ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2024-40

November 29, 2024

MEDICINE HAT COLLEGE

Case File Number 010924

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to Medicine Hat College (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). The Applicant stated:

> Please provide records, including reports, briefing notes, meeting notes and communication (email messages and other correspondence) pertaining to projects for an emergency notification system and mobile app through Campus Alberta Risk Assurance (CARA) and/or Mount Royal University. In particular, provide records specifying the following terms: CARA, RallyEngine, CutCom, AppArmor, SafeSpace, information escrow, sexual violence reporting, Virtual Safewalk, working/studying alone, work/study alone, SoloSafe, RFP, and proposal.

The Public Body searched for responsive records. It provided notice to the third parties named in the records. CutCom Software Inc. / AppArmor Inc. (the Third Party) objected to disclosure of information in the records. The Public Body decided to withhold some information under section 16(1) but decided it would disclose the remainder to the Applicant.

The Third Party requested review by the Commissioner of the Public Body's decision to grant access to information in the records.

The Adjudicator confirmed that none of the information the Public Body had decided to disclose was subject to section 16(1). She ordered the Public Body to disclose that information to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act,* R.S.A. 2000, c. F-25, ss. 16, 71, 72

Authorities Cited: AB: Orders F2015-12, F2018-32, **ON:** Order MO-2801

Cases Cited: *Beverage Industry Association of Newfoundland and Labrador v. Newfoundland and Labrador (Minister of Finance)*, 2019 NLSC 222 (CanLII)

I. BACKGROUND

[para 1] The Applicant made an access request to Medicine Hat College (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). The Applicant stated:

> Please provide records, including reports, briefing notes, meeting notes and communication (email messages and other correspondence) pertaining to projects for an emergency notification system and mobile app through Campus Alberta Risk Assurance (CARA) and/or Mount Royal University. In particular, provide records specifying the following terms: CARA, RallyEngine, CutCom, AppArmor, SafeSpace, information escrow, sexual violence reporting, Virtual Safewalk, working/studying alone, work/study alone, SoloSafe, RFP, and proposal.

[para 2] The Public Body searched for and located responsive records.

[para 3] The records contained communications with CutCom/AppArmor (the Third Party). The Public Body notified the Third Party of the access request and provided an opportunity to make written representations as to why the information should not be disclosed. The Third Party objected to the disclosure of all the records in question. The Public Body agreed to redact some of the information contained in the emails under section 16, including login information, information on the prototype, links to proposal, information related to testing of a product and list of customers.

[para 4] On November 7, 2018, the Third Party requested review by the Commissioner of the Public Body's decision to disclose the remaining information. The Commissioner agreed to conduct an inquiry and delegated the authority to conduct it to me.

[para 5] The Applicant did not request review of the Public Body's decision to sever information under section 16. As a result, the inquiry will address only the Public Body's decisions not to apply section 16 to the information that is the subject of the Third Party's objection.

[para 6] The Third Party did not make submissions for the inquiry.

II. ISSUE

Does section 16(1) (disclosure harmful to business interests) of the FOIP Act require the Public Body to withhold information from the Applicant?

[para 7] Section 16(1) of the FOIP Act requires a public body to withhold certain types of business information from an applicant. It states, in part:

> *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, including Alberta, 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. The interest is proprietary although the third party need not be the sole owner of the information.

[para 11] In both 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" as defined in section 1(s) 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] Finally, section 71(3) of the FOIP Act places the burden of proof in an inquiry on a third party seeking to challenge the decision of a public body that has decided to disclose information. It states, in part:

> *71(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,*
>
> > *(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and*
> >
> > *(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.*

[para 17] As noted in the background, the Third Party did not make submissions for the inquiry. From its "Request for Inquiry", I understand that it is concerned a competitor is attempting to obtain its pricing information by making the access request although it also notes that its pricing was not determined through conversations with the Public Body. (The records at issue are essentially conversations with the Public Body.) The Third Party states:

> Put frankly, the original freedom of information request was made by a competitor of ours who lost a major RFP in the province to a product line of ours, "AppArmor". The competitor is attempting to determine both what our pricing is and how our pricing was set for the province for that tender. Interestingly, the pricing was determined not as a result of any of the communications in the freedom of information act request; the pricing was based on our historical pricing for the over 60 higher education clients we had in the country at that point.
>
> Consequently, we view this request from the third party as a direct attack on our competitive position in the province. They are attempting to determine our pricing, our confidential conversations with customers and undermine our future negotiation efforts with the 15 different Post Secondary Institutions (PSIs) we work with in the province. Additionally, the tender was part of a public process; the requester (competitor) could access this information now without a freedom of information request which contain our confidential exchanges between us and the customer, Medicine Hat College. Subsequently, we view this as exceptionally unacceptable.

[para 18] The Third Party does not point to information in the records it considers its proprietary information. Its primary concern appears to be the disclosure of "confidential exchanges" between the Third Party and the Public Body. I am unable to

find that the exchanges to which the Third Party refers reveal any information subject to section 16(1)(a).

[para 19] The Public Body argues:

> The Respondent properly determined that Section 16(1) of FOIPPA was inapplicable to the Contested Sections of the Records as the information failed to meet the requirements of parts (a) and (b) of the test. Specifically, the information: is not the information of the Third Party; is not the technical or commercial information of the Third Party; has not been supplied by the Third Party to the Respondent; and, would not be revealed by its disclosure. Additionally, the information fails to meet the requirements of part (c) of the test, as the Third Party has failed to provide evidence that the disclosure of the information could reasonably be expected to significantly harm its competitive position or interfere with its negotiating position.

[para 20] From my review of the records at issue, I am unable to identify any information regarding the Third Party's pricing that could be said to be proprietary or to belong to it in any sense. I am also unable to identify *any* information meeting the terms of section 16(1)(a) in the records at issue. For this reason, I agree with the Public Body that the terms of section 16(1) are not met.

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

[para 21] As discussed above, the requirements of sections 16(1)(a), (b) and (c) must all be met before section 16(1) can be said to apply to information. As there is no information meeting the terms of section 16(1)(a) in the records, there is no question of any such information being supplied 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 22] As there is no information meeting the terms of section 16(1)(a) and (b) in the records, there is no question of the terms of section 16(1)(c) being met.

[para 23] I acknowledge that the Third Party is concerned about harm arising from disclosure of communications with the Public Body; however, the harm envisioned would come from disclosure of information not meeting the terms of section 16(1)(a) and (b).

[para 24] To conclude, I find that the Public Body is not required to withhold the information subject to the Third Party's objection.

III. ORDER

[para 25] I make this Order under section 72 of the Act. As I find that the Public Body is not required to withhold the information that is the subject of the objection, I order it to give the Applicant access to it.

[para 26] 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
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