider whether the information falls within the terms of section 1(s) of the FOIP Act.

[para 17] From my review of the records at issue and Bird’s *in camera* submissions, I find that the information Bird seeks to have withheld reveals its business strategies, including strategies for creating successful proposals and also strategies for operating its e-scooter business.

[para 18] Bird, like other e-scooter businesses in its industry, cannot simply begin operating in a given municipality; Bird must first obtain a permit to operate its business from the municipality. Municipalities grant a limited number of permits through an RFP process. In the present case, the City of Calgary conducted an RFP process with the intention of granting permits to two e-scooter businesses to provide mobility as a service in Calgary. Bird’s proposal was one of two successful proposals. Bird argues that it is

successful in getting permits because of the strategies that could be revealed if the information in the records at issue is disclosed.

[para 19] A key component of a successful e-scooter business in the mobility as a service industry is writing and developing effective proposals so that the business may secure permits to operate in desirable locations. To be successful in the RFP process, Bird must be able to develop a proposal and answer a municipality's questions in such a way that a municipality will evaluate its proposal more highly than those of its competitors. Its proposal must enable it to stand out among competitors providing similar products. While municipalities will require competing a e-scooter business to address certain topics in their proposals; the e-scooter businesses may conduct their own research and develop their own strategies to present the required information in such a way as to ensure that the municipality ranks the proposal highly.

[para 20] The Public Body's RFP process requires participants to answer specific questions regarding the way they operate their businesses and also to describe the marketing strategies they will employ to achieve particular objectives. While the Public Body's questions and requirements may determine to a certain extent the content of the proposal, it is left to the participant to present its strategies in accordance with the proposal development strategies it believes are likely to be successful. In addition, some of the strategies an applicant uses to meet a municipality's requirements will make its proposal more attractive to a municipality than those of its competitors.

[para 21] A successful e-scooter business in the mobility as a service industry may also determine what a potential client municipality will value, even if the RFP is silent on the topic, and present this information in a proposal.

[para 22] Finally, an e-scooter business must also adopt or develop technology and enter partnerships so that users may access e-scooters. Bird is concerned that disclosing the information at issue could reveal information about its technology and partnerships that would not otherwise be available to its competitors in the mobility as a service industry.

[para 23] From my review of the information Bird seeks to have withheld, I am satisfied that it reveals Bird's strategies for winning RFPs, identifying and meeting client needs, and use of technology in its business. A competitor, particularly one who submitted a proposal in the same competition, could learn significant information about Bird's strategies and techniques for competing in RFPs by reviewing the information Bird seeks to have withheld.

[para 24] I find that the information at issue reveals methods and techniques Bird uses in operating its business and falls within the terms of section 1(s)(i).

[para 25] The next question is whether the information that would be revealed "derives independent economic value, actual or potential, from not being generally

known to anyone who can obtain economic value from its disclosure or use” as set out in section 1(s)(ii).

[para 26] I find that the information that would be revealed regarding Bird’s strategies if the information at issue were to be released, would likely be useful to competitors in creating successful proposals in RFP processes in other municipalities.

[para 27] As noted above, e-scooter businesses must compete with each other in order to operate in municipalities. I find that if Bird’s competitors were to learn its strategies for winning RFPs or making its e-scooters accessible to users through disclosure of the records at issue, they could reasonably be expected to adopt those strategies for the benefit of their own businesses, even though they did not invest time or money into developing them.

[para 28] I find that the information at issue has economic value to Bird, as it enables it to win RFPs and to operate its business in a competitive market.

[para 29] Section 1(s)(iii) requires that reasonable efforts to prevent the information in question from becoming generally known. As cited above, Bird states in its initial submissions:

The Redacted Record also contains trade secrets and proprietary information relating to Bird’s products and services, including important specifications that would be of interest to Bird’s competitors. Information about Bird’s product and service specifications has been consistently treated by Bird as a trade secret. The information contained in the Redacted Record is not available from sources otherwise accessible by the public and could not be obtained by observation or independent study by a member of the public acting on his or her own.

[para 30] The evidence before me is that Bird treats the information at issue as a trade secret and that it is not publicly known or inferable.

[para 31] I find that the terms of section 1(s)(iii) are met.

[para 32] The final requirement of section 1(s) is that disclosure would result in significant harm or undue financial loss or gain. I find that this requirement is met. If the information at issue were revealed to Bird’s competitors, they could use this information to compete against Bird, despite the fact that Bird developed the strategy through research and investment. I find that disclosure could reasonably be expected to result in undue financial loss to Bird, and undue financial gain to its competitors.

[para 33] For the reasons above, I find that the information Bird seeks to have withheld meets the definition of “trade secret”. As I find that the information at issue consists of Bird’s trade secrets, I also find that the requirements of section 16(1)(a) are met, given that section 16(1)(a) applies to “trade secrets” “of a third party”.

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

[para 34] Section 16(1)(b) requires that a third party supply information to a public body in confidence. The Public Body takes the position that the information at issue was supplied in confidence:

The Public Body considers that the Submission of the Third Party was supplied to the Public Body. The Public Body notes that the Application provides for confidential treatment of the Submission at article 4.5.2 as follows:

4.5.2 Confidential Information of Applicant Applicants are advised that The City is governed by Alberta's *Freedom of Information and Protection of Privacy Act* ("FOIP") and The City may be required to disclose all or part of an Applicant's Submission pursuant to FOIP. Applicants are also advised that FOIP may provide protection for confidential and proprietary business information. Applicants should identify any confidential or proprietary information in their Submission or any accompanying documentation and are advised to consult with their own legal advisors regarding the appropriate way in which such information should be identified. Subject to the provisions of FOIP, The City will make reasonable efforts to maintain the confidentiality of information identified as confidential or proprietary, except as otherwise required by law or by order of a court or tribunal or by order or decision of the Information and Privacy Commissioner (Alberta). Applicants are advised that their Submissions will, as necessary, be disclosed, on a confidential basis, to The City's advisers retained for the purpose of evaluating or participating in the evaluation of their Submissions. If an Applicant has any questions about the collection and use of personal information pursuant to this Application, questions are to be submitted to the City Contact.

The Public Body considers this provision to be an explicit indication that the confidential or proprietary information supplied and identified as confidential by a Third Party is intended to be treated as confidential.

The Public body notes that nearly all the pages of the Third Party's Submission are marked "Confidential" in the footer.

The confidentiality terms explicitly extend to The City's advisers retained for the purpose of evaluating or participating in the evaluation of the Submissions.

[para 35] From the foregoing, I understand that the Public Body advised participants in the RFP process to indicate whether information was being supplied in confidence and that Bird indicated that it was supplying the information at issue in confidence. Both Bird and the Public Body take the position that Bird supplied the information at issue in confidence.

[para 36] I find that Bird supplied its trade secrets within the terms of section 1(s) and section 16(1)(a) of the FOIP Act to the Public Body on express terms of confidence. I have also found above that the evidence establishes that it treats the information as a trade secret; that is, it treats the information as confidential and the information is not publicly known.

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

[para 37] Section 16(1)(c) contains an exhaustive list of harmful outcomes. If disclosure of information could reasonably be expected to result in one of them, then the requirements of section 16(c) are met.

[para 38] Bird argues:

Bird operates in the MaaS industry [mobility as a service], which is in its relative infancy in Canada. This startup industry is highly consolidated, with only a handful of key players. All new business in the marketplace is with Canadian municipalities, acquired through competitive public sector procurements. To operate in a municipality in Canada, Bird and its competitors require approval from the relevant municipal government, which is acquired through an RFP, like the Application.

As such, Bird's success or failure as a company is entirely dependent on its success or failure in the RFP process. In this highly competitive environment, Bird responds to five to 10 RFPs each year. Because of the nature of the market, typically the same group of companies, including Bird, respond to these RFPs. In fact, three of these competitors, Roll, Lime and Superpedestrian are seeking disclosure of the Redacted Record.

Despite heavy competition, Bird is the most successful E-Scooter bidder in Canada, operating in more municipalities than any of its competitors. This success is no coincidence, and driven by the RFP strategy that Bird has developed over several years, culminating in the information included in the Redacted Record.

[para 39] I have already found, above, that the information at issue constitutes Bird's "trade secrets" within the terms of section 1(s) of the FOIP Act. In coming to that conclusion, I found that Bird's competitors, particularly one that submitted a proposal in the same competition, could learn significant information about Bird's strategies and techniques for competing in RFPs by reviewing the information Bird seeks to have withheld. In addition, a competitor could learn Bird's strategies for operating an e-scooter business. Above, I found that this outcome would result in undue financial gain to the competitor, as the competitor would not have invested any resources to develop the information, but could use it to compete against Bird. I also find that disclosure would likely result in measurable financial loss to Bird, as the strategies in which it has invested would become less effective in RFP competitions due to competitors adopting them.

[para 40] I find that disclosure of the information at issue could reasonably be expected to result in the harms contemplated by sections 16(1)(c)(i) and (iii).

Conclusion

[para 41] As I find that the requirements of section 16(1) are met, I will confirm that the Public Body is required to withhold the records at issue.

III. ORDER

[para 42] I make this Order under section 72 of the Act.

[para 43] I confirm that the Public Body is required by section 16(1) of the FOIP Act to withhold the information at issue.

Teresa Cunningham
Adjudicator