

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2025-10

March 17, 2025

ENVIRONMENT AND PROTECTED AREAS

Case File Number 006969

Office URL: www.oipc.ab.ca

Summary: A law firm (the Applicant) made an access request on behalf of its client to Environment and Protected Areas (previously Environment and Parks) (the Public Body or EPA) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for agreements between the Government of Alberta and TransAlta (the Third Party) made on or about June 4, 2014, and August 27, 2016.

The Public Body located a Waste Management Service Agreement comprised of 51 pages (the Agreement) that was responsive to the Applicant's access request. It provided the Applicant with the Agreement but withheld responsive information on some pages pursuant to section 16(1) (disclosure harmful to business interests of a third party) of the FOIP Act.

The Applicant requested a review by this office of the Public Body's decision to withhold responsive information under section 16(1). As it was not satisfied with the outcome of the review, the Applicant, on behalf of its client, requested an inquiry.

Subsequently, the Public Body informed the Applicant that it was applying section 18(1) (disclosure harmful to individual or public safety), instead of section 16(1), to withhold some of the information it had initially withheld under section 16(1). The Applicant requested that the adjudicator review the Public Body's application of section 18(1) in the inquiry.

TransAlta was invited and participated in the inquiry as an affected party.

The Adjudicator found that the Public Body properly applied section 16(1) to withhold the information withheld under this section.

The Adjudicator found that section 18(1) applied to the information withheld by the Public Body under this section, and the Public Body properly exercised its discretion in withholding the information under this section.

Statutes Cited: AB: *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3, *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 16, 18, 71, 72, *Electric Utilities Act*, SA 2003, c. E-5.1

Regulations Cited: AB: *Designation of Constitutional Decision Makers Regulation*, Alta Reg. 69/2006, *Fair, Efficient and Open Competition Regulation*, AR 159/2009

Statutes Cited: Federal: *Constitution Act, 1930*; *Natural Resources Transfer Agreement, 1930* [Schedule 2 of the *Constitution Act, 1930*, being Item 16 of the Schedule to the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11]; *An Act to Ratify Certain Agreements Between the Government of the Dominion of Canada and the Government of the Province of Alberta*, SA 1946, c 2.

Orders Cited: AB: F2004-013, F2008-005, F2010-019, F2011-018, F2015-41, F2022-33, and F2025-01.

Cases Cited: *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, *Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231, *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10.

I. BACKGROUND

[para 1] On March 10, 2017, a law firm (the Applicant) made an access request on behalf of its client, to Environment and Protected Areas (previously Environment and Parks) (the Public Body) under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the FOIP Act) for the following information:

Agreements between the Government of Alberta and TransAlta on or about June 4, 2014 and August 27, 2016. The agreements modify TransAlta's operations at Ghost reservoir for flood mitigation purposes. In exchange, Gov. of Alberta is to provide compensation for loss of power generation.

[para 2] The date range specified by the Applicant for the records was:

Approximately the agreements were entered into June 4, 2014 and August 27, 2016

[para 3] The Public Body located one responsive record to the access request: a Waste Management Service Agreement comprised of 51 pages and made effective April 1, 2016, between Her Majesty The Queen in Right Of The Province of Alberta and TransAlta Generation Partnership (TransAlta) (the Agreement).

[para 4] On August 2, 2017, The Public Body informed the Applicant that it was providing it with partial access to the Agreement. The Public Body informed the Applicant that it had applied section 16(1) (disclosure harmful to business interests of a third party) of the FOIP Act to withhold information on pages 16-19, 30-36, 39, and 48-49.¹

[para 5] Subsequently, the Applicant asked the Commissioner to review the Public Body's decision to withhold responsive information under section 16(1).²

[para 6] The Commissioner authorized a Senior Information and Privacy Manager to investigate and attempt to settle the matter.

[para 7] On April 13, 2018, the Public Body released additional pages from the Agreement; however, it continued to withhold information under section 16(1).

[para 8] On April 27, 2018, the Applicant requested an inquiry.³

[para 9] The Commissioner agreed to conduct an inquiry and delegated her authority to conduct the inquiry to me.

[para 10] Subsequently, the Public Body informed the Applicant that it was applying section 18(1) (disclosure harmful to individual or public safety) to withhold certain of the information on pages 17, 19 and 48 of the Agreement instead of section 16(1).⁴ The Applicant requested that I review the Public Body's application of section 18(1) to withhold responsive information, in the inquiry.⁵

[para 11] TransAlta was invited and participated in the inquiry as an affected party.

II. RECORDS AT ISSUE

[para 12] The record at issue consists of the Waste Management Service Agreement made effective April 1, 2016, between Her Majesty The Queen in Right Of The Province of Alberta and TransAlta Generation Partnership (the Agreement). The specific information at issue consists of the information withheld on pages 16-19, 30-36, 39, and 48-49 pursuant to section 16(1) or section 18(1).

[para 13] For the purpose of this inquiry, the Public Body provided a current redacted copy of the Agreement to the Applicant and provided me with a current un-redacted and redacted copy of the Agreement.

¹ Public Body's letter to Applicant dated August 2, 2017.

² Applicant's Request for Review received October 6, 2017.

³ Applicant's Request for Inquiry dated April 27, 2018.

⁴ Public Body's letter to Applicant dated April 11, 2023.

⁵ Applicant's letter to Adjudicator dated April 12, 2023.

III. ISSUES

[para 14] In its initial submission, the Applicant asserted that section 16(3)(b) of the FOIP Act applied and therefore the Public Body was required to disclose the withheld information to the Applicant.

[para 15] Section 16(3)(b) provides that section 16(1) does not apply if an enactment of Alberta or Canada authorizes or requires the information to be disclosed.

[para 16] By letter dated January 25, 2024, I informed the parties that I was amending the Notice of Inquiry for this matter to include the issue of whether section 16(3) applied. I asked the Public Body and the TransAlta to provide me with their rebuttal submissions on this issue and in response to the other arguments raised by the Applicant in its initial submission.

[para 17] The Notice of Inquiry, dated June 9, 2023, and amended January 25, 2024, sets out the following issues:

1. Does section 16(3) of the Act apply to the information withheld under section 16(1) of the Act, such that section 16(1) of the Act does not apply?

This issue will consider whether there is an enactment of Alberta or Canada which authorizes or requires the information to be disclosed.

2. If section 16(3) does not apply, does section 16(1) of the Act (disclosure harmful to business interests of a third party) apply to the information withheld in the record?
3. Did the Public Body properly apply section 18 of the Act (disclosure harmful to individual or public safety) to the information in the record?

IV. DISCUSSION OF ISSUES

1. **Does section 16(3) of the Act apply, to the information withheld under section 16(1) of the Act, such that section 16(1) of the Act does not apply?**

This issue will consider whether there is an enactment of Alberta or Canada which authorizes or requires the information to be disclosed.

[para 18] If there is an enactment of Alberta or Canada which authorizes or requires the information the Public Body has withheld under section 16(1) of the FOIP Act, to be disclosed, then an analysis of whether the Public Body had properly applied section 16(1) in the first instance to withhold information would be redundant.

[para 19] Section 16(1) states:

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

(a) that would reveal

- (i) *trade secrets of a third party, or*
- (ii) *commercial, financial, labour relations, scientific or technical information of a third party,*
- (b) *that is supplied, explicitly or implicitly, in confidence, and*
- (c) *the disclosure of which could reasonably be expected to*
 - (i) *harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
 - (ii) *result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
 - (iii) *result in undue financial loss or gain to any person or organization, or*
 - (iv) *reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[para 20] Section 16(3)(b) states:

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

...

- (b) *an enactment of Alberta or Canada authorizes or requires the information to be disclosed,*

...

[para 21] In other words, if an enactment of Alberta or Canada authorizes or requires the information withheld by a public body under section 16(1), to be disclosed, a public body cannot withhold the information under section 16(1).

[para 22] In its initial submission, the Applicant stated, in part (footnotes omitted):⁶

19. The Applicant is legal counsel for the Stoney Indian band, also known as the Stoney Nakoda Nations (the “Stoney Nakoda”).
20. The Stoney Nakoda are comprised of the Bearspaw First Nation, Chiniki First Nation, and Goodstoney First Nation. The Stoney Nakoda are signatories to Treaty No. 7 and have Aboriginal and Treaty rights as recognized and affirmed by the Natural Resource Transfer Agreement, 1930 as amended, and section 35 of the Constitution Act, 1982. The main Stoney Nakoda reserve lands, which were set

⁶ Applicant’s initial submission dated September 19, 2023.

apart for the exclusive use and benefit of the Stoney Nakoda pursuant to Treaty No. 7, are Indian reserves 142, 143, and 144, including the bed and waters of the Bow River. The Stoney Nakoda are an Indian band, as defined in the Indian Act.

21. Stoney Indian reserves no. 142, 143 and 144 straddle the Bow River from its junction with the Kananaskis River eastward to the current location of the Ghost Dam. The Ghost Reservoir was created by the Ghost Dam.
22. TransAlta operates the Ghost Dam pursuant to a hydroelectric license issued by the Province of Alberta.
- ...
25. The Ghost Dam was constructed in 1929/30, creating the Ghost Reservoir which flooded a portion of the Stoney Indian reserves.
26. In 1945 the Alberta Natural Resources Transfer Agreement, now enshrined in the Constitution Act, 1930, was amended to provide that a portion of the “water power rentals” from the hydroelectric facilities at the Ghost Dam would be payable to the benefit of the Stoney Nakoda.
27. The Province of Alberta was a party to the 1930 Natural Resources Transfer Agreement and the 1938 and 1945 amendments thereto (collectively along with other amendments, the “Constitution Act, 1930”). The Stoney Nakoda were not a party to or privy to this agreement or any of the amendments thereto.
28. As a consequence of the Constitution Act, 1930, the Stoney Nakoda receive yearly water power rental payments from TransAlta.
29. In addition to subsections 16(1) and 18(1) of the Act set out above, subsection 16(2) and 16(3) provide as follows:

[Reproduction of sections 16(2) and 16(3) of the FOIP Act]

ISSUES

30. The Applicant submits that there are in fact three issues before the OIPC:
 - (a) Does the refusal to disclose the entire agreement fall under subsection 16(1)?
 - (b) If disclosure can be withheld under subsection 16(1), is paragraph 16(3)(b) applicable to the Record?
 - (c) Does section 18 apply to any of the redacted portions of the Record?
- ...
37. TransAlta’s reasons for confidentiality may apply to third parties, but this reason cannot apply to the Stoney Nakoda since the Stoney Nakoda are already or should be privy to this information.

38. The Constitution Act, 1930, mandates that the Stoney Nakoda be made privy to the water power information that EPA and TransAlta claim is confidential to them but not including the Stoney Nakoda.
39. Such an interpretation of the Constitution Act, 1930, is not in keeping with principles of constitutional interpretation, nor is it in keeping with the honour of the Crown.
40. Any proprietary confidential information submitted by TransAlta is at law confidential to both EPA and the Stoney Nakoda. TransAlta has submitted no Ghost Dam water power information that it can claim is confidential from the Stoney Nakoda.
41. In other words, the non-disclosure components in the Record should apply to all three parties, including the Stoney Nakoda, and not just as between EPA and TransAlta. This is a tripartite provision, not a bilateral one, both *de facto* and *de jure*.
42. The Applicant is seeking access to the Record on behalf of the Stoney Nakoda. It is not seeking that the Record be made available to the public as a whole, nor to any competitors to the TransAlta/Stoney Nakoda Ghost Reservoir hydro operations.
43. The Applicant is not seeking to “reveal” to third parties any information. It seeks the Record solely for its own use.
44. The terms of TransAlta’s hydro license for the Ghost Dam provide that information must be disclosed, it is not proprietary to TransAlta.
45. However, if there is any information that is confidential to TransAlta, but not the Stoney Nakoda, then the Applicant submits that subsection 16(3) of the Act applies, on the basis that EPA has a fiduciary duty to disclose the entire, unredacted agreement to the Stoney Nakoda.
46. The Applicant submits that the provisions of the Constitution Act, 1930, that recognize the Stoney Nakoda right to a share in the water power from the Ghost Dam, constitute an enactment of Alberta (and Canada) that authorizes or requires the Record to be disclosed to the Stoney Nakoda.
47. TransAlta’s assertions of confidentiality cannot be allowed to override EPA’s constitutional obligations to the Stoney Nakoda.
48. Notably, EPA is not objecting to disclosure of the Record; it is only TransAlta that is objecting.
49. The Constitution Act, 1930, is evidence of the Stoney Nakoda right to the water power in the Bow River and the Stoney Nakoda right to 50% of the power that is generated by and at the Ghost Dam.
50. The Stoney Nakoda has reason to believe that the contents of the Record impact these water power rights of the Stoney Nakoda. Neither EPA nor TransAlta have submitted any evidence or even argument to the contrary.

51. It must be emphasized that the legislation at issue here is no ordinary statute; the legislation at issue the Constitution Act, 1930, is a superior statute to the Act. The Act, including the entirety of all its provisions, must be interpreted subject to the Constitution Act, 1930.
52. On this basis alone, the present situation is distinguishable from that before the Commissioner in the Imperial Decision.
53. Furthermore, given the relevant provisions of the Constitution Act, 1930, EPA arguably has a fiduciary duty to include the Stoney Nakoda as a party to the 2016 Agreement, let alone an obligation to disclose the Record of the Agreement to the Stoney Nakoda.

[para 23] The Public Body did not provide an initial submission in this inquiry. Presumably, if it agreed with the Applicant's arguments regarding the effect of the *Constitution Act, 1930*, it would have disclosed the entire Agreement to the Applicant. It did not do so; rather, it informed the Applicant that it was applying section 16(1) and section 18(1)(b) to withhold certain responsive information in the Agreement from the Applicant.

[para 24] TransAlta disagreed with the Applicant's assertions regarding the effect of the *Constitution Act, 1930* and submitted that this Office did not have the jurisdiction to consider or make a decision regarding constitutional issues or rights. TransAlta stated:⁷

The Adjudicator has requested that TransAlta "specifically address the Law Firm's submission that the Constitution Act, 1930, authorizes or requires the information (the information withheld under section 16(1)) to be disclosed."

TransAlta must, at the outset, register its objection to any further inquiry by the Adjudicator on this point.

TransAlta submits that the Applicant's submission concerns the interpretation and application of the Constitution Act, 1930. Neither the Adjudicator, nor the OIPC holds the necessary jurisdiction to make determinations of constitutional questions under section 11 of the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3, as the OIPC is not among the entities listed in the *Designation of Constitutional Decision Makers Regulation*.

The Applicant's entire argument to entitlement to access the Records under section 16(3) is framed in reference to the content and interpretation of the *Constitution Act, 1930*. To quote at length from the Applicant's Initial Submission:

38. *The Constitution Act, 1930*, mandates that the Stoney Nakoda be made privy to the water power information that EPA and TransAlta claim is confidential to them but not including the Stoney Nakoda.

⁷ TransAlta's submission dated February 15, 2024.

39. Such an interpretation of the *Constitution Act, 1930*, is not in keeping with principles of constitutional interpretation [...],
46. The Applicant submits that in the provisions in the *Constitution Act, 1930*, that recognize the Stoney Nakoda right to a share in the water power from the Ghost Dam, constitute an enactment of Alberta (and Canada) that authorizes or requires the Record to be disclosed to the Stoney Nakoda.
47. TransAlta's assertions of confidentiality cannot be allowed to override EPA's constitutional obligations to the Stoney Nakoda. [...]
49. The *Constitution Act, 1930*, is evidence of the Stoney Nakoda right to the water power in the Bow River and the Stoney Nakoda rights to 50% of the power that is generated by and at the Ghost Dam. [*Emphasis added.*]

This argument specifically asks the adjudicator to make a determination on the interpretation of the content and substance of the *Constitution Act, 1930* itself as “an enactment of Alberta (and Canada) that authorizes or requires the Record to be disclosed [...]” In brief, the Applicant is asking the Adjudicator to make “a determination of any right under the Constitution of Canada or the Alberta Bill of Rights” for the purposes of section 10(d)(ii) of the *Administrative Procedures and Jurisdiction Act*. This is a plain and unambiguous question of constitutional law.

Again, the Applicant's own submission freely admits as much, and concedes that the matter in question is fundamentally a constitutional one:

47. TransAlta's assertions of confidentiality cannot be allowed to override EPA's constitutional obligations to the Stoney Nakoda. [...]
51. It must be emphasized that the legislation at issue here is no ordinary statute; the legislation at issue, the *Constitution Act, 1930*, is a superior statute to the Act. The Act, including the entirety of all of its provisions, must be interpreted subject to the *Constitution Act, 1930*.

To make a determination on this constitutional question, or even to invite and accept further submissions from the Applicant, would constitute a reviewable error of law, and the Adjudicator must decline to rule on the Applicant's constitutional submissions regarding section 16(3) entirely.

In the alternative, and to the extent that the Adjudicator determines it does have the jurisdiction to determine the matter, despite the clear language in section 11 of the *Administrative Procedures and Jurisdiction Act*, the Applicant's argument must still be dismissed for a fatal defect in form.

No notice of question of constitutional law, in the form provided under Schedule 2 of the *Designation of Constitutional Decision Makers Regulation*, was filed by the Applicant, nor notice given to the Minister of Justice of Alberta, nor the Attorney General of Canada.

Further in the alternative, and to the extent the Adjudicator determines both that it has the jurisdiction to determine the matter despite section 11 of the *Administrative Procedures and Jurisdiction Act*, and that it may make a determination despite the Applicant's failure

to comply with Schedule 2 of the *Designation of Constitutional Decision Makers Regulation* by dispensing with the requirement altogether, TransAlta has reviewed the Applicant’s Initial Submission and notes that no requirement exists within the *Constitution Act, 1930* to disclose the Record.

The information highlighted by the Applicant at [page] 98 of its Initial Submission points only to an entitlement to *sums which have been paid or are payable*. The Applicant already possesses the financial information contained within the Record, and there is no entitlement to the redacted portions of the Record, nor its contents in their entirety. There is no provision in the constitutional enactment cited, and no express or implied interpretation, which would compel its disclosure under section 16(3) of the *Act*.

TransAlta therefore submits that the Applicant points to no specific provision in the *Constitution Act*, nor the *Natural Resources Transfer Act* contained within it, which authorizes or requires the disclosure for a simple reason – there is none.

[para 25] In its rebuttal submission, the Applicant stated, in part:⁸

2. The section of the *Constitution Act, 1930* that supports the statement made by the Applicant in its initial submission, is subsection 3(c) of the 1945 *Act to Ratify Certain Agreements between the Government of the Dominion of Canada and the Government of the Province of Alberta* (the “1945 Amendment”),² which itself is incorporated into the *Constitution Act, 1930* (together, the *Constitution Act, 1930*).³

2. *An Act to Ratify Certain Agreements Between the Government of the Dominion of Canada and the Government of the Province of Alberta*, SA 1946, c 2 at s 3(c).

3. Attached hereto as Appendix A is an unofficial compilation of *The Alberta Natural Resources Act*, *The Natural Resources Transfer (Amendment) Act, 1938*, and *The Natural Resources Transfer (Amendment) Act, 1945*.

3. This subsection states:

*“As and from October 1, 1930, all sums which have been paid **or are payable** under the terms of the said Interim Licence of January 17, 1929, and the Final Licence referred to in paragraph 3(a) above for water power rights, since that date shall be divided between Canada and the Province in the proportions of **one-half to Canada for the benefit of the said Indians of the Stoney Band** and one-half to the Province, and shall be paid to Canada and the Province respectively in the proportions stated.”⁴ [emphasis added]*

4. *Supra* note 2.

...

[para 26] The Applicant further submitted:

...

⁸ Applicant’s rebuttal submission dated March 28, 2024.

8. TransAlta filed a Rebuttal Submission on February 15, 2024. However, EPA has not filed a Rebuttal Submission and has made no further submissions.
9. Specifically, EPA has not invoked the *Administrative Procedures and Jurisdiction Act*⁵ and has made no submissions in regard to that Act. EPA has not adopted nor commented upon TransAlta's submissions in regard to constitutional questions or the Administrative Procedures and Jurisdiction Act.

5. *Administrative Procedures and Jurisdiction Act, RSA 2000, c. A-3.*

10. In fact, it is TransAlta that has effectively "challenged" the applicability of the 1945 Amendment to the present Inquiry.⁶ The Applicant is making no such challenge. Thus TransAlta has no ability to raise Part 3 of the *Administrative Procedures and Jurisdiction Act* without EPA or TransAlta filing the requisite Notice of Question of Constitutional Law pursuant to that Act. Neither has done so.

6. *Ibid*, s 10(d).

...

[para 27] The Applicant's argument with respect to the application of section 16(3) of the FOIP Act is not entirely clear. It may be that the Applicant is arguing that the *Constitution Act, 1930* makes the Applicant's client a party to the Agreement and therefore, the Public Body is authorized or required to disclose the information it has withheld under section 16(1) of the FOIP Act, to the Applicant because the Applicant's client is a party to the Agreement pursuant to the *Constitution Act, 1930*.

[para 28] Parties to an Agreement normally receive a copy of the Agreement they are a party to, and do not need to make (or have their legal counsel make) an access request under the FOIP Act to obtain an original, or a copy of the Agreement.

[para 29] Alternatively, the Applicant may be arguing that separate and apart from any argument that the *Constitution Act, 1930* makes the Applicant's client a party to the Agreement, the *Constitution Act, 1930* authorizes or requires the Public Body to disclose the information it has withheld under section 16(1) of the FOIP Act, to the Applicant (or its client).

[para 30] TransAlta has argued that whether the *Constitution Act, 1930* requires the Public Body to disclose the information withheld under section 16(1) of the FOIP Act to the Applicant (or its client), is a constitutional question. TransAlta argues that the *Administrative Procedures and Jurisdiction Act, R.S.A. 2000, c A-3* (the *Administrative Procedures and Jurisdiction Act*) does not give me the authority to decide constitutional issues or questions.

[para 31] My jurisdiction under the FOIP Act is the first issue that must be determined. If TransAlta is correct, and I do not have jurisdiction to decide constitutional issues or questions, then I cannot consider whether the *Constitution Act, 1930* requires the Public Body to disclose the information withheld under section 16(1) of the FOIP Act to the Applicant (or its client). If I have jurisdiction to decide constitutional issues, then I can decide whether the *Constitution*

Act, 1930 authorizes or permits the Public Body to disclose the withheld information to the Applicant (or its client) and section 16(3) of the FOIP Act applies.

[para 32] The Applicant took issue with the fact that TransAlta raised the question of my jurisdiction to decide constitutional issues under the *Administrative Procedures and Jurisdictions Act*.

[para 33] Any party to an inquiry can raise issues regarding the jurisdiction of this Office to hear or decide a particular issue.

[para 34] In this case, even if TransAlta had not raised the question of whether I have the jurisdiction under the *Administrative Procedures and Jurisdiction Act* to consider whether the *Constitution Act, 1930* has the effect the Applicant asserts it does, I would have considered it on my own, as has been done by this Office in prior Orders, since it involves the fundamental question of this Office's jurisdiction.

[para 35] Sections 10(d) and 11 of the *Administrative Procedures and Jurisdiction Act* state:

10(d) "question of constitutional law" means

(i) any challenge, by virtue of the Constitution of Canada or the Alberta Bill of Rights, to the applicability or validity of the Parliament of Canada or an enactment of the Legislature of Alberta, or

(ii) a determination of any right under the Constitution of Canada or the Alberta Bill of Rights.

11 Notwithstanding any other enactment, a decision maker has no jurisdiction to determine a question of constitutional law unless a regulation made under section 16 has conferred jurisdiction on that decision maker to do so.

[para 36] The Commissioner is not listed in the *Designation of Constitutional Decision Makers Regulation*, Alta Reg. 69/2006 as a decision maker who has the jurisdiction to determine questions of constitutional law.

[para 37] Previous Orders of this Office have confirmed that the Commissioner does not have the jurisdiction to determine constitutional questions or issues.⁹

[para 38] For example, in Order F2015-41, former Commissioner Clayton stated at paragraphs 11 and 12:

[para 11] Section 11 of Alberta's *Administrative Procedures and Jurisdiction Act* states:

11 Notwithstanding any other enactment, a decision maker has no jurisdiction to determine a question of constitutional law unless a regulation

⁹ See for example, Orders F2008-005 at paragraphs 78 – 80, F2010-019 at paragraphs 12 – 13, F2015-41 at paragraphs 11 -12, and F2022-33 at paragraphs 52 – 53.

made under section 16 has conferred jurisdiction on that decision maker to do so.

[para 12] The regulation referred to in this provision does not confer jurisdiction to determine questions of constitutional law on the Information and Privacy Commissioner of Alberta. Therefore, I do not have jurisdiction to determine if the Complainant's Charter rights have been violated or any other Charter related questions which the Applicant raises. For this reason, I will not comment on the Complainant's arguments relating to the Charter.

[para 39] As a result, whether the Applicant is arguing that the *Constitution Act, 1930* makes the Applicant's client a party to the Agreement, and therefore authorizes or requires the Public Body to disclose the information it has withheld under section 16(1) of the FOIP Act to the Applicant (or its client), or whether it is arguing that a provision or provisions contained in the *Constitution Act, 1930* authorize or require the Public Body to disclose the information it has withheld under section 16(1) of the FOIP Act to the Applicant (or its client), both of these arguments require me to interpret and make a finding with respect to the application of constitutional legislation, which I do not have the authority under the *Administrative Procedures and Jurisdiction Act* to do.

[para 40] Ultimately, whether the *Constitution Act, 1930* makes the Applicant's client a party to the Agreement, and/or authorizes or requires the Public Body to disclose the withheld information to the Applicant (or its client) pursuant to the *Constitution Act, 1930*, are questions over which the Court, and not this Office, has jurisdiction. For this reason, I will not consider or comment on the Applicant's arguments relating to the *Constitution Act, 1930*.¹⁰

[para 41] I do, however, have jurisdiction under the FOIP Act to determine whether the Public Body has properly applied section 16(1) to withhold the information in the Agreement. I will now turn to consider this issue.

2. If section 16(3) does not apply, does section 16(1) of the Act (disclosure harmful to business interests of a third party) apply to the information withheld in the record?

[para 42] As I have no jurisdiction to determine whether the *Constitution Act, 1930* makes the Applicant's client a party to the Agreement, or authorizes or requires the Public Body to disclose the information withheld under section 16(1) of the FOIP Act to the Applicant or its client, I have not considered the Applicant's arguments with respect to the application of the *Constitution Act, 1930* in making my determination regarding whether the Public Body properly applied section 16(1) of the FOIP Act to withhold certain information.

¹⁰ As I have determined I do not have the jurisdiction to consider the application and effect of the *Constitution Act, 1930* in this inquiry, I do not need to, and cannot consider TransAlta's arguments in rebuttal to the Applicant's argument that the *Constitution Act, 1930* authorizes or requires the Public Body to disclose the information withheld under section 16(1) of the FOIP Act, to the Applicant (or its client).

[para 43] Based on the evidence before me, the only parties to the Agreement are Her Majesty The Queen in Right Of The Province of Alberta and TransAlta Generation Partnership.

[para 44] The Public Body applied section 16(1) to withhold information on pages 16-19, 30-36, 39, and 48-49 of the Agreement.

[para 45] Section 16(1) is not discretionary. If information meets the requirements set out in section 16(1), the head of the public body must refuse to disclose it to an applicant.

[para 46] In its initial submission, the Applicant stated:

48. Notably, EPA is not objecting to disclosure of the Record; it is only TransAlta that is objecting.

[para 47] This is incorrect. Under section 16 it is *the head of the public body* that decides whether section 16(1) applies to information, and it must withhold this information.

[para 48] In the case at hand, the Public Body disclosed part of the Agreement to the Applicant and determined that it must withhold certain information in the Agreement from the Applicant under section 16(1).

[para 49] In its response letter to the Applicant dated August 2, 2017, the Public Body identified the pages it was applying section 16(1) to, and specifically stated (my emphasis):

Pages 16-19, 30-36, 39, 48-49 of the records have the exception Section 16(1) of the *Freedom of Information and Protection of Privacy (FOIP) Act*, which provides that a public body must refuse to disclose information that would reveal commercial or financial information of a third party, applied to them. This decision was made by [Name], Assistant Deputy Minister, Operations, Alberta Environment and Parks.

[para 50] This is the Public Body informing the Applicant that it has identified information which it believes section 16 applies to, and that it must refuse to disclose this information in the Agreement from the Applicant *and is* refusing to disclose this information.

[para 51] The Public Body has had an opportunity in this inquiry to say whether it agrees with any of the arguments put forward by the Applicant and the Public Body has not made any submission agreeing with any of the arguments put forward by the Applicant for disclosure of the withheld information to the Applicant (or its client).

[para 52] Before turning to the test that must be met for section 16(1) to apply, it is helpful to review the purpose of section 16(1). In Order F2025-01, the adjudicator discussed the purpose of section 16(1) as follows:

[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 (*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 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 no 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.

[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 is not disclosed when providing access to government information.

[para 53] As set out in Order F2004-013 at paragraph 10, for section 16(1) to apply, the following criteria under subsections (a), (b), and (c) 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)?

[para 54] Where, as in this case, a public body decides to refuse an applicant access to information, section 71(1) provides that the burden to establish that the applicant has no right of access to the record, or part of the record, is on the public body. Section 71(1) states:

71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.

[para 55] The standard of proof under section 71(1) is the balance of probabilities.¹¹

[para 56] The Public Body did not provide any submissions in this inquiry; however, previous orders of this Office have noted that arguments may be provided by the affected (third) party to support a public body's decision to withhold information under section 16(1). For example, in Order F2011-018 at paragraph 39, the adjudicator stated:

[para 39] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it withheld under section 16(1). The Public Body may be assisted by the Affected Party.

[para 57] The Public Body acknowledged receipt of TransAlta's initial submission and informed this Office and the parties that there was no further information it could add at this time so it did not intend to submit a rebuttal submission.¹² I understand the Public Body to be relying on TransAlta's initial submission to provide the reasons for which the Public Body withheld responsive information under section 16(1).

[para 58] As I have the records, and TransAlta has provided submissions on how the redacted information meets the requirements to be withheld under section 16(1), I may consider these arguments in determining whether the burden under section 71(1) has been discharged.

[para 59] Taking the foregoing into account, I will now consider whether the Public Body properly applied section 16(1) to withhold the information it redacted in the Agreement.

Section 16(1)(a)

[para 60] In its initial submission, TransAlta states that the information withheld in the Agreement by the Public Body and sought by the Applicant meets the requirements of section 16(1)(a) as it "details how and to what extent such operations may or must be changed in order to effect the agreement, as well as sensitive contact information detailing how and when such changes may or must occur. The information withheld also documents and explains the operational and technical capabilities of TransAlta's assets".¹³

[para 61] TransAlta made the following specific submissions regarding the application of section 16(1)(a) and 16(1)(c) where it was applied to withhold information in the Agreement (footnotes incorporated into text):¹⁴

- ii. *Section 16(1)(a): The Disclosure of the Record Would Reveal TransAlta's Trade Secrets, Commercial, Financial, Labour Relations, Scientific, or Technical Information & Page 16-17 Redactions*

¹¹ See *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 at paragraphs 79 – 80.

¹² Email dated August 4, 2023, from Public Body to this Office, the Applicant, and TransAlta.

¹³ TransAlta's initial submission dated July 24, 2023.

¹⁴ *Ibid.*

TransAlta notes that the wording of the request itself assumes that the disclosure of – at a minimum – TransAlta’s commercial, financial and technical information of a third party could occur. Of particular note here is the manner the Applicant’s request is framed:

“[t]he agreements modify TransAlta’s operation at Ghost Reservoir for flood mitigation purposes. In exchange, Gov. of Alberta is to provide compensation for loss of generation power.” [Emphasis added]

By necessity, to modify the operation of the Ghost Reservoir requires a description and understanding of the current operation, or at a minimum a statement of how that operation will change as a result of the Record, and in particular would admit of *how* and *when* generation power could be lost. This point permeates the Applicant’s request – and the modification to TransAlta’s operations are apparent from the context that can be understood from the unredacted portions of the Record already provided. TransAlta draws the OIPC’s attention to page 16, section 5 of the Record, which states:

TransAlta shall not be required to adjust or otherwise affect its operations or management at the Other Works in order to fill Ghost Reservoir.

The immediately preceding sections 1 through 4, which are partially or entirely redacted, therefore, contain a detailed listing and recitation of those very adjustments and impacts upon the operations or management of TransAlta’s assets for flood mitigation purposes. By the same token redactions on the balance of page 16 and 17 itemizes exactly where and how TransAlta may be released from those same adjustments and impacts to the operations and management of its asset. TransAlta submits that the information sought is clearly a “trade secret”, as defined by the Supreme Court of Canada in *Merck Frosst Canada Ltd. v Canada (Health)* [Merck Frosst Canada Ltd. v Canada (Health), 2012 SCC 3, at para 109.]:

- the information must be secret in an absolute or relative sense (i.e. known only by one or a relatively small number of persons);
- the possessor of the information must demonstrate that he has acted with the intention to treat the information as secret;
- the information must be capable of industrial or commercial application;
- the possessor must have an interest (e.g. an economic interest) worthy of legal protection.

In TransAlta’s submission, all of the above elements are satisfied.

...

iv. Page 18 Redactions

The redactions on this page under the heading “Constraints” describe the technical data contained within the redactions on page 30-36. This information, as noted in the heading, describes and contextualizes the constraints themselves.

The redactions on this page under the heading “Directions for Water from the Kananaskis System by Alberta” describes, as the name implies, when the directions affecting TransAlta’s operation of its assets may be directed to do otherwise by Alberta for the purposes of effecting the Record at issue. Specifically:

- The first redaction under this heading states the time of year when such changes take effect.
- The second block of redactions under this heading describes the technical requirements and the manner in which TransAlta will operate its assets[.]
- The last redaction under this heading describes the interval at which Directions for a release may be issued under the agreement.

The disclosure of this information would allow a competitor to accurately understand the changes to operational assets required to implement the agreement, and in so doing, could forecast or otherwise undercut the balance of TransAlta’s entire operational strategy for specific assets, and completely undermine TransAlta’s ability to compete in the market which is codified in legislation as being premised upon fair, efficient and open competition.

v. *Page 30-36 Redactions*

These pages contain technical data on the operational capabilities of various TransAlta assets, and their intended operational profiles in visual and tabular form. These figures are referenced in the redactions to pages 16 through 19 discussed above. The disclosure of this information would allow a competitor to accurately understand the changes to operational assets required to implement the agreement, and in so doing, could forecast the balance of TransAlta’s entire operational strategy for specific assets, and completely undermine TransAlta’s ability to compete in the market which is codified in legislation as being premised upon fair, efficient and open competition.

vi. *Page 48 Redactions*

The information redacted here consists of technical operating information, operating protocols, and operational capabilities of TransAlta’s facilities, or reporting information that would reveal the technical and operational capabilities of TransAlta facilities. The disclosure of this information would place TransAlta at a structural and permanent disadvantage to its competitors in Alberta’s wholesale electricity market, which – again – is codified in legislation as being premised upon fair, efficient and open competition.

[para 62] In Order F2025-01, the adjudicator discussed what constituted “commercial, financial, labour relations, scientific or technical information of a third party”. In particular, the adjudicator stated:

[para 36] Past orders of this Office have defined “commercial information” as information belonging to a third party about its busing, selling or exchange or 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 the third parties because “the information is about terms under which [the third parties] performed or 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, a 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 pace, who may want it and for what purposes, a value that may fluctuate widely over time” (*Air Atonabee*, at pp. 267-68).

[para 63] I have reviewed the information withheld under section 16(1) in the Agreement by the Public Body and considered TransAlta’s descriptions of the withheld information set out above and arguments with respect to how the information meets the requirements of section 16(1)(a).

[para 64] I agree that the information withheld in the Agreement under section 16(1) consists of either TransAlta’s trade secrets or is TransAlta’s commercial or technical information and meets the requirements under section 16(1)(a).

Section 16(1)(b)

[para 65] There are two components that must be met for section 16(1)(b) to apply: the information must be *supplied* by the third party, and it must be supplied *in confidence*.

[para 66] In *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231, the Alberta Court of Appeal discussed what the term “supplied” in section 16(1)(b) meant. At paragraphs 81 – 83, the Court stated (emphasis added):

[81] The Commissioner reasoned that the requirement in s. 16(1)(b) that the information be “supplied” was related to whether it was “of the third party”. He concluded at para. 24 that “information in an agreement that has been negotiated between a third party and a public body is not information that has been *supplied* to a public body.” In this case he ruled at para. 25 that “the information the Public Body seeks to withhold is part of a contract negotiated between itself and the Affected Party.” The Commissioner acknowledged that information disclosed during negotiations that ended up in an agreement might still be “supplied” by the third party and “confidential”.

[82] The chambers judge was correct in determining that these findings are unreasonable. First of all, as previously noted, it is not the Remediation Agreement itself that must be the protected information. There would be room to argue that negotiated contracts themselves are not “supplied” by either party to the agreement. 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. 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”.

[83] 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 67] In its submission, TransAlta provided the following arguments to establish that the withheld information was “supplied” by TransAlta to the Public Body:¹⁵

The redacted information consists entirely of Schedules and attachments or information derived therefrom. This information would not have changed, and consists of non-negotiated confidential information supplied by TransAlta to the EPA.

I am informed that these Schedules and attachments were generated by TransAlta, using its own models and its own assets’ operational information.

With the exception of the redactions at section 1 on page 16 of the Redacted Record and section 4 on page 18 of the Redacted Record, all of the redactions in Schedule A are immutable information [As that term is used in Order F2023-44, at para 47] supplied by TransAlta in confidence to EPA regarding the physical and operational attributes, limitations, constraints and capabilities of the assets themselves. This information is confidential to TransAlta based on the physical properties and technical studies of its physical assets. It was not negotiated.

¹⁵ TransAlta’s rebuttal submission dated February 15, 2024.

As an example, on page 19 at section 14 of the Record which contains no redactions, the Record itself makes it unambiguous that the data was generated and supplied solely by TransAlta using its own internal scientific and technical information:

TransAlta has established the Normal Operating Range using the best engineering information available as of the Effective Date. [...]

The redactions to section 1 of page 16 and section 4 of page 18 of the Redacted Record are similarly immutable information, but they are calendar dates supplied by TransAlta as an output of the immutable information supplied above. TransAlta continues to object to the disclosure of these redactions.

The redactions on pages 39, 48 and 49 in the Interim Water Management Services Agreement follow the same pattern as the redactions to the Water Management Services Agreement itself on pages 16 through 19 of the redacted Record and relate to the same information.

The nature of the redacted information being immutable and supplied by TransAlta is easily discernible with reference to the unredacted information on page 48. The redacted information for the most part falls under the heading “A. Reference Information”. TransAlta submits that this is clear and unambiguous evidence of intention, and a recognition by both parties to the Record, that the information was supplied by TransAlta concerning immutable information about its operations and its assets.

[para 68] Having reviewed the information withheld on the aforementioned pages and considered TransAlta’s arguments, I find the information to have been supplied by TransAlta to the Public Body.

[para 69] With respect to the information being supplied *in confidence*, in its submission, TransAlta stated:¹⁶

The record at issue contains a confidentiality protocol, which in and of itself demonstrates an intention that TransAlta supplied information in confidence. But more than that, TransAlta has strictly complied with this confidentiality protocol, having appropriately marked the record itself as confidential. This satisfies section 16(1)(b).

[para 70] TransAlta supported its assertion that the information was supplied in confidence with the following arguments:

TransAlta submits that Schedule D to the document at issue should be dispositive of the requirement in 16(1)(b) to prove that the information was supplied explicitly or implicitly in confidence. While the Applicant states that “Schedule D does not identify any provisions of the Agreement that would fall under section 16(1) of the Act”, nothing turns on specific provisions being marked or not.

Much like settlement communications, it is the content and substance of what is being disclosed, and the intentions of the parties – not a label – that affords it the confidential protection it enjoys. A specific notation of label is not required to establish the protection

¹⁶ TransAlta’s initial submission dated July 24, 2023.

sought, [See *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 ABCA 10, at paras 24-25. See especially *Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231, at para 88.] but is helpful in assisting the reader. TransAlta submits that the relevant test was set by the Alberta Court of Appeal as being the subjective intention of the discloser [*Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231, at para 75.]:

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”. [Emphasis added.]

Schedule D does identify several types of information which are properly the subject of s. 16(1)(b). These types of information include:

- (a) all data, reports, computer tapes, notes, interpretations and records containing or otherwise reflecting information concerning marketing plans, business plans, strategies, alliances, forecasts, financial information, supplier information, technical information, statistics, analysis, reports, and any customer information which is not available to the general public and which the Disclosing Party will provide or has previously provided to the Receiving Party at any time and in any form including but not limited to, any written oral information obtained by meeting with representative or personnel of the Disclosing Party;
- (b) all the Disclosing Party’s technical data and know-how relating to both existing and proposed products, processes, infrastructure, methods, systems and equipment;
- (c) business practices of the Disclosing Party; or
- (d) without limitation, all of the Disclosing Party’s trade secrets.

Critically, Schedule D provides that in order to designate written information as confidential, the written materials must be marked as “confidential.” The entire record at issue is marked in this fashion in the upper right hand margin. TransAlta submits it would neither be prudent or practical to mark only those pages, or only those sections in an itemized listing, which contain “Confidential Information” as confidential. The intent of the marking is to signal to the reader that the entire document contains the types of information listed above – not that the document itself consists entirely of confidential information.

TransAlta submits that the redactions surely meet this subjective test of intention, having executed a separate agreement intended to provide an objective means of identifying information supplied in confidence, and marking the information in accordance with those terms and conditions.

TransAlta's intention to supply the information in the Record to a Public Body in confidence could not be any clearer.

[para 71] Schedule "D" to the Agreement, is a Mutual Confidentiality and Non-Disclosure Agreement (the Confidentiality Agreement). In this Agreement, the Public Body and TransAlta set out their obligations to keep "Confidential Information", as defined therein, confidential.

[para 72] The information withheld in the Agreement under section 16(1) falls within the definition of "Confidential Information" in the Confidentiality Agreement.

[para 73] There is no evidence before me to suggest that the withheld information has been treated by either the Public Body or TransAlta as non-confidential.

[para 74] I find that TransAlta supplied the withheld information in confidence to the Public Body and the information meets the requirements of section 16(1)(b).

Section 16(1)(c)

[para 75] In order for section 16(1) to apply, it must be established on a balance of probabilities that disclosure of the information "could reasonably be expected to" result in at least one of the outcomes listed in section 16(1)(c).

[para 76] The phrase "could reasonably be expected to" in section 16(1)(c) was discussed by the adjudicator in Order F2025-01. At paragraphs 84 – 85, the adjudicator stated:

[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 "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. The 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 77] TransAlta made the following submission regarding the application of section 16(1)(c):

- i. *Section 16(1): The Disclosure of the Record Would Undermine the Fair, Efficient and Openly Competitive Nature of the Electric Industry in Which TransAlta Competes*

As discussed below, the disclosure of the redacted information would serve to undermine the core objective and express legislative purpose of the *Electric Utilities Act* itself [SA 2003, c. E-5.1], which is to promote an electricity market that is based on fair and open competition [See *Electric Utilities Act*, s. 5(b), (c), and (d). See also, *Fair[,] Efficient and Open Competition Regulation*, AR 159/2009 generally.]. As the Applicant is no doubt aware as experienced counsel before the Alberta Utilities Commission, “competition is the touchstone running through all aspects of the legislative scheme governing the electrical industry now in effect in Alberta” [*ATCO Electric Limited v Alberta (Energy and Utilities Board)*, 2004 ABCA 215 at para 24.].

Alberta’s power pool operates as an hourly auction for electric energy. Generators must offer all of their capacity into the power pool, unless there is an acceptable operational reason not to do so, and generators are dispatched in order of economic merit of their offers into the hourly auction. Accordingly, there is no guarantee that a particular generator will generate a particular amount, or indeed any amount of generation.

Disclosure of the redacted information in the Record may reveal to TransAlta’s competitors its past, present or future times, situations, periods, circumstances, patterns,

signals, or other behaviours where TransAlta may or may not be able to offer any or all of its entire capacity, or where it may be prevented from offering in at an economically competitive price, or spill its available fuel (water) to meet the objectives of the Record. Divulging this information to the public, and *ipso facto* to TransAlta's competitors, would put TransAlta at a structural disadvantage relative to the rest of the market. Not only is this fundamentally unfair, it would also constitute a breach of the purpose of the *Electric Utilities Act* expressly enumerated in subsections 5(b-e) therefor, which provides:

5 The purposes of this Act are [. . .]

(b) to provide for a competitive power pool so that an efficient electricity market based on fair and open competition can develop, where all persons wishing to exchange electric energy through the power pool may do so on non-discriminatory terms and may make financial arrangements to manage financial risk associated with the pool price;

(c) to provide for rules so that an efficient electricity market based on fair and open competition can develop in which neither the market nor the structure of the Alberta electric industry is distorted by unfair advantages of government-owned participants or any other participant; [. . .]

(d) to continue a flexible framework so that decisions of the electric industry about the need for and investment in generation of electricity are guided by competitive market forces;

(e) to enable customers to choose from a range of services in the Alberta electric industry developed by a competitive electricity market, and to receive satisfactory service; [. . .].

The provision of the redacted information in the Record would allow TransAlta's competitors to know exactly when TransAlta may or may not be able to offer any or all of its entire capacity due to operational changes pursuant to the Record. This not only prevents TransAlta from competing in the market, it establishes a sufficient degree of informational asymmetry in favour of TransAlta's competitors, which could enable those participants to manipulate power prices away from a competitive outcome, which is expressly prohibited by section 2(k) of the *Fair, Efficient and Open Competition Regulation*.

This explanation, in TransAlta's submission, clearly satisfies [the requirements] in 16(1)(c)(i) and (iii).

Given that the purpose of the agreement itself is for flood mitigation, and the significant impacts of flooding which materialized in Alberta in 2013, there is also a clear public in continuing to supply such information to the public body. Were this information to be disclosed by order of the OIPC, TransAlta would never supply such information to the public body. This explanation satisfies 16(1)(c)(ii).

It is noteworthy that for a public body to refuse disclosure, only one of the factors in 16(1) be satisfied. TransAlta's information satisfies *all three*.

[para 78] As reproduced above under the heading Section 16(1)(a), TransAlta specifically explained how the disclosure of the information withheld in the Agreement could reasonably be expected to result in the consequences set out in Section 16(1)(c)(i), (ii), and/or (iii) occurring.

[para 79] In its rebuttal submission, the Applicant stated in part:¹⁷

28. There are no impediments to EPA releasing the withheld and redacted schedules and attachments to the Record, on appropriate confidentiality terms.
29. TransAlta's reasons for confidentiality may apply to third parties, but this reason cannot apply to the Stoney Nakoda.
30. The Stoney Nakoda are not a competitor to TransAlta. They intend to use the Record for their own purposes, and do not intend to share the information with any other parties. The Stoney Nakoda are not seeking that the Record be made available to the public as a whole, nor to any competitors to the TransAlta/Stoney Nakoda Ghose Reservoir hydro power generation operations.
31. The same confidentiality measures applied as between TransAlta and EPA can be applied between EPA and the Stoney Nakoda. Appropriate confidentiality terms would protect the information from being revealed to other third parties or to the public at large.

[para 80] Section 16(1) is a mandatory provision. Except where section 16(3) applies, if the information meets the requirements of section 16(1), a public body must withhold it.

[para 81] The FOIP Act does not say that section 16(1), and in particular section 16(1)(c), does not apply if an applicant promises that it will not disclose the confidential information supplied by the third party to the public body to anyone else.

[para 82] Section 16(3) does not include an exception for a public body to disclose information to which section 16(1) applies, to an applicant, if the applicant promises or agrees not to disclose the information any further. Nor is there any requirement in the FOIP Act for the Public Body or TransAlta to enter into a confidentiality agreement with the Applicant's client.

[para 83] Accordingly, the Applicant's assertion that its client would not disclose the information to which section 16(1) applies is not a relevant consideration in determining whether disclosure of the information to the Applicant, or its client, could reasonably be expected to result in one of the consequences set out in the subsections of 16(1)(c).

[para 84] In the case before me, I find that TransAlta has made sufficient arguments to show that the likelihood of one of the scenarios in section 16(1)(c)(i), (ii) and/or (iii) occurring if the information is disclosed is considerably above a mere possibility.

¹⁷ Applicant's rebuttal submission dated March 28, 2024.

[para 85] In summary, I find that section 16(1) applies to the information withheld by the Public Body on this basis.

3. Did the Public Body properly apply section 18 of the Act (disclosure harmful to individual or public safety) to the information in the record?

[para 86] The Public Body applied section 18(1) to information on pages 17, 19 and 48 of the Agreement.

[para 87] Section 18(1) states:

18(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

- (a) threaten anyone else's safety or mental or physical health, or*
- (b) interfere with public safety.*

[para 88] Section 18(1) does not require that a public body establish that the consequences set out in subsections (a) or (b) *will* occur, only that they *could reasonably be expected* to occur.

[para 89] In its initial submission TransAlta provided the following explanation as to how section 18 applied to the information withheld by the Public Body on these pages:¹⁸

...

2. Summary of Arguments

...

The section 18 redactions are appropriate given the risk that the disclosure of such information may result in improper contact being made and put the assets at risk of compromise or misoperation. As the record at issue pertains to water management of hydroelectric generation assets, these could result in rapid changes to water levels or flows, which could seriously jeopardize public safety downstream of any of TransAlta's hydroelectric generation fleet in the province of Alberta.

...

- b. Did the Public Body properly apply section 18 of the Act (disclosure harmful to individual or public safety) to the information in the record? ("Issue 2")*

For the reasons below, TransAlta submits the answer to Issue 2 is also a clear and simple 'yes'.

¹⁸ TransAlta's initial submission dated July 24, 2023 at pages 5 and 11.

In the alternative, even if the OIPC comes to a different conclusion, TransAlta submits that the information nevertheless *also* qualifies for protection from disclosure under section 16(1) of the Act.

i. Page 17 Redactions

This information contains secure non-public contact information for making directions to changes to the “Intended Water Level”, as noted in the unredacted portion of this section. Any disclosure of this information could result in unwanted or unsolicited contact, which may in turn cause a failure or a delay in responding to a change in the Intended Water Level, or may result in improper contact being made and put the assets at risk of compromise or misoperation. This contact information serves a number of other important and time-sensitive functions, and their publication may expose this contact information as a target of phishing or other social engineering attempts to gain unauthorized access to this contact information.

ii. Page 19 Redactions

This information contains secure contact information. For the same reasons discussed in reference to the redactions on page 17, TransAlta objects to the production of this information.

iii. Page 48 Redactions

This information contains secure contact information. For the same reasons discussed in reference to the redactions on page 17 and 19, TransAlta objects to the production of this information.

[para 90] The Applicant argued that section 18(1) did not apply for the following reasons:¹⁹

54. Certain redactions have also been made pursuant to section 18 of the Act based on TransAlta’s concerns over operational changes to the “Intended Water Level”.
55. As set out above, the Ghost Reservoir floods a portion of the Stoney Indian reserves. As such Stoney Nakoda Emergency Services has a shared responsibility for safety on the Ghost Reservoir and directly liaises with Emergency Alberta in that regard.
56. For TransAlta to argue that disclosure of the Record will somehow endanger individual or public safety is the antithesis of reality. Disclosure of Ghost Reservoir water level information to the Stoney Nakoda can only enhance public safety.

[para 91] In rebuttal, TransAlta reiterated that the information withheld under section 18 pertained to contact information only. It stated:²⁰

¹⁹ Applicant’s initial submission dated September 19, 2023.

²⁰ TransAlta’s rebuttal submission dated February 15, 2024, at pages 4 – 5.

. . . Releasing this confidential information to third parties can only serve to impede or interrupt the time-sensitive duties and one-way nature of the communications, and thereby impair public safety.

As the unredacted portions make clear – the contact information is for TransAlta’s counterparty to make directions about the Intended Water Level and for Requested Release Rates.

There is no public interest purpose served by giving the Applicant access to this contact information. Protocols for involving third party requests, and publishing data are visible at section 13 of Schedule B, on page 19 of the Record. No access to the redacted information is necessary for the Applicant to make requests of TransAlta, nor to receive information from TransAlta or from EPA.

None of the information redacted pursuant to Section 18(1)(b) pertains to the “Intended Water Level” itself. Public information on current and historical water levels at Ghost reservoir are and have been available to the Applicant through Alberta Environment by visiting <http://rivers.alberta.ca>.

[para 92] In its rebuttal, the Applicant argues that it should not have to use the third-party request protocol to contact TransAlta and ought to have the direct contact information withheld in the Agreement so that it can use the contact information to directly contact TransAlta in emergencies. It states, in part:²¹

38. The Ghost Reservoir, created by the Ghost dam operated by TransAlta, floods a portion of the Stoney Indian Reserve. The Stoney Nakoda are obligated to, and do maintain their own Emergency services organizations whose jurisdiction extends to lands bordering the Ghost Reservoir.
39. The redacted contact information relates directly to the parties responsible for the intended water level and release rate of waters flowing through the Ghost dam. Direct communications access to controls over the intended water level and release rates provides an important and useful tool to Stoney Nakoda Emergency Services in the fulfillment of their duties.
40. The unredacted third party request protocols available on the record at section 13 of Schedule “B” (,) contemplate a general protocol for only those third-party requests from any and all users of the Kananaskis River. This has no relevance to users on the Ghost Reservoir.
41. Regardless, a third-part request protocol which is intended to handle requests from all users, and with multiple parties and steps involved, cannot possibly serve the public interest better than a direct line of communication to the parties impacted by changes to the intended Ghost Reservoir water level and the release rates.

²¹ Applicant’s rebuttal submission dated March 28, 2024.

42. In fact, it would be an impediment to public safety to require emergency service providers, such as Stoney Nakoda Emergency Services, to rely on a general third-party access protocol, rather than a line of direct communication.
43. The Applicant and the Stoney Nakoda do not intend to reveal the redacted information to any other third parties. The Stoney Nakoda seeks the Record solely for their own use, of which the provision of emergency services is undeniably a part.
44. It would be illogical and dangerous to conclude that the Stoney Nakoda should be denied information necessary for their emergency management organizations to perform their duties.
45. The Stoney Nakoda are obligated to and do maintain their own Emergency Services organizations whose jurisdiction extends to lands bordering the Ghost Reservoir. To argue that the Stoney Nakoda should be denied information necessary for these organizations to perform their duties, is illogical and dangerous.

[para 93] As I understand from TransAlta's submissions, the contact information for TransAlta that was withheld by the Public Body is not contact information that has been made public. It is secure non-public contact information provided by TransAlta to the Public Body for the sole purpose making directions to changes to the "Intended Water Level". It is not an emergency line for public use, including use by the Applicant's client, to contact TransAlta.

[para 94] The contact information withheld in the Agreement is simply not to be used for the purposes for which the Applicant's client seeks to use it.

[para 95] Whether the Applicant's client ought to have a direct way of contacting TransAlta for emergency purposes relating to the Ghost Reservoir is outside the scope of my jurisdiction and this inquiry. That is a discussion for the Applicant's client and TransAlta to have. The issue before me is whether the disclosure of TransAlta's secure non-public contact information to the Applicant could reasonably be expected to interfere with public safety such that it may be withheld under section 18(1)(b).

[para 96] As noted above, in its initial submission TransAlta stated (my emphasis):

The section 18 redactions are appropriate given the risk that the disclosure of such information may result in improper contact being made and put the assets at risk of compromise or misoperation. As the record at issue pertains to water management of hydroelectric generation assets, these could result in rapid changes to water levels or flows, which could seriously jeopardize public safety downstream of any of TransAlta's hydroelectric generation fleet in the province of Alberta.

[para 97] TransAlta further stated on page 4 of its rebuttal submission:

. . . Releasing this confidential information to third parties can only serve to impede or interrupt the time-sensitive duties and one-way nature of the communications, and thereby impair public safety.

[para 98] The test for whether disclosure of the information *could* reasonably be expected to interfere with public safety is the test set out in *Merck Frosst* set out above; namely, it must be “considerably above” a mere possibility. The test does not require a public body or third party to show that disclosure of the information *would* result in interference with public safety, only that it *could* reasonably be expected to interfere with public safety.

[para 99] The Applicant’s own submissions support TransAlta’s concern that if disclosed to the Applicant, the Applicant would use the secure non-public contact information to contact TransAlta, which is a purpose for which the information was not intended. It is only to be used by the Public Body to contact TransAlta in relation to the Agreement.

[para 100] I accept TransAlta’s submissions that disclosure of this information could result in unwanted or unsolicited contact, which may in turn cause a failure or a delay in responding to a change in the Intended Water Level, or may result in improper contact being made and put the assets at risk of compromise or misoperation and ultimately jeopardize public safety downstream of any of TransAlta’s hydroelectric generation fleet in the province of Alberta. For this reason, I find that section 18(1)(b) applies to the information.

[para 101] The fact that the Applicant’s client does not intend this to be a possible outcome is not relevant to a determination as to whether such an outcome could reasonably be expected to occur.

[para 102] Furthermore, while the Applicant states that its client does not intend to disclose the secure non-public contact information, this does not remove the risk that once the secure non-public contact information has been disclosed to the Applicant or its client, TransAlta no longer has control over what happens to it, or the ability to ensure proper security measures are implemented to prevent its misuse or further disclosure.

[para 103] I accept TransAlta’s argument that this could increase the risk that the contact information could become a target of phishing or other social engineering attempts to gain unauthorized access to this contact information and that if the information is compromised in this way, it could reasonably be expected to interfere with public safety. For this reason as well, I find that section 18(1)(b) applies to the information.

[para 104] Section 18 is a discretionary provision meaning the Public Body can decide whether to disclose the information. In this case, the Public Body decided not to disclose TransAlta’s secure non-public contact information in an agreement dealing with major infrastructure. Given the potential harm that could occur to public safety from the possible misuse of this information if it was disclosed, it is apparent why the Public Body decided to withhold this information and I find the Public Body exercised its discretion reasonably in withholding this information.

[para 105] As I have concluded that section 18(1)(b) applies to the information withheld on pages 17, 19 and 48, it is not necessary for me to consider TransAlta’s alternative argument that section 16(1) applies to this information.

V. ORDER

[para 106] I make this Order under section 72 of the Act.

[para 107] I find that the Public Body properly applied section 16(1) to the information withheld under this section.

[para 108] I find that the Public Body properly applied section 18(1) to the information withheld under this section.

Carmen Mann
Adjudicator
/kh