ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER FOIP2025-30

October 31, 2025

PUBLIC SAFETY AND EMERGENCY SERVICES

Case File Number 005965

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Summary: An individual made an access request on behalf of an association (the Applicant) to Justice (now Public Safety and Emergency Services) (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for a copy of "the most recent annual financial statement for the inmate welfare fund in the Alberta Correctional Centres, broken down by Centre", and the records indicating the sources of the income if it was not indicated in the financial statements.

The Public Body provided the Applicant with 73 pages of responsive records. It withheld certain information 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) and subsequently an inquiry.

Two third parties were invited to participate in the inquiry as affected parties. One of these affected parties, the third party which provided telephone services to inmates, elected to participate in the inquiry. The second affected party, the third party which provided canteen services to inmates, did not respond to the invitation and did not participate in the inquiry.

The Adjudicator found that the Public Body 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, 25, 71, 72.

Orders Cited: AB: 99-018, 2000-10, 2000-017, F2003-018, F2005-016, F2006-024, F2010-029, F2010-037, F2011-018, F2014-35, F2017-82, F2024-20, F2024-40 and F2025-01.

Cases Cited: AB: *Alberta Teachers' Assn. v. Buffalo Trail Public Schools Regional Division No. 28*, 2013 ABQB 283, *Alberta Teachers' Assn. v. Buffalo Trail Public Schools Regional Division No. 28*, 2014 ABCA 432, *Park Place Seniors Living Inc v Alberta Health Services*, 2017 ABQB 575, *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10.

Cases Cited: CANADA: *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3.

I. BACKGROUND

[para 1] On November 30, 2015, an individual made an access request on behalf of an association (the Applicant) to Justice (now Public Safety and Emergency Services) (the Public Body) under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the FOIP Act) for a copy of the following information:

> . . . the most recent annual financial statement for the inmate welfare fund in the Alberta Correctional Centres, broken down by Centre.
>
> Further, if the financial statements do not indicate this, please provide me with the records indicating the sources of the income.

[para 2] On May 8, 2017, the Public Body provided the Applicant with 73 pages of responsive records. It disclosed all of the responsive information in the records with the exception of certain discrete amounts which it withheld pursuant to section 16(1) (disclosure harmful to business interests of a third party) of the FOIP Act.

[para 3] On May 16, 2017, the Applicant asked the Commissioner to review the Public Body's decision to withhold responsive information under section 16(1).

[para 4] The Commissioner authorized a Senior Information and Privacy Manager to investigate and attempt to settle the matter.

[para 5] Subsequently, on February 13, 2018, the Applicant requested the Commissioner conduct an inquiry into the Public Body's decision to withhold responsive information under section 16(1).

[para 6] The Commissioner agreed to conduct an inquiry and delegated her authority to conduct the inquiry to me.

[para 7] Two third parties were invited to participate in the inquiry as affected parties. One of these third parties, the third party which provided telephone services to inmates (the Telephone Service Provider or TSP) elected to participate in the inquiry. The second third party, the third party which provided canteen services to inmates (the Canteen Service Provider or CSP) did not respond to the invitation and did not participate in the inquiry.

II. RECORDS AT ISSUE

[para 8] As set out in the Index of Records provided by the Public Body to this Office and the Applicant, the information at issue is the amounts withheld by the Public Body pursuant to section 16(1) of the FOIP Act in the 73 pages of responsive records (the Records) as follows:

Pages	Description of Information
1, 3, 5, 9, 12, 14, 16, 18, 20, 55, 57, 60, 64, 66, 68, 70, 72	"Contractor Canteen Rebate" and "Telephone Commission"
7, 11, 59, 62	"Contractor Canteen Rebate", "Total Misc Income" and "Total Revenue"

III. ISSUE

[para 9] The Notice of Inquiry, dated October 31, 2024, sets out the following issue:

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

IV. DISCUSSION OF ISSUE

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

[para 10] Section 16(1) states:

> *16(1) The head of a public body must refuse to disclose to an applicant information*
>
> *(a) that would reveal*
>
> *(i) trade secrets of a third party, or*
>
> *(ii) commercial, financial, labour relations, scientific or technical information of a third party,*

(b) that is supplied, explicitly or implicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

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

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[para 11] The Public Body applied section 16(1) to withhold the "Contractor Canteen Rebate" and "Telephone Commission" amounts on pages 1, 3, 5, 9, 12, 14, 16, 18, 20, 55, 57, 60, 64, 66, 68, 70, 72 of the Records, and the "Contractor Canteen Rebate", "Total Misc Income" and "Total Revenue" amounts on pages 7, 11, 59 and 62 of the Records.

[para 12] The pages above on which the amounts have been redacted bear the heading "Offender Welfare Fund Statement Report" and the amounts appear under the heading "Revenue". The Offender Welfare Fund Statement Reports indicate they were generated by the Government of Alberta Justice and Solicitor General.

[para 13] Section 16(1) is not discretionary. If information meets the requirements set out in section 16(1), the head of the public body must refuse to disclose it to an applicant.

[para 14] Before turning to the test that must be met for section 16(1) to apply, it is helpful to review the purpose of section 16(1). In Order F2025-01, the adjudicator discussed the purpose of section 16(1) as follows:

> [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 balance is well illustrated by these appeals. They arise out of requests for information which had been provided to government by a manufacturer as part of the new drug approval process. In order to get

> approval to market new drugs, innovator pharmaceutical companies, such as the appellant Merck Frosst Canada Ltd. ("Merck"), are required to disclose a great deal of information to the government regulator, the respondent Health Canada, including a lot of material that they, with no good reason, do not want to fall into their competitors' hands. But competitors, like everyone else in Canada, are entitled to the disclosure of government information under the *Access to Information Act*, R.S.C. 1985 c. A-1 ("Act" or "ATI").
>
> The Act strikes a careful balance between the sometimes competing objectives of encouraging disclosure and protecting third party interests. While the Act requires government institutions to make broad disclosure of information, it also provides exemptions from disclosure for certain types of third party information, such as trade secrets or information the disclosure of which could cause economic harm to a third party.
>
> [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 is not disclosed when providing access to government information.

[para 15] In 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)).

[para 16] In that case, as in this case, the public body had disclosed some information to the applicant in the responsive records but withheld other information under section 15(1) (now section 16(1)). At paragraph 16, former Commissioner Clark 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) to (iii).

[para 17] 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 18] Section 71(1) states:

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

[para 19] The standard of proof under section 71(1) is the balance of probabilities.[1]

[para 20] I note that the Public Body stated in its submission that the burden of proof in this case was on the third parties under section 71(3)(b) of the FOIP Act, however, this is incorrect.

[para 21] Section 71(3) states:

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

[para 22] Section 71(3)(b) only applies where a public body has decided *to give an applicant access* to all or part of a record containing information about a third party; not where it has decided *to refuse to give an applicant access* to all or part of a record containing information about a third party.

[para 23] Where a public body has *refused* an applicant access to all or part of a record, as stated by former Commissioner Clark in Order 2000-017, the burden of proof that the applicant has no right of access to the record is on the Public Body pursuant to section 67(1), which is now section 71(1), of the FOIP Act.

[para 24] This has been confirmed in several Orders of this Office (see, for example, Orders 2000-010 at paragraph 8, F2010-029 at paragraph 58, and F2011-018 at paragraph 39).

[para 25] For example, in Order F2010-029, the adjudicator stated at paragraph 58:

> [para 58] As this inquiry relates to a decision to refuse access to records, the Public Body has the burden, under section 71(1) of the Act, of proving that the Applicant has no right of access to the records that it withheld under section 16(1). In its submissions, the Public Body says that the Affected Party has the burden, but this would only have been the case, under section 71(3)(b), if the Public Body had decided to give the Applicant access to the

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

> records at issue. Having said this, in order to meet its burden in this inquiry, the Public Body can be assisted by the Affected Party. Indeed, the Public Body relies in large part on the submissions of the Affected Party and the representations that it made when the access request was being processed.

[para 26] As the Public Body refused to disclose certain information in the Offender Welfare Fund Statement Reports to the Applicant, pursuant to section 71(1), the burden is on the Public Body to establish on the balance of probabilities that the Applicant has no right of access to the withheld information.

[para 27] As per the comments of the adjudicator in Order F2010-029 at paragraph 58 reproduced above, the Public Body can be assisted in meeting its burden of proof in this case by the submissions made, if any, by the CSP and the TSP.

[para 28] In reaching my conclusions herein, I have considered all of the information before me which includes the arguments of the Public Body, the arguments made by the CSP to the Public Body, the arguments made by the TSP to the Public Body, the arguments made by the TSP to me, and the arguments made by the Applicant to me.[2]

[para 29] As noted by the adjudicator at paragraph 16 in Order F2024-20, the criteria in each of sections 16(1)(a), (b) and (c) must be met for section 16(1) to apply:

> [para 16] In order for section 16(1) to properly apply to information, the criteria in each of sections 16(1)(a), (b), and (c) must be met. Meeting only one or two of the criteria does not suffice. It is not the case, as is argued by the Public Body, that simply because an entire document may be provided in confidence in accordance with section 16(1)(b), that all information in it is protected by section 16(1). Only information of a third party, of the types described in section 16(1)(a), disclosure of which results in the outcomes in section 16(1)(c) can be withheld under section 16(1). Where those conditions, or confidentiality under section 16(1)(b) are not met, information cannot be withheld under section 16(1).

"Contractor Canteen Rebate", "Total Misc Income" and "Total Revenue" amounts redacted on pages 7, 11, 59, 62

[para 30] I will first determine whether the Public Body has established that section 16(1) applies to the "Contractor Canteen Rebate" amounts withheld on pages 7, 11, 59 and 62 of the Records. I will then determine whether the Public Body has established that section 16(1) applies to the "Total Misc Income" and "Total Revenue" amounts on these pages.

[2] Even if the burden of proof in this case had been on the third parties under section 71(3)(b), having considered all of the submissions and evidence before me, I would have reached the same conclusion and found that neither the CSP nor the TSP had established on a balance of probabilities that section 16(1) applied to their respective information withheld by the Public Body in the Offender Welfare Fund Statement Reports.

[para 31] As noted above, the CSP did not respond to the invitation to participate in this inquiry; however, the Public Body advised in its initial submission that following receipt of the Applicant's access request, it contacted the CSP and the TSP and gave them the opportunity to make representations concerning the disclosure of their respective information.

[para 32] In its submission, the Public Body summarized the response it received from the CSP as follows:

> On October 5, 2017, the Public Body requested a third-party review from [the CSP]. On October 16, 2017, [the CSP] provided a response requesting that their business information be withheld in accordance with section 16(1) of the FOIP Act based on the following that could result if the information were disclosed.
>
> *Financial loss* – in the response received from [the CSP], they acknowledged that the records contained financial information directly related to the services they provide to the Public Body.
>
> *Labour Relations* – the information, if released, could likely be used for collective bargaining purposes that would harm the business interests of [the CSP].
>
> *Prejudice* – [the CSP] believes that the release of the information could reasonably be expected to significantly impact their competitive advantage by interfering with the negotiations in a re-bid situation. If the information were to be released, competitors with access to their information will be in the position to copy or undercut their rate.
>
> *No longer supply information* – if third parties become aware that information provided during a bid proposal could be released without their consent, going forward companies could consider restricting the type of information they provide to the Public Body.
>
> *Undue Financial Loss* – In the event that [the CSP] has made capital investments including but not limited to installation costs for services at government facilities, it is in the Public Body's interest for [the CSP] to continue delivering quality food services. If another competitor was to undercut the third party's rates based on confidential information provided to the Public Body, it could lead to significant financial loss to the third party and possibly inefficient food services at the government facilities that rely on the services of [the CSP].
>
> Furthermore [the CSP] asserted that the information was provided to the Public Body during a request for proposal process. The confidential financial information/offer was only provided to the Public Body to ensure that sufficient information was provided to adequately evaluate their proposal. The information provided to the Public Body are not routinely provided outside their company and it was implied that the information was supplied in confidence and would only be used for the purpose of proposal evaluation.

Section 16(1)(a)

[para 33] There are two components that must be established in order for section 16(1)(a) to apply. The first component is that the information being withheld must be trade secrets or commercial, financial, labour relations, scientific or technical information. The second component is that the information must be "of a third party".

[para 34] In Order F2025-01, the adjudicator discussed what constituted "commercial, financial, labour relations, scientific or technical information of a third party". In particular, at paragraphs 36 – 38, the adjudicator stated:

> [para 36] Past orders of this Office have defined "commercial information" as information belonging to a third party about its buying, selling or exchange of merchandise or services. "Financial information" is information belonging to a third party about its monetary resources and use and distribution of its monetary resources (Order F2009-028, at para. 42). In Order F2011-002 the adjudicator found that fees for services performed by a third party for a public body, which were contained in requested records, were "commercial information" of the third parties because "the information is about terms under which [the third parties] performed or sold services to the Public Body" (at para. 15).
>
> [para 37] Examples of financial information listed in Order PO-2010 from the Ontario Office of the Information and Privacy Commissioner, which was cited in Order F2011-002 from this Office, include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.
>
> [para 38] In *Merck Frosst*, the Supreme Court of Canada cited the discussion of the scope of "financial, commercial, scientific or technical" in *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 1989 CanLII 10334 (FC), 37 Admin. L.R. 245. It said:
>
> > [139] First, the terms "financial, commercial, scientific or technical" should be given their ordinary dictionary meanings. As MacKay J. in *Air Atonabee* stated, a p. 268:
> >
> > > . . . dictionary meanings provide the best guide and that it is sufficient for purposes of subs. 20(1)(b) that the information relate or pertain to matters of finance, commerce, science or technical matters as those terms are commonly understood.
> >
> > [140] Second, the case law also holds that in order to constitute financial, commercial, scientific or technical information, the information at issue need not have an inherent value, such as a client list might have, for example. The value of information ultimately "depends upon the use that may be made of it, and its market value will depend upon the market place, who may want it and for what purposes, a value that may fluctuate widely over time" (*Air Atonabee,* at pp. 267-68).

[para 35] In the case before me, the Public Body stated that the CSP "acknowledged that the records contained financial information directly related to the services they provide to the Public Body".

[para 36] The Public Body further stated "Part 1 of the test has been met; the information is commercial or financial in nature as it relates to both parties' financial information provided to the Public Body during a bidding process".

[para 37] It is not clear what the Public Body means by this latter statement. The CSP's bid proposal did not form any part of the Records. The "Contractor Canteen Rebate" amounts that were withheld by the Public Body and which are the subject of this inquiry are in the Offender Welfare Fund Statement Reports which were generated by the Public Body in response to the Applicant's access request. These amounts would not have been known at the time the CSP submitted its bid proposal and therefore could not have been provided to the Public Body by the CSP during the bidding process.

[para 38] Nonetheless, as I understand it, the rebate is a factor of the revenue generated by the CSP in the provision of canteen services to the inmates incarcerated with the Public Body and is paid to the Public Body which allocates it to the Offender Welfare Fund.

[para 39] In Order F2014-35, the adjudicator considered whether information in audited financial returns fell within section 16(1)(a) of the FOIP Act. At paragraph 17, the adjudicator concluded:[3]

> [para 17] I accept that the information Shepherd's Care, Touchmark and Revera seek to have severed from their audited returns is the financial information of Shepherd's Care, Touchmark and Revera within the terms of section 16(1)(a).

[para 40] Based on the comments of the Supreme Court of Canada in *Merck Frosst*, and the conclusion of the adjudicator in Order F2014-35 with respect to information in financial returns, I find that the "Contractor Canteen Rebate" amounts constitute financial information under section 16(1)(a) of the FOIP Act.

[para 41] However, as noted above, in order for section 16(1)(a) to apply, the Public Body must *also* establish that the withheld information is "of a third party".

[para 42] Unlike in Order F2014-35, where the financial information at issue appeared in the audited financial returns of the other parties in that case, in this case the financial information at issue appears in the *Public Body's* Offender Welfare Fund Statement Reports. The question to be determined is whether the "Contractor Canteen Rebate" amounts which appear *in the Public Body's Offender Welfare Fund Statement Reports* are "of a third party"; namely the CSP.

[3] Upheld on judicial review in *Park Place Seniors Living Inc. v. Alberta Health Services*, 2017 ABQB 575.

[para 43] What is meant by the phrase "of a third party" was considered by the adjudicator in Order F2024-40.

[para 44] In Order F2024-40, a third party objected to the public body's decision to disclose information to an applicant which the third party argued should be withheld under section 16(1) of the FOIP Act.

[para 45] At paragraphs 10 – 14 of Order F2024-40, the adjudicator stated:

> [para 10] Section 16(1)(a) and the equivalent provisions in the access to information statutes of other provinces, have been interpreted in orders of access to information commissioners and in decisions of the Courts. For example, in *Beverage Industry Association of Newfoundland and Labrador v. Newfoundland and Labrador (Minister of Finance)*, 2019 NLSC 222 (CanLII), the Supreme Court of Newfoundland reviewed provisions equivalent to Alberta's section 16, and said the following:
>
> > In his reasons, the Commissioner referred to decisions of Commissioners in other provinces supporting the position that the language in section 39 requires that the information be "of a third party", and that this suggests that the third party must have a proprietary interest in that information. Further, in Court, the Department referred to *Corporate Express Canada Inc. v. Memorial University of Newfoundland*, 2015 NLCA 52, in which the Court of Appeal discussed section 27(1)(b) of the *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1. That legislation has since been repealed and replaced by the Act. However, the Court of Appeal's interpretation of that provision remains relevant to section 39 of the Act. The Court of Appeal stated in the *Corporate Express* decision at paragraph 26, as follows:
> >
> > > Whether the requested information is the confidential information of a third party requires that the contents of the requested information be examined with a view to identifying the origin and ownership of the information. This is an essential part of the test for exemption set out in section 27(1)(b), along with whether the information was supplied by the third party explicitly or implicitly in confidence and whether it was treated consistently as confidential information by the third party. Application of the test involves fact finding, the application of legal principles and interpretation of the legislative provision. It is an objective determination, made in the context of the purpose of the legislation. Accordingly, I do not agree with Staples that the Judge erred in saying that the test under section 27(1)(b) is an objective one.
> >
> > Similarly, Justice Orsborn stated in *Atlantic Lottery Corp. v. Newfoundland and Labrador (Minister of Finance)* at paragraph 34, as follows:

> It is not necessary for the disposition of this appeal to determine whether the NR information is owned by the retailers. The case law is clear that to come within the section 39 exception the information must be "of a third party" - - i.e. proprietary information of a third party. In its submission to the Commission, as already noted, ALC wrote that "the information that is being requested is proprietary information belonging exclusively to ALC that is deemed to be a highly valuable and confidential corporate asset of ALC…" In the face of this assertion, it would be difficult to maintain that the information is owned by the retailers; nonetheless, I express no final opinion on that matter.
>
> Based on these authorities, I conclude that the words "of a third party" in section 39 of the Act do suggest that the third party must have some form of a proprietary interest in the information. However, in my view, this does not mean the information need be solely owned by the third party.

In the foregoing case, the Court noted that privacy commissioners across Canada, including Alberta, considered the phrase "of a third party", which appears in section 16(1)(a) of the FOIP Act, to mean that the information in question *belongs* to the third party supplying the information. The interest is proprietary although the third party need not be the sole owner of the information.

[para 11] In both Order F2015-12 of this office and in Order MO-2801, a decision of the Ontario Office of the Information and Privacy Commissioner following previous orders of that office, it was held that "of a third party" means that information "belongs" to a party.

[para 12] In Order MO-2801, the Adjudicator stated at paragraphs 186 – 188:

> As stated above, the only representations about section 11(a) by Peel was that the records contain financial information that was negotiated between the affected party and Peel and that this information is confidential business information i.e. unit pricing information.
>
> Adjudicator Laurel Cropley in Order PO-2620, relying on Order PO-1736 discussed part 2 of the test under section 11(a) as follows:
>
> > Based upon my review of the records and representations, I conclude that the information contained in the records does not "belong to" the OLGC. I find that I have not been provided with sufficient evidence to demonstrate that the mutually-generated, agreed-upon terms which formed part of the negotiation process constitute the intellectual property of the OLGC or are a trade secret of the OLGC. Other than a statement that the information was created at the expense of the OLGC and the other contracting parties, I have not been provided with evidence to indicate how the OLGC expended money, skill or

> effort to develop the information. Therefore, I find that the information sought to be withheld does not "belong to" the OLGC within the meaning of section 18(1)(a) of the [Freedom of Information and Protection of Privacy Act (the provincial Act), the equivalent to section 11(a) of the Act]. Part 2 of the test under that section has not, therefore been met.
>
> I agree with this reasoning and find that the negotiated unit pricing information of the affected party's product in pages 1002-1003, 1005-1017, 1019-1020, 1023-1025, 1027-1031, and 1033-1044 of the records does not "belong to" Peel. I find that I have not been provided with sufficient evidence to demonstrate that the mutually-generated, agreed-upon terms which formed part of a negotiation process constitutes the proprietary information of Peel. I have not been provided with evidence to indicate how Peel expended money, skill or effort to develop this information. Part 2 of the test under section 11(a) has not been met. As no other exemptions have been claimed for these pages, I will order this information disclosed.

> [para 13] The Adjudicator in the foregoing case concluded that the information at issue was not proprietary, as there was no evidence that the third party had expended money, skill or effort to develop it. As a result, the information did not fall within the terms of Ontario's equivalent provision to section 16 of Alberta's FOIP Act.
>
> [para 14] I agree with the reasoning of the Adjudicator in Order MO-2801 that information may be said to belong to a third party if it can be said to have expended money, skill or effort to develop or obtain it for use in its business.

[para 46] In the case before me, I understand that the "Contractor Canteen Rebate" amounts were generated from the sale of canteen items by the CSP and that the CSP provided the "Contractor Canteen Rebate" amounts which appear in the Public Body's Offender Welfare Fund Statement Reports, to the Public Body.

[para 47] In my view, the "Contractor Canteen Rebate" amounts are financial information of *both* the Public Body and the CSP. As it is not a requirement that the information be *solely* "of a third party" for section 16(1)(a) to apply, I conclude that the "Contractor Canteen Rebate" amounts in the Offender Welfare Fund Statement Reports are "of a third party".

Conclusion re: Section 16(1)(a)

[para 48] In summary, I find that the requirements for section 16(1)(a) are met with respect to the "Contractor Canteen Rebate" amounts. I will turn now to consider whether the requirements of section 16(1)(b) have been met for the "Contractor Canteen Rebate" amounts.

Section 16(1)(b)

[para 49] There are two components that must be met for section 16(1)(b) to apply. The first component is that the information must be *supplied* by the third party to the public body. The second component is that the information must be supplied explicitly or implicitly *in confidence*.

[para 50] The Applicant submitted that the "Contractor Canteen Rebate" amounts were not supplied by the CSP to the Public Body explicitly or implicitly in confidence.[4]

[para 51] In Order F2025-01, the adjudicator reviewed how past Orders of this Office, privacy commissioners in other Canadian jurisdictions, and the Courts have determined whether information has been "supplied" by a third party. At paragraphs 49 – 63, the adjudicator stated:

> [para 49] Many past Orders of this Office, as well as from the Ontario Office and the BC Office have held that a contract is negotiated between a public body and third party, and therefore cannot be found to have been supplied by the third party. This is true even where the contract price is the same as the bid price (see Alberta Order F2009-028, BC Order F11-27, and Ontario Order PO-226). This approach has also been upheld by the Ontario Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, 2005 CanLII 24249 (ON SCDC), [2005] O.J. 2851 and *Canadian Medical Protection Association v. John Doe*, 2008 CanLII 45005 (ON SCDC), [2008] O.J. No. 3475, and the BC Supreme Court in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner),* 2002 BCSC 603.
>
> [para 50] There are exceptions to this principle: where the information is immutable, or where disclosure of the information in the contract would permit an accurate inference about underlying non-negotiated confidential information supplied by the third party to the public body (Order F2013-47, citing Ontario Order PO-3176).
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> [para 51] Immutable information is described in Order F2019-17, at para. 95:
>
> > Immutable information is information that, by its nature and in the given context, is not susceptible to change; it is not information that *could have* changed but did not (see Order F2012-15, citing BC Order F11-27). Conditions proposed by one party and accepted by a public body without changes is reflective only of the tendering process chosen by the public body; it does not change the nature of the information contained in the proposals. In other words, the fact that a public body may not have made a counter-offer on a proposal does not mean that the proposal prices were immutable. To say that proposal prices are immutable is to say that the bidder could not have offered numbers other than those it did, in fact, offer. As stated in BC Order F11-27 (at para. 13):
> >
> > > In other words, information may originate from a single party and may not change significantly - or at all - when it is incorporated

[4] Applicant's Rebuttal Submission dated February 13, 2025, at paragraph 12.

> into the contract, but this does not necessarily mean that the information is 'supplied'. The intention of s. 21(1)(b) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change, but, fortuitously, was not changed.

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

> First of all, as previously noted, it is not the Remediation Agreement itself that must be the protected information. <u>There would be room to argue that negotiated contracts themselves are not "supplied" by either party to the agreement</u>. Imperial Oil did seek to prevent disclosure of the Remediation Agreement simply because it was an agreement, but that was based on it being privileged. <u>The overlapping exemption under s. 16 was not an attempt to prevent the disclosure of the Remediation Agreement as an agreement, but rather because of the information it "would reveal".</u>
>
> What s. 16(1) protects are documents that "may reveal" protected information that has been supplied by one of the parties. If Imperial Oil supplied protected financial, scientific and technical information to Alberta Environment in order to enable the negotiation of the Remediation Agreement, that information would still be "supplied" and therefore protected. "Supplied" relates to the source of the information, and whether information was "supplied" does not depend on the use that is made of it once it is received. <u>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.</u> It cannot be the rule that only information that is of no use to the public body is "supplied".

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

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

change) or that they were comprised of underlying non-negotiated confidential information supplied by the third party.

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

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

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

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

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

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

methodologies, and those resulting methodologies might nevertheless qualify as immutable information of the third party (at para 24).

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

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

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

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

[para 52] I also note the adjudicator's conclusion at paragraph 69 of Order F2025-01:

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

[para 53] In the case before me, the withheld "Contractor Canteen Rebate" amounts appear in the Offender Welfare Fund Statement Reports created by the Public Body.

[para 54] As stated above, the CSP did not participate in this inquiry and as a result, I have no direct submission from it about how the "Contractor Canteen Rebate" amounts meet the requirements of section 16(1)(b).

[para 55] The Public Body informed me what arguments the CSP had made to the Public Body to withhold the Rebate amounts.

[para 56] In its submission, the Public Body stated that "both companies confirmed that the records were in fact provided to the Public Body at some point".

[para 57] This statement is unclear. The Offender Welfare Fund Statement Reports were the records responsive to the Applicant's access request. These records clearly indicate they were created by the Government of Alberta Justice and Solicitor General. The Offender Welfare Fund Statement Reports were not "provided" by the CSP or the TSP to the Public Body.

[para 58] The "Contractor Canteen Rebate" amounts which were withheld by the Public Body are discrete amounts within the Offender Welfare Fund Statement Reports created by the Public Body.

[para 59] The Public Body stated in its submission "Part 2 of the test has been met, as the information has been supplied in confidence during a bidding proposal to the Public Body"; however, it did not provide any argument of its own or from the CSP as to whether these amounts were "supplied" to the Public Body, as that term has been considered by this Office and the Courts.

[para 60] Further, as noted above, the Records do not involve or include the CSP's bid proposal. Most of the CSP's arguments, as summarized by the Public Body, do not even appear to relate to the specific information that was withheld in this case.

[para 61] The "Contractor Canteen Rebate" amounts, where they appear in the Records, are all different amounts. It may be that the "Contractor Canteen Rebate" amounts arise from a rate that was negotiated between the parties, so while the actual amounts that appear in the Records may have been provided by the CSP to the Public Body, they are a product of a negotiated rate and are not immutable, and therefore arguably not "supplied" as that term has been interpreted by this Office.

[para 62] The rate or rates, or formula pursuant to which the "Contractor Canteen Rebate" amounts are calculated does not appear in the Offender Welfare Fund Statement Reports.

[para 63] The "Contractor Canteen Rebate" amounts themselves do not reveal any underlying immutable or non-negotiated information of the CSP. Nor do I see anything in the information that has been disclosed to the Applicant in the Records that could be used in conjunction with the "Contractor Canteen Rebate" amounts to reveal any underlying immutable or non-negotiated information of the CSP.

[para 64] The onus of establishing that the "Contractor Canteen Rebate" amounts were *supplied* to the Public Body by the CSP, as that term has been interpreted by this Office, is on the Public Body. In the absence of any arguments from either the Public Body or the CSP on this point, I am unable to conclude that the "Contractor Canteen Rebate" amounts were *supplied* by the CSP to the Public Body.

[para 65] As there is insufficient evidence and argument before me to find that the "Contractor Canteen Rebate" amounts were *supplied* by the CSP to the Public Body, the requirements of section 16(1)(b) have not been met and it is not necessary for me to continue the analysis; however, for the sake of completeness, I will also consider whether the Public Body or the CSP has established that the "Contractor Canteen Rebate" amounts were supplied *in confidence*.

[para 66] The factors for determining whether the information was supplied *in confidence* were set out by former Commissioner Clark at paragraph 37 in Order 99-018, citing Ontario Order M-169, as follows:

> 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 67] I will evaluate the Public Body's submission and CSP's position, as relayed to me by the Public Body, using the factors set out by former Commissioner Clark in Order 99-018 above.

Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.

[para 68] With respect to the information being supplied explicitly or implicitly *in confidence*, in its submission the Public Body advised that the CSP informed it that:

> Furthermore [the CSP] asserted that the information was provided to the Public Body during a request for proposal process. The confidential financial information/offer was only provided to the Public Body to adequately evaluate their proposal. The information

> provided to the Public Body are not routinely provided outside their company and it was implied that the information was supplied in confidence and would only be used for the purpose of proposal evaluation.

[para 69] This general statement does not specifically address whether the "Contractor Canteen Rebate" amounts were communicated by the CSP explicitly or implicitly in confidence to the Public Body. In fact, nowhere in the CSP's arguments, as presented by the Public Body, do the words "Contractor Canteen Rebate" appear.

[para 70] As previously noted, the "Contractor Canteen Rebate" amounts would not have been known at the time of the CSP's proposal to the Public Body and therefore could not have been provided by the CSP to the Public Body at that time in order to permit the Public Body "to adequately evaluate their proposal".

[para 71] The Public Body did not provide me with any information about the terms of its bidding process, or the contract it entered into with the CSP. It did not point to or provide me with any contractual requirement wherein it agreed to keep the "Contractor Canteen Rebate" amounts confidential.

[para 72] There is no evidence before me to suggest that the various "Contractor Canteen Rebate" amounts that appear in the Public Body's Offender Welfare Fund Statement Reports were communicated by the CSP to the Public Body explicitly or implicitly on the basis that they were confidential and were to be kept confidential.

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.

[para 73] The Public Body stated the CSP informed it that "[t]he confidential financial information/offer was only provided to the Public Body to adequately evaluate their proposal" and "[t]he information provided to the Public Body are not routinely provided outside their company".

[para 74] It is not clear how these statements can apply to the "Contractor Canteen Rebate" amounts which were not known at the time the CSP would have submitted its bid proposal to the Public Body.

[para 75] The Public Body does not explain how the various "Contractor Canteen Rebate" amounts in the Offender Welfare Fund Statement Reports from the various facilities could have been used "for the purpose of proposal evaluation" when these amounts did not exist at the time the CSP's proposal would have been evaluated.

[para 76] Neither the Public Body, nor the CSP in its arguments as summarized by the Public Body in its submission in this inquiry, informed me how the CSP specifically treated the "Contractor Canteen Rebate" amounts prior to communicating them to the Public Body.

[para 77] There is insufficient evidence before me to conclude that the CSP treated the "Contractor Canteen Rebate" amounts consistently in a manner that indicated a concern for their protection from disclosure by the CSP prior to being communicated to the Public Body.

Not otherwise disclosed or available from sources to which the public has access.

[para 78] I accept that the "Contractor Canteen Rebate" amounts were "not otherwise disclosed" or "available from sources to which the public has access". If they were, there would have been no need for the Applicant to submit an access request to the Public Body for this information. This factor on its own, however, does not persuade me that the "Contractor Canteen Rebate" amounts were supplied explicitly or implicitly in confidence by the CSP to the Public Body.

Prepared for a purpose which would not entail disclosure.

[para 79] Neither the Public Body nor the CSP in its position as summarized by the Public Body specifically addressed whether the "Contractor Canteen Rebate" amounts were prepared for a purpose which would not entail disclosure.

[para 80] Even if I accept that the "Contractor Canteen Rebate" amounts were prepared by the CSP for a purpose which the CSP intended would not entail disclosure, I do not have an independent statement from the Public Body confirming it understood and agreed that the "Contractor Canteen Rebate" amounts were prepared for a purpose which would not entail disclosure. In its submission, the Public Body simply repeated what the CSP had said regarding its position on the confidentiality of the "Contractor Canteen Rebate" amounts.

<u>Conclusion re: Section 16(1)(b)</u>

[para 81] In light of the foregoing, I find that neither the Public Body nor the CSP has established that the "Contractor Canteen Rebate" amounts were supplied by the CSP explicitly or implicitly in confidence to the Public Body as required by section 16(1)(b).

[para 82] As previously noted, a failure to establish any one of the components of section 16(1) leads to the conclusion that section 16(1) does not apply. Accordingly, I find that section 16(1) does not apply to permit the Public Body to withhold the "Contractor Canteen Rebate" amounts.

[para 83] As I have concluded that the requirements of section 16(1)(b) have not been fulfilled it is not necessary for me to determine whether the Public Body or the CSP has established that one or more of the criteria in section 16(1)(c) have been met. Nonetheless, for the sake of completeness, I will consider the Public Body's submission regarding the application of section 16(1)(c).

Section 16(1)(c)

[para 84] In order for section 16(1) to apply, the Public Body must establish on a balance of probabilities that disclosure of the information "could reasonably be expected to" result in at least one of the outcomes listed in section 16(1)(c).

[para 85] The phrase "could reasonably be expected to" in section 16(1)(c) was discussed by the adjudicator in Order F2014-35, which was upheld on judicial review.[5] At paragraphs 24 - 28, the adjudicator stated:

> [para 24] In *Canada (Information Commissioner) v. Canada (Prime Minister)*, 1992 CanLII 2414 (FC), [1992] F.C.J. No. 1054; Rothstein J., as he then was, made the following observations in relation to the evidence a party must introduce in order to establish that harm will result from disclosure of information. He said:
>
> > While no general rules as to the sufficiency of evidence in a section 14 case can be laid down, what the Court is looking for is support for the honestly held but perhaps subjective opinions of the Government witnesses based on general references to the record. Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged. [my emphasis]
>
> [para 25] In the case of section 16(1)(c)(i) of the FOIP Act, the harm that must be established is significant harm to a third party's competitive position or significant interference with a third party's negotiating position. Following the approach set out in the foregoing case, a third party seeking to establish the likelihood of significant interference with negotiating position arising from disclosure must establish a direct linkage between the information at issue and the risk of significant interference that it projects.
>
> [para 26] In *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515, the Court upheld a decision of the Commissioner requiring evidence to support the contention that there was risk of harm if information was disclosed.

[5] *Park Place Seniors Living Inc v Alberta Health Services*, 2017 ABQB 575

> 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 reasons does 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 held that there is an evidentiary burden on the party opposing disclosure based on expectation of harm*: Chesal v. Nova Scotia (Attorney General)* 43, at para. 56 *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)* 44 at para. 26.

[para 27] In a recent decision, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, the Supreme Court of Canada confirmed that when access and privacy statutes refer to reasonable expectations of harm, that a party must demonstrate that disclosure will result in a risk of harm that is beyond the merely possible or speculative. The Cout stated:

> It is important to bear in mind that these phrases are simply attempts to explain or elaborate on identical statutory language. The provincial appellate courts that have not adopted the "reasonable expectation of probable harm" formulation were concerned that it suggested that the harm needed to be probable: see, e.g., *Worker Advisor*, at paras. 24-25; *Chesal v. Nova Scotia (Attorney General)*, 2003 NSCA 124, 219 N.S.R. (2d) 139, at para. 37. As this Court affirmed in *Merck Frosst*, the word "probable" in this formulation must be understood in the context of the rest of the phrase: there need be only a "reasonable expectation" of probable harm. The "reasonable expectation or probable harm" formulation simply "captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm": para. 206.
>
> Understood this way, there is no practical difference in the standard described by the two reformulations of or elaborations on the statutory test. Given that the statutory tests are expressed in identical language in provincial and federal access to information statutes, it is preferable to have only one further elaboration of that language; *Merck Frosst*, at para. 195:
>
> > I am not persuaded that we should change the way this test has been expressed by the Federal Courts for such an extended period of time. Such a change would also affect other provisions because similar language to that in s. 20(1)(c) is employed in several other exemptions under the Act, including those relating to federal-provincial affairs (s. 14), international affairs and defence (s. 15), law enforcement and investigations (s. 16), safety of individuals (s. 17), and economic interests of Canada (s.

> 18). In addition, as the respondent points out, the "reasonable expectation of probable harms" test has been followed with respect to a number of similarly worded provincial access to information statutes. According, the legislative interpretation of this expression is of importance both to the application of many exemptions in the federal Act and similarly worded provisions in various provincial statutes. [Emphasis added in original.]
>
> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras 197 and 199. The inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40.
>
> [para 28] Section 16(1)(c) of the FOIP Act incorporates the phrase, "could reasonably be expected to", discussed in the foregoing excerpt from *Ontario (Community Safety and Correctional Services*). It is therefore incumbent on the party seeking to have information withheld from an applicant to submit or adduce evidence that disclosure of the information could reasonably be expected to result in probable harm. In this case, the harm in question is significant interference is significant interference to the third parties' negotiating positions.

[para 86] At paragraph 86 in Order F2025-01, the adjudicator summarized what a third party must do in order to satisfy section 16(1)(c) as follows:

> [para 86] The Supreme Court of Canada has made it clear that there is one evidentiary standard to be used wherever the phrase "could reasonably be expected to" appears in access-to-information legislation. There must be a reasonable expectation of probable harm, and the Third Party must provide sufficient evidence to show that the likelihood of any of the above scenarios is "considerably above" a mere possibility. The Third Party has not provided any arguments as to how the disclosure of an Agreement that is eight years old could reasonably be expected to result in one of the harms set out in section 16(1)(c).

[para 87] The CSP's arguments on the application of section 16(1)(c), as summarized by the Public Body in its submission, are reproduced at paragraph 32 above.

[para 88] Additionally, the Public Body stated in its submission:

> Part 3 of the test involves harms to business interest. The third parties have advised the public body that release of the records will impact their competitive advantage during any

future bid proposals as competitors might use the information to copy or undercut their rates which might hinder their ongoing business relations with the Public Body.

Section 16(1)(c)(i) - harm significantly the competitive position or interfere significantly with the negotiating position of the third party

[para 89] In Order F2014-35, the adjudicator made the following comments regarding the application of section 16(1)(c)(i), which I find of assistance in the case before me:

> [para 30] Shepherd's Care, Touchmark and Revera did not explain how disclosure of specific information in their audited financial returns could be expected to create significant interference with their respective negotiating positions in collective bargaining. Moreover, they did not explain how their negotiating positions would be interfered with, or point to the information in the records that could be expected to result in that harm.
>
> [para 31] As was the case in *Canada (Prime Minister)* and *Qualicare*, (*supra*), I have been provided with essentially bare statements that significant interference to their negotiating positions will result from disclosure, should the information be disclosed, but no argument or evidence to establish the nature of the harm, its relation to the information in the records, or the likelihood that such harm would result from disclosure of the specific information. The records have been left to speak for themselves; however, the harm that the parties foresee is not evident from the contents of the records.

[para 90] Similarly, in the case before me, neither the CSP nor the Public Body have adequately explained how the disclosure of the "Contractor Canteen Rebate" amounts in the Records to the Applicant could have harmed significantly the competitive position of, or interfered significantly with the negotiating position of the CSP under section 16(1)(c)(i) at the time the Public Body responded to the Applicant's access request, or could do so now, over eight years later, if disclosed to the Applicant. Nor have the CSP or the Public Body established that the likelihood of such harm occurring was at the time, or is now, considerably above a mere possibility.

[para 91] There is no information before me to explain how the disclosure of the various "Contractor Canteen Rebate" amounts in the Offender Welfare Fund Statement Reports could enable a competitor to determine the CSP's rate. Having reviewed the withheld information, it is not apparent to me how a competitor could use the various Rebate amounts to determine the CSP's rates and thereby copy or undercut the CSP's rates in any future bid process.

Section 16(1)(c)(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 92] The CSP and the Public Body have also failed to establish that the likelihood that the disclosure of the "Contractor Canteen Rebate" amounts to the Applicant would 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, was or is considerably above a mere possibility. If

contractually obligated to provide the Rebate amounts, the CSP could not withhold this information from the Public Body.

Section 16(1)(c)(iii) - result in undue financial loss or gain to any person or organization

[para 93] Likewise, neither the CSP nor the Public Body have explained how disclosing the various Rebate amounts to the Applicant would result in undue financial loss or gain to any person or organization, including the CSP, or that the likelihood that such harm would result was or is considerably above a mere possibility.

Section 16(1)(c)(iv) - reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[para 94] This section was not argued by either the Public Body or the CSP and is not relevant in this case.

Conclusion re: Section 16(1)(c)

[para 95] Accordingly, I find that neither the Public Body nor the CSP have established that the disclosure of the "Contractor Canteen Rebate" amounts could reasonably be expected to result in any of the outcomes in section 16(1)(c)(i) – (iii).

[para 96] As I have found that section 16(1) does not apply to the "Contractor Canteen Rebate" amounts on pages 7, 11, 59 and 62 of the Records, I will order the Public Body to disclose these amounts on pages 7, 11, 59 and 62 of the Records to the Applicant.

[para 97] I will now consider whether the Public Body has established that section 16(1) applies to the "Total Misc Income" and "Total Revenue" amounts on pages 7, 11, 59 and 62 of the Records.

[para 98] Section 16(1) prohibits a public body from disclosing to an applicant information which would reveal information of a third party to which section 16(1) applies.

[para 99] The Public Body did not explain how the "Total Misc Income" and "Total Revenue" amounts which appear on pages 7, 11, 59 and 62 that each bear the heading "Revenue" in the Records, were the trade secrets or commercial, financial, labour relations, scientific or technical information of the CSP.

[para 100] In fact, I note that the Public Body released the "Total Misc Income" and "Total Revenue" amounts where they appeared on pages 1, 3, 5, 9, 12, 14, 16, 18, 20, 55, 57, 60, 64, 66, 68, 70, 72 where it had withheld the "Contractor Canteen Rebate" and "Telephone Commission" amounts. Consequently, the "Total Misc Income" and "Total Revenue" amounts are not in and of themselves information of a third party to which section 16(1) applies.

[para 101] However, I understand the Public Body to have withheld the "Total Misc Income" and "Total Revenue" amounts on pages 7, 11, 59 and 62 under section 16(1) since, given the other information it disclosed to the Applicant on these pages, if either or both the "Total Misc Income" and "Total Revenue" amounts were disclosed, the Applicant would be able to deduce the "Contractor Canteen Rebate" amounts withheld on these pages.

[para 102] Consequently, disclosure of either or both the "Total Misc Income" or "Total Revenue" amounts where they appear with the withheld "Contractor Canteen Rebate" amounts on pages 7, 11, 59 and 62 in the Records *would reveal* the "Contractor Canteen Rebate" amounts.

[para 103] Withholding the "Total Misc Income" and "Total Revenue" amounts under section 16(1) would be required if the disclosure of either or both or these amounts revealed information of a third party to which section 16(1) applied.

[para 104] If, however, the information that would be revealed by the disclosure of either or both the "Total Misc Income" and "Total Revenue" amounts is *not* subject to section 16(1), then the disclosure of the "Total Misc Income" and "Total Revenue" amounts would not reveal information subject to section 16(1) and the "Total Misc Income" and "Total Revenue" amounts could not be withheld under section 16(1).

[para 105] As I have determined that the Public Body and the CSP have failed to establish that section 16(1) applies to the "Contractor Canteen Rebate" amounts on pages 7, 11, 59 and 62 and that I will order the Public Body to disclose these amounts to the Applicant, section 16(1) also cannot apply to the "Total Misc Income" and "Total Revenue" amounts on these pages since disclosure of these amounts would not reveal information of a third party that must be withheld under section 16(1).

[para 106] Accordingly, I will order the Public Body to disclose the "Total Misc Income" and "Total Revenue" amounts on pages 7, 11, 59 and 62 to the Applicant.

[para 107] I will now turn to consider whether the Public Body has established that section 16(1) applies to the "Contractor Canteen Rebate" amounts and the "Telephone Commission" amounts withheld on pages 1, 3, 5, 9, 12, 14, 16, 18, 20, 55, 57, 60, 64, 66, 68, 70, and 72 of the Records.

"Contractor Canteen Rebate" and "Telephone Commission" amounts withheld on pages 1, 3, 5, 9, 12, 14, 16, 18, 20, 55, 57, 60, 64, 66, 68, 70, and 72 of the Records

[para 108] The Public Body withheld the "Contractor Canteen Rebate" amounts along with the "Telephone Commission" amounts under the heading "Revenue" and "Misc Income" on pages 1, 3, 5, 9, 12, 14, 16, 18, 20, 55, 57, 60, 64, 66, 68, 70, and 72 of the Records.

[para 109] The Public Body disclosed all of the rest of the information on these pages to the Applicant, including the "Total Misc Income" and "Total Revenue" amounts.

[para 110] I have already determined above that the Public Body and the CSP have failed to establish that section 16(1) applies to the "Contractor Canteen Rebate" amounts and will order it to disclose these amounts where they appear on pages 7, 11, 59, and 62; however, since the Public Body withheld the "Contractor Canteen Rebate" amounts and the "Telephone Commission" amounts on pages 1, 3, 5, 9, 12, 14, 16, 18, 20, 55, 57, 60, 64, 66, 68, 70, and 72 of the Records but disclosed the "Total Misc Income" and "Total Revenue" amounts under the heading "Revenue" on these pages, if I were to order it to disclose the "Contractor Canteen Rebate" amounts on these pages, the Applicant would then be able to deduce the "Telephone Commission" amounts.

[para 111] In other words, if section 16(1) applies to the "Telephone Commission" amounts on these pages, then I cannot order the Public Body to disclose the "Contractor Canteen Rebate" amounts on these pages, as the disclosure of the "Contractor Canteen Rebate" amounts along with the other information the Public Body has already disclosed to the Applicant on these pages, would enable the Applicant to determine (and therefore reveal) the "Telephone Commission" amounts.

[para 112] Accordingly, I must determine whether section 16(1) applies to the "Telephone Commission" amounts on pages 5, 9, 12, 14, 16, 18, 20, 55, 57, 60, 64, 66, 68, 70, and 72 before I can determine whether section 16(1) applies to the "Contractor Canteen Rebate" amounts on these pages.

[para 113] If section 16(1) does not apply to the "Telephone Commission" amounts, then I will order the Public Body to disclose the "Contractor Canteen Rebate" amounts and the "Telephone Commission" amounts on the aforementioned pages to the Applicant.

[para 114] As mentioned above, in its submission, the Public Body advised that it had contacted the CSP and the TSP to give them an opportunity to make representations concerning the disclosure of their information in the Records.

[para 115] The Public Body stated that "both companies confirmed that the records were in fact provided to the Public Body at some point". In its submission, the Public Body summarized the TSP's response as follows:

> . . . On October 20, 2017 [the TSP] provided a response to the third-party review indicating that the information in the records pertaining to the rates were presented during a competitive bidding process with regards to the Alberta's Request for Proposal [RFP Number]. The information was recommended to be withheld under section 16(1) of the FOIP Act due to the following harm that could result if the information were disclosed:

Confidential Information – [The TSP] confirmed that the information was provided to the Public Body during a proposal bid [RFP Number]. The third party acknowledged that they provided detailed confidential information including the proposed commissioned rates that would be paid to the Province of Alberta Correctional Services Division if they were the successful vendors.

Trade secret and confidential information – Some of the information provided during the bid proposal included value proposition and positioning relative to its competitors, qualifications and experience with other clients as well as proposed solutions and cost information. The information provided during the bidding process is considered proprietary and confidential by [the TSP]. Therefore, the third party did not consent to the release of information in whole or in part in response to the FOIP Request.

Undue Financial Loss – the third-party is of the opinion that the information is part of their intellectual capital and if released could be used by competitors to directly compete with [the TSP] to provide similar services. This advantage would be even more pronounced where [the TSP] does not have access to similar information from their competitors.

[para 116] The TSP also provided submissions in this inquiry. In its initial submission it stated, in part:

Correctional telephony is a highly competitive space, where [the TSP] and its partner [Organization X] develop and deploy this specialized telephony solution within correctional facilities, carrying the full costs of design, acquisition, installation, operation, maintenance and support, using their own capital and paying a commission fee to the facility for permission to install and operate the telephony solution in the facility. Simply, [the TSP] owns and operates the correctional telephony solution, taking all of the costs and risks of doing so.

As a result, all of the information concerning the telephony solution, including its design, installation, operation, maintenance and support (including, the specific details of utilization, revenues, costs and asset lifecycles) are [the TSP's] confidential information. Information that would provide an invaluable road-map for a competitor to understand:

- [the TSP's] design, installation, operation, maintenance and support of the specific telephony solution (including its likely age and components);
- the opportunities to expand and optimize such solution as the needs of the facility and its population of users develop over time; and
- the telephony solutions that [the TSP] would likely offer to other facilities in current or future competitive processes.

Simply, if a competitor obtains operational data and thus develops an understanding of the value and mix of services, they can quickly extrapolate the current and future utilizations within, and thus use cases for, a facility, and obtain a material advantage in the next competitive bid process for such facility or other similar facilities. This understanding would allow a competitor to model how [the TSP] may implement and deploy current and

> new technologies, and thus take advantage of such model to better compete when submitting bids to various facilities, effectively undercutting [the TSP].
>
> In addition, knowledge of [the TSP's] design, installation, operation, maintenance and support of the specific telephony solution (including its likely age and components), increases the security risks to such a solution, providing threat-actors with valuable insights into vulnerabilities that could be exploited. Not surprisingly, the security of telephony solutions in correctional facilities is a material concern and increasing the risk to such solutions will result in additional costs to [the TSP] as they work to mitigate such risks, and reputational harm should a security breach occur.

Section 16(1)(a)

[para 117] Like the "Contractor Canteen Rebate" amounts, I understand that the "Telephone Commission" amounts are amounts based on a particular rate or formula agreed to by the TSP and the Public Body, and derived from the "inmate telephony services" the TSP provides to inmates, which amounts were calculated and provided by the TSP to the Public Body.

Conclusion re: Section 16(1)(a)

[para 118] For the same reasons I determined that the "Contractor Canteen Rebate" amounts were commercial or financial information of a third party (the CSP), I find that the "Telephone Commission" amounts withheld by the Public Body in the Offender Welfare Fund Statement Reports are financial information of both the TSP and the Public Body and therefore meet the requirements of section 16(1)(a).

Section 16(1)(b)

[para 119] Referencing the Public Body's summary in its submission of the TSP's arguments to the Public Body, the Applicant stated: [6]

> 13. Under the heading "Confidential Information", [the TSP] asserts "they provided confidential information including the proposed commissioned rates that would be paid to the Province of Alberta, Correctional Services Division" but that was a bald statement it was confidential. There is no claim it was supplied in confidence, explicitly or implicitly. Moreover, [the Applicant] does not seek the "proposed commissioned rates". Further, while the proposed rates would have been supplied by [the TSP], the negotiated rate was not.

[para 120] The Applicant further argued that:

> The Combined Commission/Rebate Amounts

[6] Applicant's Rebuttal Submission dated February 13, 2025, at paragraph 13.

16. These rates are not discernible from the records sought by [the Applicant]. Only the dollar amounts paid to the [Inmate Welfare Fund] are sought. The rebate and commission amounts in the records are a percentage of something that is unknown; an unknown that is, presumably what the Third Parties and the Public Body wish to protect. Regardless, those are negotiated rates and, therefore, not supplied by a third party.

[para 121] The rate or rates, or formula pursuant to which the "Telephone Commission" amounts are calculated does not appear in the Offender Welfare Fund Statement Reports.

[para 122] While I accept that the TSP *informed* the Public Body of the various "Telephone Commission" amounts which appear in the Public Body's Offender Welfare Fund Statement Reports, neither the Public Body nor the TSP made any submissions on whether the TSP *supplied* the "Telephone Commission" amounts to the Public Body, as that term has been interpreted by this Office and the Courts and discussed in paragraphs 51 and 52 above.

[para 123] The "Telephone Commission" amounts, where they appear in the Records, are all different amounts. It may be that the "Telephone Commission" amounts arise from a rate or formula that was negotiated between the parties, so while the actual amounts that appear in the Records may have been provided by the TSP to the Public Body, they are a product of a negotiated rate and are not immutable, and therefore arguably not "supplied" as that term has been interpreted by this Office and the Courts.

[para 124] The "Telephone Commission" amounts themselves do not reveal any underlying immutable or non-negotiated information of the TSP. Nor do I see anything in the information that has been disclosed to the Applicant in the Records that could be used in conjunction with the "Telephone Commission" amounts to reveal any underlying immutable or non-negotiated information of the CSP.

[para 125] The onus of establishing that the "Telephone Commission" amounts were *supplied* to the Public Body by the TSP, as that term has been interpreted by this Office and the Courts, is on the Public Body.

[para 126] In the absence of any arguments from either the Public Body or the TSP on this point, I am unable to conclude that the "Telephone Commission" amounts withheld on pages 5, 9, 12, 14, 16, 18, 20, 55, 57, 60, 64, 66, 68, 70, and 72, were *supplied* by the TSP to the Public Body.

[para 127] As there is insufficient evidence and argument before me to find that the "Telephone Commission" amounts were supplied by the TSP to the Public Body, the requirements of section 16(1)(b) have not been met and it is not necessary for me to continue the analysis; however, for the sake of completeness, I will also consider whether the Public Body or the TSP has established that the "Telephone Commission" amounts were supplied *in confidence*.

[para 128] As noted above, the second requirement of section 16(1)(b) is that the information be supplied explicitly or implicitly *in confidence*.

[para 129] In its initial submission, the TSP stated:

> *The Information Contains Confidential Information*
>
> As set out above, the responsive records contain confidential commercial and financial information of [the TSP] which would provide the keys to unlocking an understanding of [the TSP's] operations and the current and future utilizations and use cases for a facility, which in turn would allow a competitor to ascertain [the TSP's] competitively sensitive information concerning its:
>
> - strategies, methodologies, approaches, frameworks, know-how and tools to be deployed in any given project;
> - current and expected solutions and costs; and
> - as a result, its value propositions and positioning relative to its competitors.
>
> This information is consistently treated by [the TSP] as proprietary and confidential information . . .
>
> *The Information was Supplied in Confidence*
>
> As noted at paragraph 96 of *ABC Benefits Corporation v Alberta (Information and Privacy Commissioner)* 2015 ABQB 662, ". . . The content, rather than the form, of the information must be considered. . . ." [The TSP] submits that, in light of the above (i.e., the sensitive commercial information of [the TSP], it is apparent that [the TSP] disclosed the redacted information in confidence.
>
> As detailed above, [the TSP] reiterates that [the TSP] owns and operates the subject correctional telephony solution rather than *Public Safety and Emergency Services*. Accordingly, the information arising from the operations of such telephony solution is the confidential, commercial and financial information of [the TSP]. [The TSP] has provided such information to *Public Safety and Emergency Services* in confidence.
>
> We submit, the confidential nature of the subject information is well known to the parties. For example, given the security needs of the telephony solution, neither [TSP] nor Public Safety and Emergency Services would want any operational information concerning the telephony solution to be released publicly, as to do so would provide threat-actors with valuable insights into such operations and thus the related vulnerabilities that could be exploited. It is in the public interest that such telephony solutions remain secure.
>
> Furthermore, we note that while the redacted confidential information may be in the custody of *Public Safety and Emergency Service*, [TSP] submits that ample deference should be given to the fact that *Public Safety and Emergency Services* did not, in fact, originate the confidential information disclosed in the responsive record.

[para 130] I will evaluate the Public Body's and TSP's submissions using the factors set out by former Commissioner Clark in Order 99-018 above.

Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.

[para 131] In its submission, the Public Body advised that:

> [The TSP] confirmed that the information was provided to the Public Body during a proposal bid [RFP Number]. The third party acknowledged that they provided detailed confidential information including the proposed commissioned rates that would be paid to the Province of Alberta Correctional Services Division if they were the successful vendors.
>
> *Trade secret and confidential information* – Some of the information provided during the bid proposal included value proposition and positioning relative to its competitors, qualifications and experience with other clients as well as proposed solutions and cost information. The information provided during the bidding process is considered proprietary and confidential by [the TSP]. Therefore, the third party did not consent to the release of information in whole or in part in response to the FOIP Request.

[para 132] The information at issue in this inquiry is the various "Telephone Commission" amounts where they appear in the Public Body's Offender Welfare Fund Statement Reports. The amounts are not information that would have been known at the time of the bidding process and therefore could not have been provided by the TSP to the Public Body during the bidding process.

[para 133] Neither the Public Body nor the TSP specifically stated in their submissions that the "Telephone Commission" amounts were communicated *explicitly* in confidence by the TSP to the Public Body.

[para 134] Neither the Public Body nor the TSP has pointed me to, or provided me with any agreement between the Public Body and the TSP which explicitly stated that the TSP would provide the "Telephone Commission" amounts to the Public Body in confidence and that the "Telephone Commission" amounts were to be kept confidential.

[para 135] Nor has the TSP provided any documentation wherein it informs the Public Body of the various "Telephone Commission" amounts and informs the Public Body that it is providing this information in confidence and that the "Telephone Commission" amounts were to be kept confidential.

[para 136] In addition, the Public Body has not stated in its submission that it understood the "Telephone Commission" amounts were being communicated to it by the TSP implicitly in confidence.

[para 137] The TSP asserted that:

> The confidential nature of the subject information is well known to the parties. For example, given the security needs of the telephony solution, neither [the TSP] nor Public Safety and Emergency Services would want any operational information concerning the telephony solution to be released publicly, as to do so would provide threat-actors with valuable insights into such operations and thus the related vulnerabilities that could be exploited. It is in the public interest that such telephony solutions remain secure.

[para 138] There is no evidence before me to support the TSP's assertion that the confidential nature of the "Telephone Commission" amounts was well known to the parties. Further, even if I accept that the "Telephone Commission" amounts constitute "operational information concerning the telephony solution" it is not clear from the Public Body's submission that in the absence of the TSP's objection to the release of this information, the Public Body would not want it to be released publicly.

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.

[para 139] The TSP stated in its submission that:

> . . . the responsive records contain confidential commercial and financial information of the [TSP] which would provide the keys to unlocking an understanding of [the TSP's] operations and the current and future utilizations and use cases for a facility, which in turn would allow a competitor to ascertain [the TSP's] competitive sensitive information including its
>
> - strategies, methodologies, approaches, frameworks, know-how and tools to be deployed in any given project;
> - current and expected solutions and costs; and
> - as a result, its value propositions and positioning relative to its competitors.
>
> This information is consistently treated by [the TSP] as proprietary and confidential information . . .

[para 140] While the TSP refers to "commercial and financial information", the TSP does not specifically refer to the "Telephone Commission" amounts in its initial submission, and does not specifically inform me that it has consistently treated the "Telephone Commission" amounts which appear in the Public Body's Offender Welfare Fund Statement Reports in a manner that indicates a concern for the protection of disclosure of these amounts by the TSP prior to being communicated to the Public Body.

[para 141] Furthermore, even if I were to infer the TSP was speaking about the "Telephone Commission" amounts, simply stating that "the information is consistently treated by the TSP as proprietary and confidential" does not tell me what steps or mechanisms the TSP put in

place in order to protect the "Telephone Commission" amounts from disclosure before they were disclosed to the Public Body.

[para 142] Accordingly, there is insufficient evidence before me to conclude the TSP consistently treated the "Telephone Commission" amounts in a manner that indicates a concern for the protection of the "Telephone Commission" amounts from disclosure by the TSP prior to being communicated to the Public Body.

Not otherwise disclosed or available from sources to which the public has access.

[para 143] I accept that the "Telephone Commission" amounts were "not otherwise disclosed" or "available from sources to which the public has access". If they were, there would have been no need for the Applicant to submit an access request to the Public Body for this information. This factor on its own does not persuade me that the "Telephone Commission" amounts were supplied explicitly or implicitly in confidence by the TSP to the Public Body.

Prepared for a purpose which would not entail disclosure

[para 144] Neither the TSP nor the Public Body addressed the purpose for which the "Telephone Commission" amounts were prepared.

[para 145] Even if I accept that the "Telephone Commission" amounts were prepared by the TSP for a purpose which the TSP intended would not entail disclosure, I do not have an independent statement from the Public Body confirming it understood and agreed that the "Telephone Commission" amounts were prepared for a purpose which would not entail disclosure. In its submission, the Public Body simply repeated what the TSP had said regarding its position on the confidentiality of the "Telephone Commission" amounts.

<u>Conclusion re: Section 16(1)(b)</u>

[para 146] In light of the foregoing, I find that neither the Public Body nor the TSP has established that the "Telephone Commission" amounts were supplied by the TSP explicitly or implicitly in confidence to the Public Body as required by section 16(1)(b).

[para 147] As previously noted, a failure to establish any one of the components of section 16(1) leads to the conclusion that section 16(1) does not apply. Accordingly, I find that 16(1) does not apply to permit the Public Body to withhold the "Telephone Commission" amounts.

[para 148] As I have concluded that the requirements of section 16(1)(b) have not been fulfilled it is not necessary for me to determine whether the Public Body has established that one or more of the criteria in section 16(1)(c) have been met. Nonetheless, for the sake of completeness, I will consider the Public Body's submission regarding the application of section 16(1)(c).

Section 16(1)(c)

[para 149] In Order F2011-018, the adjudicator stated the following with respect to the application of section 16(1)(c):

> [para 47] The test regarding a reasonable expectation that a particular harm or outcome will occur must be satisfied on a balance of probabilities, meaning that the evidence must involve more than speculation or a mere possibility; the evidence must demonstrate a probability that the outcome or harm in question will occur on disclosure, and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue (Order 96—013 at paras. 31 and 33). The requirement for an evidentiary foundation for assertions of harm was upheld in *Qualicare Health Service Corporation v Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515 (at paras. 6, 29 and 60).

[para 150] In *Park Place Seniors Living Inc v Alberta Health Services,* 2017 ABQB 575, which upheld Order F2014-35, the Court stated:

> [37] The Adjudicator also relied on *Qualicare Health Service Corporation v Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515:
>
> > [para 26] In Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner), 2006 ABQB 515 (CanLII), the Court upheld a decision of the Commissioner requiring evidence to support the contention that there was a risk of harm if information was disclosed.
>
> [38] 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 reasons does he suggest that evidence of actual harm is necessary.
>
> [39] 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 that there is an evidentiary burden on the party opposing disclosure based on expectation of harm: *Chesal v Nova Scotia (Attorney General)* 43, at para 56; *Ontario (Workers' Compensation Board) v Ontario (Assistant Information & Privacy Commissioner)* 44 at para 26.

[para 151] I note the comments of the adjudicator as well at paragraph 24 of Order F2014-35:

> [para 24] In *Canada (Information Commissioner) v. Canada (Prime Minister)*, 1992 CanLII 2414 (FC), [1992] F.C.J. No. 1054; Rothstein J., as he then was, made the following observations in relation to the evidence a party must introduce in order to establish that harm will result from disclosure of information. He said:

> While no general rules as to the sufficiency of evidence in a section 14 case can be laid down, what the Court is looking for is support for the honestly held but perhaps subjective opinions of the Government witnesses based on general references to the record. Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged. [my emphasis]

[para 152] With the foregoing in mind, and taking into consideration the cases and Orders reviewed when considering the application of section 16(1)(c) in paragraphs 84 - 94 above, I will consider the Public Body's and the TSP's submissions as they relate to the enumerated outcomes in sections 16(1)(c).

Section 16(1)(c)(i) - harm significantly the competitive position or interfere significantly with the negotiating position of the third party

[para 153] In its submission, the Public Body stated:

> Part 3 of the test involves harms to business interest. The third parties have advised the public body that release of the records will impact their competitive advantage during any future bid proposals as competitors might use the information to copy or undercut their rates which might hinder their ongoing business relations with the Public Body.

[para 154] The TSP asserted in its initial submission that:

> Correctional telephony is a highly competitive space, where [the TSP] and its partner [Organization X] develop and deploy this specialized telephony solution within correctional facilities, carrying the full costs of design, acquisition, installation, operation, maintenance and support, using their own capital and paying a commission fee to the facility for permission to install and operate the telephony solution in the facility. Simply, [the TSP] owns and operates the correctional telephony solution, taking all of the costs and risks of doing so.
>
> As a result, all of the information concerning the telephony solution, including its design, installation, operation, maintenance and support (including, the specific details of utilization, revenues, costs and asset lifecycles) are [the TSP's] confidential information. Information that would provide an invaluable road-map for a competitor to understand:
>
> - [the TSP's] design, and optimize such solution as the needs of the facility and its population of users develop over time; and

- the telephony solutions that [the TSP] would likely offer to other facilities in current or future competitive processes.

> Simply, if a competitor obtains operational data and thus develops an understanding of the value and mix of services, they can quickly extrapolate the current and future utilizations within, and thus use cases for, a facility, and obtain a material advantage in the next competitive bid process for such facility or other similar facilities. This understanding would allow a competitor to model how [the TSP] may implement and deploy current and new technologies, and thus take advantage of such model to better compete when submitting bids to various facilities, effectively undercutting [the TSP].
>
> In addition, knowledge of [the TSP's] design, installation, operation, maintenance and support of the specific telephony solution (including its likely age and components), increases the security risks to such a solution, providing threat-actors with valuable insights into vulnerabilities that could be exploited. Not surprisingly, the security of telephony solutions in correctional facilities is a material concern and increasing the risk to such solutions will result in additional costs to [the TSP] as they work to mitigate such risks, and reputational harm should a security breach occur.

[para 155] The TSP summarized its position in its rebuttal submission as follows:

> As set out in [the TSP's] initial submission, the release of the redacted information that is the focus of the Inquiry will unlock and result in the release of [the TSP's] confidential commercial and financial information, harming [the TSP's] competitive position, increasing [the TSP's] security costs, and increasing the risk of reputational harm arising from a security breach.

[para 156] "Increasing security costs" or "increasing the risk of reputational harm arising from a security breach" are not consequences listed under section 16(1)(c) to which section 16(1) applies. Even if they were, neither the Public Body nor the TSP has shown how disclosing the "Telephone Commission" amounts could reasonably be expected to result in increasing the TSP's security costs, result in a security breach, or increase the risk of reputational harm arising from a security breach.

[para 157] In my view, the "Telephone Commission" amounts are not "operational data"; however, even if I accept that the "Telephone Commission" amounts constitute "operational data", neither the TSP nor the Public Body have provided any explanation as to how the disclosure of the "Telephone Commission" amounts could reasonably be expected to result in a competitor using this information to develop an "understanding of the value and mix of services", or result in a competitor then being able to use this understanding to "quickly extrapolate the current and future utilizations within, and thus use cases for, a facility, and obtain a material advantage in the next competitive bid process for such facility or other similar facilities".

[para 158] Nor have either the TSP or the Public Body provided any evidence to demonstrate that the likelihood of such outcomes occurring if the "Telephone Commission" amounts are disclosed to the Applicant is considerably above a mere possibility.

[para 159] The TSP further argued that disclosure of the information in the Records (which in this case was the "Telephone Commission" amounts in the Offender Welfare Fund Statement Reports) would:

> . . . provide the provide the keys to unlocking an understanding of [the TSP's] operations and the current and future utilizations and use cases for a facility, which in turn would allow a competitor to ascertain [the TSP's] competitive sensitive information including its
>
> - strategies, methodologies, approaches, frameworks, know-how and tools to be deployed in any given project;
> - current and expected solutions and costs; and
> - as a result, its value propositions and positioning relative to its competitors.

[para 160] Neither the TSP nor the Public Body have provided any explanation as to how exactly the Applicant, or anyone else for that matter, could ascertain its strategies, methodologies, approaches, frameworks, know-how and tools to be deployed in any given project; its current and expected solutions and costs; and consequently, its value propositions and positioning relative to its competitors, simply by knowing the various "Telephone Commission" amounts in the Offender Welfare Fund Statement Reports.

[para 161] Nor have either the TSP or the Public Body provided any evidence to demonstrate that such outcomes are considerably above a mere possibility if the "Telephone Commission" amounts are disclosed to the Applicant.

[para 162] The TSP went on to state in its initial submission:

> Moreover, [the TSP] notes that the Office of the Information and Privacy Commissioner of Alberta has affirmed that disclosure of the responsive records (i.e. information contained in invoices) would allow an entity to "use this information in order to gain a better understanding of . . . operations . . . " (see paragraph 81 of Order F2010-037, *Buffalo Trail Public Schools Regional Division No 28*). In other words, the Office of the Information and Privacy Commissioner of Alberta has previously agreed that documents analogous to the responsive records contain sensitive and confidential commercial and financial information that should not be released.

[para 163] The adjudicator's comments quoted by the TSP in paragraph 81 of Order F2010-037 were made in relation to the adjudicator's consideration as to whether the public body in that case had properly applied *section 25* of the FOIP Act to withhold financial information, *not* section 16(1) of the FOIP Act, which is the section at issue in this inquiry.

[para 164] Section 25 is a discretionary section which permits the head of a public body to withhold responsive information if disclosure of the information could reasonably be expected to harm the interest *of a public body or the Government of Alberta*, or the ability of the Government to manage the economy.

[para 165] In the case before me, the Public Body *did not apply* section 25 to withhold the "Telephone Commission" amounts; it applied section 16(1). As noted by the adjudicator at paragraph 102 in Order F2011-018, a third party cannot itself seek to apply a discretionary exception to disclosure:

> [para 102] The Affected Party alternatively argues that the Objection Letter may be withheld under section 27(1)(c)(iii). That section sets out a discretionary exception to disclosure, but the Public Body did not rely on that exception, whether at the time of its initial response to the Applicant's access request or during this inquiry. A third party cannot itself seek to apply a discretionary exception to disclosure.

[para 166] Further, my authority in this inquiry is limited to reviewing the section the head of the Public Body applied to withhold responsive information, which was section 16(1). The FOIP Act does not confer the authority on the Commissioner to review whether the Public Body ought to have applied a discretionary exception under the FOIP Act or to exercise the Public Body's discretion on its behalf to apply a discretionary exception. [7]

[para 167] Furthermore, even if the adjudicator's comments in relation to section 25 were somehow relevant to the case before me, on judicial review, the Court of Queen's Bench in *Alberta Teachers' Assn. v. Buffalo Trail Public Schools Regional Division No. 28* [2013] ABQB 283 found that the decision of the adjudicator respecting s. 25 of the FOIP Act was unreasonable. At paragraph 60, the Court stated: [8]

> [60] In light of the number of documents I have reviewed for which their contents provide no basis to support the finding of the Adjudicator, I find the decision of the Adjudicator respecting s. 25 of the FOIPP Act is unreasonable.

[para 168] In its rebuttal submission, the TSP further submitted:

> [The TSP] wishes to make clear that the numeric value comprising the redacted information that is the subject of this Inquiry is a critical figure, and that this data point, combined with

[7] Section 25 is a discretionary section which was not applied by the Public Body in this case. Previous Orders of this Office have confirmed that the Commissioner does not have the authority to review a public body's decision *not* to apply a discretionary exception, or to apply discretionary exceptions on behalf of a public body where it did not do so (see for example, Orders F2003-018 at paragraphs 7-8, F2005-016 at paragraphs 10 – 12, and F2006-024 at paragraphs 11 - 13).

[8] On appeal in *Alberta Teachers' Assn. v. Buffalo Trail Public Schools Regional Division No. 28* [2014] ABCA 432, the Alberta Court of Appeal determined that the appeal by the Office of the Information and Privacy Commissioner of the Court of Queen's Bench decision was moot and the Commissioner lacked standing to appeal.

> other information relating to [the TSP] that is already in the public domain or may be obtained through the FOIPPA process in Alberta or another jurisdiction, would allow a party (including a competitor) to reverse engineer [the TSP's] confidential commercial and financial information as we have laid out in our previous submissions. A party (including a competitor) would not have this ability but for the disclosure of the redacted information. The fact that we are in an Inquiry to consider this very point highlights the value of this information. As we have already noted, [the TSP's] disadvantage would be even more pronounced by the fact that [the TSP] would not have equal information about its competitors.
>
> Accordingly, we respectfully submit, the issue is not the specific numeric value sought, it is what it can quickly unlock.

[para 169] Neither the TSP nor the Public Body provided me with any information about what "other information relating to [the TSP] that is in the public domain" existed that could be combined with the "Telephone Commission" amounts to enable "a party (including a competitor) to reverse engineer [the TSP's] confidential commercial and financial information".

[para 170] Nor did the TSP or the Public Body explain exactly how, if the Telephone Commission amounts were disclosed to the Applicant, the Applicant, or any other party for that matter, could use the Telephone Commission amounts in combination with this "other information relating to [the TSP] that is already in the public domain" to "reverse engineer [the TSP's] confidential and commercial information".

[para 171] References to hypothetical future access requests in Alberta or other jurisdictions and assertions about theoretical possible outcomes from such requests are insufficient to establish that section 16(1) has been properly applied to withhold responsive information.

[para 172] Further, neither the TSP nor the Public Body provided any evidence that if the Telephone Commission amounts were disclosed, the likelihood that the outcomes it predicted in its rebuttal submission could reasonably be expected to occur, were considerably above a mere possibility.

[para 173] I find that neither the TSP nor the Public Body have shown a direct linkage between the disclosure of the "Telephone Commission" amounts and the harm alleged. Bare arguments or submissions cannot establish a "reasonable expectation of harm." Accordingly, I find that section 16(1)(c)(i) has not been satisfied.

Section 16(1)(c)(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 174] The TSP and the Public Body have also failed to establish that the likelihood that the disclosure of the "Telephone Commission" amounts to the Applicant could 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, was or is considerably above a mere possibility. If

contractually obligated to provide the "Telephone Commission" amounts, the TSP could not withhold this information from the Public Body.

Section 16(1)(c)(iii) - result in undue financial loss or gain to any person or organization

[para 175] In its submission, the Public Body stated that the TSP informed it as follows:

> *Undue Financial Loss* – the third-party is of the opinion that the information is part of their intellectual capital and if released could be used by competitors to directly compete with [the TSP] to provide similar services.

[para 176] The TSP summarized its position in its rebuttal submission as follows:

> As set out in {the TSP]'s In its submission, the release of the redacted information that is the focus of the Inquiry will unlock and result in the release of [the TSP's] confidential commercial and financial information, harming [the TSP's] competitive position, increasing [the TSP's] security costs, and increasing the risk of reputational harm arising from a security breach.

[para 177] I understand the TSP to be arguing that disclosing the "Telephone Commission" amounts could reasonably result in a competitor undercutting it in future negotiations with the Public Body, thereby resulting in an undue financial gain to its competitor, and a financial loss to the TSP.

[para 178] Neither the TSP nor the Public Body provided me with any specific details, explanation or evidence about how the disclosure of the various "Telephone Commission" amounts in the Offender Welfare Fund Statement Reports could "unlock and result in the release of [the TSP's] confidential commercial and financial information".

[para 179] Further, neither the TSP nor the Public Body provided any evidence that if the "Telephone Commission" amounts were disclosed, the likelihood that this information could be used by someone to "unlock" the confidential commercial and financial information of the TSP was considerably above a mere possibility.

[para 180] I find that the TSP's submission that disclosure of the "Telephone Commission" amounts could result in someone unlocking the TSP's confidential commercial and financial information, harming its competitive position, and/or resulting in undue financial loss or gain to any person or organization, to be a bare assertion unsupported by any evidence. I find that neither the TSP nor the Public Body have established that section 16(1)(c)(iii) applies.

[para 181] I note that in its rebuttal submission, the TSP argued that since only the "Contractor Canteen Rebate" and "Telephone Commission" amounts had been redacted from pages 1, 3, 5, 9, 12, 14, 16, 18, 20, 55, 57, 60, 64, 66, 68, 70, and 72 of the Records, and the

Public Body had disclosed the "Total Misc Income" and "Total Revenue" amounts on these pages to the Applicant, the Applicant had already received the information it sought.

[para 182] This statement is not correct. The Applicant sought access to a copy of the most recent annual financial statements for the inmate welfare fund in Alberta Correctional Centres, broken down by Centre and records indicating the sources of income if the financial statements did not reflect this. The Applicant's position that it wants access to the information withheld by the Public Body in the Records and that section 16(1) does not apply to the amounts withheld in the Records has not waivered in this inquiry.

[para 183] The TSP also argued that the Applicant agreed that the "Telephone Commission" amounts "would enable a third party to extrapolate confidential commercial and financial information of [the TSP], effectively providing a key to [the TSP's] competitively sensitive information".

[para 184] At no point in its rebuttal submission did the Applicant agree that the outcomes the TSP asserted in its initial submission could occur if the withheld information was disclosed to the Applicant, and consequently section 16(1) applied to the withheld information. The Applicant concluded its rebuttal submission with the following statement:

> 16. These rates are not discernible from the records sought by [the Applicant]. Only the dollar amounts paid to the IWF are sought. The rebate and commission amounts in the records are a percentage of something that is unknown; an unknown that is, presumably, what the Third Parties and the Public Body wish to protect. Regardless, those are negotiated rates and, therefore, not supplied by a third part.

Section 16(1)(c)(iv) - reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[para 185] This section was not argued by either the Public Body or the TSP and is not relevant in this case.

Conclusion re: Section 16(1)(c)

[para 186] I find that neither the Public Body nor the TSP have established that there is considerably above a mere possibility that the disclosure of the "Telephone Commission" amounts could reasonably result in any of the consequences in section 16(1)(c)(i), (ii) or (iii).

[para 187] As I have determined that section 16(1) does not apply to the "Telephone Commission" amounts, I will order the Public Body to disclose these amounts where they appear on pages 1, 3, 5, 9, 12, 14, 16, 18, 20, 55, 57, 60, 64, 66, 68, 70, and 72 of the Records to the Applicant.

[para 188] Since I have found that section 16(1) does not apply to the "Telephone Commission" amounts, disclosing the "Contractor Canteen Rebate" amounts on pages 1, 3, 5, 9, 12, 14, 16, 18, 20, 55, 57, 60, 64, 66, 68, 70, and 72 of the Records to the Applicant will not reveal information to which section 16(1) applies. Accordingly, I will order the Public Body to disclose the "Contractor Canteen Rebate" amounts where they appear on pages 1, 3, 5, 9, 12, 14, 16, 18, 20, 55, 57, 60, 64, 66, 68, 70, and 72 of the Records to the Applicant.

V. ORDER

[para 189] I make this Order under section 72 of the FOIP Act.

[para 190] I find that section 16(1) does not apply to the "Contractor Canteen Rebate", "Total Misc Income" and "Total Revenue" amounts withheld on pages 7, 11, 59, and 62 and order the Public Body to disclose this information to the Applicant.

[para 191] I find that section 16(1) does not apply to the "Contractor Canteen Rebate" and "Telephone Commission" amounts withheld on pages 1, 3, 5, 9, 12, 14, 16, 18, 20, 55, 57, 60, 64, 66, 68, 70, and 72, and order the Public Body to disclose this information to the Applicant.

[para 192] I further order the Public Body to notify me and the TSP in writing within 50 days of receiving a copy of this Order that it has complied with the Order.

_____

Carmen Mann
Adjudicator
/rm