

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2025-12

March 31, 2025

CITY OF EDMONTON

Case File Number 005205

Office URL: www.oipc.ab.ca

Summary: An individual (the Applicant) made an access request to the City of Edmonton (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for the operator's manual for the Jenoptik MultaRadar CD.

The Public Body located two responsive records. It provided partial disclosure of the two records to the Applicant, withholding certain responsive information from each record 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). Following the review, the Applicant requested an inquiry.

JENOPTIK Robot GmbH (the Third Party) was invited to participate as an affected party in the inquiry but did not respond to the invitation.

The Adjudicator found that the Public Body and the Third Party had failed to establish that section 16(1) applied to the withheld information and ordered the Public Body to disclose it to the Applicant.

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

Statutes Cited: ON: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M. 56, as amended.

Orders Cited: AB: 2000-017, F2008-018, F2024-27, F2025-01.

Orders Cited: ON: MO-4219.

Cases Cited: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31.

I. BACKGROUND

[para 1] On October 10, 2016, an individual (the Applicant) made an access request to the City of Edmonton (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:

Operator's manual for the Jenoptik MultaRadar CD

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

Jan. 1/16 to Oct. 10/16

[para 3] On November 17, 2016, the Public Body informed the Applicant that it had identified two responsive records to his request:

- JENOPTIK Operating Instructions, MultaRadar CD (Vehicle-Front Mounting with SmartCamera III Application Mobile and Moving); and
- JENOPTIK Verification Procedure (Radar Sensor for System).

[para 4] The Public Body advised the Applicant of the following, in part:

The records you requested contain information that, if disclosed may affect the interests of another person or organization. We have contacted the affected party, as required under section 30 of the Act, to provide them with an opportunity to consent to disclosure or to make representations explaining why disclosure may harm their business interests.

[para 5] On February 1, 2017, the Public Body informed the Applicant that it had decided to provide partial access to the records. It stated, in part:

I am pleased to advise you that the City of Edmonton has decided to provide partial access to the records requested subject to exceptions under the Act. The affected third party has consented to the disclosure of the information contained in this package.

Some of the records you requested contain information that is withheld from disclosure under the Act. We have severed the excepted information so that we could disclose to you the remaining information in the records.

The severed information is withheld from disclosure under section 16(1) (disclosure harmful to business interests of a third party) of the Act. Attachment 1 contains a list of pages that were removed in their entirety.

[para 6] The Applicant requested that the Commissioner conduct a review of the Public Body's application of section 16(1) to withhold responsive information. The Commissioner authorized a Senior Information and Privacy Manager to review the Public Body's decision.

[para 7] Following the outcome of the review, the Applicant requested that the Commissioner conduct an inquiry.

[para 8] The Commissioner agreed to conduct an inquiry and delegated her authority to conduct the inquiry to me.

[para 9] JENOPTIK Robot GmbH was identified as an affected third party (the Third Party) and invited to participate in the inquiry but did not respond to the invitation.

II. RECORDS AT ISSUE

[para 10] The Public Body withheld pages 13-71, 73-81, 83-87, and 92-100 of the JENOPTIK MultaRadar CD Operating Instructions and Verifications Procedure (collectively, the JENOPTIK Operating Manual) under section 16(1) of the FOIP Act. These are the pages at issue in this inquiry.

III. ISSUE

[para 11] The Notice of Inquiry, dated September 26, 2024, sets out the following issue:

1. Does section 16(1) of the FOIP Act (disclosure harmful to business interests of a third party) apply to the information in the records?

IV. DISCUSSION OF ISSUES

- 1. Does section 16(1) of the FOIP Act (disclosure harmful to business interests of a third party) apply to the information in the records?**

[para 12] Section 16 of the FOIP Act 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 of other person or body appointed to resolve or inquire into a labour relations dispute.*

(2) *The head of a public body must refuse to disclose to an applicant information about a third party that was collected on a tax return or collected for the purpose of determining tax liability or collecting a tax.*

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

- (a) *the third party consents to the disclosure,*
- (b) *an enactment of Alberta or Canada authorizes or requires the information to be disclosed,*
- (c) *the information relates to a non-arm's length transaction between a public body and another party, or*
- (d) *the information is in a record that is in the custody or under the control of the Provincial Archives of Alberta or the archives of a public body and has been in existence for 50 years or more.*

[para 13] The purpose of section 16(1) was discussed by the adjudicator in Order F2025-01 at paragraphs 25 -26 as follows:

[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 "ATT").

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 14] Section 16 is a mandatory exception meaning that if the information meets the requirements set out in section 16(1) or (2), and none of the provisions in section 16(3) apply, a public body *must* withhold the information.

[para 15] At paragraph 16 of Order 2000-017, former Commissioner Clark addressed who bears the burden of proof and what must be established where the public body has refused an applicant access to information under section 15(1) (now section 16(1)). He stated:

[para 16] As the Public Body refused access to information under section 15(1), the burden of proof is on the Public Body, as provided by section 67(1). In this case, the Public Body must establish that:

- (i) disclosure of the information would reveal trade secrets of a third party, or commercial, scientific or technical information of a third party (section 15(1)(a));
- (ii) the information was supplied, explicitly or implicitly, in confidence (section 15(1)(b); and
- (iii) disclosure of the information could reasonably be expected to bring about one of the outcomes set out in section 15(1)(c)(i) – (iii).

[para 16] Section 67(1) referred to by former Commissioner Clark above is now section 71(1) of the FOIP Act, and sections 15(1)(a), (b), and (c) are now sections 16(1)(a), (b) and (c).

[para 17] The Third Party did not respond to the invitation to participate in the inquiry. Accordingly, I have no submissions in the inquiry from the Third Party on the application of section 16(1) to the withheld information.

[para 18] Along with its initial submission, however, the Public Body included the letter dated December 21, 2016, (the Letter) it received from the Third Party in which the Third Party set out its position as to how section 16(1) applied to information in the record and must be withheld by the Public Body.

Would disclosure of the information reveal trade secrets of a third party, or commercial, scientific or technical information of a third party (section 16(1)(a))?

[para 19] As mentioned above, the Third Party did not provide a submission for this inquiry, however, in the Letter it sent to the Public Body it stated, in part:

Freedom of Information and Protection of Privacy Act (the “Act”)/Disclosure of Records regarding JENOPTIK MultaRadar CD Operating Instructions and Verifications Procedure (“Operating Manual”)
City of Edmonton Reference No. 2016-G-087

...

The Operations Instructions supplied by Robot in connection with the executed agreement with the City of [Edmonton] (dated 24 February 2016, hereinafter “Agreement”), was supplied in confidence by Robot, as evidenced by the contract definition of Confidential Information. Confidential Information under the Agreement means City Information and Contractor Information. Contractor Information means information provided by the Contractor to the City and indicated by the Contractor as being provided in confidence. Furthermore the definition of Intellectual Property Rights under the Agreement specifically includes “(iii) confidential information or trade secrets”.

The Operating Manual of Robot contain trade secrets as well as technical information of Robot, particularly information relating to Robot’s Intellectual Property Rights including techniques, plans and designs and therefore should not be disclosed.

Disclosing the Operations Manual provides Robot’s competitors information that are not publicly available. This could reasonably be expected to cause harm to Robot by prejudicing Robot’s competitive position in the market.

[para 20] In its initial submission, the Public Body argued that the withheld records contained trade secrets of the Third Party and detailed technical information, including techniques, plans and designs of a photo radar machine, and methods used to calibrate and verify its accuracy.

[para 21] The Public Body made the following arguments as to how the withheld information met the requirements in section 16(1)(a):

9. The withheld records contain detailed requirements, measuring procedures and technical data of components that are considered to be the third party’s intellectual property. Step by step instructions on how to align the equipment, set the sensors, take speed measurements and trigger photos are specific to the third party’s equipment.

10. Details on data management, operation of system software and verification procedures are proprietary to the third party. In particular, the release of the “Digital Data Security Solution” and “Procedure to Provide Secure Primary Evidence” may compromise the integrity of their data.
11. The third party’s trade secrets, technical details, and schematics are not publicly available and provide enough detail that a competitor could replicate their product and prejudice their competitive position in the market.

[para 22] In Order 2000-017, former Commissioner Clark, defined “scientific information” and “technical information” as follows:

[para 28] Although in a previous Order I made a finding about what constitutes “scientific information” (see Order 99-018), I have not previously defined “scientific information” or “technical information” in an Order.

[para 29] The Concise Oxford Dictionary, Ninth Edition, defines “scientific” and “technical” as follows:

Scientific: according to rules laid down in exact science for performing observations and testing the soundness of conclusions.

Technical: of or concerned with the mechanical arts and applied sciences; or relating to a particular subject or craft, etc. or its techniques.

[para 30] The Alberta Information Management and Privacy Branch’s manual entitled *Freedom of Information and Protection of Privacy Policy and Practices* (August 1998, superseded September 2000) says that “scientific information” relates to experiments, principles and procedures derived by scientific method, and “technical information” relates to particular subjects, crafts or professions that are based on a specific technique or approach.

[para 31] British Columbia Order 57-1995 says that “scientific information” is information exhibiting the principles or methods of science, and “technical information” is information relating to a particular subject, craft or technique.

[para 32] I adopt the wording of the definitions set out in British Columbia Order 57-1995, as that wording is simpler and more readily understood.

[para 23] In Order 2000-017, former Commissioner Clark considered whether the information withheld by the Public Body, which included the Gatso photo radar unit operations manual and the Gatso red light camera operations manual, (collectively the operations manuals), was scientific or technical information under section 16(1)(a).

[para 24] With respect to the operations manuals, former Commissioner Clark determined that with the sole exception of the information the Public Body had severed at page 189 (a map of the location of Gatso among other information), the remainder of the information in the operations manuals was or would reveal scientific or technical information of the third party, particularly technical information (Order 2000-017 at paragraphs 31-35).

[para 25] In Order F2008-018, the adjudicator reached a similar conclusion with respect to the instruction manuals for Gatsometer BV's red light camera and its components. At paragraph 68 the adjudicator stated:

[para 68] Records 123-263 are comprised of two different Gatsometer manuals: Instruction Manuals IM-E0207 and IM-E0306, both copyrighted by Gatsometer BV. These records contain information that explains how to use the Gatsometer 36mST-MC-3LG red light camera and its components. I find that the information in these records is "technical information" as it is about the operation and maintenance of the red light camera . . .

[para 26] The adjudicator concluded the information in these two manuals was the technical information of Gatsometer BV.¹

[para 27] Having reviewed the information withheld by the Public Body in the Operating Manual, and considered the Public Body's submissions and the Third Party's arguments in the Letter, I reach the same conclusion as former Commissioner Clark in Order 2000-017 and the adjudicator in Order F2008-018 and find that the information withheld by the Public Body in the Operating Manual is, and the disclosure of the withheld information would reveal, the Third Party's technical information.

[para 28] As I have found that the withheld information is the Third Party's technical information, I do not intend to consider whether it is also the Third Party's trade secrets.

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

[para 29] 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 30] In its Letter, the Third Party stated:

The Operations Instructions supplied by Robot in connection with the executed agreement with the City of [Edmonton] (dated 24 February 2016, hereinafter "Agreement"), was supplied in confidence by Robot, as evidenced by the contract definition of Confidential Information. Confidential Information under the Agreement means City Information and Contractor Information. Contractor Information means information provided by the Contractor to the City and indicated by the Contractor as being provided in confidence. Furthermore the definition of Intellectual Property Rights under the Agreement specifically includes "(iii) confidential information or trade secrets".

The Operating Manual of Robot contain trade secrets as well as technical information of Robot, particularly information relating to Robot's Intellectual Property Rights including techniques, plans and designs and therefore should not be disclosed.

¹ Order F2008-018 at paras 68 and 70.

[para 31] In its initial submission, the Public Body stated:

12. The withheld records were explicitly supplied to the Public Body in confidence for the purpose of evaluating and executing a contract.
13. The records were provided to the Public Body in confidence in response to a Request for Proposals and then formed part of the contract between the Public Body and the third party.
14. The contract defines “Contractor Information” as “information provided by the Contractor to the City and indicated by the Contractor as being provided in confidence.”
15. The contract further defines “Intellectual Property Rights” to include “(iii) confidential information or trade secrets.”
16. The Legal Notice on page 2 of the responsive records contain the following: “[a]ny texts, images, graphics and the like, as well as their arrangement, are subject to protection under copyright and other laws of protection. The reproduction, modification, transmission or publication of any part of this document or the entire document in any form is prohibited. All signs contained in this document (protected marks, such as logos and trade names) are the property of JENOPTIK Robot Gmbh or of third parties and must not be used, copied or distributed without prior written consent.”

[para 32] The Legal Notice which appears on page 2 of the Operating Manual was disclosed to the Applicant. The Legal Notice appears under the heading “Copyright/Industrial Property Rights” in the Operating Manual.

[para 33] As well, in paragraph 18 of its initial submission, the Public Body stated “[t]he express contractual provisions respecting confidential information are evidence that the parties put their minds to the issue of protection of sensitive and proprietary information.”

[para 34] In Order MO-4219, the Ontario Information and Privacy Commissioner considered whether a public body had properly withheld information under s. 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M. 56, as amended (the Ontario *Municipal FOIP Act*). Section 10(1) of the Ontario *Municipal FOIP Act* is substantially similar to section 16(1) of the FOIP Act.

[para 35] At paragraphs 19 – 23 of Order MO-4219 the adjudicator stated (footnotes omitted):

[19] Part two of the three-part test itself has two parts: the third party must have “supplied” the information to the city, and must have done so “in confidence”, either implicitly or explicitly.

[20] The requirement that the information was “supplied” to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.

[21] Information may qualify as “supplied” if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.

[22] In order to satisfy the “in confidence” component of part two, the party resisting disclosure must show that both the individual supplying the information and the recipient expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an objective basis.

[23] Relevant considerations in deciding whether an expectation of confidentiality is based on reasonable and objective grounds include whether the information:

- was communicated to the institution on the basis that it was confidential and was to be kept confidential,
- was treated consistently by the third party in a manner that indicates concern for confidentiality,
- was not otherwise disclosed or available from sources to which the public has access, and
- was prepared for a purpose that would not entail disclosure.

[para 36] I find it appropriate to apply the above test set out by the adjudicator in Order MO-4219 to the case at hand.

[para 37] The information in the Operating Manual was clearly supplied by the Third Party to the Public Body. The Public Body did not “negotiate” what the Third Party put in its Operating Manual.

[para 38] In Order F2008-018 the adjudicator considered similar arguments as those put forward by the Third Party and the Public Body in this case regarding the Operating Manual being supplied in confidence. At paragraphs 73 to 89, the adjudicator stated:

[para 73] ACS made the following argument in support of its position that the manual was supplied in confidence:

In Order 2000-017, the Commissioner found that similar Gasto manuals were supplied to the EPS in confidence . . . The same is true today. These Manuals are not available to the public and the information contained therein is not available from any other source. These Manuals are also not available to any competitor. ACS has consistently treated these manuals as confidential with regard to all of its clients, including the EPS. As the commissioner has previously recognized the confidential and protected nature of similar manuals. ACS reasonably expected that, if shared with the EPS, these Manuals would not be disclosed to the public. In these circumstances, ACS respectfully submits that the requirements of s. 16(1)(b) are met.

[para 74] I do not agree with ACS that the findings of the Commissioner in relation to the evidence of a party to Order 2000-017, Canadian Public Technology (CPT), about a photo radar manual it supplied to the Public Body are binding on me or are relevant to the present inquiry. Further, I do not agree that a previous order of this Office means that information

was supplied in confidence if the parties have not otherwise turned their minds in the context of the present inquiry, to this issue of confidentiality when supplying and receiving information.

[para 75] In Order 2000-017, the former Commissioner stated the following:

EPS gave evidence about who within its organization has copies of the operating manuals, the circumstances under which those individuals are permitted to use the operating manuals, the confidentiality required in regard to those manuals, and the consequences to an individual who did not observe the confidentiality.

Having reviewed all the evidence, I find that the information was supplied explicitly in confidence to the Public Body.

[para 76] An affidavit supplied by a disclosure analyst for the Public Body states:

ACS and Gatsometer B.V. are separate and distinct legal entities to the EPS. To my knowledge any information provided by ACS or Gatsometer B.V. to the EPS would have been done pursuant to a contractual relationship and provided in confidence. (Emphasis mine)

[para 77] The author of this affidavit does not state that he has knowledge that the information *was* provided by ACS or Gatsometer B.V. to the EPS in confidence. Instead, his statement indicates that he believes that the information *would have been* supplied in confidence, which suggests that he lacks actual knowledge that the manual was supplied pursuant to a contractual relationship or provided in confidence. The disclosure analyst does not explain the basis for this belief that the manual was supplied pursuant to a contractual relationship or provided in confidence, and so I am unable to accept the affidavit as establishing that the manual was supplied to EPS in confidence.

[para 78] In this case, I do not have the evidence regarding confidentiality that the former Commissioner was provided in Order 2000-017. Further, I note that the Commissioner made his finding based on the evidence before him at the inquiry, and did not make his decision based on a finding or principle that operating manuals for photo radar or red light cameras are usually supplied in confidence.

[para 79] ACS also notes that Manual IM-E0207 contains the following caution on Record 125 and argues that this is an explicit indication of confidentiality:

Copyright © 2002-Gastometer B.V.-The Netherlands
No part of this manual may be reproduced or passed on in its digital form or hard copy. Copies, prints and digital files may only be used when explicit written consent has been given by Gatsometer B.V.

[para 80] I find that this warning is a copyright warning, and establishes that the work is subject to copyright. Under section 3 of the *Copyright Act*, a copyright is the “sole right to produce and reproduce a work or any substantial part thereof in any material form whatever”.

[para 81] I do not find the copyright warning on Record 125, or the record referred to in ACS's *in camera* submissions (discussed below) to be relevant to the issue of confidentiality. Rather, these warnings caution the user that the work is copyrighted and that the owner of the copyright is asserting those rights against unauthorized copying and distribution. The copyright warning does not mean that the right of access to the copyrighted work is restricted. In fact, section 32.1 of the *Copyright Act* permits copying of copyrighted works for the purpose of complying with federal and provincial access to information legislation.

[para 82] I agree with the reasoning of the Commissioner of the United Kingdom when he said in Decision FS50083358:

. . . the fact that information may be someone's intellectual property does not of itself preclude its legitimate availability to others. Just as library books may be protected by copyright, their public availability is not restricted because of that status.

In that case, it was argued before the Information Commissioner that a copyright warning contained in a Gatsometer manual was evidence that the manual had been supplied to a public authority in confidence. The Information Commissioner rejected that argument. He ordered disclosure of Gastometer manuals IM-E9914 and IM-E9906 for Gatsometer red light camera model 36mSG-MC.

[para 83] In its *in camera* submissions, ACS argued that another warning was originally part of IM-E0207, and that the document containing the additional warning was inadvertently omitted from the manual entered into evidence by the Public Body. I am unable to give any weight to ACS' assertion that the manual contained further warnings against distribution or reproduction of the manual as counsel has not provided me with the basis for its belief that the manual supplied to the EPS originally contained an extended caution. The manual supplied to EPS contains records that counsel also suggested, *in camera*, were inadvertently and improperly included in the manual. I am unable to conclude that ACS took steps to ensure that the record containing the additional caution was included in the manual, when it apparently did not take steps to ensure that the manual did not contain extraneous material. The presence of extraneous material in the manual suggests that ACS may not have reviewed the manual prior to providing it to EPS.

[para 84] In any event, I do not find that this record, had it been included, would establish that the information in the manual was supplied in confidence. Instead, this caution establishes that Gatsometer has proprietary rights in the information and that the information should not be disseminated or reproduced by persons Gatsometer does not intend to observe the manual. However, EPS is an "intended observer" of the manual. Consequently, this caution would not serve to limit EPS's ability to disseminate or reproduce the manual. Rather, the *Copyright Act* would impose those limits.

[para 85] The response of ACS to EPS' inquiry as to its position in relation to disclosure of the manual does not refer to contractual terms, or to a requirement that the manual be kept confidential, but only to the fact that the manual contains proprietary information which could harm ACS's competitive position if disclosed. I am not satisfied there was ever an explicit agreement between ACS and EPS to maintain confidentiality of the manual.

[para 86] ACS did not provide any evidence as to the manner in which it keeps information in its manuals confidential, whether it is in the custody of other clients or the Public Body. In addition, I do not have a statement or affidavit from persons with actual knowledge as to the terms under which ACS supplied the manuals and the Public Body received them. The primary argument of ACS is that ACS has a reasonable expectation of confidentiality because of the Commissioner's findings in Order 2000-017, which Order I distinguished above. I am unable to give weight to ACS' *in camera* assertions that it has taken positive steps to protect the confidentiality of the manual, as ACS did not explain what those steps are.

[para 87] It was argued, *in camera*, that the manuals must be returned to ACS at the conclusion of the contract with EPS. However, a contractual provision requiring return of the manual was not entered into evidence. The manual itself does not indicate that it remains the property of ACS or Gatsometer. I am therefore unable to conclude that it is the case that all copies of the manual are returned to ACS on conclusion of the contract.

[para 88] In some instances, the information contained in the records at issue supports a finding that it could only have been supplied in confidence. However, I do not find that any of the information in the manual is additional evidence or leads to a finding that the manual was supplied in confidence. As noted above, the technical information in the manual is about installing, setting up, calibrating, and using equipment – information one would also expect to find in a user's manual that is not intended to be confidential. The fact that the information is about installing, setting up, calibrating and using equipment does not, in and of itself, indicate that the information was implicitly intended to be kept confidential. I do not find that there is anything about the nature of this particular information that necessitates a finding that it was supplied in confidence.

[para 89] For the reasons above, I find that ACS or Gatsometer did not supply the information in the manual in confidence.

[para 39] With respect to the requirement that the information have been supplied explicitly or implicitly, in confidence, neither the Third Party nor the Public Body provided me with a copy of the agreement between the parties containing the definition of "Confidential Information" referred to by the Third Party in its Letter, or the "contractual provisions" referred to by the Public Body in its initial submission.

[para 40] Further, as the Third Party did not provide a submission in this inquiry, I have no evidence from the Third Party as to the manner in which it keeps information in the Operating Manuals confidential. Nor did the Public Body provide any information on the manner in which it keeps the information in the Operating Manuals confidential.

[para 41] In Order F2008-018, the adjudicator concluded that the presence of a copyright warning did not indicate that the red light camera manual was supplied in confidence.

[para 42] Likewise, in Order MO-4219 at paragraph 33 the adjudicator concluded:

[33] The fact that information contained in the records may be subject to copyright, while it may suggest some measure of ownership, it does not, in and of itself, provide a basis to deny access to the information under the provisions of the Act, or oust the Act's application.

[para 43] In this case, while I have found that the Third Party supplied the Operating Manual to the Public Body, I have insufficient evidence on which to conclude that it did so in confidence. Accordingly, I find that the Third Party and the Public Body have failed to establish that the requirements of section 16(1)(b) have been met.

[para 44] In order for section 16(1) to apply, the requirements set out in section 16(1)(a), (b) and at least one of the subsections in section 16(1)(c) must be met. Given my conclusion that the Public Body has failed to establish that the Operating Manual was supplied to it in confidence as required by section 16(1)(b), it is not necessary for me to consider whether at least one of the requirements set out in section 16(1)(c) have been met, however, I will still consider the Public Body's arguments on this point.

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

[para 45] Section 16(1)(c) requires the Public Body to establish, on the balance of probabilities, that disclosure of the withheld information could reasonably be expected to result in at least one of the outcomes set out in subsections (i) – (iv).

[para 46] Previous Orders of this office have said that the phrase “could reasonably be expected to” requires a public body (or a third party) to provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to establish that disclosure of information could reasonably be expected to bring about one of the outcomes in section 16(1)(c) (see, for example, Order F2024-27 at paras 42 – 43, citing *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31).

(i) Harm significantly the competitive position or interfere significantly with the negotiating position of the third party

[para 47] In the Letter to the Public Body, the Third Party stated:

Disclosing the Operations Manual provides Robot's competitors information that [is] not publicly available. This could reasonably be expected to cause harm to Robot by prejudicing Robot's competitive position in the market.

[para 48] The Public Body did not provide any submissions on the application of section 16(1)(c)(i) other than to repeat the Third Party's statement above in the Letter.

[para 49] In Order F2008-018, the adjudicator considered whether the disclosure of the Gatsometer red light camera manuals would harm significantly the competitive position or interfere significantly with the negotiating position of ACS Public Sector Solutions (ACS) or Gatsometer.

[para 50] The following comments of the adjudicator in Order F2008-018 are relevant to the case before me:

[para 90] In *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515, the Court agreed with the Commissioner that a party alleging that it will suffer harm if information is disclosed must establish, through evidence, a reasonable expectation of harm:

The Commissioner's decision did not prospectively require evidence of actual harm; the Commissioner required some evidence to support the contention that there was a risk of harm. At no point in his reasoning did he suggest that evidence of actual harm is necessary.

The evidentiary standard that the Commissioner applied was appropriate. The legislation requires that there be a "reasonable expectation of harm." Bare arguments or submissions cannot establish a "reasonable expectation of harm." When interpreting similar legislation, courts in Ontario and Nova Scotia have held that there is an evidentiary burden on the party opposing disclosure based on expectation of harm: *Chesal v. Nova Scotia (Attorney General)*, at para. 56 *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)* at para. 26.

Although the foregoing was in the context of sections 20 and 25 of the Act, section 16 requires that disclosure of scientific or technical information be reasonably expected to result in the harms set out in section 16(c)(i)-(iv). In addition, section 71 places the burden of proof on the third party and the Public Body to establish that the Applicant has no right to the information at issue. I will therefore consider whether ACS, and indirectly, Gatsometer, and the Public Body have met the evidentiary burden to establish that any of the consequences in section 16(c)(i)-(iv) can be reasonably expected to result from disclosure of the technical information in the manual.

...

[para 93] ACS argues that ACS and Gatsometer would suffer significant harm to their competitive position within the meaning of section 16(1)(c)(i) if the records at issue are disclosed. It does not argue that any other provisions of section 16(1)(c) apply.

[para 94] As happened in *Canada (Prime Minister)*, I have been presented with general arguments as to the harm that may result from disclosure, but without a description of the harm that would be probable as a result of the disclosure of each piece of information or the correlation between the harm and the disclosure of the information. Further, the harm to a third party's competitive position that could reasonably result from disclosure under section 16(1)(c)(i) must be significant. ACS has not provided any explanation as to how disclosure of specific information would result in significant harm to Gatsometer's or its own competitive position. From review of the records at issue, I do not find that the significant harm to Gatsometer's or ACS's competitive position projected by ACS is self-evident.

[para 95] The Public Body relies on the Commissioner's findings in Order 2000-017 that disclosure of the manual would harm ACS's business interests. However, as noted above, the Commissioner's findings in that order were not made in relation to the records at issue in this inquiry.

[para 96] ACS argues that the manual is detailed and that the information it contains would enable a competitor to construct ACS or Gatsometer's traffic light enforcement technology. In addition, ACS argues that the information in the manual would enable competitors to guess ACS's future proposal prices and to underbid. Finally, ACS argues that the possession of the manuals would enable competitors to improve their technology, ensure that their technology is competitive with the technology of ACS and Gatsometer, adopt solutions developed for local markets, solve problems, and criticize or disparage Gatsometer's technology.

...

[para 98] ACS did not explain how competitors would be able to calculate accurate pricing of current products or direct me to the specific information in the manual that it considered would result in this harm. I am unable to conclude from review of the information in the manual that this harm could result, as the manual does not contain references to pricing or to materials and is copyrighted 2002. In addition, the "Declaration of Conformity" in the manual indicates that the red light camera was tested in 1996. Consequently, I am unable to conclude that disclosure of the information in the manual would have the effect of enabling competitors to calculate pricing of current products.

[para 99] ACS did not direct me to the information it believes would support its contention that disclosure of the information in the manual would enable a competitor to design its own version of the Gatsometer's red light camera or to make improvements to its own designs. From my review of the information I am not satisfied that the information in the manual, while technical, is sufficiently detailed so as to enable a competitor to create its own technology or solve problems. The purpose of the manual is to enable a client to install, calibrate, maintain, and operate a red light camera. To further this purpose, the manual is written in general terms and does not contain specific or detailed information about patented technology or technical solutions for local markets. I also find that the age of the equipment, given that it was tested in 1996, would make it unlikely that a competitor could improve its competitive position in 2009 through access to the information in the manual.

[para 100] Similarly, in Decision FS50083358, the Information Commissioner of the United Kingdom determined that Gatsometer red light camera manuals IM-E9914 and IM-E9906 were not sufficiently detailed or current to allow a competitor to reproduce or improve on the technology. He said:

In reaching a view about the supplier's comments, the Commissioner notes the age of the equipment that the Instruction Manual in question relates to – the equipment gained type approval in 1992. He also recognises the competitive international market that the suppliers operate in. In such a market, products are constantly under review and new equipment is being developed in order to retain competitiveness and to incorporate technological advances. In the Commissioner's view, competitors within the market are unlikely to gain an advantage from the information within the requested Instruction Manual as current / future products are likely to be substantially more advanced...

...

Having examined all the arguments the Commissioner considers that the public authority has not demonstrated that disclosure would or would be likely to prejudice the commercial interests of the supplier. He is not persuaded that the information is sufficiently detailed to inform development of rival devices and even if he accepted that it was, he does not think that there is a real and significant likelihood of this occurring given the age of the equipment. Therefore the exemption at section 43 is not engaged and he is not required to explore the public interest arguments applicable to this exemption.

[para 101] With regard to ACS's argument that disclosing the records at issue would enable ACS's and Gatsometer's competitor to criticize or disparage their technology, my review of the information at issue does not lead me to conclude that competitors would criticize or disparage Gatsometer's technology if any of the information in the manual were disclosed. If ACS's argument refers to the tort of trade disparagement, in which a competitor slanders the goods of another, I am unable to conclude that the information in the manual would lead a competitor to commit this tort.

[para 102] For the reasons above, I find that disclosure of the manual could not reasonably be expected to result in significant harm to the competitive position of ACS or Gatsometer.

[para 51] While Order F2008-018 dealt with the operating manuals for red light cameras, I find that the adjudicator's comments are equally applicable to the Operating Manual for the JENOPTIK MultaRadar CD.

[para 52] I note that the Applicant referred to Order F2008-018 in his Request for Review, which was provided to the Public Body with the Notice of Inquiry, in support of his position that section 16(1) did not apply to the information withheld by the Public Body. However, the Public Body did not address Order F2008-018 in its initial submission and does not appear to have reviewed it to see what this office has previously said about the requirements for establishing that section 16(1) applies or made any arguments as to why Order F2008-018 would not apply in this case.

[para 53] Nor did the Public Body cite any Orders of this Office or any case law in support of the positions it took in its initial submission regarding the application of section 16(1) to the withheld information.

[para 54] In this case, the Third Party simply made a bare statement that disclosure of the withheld information would provide its competitors with information that was not publicly available, which could reasonably be expected to cause harm to the Third Party by prejudicing its competitive position in the market.

[para 55] Neither the Public Body nor the Third Party provided *any* specific arguments or explanations as to how disclosure of the withheld information could significantly harm the competitive position or interfere significantly with the negotiating position of the third party.

[para 56] I have even less information from the Public Body and the Third Party to support the argument than the adjudicator had from the public body and third party in Order F2008-018, where she concluded the public body and third party had failed to establish that disclosure of the

red light camera manuals could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of the third party.

[para 57] As stated by the Court in the *Qualicare* case cited by the adjudicator in Order F2008-018, “[b]are arguments or submissions cannot establish a “reasonable expectation of harm.”

[para 58] I also note that it appears that the Operating Manuals were created in 2010. They were at least 6 years old when the Public Body responded to the Applicant’s access request, which further sheds doubt on whether, given the age of the information, disclosure of the withheld information in the Operating Manuals could reasonably have been expected to harm significantly the competitive position or interfere significantly with the negotiating position of the Third Party then, or now.

[para 59] For the reasons above, I find that the Third Party and the Public Body have not established that disclosure of the withheld information could reasonably be expected to 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*

[para 60] The Public Body also argued that section 16(1)(c)(ii) applied in this case. In its initial submission, it made the following arguments regarding the application of section 16(1)(c)(ii):

18. The integrity of the Public Body’s contractual relationship with the third party will be compromised if the confidential information is disclosed. The express contractual provisions respecting confidential information are evidence that the parties put their minds to the issue of protection of sensitive and proprietary information.
19. If disclosed, the Public Body risks similar information not being provided in future Requests for Proposals for needed equipment. Such equipment is in the public interest to obtain and to do so in a cost effective manner through open bid processes to ensure the best use of public funds.
20. It is foreseeable that third parties would be reluctant to provide similar full information needed by the Public Body to evaluate Request for Proposals if there is a risk that their confidential intellectual property could be disclosed. Moreover, having such similar confidential information available for disclosure may discourage third parties from participating in Requests for Proposals altogether, which would be detrimental to the public good.

[para 61] The harm predicted by the Public Body in paragraph 18 of its submission above should the withheld information be disclosed is not one of the harms contemplated in section 16(1)(c).

[para 62] The Third Party did not say in the Letter that if it was required to disclose the withheld information it would no longer supply the Operating Manual to the Public Body, and as noted, the Third Party made no submission in this inquiry.

[para 63] The Public Body provided no evidence to support its bare assertion that if it were required to disclose the withheld information it would result in similar information no longer being supplied to the Public Body by the Third Party, or other third parties in the future.

[para 64] The Public Body's assertions in this case are merely speculative. I find that the Public Body has not provided sufficient evidence to establish that disclosure of the withheld information could reasonably be expected to 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.

[para 65] Neither the Public Body nor the Third Party made any submissions on the application of section 16(1)(c)(iii) to the withheld information, so I am unable to find that it applies and section 16(1)(c)(iv) is clearly not applicable in this case. Additionally, none of the factors set out in section 16(2) or 16(3) apply in this case.

[para 66] For the reasons set forth above, I find that the Public Body and the Third Party have failed to establish that disclosure of the withheld information would bring about any of the outcomes in section 16(1)(c).

Conclusion

[para 67] I find that section 16 does not apply to the withheld information in the Operating Manuals. I reach this conclusion because the requirements of both sections 16(1)(b) (information supplied in confidence) and 16(1)(c) (harm) have not been met. Even if I am wrong in relation to one, failure to meet the other provision would mean that section 16(1) does not apply.

[para 68] Accordingly, I will order the Public Body to disclose the withheld information in the Operating Manual to the Applicant.

Section 32

[para 69] In his initial submission, the Applicant argued that section 32 applied in this case and required the Public Body to disclose the withheld information. As I have found that section 16(1) does not apply to permit the Public Body to withhold the information, I need not consider whether section 32 applies.

V. ORDER

[para 70] I make this Order under section 72 of the Act.

[para 71] I order the Public Body to disclose the withheld information in the records to the Applicant.

[para 72] I further order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order.

Carmen Mann
Adjudicator
/kh