ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2017-82

November 3, 2017

REGIONAL MUNICIPALITY OF WOOD BUFFALO

Case File Numbers 000884 and 005129

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Summary: The Requestor made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Regional Municipality of Wood Buffalo (the Public Body) for the "2009 / 2010 audit findings on transit operations". The Public Body located an audit regarding Diversified Transportation Ltd. (the Third Party) that the Public Body's employees had created. It provided notice to the Third Party that it was considering disclosing records affecting the Third Party's business interests. The Third Party objected to disclosure of the audit in its entirety. The Public Body decided to withhold some of the information in the audit, but decided to disclose other information to the Requestor. The Requestor was not informed of this decision. The Third Party requested review by the Commissioner of the Public Body's decision to grant access to information to the Requestor.

The Adjudicator asked the Public Body to provide notice to the Requestor of its decision to deny access to some of the information in the records, as required by section 31 of the FOIP Act. The Public Body did so. The Requestor requested review by the Commissioner of this decision, and the Requestor's issues were added to the inquiry. The Requestor also requested that the Commissioner review whether the Public Body had complied with the terms of section 11 of the FOIP Act (time limit for responding).

The Third Party requested that the Adjudicator address the question of whether the audit was subject to section 27(2) (privileged information) of the FOIP Act on the basis of

settlement privilege. The Public Body argued that the Commissioner lacks jurisdiction to address the issue.

The Adjudicator determined that section 16 (disclosure harmful to business interests) of the FOIP Act did not apply to the audit. The Adjudicator determined that the Public Body had not complied with the terms of section 11 of the FOIP Act; however, as it had responded to the Requestor and had made an undertaking to comply with the terms of section 31 in the future, she declined to make an order in that regard. The Adjudicator found she had jurisdiction to address the question of whether the audit was subject to section 27(2). The Adjudicator determined that the audit was not subject to settlement privilege, and that section 27(2) did not apply to it. The Adjudicator ordered the Public Body to give the Requestor access to the audit in its entirety.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 11, 14, 16, 17, 27, 30, 31, 65, 68, 71, 72

Authorities Cited: AB: Orders 96-013, 96-018, 99-018, 2002-007, F2003-004, F2005-011, F2007-014, F2008-027, F2009-028, F2011-002, F2011-018, F2012-17, F2013-17, F2013-37, F2013-47, F2015-03, F2016-64, F2016-65 **ON:** MO-2496

Cases Cited: *F.H. v. McDougall*, [2008] 3 SCR 41; *Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231; *Edmonton Police Service v. Alberta (Information and Privacy Commissioner*), 2012 ABQB 595; *R. v. Hundal*, [1993] 1 SCR 867; *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd*., 2013 ABCA 10

I. BACKGROUND

[para 1] On February 23, 2015, the Requestor made an access request for the "2009 / 2010 audit findings on transit operations".

[para 2] The Public Body located an audit and its attached schedules (the audit). It determined that Diversified Transportation Ltd.'s (the Third Party) interests under section 16 of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) were affected by the access request. On February 27, 2015, it provided notice to the Third Party under section 30 of the FOIP Act that it was considering giving access to the Requestor of an audit report regarding the Third Party's billing.

[para 3] The Third Party objected to disclosure of the information in the audit.

[para 4] On May 1, 2015, the Public Body made a decision under section 31 of the FOIP Act that it would sever some information from the report under section 16, but that it would disclose the remainder of the information to the requestor. The Public Body informed the Third Party of its decision to disclose information, but did not inform the Requestor of its decision to sever information.

[para 5] The Third Party requested review by the Commissioner of the Public Body's decision to disclose information from the audit.

[para 6] The Commissioner authorized mediation to resolve the issues between the Public Body and the Third Party. As this process was unsuccessful, the matter was scheduled for a written inquiry and the Commissioner delegated her authority to conduct the inquiry to me.

[para 7] Prior to conducting the inquiry, I asked the Public Body whether it had provided notice under section 31(4) of the FOIP Act to the Requestor of its decision to refuse access to some of the information in the audit under section 16. The Public Body did so.

[para 8] On January 31, 2017, the Requestor requested review by the Commissioner of the Public Body's decision to refuse access. The Requestor also requested that the Commissioner review the lateness of the Public Body's response to his access request.

[para 9] The issues raised by the Requestor were added to the inquiry. The parties exchanged submissions. The Third Party requested the opportunity to provide *in camera* submissions regarding the records at issue, which I granted.

[para 10] In its submissions, the Third Party raised the issue of whether section 27(2) applies to the information it is seeking to have the Public Body withhold. It argues that the audit is subject to settlement privilege. The Public Body stated in its submissions that even if the audit report were subject to settlement privilege, it has exercised its discretion under the FOIP Act not to withhold the audit.

[para 11] I have added the issue of whether the audit is subject to settlement privilege.

II. RECORDS AT ISSUE

[para 12] The audit is at issue.

III. ISSUES

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

Issue B: Did the Public Body comply with section 11 of the Act (time limit for responding)?

Issue C: Is the audit subject to settlement privilege?

IV. DISCUSSION OF ISSUES

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

[para 13] Section 16(1) of the FOIP Act requires a public body to withhold from an applicant certain types of information. It 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 14] In Order F2005-011, former Commissioner Work adopted the following approach to section 16 analysis:

> Order F2004-013 held that to qualify for the exception in section 16(1), a record must satisfy the following three-part test:
>
> Part 1: 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?
>
> Part 2: Was the information supplied, explicitly or implicitly, in confidence?

Part 3: Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)?

[para 15] All branches of this test must be met in order for section 16 to apply. That this is so is evidenced by the Legislature's use of the word "and" in section 16(1)(b), *supra*, to link sections 16(1)(a), (b), and (c).

[para 16] Further, when determining whether sections 16(1)(a), (b), and (c) are met, it is important to ensure that the same information meets the requirements of each provision. For example, if particular information meets the terms of section 16(1)(a), then that is the information that must also have been supplied in confidence, and result in harm under section 16(1)(c). It is insufficient to point to information meeting the terms of section 16(1)(a) as having been supplied in confidence within the terms of 16(1)(b), and then argue that harm would result from disclosure of other kinds of information not meeting the terms of section 16(1)(a) and (b).

[para 17] In this case, I will consider whether the information the Public Body has decided to withhold and the information the Third Party believes should be withheld meet the requirements of each of sections 16(1)(a), (b), and (c).

[para 18] The burden of proof set out in section 71(3) of the Act applies in this case. This provision 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 19] Section 16(1) does not apply to personal information, so the Third Party has the burden, by application of section 71(3)(b), of establishing that the Requestor has no right of access to the records.

[para 20] The standard of proof imposed on a third party seeking to have section 16 applied is not the criminal standard, which requires proof beyond a reasonable doubt, but the civil standard, which requires proof on the balance of probabilities. In other words, the Third Party must establish that it is more likely than not that section 16 applies to all the information it seeks to have withheld, which, in this case, is the entire audit document.

[para 21] In *F.H. v. McDougall*, [2008] 3 SCR. 41, the Supreme Court of Canada described the qualities of evidence necessary to satisfy the balance of probabilities. The Court stated:

> Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[para 22] From the foregoing, I conclude that the Third Party must provide sufficiently clear, convincing, and cogent evidence to discharge its burden of proving that section 16 applies to the information it seeks to have withheld. As the Third Party seeks to have section 16 applied, it must prove that sections 16(1)(a), (b), and (c) apply to the information with evidence that is sufficiently clear, convincing, and cogent to meet this burden.

[para 23] I turn now to the question of whether the Third Party has established that the Requestor has no right of access to the content of the audit.

Does section 16(1) apply to the audit?

Part 1: Would disclosure of this information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party?

[para 24] To meet the requirements of part 1 of the test, information must be "of a third party" and it must reveal the third party's trade secrets or commercial, financial, labour relations, or scientific or technical information.

[para 25] Orders F2009-028, F2010-013, F2011-002, F2011-018, F2012-17, F2013-17, F2013-37, F2013-47, F2016-64, and F2016-65 have defined "commercial information" as information of or belonging to a third party about its buying, selling or exchange of merchandise or services.

[para 26] In Order 96-018, the former Commissioner said the following regarding "financial information":

> In keeping with my decision in Order 96-013, I attribute ordinary meaning to the word "financial". I also reiterate that careful consideration must be given to the content of the document in determining whether or not the information falls within this section. Financial information, in my opinion, is information regarding the monetary resources of the third party and is not limited to information relating to financial transactions in which the third party is involved.
>
> As such, the information in the record is not of a "financial" nature because it reveals nothing of the third party's financial capabilities beyond its commitment to raise the dollar amount specified. Similarly, I find that the record reveals nothing of the third party's assets or liabilities, either past or present.

[para 27] In Order F2003-004, the Adjudicator listed examples of information that had been found to be financial information in past orders. He said:

> The Commissioner has said that "financial information" includes:
>
> - information relating to the monetary resources of the third party, such as the third party's financial capabilities, and assets or liabilities, past or present (Order 96-018)
> - information regarding financial transactions, insurance, past performance, estimated advertising costs and commission expected or proposed in respect of the sales involved (Order 98-006)
> - pricing strategy, revenues, contracts for goods and services, expenses (operating, capital and other) (Order 98-015)
> - particular forecasts, estimated value of certain operations, cash-flow before interest and principal payments, income statements, assets and liabilities, financial position, debt repayment and interest statements, assumptions regarding financial status of third parties, draft contracts, offers and make-up of funds, bank debts, loans and banking arrangements, assessment of worth, investments of third parties, sales contracts with third parties, details of cash-flow, balance sheets and financial position of third parties (Order 99-040)

[para 28] In Order MO-2496, an order of the Office of the Information and Privacy of Commissioner of Ontario, the Adjudicator considered the meaning of "commercial" and "financial" information as they appear in Ontario's equivalent of the FOIP Act's section 16. The Adjudicator stated:

> These terms have been defined in previous orders of this office as follows:
>
> […]
>
> Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

[para 29] In my view, Orders 96-013, 96-018 and F2003-004 of this office, and Order MO-2496 of the Office of the Information and Privacy Commissioner of Ontario, are essentially stating the same thing. "Commercial information" is information belonging to a third party, at the time the information is supplied, 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.

[para 30] The audit indicates that the Third Party did not provide documentation or give the auditors access to its records. The audit was conducted by employees of the Public Body. The employees relied on the contract the Public Body entered with the

Third Party and its subsequent extensions and amendments. They also relied on amounts invoiced by the Third Party under the contract.

[para 31] Although the Third Party seeks to have the entire audit withheld under section 16, the greatest part of the information in the audit is information generated by the Public Body's employees for the benefit of the Public Body. I find that the analysis, conclusions, and recommendations of the Public Body's employees is not information falling within the terms of section 16(1)(a).

[para 32] In addition, I do not consider the amounts the Public Body's employees calculated under the headings "adjustments" and "adjusted amounts" to be financial or commercial information belonging to the Third Party. Rather, these amounts reflect the Public Body's calculations and its views of its own entitlements under the contract it entered with the Third Party.

[para 33] The Third Party is concerned that the audit contains, or would reveal, its pricing formula and its costs, which it argues were contained in the invoices it submitted to the Public Body. I must therefore consider whether the audit would reveal such information and whether, if it does, that such information is financial, commercial, or a trade secret belonging to the Third Party within the terms of section 16(1)(a).

[para 34] In its submissions, the Third Party provided an invoice it submitted to the Public Body as an example. The position of the Third Party is that disclosure of the amounts and descriptions in the audit, which were calculated from the invoices it submitted to the Public Body, would reveal the Third Party's pricing formula and costs, which forms the basis of its bids for contracts. It argues that this information is its proprietary commercial information.

[para 35] I acknowledge that a formula by which a third party calculates its pricing, or information about a third party's fixed costs, is the commercial or financial information of a third party. However, I am unable to identify any information that would reveal the Third Party's pricing formula or methods, or its costs, in the audit. In making this finding, I also considered Schedule 7 of the audit and the "fixed overhead" portion of the audit to which the Third Party drew my attention in its submissions.

[para 36] Schedule 7 does contain reference to "costs". However, the source of the information referred to as "costs" in the invoice that was shown to me, is stated as the contract between the Public Body and the Third Party. The formulas for calculating the amounts referred to in the contract are not tied to costs to the Third Party, but percentages and external factors that both the Public Body and the Third Party agreed would govern their agreement. As a result, while Schedule 7 does use the word "costs", I am unable to say that the figures in this schedule are the costs of the Third Party and not simply amounts it is entitled to charge for services.

[para 37] Where I am able to identify amounts that could be considered "fixed costs", these are amounts such as Canada Pension Plan, Employment Insurance and Workers'

contributions. These are amounts that are fixed by legislative schemes, rather than the Third Party, and the Third Party's rates under these schemes would be the same as they would be for another employer. Moreover, these figures are combined in the audit so it is unclear what the Third Party's costs are under each heading.

[para 38] As noted above, the invoice I was shown requires payment for services provided by the Third Party under a contract between the Third Party and the Public Body. I am unable to say that the invoice reveals anything about the Third Party's pricing formula, projected profit or costs. The invoice appears to reflect terms the Third Party and the Public Body agreed to in their contract; however, to what extent such terms reflect the Third Party's pricing model, and to what extent they reflect the Public Body's bottom line, given that the Public Body agreed to the Third Party's terms in the contract, I am unable to say. In addition, the Third Party's evidence is unclear as to how information about its pricing strategy or costs is reflected in the invoices it submitted to the Public Body, or how this information is then revealed by the audit.

[para 39] Moreover, where the Public Body's employees discuss costs and profit in the audit, their discussion reflects the Public Body's assessment of the Third Party's costs and profit, which may not be the same as the Third Party's actual costs or profits. The Third Party strenuously disagrees with the Public Body's assessment of its billing practices and pricing where this information appears in the audit. I am therefore unable to say that the information of prepared by the Public Body's employees would enable a competitor to make accurate inferences as to the Third Party's pricing model or costs. Or strategies

[para 40] I acknowledge that Schedule 7 of the audit contains a breakdown of "costs". However, I do not know that these amounts reflect "fixed costs" of the Third Party. Further, I am unable to determine what the Third Party's profit margin might be from this information. It appears that the source of the method for calculating the information described as "costs" in Schedule 7 is the contract between the Public Body and the Third Party. In the contract, there are formulas for calculating particular amounts and adjustments, which apply regardless of the actual costs of the Third Party. As a result, I am unable to say that the reference to "costs" in Schedule 7 reflects the costs of the Third Party or provide any information about its profitability. Instead, the amounts described as "costs" do not appear to be costs at all, but prices for services agreed to by the Third Party and the Public Body.

[para 41] In addition, the amounts in Schedule 7, as is the case with the amounts appearing elsewhere in the audit, is a total of amounts invoiced and paid over a number of invoiced periods. Without knowing the number of invoices and the circumstances giving rise to the calculations in the invoice, I am unable to say that anyone, including a competitor of the Third Party, could draw accurate inferences as to the pricing model or costs of the Third Party if the audit is disclosed.

[para 42] In addition, the audit refers to the contractual relationship between the Public Body and the Third Party. It does not contain reference to any other contractual

relationships between the Third Party and others. As a result, it unclear how insight could be gained from the audit as to the Third Party's pricing model in relation to any other clients with whom it contracts.

[para 43] I find that release of the audit and its schedules would disclose the following types of information: the Public Body's calculation of the amounts it was billed, what it considers should have been billed, advice given by the Public Body's Compliance and Control Branch to the Public Body's Director of Public Operations, and the Compliance and Control Branch's assessment of the value of the contract. If this information is disclosed, it might enable someone to guess some aspects of the terms under which the Public Body agreed to pay the Third Party for services, or at least, the Public Body's interpretation of such terms.

[para 44] I note that in Order F2015-03, the Adjudicator stated:

> 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.

[para 45] While I find that the information that is revealed in the audit does not enable anyone to make meaningful guesses as to the Third Party's pricing strategy or costs or projected profit margins, I find that the audit does contain information about the Third Party's selling of services to the Public Body. Section 16(1)(a) is therefore met in relation to the amounts the Third Party billed the Public Body for providing services and the nature of the services it provided where that information appears in the audit. However, section 16(1)(a) is not met in relation to any other information in the audit.

[para 46] I am unable to identify any information in the audit that could be said to enable anyone to make accurate assessments of the financial resources of the Third Party or its use and distribution of money. As noted above, prior orders have defined "financial information" as information about a third party's "monetary resources and use and distribution of its monetary resources".

[para 47] As I have found that there is no information in the audit that would reveal the Third Party's pricing model, and this is the information the Third Party argues is a trade secret, it follows that I find that disclosure of the audit would not serve to disclose a trade secret of the Third Party.

[para 48] I turn now to the question of whether the services and prices for services revealed in the audit is information that was supplied in confidence by the Third Party.

Part 2: Was the information supplied, explicitly or implicitly, in confidence?

[para 49] To meet the terms of section 16(1)(b), it must be established that the information in question was supplied in confidence. Clearly, the assessment and

conclusions of the Public Body's employees regarding the contract with the Third Party were not supplied by the Third Party. I need not address this information further. I turn now to the question of whether the Third Party supplied its commercial information (the nature of the services and the amounts it billed for the services) to the Public Body in confidence.

Were the descriptions of services and claimed amounts in the invoices from which calculations in the audit were made submitted in confidence?

[para 50] In Order 99-018, former Commissioner Clark decided that the following factors should be considered in determining whether information has been supplied in confidence:

> In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:
>
> (1) Communicated to the [public body] 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 51] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner*), 2012 ABQB 595, Ross J. denied judicial review of Order F2008-027, in which the four factors set out above had been applied. Ross J. stated:

> The Adjudicator held that the evidence supported a subjective expectation of confidentiality on the part of the parties, while the law requires an objective determination in all of the circumstances that information was communicated on a confidential basis […]
>
> I am satisfied that the Adjudicator's Decision is intelligible and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." In the result, I hold that her conclusion that the information in question was not supplied in confidence is a reasonable decision based on the law and the evidence before her.

[para 52] As the Court has considered the test adopted in Order 99-018 to be a reasonable measure in determining whether information has been supplied in confidence, I will apply this test to determine whether the information at issue was supplied in confidence.

(1) Was the pricing information communicated to the Public Body on the basis that it was confidential and that it was to be kept confidential?

[para 53] I find that any information in the Third Party's invoices was not communicated on the basis that it was confidential or that it was to be kept confidential. The contract between the Public Body and the Third Party, which authorizes the Third Party to invoice the Public Body for performing various services, does not contain a

confidentiality clause. There is no acknowledgment in the contract that the formulas and rates it contains were confidential and there is no requirement that invoices be held in confidence. The absence of such provisions is striking, giving that the agreement, in which the Public Body and the Third Party agreed to resolve their dispute, does contain a confidentiality provision (paragraph 5). From the settlement agreement, I conclude that when the Public Body and the Third Party agree to keep matters confidential, they include an express contractual provision to that effect.

[para 54] The Third Party asserts in argument that it submitted the invoices with the expectation that it would be kept private and confidential. However, it does not say that it communicated any expectations that information regarding the amounts or descriptions in its invoices would be kept in confidence or that its invoices contained terms requiring confidentiality. The invoice provided for my review contains no provision requiring confidentiality.

[para 55] The Third Party relies on the fact that the Municipality and the mediator who investigated and attempted to settle the matter on behalf of this office accepted that it intended to submit the invoices in confidence. However, this argument does not speak to whether it supplied information on terms of confidence or had a subjective belief that it was doing so.

[para 56] I acknowledge that the Public Body took the position in its response to the Third Party that "while invoices are not submitted explicitly in confidence, the FOIP Branch believes the second test passes because there is an implicit confidence with all vendors about their invoices as disclosing them to competitors would harm their business interests and competitive position in the industry". The Public Body may be taken as confirming that while the invoices were not submitted on express conditions of confidence, it typically treats invoices as confidential.

[para 57] As for the conclusions of the mediator from this office, I do not know what the basis for these conclusions, and I am similarly unable to find that they amount to evidence that the Third Party supplied its pricing information and invoices on terms of confidence.

[para 58] In any event, the answer to the first question is "no". From the evidence before me, I conclude that the Third Party did not communicate to the Public Body, in writing or verbally, that the contractual terms regarding amounts payable and its invoices were to be kept confidential.

(2) Was the information 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 59] Implicit in the Third Party's arguments is the position that it treats its business model and pricing information as confidential. However, as discussed above, it is not clear that information of this kind is in the audit. While I accept that information it

billed the Public Body and the services for which it billed the Public Body are the Third Party's commercial information, I am unable to conclude on the evidence before me that the amounts it billed and the descriptions in the invoices, or the terms in the contract reflected in the invoice, were treated with concern for their protection from disclosure prior to communicating this information to the Public Body. There is no evidence before me that the Third Party asked questions of the Public Body as to whether it would or could keep any information in the contract or its invoices confidential prior to including the information in the contract or submitting the invoice. Further, there is no evidence before me as to how the Third Party treated the amounts it was charging the Public Body or the descriptions of the services it performed for the Public Body prior to entering the contract and submitting the invoices.

[para 60] For the reasons above, I find the answer to the second question is "no".

(3) Was the information not otherwise disclosed or available from sources to which the public has access?

[para 61] Express in the Third Party submissions is the position that information regarding the amounts it billed and the descriptions of services is not available to the public. I accept that if a member of the public asked for the amounts it billed the Public Body or the descriptions of services it provided to the Public Body, it would decline to provide the information. Moreover, the Public Body has stated that it keeps information in the invoices it receives confidential.

[para 62] I conclude that information about the services performed in the audit and the fees charged for the services is not likely available from sources to which the public has access.

[para 63] I find the answer to the third question is "yes".

(4) Was the information prepared for a purpose which would not entail disclosure?

[para 64] The information regarding descriptions of services and the amounts billed for services in the audit was gathered from the invoices submitted for payment by the Third Party to the Public Body. The contract between the Public Body and the Third Party was also a source of information. A primary reason for creating a written contract, as the Third Party and the Public Body did, is to clarify the legal rights and obligations of the parties in the event a dispute arises. A contract may be entered into evidence in court to assist the Court to decide the issues between the parties. Similarly, in the event of a dispute over payment, an invoice will form evidence in a Court case. Further, as the audit does not indicate that it is privileged or confidential, there does not appear to be anything that would prevent the Public Body from using the audit for a purpose that would entail disclosure.

[para 65] I find that the contract, the invoices, and the audit were not created for purposes that would exclude the possibility of disclosure. As a result, I find that the answer to the fourth question is "no".

Conclusion

[para 66] In considering the four factors above, I conclude that the Third Party has not established that it had objectively reasonable expectations that information about the costs in the contract and the invoices, which were then used to create the audit, were supplied in confidence.

[para 67] Having said this, I note that in *Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 the Alberta Court of Appeal held that section 16(1)(b) refers to a subjective belief that information is supplied in confidence.

[para 68] In *R. v. Hundal*, [1993] 1 SCR 867 the Supreme Court of Canada described how a determination whether a party's actions are subjectively reasonable, differs from determining whether they are objectively reasonable. The Court stated:

> A truly subjective test seeks to determine what was actually in the mind of the particular accused at the moment the offence is alleged to have been committed. In his very useful text, Professor Stuart puts it in this way in *Canadian Criminal Law* (2nd ed.), at pp. 123-24 and at p. 125:
>
> > What is vital is that *this accused* given his personality, situation and circumstances, actually intended, knew or foresaw the consequence and/or circumstance as the case may be. Whether he "could", "ought" or "should" have foreseen or whether a reasonable person would have foreseen is not the relevant criterion of liability.
> >
> > In trying to ascertain what was going on in the accused's mind, as the subjective approach demands, the trier of fact may draw reasonable inferences from the accused's actions or words at the time of his act or in the witness box. The accused may or may not be believed. To conclude that, considering all the evidence, the Crown has proved beyond a reasonable doubt that the accused "must" have thought in the penalized way is no departure from the subjective substantive standard. Resort to an objective substantive standard would only occur if the reasoning became that the accused "must have realized it if he had thought about it". [Emphasis in original.]

[para 69] While the foregoing is a criminal case, it sets out how a subjective test is to be applied. If section 16(1)(b) refers to a subjective belief that information has been supplied in confidence, then I must ask whether the Third Party, which is a corporation, believed that the terms it negotiated with the Public Body were to be kept confidential and that the invoices it submitted were similarly confidential. However, I may draw conclusions from the Third Party's conduct to arrive at this determination.

[para 70] I have no evidence before me to establish that the Third Party had a subjective understanding that the pricing information in the contract, any invoices it submitted under the contract relating to the pricing, and an audit that calculated the amounts the Public Body believed were payable under the contract and those in the invoices were to be kept in confidence. As noted above, the Third Party relies on the

conclusions of the Public Body's FOIP unit and the mediator appointed by the Commissioner under section 68 of the FOIP Act as determinative of confidence, rather than providing the evidence of its officers and employees who submitted the invoices and negotiated the contract.

[para 71] The Third Party did provide the *in camera* affidavit of its Vice President of Employee Transportation. However, this affidavit swears that it is a standard in the industry not to provide access to an unsuccessful bidder the pricing structure or formula of a successful bidder. I do not dispute this to be the case. However, I am unable to find that such information is reflected in the audit. Moreover, the Vice President does not swear to the Third Party's expectations of confidentiality at the time the contract with the Public Body was negotiated and entered and at the time it submitted invoices.

[para 72] In *Imperial Oil*, the Alberta Court of Appeal held that confidentiality provisions in a contract, and a provision establishing that information was subject to various access to information statutes, were indicative of a subjective belief on the part of signatories to an agreement that information appearing in the contract was supplied in confidence (paragraph 56). In the case before me, there are no confidentiality provisions in the contract or the invoices, and the parties did not address the terms of the FOIP Act in the contract. Moreover, I have no evidence before me as to the subjective belief of the Third Party or its agents in negotiating pricing information with the Public Body or submitting invoices. In other words, I do not know whether the Third Party, acting through its representatives, believed that the Public Body would keep the contract and the invoices it submitted confidential or why it held this belief, if it did.

[para 73] In *Hundal*, the Supreme Court of Canada held that the conduct of a party may assist a decision maker to determine the subjective understanding of the party. In this case, the conduct of the party was that it did not express any concerns regarding confidentiality of the contractual terms or the amounts and descriptions in its invoices. Further, there are no terms regarding confidence in the contract between the Third Party and the Public Body, which distinguishes this case from *Imperial Oil*. I am unable to say that the Third Party had expectations of confidentiality, or that any such expectations were subjectively reasonable. I note too that the confidentiality clause contained in the settlement agreement between the Third Party and the Public Body makes no reference to keeping the audit, or any invoices submitted to the Public Body, confidential.

[para 74] For the foregoing reasons, I find that the Third Party has note established that the terms of section 16(1)(b) are met.

Part 3: Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)?

[para 75] The Third Party argues that disclosure would result in a) undue financial loss due to lost business opportunities and contracts, b) third party contractors declining to invoice the Public Body, and c) undue scrutiny result from disclosure of allegations made in the audit.

[para 76] If it were the case that the audit contains information of the Third Party regarding its pricing formula and confidential cost information, with the result that the Third Party's competitors could take advantage of this information in order to compete with the Third Party, then I would agree with the Third Party that disclosure of this information could result in significant harm to its negotiating position or undue financial loss. However, I have found that the audit does not reveal the Third Party's pricing formula or cost information and that the information in the invoices it submitted was not intended to be confidential.

[para 77] Since the information of the Third Party that would be disclosed if the audit were released would be only the amounts billed by the Third Party for performing services and a description of the services, I am unable to say that disclosure of the information could be expected to result in significant harm to the Third Party's negotiating position or result in undue financial loss.

[para 78] With regard to the Third Party's argument that third party contractors would refuse to provide detailed invoices to the Public Body if information derived from its invoices is released, I am unable to identify any possibility that this harm would be likely to result. Rather, it would seem likely that third party contractors who wish to receive payment from the Public Body would continue to submit invoices that indicate the amounts being billed and the reasons for it.

[para 79] Finally, with regard to the argument that disclosure of the conclusions of the Public Body's employees in the audit might damage the Third Party's reputation and goodwill, I note that this outcome is the anticipated result of disclosure of information that is not the Third Party's commercial information. By this I mean that the information giving rise to the projected harm if disclosed would not be the information I have found to be commercial information in the records, or the information the Third Party argues is its commercial information. However, the harm contemplated by section 16(1)(c) is harm resulting from disclosure of information meeting the terms of section 16(1)(a) that was supplied in confidence within the terms of section 16(1)(b). That would not be the case in relation to any harm to the Third Party's reputation or goodwill.

[para 80] For the foregoing reasons, I find that the terms of section 16(1)(c) are not met and I conclude that section 16 does not apply to the information in the audit.

Issue B: Did the Public Body comply with section 11 of the Act (time limit for responding)?

[para 81] Section 11 of the Act requires a public body to make every reasonable effort to respond to an access request no later than 30 days after receiving the request. Section 11 of the Act states:

> *11(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless*

(a) that time limit is extended under section 14, or

(b) the request has been transferred under section 15 to another public body.

(2) The failure of the head to respond to a request within the 30-day period or any extended period is to be treated as a decision to refuse access to the record.

[para 82] Section 14 of the FOIP Act authorizes a public body to extend the time for responding to an access request in limited circumstances. It states:

14(1) The head of a public body may extend the time for responding to a request for up to 30 days or, with the Commissioner's permission, for a longer period if

(a) the applicant does not give enough detail to enable the public body to identify a requested record,

(b) a large number of records are requested or must be searched and responding within the period set out in section 11 would unreasonably interfere with the operations of the public body,

(c) more time is needed to consult with a third party or another public body before deciding whether to grant access to a record, or

(d) a third party asks for a review under section 65(2) or 77(3).

[…]

[para 83] Section 30 of the FOIP Act contains notice requirements when the head of a Public Body is considering giving access to information. It states, in part:

30(1) When the head of a public body is considering giving access to a record that may contain information

(a) that affects the interests of a third party under section 16, or

(b) the disclosure of which may be an unreasonable invasion of a third party's personal privacy under section 17,

the head must, where practicable and as soon as practicable, give written notice to the third party in accordance with subsection (4).

[…]

(4) A notice under this section must

(a) state that a request has been made for access to a record that may contain information the disclosure of which would affect the interests or invade the personal privacy of the third party,

(b) include a copy of the record or part of it containing the information in question or describe the contents of the record, and

(c) state that, within 20 days after the notice is given, the third party may, in writing, consent to the disclosure or make representations to the public body explaining why the information should not be disclosed.

(5) When notice is given under subsection (1), the head of the public body must also give the applicant a notice stating that

(a) the record requested by the applicant may contain information the disclosure of which would affect the interests or invade the personal privacy of a third party,

(b) the third party is being given an opportunity to make representations concerning disclosure, and

(c) a decision will be made within 30 days after the day notice is given under subsection (1).

[para 84] Section 30 requires the head of a public body to provide notice to a third party when the head is considering disclosing information that may affect the third party's interests under section 16 or 17. The head is not required to provide notice if the head is not considering giving access to the information, or if the head decides that the record does not contain information affecting a third party's interests under section 16 or 17. Section 30(4) contains the form that notice is to take and a time limit for receiving representations from a third party.

[para 85] Section 30(5) makes it mandatory to provide notice to an applicant that the head of a public body has provided notice under section 30(1). Section 30(5)(c) establishes that the applicant is to be told that a decision will be made 30 days after notice has been given to the third party.

[para 86] Section 31 of the FOIP Act contains time limits and notice requirements for completing a consultation under section 30. It states:

31(1) Within 30 days after notice is given pursuant to section 30(1) or (2), the head of the public body must decide whether to give access to the record or to part of the record, but no decision may be made before the earlier of

(a) 21 days after the day notice is given, and

(b) the day a response is received from the third party.

(2) On reaching a decision under subsection (1), the head of the public body must give written notice of the decision, including reasons for the decision, to the applicant and the third party.

(3) If the head of the public body decides to give access to the record or part of the record, the notice under subsection (2) must state that the applicant will be given access unless the third party asks for a review under Part 5 within 20 days after that notice is given.

(4) If the head of the public body decides not to give access to the record or part of the record, the notice under subsection (2) must state that the applicant may ask for a review under Part 5.

[para 87] As noted above, the Public Body did not provide its decision of May 1, 2015 to the Requestor, but only to the Third Party. The Public Body therefore did not comply with section 31(4) of the FOIP Act. In addition, it did not extend the time for responding under section 14(1). As a result, the Public Body was not in compliance with section 11 of the FOIP Act, which requires a Public Body to take all reasonable steps to respond to an access request within 30 days of receiving the request.

[para 88] The Public Body states:

> The Municipality acknowledges and apologizes for the following:
>
> Failure to respond to the Applicant on April 24, 2015,
> Failure to provide proper section 31 notice to the applicant at the same time the notice was given to the [Third Party] on May 1, 2015.
>
> These failures were not a willful intent to evade the applicant but due to misunderstanding of how to respond to an applicant when the entirety of the records are asked to be reviewed by a [third party]. The Municipality endeavors to provide proper notices in the future of decisions to applicants at the same time as notices are given to [third parties].

[para 89] The Public Body acknowledges that it failed to comply with the terms of section 31(4) in relation to the information it decided to sever from the records. However, at my request, it provided notice to the Requestor and informed the Requestor of its decision to sever information from the records and the Requestor's right to request review of its decision. Doing so enabled the Requestor to request review, so that all the issues arising from the Requestor's access request could be decided at once, rather than in a series of inquiries.

[para 90] As the Public Body has now responded to the Requestor and the Requestor's issues have been added to the inquiry, the Requestor will not suffer any in obtaining a final response to his access request beyond the time spent by this office in

addressing the Third Party's request for review. The Public Body has acknowledged that it now realizes it is under a duty under section 31(4) of the FOIP Act to notify a requestor when it decides not to provide access or to provide only partial access to records, at the time the decision is made. As the Public Body has rectified its omission by providing notice and has undertaken to meet its duty under section 31(4) in the future, I see no benefit in making an order in relation to this issue.

Issue C: Is the audit subject to settlement privilege?

[para 91] Section 27 sets out the circumstances in which the head of a public body may or must withhold various kinds of legal communications from a requestor. It states:

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> > *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*
> >
> > *[…]*
>
> *(2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body […]*

[para 92] The Third Party argues that the audit is subject to settlement privilege and that this privilege belongs to it in addition to the Public Body. The Third Party argues that the audit was created in contemplation of litigation and sent to the Third Party in the course of settlement negotiations. The Third Party indicates that the audit was attached to a document addressed to it marked "without prejudice". It takes the position that neither side can waive settlement privilege, and therefore, section 27(2) makes it mandatory for the Public Body to withhold the audit.

[para 93] In its response to the Third Party, the Public Body disagreed that the audit was privileged. It took the position that the audit is an internal document that did not form part of the negotiations. It characterized the audit as the starting point of the dispute between itself and the Third Party. The Public Body argues that even if the audit were privileged, it has exercised its discretion in favor of disclosure. It also argues that I have no jurisdiction to review a decision in which it exercises discretion to disclose privileged information.

[para 94] The Public Body states:

> The Municipality unequivocally stands by our original statement and firm belief that the 3rd party who is notified under section 30 can only respond concerning their business interests or personal privacy interests outlined in sections 16 and 17. Section 30 specifically states this. Under the Act, a 3rd party has no right to ask for a review of the Municipality's decisions or actions on the use of any other exception to disclosure (except for sections 16 and 17).

> The Municipality reminds the Commissioner and the 3rd party that **the only reason they received a notice** was because the Municipality knew the information may affect their business interests. [emphasis in original]
>
> Theoretically if the information only would have legal privilege considerations, the 3rd party would never [have] known about the potential disclosure!
>
> The Municipality stresses that the Commissioner must seriously consider the huge ramifications on the legislation, on the processing of FOIP requests for all public bodies and on the access rights that the Act is supposed to grant. If the Commissioner gives this 3rd party the right to review section 27 exception (and thus any other exceptions to disclosure), on top of sections 16 and 17[,] this will set a huge detrimental precedent in the following ways:
>
> I. With this precedent, the legislation would need to be changed as all 3rd parties would have the right to review all public bodies' records being considered for release even if those records do not have any section 16 or 17 considerations. If a 3rd party is even mentioned in the records they would have to be notified. Does the Commissioner seriously believe that this is in compliance with the Act's purpose which is to disclose information subject to **limited and specific exceptions** in the Act (section 2a)? Would a proposed legislative change be supported by the legislature? The Commissioner [cannot] order the Municipality to do anything outside the FOIP Act, so if this precedence is made, the legislation must be changed immediately prior to any such Order. [emphasis in original]
>
> 2. With this precedent, the processing of all FOIP requests for all public bodies would be bogged down and delayed and actioning requests within 30 days would be impossible due to 3rd party reviews being necessary in the vast majority of cases. This again would be against the spirit of the Act and the purpose of the Act.
>
> 3. With this precedent just imagine the huge growth in requests for reviews by 3rd parties to the Commissioner's Office. The office can barely cope with the current workload and would not be able to handle this huge influx of work. Again this harms the access rights enshrined in the Act.
>
> The Municipality will not comment on any of the third party's arguments for the use of section 27 as they have no right to review that issue.

[para 95] Cited above, section 27(2) is a mandatory provision. When the Legislature creates mandatory or "must" provisions, it means that whoever must do something has a duty to do so. Under section 27(2), the head of a public body has a duty to withhold information described in section 27(1)(a), if the information relates to someone other than a public body.

[para 96] Section 27(2) is drafted in broad terms. Past orders held that where privileged records were created by a lawyer or an employee of a public body, that the terms of section 27(2) were met, on the basis that a lawyer or employee is a "person" and not a public body (see 2002-007 for example). In Order F2007-014, I rejected this view as overly broad. If all information created by a solicitor or client is subject to section 27(2), there would be no reason for the Legislature to enact section 27(1)(a), a discretionary provision.

[para 97] In my view, by creating a mandatory duty for a public body under section 27(2), the Legislature may be seen as acknowledging a right in a person, other than a public body or someone acting on a public body's behalf, to have privileged information

relating to the person withheld from a requestor. The circumstances in which a person would have a right to require a public body to withhold privileged information relating to the person would be the circumstance acknowledged in law: when the person holds privilege in the information.

[para 98] Section 30, reproduced above, describes the circumstances in which a public body is required to provided notice to a third party that it is considering giving access to information affecting the third party's interests. Section 30 refers only to sections 16 and 17 of the FOIP Act, and makes no reference to section 27 of the FOIP Act, even though, section 27(2), like sections 16 and 17 is mandatory. As a consequence, section 30 does not impose a duty on a public body to give notice to a person with interests under section 27(2). However, when a public body provides notice under section 30, there is no bar to a party objecting to disclosure on the basis of section 27(2) or the public body deciding that section 27(2) obligates it to withhold information.

[para 99] I take the Public Body's point that a third party would have no recourse under the FOIP Act if a public body elected to disclose information subject to section 27(2) without notice. However, in this case, the Public Body met its duty to the Third Party under sections 30 and 31 by informing it that it was considering disclosing information affecting the Third Party's interests under section 16. The Third Party provided an objection in relation to section 16 and section 27. The Public Body responded to these objections and made its decision under section 31.

[para 100] Section 65(2) authorizes a third party that has received notice of a decision to give access under section 31 to request review. It does not limit the Third Party to requesting review of decisions as they relate to section 16 or 17 of the FOIP Act. Moreover, if the Commissioner considers that a public body is required to withhold information, as in the case when a mandatory exception such as section 27(2) applies, the Commissioner may require the public body to refuse access under section 72(2)(c).

[para 101] I find that the Third Party has standing to raise the issue of whether section 27(2) applies to the information in the audit and that I have jurisdiction to address the issue.

Is the audit subject to settlement privilege?

[para 102] In *The Law of Evidence*, the authors set out three preconditions for the application of settlement privilege:

> 1. A litigious dispute must be in existence or within contemplation;
> 2. The communication must be made with the express or implied intention that it would not be disclosed to the Court in the event that negotiations failed.
> 3. The purpose of the communication must be to attempt to effect a settlement. [1]

[1] David M. Paciocco, Lee Stuesser, *The Law of Evidence*, (Toronto; Irwin Law Inc. 2011) p. 249

[para 103] In *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd*., 2013 ABCA 10, the Alberta Court of Appeal confirmed this tripartite test and also confirmed that neither party to a settlement communication may waive the privilege. The Court stated:

> As settlement privilege operates to preclude admission of evidence that might otherwise be relevant, it competes with the court's truth-seeking function. For that reason, courts must ensure the communications come within the tripartite test before applying the privilege. However, once that test is met, the privilege must be given broad scope and attach not only to communications involving offers of settlement but also to communications that are reasonably connected to the parties' negotiations. The privilege belongs to both parties and cannot be unilaterally waived or overridden by either of them: see *Hansraj* at para 13.

[para 104] I turn now to the question of whether the audit is subject to settlement privilege.

Was a litigious dispute in existence or within contemplation when the audit was prepared?

[para 105] The audit document was prepared on December 23, 2011. This document indicates that Public Body employees gathered data for it between September 1, 2010 and July 31, 2011. There is no reference to litigation taking place in the document, and the document makes no recommendations with respect to litigation. Further, the Public Body took the position in its response to the Third Party that the audit preceded litigation negotiations. On the evidence before me, I find that at the time the audit document was prepared, there was no litigious dispute in existence or within contemplation. As a result, it does not appear to be the case that the content of the audit is connected with negotiations between the Public Body and the Third Party.

[para 106] I acknowledge that the Third Party argues that the audit was provided to it attached to a letter that was marked "without prejudice" and that litigation was within contemplation at that time. However, the test requires that the document in question be prepared when a litigious dispute is in existence or within contemplation.

[para 107] From the evidence before me, which is the content of the audit itself, I find that at the time the audit was prepared, the Public Body had not turned its mind to the question of whether it would engage in litigation.

Was the audit made with the express or implied intention that it would not be disclosed to the Court in the event that negotiations failed?

[para 108] The audit does not refer to negotiations and it is not marked "without prejudice". Indeed, it would be odd if it were marked "without prejudice", given that the audit is an internal document, prepared by the Public Body's Compliance and Control Branch and submitted to its Director, Public Operations.

[para 109] I find that there is no implied or express intention in the audit that it could not be provided to the Court in the event that negotiations failed. Rather, there were no negotiations or Court proceedings in contemplation when the audit was prepared.

Was the purpose of the audit to attempt to effect a settlement?

[para 110] From my review of the audit, I am unable to agree with the Third Party that its purpose was to attempt to effect a settlement. Rather, the purpose was to inform the Public Body's Director, Public Operations, of the findings and conclusions of the Public Body's Compliance and Control Branch.

Conclusion

[para 111] I acknowledge that the Third Party provided a copy of a letter dated January 18, 2013 to its parent company from the Public Body that contains references to an audit. However, I find, on review of this document, that this document contains reference to audits conducted by the Public Body *after* the audit at issue was conducted, given that it contains calculations from December 31, 2011 and December 31, 2012. Even if it were the case that the audit appearing at Tab 19 of the Third Party's submissions and the audit that is at issue were one and the same, in my view, a document that fails to meet the terms of the tripartite test and was not connected with negotiations at the time it was created cannot meet the test for settlement privilege by virtue of being attached to another document that does.

[para 112] For the foregoing reasons, I find that the audit is not subject to settlement privilege.

V. ORDER

[para 113] I make this order under section 72 of the FOIP Act.

[para 114] I order the Public Body to give the Requestor access to the records at issue in their entirety.

[para 115] I order the Public Body to notify me in writing, within 50 days of receiving a copy of this order, that it has complied with it.

_____

Teresa Cunningham
Adjudicator