ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2024-27

August 15, 2024

ENERGY AND MINERALS

Case File Number 026672

Office URL: www.oipc.ab.ca

Summary: On February 17, 2022, Energy and Minerals (the Public Body, formerly Energy) received the Applicant's request for access to:

> All records that Alberta Energy withheld on "non-responsive" grounds, in EN000-2020-G-53 and, the parts of all records that Alberta Energy redacted on "non-responsive" grounds, in EN000-2020-G-53.
>
> These "non-responsive" items are marked on the attached "Applicant's Copy" in EN000-2020-G-53. By my count, the "non-responsive" pages that Alberta Energy withheld are pages 9, 19, and 22 of the Applicant's Copy; the "non-responsive" redactions are on pages 7, 8, 24, and 28 of that file.
>
> Timeframe: February 28, 2020 to June 11, 2020

The Public Body responded to the access request on April 12, 2022 and advised that some information was being withheld under sections 16(1) (disclosure harmful to business interests) and 24(1) (advice from officials) of the FOIP Act. The Applicant requested that the Commissioner review whether the Public Body properly withheld the information it severed from the records.

The Adjudicator determined that the Public Body was not authorized or required to withhold the information from the Applicant and ordered the Public Body to give the Applicant access to the information it had severed.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 16, 24, 72

Authorities Cited: AB: Orders 99-018, F2011-018, F2012-06, F2015-12, F2015-29, F2018-32, F2019-17, F2022-62, F2024-17, **ON:** Order MO-2801

Cases Cited: *Beverage Industry Association of Newfoundland and Labrador v. Newfoundland and Labrador (Minister of Finance)*, 2019 NLSC 222 (CanLII); *Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31 (CanLII); *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), [2012] 1 SCR 23 (CanLII)

I. BACKGROUND

[para 1] On February 17, 2022, Energy and Minerals (the Public Body, formerly Energy) received the Applicant's request for access to:

> All records that Alberta Energy withheld on "non-responsive" grounds, in EN000-2020-G-53 and, the parts of all records that Alberta Energy redacted on "non-responsive" grounds, in EN000-2020-G-53.
>
> These "non-responsive" items are marked on the attached "Applicant's Copy" in EN000-2020-G-53. By my count, the "non-responsive" pages that Alberta Energy withheld are pages 9, 19, and 22 of the Applicant's Copy; the "non-responsive" redactions are on pages 7, 8, 24, and 28 of that file.
>
> Timeframe: February 28, 2020 to June 11, 2020

[para 2] The Public Body responded to the access request on April 12, 2022 and advised that some information was being withheld under sections 16(1) (disclosure harmful to business interests) and 24(1) (advice from officials) of the FOIP Act. The Applicant requested that the Commissioner review whether the Public Body properly withheld the information it severed from the records.

[para 3] The Commissioner assigned a senior information and privacy manager (SIPM) to investigate and attempt to settle the matter. At the conclusion of these reviews, the Applicant requested an inquiry for the Public Body's initial response to its access request (case file #024694) and the subsequent response to its request for information severed as "non-responsive" (case file #026672)

[para 4] The Commissioner agreed to conduct an inquiry regarding the Public Body's severing decisions and delegated the authority to conduct it to me. This Order disposes of the issues arising in relation to case file #026672.

II. ISSUES

ISSUE A: Does section 16 of the FOIP Act (disclosure harmful to business interests) require the Public Body to withhold information from the Applicant?

ISSUE B: Is the Public Body authorized to withhold information under section 24 of the FOIP Act (advice from officials) from the Applicant?

III: DISCUSSION OF ISSUES

ISSUE A: Does section 16 of the FOIP Act (disclosure harmful to business interests) require the Public Body to withhold information from the Applicant?

[para 5] The Public Body applied section 16 of the FOIP Act to a portion of a paragraph appearing on what is numbered record 6 in the records the Public Body provided for the inquiry. The information in question is the name of an organization and details of a request it had made to the Public Body.

[para 6] The Public Body argues:

> Section 16 is a mandatory exemption that protects certain types of information that could cause undue harm to the business interests of a third party. Under FOIP legislation, a third party is anyone other than a public body or the Applicant. The Act provides three criteria, or tests, that must all be met in order for section 16 to be applied to the information.
>
> Consultation with a third party is required only if a public body is considering disclosure of the third party's business information. In this case, a formal consultation was not conducted with the third party, as Energy has no intention of releasing this information given the harm to third party business interests that could potentially occur if this information were disclosed. As a result, Energy must demonstrate that the responsive records meet the criteria to be withheld under section 16.
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> To meet the test under section 16(1)(a)(ii), disclosure would need to reveal commercial, financial, labour relations, scientific or technical information of a third party business.
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> On page 7 (EN000-2022-G-14 – Working Copy- Page 6), a third party is requesting specific regulatory treatment. If disclosed, it would reveal the strategic direction of the third party, and its competitive position with respect to its application for development. Based on the criteria outlined for section 16(1)(a)(ii), the first test has been met.
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> To meet the test under section 16(1)(b), the information must be supplied implicitly or explicitly in confidence.
>
> Page 7 (EN000-2022-G-14 – Working Copy- Page 6) identifies that a letter sent by a third party to Energy and the Alberta Energy Regulator (AER); however, the letter was submitted: (1) after its application for development; and (2) with an expectation of confidentiality. This third party requested specific regulatory treatment for their project. It was confirmed with the program areas that neither the letter nor the fact that this third party made the request are publicly known. Based on the criteria outlined for section 16(1)(b), the second test has been met as there was an expectation of confidentiality.
>
> To meet the test under section 16(1)(c)(i)(ii), it must be demonstrated that the disclosure of information: (i) could harm the third party's competitive position or interfere significantly with negotiations [section 16(1)(c)(i)]; and (ii) result in similar information no longer being supplied to the public body when it is in the public interest that such information continue to be supplied [section 16(1)(c)(ii)].

Page 7 (EN000-2022-G-14 – Working Copy- Page 6) contains information relating to a third party's project, specifically its application for coal development. The application itself is available on AER'S public-facing website, but the fact that the third party requested specific regulatory treatment is not. Disclosure of this information could reasonably result in other mining companies making the same request, thus weakening the third party's competitive and negotiating position with respect to its project [section 16(1)(a)(c)(i)].

The application process is dependent upon third parties sharing their business information with Energy and other public bodies (AER) involved in the decision-making process. This includes supplemental information requested by the decision-making body, or volunteered by the third party to support its application. It is in the interest of Energy and other public bodies to ensure that such information remains confidential in order for companies to feel comfortable and continue supplying information with the knowledge that it will be maintained in a secure manner.

Based on the criteria outlined for sections 16(1)(c)(i)(ii), part three of the test criteria has been met.

[para 7] Section 16(1) of the FOIP Act requires a public body to withhold from an applicant certain types of information. 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 8] In Order F2018-32, the Adjudicator reviewed the purpose of section 16 and prior decisions of this office. She said:

> Section 16 applies "to protect the informational assets of third parties in situations where those assets have been supplied to government in confidence, and that harm could result from the disclosure of these informational assets." Previous orders have consistently stated that all three parts of the following test must be met in order for s. 16(1) to apply:
>
> 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?
>
> 2. Was the information supplied, explicitly or implicitly, in confidence?
>
> 3. Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)?

[para 9] I turn now to the question of whether the information the Public Body severed meets the terms of sections 16(1)(a), (b), and (c) of the FOIP Act.

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 10] Section 16(1)(a) and equivalent provisions in the access to information statutes of other provinces, have been interpreted in orders of access to information commissioners and in decisions of the Courts. For example, in *Beverage Industry Association of Newfoundland and Labrador v. Newfoundland and Labrador (Minister of Finance)*, 2019 NLSC 222 (CanLII), the Supreme Court of Newfoundland reviewed provisions equivalent to Alberta's section 16, and said the following:

> In his reasons, the Commissioner referred to decisions of Commissioners in other provinces supporting the position that the language in section 39 requires that the information be "of a third party"; and that this suggests that the third party must have a proprietary interest in that information. Further, in Court, the Department referred to *Corporate Express Canada Inc. v. Memorial University of Newfoundland*, 2015 NLCA 52, in which the Court of Appeal discussed section 27(1)(b) of *the Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1. That legislation has since been repealed and replaced by the Act. However, the Court of Appeal's interpretation of that provision remains relevant to section 39 of the Act. The Court of Appeal stated in the *Corporate Express* decision at paragraph 26, as follows:
>
> > Whether the requested information is the confidential information of a third party requires that the contents of the requested information be examined with a view to identifying the origin and ownership of the information. This is an essential part of the test for exemption set out in section 27(1)(b), along with whether the information was supplied by the third party explicitly or implicitly in confidence and whether it was treated consistently as confidential information by the third party. Application of the test involves fact finding, the application of legal principles and interpretation of the legislative provision. It is an objective determination, made in the context of the purpose of the legislation. Accordingly, I do not agree with Staples that the Judge erred in saying that the test under section 27(1)(b) is an objective one.
>
> Similarly, Justice Orsborn stated in *Atlantic Lottery Corp. v. Newfoundland and Labrador (Minister of Finance)* at paragraph 34, as follows:
>
> > It is not necessary for the disposition of this appeal to determine whether the NR information is owned by the retailers. The case law is clear that to come within the section

> 39 exception the information must be "of a third party" -- i.e. proprietary information of a third party. In its submission to the Commission, as already noted, ALC wrote that "the information that is being requested is proprietary information belonging exclusively to ALC that is deemed to be a highly valuable and confidential corporate asset of ALC..." In the face of this assertion, it would be difficult to maintain that the information is owned by the retailers; nonetheless, I express no final opinion on that matter.
>
> Based on these authorities, I conclude that the words "of a third party" in section 39 of the Act do suggest that the third party must have some form of a proprietary interest in the information. However, in my view, this does not mean the information need be solely owned by the third party.

In the foregoing case, the Court noted that privacy commissioners across Canada considered the phrase "of a third party", which appears in section 16(1)(a) of the FOIP Act, to mean that the information in question *belongs* to the third party supplying the information, or that it is proprietary to it, although the third party need not be the sole owner of the information.

[para 11] In Order F2015-12 of this office and in Order MO-2801, a decision of the Ontario Office of the Information and Privacy Commissioner following previous orders of that office, it was held that "of a third party" means that information "belongs" to a party.

[para 12] In Order MO-2801, the Adjudicator stated at paragraphs 186 – 188:

> As stated above, the only representations about section 11(a) by Peel was that the records contain financial information that was negotiated between the affected party and Peel and that this information is confidential business information i.e. unit pricing information.
>
> Adjudicator Laurel Cropley in Order PO-2620, relying on Order PO-1736 discussed part 2 of the test under section 11(a) as follows:
>
> > Based upon my review of the records and representations, I conclude that the information contained in the records does not "belong to" the OLGC. I find that I have not been provided with sufficient evidence to demonstrate that the mutually-generated, agreed-upon terms which formed part of a negotiation process constitute the intellectual property of the OLGC or are a trade secret of the OLGC. Other than a statement that the information was created at the expense of the OLGC and the other contracting parties, I have not been provided with evidence to indicate how the OLGC expended money, skill or effort to develop the information. Therefore, I find that the information sought to be withheld does not "belong to" the OLGC within the meaning of section 18(1)(a) of the [*Freedom of Information and Protection of Privacy Act* (the provincial Act), the equivalent to section 11(a) of the Act]. Part 2 of the test under that section has not, therefore, been met.
>
> I agree with this reasoning and find that the negotiated unit pricing information of the affected party's product in pages 1002-1003, 1005-1017, 1019-1020, 1023-1025, 1027-1031, and 1033-1044 of the records does not "belong to" Peel. I find that I have not been provided with sufficient evidence to demonstrate that the mutually-generated, agreed-upon terms which formed part of a negotiation process constitutes the proprietary information of Peel. I have not been provided with evidence to indicate how Peel expended money, skill or effort to develop this information. Part 2 of the test under section 11(a) has not been met. As no other exemptions have been claimed for these pages, I will order this information disclosed.

[para 13] The Adjudicator in the foregoing case concluded that the information at issue was not proprietary, as there was no evidence that the third party had expended money, skill or effort to develop it. As a result, the information did not fall within the terms of Ontario's equivalent provision to section 16 of Alberta's FOIP Act.

[para 14] I agree with the reasoning of the Adjudicator in Order MO-2801 that information may be said to belong to a third party if it can be said to have expended money, skill or effort to develop or obtain it for use in its business.

[para 15] Cited above, section 16(1)(a) applies to "trade secrets of a third party" or "commercial, financial, labour relations, scientific or technical information of a third party". These terms have been considered and interpreted in past orders of this office.

[para 16] Turning to the case before me, the information at issue is a note written by an employee of the Public Body about a third party mining company's application to develop coal. The note references a mining company's request for approval, a sentence-long summary of a brief argument the third party made regarding its application, and the name of the mining company.

[para 17] The Public Body acknowledges that the information at issue must meet the terms of section 16(1)(a), but does not explain how it does. It is unclear to me how the note could possibly be said to reveal a "trade secret" or "commercial, financial, labour relations, scientific or technical information" of the third party mining company.

[para 18] Section 1(s) of the FOIP Act 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 19] The information at issue does not reveal a formula, pattern, compilation, program, device, product, method, technique or process – a requirement if information is to fall within the terms of the foregoing provision.

[para 20] In Order F2018-32, the Adjudicator reviewed prior decisions of the office addressing "financial" and "commercial" information. She said:

> Compugen submits the information in dispute is financial and commercial information. NAIT says the information is commercial information. Previous orders have said that "commercial information" is information belonging to a third party, at the time the information is supplied, about its buying, selling or exchange of merchandise or services and "financial information" is information belonging to a third party about its monetary resources and use and distribution of its monetary resources.

Commercial information has been considered in past order to refer to a third party's "buying, selling, or exchange of merchandise or services" and "financial information" is information about a third party's monetary resources and its use and distribution of those resources. As noted above, the information is not simply "about the third party" – the information must belong to it in a sense.

[para 21] In Order F2011-018, the Adjudicator reviewed previous decisions which considered "commercial" and "labour relations" information within the terms of section 16(1)(a). He said:

> Definitions for "commercial information" and "labour relations information" were noted in Order F2010-013 (at paras. 19 and 24), being the Order that dealt with the Applicant's right of access to the AHW Notices. I refer to those same definitions for the purpose of reviewing the content of the Objection Letter. I find that the Objection Letter does not contain or reveal information about the "buying, selling or exchange of merchandise or services" (commercial information), and that it does not contain or reveal information about "employer/employee relations including especially matters connected with collective bargaining and associated activities" or "relationships within and between workers, working groups and their organizations and managers, employers and their organization" (labour relations information).

[para 22] I find the note cannot be construed as revealing labour relations information belonging to a third party as that term has been defined in past orders.

[para 23] In Order F2012-06, I reviewed past orders of this office regarding the meaning of "scientific" or "technical information" within the terms of section 16(1)(a) and said:

> In Order 2000-017, the former Commissioner defined "scientific information" as "information exhibiting the principles or methods of science". Scientific information for the purposes of section 16(1)(a), then, is information belonging to a third party that exhibits the principles or methods of science.
>
> The *Canadian Oxford Dictionary* offers the following definitions of the word "technical": "1. of or involving the mechanical arts and applied sciences 2. of or relating to a particular subject or craft". Previous decisions of this office differ from one another to a certain extent, given that Order F2008-018 considers technical information to refer to information relating to fields of applied sciences or mechanical arts, while Order F2002-002 holds information to be technical for the

> purposes of section 16(1)(a) provided it relates to particular subjects or crafts. Reconciling these two orders, technical information, is information belonging to a third party regarding the applied sciences, proprietary designs, methods, and technology.

[para 24] I am unable to identify information in the note that could be argued to reveal scientific or technical information belonging to the third party mining company.

[para 25] As I find that the information the Public Body severed is not a "trade secret" or "commercial, financial, labour relations, scientific or technical information", as those terms have been interpreted in past orders, and as the information is not "of the third party" as this phrase has been interpreted in past orders of this office (and in other Canadian jurisdictions) it does not meet the requirements of section 16(1)(a) of the FOIP Act.

Was the information supplied in confidence within the terms of section 16(1)(b)?

[para 26] I have already found that the information to which the Public Body applied section 16(1) does not meet the terms of section 16(1)(a). As a result, section 16(1)(b) cannot apply, given that it is referring to information meeting the terms of section 16(1)(a) and the information at issue does not meet the requirements of this provision. Nevertheless, for the sake of completeness, I will address whether the requirements of section 16(1)(b) would be met if it is assumed that the information meets the requirements of section 16(1)(a).

[para 27] The Public Body argues:

> Page 7 (EN000-2022-G-14 – Working Copy- Page 6) identifies that a letter sent by a third party to Energy and the Alberta Energy Regulator (AER); however, the letter was submitted: (1) after its application for development; and (2) with an expectation of confidentiality. This third party requested specific regulatory treatment for their project. It was confirmed with the program areas that neither the letter nor the fact that this third party made the request are publicly known. Based on the criteria outlined for section 16(1)(b), the second test has been met as there was an expectation of confidentiality.

[para 28] The Public Body asserts that the third company mining company requested particular treatment with "an expectation of confidentiality". It provides no explanation or evidence as to why a mining company would expect its application in relation to public lands to be confidential. Possibly, the Public Body takes the position that because its employees believe the public is unaware of the third party mining company's application, the application was submitted in confidence.

[para 29] Past orders of this office have interpreted the phrase, "supplied in confidence".

[para 30] In Order 99-018, former Commissioner Clark decided that the following factors should be considered in determining whether information has been supplied in confidence:

> In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:
>
> (1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.
>
> (2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the Third Party prior to being communicated to the government organization.
>
> (3) Not otherwise disclosed or available from sources to which the public has access.
>
> (4) Prepared for a purpose which would not entail disclosure.

[para 31] In *Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 the Alberta Court of Appeal determined that the test to determine whether a third party organization supplied information in confidence is a subjective one.

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

[para 32] In Order F2019-17, the Adjudicator said:

> In Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), 2014 SCC 31 (CanLII), the Supreme Court of Canada emphasized the importance of applying one test where the same language is used in provincial and federal access to information statutes (at para. 53). It cited its earlier decision, Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3 (CanLII) [2012] 1 S.C.R. 23, as making the same point.
>
> Because the language in section 16(1)(b) of the FOIP Act and section 20(1)(b) of the federal ATIA is similar, the Supreme Court's decisions in Air Atonabee and Merck Frosst are relevant to interpreting section 16(1)(b). In my view, those decisions can be read consistently with the Alberta Court of Appeal's decision in Imperial Oil. Where both parties agree that information was provided in confidence and there are no other factors to indicate otherwise, I accept that part of the test has been met. This is a more subjective test, as discussed in Imperial Oil. However, where there is extrinsic evidence, such as the records themselves, I must also consider that evidence. In my view, this is not inconsistent with Imperial Oil; otherwise the Court of Appeal could be interpreted as saying that extrinsic evidence should be ignored or discounted in favour of the parties' subjective positions. I don't read the Court's decision that way. Rather, I understand the Court in Imperial Oil saying that the intentions of the parties is a significant factor in the determination of confidentiality, and that the Commissioner (or her delegates) cannot make a finding contrary to those intentions without reason, such as evidence to the contrary.

[para 33] I agree with the interpretation of the Adjudicator in Order F2019-17.

[para 34] I note there is no evidence before me to suggest that the third party mining company submitted the application on the basis that it was confidential and that it was to be kept confidential or any indication that it thought that it did. The information at issue was generated by the Public Body and simply references the application.

[para 35] There is no evidence to establish that the information at issue, which consists of 1) the name of the third party mining company 2) the fact that it made an application and 3) asked for a specific disposition of the application has been treated consistently with concern for its protection.

[para 36] While the Public Body states that a "program area" believes that the information to which it applied section 16 is not known to the public, it has not explained why the area believes this to be the case. On the evidence before me, it appears entirely possible that members of the public may be aware of the application in relation to public lands. Certainly, the severed information reveals that the third party mining company was aware of the disposition of another company's application.

[para 37] There is no evidence before me in relation to the fourth factor set out in Order 99-018. I note that the application to which the severed information refers is in relation to public lands; I am unable to say that providing nonproprietary information in relation to applications to develop coal on public lands would not entail disclosure.

[para 38] To conclude, I find that there is no evidence to support finding that the third party supplied the information to which the note refers, in confidence.

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

[para 39] The Public Body argues that disclosure of the information at issue could lead other mining companies to copy the third party mining company's application. It reasons that other mining companies would then make the same request and that this would result in harm to the third party's negotiating position. The Public Body also argues that it is in its own interest, and that of other public bodies to keep the information "confidential" as third parties will then be "comfortable" in the knowledge that the public body will keep the information they send secure.

[para 40] I have already found that the information to which the Public Body has applied section 16(1) is not information falling within the terms of section 16(1)(a). For this reason alone, the harms test in section 16(1)(c) cannot be met. Section 16(1)(c) is not concerned with protecting information that does not belong to a third party in some way.

[para 41] Even if it is assumed that the information at issue meets the requirements of section 16(1)(a), there is no evidence that supports finding that the third party organization's negotiating or competitive position would be harmed as envisioned by the Public Body. While the Public Body asserts that it would be, it is not clear from its submissions whether the Public Body knows what the third party's strategy is, with

whom it is bargaining, negotiating, or competing, or what impact, if any, disclosure could have on the third party's position.

[para 42] In Order F2024-17, the Adjudicator said the following regarding the meaning of the phrase "could reasonably be expected to", which appears in section 16(1)(c) of the FOIP Act:

> The Supreme Court of Canada has clearly enunciated the test to be used in access-to-information legislation wherever the phrase "could reasonably be expected to" is found (such as in section 21(1)). In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), the Court stated:
>
> > Given that the statutory tests are expressed in identical language in provincial and federal access to information statutes, it is preferable to have only one further elaboration of that language; *Merck Frosst*, at para. 195:
> >
> > I am not persuaded that we should change the way this test has been expressed by the Federal Courts for such an extended period of time. Such a change would also affect other provisions because similar language to that in s. 20(1)(c) is employed in several other exemptions under the Act, including those relating to federal-provincial affairs (s. 14), international affairs and defence (s. 15), law enforcement and investigations (s. 16), safety of individuals (s. 17), and economic interests of Canada (s. 18). In addition, as the respondent points out, the "reasonable expectation of probable harm" test has been followed with respect to a number of similarly worded provincial access to information statutes. Accordingly, the legislative interpretation of this expression is of importance both to the application of many exemptions in the federal Act and to similarly worded provisions in various provincial statutes. [Emphasis added.]
> >
> > This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.
>
> The Supreme Court of Canada has made it clear that there is one evidentiary standard to be used wherever the phrase "could reasonably be expected to" appears in access-to-information legislation. There must be a reasonable expectation of probable harm, and the Public Body must provide sufficient evidence to show that the likelihood of any of the above scenarios is "considerably above" a mere possibility.

[para 43] I agree with the Adjudicator's analysis in the foregoing order. In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31 (CanLII) the Supreme Court of Canada established a uniform evidentiary standard in relation to the phrase "could reasonably be expected to" whenever it appears in legislation. A party seeking to meet the standard must establish a reasonable expectation of probable harm.

[para 44] The Public Body's arguments fall short of the standard set out in *Ontario (Community Safety and Correctional Services).* The Public Body's theory relies on other mining companies submitting proposals in relation to the same public land as the third party mining company. There is no evidence before me as to the likelihood of that. The Public Body's theory also rests on the idea that the third party mining company's argument is persuasive in relation to the correct disposition of its application to develop coal. I am unable to say that this would be the case. It may be that the Public Body has standards that must be met before it grants mining companies approvals to develop coal on public lands. It is possible that the third party mining company's argument would not be persuasive or successful, with the result that disclosure would not affect its position at all.

[para 45] As there is no evidence as to the number of mining companies in a position to make the same application as the third party mining company, and as it is unclear that the third party's request would have any prospect of success, I am unable to find that there is a reasonable likelihood that the third party mining company would suffer any harm to its negotiating position if the information at issue is disclosed.

[para 46] Cited above, the Public Body describes its decision to sever information under section 16(1) as enabling it to allow third party mining companies to "feel comfortable" when they communicate with the Public Body. The Public Body takes the position that third parties who make coal development applications may be reluctant to supply information to the Public Body in support of their coal development applications. Cited above, section 16(1)(c)(ii) is concerned with the harmful outcome that third parties will not provide information subject to section 16(1)(a) when it is in the public interest that the third party do so. Section 16 enables third parties to provide confidential proprietary information to a public body in particular circumstances when it is necessary to do so without the fear of disclosure. It is not intended to protect all communications about or by a third party business from disclosure.

[para 47] There is no evidence before me to suggest that companies would stop seeking permits to develop coal or fail to provide the information the Public Body requires in support of their applications if the information in the records is disclosed. It seems likely that mining companies will provide the information the Public Body needs to evaluate their applications if they wish to engage in coal development in Alberta. The Public Body appears to take the position that any information relating to a third party or submitted by a third party is subject to section 16(1); however, as discussed above, it is only information meeting the terms of section 16(1)(a), that also, simultaneously, meets the requirements of section 16(1)(b) and (c) that may be withheld under section 16(1).

[para 48] The Public Body states that it did not provide notice to the third party because it did not intend to disclose the information at issue. While I agree with the Public Body that it was not required to provide notice to the third party in this case, I do so for different reasons than it argued.

[para 49] In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), [2012] 1 SCR 23, the Supreme Court of Canada considered the circumstances in which the head of an institution (public body) in which the head is required to give notice to a third party business and when it is not. Cromwell J., speaking for the majority, said:

> The institutional head has a general duty, subject to the other provisions of the Act, to provide access to the record requested (s. 4(1)). This is the duty that Health Canada purported to carry out when it disclosed some documents without giving notice to Merck of its intention to do so. There is also a duty not to disclose information falling within the s. 20(1) exemptions. The notice provisions relate to how the institutional head carries out that duty.
>
> In considering a request for disclosure of third party information under the Act, the institutional head has four main possible courses of action (aside from the exercise of discretion under s. 20(6)), two of which engage the notice provisions. He or she may decide to (i) disclose the requested information without notice; (ii) refuse disclosure without notice; (iii) form an intention to disclose severed material with notice; or (iv) give notice because there is reason to believe that the record requested might contain exempted material. I will review each option briefly.
>
> I turn first to disclosure without notice. The practical realities as well as the text of the notice provision in s. 27(1) suggest a high threshold for disclosure without notice. Such disclosure is only justified in clear cases, that is, where the head, reviewing all the relevant evidence before him or her, concludes that there is no reason to believe that the record might contain material referred to in s. 20(1). The institutional head cannot repent after the fact from an ill-advised decision to disclose. Disclosure without notice and any harm that might follow are irreversible. Giving notice in all but clear cases reduces the risk of irremediable harm to the third party through inappropriate disclosure. Moreover, the institutional head may not have enough information to make a correct judgment about whether the information is exempt; the input of the third party may be required in order for the institutional head's decision to be properly informed. It is, therefore, both prudent and consistent with the text of the Act for the institutional head to disclose without notice only where the exemptions clearly cannot apply.

[para 50] In the foregoing case, the Court held that notice was not required in cases where the exemptions clearly *cannot* apply. The case before me is such a case. It is not even arguable that the note to which the Public Body applied section 16(1) falls within the scope of section 16(1), given that it does not contain information belonging to a third party in any sense. As a result, notice to the third party was, and is, not required.

Conclusion

[para 51] As the requirements of section 16(1) are not met, I find that the Public Body is not required to withhold the information to which it applied section 16(1).

ISSUE B: Is the Public Body authorized to withhold information under section 24 of the FOIP Act (advice from officials) from the Applicant?

[para 52] The Public Body severed some information from page 1 and page 6 under both sections 24(1)(a) and (b).

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

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

(b) consultations or deliberations involving

(i) officers or employees of a public body,

(ii) a member of the Executive Council, or

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

[…]

[para 53] In Order F2015-29, the Director of Adjudication interpreted sections 24(1)(a) and (b) of the FOIP Act and described the kinds of information that fall within the terms of these provisions. She said:

> The intent of section 24(1)(a) is to ensure that internal advice and like information may be *developed* for the use of a decision maker without interference. So long as the information described in section 24(1)(a) is developed by a public body, or for the benefit or use of a public body or a member of the Executive Counsel, by someone whose responsibility it is to do so, then the information falls under section 24(1)(a).
>
> A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision.

[para 54] I agree with the analysis of the Director of Adjudication as to the purpose and interpretation of section 24(1)(a) and agree that this provision applies to information intended to assist a decision maker to make a decision. Section 24(1)(a) protects the policy development process, but not the final decision regarding the policy.

[para 55] In Order F2022-62, the Adjudicator reviewed past orders and identified the kinds of information that have been found not to be subject to section 24(1)(a) or (b). She said:

> In addition to the requirements in those tests, sections 24(1)(a) and (b) apply only to the records (or parts thereof) that reveal substantive information about which advice was sought or consultations or deliberations were being held. Information such as the names of individuals involved in the advice or consultations, or dates, and information that reveals only the fact that advice is being sought or consultations held on a particular topic (and not the *substance* of the advice or consultations) cannot generally be withheld under section 24(1) (see Order F2004-026, at para. 71).

Bare recitation of facts or summaries of information also cannot be withheld under sections 24(1)(a) or (b) unless the facts are interwoven with the advice, proposals, recommendations etc. such that they cannot be separated (Order F2007-013 at para. 108, Decision F2014-D-01 at para. 48).

As well, section 24(1)(a) does not apply to a decision itself (Order 96-012, at para. 31).
The first step in determining whether section 24(1)(a) was properly applied is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options (which I will refer to as "advice etc.", section 24(1)(a)); and consultations or deliberations between specified individuals (section 24(1)(b)).

[para 56] The Public Body argues:

Section 24 is a discretionary exception intended to maintain candour in the giving of advice, recommendations, deliberations, consultation and related analytical alternatives for potential courses of action. Advice and recommendations may either be accepted or rejected as the deliberative process progresses towards a final decision. The purpose and intent of this section is to protect the government's decision or policy-making process. It applies to advice, proposals, recommendations, positions, as well as plans and criteria developed for the purpose of negotiations.

Section 24(1)(a) may be applied to statements of advice, proposals, recommendations, and analysis that aim to examine possible resolutions or options in dealing with an issue or problem, and is intended for the purpose of maintaining candor. This exception can be applied to advisory functions at all levels in the public body and applies to advice and recommendations obtained from outside the public body.

In order to qualify as advice, the information must meet the three-part test developed by the Information and Privacy Commissioner in Order 96-006, in that the information is 1) sought or expected, 2) directed towards taking an action, and 3) made to someone who can implement the action. The information withheld under section 24(1)(a) meets all three of these criteria.

The information withheld on page 2 (EN000-2022-G-14 – Working Copy –Page 1) shows an Environment and Protected Areas' employee's questions, seeking advice from an Energy employee. Disclosing this information, given the current sensitivity surrounding the subject matter, can reasonably be expected to impede the flow of advice and information essential for current deliberation and future decisions regarding resource development. The questions asked were in regard to a moratorium on new coal leasing and its effects on the processing of applications. These questions needed to be raised in order to support decision-making processes with regards to coal development, and to support advice to Environment and Protected Areas' officials, by gaining an understanding of the actions needed to be taken in light of the moratorium on new coal leasing. This specific information would help support the decision making process and the establishment of a recommended course of action.

The advice withheld on page 7 (EN000-2022-G-14 – Working Copy – Page 6) was created by members of the public body and the redacted information is a shorthand summary of a significant process leading up to the advice and decisions referenced in the information. This information and this document reveal deliberations involving employees of the public body and the summary could reasonably be expected to impede the flow of advice and information essential for current deliberation and future decisions regarding resource development. Disclosure of the advice can reasonably be expected to put a chill on future free and open advice to decision makers. This would have the effect of potentially providing incomplete advice to decision makers and result in deficient public policy. It is submitted therefore that the information was withheld for a proper and relevant purpose. It describes the advice provided by public servants and the subsequent deliberations the public service provided to decision makers regarding the potential impacts of the

> Coal Policy rescission. The advice arising from the deliberations would ultimately be presented to executive decision makers to support a policy decision. The policy decisions that were made are publicly available on government websites, along with the reasons for the decisions. However these discussions and analyses (et al.) are not publicly available and thus need to be protected in order to promote candid and substantive discussions on matters that relate to policy decisions.
>
> Section 24(1)(b)(i) allows a public body to withhold information where disclosure could reveal consultations and deliberations between officers and employees of the Government of Alberta. This exception to disclosure protects candour and fearless advice, including when employees may be formulating ideas. Protecting this deliberation when, for example, research and analysis reveals that earlier positions or advice were incorrect or previously unknown risks come to light, is essential to promoting a high-performing, productive public service.
>
> Disclosure of the redacted information on page 2 and page 7 can reasonably be expected to put a chill on future free and open deliberations among officials, which would ultimately negatively impact the advice given to decision makers. This would have the effect of potentially providing incomplete advice to decision makers and result in deficient public policy.

I turn now to the question of whether the information severed by the Public Body falls within the terms of sections 24(1)(a) and/or 24(1)(b) of the FOIP Act.

Page 1

[para 57] The information severed from page 1 is a series of questions from one employee to another employee regarding process.

[para 58] The Public Body has not provided any context to the information on page 1 that would enable me to find that the employee who asked the questions was deliberating as to what to decide or consulting for that purpose. If the employee was authorized to make a decision on behalf of the Public Body, I have not been told what it was or how the questions relate to it. As a result, I cannot find that section 24(1)(b) applies. The severed information does not contain information that could be construed as advice, proposals, recommendations, analyses or policy options. For this reason, I find that section 24(1)(a) does not apply.

Page 6

[para 59] The information severed from page 6 is factual information about a briefing note that had been written in the past. As discussed in Order F2022-62, a bare recitation of facts, without more, has been found not to meet the terms of section 24(1)(a) or (b) in past orders.

[para 60] On the evidence before me, I am unable to find that the severed information consists of advice, proposals, recommendations, analyses or policy options. I am also unable to say that the record reveals consultations or deliberations. If the information severed by the Public Body was intended to contribute to or influence a decision, I cannot say from reading the information what the decision was or who would make it.

[para 61] The Public Body has left the records to speak for themselves. In this case, the content of the records is inadequate to establish that section 24(1)(a) or (b) applies.

[para 62] To conclude, I find that the Public Body is not authorized to withhold information under section 24(1)(a) or (b).

IV. ORDER

[para 63] I make this Order under section 72 of the Act.

[para 64] I order the Public Body to give the Applicant access to the information it severed from the records.

[para 65] I order the Public Body to inform me within 50 days of receiving this order that it has complied with it.

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Teresa Cunningham
Adjudicator
/kh