ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER FOIP2025-R-02
(RECONSIDERATION OF ORDER F2019-R-01)

July 2, 2025

PRIMARY AND PREVENTATIVE HEALTH SERVICES

Case File Number F5903

Office URL: www.oipc.ab.ca

Summary: This order is a reconsideration of Order F2019-R-01. In that order, the previous adjudicator found that none of the information Alberta Health (now Primary and Preventative Health Services) (the Public Body) withheld from the record qualified for exemption under section 16(1) of the Act. On judicial review of that order, the Court of Queen's Bench ruled that parts of the previous adjudicator's order were unreasonable. The court remitted the matter to the IPC for reconsideration as to whether the withheld information meets the criteria of sections 16(1)(b) and 16(1)(c) of the Act.

The present inquiry was heard by a different, external adjudicator. The adjudicator held that none of the information at issue met the criteria of section 16(1)(b) of the Act. The adjudicator decided it was not necessary to determine whether section 16(1)(c) applied to any of the information at issue. The adjudicator ordered the Public Body to disclose the entire record to the Applicant.

Statutes Cited: **AB**: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, sections 1(s), 16, 16(1)(a), 16(1)(b), 16(1)(c), 25, 71(3), 71(3)(b), 72; *ABC Benefits Corporation Act*, R.S.A. 2000, c. A-1.

Authorities Cited: **AB**: Orders 99-018, F2004-013, F2009-028, F2013-47, F2015-03, F2019-17, F2019-R-01; **BC**: Orders F11-27, F17-52; **ONT**: Orders PO-2226, PO-3176; **SK:** Review Report 148-2024, 163-2024.

Court Cases Cited: *Imperial Oil Limited v. (Alberta) Information and Privacy Commissioner*, 2014 ABCA 231; *ABC Benefits Corporation v. Alberta (Information and Privacy Commissioner)*, 2015 ABQB 662 (CanII); *ABC Benefits Corporation v. Alberta (Information and Privacy Commissioner)*, 2022 ABQB 276; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII); *Boeing Co. v. Ontario (Ministry of Economic Development & Trade)*, 2005 CanLII 24249; *Canadian Medical Protective Association v. John Doe*, 2008 CanLII 45005; *K-Bro Linen Systems Inc. v. Ontario (Information & Privacy Commissioner)*, 2022 ONSC 3572; (*Canadian Pacific Railway v. British Columbia (Information & Privacy Commissioner)*, 2002 BCSC 603).

I. BACKGROUND

Request

[para 1] In 2011 the Applicant made a request under the *Freedom of Information and Protection of Privacy Act* ("the *Act*") to Alberta Health (now Primary and Preventative Health Services) (the Public Body) for access to a copy of the contract between Alberta Health ("AH") and Alberta Blue Cross ("ABC") for administering the provincial drug plan on behalf of the government. He also requested information regarding payments made to ABC for administering these plans.

[para 2] Alberta Health identified one record as responsive to the request, an 81-page agreement (the record). In its response to the Applicant, Alberta Health advised that it had decided to provide him with partial access to the record. Alberta Health stated that it had decided to withhold some information on the basis of the exemptions at sections 16 (third party business interests) and 25 (public body's economic interests) of the *Act*.

First Inquiry and 2013 IPC Order

[para 3] The Applicant asked our office to review Alberta Health's decision to withhold information. An adjudicator conducted an inquiry which resulted in Order F2013-47 dated November 8, 2013 (the "2013 IPC Order"). The adjudicator found that:

- none of the withheld information qualified for exemption under section 16(1) because
  - some of it failed para. (a) of the test for exemption because it does not "belong" to ABC
  - all of it failed para. (b) of the test for exemption because it was not "supplied" to Alberta Health
- all of the withheld information failed the test for exemption under s. 25 due to lack of sufficient evidence of harm

[para 4] As a result, the adjudicator ordered Alberta Health to disclose the record in its entirety to the Applicant.

2015 Court Decision

[para 5] ABC applied for judicial review of the 2013 IPC Order. In *ABC Benefits Corporation v. Alberta (Information and Privacy Commissioner)*, 2015 ABQB 662 (the "2015 Court Decision"), the Court of Queen's Bench ruled that:

- the adjudicator erred in finding that all of the withheld information failed the test for exemption under s. 16(1)(b) because it was not "supplied" to Alberta Health, and
- the adjudicator's s. 25 finding was reasonable

[para 6] Accordingly, the court quashed part of the 2013 IPC Order, and remitted the matter back to this office so that it could reconsider whether the withheld information met paragraphs (b) and (c) of the test for exemption under section 16(1) of the *Act*.

Reconsideration Inquiry and 2019 IPC Order

[para 7] An adjudicator with this office commenced a reconsideration inquiry in October 2017.

[para 8] After receiving the notice of reconsideration, Alberta Health conducted a further review of the record. It concluded that the initial severing had not taken into account several relevant factors which, in its view, should have resulted in the disclosure of some information that it had previously withheld under section 16(1). Alberta Health made proposed redactions to the record a second time and provided a copy of the newly-redacted record to this office.

[para 9] Alberta Health notified ABC of its new conclusions and gave ABC a copy of the newly-redacted record. ABC agreed with Alberta Health that the fact some of the information was publicly available on the (then) Alberta Queen's Printer site meant that such pages (1-42 and 46-47) should be disclosed to the Applicant.

[para 10] ABC continued to object to disclosure of the remaining withheld information, and took the position that the court's direction to this office to reconsider must be followed. Alberta Health did not disclose any additional information to the Applicant.

[para 11] The adjudicator continued with her reconsideration inquiry, which considered all of the original severances made by Alberta Health, and the reasons in the 2015 Court Decision. The adjudicator issued Order F2019-R-01 on March 31, 2019 (the "2019 IPC Order"). The adjudicator found that none of the withheld information qualified for exemption.

[para 12] First, the adjudicator found that pages 1-42 and 46-47 were not exempt because they were publicly available. Second, the adjudicator found that the remaining withheld information did not qualify for exemption under section 16(1).

[para 13] Below is a chart summarizing her latter findings. The chart breaks down the information remaining at issue into ten categories, and indicates which of the key elements under paragraphs (b) and (c) of section 16(1) apply to each category:

Row	Pages	Type of information	16(1)(b) "supplied"?	16(1)(b) "in confidence"?	16(1)(c) harm?
1	43-45	List of reports ABC to provide AH to confirm ABC's compliance with its duties in pp. 1-42	No	n/a	No (provisional assessment)
2	66-72	Information about ABC's contractual duties (replacement for pp. 34-39)	No	n/a	No (provisional assessment)
3	48-52, 62, 64	Processes and methodologies	Yes	Yes (assumed for discussion)	No

Row	Pages	Type of information	16(1)(b) "supplied"?	16(1)(b) "in confidence"?	16(1)(c) harm?
4	53-54, 56, 58, 60, 79-81	Compensation	Yes	Yes (assumed for discussion)	No
5	73-78	Processes and methodologies	Yes (assumed for discussion)	Yes (assumed for discussion)	No
6	48-51	Term and termination	Yes	Yes (assumed for discussion)	No
7	62	Types of services to be provided	Yes	Yes (assumed for discussion)	No
8	64	Audit	Yes	Yes (assumed for discussion)	No
9	53-54, 56, 58, 60, 79-81	Rates and fees	Yes	Yes (assumed for discussion)	No
10	79-81	Services that can be invoiced and how invoices will be paid	Yes	Yes (assumed for discussion)	No

[para 14] Accordingly, the adjudicator again ordered Alberta Health to disclose the record in its entirety to the Applicant.

2022 Court Decision

[para 15] ABC applied for judicial review of the 2019 IPC Order. In *ABC Benefits Corporation v. Alberta (Information and Privacy Commissioner)*, 2022 ABQB 276 (the "2022 Court Decision"), the court ruled:

- the adjudicator erred in finding that the withheld information in pp. 43-45, 66-72 failed to meet the requirements of paras. (b) and (c) of section 16(1), and
- the adjudicator erred in finding that the remaining withheld information failed to meet the requirements of para. (c) of s. 16(1)

[para 16] As a result, the court quashed part of the 2019 IPC Order, and again remitted the matter back to this office so that it could reconsider whether the withheld information (apart pages 1-42 and 46-47, the publicly available information) meets paragraphs (b) and (c) of the test for exemption under section 16(1) of the *Act*.

Current Inquiry

[para 17] In accordance with the court's direction, this office issued a Notice of Reconsideration on April 14, 2023 to the Applicant, Alberta Health and ABC. This office invited the parties to provide submissions and to share them with the other parties. Only Alberta Health and ABC provided submissions, and copied

each other on them. None of the parties provided rebuttal submissions despite being given an opportunity to do so.

II. INFORMATION/RECORDS AT ISSUE

[para 18] The chart I set out above breaks down the information remaining at issue in the record into ten categories. In my reasons below I will follow this logic and make findings with respect to each category.

III. DISCUSSION OF ISSUES

Introduction to the section 16 third party business interests exemption

[para 19] In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII) (*Merck*), 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 [*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* ("*ATIA*")].
>
> The [*ATIA*] strikes a careful balance between the sometimes competing objectives of encouraging disclosure and protecting third party interests. While the [*ATIA*] 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 20] While the court was discussing a provision in the federal *Access to Information A*ct, this balancing is also applicable to section 16 in Alberta's *Act*. The *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.

The wording of the section 16 exemption

[para 21] Section 16 is a mandatory exception to disclosure. Section 16(1) of this provision 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.

The test for exemption under section 16

[para 22] Based on Order F2004-013, at paragraph 10, for section 16(1) to apply to information, the requirements set out in all three paragraphs of that section must be met:

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

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

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

Burden of proof under section 16

[para 23] Since this inquiry involves information about a third party, the burden of proof set out in section 71(3) of the *Act* applies. It reads:

If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,

(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and

(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.

[para 24] Section 16(1) does not apply to personal information, so ABC has the burden, under section 71(3)(b), of establishing that the Applicant has no right of access to the records by virtue of section 16(1).

Issue A: Was the information at issue "supplied" for the purpose of section 16(1)(b) of the *Act*?

Meaning of the word "supplied" where the information is in a contract

"Supplied vs. "negotiated"

[para 25] Many past orders of this office, as well as from the Ontario and British Columbia information and privacy commissioners' offices, have held that a contract is negotiated between a public body and a third party, and therefore the information in the contract cannot be found to have been supplied by the third party. This is true even where the contract price is the same as the bid price (see Alberta Order F2009-028, BC Order F11-27, Ontario Order PO-2226).

[para 26] This approach has also been upheld by the Ontario Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development & Trade)*, 2005 CanLII 24249, *Canadian Medical Protective Association v. John Doe*, 2008 CanLII 45005, and *K-Bro Linen Systems Inc. v. Ontario (Information & Privacy Commissioner)*, 2022 ONSC 3572. The BC Supreme Court has similarly upheld a BC IPC ruling on this point (*Canadian Pacific Railway v. British Columbia (Information & Privacy Commissioner)*, 2002 BCSC 603).

Exceptions: immutability or accurate inferences about supplied information

[para 27] There are two exceptions to this principle where: (i) the information is immutable, or (ii) disclosure of the information in the contract would permit an accurate inference about underlying non-negotiated confidential information supplied by the third party to the public body (Order F2013-47, citing Ontario Order PO-3176).

[para 28] Immutable information is described in Order F2019-17, at para. 95:

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

[para 29] The Alberta Court of Appeal in a 2014 decision discussed at length whether information in an agreement can still be "supplied" under section 16(1)(b) in *Imperial Oil Ltd. v. Alberta (Information & Privacy Commissioner)*, 2014 ABCA 231 (CanLII) ("*Imperial Oil*"). In that decision, the court agreed that information in a negotiated contract might not be "supplied" by either party to the contract. The records at issue in that case consisted of a remediation agreement between parties, as well as attachments to that agreement. The court said (at paras. 82-83, emphasis added):

> …[I]t 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".*
>
> 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 30] The IPC summarized the court's comments in a 2015 decision (Order F2015-03 (at para. 46)):

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

[para 31] In the 2015 Court Decision, the court made a similar point to the court's decision in *Imperial Oil*: the fact that information appears in a contract or agreement does not necessarily mean that it can be characterized as information negotiated between the parties. An agreement or contract can also include information that is not subject to negotiation (i.e. immutable information) such as fixed costs. The court in the 2015 Court Decision noted that immutable costs must be accepted by a public body in order for an agreement to be reached; the fact that immutable costs (or other immutable information) must be accepted does not render it negotiated rather than supplied.

[para 32] These cases stand for the proposition that immutable or non-negotiated information that ends up as an agreed term in a contract does not thereby become negotiated for the purpose of section 16(1).

[para 33] However, neither of the decisions in *Imperial Oil* nor the 2015 Court Decision rejected the long-standing principle that fees for service in a contract are generally accepted to be negotiated between the parties. Rather, these decisions appear to accept the premise, set out in the case law cited above, that fees for service set out in an agreement or contract are generally found to be negotiated, rather than supplied by one party to another, even when the prices in the agreement are accepted from a proposal without change. The exceptions to this general rule are for information that is immutable or reveals underlying non-negotiated confidential information. The decisions in *Imperial Oil* and the 2015 Court Decision primarily address what kind of information falls within these exceptions to the general rule.

[para 34] Information can qualify as "supplied" even where the public body *requested or required* the third party to develop it and provide it to the public body (*Imperial Oil*, para. 72). This extends to a situation where the third party incorporates information that is not its own (for example, publicly available information) into the information it develops and provides to the public body (*Imperial Oil*, para. 70).

Row 1 (pp. 43-45): List of reports ABC to provide AH to confirm ABC's compliance with its duties in pp. 1-42

[para 35] This information consists of a list of names of reports ABC agreed to provide AH, and a corresponding list of the frequencies with which the reports are to be provided. In essence, this information sets out ABC's reporting requirements to AH. The names of the reports are very brief, and reveal little of substance other than their general nature.

[para 36] In the 2019 IPC Order, the adjudicator held that ABC did not supply these lists of reports to Alberta Health. Her reasoning can be summarized as follows:

- Alberta Health believed this list of reports was not supplied to it by ABC, because Alberta Health itself identified the reports it needed to determine ABC's compliance with its contractual duties
- ABC failed to provide evidence to support the conclusion that the information consists of methodologies for providing the services that ABC independently developed
- this information is not ABC's information and therefore it cannot be immutable

[para 37] In overturning the adjudicator's decision on this point, the court in the 2022 Court Decision found that she erred when she either:

- jumped from her conclusion that (i) ABC did not independently develop processes or methodologies constituting commercial or technical or scientific information, or trade secrets related to information on the pages in question, to the conclusion that (ii) such information was not immutable, or
- failed to explain how the first conclusion compels the second

[para 38] ABC submits that the information in the list of reports contains trade secrets, and as such, was supplied to Alberta Health. It says that this information was not, and could not have been, negotiated. Further, ABC says that this information is also "immutable" because these are the contents of reports ABC was able to provide, and the frequency with which it was able to provide them.

[para 39] Section 1(s) contains a four-part, detailed definition of the term "trade secret." ABC did not provide specific submissions on why the list of reports meets the four components of the definition and would therefore qualify as trade secrets. I find that this information does not fit within the terms of the definition.

[para 40] ABC further submits that it took scientific, financial or commercial information provided by Alberta Health, such as the information that was to be exchanged, and applied this information to the specific capabilities, methodologies, security measures and unique business practices that ABC employs.

[para 41] Alberta Health says that this list of reports was not supplied to it by ABC. It says that the opposite is true; Alberta Health supplied the information to ABC. It submits that the reports had to meet

Alberta Health's standards and requirements, and that the purpose of the reports is to benefit Alberta Health in determining ABC's compliance with the terms of the contract.

[para 42] First, consistent with the adjudicator's 2019 finding, I find that ABC failed to provide evidence to support the conclusion that the list of reports consists of methodologies for providing the services that ABC independently developed. To make a finding in ABC's favour on this point, I would have expected to receive evidence explaining how, when and for what purpose ABC developed this list of reports, and what expertise and resources of ABC were brought to bear in their development. I did not receive such evidence from ABC. There is no basis to conclude that disclosure of this information would reveal underlying non-negotiated confidential information.

[para 43] This is reinforced by the fact that the report names are brief and reveal little substantive information. They are the types of reports that other third parties could have created based on Alberta Health's requirements and, again, ABC has not provided an evidentiary basis for me to reach a different conclusion.

[para 44] Second, I also find that the list of reports cannot be considered immutable. It does not stand to reason that the reports could not be subject to change. Alberta Health takes the position that the contents and frequency of the reports had to meet its satisfaction. What if Alberta Health had said to ABC that it needs to change or add information to the reports? What if Alberta Health had said to ABC that it needs to provide these reports more or less frequently? It is difficult to accept the view that it would not have been possible for ABC, for example, to change the frequency of a given element of a report from every three months to every six months if that's what Alberta Health asked for.

[para 45] These examples really highlight the problem with ABC's arguments.

[para 46] This would have been the kind of negotiation that is common in contracts of this nature. The fact that such negotiations did not take place does not detract from the conclusion that this is the kind of information that is capable of change, even if it did not (see the discussion above from Order F2019-17 on the meaning of "immutable.")

[para 47] Alberta Health's submission that Alberta Health in fact supplied the information in question to ABC supports the conclusion that ABC did not supply the information.

[para 48] Finally, the evidence ABC provided on immutability is conclusory in nature, and does not indicate when or how the contents and frequency of these reports were developed, or how ABC's confidential information could be revealed by disclosure of the list of reports.

[para 49] The report information in row 1 does not meet the "supplied" test in section 16(1)(b). This information therefore is not exempt under section 16(1).

Row 2 (pp. 66-72): Information about ABC's contractual duties (replacement for pp. 34-39)

[para 50] In the 2019 IPC Order, the adjudicator held that ABC did not supply this information for similar reasons as those summarized above under row 1.

[para 51] ABC submits that this information relates to terms that contain trade secrets, and as such, was supplied and could not have been negotiated. ABC says this information is also "immutable" because

it discusses the services it is capable of providing. ABC elaborates on its submissions here in a similar manner to that described above under row 1.

[para 52] Alberta Health says that this information is general in nature and provides high level information as to the contractual obligations of ABC. The information includes legal obligations, general file management requirements, and general client service requirements that ABC is to maintain as part of its contractual agreements. There is no indication that any of the information in these pages was supplied by ABC but are contractual conditions that were supplied by Alberta Health.

[para 53] Again, for similar reasons as I stated above, I find that ABC did not provide sufficient evidence for me to conclude that this information consists of methodologies for providing the services that ABC independently developed, or that underlying methodologies could be deduced or inferred from this information.

[para 54] ABC agreed to meet Alberta Health's requirements as to the services ABC was required to deliver. Revealing descriptions of those services is very different from revealing *how* ABC intended or proposed to deliver those services, that is, its business methodologies or processes. The information in question here does not reveal any such methodologies or processes.

[para 55] In addition, I find that there is no basis to conclude that this information is immutable. Again, it is simply not credible to argue that the details of the services ABC was to provide to Alberta Health were not capable of negotiation, even if in fact there was no such negotiation. Further, once again, this conclusion is supported by Alberta Health's submission that Alberta Health supplied the information to ABC.

[para 56] Even if these contractual terms were the "most" that ABC was capable of delivering, that fact (if it is a fact) is not revealed by the information in question here. Further, Alberta Health could have agreed to lower standards, thus supporting the conclusion that this information is not immutable or information that would reveal non-negotiated information supplied by ABC.

[para 57] The contractual duties information in row 2 was not supplied under section 16(1)(b) and, therefore, it is not exempt under section 16(1).

Row 3 (pp. 48-52, 62, 64): processes and methodologies
Row 4 (pp. 53-54, 56, 58, 60, 79-81): compensation
Row 6 (pp. 48-51): term and termination
Row 7 (p. 62): types of services to be provided
Row 8 (p. 64): audit
Row 9 (pp. 53-54, 56, 58, 60, 79-81): rates and fees
Row 10 (pp. 79-81): services that can be invoiced and how invoices will be paid

[para 58] The adjudicator in the 2019 IPC Order found that ABC supplied the information in these rows to Alberta Health. The adjudicator provided thorough, logical and persuasive reasons for her decision on these rows, and I adopt her reasons and make the same findings.

Row 5 (pp. 73-78): processes and methodologies

[para 59] For this remaining information, the adjudicator made no specific finding. Rather, she assumed for purposes of discussion that this information was both "supplied," and "supplied in confidence" under section 16(1)(b), and she proceeded to analyze whether this information met the "harms" requirement under section 16(1)(c). She found that it did not, rendering the "supplied in confidence" discussion moot.

[para 60] I will also consider the row 5 information to have been "supplied," for the purposes of discussion. However, I will consider whether this information meets the "in confidence" test under section 16(1)(b).

[para 61] To conclude, the information in rows 1-2 was not supplied and therefore is not exempt under section 16(1). The information in rows 3-4, 6-10 qualify as having been supplied for the purpose of section 16(1)(b). I will consider the information in row 5 to have met the supplied requirement, for purposes of discussion.

Issue B: Was the information at issue supplied "in confidence" for the purpose of section 16(1)(b) of the *Act*?

Meaning of "supplied in confidence"

[para 62] Past orders of this office have interpreted the phrase "supplied in confidence," as described below.

[para 63] In Order 99-018 (at para. 37), former Commissioner Clark decided that the following factors should be considered in determining whether information has been supplied in confidence:

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

[para 64] In *Imperial Oil*, the Alberta Court of Appeal determined that the test to determine whether a third party organization supplied information in confidence is a subjective one. The court said (at para. 75):

> The Commissioner made the obvious point that no public body can "contract out" of the [*Act*]. No party disputes that, but that is not the issue. The exception in s. 16(1)(b) is that the information was "supplied, explicitly or implicitly, in confidence". That is substantially a subjective test; if a

> party intends to supply information in confidence, then the second part of the test in s. 16(1) is met. It follows that while no one can "contract out" of the [*Act*], parties can effectively "contract in" to the part of the exception in s. 16(1)(b). It also follows that the perceptions of the parties on whether they intended to supply the information in confidence is of overriding importance. No one can know the intention of the parties better than the parties themselves. It is therefore questionable whether the Commissioner can essentially say: "You did not intend to implicitly provide this information in confidence, even if you thought you did".

[para 65] In Order F2019-17 (at para. 129-130), the adjudicator said:

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

[para 66] I agree with the interpretation of the adjudicator in Order F2019-17.

2019 IPC Order findings on "in confidence"

[para 67] The adjudicator in the 2019 IPC Order (Order F2019-R-01) did not make a definitive finding on the "in confidence" element of section 16(1)(b) as it applied to the information now remaining at issue, the information in rows 3-10. She assumed for discussion that the test for this element had been met, and went on to find that the section 16(1)(c) "harms" test had not been met for any of the information in question.

[para 68] I set out below a summary of her analysis under the "in confidence" element of section 16(1)(b):

- there is insufficient evidence indicating that at the time ABC supplied the information to Alberta Health, ABC communicated its expectation of confidentiality to Alberta Health *and* Alberta Health agreed to keep the information confidential
- the case law indicates that there is a lowered expectation of confidentiality in relation to the payment terms of a contract with a public body that expends public funds
- neither ABC nor Alberta Health made direct submissions on the issue of the intentions respecting confidentiality of the minister as a party to the agreement, either with respect to

the pricing information or the agreement generally, nor on the question of which parties' subjective intentions are determinative

[para 69] The adjudicator went on to say this (at para. 64):

> I therefore considered asking these parties whether there is evidence to support the view that at the time the pricing information (accepting it to have been "supplied") was given to Alberta Health, Alberta Health understood or agreed that this information was to be kept confidential. I also contemplated asking the parties whether the appropriate test for "supplied in confidence" is the intention of only the supplying party, or also depends on the intention of the receiving party (a question on which ABC has already commented).

[para 70] The adjudicator went on to say that, for the sake of moving the inquiry along expeditiously, she would not ask the parties for further submissions on these points, and would assume for discussion purposes that the "in confidence" element of section 16(1)(b) had been met.

The parties' submissions on "in confidence"

[para 71] I gave both ABC and Alberta Health an opportunity to provide further and better submissions on this point. Both parties essentially repeated their submissions. Neither party provided me with the new or additional evidence and arguments to which the adjudicator in the 2019 IPC Order said that she would have liked to have received for the purpose of making a definitive decision on the "in confidence" element of section 16(1)(b).

[para 72] Below are my findings on this point in relation to the information remaining at issue.

Row 5 (pp. 73-78): processes and methodologies

[para 73] This is the only information for which both parties take the position that ABC supplied the information to Alberta Health in confidence.

[para 74] The adjudicator in Order F2019-17 said the intentions of the parties is a significant factor in the determination of confidentiality, and that the Commissioner (or her delegates) cannot make a finding contrary to those intentions without reason, such as evidence to the contrary. I accept that both parties' consistent statements to this effect carry some weight. However, weighing heavily against an expectation of confidentiality is the failure of either party to bolster their submission with new or additional evidence on this point.

[para 75] The adjudicator in Order F2019-R-01 found that the evidence from the parties in support of a "confidentiality" finding that was before her at the time was not sufficiently persuasive. The adjudicator clearly and carefully explained in detail why she found the evidence to be insufficient and unpersuasive. In particular, she stated at paras 61 and 64 (emphasis in original):

- the statement by ABC that it "entered into the agreements on the basis and understanding that the agreements were confidential" might be taken as a suggestion that the intention of supplying the information confidentially was *communicated to the Minister* and that the *Minister agreed* that the Agreement (which include the pricing information) would be treated as confidential. However, the Affidavit does not say this directly, and, there is no direct evidence as to any position taken by the Minister on this question at the time the information was supplied, nor argument about how the terms

of the Agreement bear on this question. Neither was any direct evidence presented by Alberta Health about the Minister's intentions in either its submissions before the former Adjudicator or in its recent submissions.

- Neither ABC nor Alberta Health made direct submissions on the issue of the intentions respecting confidentiality of the Minister as a party to the Agreement, either with respect to the pricing information or the Agreement generally, nor on the question of *which parties'* subjective intentions are determinative.

[para 76] The lack of new or additional evidence, combined with what the adjudicator in the 2019 IPC Order viewed as evidence that was not sufficiently persuasive, leads me to conclude that the parties have not met the burden of proof under the confidentiality element of the section 16(1)(b) test.

Rows 3-4, 6-10

[para 77] Alberta Health takes the position that none of this information was supplied in confidence. This puts the lack of evidence from either party on this point as I explained above in ever more stark relief. The Saskatchewan Information and Privacy Commissioner has stated that, under its equivalent exemption to section 16(1)(b), information will *not* be found to have been supplied in confidence unless there is evidence that both parties had a "mutual understanding" that information supplied by the third party will be held in confidence by the institution [see, for example, Review Report 148-2024, 163-2024.] That office's FOIP Manual states:

> If one party intends the information to be kept confidential but the other does not, the information is not considered to have been obtained in confidence.

[para 78] I note the British Columbia Information and Privacy Commissioner takes a similar approach under its third party commercial information exemption [see, for example, Order F17-52].

[para 79] I agree with this approach. I find that the fact that Alberta Health has asserted this information was not supplied in confidence weighs heavily against a conclusion that the "in confidence" element under section 16(1)(b) has been satisfied.

[para 80] For these reasons, I do not have sufficient evidence before me on which to conclude that the confidentiality element of the section 16(1)(b) test has been met for this information.

Row 1 (pp. 43-45): List of reports ABC to provide AH to confirm ABC's compliance with its duties in pp. 1-42
Row 2 (pp. 66-72): Information about ABC's contractual duties (replacement for pp. 34-39)

[para 81] I found above that this information was not "supplied" and therefore it cannot qualify for exemption under section 16(1)(b). For similar reasons as stated above under Rows 3-4, 6-10, I find that, based on the fact that Alberta Health does not take the position that this information was supplied in confidence, combined with the lack of new or additional evidence from either party on this point, the information in rows 1 and 2 also was not supplied "in confidence."

Conclusion

[para 82] None of the information in rows 3-10 meets the "supplied in confidence" test under section 16(1)(b).

[para 83] As a result, none of the information remaining at issue qualifies for exemption under section 16(1).

IV. ORDER

[para 84] I make this Order under section 72 of the *Act*.

[para 85] I order the Public Body to give the Applicant access to the agreement in full.

[para 86] I order the Public Body to inform me within 50 days of receiving this order that it has complied with it.

David Goodis
External Adjudicator
/kh