ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2015-03

January 30, 2015

CITY OF COLD LAKE

Case File Number F6516

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Summary: An Applicant made an access request to the City of Cold Lake (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for the request for proposal/tenders, contracts, statutory declarations, specifications for gravel, and receipts relating to Knelsen Sand and Gravel Ltd. and the Cold Lake Highway 28 twinning project. The timeframe was January 1, 2008 to the date of the request.

The Public Body decided to give the Applicant access to the requested records. The Third Party requested a review of that decision, arguing that disclosure of the unit prices and hourly labour rates in the contract documents would be harmful to its business interests under section 16(1) of the Act.

The Adjudicator found that section 16(1) did not apply to the unit prices and hourly labour rates in the contract documents, as this information was not supplied in confidence within the terms of section 16(1)(b). She ordered the Public Body to disclose that information.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 16, 55, 67, 69, 71, 72; **BC**: *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, ss. 54, 56; **Can**: *Access to Information Act*, RSC 1985, c. A-1, s. 20; **Ont:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 10, Ontario Regulation 460, s. 5.1.

Orders Cited: AB: Orders 99-018, F2004-013, F2005-011, F2008-019, F2009-028, F2011-002, F2012-15, F2013-47; **BC:** Order No. 01-36, 01-39, F11-27; **Ont:** Orders PO-226, PO-2010, PO-2050, PO-2490, PO-2688, PO-3176, PO-3269, PO-3377.

Case Cited: AB: *1447743 Alberta Ltd.* v. *Calgary (City),* 2011 ABCA 84; *Air Atonabee Ltd. V. Canada (Minister of Transport),* (1989), 37 Admin. L.R. 245; *Boeing Co. v. Ontario (Ministry of Economic Development and Trade),* [2005] O.J. 2851; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police),* [2003] 1 SCR 66, 2003 SCC 8 (CanLII); *Canadian Medical Protective Association v. John Doe,* [2008] O.J. No. 3475, *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner),* 2002 BCSC 603; *Edmonton Police Service v. Alberta (Information and Privacy Commissioner*), 2012 ABQB 595 (CanLII); *Imperial Oil Limited v Alberta (Information and Privacy Commissioner),* 2014 ABCA 231; *Les Aliments Prince Foods Inc. v. Canada (Department of Agriculture),* 164 FTR 104, 1999 CarswellNat 1319 (FC); *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3 (CanLII).

Authorities: K. Martin, "Procurement: The Integrity of the Bidding Process and the Role of the Consultant" (Construction Law Update – 2008, Continuing Legal Education Society of British Columbia, April 2008).

I. BACKGROUND

[para 1] On August 1, 2012, an Applicant made an access request to the City of Cold Lake (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for the request for proposal/tenders, contracts, statutory declarations, specifications for gravel, and receipts relating to Knelsen Sand and Gravel Ltd. and the Cold Lake Highway 28 twinning project. The timeframe was January 1, 2008 to the date of the request.

[para 2] The Public Body decided to give the Applicant access to the requested records. The Third Party requested a review of that decision, arguing that disclosure of the unit prices and hourly labour rates in the contract documents would be harmful to its business interests under section 16(1) of the Act.

[para 3] As contemplated by section 67(1)(a)(ii) of the Act, the Applicant was notified of the Third Party's request for review, as it is affected by the request. The Applicant made submissions to the inquiry.

II. RECORDS AT ISSUE

[para 4] The records at issue consist of the contract document between the Public Body and Third Party. The information that the Third Party argues ought to be withheld under section 16 consists of the unit prices and hourly labour rates provided on pages 38-50 of the contract documents (the prices listed under "unit price" and "amount" columns on pages 38-47, the price under the "amount" column on page 48, and the prices under the "hourly rate" column on page 50).

III. ISSUES

[para 5] The Notice of Inquiry, dated March 27, 2014, set out the following issue:

> **Does section 16 of the Act (disclosure harmful to business interests of a third party) apply to the information in the records which the Public Body proposed to disclose to the Applicant?**

IV. DISCUSSION OF ISSUES

Preliminary Issue 1 – standing of the Public Body in the inquiry

[para 6] In its final (fourth) submission to this inquiry, the Third Party objected to the participation of the Public Body in this inquiry. Specifically, it argued (at para. 6) that "the Public Body's role in this process [the inquiry] has gone beyond the scope of what is permitted in law." It further stated:

> Where a public body is adjudicating over a dispute between two adversarial parties, it is especially important that the public body remain neutral.
>
> It is the position of the Third Party that:
>
> a) The Public Body has not remained neutral;
> b) The Public Body has taken an active position against the Third Party and has supported the Disclosed Affected Party to this Inquiry & party who made the initial FOIP application to the Public Body, [the Applicant], contrary to the legal principles as set out in the Supreme Court of Canada and Alberta Court of Appeal decisions; and
> c) The Public Body is arguing the merits of its decision, notwithstanding the fact that the Disclosed Affected Party to this Inquiry & party who made the initial FOIP application to the Public Body, [the Applicant], is a part of this process but is choosing not to participate in the hearing.
>
> Through its submissions, the Public Body is attempting to defend its decision which is contrary to the law. (At paras. 11-12)

[para 7] The Public Body responded that while there are no Alberta cases on this point, courts outside of Alberta have found that a public body had full standing in an inquiry before a similar office. It cited the Federal Court in *Les Aliments Prince Foods Inc. v. Canada (Department of Agriculture)*, 164 FTR 104, 1999 CarswellNat 1319 (FC), which considered the standing of a federal public body in a judicial review of a decision made under the federal *Access to Information Act* (ATIA) (under that Act, the Information Commissioner can investigate a federal public body's decision not to provide access to requested information; however she does not have the power to order the public body to disclose records. An applicant can, after a review by the Commissioner, request a *de novo* review by the Federal Court, which does have the authority to order disclosure). In that case the Court stated (at paras. 19-20):

> It is thus of the very essence and structure of the Act that the federal institution in possession of the documents disclosure of which is requested should be a full party to the judicial review process provided for in the Act, and that is should inform the Court of its position on the "disclosability" of the documents in question. This is true whether the objection is made by a third party, as here, or by the institution itself, in which case the Act imposes on the latter a clear burden to establish the merits of its position.
>
> There has never been any question that the federal institution concerned can appear, file its evidence, hold cross-examinations on affidavits, submit memoranda of facts and law and argue orally on all the questions before the Court, as set out by McKay J. in the above-cited case. This is so clear that no one has ever questioned it.

[para 8] In *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 SCR 66, 2003 SCC 8 (CanLII), the Supreme Court of Canada stated, with regard to its review of a federal public body's decision under the ATIA, that a public body's decision to withhold records under the ATIA is not akin to a decision of an administrative tribunal, only the latter of which is independent.

[para 9] The Public Body also cited *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603, in which the BC Supreme Court confirmed that a public body has full status as a participant in the review and inquiry process of the BC Information and Privacy Commissioner under BC's FOIP Act (which, unlike the federal ATIA, provides the BC Commissioner with a role akin to Alberta's Commissioner with respect to the oversight of the respective FOIP Act). That Court stated (at paras. 64-65):

> I find that the ***Act*** contemplates that the public body will be a full participant in the review and inquiry process. Section 54(a) provides that the Commissioner must give a copy of the Request for Review to the public body. Section 56(3) provides that the head of the public body concerned must be given an opportunity to make representations during the inquiry. I find that s. 56(4)(b) creates a discretion with respect to a party's access to and ability to respond to another party's representations. It does not create a discretion to exclude or limit the public body's ability to make representations in the manner submitted on behalf of CPR.
>
> I find further that the ***Act*** contemplates numerous situations in which the public body will have a vested interest in the decision with respect to disclosure. The existence of such an interest in any particular case does not, in my view, in any way limit the standing of the public body. Nor does it constitute a basis upon which to limit the weight to be given to that public body's submission on judicial review as contended by CPR anymore than does CPR's vested interest in the outcome.

[para 10] Sections 67(1)(a)(i), 69(3) are equivalent to sections 54(a) and 56(3) of BC's FOIP Act cited in this excerpt.

[para 11] As support for its position, the Third Party cited the Alberta Court of Appeal in *1447743 Alberta Ltd.* v. *Calgary (City)*, 2011 ABCA 84, in which the Court considered the role of the Subdivision and Development Appeal Board (a public body with an adjudicative function) in an appeal of one of its decisions. The Court stated in that decision that it would not be appropriate for the Board to "justify the correctness of its decision."

[para 12] I agree with the analyses provided by the Supreme Court of Canada and the Federal Court with respect to the ATIA, as well as the BC Supreme Court with respect to BC's FOIP Act: the function of a public body in making a decision to withhold or provide access to information under access-to-information legislation is not akin to that of a quasi-judicial tribunal reviewing such a decision, which must be and be seen to remain independent. Unlike the public body in the Alberta Court of Appeal case cited by the Third Party, in responding to an access request under the FOIP Act, the Public Body in this case was not performing an adjudicative function. For this reason, the case cited by the Third Party, which refers to the impropriety of an independent quasi-judicial decision-maker justifying the correctness of its decision, is not applicable. The Public Body's role in this inquiry is as a full participant, defending its decision to provide the Applicant with access to requested records.

Preliminary Issue 2 – Section 55(1)

[para 13] Section 55(1) states that the Commissioner may authorize that public body to disregard an access request (or requests) on one of two grounds: one of which is if the request is frivolous and vexatious (section 55(1)(b)). The trigger for this provision is when the public body that received the request asks the Commissioner for permission to disregard it.

[para 14] The Third Party argues that the Applicant has sought the requested information "with vexatious intent regarding the litigation proceedings between the parties" (Initial submission, para. 33). It also states:

> [t]he review of the Public Body's decision [to grant access to information] and the request for inquiry of the Portfolio Officer's decision should encompass where the Public Body has failed to seek authorization to disregard a frivolous or vexatious request. If the Public Body should have sought such authority pursuant to s. 55(1)(b) and failed to do so, the Inquiry should remedy that failure. It has been recognized that a third party may raise these provisions regarding frivolous and vexations requests albeit in limited circumstances. (Initial submission, para. 32).

[para 15] The Third Party cites Ontario Orders PO-2490, PO-2688 and PO-3269 as support for its argument that a Third Party can raise arguments regarding the application of section 55(1).

[para 16] The Public Body argues that the provisions regarding frivolous and vexatious requests in Ontario's legislation is different from section 55. Under Ontario's *Freedom of*

Information and Protection of Privacy Act (FIPPA), the head of a public body (or "institution" under FIPPA) makes the determination regarding whether an access request is frivolous or vexatious. Section 10 of that Act states:

> *10. (1) Subject to subsection 69 (2), every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,*
>
> *(a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or*
>
> *(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.*

[para 17] Section 5.1 of the Regulation 460 sets out conditions under which a public body may find that a request is frivolous or vexatious. It states:

> *5.1 A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,*
>
> *(a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or*
>
> *(b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.*

[para 18] The Public Body points out that section 5.1 of the Regulation includes mandatory language ("A head of an institution… *shall* conclude…"), which distinguishes the Ontario provisions from section 55(1) in Alberta's Act.

[para 19] Having reviewed the Ontario orders on this issue, I disagree that they support the Third Party's position. In Ontario Order PO-2050, the adjudicator found that an affected party can raise an objection regarding what it believes is a vexatious request in only rare circumstances. He stated:

> In my view, the rationale for not permitting an affected person to raise a discretionary exemption (in most cases) is similarly applicable to a claim by the affected person that the request is vexatious. This is not to say that an affected party may never raise an issue of "harm" in the particular circumstances relating to a request. In previous orders of this office, adjudicators have considered the discretionary exemptions in sections 14(1)(e) (danger to life or safety) (Order PO-1787) and 20 (danger to safety or health) (Reconsideration Order R-980015) in circumstances where the affected person raised their application. However, these remain the very rare case.

[para 20] In Order PO-2688, the adjudicator agreed with the above analysis, and concluded:

> In my view, the circumstances of this appeal do not give rise to one of those rare occasions when this office considers the application of a section of the *Act*, not

> raised by the institution which is not one of the mandatory exemptions. In making my decision, I adopt and agree with the reasoning of Senior Adjudicator Higgins [in Order PO-2490] and Adjudicator Cropley [in Order 2050]. In particular, I share their view that the frivolous and vexatious provisions of the *Act* are not intended to be used by parties resisting disclosure of records that would be otherwise subject to the *Act* because these parties do not like the nature of the request or are suspicious of the requester. Accordingly, I confirm that this office's duty to consider the application of the frivolous and vexatious provisions of the *Act*, when raised by an affected party, will arise in very limited circumstances. (Emphasis added)

[para 21] I agree with the Public Body that the provisions in Ontario's Act are not sufficiently similar to those in Alberta's Act to be instructive. Even if they were, the Ontario cases would not support the Third Party's ability to raise the question whether the request is frivolous or vexatious.

[para 22] Under section 55(1) of Alberta's Act, a public body may request authority from the Commissioner to disregard a request. A public body is not *required* to make such a request to the Commissioner, even if an access request would meet the test for "frivolous or vexatious" under section 55(1)(b). As the Public Body has not made a request in this inquiry, and there is no ability for a third party to make a similar request under the Act, I find that section 55(1) is not an issue in this inquiry.

Does section 16 of the Act (disclosure harmful to business interests of a third party) apply to the information in the records which the Public Body proposed to disclose to the Applicant?

[para 23] Section 16 of the Act reads, in part, as follows:

> *16(1) The head of a public body must refuse to disclose to an applicant information*
>
> *(a) that would reveal*
>
> *(i) trade secrets of a third party, or*
>
> *(ii) commercial, financial, labour relations, scientific or technical information of a third party,*
>
> *(b) that is supplied, explicitly or implicitly, in confidence, and*
>
> *(c) the disclosure of which could reasonably be expected to*
>
> *(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
>
> *…*
>
> *(iii) result in undue financial loss or gain to any person or organization, or*
>
> *…*
>
> *(3) Subsections (1) and (2) do not apply if*
>
> *(a) the third party consents to the disclosure,*

[para 24] As this inquiry involves a request for review by a third party following a public body's decision to release a record to an applicant, the burden of proof set out in section 71(3) of the Act applies. It reads as follows:

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

[para 25] Section 16(1) does not apply to personal information, so the Third Party has the burden, under section 71(3)(b), of establishing that the Applicant has no right of access to the records by virtue of section 16(1).

[para 26] For section 16(1) to apply to information, the requirements set out in all three paragraphs of that section must be met.

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

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

- Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)? (Order F2004-013 at para. 10; Order F2005-011 at para. 9)

[para 27] The information the Third Party argues ought to be severed from the records at issue consist of the "unit price" for various goods and services (basically a breakdown of the various goods and services that make up the contract, and the costs associated with one unit of each), as well as the hourly rates for specified labour.

[para 28] The Public Body's tendering documents indicate that at the time the tendering process began, the Public Body had only an estimate of how much of each product or service, and how many hours of labour, would be required for each item involved in the project. Specifically, pages 1-2 of Part II of the bid documents (provided by the Public Body with its initial submission) states:

> 3.1 Where Quantities are included in this Bid Form and unit prices are requested, it is understood that:

> 3.1.1 the estimates of quantities shown in the unit price table contained in this Bid Form are approximate only and for the sole purpose of comparing Bids;
>
> …
>
> 3.1.4 except as otherwise set forth in the General Conditions, payment for Work carried out on a unit price basis shall be made on the basis of actual quantities as determined by the Consultant at the unit prices set forth in this Bid Form for each respective item of unit price Work…

[para 29] Therefore, it seems that bidders provided a breakdown of their respective bid so that, should they win the contract, they could be paid for each actual unit of goods and/or services, and each hour of labour, that the project required.

[para 30] These unit prices and hourly rates form part of the contract between the Third Party and the Public Body. The unit prices and hourly rates also came directly from the Third Party's bid, as the Public Body accepted the winning bid without changes to the bid's breakdown costs (although the final number of hours or number of goods were only an estimate).

Would disclosure of the records reveal one of the types of information set out in section 16(1)(a)?

[para 31] The Third Party argues that the information at issue is financial, commercial and technical information about its business. It states:

> Specifically, the Records at Issue contain private information regarding the Third Party's financial affairs including estimated project costs for labour and materials where inferences may [be] drawn as to suppliers, strategies, processes and financial margins. The information also clearly demonstrates how the Third Party would bid on this type of project enabling competitors not only to follow its strategy but itemize where the Third Party is achieving optimal results so that competitors may determine where their cost saving efforts should be focused. Moreover, it reveals trade secrets to competitors as to the type and optimal quantity of materials for similar types of projects. Further, if competitors were to have other financial information regarding the Third Party, extrapolations could be conducted on the strength of the Third Party's financial position, its borrowing capacity and its overall financial security and value of operations. (Initial Submission, para. 14)

[para 32] The Public Body agrees that the information at issue is properly characterized as the Third Party's commercial information but disagrees that it is also financial information of the Third Party, or its trade secret.

[para 33] "Commercial information" is 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).

[para 34] The Public Body states that financial information includes information such as cost accounting methods, pricing practices, profit and loss data, overhead and operating costs. These examples of financial information were provided in Order PO-2010 from the Ontario Office of the Information and Privacy Commissioner, which was cited in Order F2011-002 from this Office.

[para 35] The Third Party argues that several Orders from the Ontario office have found unit prices to be financial information under the Ontario Act; it cites four Orders in support of its position. Past Orders of this Office have accepted unit prices as "financial or commercial information" of a third party (see Order F2012-15).

[para 36] In Order F2011-002 the adjudicator found that fees for services performed by a third party for a public body, which were contained in requested records, were "commercial information" of third parties because "the information is about the terms under which [the third parties] performed and sold services to the Public Body" (at para. 15).

[para 37] It is not clear to me that unit prices and hourly labour rates constitute information about the Third Party's "monetary resources and use and distribution of its monetary resources" such that the information is "financial information" in this context. However, I agree that the information is commercial information of the Third Party as it relates to the Third Party's selling of services. Therefore, section 16(1)(a) is satisfied and I do not need to consider whether the information is technical information or a trade secret.

Was the information supplied by the Third Party in confidence, within the terms of section 16(1)(b)?

Supplied

[para 38] The information at issue that was supplied to the Public Body by the Third Party was comprised of the unit prices and hourly labour rates that were included in the Third Party's bid to the Public Body. These unit prices and hourly rates then became, without change, part of the contract between the Third Party and Public Body.

[para 39] The unit prices and hourly rates making up part of the contract were agreed to between those two parties. Many past Orders of this Office, as well as from the Ontario Office and the BC Office have held that a contract is negotiated between a public body and third party, and therefore cannot be found to have been supplied by the third party. This is true even where the contract price is the same as the bid price (see Alberta Order F2009-028, BC Order F11-27, and Ontario Order PO-226). This approach has also been upheld by the Ontario Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. 2851 and *Canadian Medical Protective Association*

v. John Doe, [2008] O.J. No. 3475, and the BC Supreme Court in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603. There are limited exceptions to this principle: where the information is immutable, or where disclosure of the information in the contract would permit an accurate inference about underlying non-negotiated confidential information supplied by the third party to the public body (Order F2013-47, citing Ontario Order PO-3176).

[para 40] The Public Body relied on this interpretation in determining that it would disclose the requested records (the contract) in their entirety.

[para 41] During this inquiry the Alberta Court of Appeal issued its decision in *Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 (*Imperial Oil*). One issue considered by the Court was whether all information in an agreement between a third party and a public body was negotiated rather than supplied. It stated (at paras. 82-84, emphasis added):

> First of all, as previously noted, it is not the Remediation Agreement itself that must be the protected information. There would be room to argue that negotiated contracts themselves are not "supplied" by either party to the agreement. Imperial Oil did seek to prevent disclosure of the Remediation Agreement simply because it was an agreement, but that was based on it being privileged. The overlapping exemption under s. 16 was not an attempt to prevent the disclosure of the Remediation Agreement as an agreement, but rather because of the information it "would reveal".
>
> What s. 16(1) protects are documents that "may reveal" protected information that has been supplied by one of the parties. If Imperial Oil supplied protected financial, scientific and technical information to Alberta Environment in order to enable the negotiation of the Remediation Agreement, that information would still be "supplied" and therefore protected. "Supplied" relates to the source of the information, and whether information was "supplied" does not depend on the use that is made of it once it is received. If the disclosure of the Remediation Agreement "would reveal" that protected information, then non-disclosure is mandatory under s. 16. To suggest that information loses its protection just because it ends up "in an agreement that has been negotiated" is not one that is available on the facts and the law. It cannot be the rule that only information that is of no use to the public body is "supplied".
>
> In this case it is beyond dispute that some of the information qualifies. For example, the five technical letters from the environmental consultants were commissioned by Imperial Oil, and supplied to Alberta Environment by Imperial Oil. The fact that they ended up as exhibits to the Remediation Agreement cannot reasonably be found to take them outside the protection of s. 16. The Commissioner found at para. 27 that these technical reports were not "supplied" by Imperial Oil, but rather were "documents that reflected the Public Body's requirements and were *negotiated with it*, with the assistance of a third party". It is unclear whether the Commissioner was referring to the consultants or Imperial Oil as the "third party" that provided this "assistance". In any event, there is simply no evidence on the record to support this assertion. There is no indication anywhere that the consultants negotiated the contents of their reports with

> anybody. There is no indication that Imperial Oil and Alberta Environment "negotiated" what is in the consultants' reports. On their face, they were reports commissioned by Imperial Oil, drafted independently by the consultants, and then "supplied" to Alberta Environment. The fact that these reports may have been requested (or demanded, or required in the ordinary course) by Alberta Environment, or supplied by Imperial Oil as a legal, practical or tactical necessity does not change the fact that they were, in fact, supplied by Imperial Oil.

[para 42] This analysis from the Court of Appeal might suggest that any information that was provided by a third party to a public body was *supplied* within the terms of section 16(1)(b), regardless of whether that information later formed part of an agreement (or contract) between those parties.

[para 43] The Third Party argues for this interpretation in its submissions; specifically, the Third Party argued that the unit prices (and presumably hourly rates) were supplied within the terms of section 16(1)(b) based on the Court of Appeal's interpretation in *Imperial Oil*. It states:

> In *Imperial Oil* there were exhibits to the agreement, which included letters from experts commissioned by Imperial Oil. The Court of Appeal stated "[t]he fact that they ended up as exhibits to the Remediation Agreement cannot reasonably be found to take them outside the protection of s.16" (at para 84). Similar to the Records at Issue, the mere inclusion of unit pricing in the agreement cannot force that information outside of the protection of s.16. (Additional submission addressing *Imperial Oil*, at para. 15)

[para 44] The Public Body argued that *Imperial Oil* is distinguishable from the present case regarding whether information was supplied. It states:

> [r]egarding the question of whether the records were supplied to the public body, the Court in *Imperial Oil* determined that certain information contained in the remediation agreement was 'supplied' to the public body. Specifically, the Court referred to five technical reports that were prepared for Imperial Oil by independent consultants and that were included as exhibits to the remediation agreement. It is clear that these documents were not subject to negotiations between the parties in the same manner the provisions of the remediation agreement were. These documents were not changed through the mediation process nor could they have been. Although the Court does not use the term, the records discussed in *Imperial Oil* were immutable in that they were not, *by their nature*, subject to change. Neither Alberta Environment nor Imperial Oil had the power to revise unilaterally or to persuade the other party to revise these records. In contrast to this, and as the Public Body has previously submitted, the records in issue in this Inquiry <u>are not</u> immutable and therefore are considered to have been negotiated, not supplied. Because the records in that case were fundamentally different in nature, the comments of the Court of Appeal in *Imperial Oil* do not affect the determination of whether the records in issue in this Inquiry were supplied to the Public Body. (Additional submission addressing *Imperial Oil*, at para. 12)

[para 45] I agree with the Public Body's interpretation. In the excerpt cited by the Third Party (and reproduced above) the Court of Appeal in *Imperial Oil* was not addressing whether the remediation agreement itself was supplied or negotiated; it agreed that a negotiated contract might not be "supplied" by either party to the contract.

[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 47] It would seem that these reports were not a fundamental part of that agreement in the same manner as the Third Party's unit prices and hourly rates are a fundamental part of the contract. The Third Party argues that its unit prices and hourly rates were not up for negotiation but that the Public Body would either accept the bid or reject it. It argues that the unit prices and hourly rates were therefore immutable information and/or that disclosing these prices in the contract would allow an accurate inference about information supplied to the Public Body prior to the contract.

[para 48] In my view, contracts (or other agreements) are based on an offer and an acceptance; whether several offers were made and rejected before one was accepted, or whether the first offer was accepted (as was the case here) does not change the nature of the process of coming to an agreement. As stated in BC Order F11-27 (at para. 13):

> In other words, information may originate from a single party and may not change significantly – or at all – when it is incorporated into the contract, but this does not necessarily mean that the information is 'supplied'. The intention of s. 21(1)(b) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change, but, fortuitously, was not changed.

[para 49] The adjudicator in Order F2013-47 provided an example of immutable information (at para. 36):

> For example, a third party might supply a proprietary design or formula as part of its bid or during negotiations. A public body might then require the third party to use that design or formula as a term of the contract. Even though the proprietary design or formula is the subject of negotiations, and is part of the contract, the formula or design was originally *supplied* by the third party, and may meet the requirements of both section 16(1)(a) and (b).

[para 50] In BC Order 01-39, the former BC Commissioner gave the following examples of what may be immutable information in a contract (at para. 45):

> For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of s. 21(1)(b). To take another example, if a third party produces its financial statements to the public body in the course of its contractual negotiations, that information may be found to be "supplied."

[para 51] In other words, 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). The Third Party argues that the unit prices and hourly rates are immutable because the tender process used by the Public Body meant that the bid would be rejected or accepted without change. However, this is reflective only of the bidding process chosen by the Public Body; it does not change the nature of the information contained in the bids. In other words, the fact that the Public Body would not make a counter-offer on a bid does not mean that the bid prices were immutable. To say that bid prices (or the unit prices and hourly rates that comprised the bid total) are immutable is to say that the Third Party could not have offered numbers other than those it did, in fact, offer.

[para 52] The Third Party did not provide arguments as to how the unit prices or hourly rates are immutable in this sense, and I do not believe they are. If the Third Party were asked to provide the actual costs for providing a unit of services, those costs would arguably have been immutable. Similarly, had the hourly rates reflected labour rates that the Third Party could not change (e.g. rates set out in a collective agreement), that information might be considered to be immutable. However, there is no indication that either of these circumstances is the case here. Rather, the unit prices appear to be merely a breakdown of the final bid price, which is clearly not immutable. (I note also that the Third Party argued that the hourly rates would signal its labour "mark up" to subcontractors.)

[para 53] Further, in order to reach an agreement, at least one party must provide an offer for the other party to accept or reject, which will be reflected in the final contract. A general principle that states that a contract (or agreement) might be negotiated and not supplied (as past Orders and the Court of Appeal stated) would not be a useful principle if the exception includes any information appearing in the contract (or agreement) that was provided by one party to the other in an offer or bid. It is uncertain what a contract (or agreement) would be comprised of, if not terms offered by one party and accepted by the other. It is therefore unclear that the Court intended to include offers or bids in within the scope of its discussion of supplied information.

[para 54] To conclude, I am not convinced that the Court of Appeal's discussion in *Imperial Oil* overturned the precedence from this Office and other jurisdictions regarding the general principle that information in a contract is negotiated information and not supplied by one party within the terms of section 16(1)(b). In my view, the Court was concerned with reports that were attachments to an agreement, the contents of which

were not susceptible to change. The Court's conclusions regarding those reports seem to be consistent with existing exceptions to the general rule about contract information being negotiated – namely, that information in a contract may be supplied within the terms of section 16(1)(b) if that information is immutable or if the disclosure of the contract information would allow an accurate inference to be drawn about *underlying* confidential information.

[para 55] The Third Party did not provide me with evidence that either of the exceptions to the general principle apply to the unit prices or hourly rates appearing in the contract. As such, it is my view that the information in the contract was not supplied by the Third Party within the terms of section 16(1)(b). If I am wrong in that conclusion, I have also found, for the reasons given below, that the unit prices and hourly rates were not supplied *in confidence*. Therefore, section 16(1)(b) is not met in any event.

In confidence

[para 56] The Public Body's tender documents did not include an express statement of confidentiality; nor did the Third Party's bid documents. Therefore, the issue is whether the bid was supplied implicitly in confidence.

[para 57] In Order 99-018, former Commissioner Clark decided that the following factors should be considered in determining whether information has been implicitly supplied in confidence:

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

[para 58] These factors were upheld in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner*), 2012 ABQB 595 (CanLII), where the Court agreed that the law requires an objective determination that information was communicated in confidence.

[para 59] In *Imperial Oil*, the Court of Appeal stated that the test for confidentiality in section 16(1)(b) is a subjective one. It states (at para. 75):

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

[para 60] In the *Imperial Oil* Order, former Commissioner Work did not cite the factors from Order 99-018 to determine whether information was supplied implicitly in confidence in that case (the issue of confidentiality was decided on other grounds); as such, the Court of Appeal did not address the appropriateness of those factors when it determined that the test for confidentiality should be subjective rather than objective.

[para 61] In *Air Atonabee Ltd. V. Canada (Minister of Transport)*, (1989), 37 Admin. L.R. 245, the Federal Court interpreted section 20(1)(b) of the federal ATIA, which is similar to section 16 of the FOIP Act. Section 20(1) of the ATIA states:

> *20(1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains*
>
> *(a) trade secrets of a third party;*
> *(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;*
> *(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or*
> (d) *information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.*

[para 62] Regarding the test for confidentiality in section 20(1)(b) of the ATIA, the Federal Court stated (emphasis mine):

> The second requirement under subsection 20(1)(b), that the information be confidential, has been dealt with in a number of decisions. <u>These establish that the information must be confidential in its nature by some objective standard which takes account of the content of information, its purposes and the conditions under which it was prepared and communicated</u> (per Jerome A.C.J., in Montana, supra, at page 25). It is not sufficient that the third party state, without further evidence, that it is confidential (see, e.g., Merck Frosst Canada Inc., supra; Re Noel and Great Lakes Pilotage Authority Ltd. et al. (1987), 45 D.L.R. (4th) 127 (F.C.T.D.)). Information has not been held to be confidential, even if the third party considered it so, where it has been available to the public from some other source (Canada Packers Inc. v. Minister of Agriculture, [1988] 1 F.C. 483 (T.D.) and related cases, appeal dismissed with variation as to reasons on other grounds, [1989] 1 F.C. 47 (F.C.A.)), or where it has been available at an earlier time or in another form from government (Canada

> Packers Inc., supra; Merck Frosst Canada Inc., supra). Information is not confidential where it could be obtained by observation albeit with more effort by the requestor (Noel, supra). As outlined by Jerome A.C.J. in earlier cases dealing with subsection 20(1)(b):
>
> > It is not sufficient that [the applicant] considered the information to be confidential.. It must also have been kept confidential by both parties and must not have been otherwise disclosed, or available from sources to which the public has access.

[para 63] The factors set out in Order 99-018 are consistent with those factors set out by the Federal Court in *Air Atonabee*. The Supreme Court of Canada relied on the factors set out by the Federal Court in *Air Atonabee* when interpreting the same provision of the ATIA in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII) (*Merck Frosst*), (at para. 133). It said:

> In order to qualify for the exemption, the information must be (i) financial, commercial, scientific or technical information; (ii) confidential and consistently treated in a confidential manner by the third party; and (iii) supplied to a government institution by a third party. The parties accept the factors identified by MacKay J. in *Air Atonabee* as being appropriate to consider the question of whether information is confidential within the meaning of s. 20(1)(*b*).

[para 64] In my view, section 16(1)(b) of the FOIP Act is substantively similar to section 20(1)(b) of the ATIA such that it would be appropriate to apply the objective test for confidentiality from *Air Atonabee* (and *Merck Frosst*) to section 16.

[para 65] Further, in *Imperial Oil*, both parties to the agreement argued that they had intended the record to be kept confidential. In this case, the Public Body argues that it had no such intention at the time it accepted the Third Party's bid. Therefore, the intent of the parties cannot be determinative in this case and other factors will need to be considered.

[para 66] Since the Court of Appeal in *Imperial Oil* did not specifically consider the test commonly used to determine whether information was supplied in confidence within the terms of section 16(1)(b) of the FOIP Act, and the Supreme Court of Canada has endorsed an objective test regarding the similar provision in the federal ATIA, I decline to use a purely subjective test for determining whether the information at issue was supplied in confidence within the terms of section 16(1)(b). Rather, I will use the test set out in Order 99-018, which considers the intention of the parties as one of several relevant factors.

[para 67] The Public Body states that "the Third party has not provided any evidence of particular steps it has taken to preserve the confidentiality of the information it has submitted or that it generally takes when submitting this type of information to clients" (Initial submission, para. 29). The Public Body also noted that the tendering process included a public bid opening, where the total of each bid was announced publicly.

[para 68] The Public Body notes that, at the time of the Third Party's bid, the interpretation of section 16 to information in contracts was that the information is negotiated and not supplied (with limited exceptions, such as immutable information). The Public Body's point might be that the Third Party could not have prepared its bid for a purpose that would not entail disclosure because the law at the time the bid was prepared was that information in contracts is not generally subject to the exception in section 16.

[para 69] The Public Body argues that the Third Party ought to have expected that a contract between it and the Public Body could be made public. It states:

> … the Public Body submits that, as the OIPC determined in Order F2011-002, there is no generally implied expectation of confidentiality that applies to tendering processes. In fact, the opposite is likely true. Where a third party has entered a bid for the opportunity to participate in a project paid for by public funds, it could be argued that the third party acknowledges that a resulting contract may be subject to public scrutiny as expenditures of public funds are typically conducted in an open and accountable manner. (Initial submission, para. 28)

[para 70] The Third Party refers to Order F2011-002 from this Office, in which the adjudicator did not accept the third parties' argument that it was "industry practice" to keep "information pertaining to commercial aspects of their business" confidential (at para. 27). The adjudicator went on to say:

> In relation to the first factor set out in Order 99-018, there is no evidence before me that the third parties communicated to the Public Body that distribution of the information withheld by the Public Body was to be restricted. I accept that Descon and Nikiforuk may have thought or expected that the Public Body would not distribute the information; however, there is no evidence that the third parties imposed limits on the Public Body's use or disclosure of the information to ensure that this was so. In addition, there is no indication that the Public Body assured Nikiforuk or Descon that information in successful tenders or invoices would be held in confidence or that the Public Body's conduct would have led these parties to conclude that this was so.
>
> Nikiforuk and Descon have not explained the steps taken to preserve the confidentiality of the information they submitted to the Public Body for the purposes of the second factor. While Descon states that tendered prices are available only to the client, it does not explain the measures it takes to ensure that its clients will not disclose its tendered prices to others.

[para 71] The Third Party argues that this decision should be considered with caution. It states:

> Where it is industry-norm that such information would be confidential, the Privacy Commissioner should be cautious in assuming the opposite absent evidence. Rather, it should be a rebuttable presumption with the bid tender process that the information is confidential. (Initial submission at para. 18)

[para 72] Regarding the "industry-norm", the Third Party provided an excerpt from *Procurement: The Integrity of the Bidding Process and the Role of the Consultant* (a paper prepared by a lawyer for the Continuing Legal Education Society of BC), which is dated 2008. Regarding confidentiality, that publication states:

> As with many issues in procurements, confidentiality is best dealt with expressly in the tender documents.
>
> Where a public opening is stipulated in a fixed price tender, prices are publicly announced and no one expects confidentiality as to price. However, confidentiality issues may arise regarding the content of a bid other than price, in unit price tenders, and in RFPs.
>
> Here is an example of a confidentiality clause in an RFP:
>
> > All proposals became the property of [the owner] and will not be returned to the Proponent.
> >
> > All proposals will be held in confidence by [the owner] unless otherwise required by law.
> >
> > Proponents should be aware [the owner] is a "public body" defined by and subject to the Freedom of Information and Protection of Privacy Act of British Columbia.
>
> In the absence of a clause dealing with confidentiality, the content of bids and proposals is likely impliedly agreed to be confidential, and disclosure of some content of bids or proposals to competitors would constitute a breach of the duty of fairness.
>
> Note that it is common for public owners to notify bidders that they are subject to freedom of information legislation as in the clause above. Where an FOI request is received, it is the owner's obligation not to disclose documents or parts of documents that could cause harm to the commercial interests of a third party.
>
> Where a decision is taken to end the tender without an award but to follow a different process, care must be taken not to breach the duty of fairness by disclosing confidential information of one bidder to another during any subsequent negotiations or discussions.
>
> It is prudent to require members of evaluation teams of Proposals under an RFP to sign confidentiality agreements.

[para 73] The Public Body agrees with the Third Party that confidentiality is implied during the bidding process, but that this confidentiality applies *only* during the bidding process, not after a bid has been accepted. It states:

> Where it is stated that a sealed bid is an indication of an expectation of confidentiality, this should be interpreted to mean an indication of an expectation of confidentiality during the bidding process. However, the same expectation of confidentiality is not implied with respect to a bid that is accepted and is incorporated into a contract between the parties. This is supported by the Public Body's cited authorities that support disclosure and the non-application of

> Section 16 of the *FOIP Act* on the basis that these decisions, like the case at hand, deal with the selected bids and the subsequent agreements – not bids received during the bidding process. (Rebuttal submission, para. 14).

[para 74] I accept the position of both parties that bids are generally supplied in confidence during a tender process in order to avoid interference with that process. With respect to the Third Party's arguments regarding the industry norm, I disagree that the existence of an industry norm changes the burden of proof the Third Party has to show that section 16 applies to the records at issue. The existence of industry norms regarding confidentiality is a relevant factor, but does not create a rebuttable presumption that the Third party's bid was supplied in confidence.

[para 75] The text cited by the Third Party specifically states that confidentiality should be explicitly addressed in the bid documents, and that absent explicit statements, bids are *likely* implicitly confidential in accordance with a duty of fairness. The text then comments that public "owners" are subject to access laws, and must not disclose information that could cause "commercial harm" to bidders. This is an overly simplified statement regarding a public body's duty not to disclose information that falls within the terms of section 16, as "commercial harm" is not a harm listed in section 16(1)(c). Regardless, in my view, the comments made in this text clearly indicate situations in which confidentiality may not be implicitly agreed in a bidding process; hence the direction to explicitly address the issue in the bid documents.

[para 76] This is the primary evidence provided by the Third Party regarding its expectation that its bid would remain confidential even after it was awarded the contract.

[para 77] In BC Order No. 01-36 the former BC Commissioner adopted the factors set out in Order 99-018 regarding implicit confidentiality. He said (at para. 30):

> It has not elaborated on the bare assertion that it has always treated the list as confidential. It has not provided me with any evidence as to how it has handled the list internally or in any dealings with others. There is no evidence before me of security measures to ensure confidentiality or other circumstances suggesting that Western Rubber was concerned to keep the list confidential before it was supplied to PWC. Certainly, the copy of the list provided to me for the purposes of this inquiry is not marked as being confidential.

[para 78] In Alberta Order F2008-019, the adjudicator agreed with the former BC Commissioner in BC Order No. 01-36, and went on to state (at para. 19):

> I note that the purchase agreement does not contain a confidentiality warning. In addition, an assertion made after the fact that information was supplied in confidence is insufficient to establish that the information was in fact supplied in confidence. Rather, a party seeking to establish that information was supplied in confidence must do so through evidence. Evidence of the party's practices in relation to its commercial and financial information and the steps it has taken to maintain confidentiality of information are vital, particularly in cases where the record itself does not indicate that it was intended to be confidential. However,

> Juniper has not provided any evidence as to the steps it took, if any, to ensure the confidentiality of the information contained in the purchase agreement.

[para 79] In Ontario Order PO-3377, an adjudicator accepted that a proposal made to a public body was provided in confidence, based on evidence provided by the parties. In that case, the public body had provided information about the security measures taken to ensure that proposals are kept confidential throughout their lifecycle; it also pointed to "the confidentiality assurances on its procurement web page, as well as the references to the confidentiality of the records in the university's template for responses to RFPs" (at paras. 36-37).

[para 80] The Third Party offered no evidence similar to that offered in the Ontario Order cited above. The Third Party did not provide any evidence that it took steps to maintain the confidentiality of its bid. The Third Party presumably prepared its bid with the hope that it would be the successful bid; according to the tender documents, the winning bid would become the contract between the Public Body and winning bidder. Therefore, the Third Party prepared its bid with the intent that it would form the contract between it and the Public Body. The interpretation of section 16 in Alberta at the time the Third Party bid on the project was that information in government contracts is not information that was supplied in confidence, within the terms of section 16. Although there were exceptions to that general rule, the Third Party ought to have been aware of the possibility that, were its bid to be the successful bid, the resulting contract may have become public in its entirety. It is therefore dubious whether the Third Party could be said to have prepared its bid for a purpose that would not entail disclosure (the fourth factor set out in Order 99-018).

[para 81] In conclusion, I do not accept that the text provided by the Third Party indicates a rebuttable presumption in favour of confidentiality of bids after the closing of the bidding process. The Third Party did not provide me with any other evidence that it took steps to maintain the confidentiality of its bid. Further, the interpretation of section 16 at the time of the Third Party's bid ought to have alerted the Third Party to the distinct possibility that the entire contract would be disclosed in response to an access request. Lastly, the Public Body has argued that it did not intend that bids would remain confidential after the close of the bidding process, and did not include any indication in the bid document that confidentiality would be maintained.

[para 82] For all of these reasons, I find that the records at issue were not supplied to the Public Body by the Third Party in confidence, within the terms of section 16(1)(b). I therefore do not need to consider whether the disclosure of the information in the records would result in a harm described in section 16(1)(c).

V. ORDER

[para 83] I make this Order under section 72 of the Act.

fr[para 84] I find that section 16(1) of the Act does not apply to the information listed under “unit price”, “amount” and “hourly rate” columns on pages 38-50 of the records at issue. I uphold the Public Body’s decision regarding that information, and I order the Public Body to disclose it to the Applicant.

[para 85] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

_____

Amanda Swanek
Adjudicator