ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2025-01

January 20, 2025

HEALTH

Case File Number 005512

Office URL: www.oipc.ab.ca

Summary: An Applicant made an access request to Health (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for records regarding discussions with DynaLIFEDx about the transfer of lab services.

The Public Body invited DynaLIFEDx (the Third Party) to provide input regarding disclosure of the records relating to the Third Party. After this consultation, the Public Body decided to apply section 16(1) to some, but not all, of the information in the responsive records. The Public Body informed the Third Party of its decisions regarding access, and the Third Party requested a review of the Public Body's decision to disclose some information. The Third Party subsequently requested an inquiry.

The inquiry considered the application of section 16(1) only to the information in dispute between the parties. The information to which the Public Body and Third Party agreed must be withheld under section 16(1) was not at issue.

The Adjudicator found that section 16(1) did not apply to the information at issue.

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

Orders Cited: AB: 2000-003, F2004-013, F2009-028, F2011-002, F2013-47, F2015-03, F2019-17, **BC**: F05-02, F11-27, **Ont**: PO-226, PO-2010, PO-3176

Case Cited: *ABC Benefits Corporation v. Alberta (Information and Privacy Commissioner)*, 2015 ABQB 662, *ABC Benefits Corporation v. Alberta (Information and Privacy Commissioner)*, 2022 ABQB 276, *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245, *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. 2851, *Canada (Information Commissioner) v. Canada (Prime Minister)*, 1992 CanLII 2414 (FC), [1992] F.C.J. No. 1054, *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475, *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603, *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 (CanLII), *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), 2012 SCC 3, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31

I. BACKGROUND

[para 1] On September 30, 2016, an Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to Health (the Public Body) for

> all documents, including e-mails, correspondence, memos, contracts, briefing notes, memos, etc., regarding discussions with Dynalife about the transfer of lab services.

The relevant date range is May 5, 2015 to September 30, 2016.

[para 2] Some of the records responsive to this request contain information about DynaLIFEDx (the Third Party). After consulting with the Third Party, the Public Body decided to withhold some information in the responsive records under section 16(1), and disclose some information. The Third Party requested a review of the Public Body's decision to disclose information.

[para 3] On June 7, 2024, the Commissioner informed the Public Body and the Third Party that she had decided to conduct an inquiry into the matter. The Applicant was invited to participate as an affected party. Although the Applicant agreed to participate, they did not provide submissions or any other response during the inquiry.

[para 4] As its initial submission, the Third Party provided a letter to this office, copied to the other parties, stating that it was providing an *in camera* submission. For the reasons discussed below, I did not accept the Third Party's *in camera* submission. While the Third Party was given another opportunity to provide its initial submission it declined to do so.

[para 5] The Public Body provided an initial submission. The Third Party and the Applicant were given opportunities to provide submissions in response to the Public Body's initial submission but declined to do so.

II. RECORDS AT ISSUE

[para 6] The record at issue consists of pages 73-116 of the records the Public Body located as responsive to the Applicant's access request. These pages comprise a single record. In its brief

initial submission, the Third Party has referred to the record as a "Draft Extension and Amending Agreement". This appears to be an accurate description of the record.

[para 7] From the Public Body's submission, I understand that the Public Body is not a party to the Agreement; rather the Agreement is between the Third Party and Alberta Health Services (AHS). However, the Public Body has custody and control of the copy of the Agreement at issue here.

[para 8] The Public Body determined that some information on pages 85-87 and 108-116 must be withheld under section 16(1). The Public Body determined that section 16(1) does not apply to the remaining information on pages 73-116. The Third Party objected to this latter determination, arguing that section 16(1) applies to all of the information in pages 73-116. The information at issue is the information in dispute between the parties: the information on pages 73-116 to which the Public Body has not applied section 16(1). The information to which the parties agree section 16(1) applies is not at issue.

[para 9] The Public Body has applied sections 17(1) and 24(1) to some information on pages 77, 88 and 89 of the records. As the Third Party has argued that section 16(1) applies to this information, it falls within the scope of this inquiry. However, I will only consider the application of section 16(1) to this information; the Public Body's application of other exceptions is not at issue.

III. ISSUES

[para 10] The Notice of Inquiry, dated August 8, 2024, sets out the following issue:

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

[para 11] Along with this issue, the Notice of Inquiry states:

> *Under section 71(3)(b) of the Act, the third party bears the burden of showing that the applicant has no right of access to the record under section 16(1).*

IV. DISCUSSION OF ISSUES

Preliminary issue – Parties' in camera submissions

[para 12] With its request for review, the Third Party had provided detailed submissions that included copies of the records at issue and arguments that revealed the content of the records at issue (request for review and submissions dated March 2017). It is the practice of this office to include a copy of a third party's request for review and any attachments to the Notice of Inquiry, which is exchanged with all parties to the inquiry. In response to a letter in which I informed the Third Party that the Applicant had been invited to participate in the inquiry, the Third Party asked that much of the materials attached to its request for review be redacted as they include the records at issue or refer to their content.

[para 13] I found the Third Party's request to be reasonable; to satisfy this request, I informed the Third Party and the other parties, via the Notice of Inquiry, that only the Third Party's request for review form and one attachment (totalling 5 pages) would be brought forward to the inquiry. Those documents were included with the Notice of Inquiry. The Third Party was advised in the Notice, that the attachments removed from its request for review would not be before me in the inquiry, and that the Third Party would have an opportunity to provide any arguments and evidence it wants before me in its submissions, in accordance with the inquiry procedures.

[para 14] For its initial submission, the Third Party provided a letter exchanged with the other parties, stating that it would be relying on the submissions previously provided with its request for review in March 2017. The Third Party provided a copy of these submissions to this office but did not provide a copy to the Public Body or Applicant. In its exchanged letter, the Third Party stated that the March 2017 submissions were confidential and were not to be disclosed outside this office.

[para 15] Parties are required to exchange their submissions with the other parties named in the Notice of Inquiry, unless the party is granted permission to provide all or some of its submissions *in camera*. The requirement to exchange submissions is set out in the Notice itself, and the *Inquiry: Preparing Submissions* and *Inquiry Procedures* publications provided to the parties with the Notice of Inquiry.

[para 16] The Notice of Inquiry also informs parties that they may request that a submission be accepted *in camera*, and directs parties to the *Inquiry Procedures* publication, which is provided with the Notice of Inquiry. The *Inquiry Procedures* publication states:

> A party who wants to vary the inquiry procedures must make a written request to the Commissioner. Parties are encouraged to use forms when making requests for variations, as the forms set out additional instructions for making a specific variation request. Requests for variation forms are available at www.oipc.ab.ca. If a party cannot access the website, please call (780) 422-6860 or toll free at 1-888-878-4044, or email registrar@oipc.ab.ca to request a form.
>
> Follow the instructions in each form as there are certain requirements that must be met, depending on the variation request.

[para 17] A copy of each variation form was provided to the parties with the Notice of Inquiry, including the form to be used to request that all or part of a submission be accepted *in camera*. The instructions on this form states that *in camera* submissions are accepted only when:

- the submission (or part of it) reveals the contents of the "records at issue";
- the applicable Act requires that information not be disclosed; or
- the circumstances of the particular case require that information not be disclosed.

The form further informs parties that if an *in camera* submission request is not granted, the adjudicator will disregard that part of the submission, and may provide instructions to the party on how to proceed.

[para 18] The Third Party did not follow the above process to request to provide an *in camera* submission. By letter dated September 5, 2024, I reiterated the process set out above for providing an *in camera* submission and informed the parties that I would not be accepting the Third Party's *in camera* submission as it had not followed the proper process in submitting it. I said:

> The Third Party has stated that its *in camera* submission contains references and extracts of the records at issue. I agree that portions of the Third Party's *in camera* submission contain information that quote or reveal the content of the records at issue; however, most of the information in the submission does not. Therefore, the submission in its entirety cannot be accepted *in camera*.
>
> The Third Party may resubmit an exchanged and *in camera* version of this submission, wherein the portions of the submission that quote or reveal the content of the records at issue is severed from the exchanged submission. If the Third Party is seeking permission to submit portions of its submission *in camera* for reasons other than they quote or reveal the content of the records at issue, the Third Party must provide a specific reason for requesting those portions be accepted *in camera*, as set out in the form.
>
> If the Third Party wishes to resubmit an exchanged and *in camera* submission per the above instructions, it must do so by **September 13, 2024**. If the Third Party does not resubmit by this date, I will assume it is opting to rely only on the attachments to the Notice of Inquiry as its initial submission.

[para 19] The Third Party did not exercise this opportunity to provide an initial submission in accordance with this office's procedures. Nor did the Third Party provide a rebuttal submission or any other information or argument for this inquiry.

[para 20] With its exchanged initial submission, the Public Body also provided an *in camera* submission. The Public Body followed the process set out above for doing so. The Public Body stated that the *in camera* portion of its initial submission reveals the content of the records at issue. By letter dated October 16, 2024, I accepted some of the *in camera* portion, but not all. I explained my reasons as follows:

> The *in camera* portions of the submission include five paragraphs of arguments, which were omitted from the exchanged submission (paragraphs 33- 37). I will accept these arguments *in camera* as they refer to specific information in the records at issue.
>
> The *in camera* portion also includes a five-paragraph affidavit, with four attached exhibits (Exhibits A – D). For the same reasons, I will accept most of this affidavit *in camera*. However, I will not accept the fifth paragraph (of five) of this affidavit *in camera*, for the reason that most of this paragraph is repeated in the exchanged submission. The portion of this paragraph that does not appear in the exchanged submission refers to an exhibit (Exhibit D), which I am also not accepting *in camera*.
>
> The reason I am not accepting Exhibit D *in camera* is because it consists of a document that has been published and is readily available to the public. The Public Body has not clearly explained why a document already in the public domain cannot be exchanged with the parties in this inquiry.

> I am not asking the Public Body to resubmit the *in camera* affidavit to omit these items that I am not accepting. Paragraph five has already essentially been exchanged, and I will simply disregard Exhibit D, unless the Public Body opts to provide an exchanged copy of that Exhibit. If the Public Body opts to do this, it should do so by **no later than October 23, 2024**.

[para 21] I also noted that my approach with respect to the Public Body's *in camera* submission is different from my approach to the Third Party's *in camera* submission. Specifically, I did not reject the Public Body's submission in full and give it an opportunity to redo the submission. My reasons for doing so were communicated in my letter, as follows:

> This [is] a different approach than I took when I decided not to accept the Third Party's *in camera* submission because, unlike the Third Party's submission, the portions of the Public Body's *in camera* submission that I am not accepting are easily identifiable and severable from the portions I am accepting. In other words, I can clearly communicate to the Public Body which portions I am accepting and which portions I am not; I can also easily identify and disregard the portions I have not accepted, while drafting my Order. Unlike the Third Party's *in camera* submission, this can be done without risking confusion and avoiding the possibility of disclosing in my Order information that a party believed had been accepted *in camera*.

[para 22] On October 23, 2024, the Public Body provided new copies of its exchanged submission to include the information I had not accepted *in camera*.

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

[para 23] As stated above, the Agreement is between the Third Party and AHS; the Public Body does not appear to be a party to the Agreement. In its submission, the Public Body states that it consulted with AHS in processing this record in response to the Applicant's access request. The Public Body states that AHS had also received an access request that included the record at issue here, and after consulting with AHS, the Public Body "determined it was best to disclose the Record at Issue in the same manner as AHS was disclosing it – partially release the Record at Issue with severance under sections 16 and 24 (advice to public body)."

[para 24] I understand that the Public Body's submission to this inquiry is based, at least in part, on the consultations that took place with AHS.

[para 25] With respect to the application of section 16(1), I will start with the purpose of this provision in the context of access-to-information legislation. In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), 2012 SCC 3 (*Merck Frosst*), the Supreme Court of Canada discussed the balance between a right of access to government information with exceptions that protect a third party's confidential business information. The Court said (at paras. 3-4):

> The need for this balance is well illustrated by these appeals. They arise out of requests for information which had been provided to government by a manufacturer as part of the new drug approval process. In order to get approval to market new drugs, innovator pharmaceutical companies, such as the appellant Merck Frosst Canada Ltd. ("Merck"), are required to disclose a

> great deal of information to the government regulator, the respondent Health Canada, including a lot of material that they, with good reason, do not want to fall into their competitors' hands. But competitors, like everyone else in Canada, are entitled to the disclosure of government information under the *Access to Information Act*, R.S.C. 1985, c. A-1 ("Act" or "*ATI*").
>
> The Act strikes a careful balance between the sometimes competing objectives of encouraging disclosure and protecting third party interests. While the Act requires government institutions to make broad disclosure of information, it also provides exemptions from disclosure for certain types of third party information, such as trade secrets or information the disclosure of which could cause economic harm to a third party.

[para 26] While the Court was discussing a provision in the federal *Access to Information Act*, this balancing is also applicable to section 16 in Alberta's FOIP Act. The FOIP Act provides a right of access to government information, including information about the expenditure of public funds to provide services to the public; section 16 ensures that confidential business information of third parties is not disclosed when providing access to government information.

[para 27] Section 16(1) of the Act reads as follows:

> *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 28] As stated in the Notice of Inquiry, this inquiry involves information about a third party such that the burden of proof set out in section 71(3) of the Act applies. It reads as follows:

> *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 29] Section 16(1) does not apply to personal information, so the Third Party has the burden, under section 71(3)(b), of establishing that the Applicant has no right of access to the records by virtue of section 16(1).

[para 30] Per Order F2004-013, at paragraph 10, for section 16(1) to apply to information, the requirements set out in all three paragraphs of that section must be met:

- 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 under section 16(1)(a)?

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

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

Parties' arguments

[para 31] As stated above, the Applicant did not provide any arguments or other information for this inquiry.

[para 32] The Third Party has not provided arguments relating to the application of section 16(1) for this inquiry. As stated above, the Third Party had included detailed submissions with its request for review; however, as the Third Party objected to the sharing of these submissions with the Applicant, they were removed from the request for review and were not brought forward into the inquiry. As stated above, the Third Party provided these submissions again with its initial submission, but did so in a manner that was not compliant with the inquiry processes that had been communicated to the parties. The Third Party was given another opportunity to provide these submissions in accordance with the inquiry procedures, as well as instructions for doing so, but declined. As such, the only information submitted by the Third Party that is before me is the Third Party's request for review form (3 pages, dated March 20, 2017); a copy of a letter from the Public Body to the Third Party that accompanied the form (2 pages, dated March 6, 2017); and the 1-page letter from the Third Party to this office, and copied to the Public Body and Applicant, advising that it was providing an *in camera* submission (letter dated September 5, 2024). In that letter the Third Party states:

> As noted in the Third Party Initial Submissions at para 7:
>
> > By stating particulars from the Draft Extension and Amending Agreement in this brief, DL is expressly not waiving its claim to any confidentiality. The details in this brief relating to DL's commercial, financial and labour relations information must not be disclosed outside of the Office of the Information and Privacy Commissioner.

[para 33] This is the only argument I have from the Third Party on its position regarding the application of section 16(1) to the information in the records. This is so despite the fact that the Notice of Inquiry expressly informed the parties that the Act places the burden of proof on the Third Party to show that section 16(1) applies to the information in the record at issue.

[para 34] The Public Body has provided brief submissions regarding the information in the record to which the Public Body has not applied section 16(1). The Public Body has organized its arguments into the three subsections of section 16(1), and I will discuss the arguments in the discussion of those subsections, below.

Section 16(1)(a)

[para 35] Section 16(1)(a) sets out the types of information to which this provision can apply. In the letter comprising its initial submission, the Third Party referred to the information in the records at issue as its "commercial, financial and labour relations information".

[para 36] Past orders of this Office have defined "commercial information" as information belonging to a third party about its buying, selling or exchange of merchandise or services. "Financial information" is information belonging to a third party about its monetary resources and use and distribution of its monetary resources (Order F2009-028, at para. 42). In Order F2011-002 the adjudicator found that fees for services performed by a third party for a public body, which were contained in requested records, were "commercial information" of third parties because "the information is about the terms under which [the third parties] performed and sold services to the Public Body" (at para. 15).

[para 37] Examples of financial information listed in Order PO-2010 from the Ontario Office of the Information and Privacy Commissioner, which was cited in Order F2011-002 from this Office, include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.

[para 38] In *Merck Frosst*, the Supreme Court of Canada cited the discussion of the scope of "financial, commercial, scientific or technical" in *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245. It said:

> [139] First, the terms "financial, commercial, scientific or technical" should be given their ordinary dictionary meanings. As MacKay J. in *Air Atonabee* stated, at p. 268:
>
> > . . . dictionary meanings provide the best guide and that it is sufficient for purposes of subs. 20(1)(b) that the information relate or pertain to matters of finance, commerce, science or technical matters as those terms are commonly understood.
>
> [140] Second, the case law also holds that in order to constitute financial, commercial, scientific or technical information, the information at issue need not have an inherent value, such as a client list might have, for example. The value of information ultimately "depends upon the use that may be made of it, and its market value will depend upon the market place, who may want it and for what purposes, a value that may fluctuate widely over time" (*Air Atonabee*, at pp. 267-68).

[para 39] With respect to labour relations information, Order 2000-003 includes a definition of that term, which states (at paras. 97-99):

> The term "labour relations" has been defined by a number of other sources:
>
> - Sack and Poskanzer, *Labour Law Terms, A Dictionary of Canadian Labour Law*, defines labour relations as "employer-employee relations including especially matters connected with collective bargaining and associated activities".
>
> - Webster's Third New International Dictionary defines labour relations as "relations between management and labour, especially as involved in collective bargaining and maintenance of contract".
>
> - Arthur Mash, *Concise Encyclopedia of Industrial Relations*, defines labour relations within the context of industrial relations, as follows: "…relationships within and between workers, working groups and their organizations and managers, employers and their organization…'Labour relations' are sometimes abstracted from 'industrial relations' as describing organized or institutionalized relationships within the whole, though sometimes the two terms are used as if they were interchangeable..."
>
> Given these definitions, I agree that "labour relations" would include "collective relations", such as collective bargaining and related activities.
>
> However, I do not think that "labour relations" should be limited to "collective relations", as that would unduly limit the scope of labour relations. For the purposes of section 15(1), I favour a more comprehensive definition, such as that set out in the *Concise Encyclopedia of Industrial Relations*.

[para 40] In BC Order F05-02 the adjudicator reviewed precedent from Ontario, concluding (at para. 100):

> Section 21(1)(a)(ii) of the Act refers to "labour relations information" but, unlike s. 65(6)3 of the Ontario legislation, it does not also refer to "employment-related matters", a more expansive phrase. I conclude that "labour relations information" in s. 21(1)(a)(ii) may not necessarily be strictly limited to the collective bargaining relationship between employer and union in that it may also include negotiations, bargaining and related matters between parties to analogous relationships. At the same time, labour relations information is not synonymous with the wider category of information about an individual's actions on the job, and information may be "of or about" an employee without being "of or about" organizations to which the employee belongs, in this case the BCTF or the NDTA.

[para 41] From the above, the term 'labour relations' may not be restricted to collective relations, but it is also not so broad as to include any type of relationship or interaction in the workplace.

[para 42] The Public Body argues that the information to which it applied section 16(1) contains commercial or financial information of the Third Party. It argues that the information to which it has not applied section 16(1) is "comprised of boilerplate clauses and information

related to the specific arrangements between the Third Party and AHS. Therefore, the unsevered portions of the Record at Issue do not reveal the commercial, financial, labour relations, scientific or technical information of the Third Party."

[para 43] Some of the information to which the Public Body did not apply section 16(1) in the record sets out the terms and conditions under which the Third Party will transfer assets and liabilities to another party. I agree that this information constitutes the Third Party's commercial or financial information. However, some of the information in the record relates to parties other than the Third Party or refers to rights and obligations of parties other than the Third Party. The Third Party has not provided any reason for me to conclude that such information could be commercial or financial information of the Third Party.

[para 44] It is not clear what information the Third Party believes is labour relations information. There are elements of the record that discuss various roles or responsibilities that may be assigned to employees of the Third Party in particular circumstances, and some information in the records refers to the terms under which Third Party employees may be transferred to another body. It's not clear that such information can be characterized as labour relations information of the Third Party as it does not primarily relate to relations between the Third Party and its employees. However, it is arguable that this information reveals something about the Third Party's labour relations, even if only in the most general of terms.

[para 45] I conclude that some of the information at issue in the record contains commercial and financial information of the Third Party, and may also contain labour relations information. However, for the reasons discussed in the next section, none of this information meets the requirements of section 16(1)(b).

Section 16(1)(b)

[para 46] In order for section 16(1)(b) to apply, the information must be supplied by the third party to the public body, explicitly or implicitly in confidence or would reveal information that was supplied in confidence.

[para 47] As stated above, the Agreement is between the Third Party and AHS. For section 16(1)(b) to be met, the Third Party must have supplied the relevant information to *a* public body, not necessarily the public body responding to the access request. AHS is also a public body.

[para 48] As with the other elements of section 16(1), the Third Party has the burden of showing that it supplied the information to a public body in confidence.

Section 16(1)(b) – Information *supplied*

[para 49] Many past Orders of this Office, as well as from the Ontario Office and the BC Office have held that a contract is negotiated between a public body and third party, and therefore cannot be found to have been supplied by the third party. This is true even where the contract price is the same as the bid price (see Alberta Order F2009-028, BC Order F11-27, and Ontario Order PO-226). This approach has also been upheld by the Ontario Divisional Court in

Boeing Co. v. Ontario (Ministry of Economic Development and Trade), [2005] O.J. 2851 and *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475, and the BC Supreme Court in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603.

[para 50] There are exceptions to this principle: where the information is immutable, or where disclosure of the information in the contract would permit an accurate inference about underlying non-negotiated confidential information supplied by the third party to the public body (Order F2013-47, citing Ontario Order PO-3176).

[para 51] Immutable information is described in Order F2019-17, at para. 95:

> Immutable information is information that, by its nature and in the given context, is not susceptible to change; it is not information that *could have* changed but did not (see Order F2012-15, citing BC Order F11-27). Conditions proposed by one party and accepted by a public body without changes is reflective only of the tendering process chosen by the public body; it does not change the nature of the information contained in the proposals. In other words, the fact that a public body may not have made a counter-offer on a proposal does not mean that the proposal prices were immutable. To say that proposal prices are immutable is to say that the bidder could not have offered numbers other than those it did, in fact, offer. As stated in BC Order F11-27 (at para. 13):
>
> > In other words, information may originate from a single party and may not change significantly – or at all – when it is incorporated into the contract, but this does not necessarily mean that the information is 'supplied'. The intention of s. 21(1)(b) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change, but, fortuitously, was not changed.

[para 52] The Alberta Court of Appeal discussed at length whether information in an agreement can still be 'supplied' within the terms of section 16(1)(b), in *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 (CanLII). In that decision, the Court agreed that information in a negotiated contract might not be "supplied" by either party to the contract. The records at issue in that case consisted of a remediation agreement between parties, as well as attachments to that agreement. The Court said (at paras. 82-83, emphasis added):

> First of all, as previously noted, it is not the Remediation Agreement itself that must be the protected information. <u>There would be room to argue that negotiated contracts themselves are not "supplied" by either party to the agreement.</u> Imperial Oil did seek to prevent disclosure of the Remediation Agreement simply because it was an agreement, but that was based on it being privileged. <u>The overlapping exemption under s. 16 was not an attempt to prevent the disclosure of the Remediation Agreement as an agreement, but rather because of the information it "would reveal".</u>
>
> What s. 16(1) protects are documents that "may reveal" protected information that has been supplied by one of the parties. If Imperial Oil supplied protected financial, scientific and technical information to Alberta Environment in order to enable the negotiation of the Remediation Agreement, that information would still be "supplied" and therefore

> protected. "Supplied" relates to the source of the information, and whether information was "supplied" does not depend on the use that is made of it once it is received. If the disclosure of the Remediation Agreement "would reveal" that protected information, then non-disclosure is mandatory under s. 16. To suggest that information loses its protection just because it ends up "in an agreement that has been negotiated" is not one that is available on the facts and the law. It cannot be the rule that only information that is of no use to the public body is "supplied".

[para 53] The Court's comments were summarized in Order F2015-03 (at para. 46):

> The Court of Appeal's discussion regarding supplied information was specifically concerned with reports attached to the remediation agreement, which were created by consultants and not up for negotiation. In other words, the content of those reports would not change regardless of the discussions that led to the remediation agreement. I agree with the Public Body that, although it used different language, the Court concluded that the reports attached to the remediation agreement consisted of information that was either immutable (because the content of the reports were not going to change) or that they were comprised of underlying non-negotiated confidential information supplied by the third party.

[para 54] The Court in *ABC Benefits Corporation v. Alberta (Information and Privacy Commissioner)*, 2015 ABQB 662, made a similar point to the Court's in *Imperial Oil*: the fact that information appears in a contract or agreement does not indisputably mean that it can be characterized as information negotiated between the parties. An agreement or contract can also include information that is not subject to negotiation (i.e. immutable information) such as fixed costs.

[para 55] I understand these cases to stand for the proposition that *immutable* or *non-negotiated* information that ends up as an agreed term in a contract does not thereby become negotiated for the purpose of section 16(1).

[para 56] However, neither *Imperial Oil* nor *ABC Benefits* rejected the long-standing principle that fees for service in a contract are generally accepted to be negotiated between the parties. Rather, these decisions appear to accept the premise set out in the case law cited above, that fees for service set out in an agreement or contract are generally found to be negotiated, rather than supplied by one party to another, even when the prices in the agreement are accepted from a proposal without change. The decisions in *Imperial Oil* and *ABC Benefits* primarily address what kind of information falls within the exceptions to the general rule for information that is immutable or reveals underlying non-negotiated confidential information.

[para 57] The example of immutable information discussed in *ABC Benefits* was fixed costs. In *Imperial Oil*, the Court primarily discussed reports that had been created for an organization and that were later appended to an agreement between the organization and a public body.

[para 58] In some cases, immutable or non-negotiated information, such as fixed costs or trade secrets, might be inferable from information in an agreement or contract, even if that immutable or non-negotiated information is not stated outright. In such a case, what would otherwise be negotiated information to which section 16(1) does not apply becomes information to which section 16(1) does apply, because of what can be inferred from that information. In this case, if

the information in the records to which the Public Body did not apply section 16(1) reveals immutable or otherwise non-negotiated information, then the conditions for section 16(1)(b) may be met.

[para 59] The Court of Appeal also noted in *Imperial Oil* that commercial, financial or other information of a third party may be the type of information that is protected under section 16(1) even if the third party incorporated information from other sources in developing that commercial, financial or other information. Specifically, the Court of Appeal noted that a third party might take information from the public realm and apply it to its own business, "the resulting data would still be 'of the third party'" (at para. 70). This point was reiterated in the more recent case, *ABC Benefits Corporation v. Alberta (Information and Privacy Commissioner)*, 2022 ABQB 276 (*ABC Benefits 2*), wherein the Court commented that a third party might incorporate requirements or specification of a public body into its own methodologies, and those resulting methodologies might nevertheless qualify as immutable information of the third party (at para. 24).

[para 60] This is different from saying that information provided by a public body – such as the requirements, conditions, or specifications set out by the public body in a contract or agreement – is somehow transformed into immutable or non-negotiated confidential business information of the third party for the sole reason that the third party agreed to those terms. If this were the case, a public body could be prohibited from disclosing *its own terms and conditions* simply because a third party agreed to meet those terms. This is not consistent with the scope or purpose of section 16(1), as discussed above.

[para 61] Therefore, I am proceeding with the analysis that information in the Agreement is generally negotiated between the parties rather than supplied in confidence by one party. However, information in the Agreement is not negotiated if it is comprised of immutable information about the Third Party that was supplied by the Third Party, or if the information in the Agreement reveals underlying non-negotiated information, as those exceptions have been discussed in *Imperial Oil*, *ABC Benefits* and *ABC Benefits 2*.

[para 62] As stated above, the Third Party has not provided substantive submissions to this inquiry. The Public Body's arguments regarding the application of section 16(1)(b) did not address whether any of the information at issue was supplied by the Third Party to a public body within the terms of section 16(1)(b). Rather, the Public Body's submission focusses on the confidentiality aspect of section 16(1)(b), which I will discuss in the next section.

[para 63] All of this is to say that I have little in the way of arguments upon which to base my determination as to whether the information at issue was supplied by the Third Party to a public body within the terms of section 16(1)(b). I must therefore make my determination based on the records before me.

[para 64] As indicated above, the Public Body has applied section 16(1) to some information in the records. This information includes terms that set out rights that the Third Party can exercise that could directly affect its commercial and financial status; information that refers to or states assets and liabilities of the Third Party; and terms for providing specific products or

services. None of this information is at issue as the Public Body determined it is properly withheld under section 16(1).

[para 65] I have reviewed the remainder of the information in the record with a view of determining whether the remaining information is of the type discussed in *Imperial*, *ABC Benefits* and *ABC Benefits 2*; that is, information that can be characterized as commercial, financial or labour relations information of the Third Party, that was supplied by the Third Party to a public body, or whether the remaining information would *reveal* information of that type.

[para 66] Specifically, I have reviewed the record at issue to determine whether any of the remaining information not withheld by the Public Body under section 16(1) is or reveals information such as overhead or other fixed costs, or technological processes or methodologies for providing goods or services.

[para 67] I agree with the Public Body that much of the remaining information in the record consists of boilerplate agreement language relating to the specific arrangements between the Third Party and AHS. In other words, this information is clearly comprised of negotiated terms between the parties. Some of the terms assign responsibility to the Third Party for fulfillment; other terms assign responsibility to AHS, or to both parties.

[para 68] Some of the information in the Agreement refers to financial amounts, leases relating to the Third Party, and labour arrangements relating to staff of the Third Party. I will address this information more specifically, below.

[para 69] The Agreement includes some financial amounts that the Public Body has not withheld under section 16(1). Many of these amounts can be characterized as total amounts to be paid in specific circumstances, agreed to by both parties. The case law from this office, as well as from other jurisdictions with substantially similar provisions, is clear that contract prices and totals are negotiated information. Exceptions to this rule include where the records may include a breakdown of payments or costs that could reveal a third party's underlying fixed costs or other such immutable information. In this case, there is no indication that the amounts to which the Public Body did not already apply section 16(1) were amounts provided by the Third Party to a public body, rather than amounts agreed to between the parties. Nor is there any detailed breakdown of these amounts that could reveal underlying immutable or non-negotiated information of the Third Party.

[para 70] There are several tables in the Agreement that set out fee adjustments to be made in particular circumstances. These adjustments are set out in percentages and dollar amounts. These relate to fees that are to be paid by a public body. Based on the information in the record and absent any submission from the Third Party, I cannot conclude that these adjustment amounts were supplied by the Third Party, or that they reveal immutable or non-negotiated information of the Third Party.

[para 71] There are also tables that set out totals to be paid for specific goods or services, in specific years. As above, prices for services are negotiated information unless they reveal immutable or non-negotiated information of the Third Party. This information does not appear to

have been supplied by the Third Party, nor does it appear to reveal immutable or non-negotiated information of the Third Party. For example, the tables do not include a breakdown of the costs that might reveal underlying fixed costs of the Third Party.

[para 72] The Agreement refers to leases to which the Third Party is a party, but does not reveal any details such as amounts relating to the lease costs paid by the Third Party. Rather, the information reveals only agreements between the parties regarding lease assignments.

[para 73] The Agreement refers to labour arrangements of the Third Party but does not reveal details such as labour costs; the information merely relates to agreements between the parties regarding the assignment of responsibilities, or obligations of a public body. This does not seem to be the type of information that could be supplied by the Third Party and I have no argument to support finding otherwise.

[para 74] To conclude, the information in the record that was not already withheld by the Public Body under section 16(1) does not appear to be the type of information that the Third Party could have supplied to a public body within the terms of section 16(1)(b). Nor does the information at issue appear to *reveal* that type of information.

[para 75] Absent submissions from the Third Party to support finding that this is information supplied by the Third Party within the terms of section 16(1)(b), I find that none of the information in the Agreement is information supplied by the Third Party within the terms of section 16(1)(b), aside from the information already withheld by the Public Body under section 16(1).

Section 16(1)(b) – Information supplied *in confidence*

[para 76] With its submission the Public Body provided a copy of printout from FOIPNet, which I understand is the file management system for managing access requests. This printout includes the steps that had been taken and recorded in processing the Applicant's access request, including consultations with the third party and AHS. On page 4 of this printout, the Public Body noted that the Third Party objected to the disclosure of the record at issue on the basis that disclosure is "not in keeping with confidentiality clause."

[para 77] The Public Body's arguments regarding the application of section 16(1)(b) were brief, and were primarily provided *in camera*. I can therefore address these arguments in only a general manner.

[para 78] In the Agreement, there is a confidentiality clause relating to specified information. This clause applies to information that is to be provided by the Third Party at a future time; that information is not part of the Agreement comprising the record at issue. There does not appear to be any other express confidentiality provision that relates to the information in the Agreement itself.

[para 79] In any event, I have found that the information in the Agreement that the Public Body has not already withheld under section 16(1) is not information that was supplied to a

public body by the Third Party. Therefore, there is no information that could be said to have been supplied *in confidence*.

[para 80] Given this, the Third Party has not satisfied me that the information at issue in the record, to which the Public Body has not applied section 16(1), meets the requirements of section 16(1)(b).

Section 16(1)(c)

[para 81] As I have found that the information in the Agreement that the Public Body has not already withheld under section 16(1) is not information that was supplied by the Third Party within the terms of section 16(1)(b), I do not need to consider the remainder of the test for the application of section 16(1).

[para 82] Even had I found that some or all of the information in the Agreement – to which the Public Body had not already applied section 16(1) – met the test for section 16(1)(b), I would have had insufficient information to find that the test for section 16(1)(c) was met.

[para 83] Section 16(1)(c) requires that disclosure of the information result in one of the harms set out in subsection (i) to (iv), set out above.

[para 84] 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 16(1)(c)). The Court stated in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31:

> 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, [2008] 3 S.C.R. 41, at para. 40.

[para 85] In *Canada (Information Commissioner) v. Canada (Prime Minister)*, 1992 CanLII 2414 (FC), [1992] F.C.J. No. 1054, Rothstein J., as he then was, made the following observations in relation to the evidence a party must introduce in order to establish that harm will result from disclosure of information. He said:

> While no general rules as to the sufficiency of evidence in a section 14 case can be laid down, what the Court is looking for is support for the honestly held but perhaps subjective opinions of the Government witnesses based on general references to the record. Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The Court must be given an explanation of how or why the harm alleged would result from disclosure of

> specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged. [my emphasis]

[para 86] 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 Third Party must provide sufficient evidence to show that the likelihood of any of the above scenarios is "considerably above" a mere possibility. The Third Party has not provided any arguments as to how the disclosure of an Agreement that is eight years old could reasonably be expected to result in one of the harms set out in section 16(1)(c).

[para 87] This is not to say that the age of the Agreement precludes the possibility that the harms test could be met. However, to make such a finding, the Third Party would have to provide support for it, which it has not done.

Conclusion regarding the application of section 16(1)

[para 88] I find that the information in the Agreement that the Public Body has not already withheld under section 16(1) is not information to which section 16(1) applies.

[para 89] I will order the Public Body to disclose this information to the Applicant, subject to the Public Body's application of sections 17(1) and 24(1) on pages 77, 88 and 89, which was not at issue in this inquiry.

V. ORDER

[para 90] I make this Order under section 72 of the Act.

[para 91] I find that section 16(1) does not apply to the information in the record at issue, aside from the information to which the Public Body had already applied that provision. I order the Public Body to disclose this information to the Applicant, subject to the other exceptions it has applied to this information.

[para 92] I further order the Public Body to notify me and the Third Party in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

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Amanda Swanek
Adjudicator