ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2023-44

November 24, 2023

CITY OF EDMONTON

Case File Number 011489

Office URL: www.oipc.ab.ca

Summary: An Applicant made an access request to the City of Edmonton (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for a record showing what the Public Body is paying Prestige Transport for Disabled Adult Transportation Services (DATS).

The Public Body invited Prestige Transportation Ltd. to make written representations as to why the information should not be disclosed. Prestige Transportation objected to the disclosure of certain parts of the record under section 16 of the Act.

The Public Body agreed to redact the certain information under section 16(1) of the FOIP Act. However, the Public Body found that some information could not be withheld under that provision.

Prestige Transportation requested a review of the Public Body's decision, and subsequently an inquiry.

The Adjudicator found that section 16(1) does not apply to the information in the record at issue.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 16, 71, 72.

Orders Cited: AB: Orders F2004-013, F2009-028, F2011-002, F2013-47, F2015-03, F2019-17, **BC**: Order F11-27, **Ont**: Orders MO-3905, PO-226, PO-2010, PO-3176

Case Cited: AB: *ABC Benefits Corporation v. Alberta (Information and Privacy Commissioner)*, 2015 ABQB 662, *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. 2851, *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, *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231, *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), 2012 SCC 3

I. BACKGROUND

[para 1] An Applicant made an access request to the City of Edmonton (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for:

> What the City of Edmonton is currently paying Prestige Transportation for Disabled Adult Transportation Services [DATS].

[para 2] The Applicant's request was dated November 7, 2018. The Public Body clarified with the Applicant that the Applicant was seeking the amount the Public Body was paying for the DATS service at the time of the request only.

[para 3] The Public Body invited Prestige Transportation Ltd. to make written representations as to why the information should not be disclosed. Prestige Transportation objected to the disclosure of certain parts of the record under section 16 of the Act.

[para 4] The Public Body agreed to redact certain information under section 16(1) of the FOIP Act. However, the Public Body found that some information could not be withheld under that provision.

[para 5] Prestige Transportation requested a review of the Public Body's decision, and subsequently an inquiry.

[para 6] The Applicant was invited to participate in this inquiry but did not respond.

[para 7] Since the time of the access request, Prestige Transportation amalgamated with other organizations to create TappConnect. Its submission states:

> 1. The Third Party in this Inquiry, Prestige Transportation Ltd. ("**Prestige**") was a company incorporated in Alberta on March 21, 2006, and carried on the business of providing passenger transportation services in and around the Edmonton region.
>
> 2. Prestige, together with Greater Edmonton Taxi Services Inc. ("**GETS**") and Cliff's Towing Ltd., amalgamated effective September 1, 2021 to become 2370845 Alberta Ltd., which subsequently changed its name on July 11, 2023 to TAPPconnect Inc. ("**TAPPconnect**").

> 3. 331001 Alberta Ltd. ("**331 Ltd.**") is a company duly incorporated pursuant to the laws of the Province of Alberta. 331 Ltd. is the sole shareholder of TAPPconnect.
>
> 4. GETS, now TAPPconnect, is Edmonton's largest taxi transportation provider. TAPPconnect operates its taxi fleets under the following divisions – Yellow Cab, Barrel Taxi, Checker Cabs, Prestige Cab, 24-7 Taxi, Capital Taxi, Garage division and Body Shop division, and Prestige Transportation operating as Prestige Limousine, DATS Contractors, Stretch division, and Charter division, providing transportation and taxi cab services in the Edmonton area 24 hours each day, year round.

[para 8] As I understand it, Prestige Transportation is now a division of TappConnect. The record at issue relates to Prestige Transportation prior to this amalgamation; however, TappConnect continues to object to the disclosure of the information relating to Prestige Transportation. The submissions made to this inquiry appear to have been submitted on behalf of TappConnect, and the affidavit provided with the submissions was sworn by the Director of TappConnect. I will refer to this entity as the Third Party.

II. RECORDS AT ISSUE

[para 9] The record at issue consists of a one-page document that sets out the rate schedule to be paid to the Third Party by the Public Body for the DATS services.

III. ISSUES

[para 10] The Notice of Inquiry, dated August 1, 2023, sets out the following issue:

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

IV. DISCUSSION OF ISSUES

[para 11] In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), 2012 SCC 3 (*Merck Frosst*), the Supreme Court of Canada discussed the balance between a right of access to government information with exceptions that protect a third party's confidential business information. The Court said (at paras. 3-4):

> The need for this balance is well illustrated by these appeals. They arise out of requests for information which had been provided to government by a manufacturer as part of the new drug approval process. In order to get approval to market new drugs, innovator pharmaceutical companies, such as the appellant Merck Frosst Canada Ltd. ("Merck"), are required to disclose a great deal of information to the government regulator, the respondent Health Canada, including a lot of material that they, with good reason, do not want to fall into their competitors' hands. But competitors, like everyone else in Canada, are entitled to the disclosure of government information under the *Access to Information Act*, R.S.C. 1985, c. A-1 ("Act" or "*ATI*").
>
> The Act strikes a careful balance between the sometimes competing objectives of encouraging disclosure and protecting third party interests. While the Act requires government institutions to make broad disclosure of information, it also provides exemptions from disclosure for certain

types of third party information, such as trade secrets or information the disclosure of which could cause economic harm to a third party.

[para 12] While the Court was discussing a provision in the federal *Access to Information Act*, this balancing is also applicable to section 16 in Alberta's FOIP Act. The FOIP Act provides a right of access to government information, including information about the expenditure of public funds to provide services to the public; section 16 ensures that confidential business information of third parties is not disclosed when providing access to government information.

[para 13] 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,*
>
> *(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*
>
> *...*

[para 14] As this inquiry involves information about a third party, 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 15] 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 16] Per Order F2004-013, at paragraph 10, for section 16(1) to apply to information, the requirements set out in all three paragraphs of that section must be met:

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

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

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

[para 17] In October 2009, the Public Body issued an RFP (request for proposal) in relation to the provision of DATS Ambulatory services (DATS services). The Third Party provided a copy of the Public Body's RFP document. The Public Body's RFP asked bidders to provide rates for different DATS services (a minivan service, a passenger van service and an accessible taxi service) in their proposals. The RFP document sets out a chart for providing the rates for each service; the chart includes a column for a non-fuel rate, a column for a fuel rate, and a column for the total of those two rates.

[para 18] The Third Party states that the fuel rates were provided by the Public Body in the RFP document; I have confirmed that this is so from the RFP document provided by the Third Party with its initial submission. Given this, I understand that bidders provided a non-fuel rate for each service in their proposals, added the fuel rate provided by the Public Body, and added those two numbers to create the total rate for each service.

[para 19] The Public Body's RFP document does not ask the bidders for a breakdown of the proposed non-fuel rates (for example, labour costs, vehicle maintenance costs etc.). The Third Party states that such costs were used to calculate the non-fuel rate in its bid proposal; however, only the overall non-fuel rates are included in the bid proposals.

[para 20] The Third Party was the winning bidder in this RFP process. The Third Party states that the rates set out in its bid proposal were incorporated into the DATS Contract for service (the Contract) (initial submission, at para. 68). It is these rates set out in the Third Party's bid proposal that the Third Party is seeking to protect.

[para 21] The record at issue is a one-page document setting out the Third Party's Rate Schedule for providing each type of DATS service; it includes the non-fuel rate, the fuel rate, and the total of those two rates for each DATS service.

[para 22] The Rate Schedule in the record at issue is not the rate schedule included in the Third Party's bid proposal that was incorporated into the Contract. With its initial submission, the Third Party provided an affidavit sworn by the Director of TAPPconnect (Affiant). The Affiant states that a multi-year contract between the Public Body and the Third Party (then Prestige Transportation) was signed in December 2009 for the DATS services. The Contract was extended via several Change Orders, to January 2019. Each Change Order included rate escalations in line with the Consumer Price Index (CPI). The Affiant further states that the non-

fuel rates were adjusted according to a specific CPI formula set out in the contract. This formula is contained in the copy of the Public Body's RFP, attached to the Third Party's submission.

[para 23] The Affiant states that Change Order #8 relates to contract period August 1, 2018 to December 31, 2018, which is the time period relevant to the access request. The Affiant states that Change Order #8 contains a Rate Schedule, which

> … incorporated the confidential rates submitted by Prestige in the Prestige RFP Response, as revised by the CPI-increased adjustments incorporated by way of the successive Change Orders.

[para 24] This is the rate schedule contained in the record at issue.

[para 25] To summarize the above, the non-fuel rates in the Third Party's bid proposal are the proposed rates for providing the DATS services set out by the Third Party and accepted by the Public Body, to which the Public Body's fuel rates were added. The rates in the record at issue are not the rates included in Prestige Transportation's bid proposal; rather, the rates in the record at issue were the result of several revisions, in accordance with a calculation set out in the RFP document.

[para 26] In response to the Applicant's access request, the Public Body proposed to withhold the non-fuel rates and the fuel rates in the record at issue, but disclose the total rates.

[para 27] The Third Party argues that the non-fuel rates in its bid proposal meet the test for the application of section 16(1). It argues that these rates can be calculated from the total rates in the record at issue if those rates are disclosed by the Public Body.

[para 28] The Third Party explains how these calculations could be made by any person with a copy of the Public Body's RFP documentation. First, the fuel rates were supplied by the Public Body in the RFP documentation. While the fuel rates in the RFP have been amended several times, they were amended using a formula that was set out in the RFP documentation. Therefore, a competitor with a copy of the RFP documentation could calculate the fuel rates in the record at issue from the fuel rate in the RFP. If the totals in the record at issue are disclosed, then subtracting the calculated 'new' fuel rates could reveal the non-fuel rates in the record at issue.

[para 29] The Third Party also states that while the non-fuel rates in the record at issue are not the same as the non-fuel rates in the Contract, the former were also calculated from the rates in the initial Contract using a formula set out in the RFP documentation. Further, the non-fuel rates in the initial Contract are the same as those contained in the Third Party's bid proposal. Therefore, disclosing the non-fuel rates in the record at issue would allow a person with a copy of the RFP documentation to calculate the non-fuel rates that the Third Party provided in its proposal, which were incorporated into the Contract without change. Using these calculations, disclosing the total rates in the record at issue could effectively reveal the non-fuel rates provided in the Third Party's proposal.

[para 30] The copy of the Public Body's RFP document provided with the Third Party's submission includes the calculations for amending the rates, referred to above. Therefore, the Third Party's arguments on this point seem plausible from the information before me. For the

purposes of this discussion, I accept it as true that the amended rates in the record at issue can be used to calculate the rates set out in the initial Contract, which were the same as those contained in the Third Party's bid proposal. I also accept that the total rates can reveal the non-fuel rates, as the fuel rates would be known to the competitors who also bid on the RFP. Any party that participated in the 2009 RFP process would have had a copy of the RFP documentation.

[para 31] Given the above, the Public Body must withhold the total rates in the record at issue if the non-fuel rates in the record are information that must be withheld under section 16(1).

[para 32] In the record, there are rates for two different time periods. Only one time period is responsive to the Applicant's access request; the Public Body has withheld the information relating to the irrelevant time period as non-responsive. Only the rates associated with the responsive time period are at issue in this inquiry. In referring to the record at issue I am referring only to the responsive information in the record at issue.

[para 33] The Public Body's submission to this inquiry states that the Third Party bears the onus of showing that section 16(1) applies to the information at issue. The Public Body did not make any further arguments regarding the application of section 16(1).

Section 16(1)(a)

[para 34] Section 16(1)(a) sets out the types of information to which this provision can apply.

[para 35] Past orders of this Office have defined "commercial information" as information belonging to a third party about its buying, selling or exchange of merchandise or services. "Financial information" is information belonging to a third party about its monetary resources and use and distribution of its monetary resources (Order F2009-028, at para. 42).

[para 34] Examples of financial information listed in Order PO-2010 from the Ontario Office of the Information and Privacy Commissioner, which was cited in Order F2011-002 from this Office, include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.

[para 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] The Third Party argues that the rates in the rate schedule in the record at issue is its commercial information. I agree that the rate schedule is the Third Party's commercial information, as that phrase has been defined in past Orders of this office.

Section 16(1)(b)

[para 38] In order for section 16(1)(b) to apply, the information must be supplied by the third party to the public body, explicitly or implicitly in confidence or would reveal information that was supplied in confidence.

[para 39] As stated above, the Third Party has argued that the fuel rates were provided by the Public Body in its RFP documentation, and were amended using a calculation also set out in the RFP documentation. Given this, the fuel rate is not information of the Third Party or information that was supplied by the Third to the Public Body. Further, as pointed out by the Third Party, the fuel rates were provided to other parties that participated in the RFP process, such that it is not confidential information.

[para 40] Given this, the fuel rates provided by the Public Body in its RFP documentation is not information to which section 16(1) can apply as it is not information *of* the Third Party or supplied by the Third Party. It is unclear why the Public Body applied section 16(1) to this information, and the Public Body has not provided any clarity in its submission.

Section 16(1)(b) – Information *supplied*

[para 41] 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.

[para 42] There are exceptions to this principle: where the information is immutable, or where disclosure of the information in the contract would permit an accurate inference about underlying non-negotiated confidential information supplied by the third party to the public body (Order F2013-47, citing Ontario Order PO-3176).

[para 43] Immutable information is described in Order F2019-17, at para. 95:

> Immutable information is information that, by its nature and in the given context, is not susceptible to change; it is not information that *could have* changed but did not (see Order F2012-15, citing BC Order F11-27). Conditions proposed by one party and accepted by a public body without changes is reflective only of the tendering process chosen by the public body; it does not change the nature of the information contained in the proposals. In other words, the fact that a public body may not have made a counter-offer on a proposal does not mean that the proposal prices were immutable. To say that proposal prices are immutable is to say that the bidder could not have offered numbers other than those it did, in fact, offer. As stated in BC Order F11-27 (at para. 13):
>
> > In other words, information may originate from a single party and may not change significantly – or at all – when it is incorporated 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 44] The Alberta Court of Appeal discussed at length whether information in an agreement can still be 'supplied' within the terms of section 16(1)(b), in *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 (CanLII). *Imperial Oil* has been offered by the Third Party as a decision that rejected the settled distinction between "supplied" and "negotiated" as this term is found in section 16(1). Although it has not explicitly said so, the Third Party's submission indicates that *Imperial Oil* stands for the principle that information in an agreement provided by one party and accepted by another party without change is not negotiated.

[para 45] However, as I explained in Order F2015-03, the Court in *Imperial Oil* agreed that information in a negotiated contract might not be "supplied" by either party to the contract. The records at issue in that case consisted of a remediation agreement between parties, as well as attachments to that agreement. The Court said (at paras. 82-83, emphasis added):

> 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".

[para 46] In that Order, I found that 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 (at para. 46):

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

were not going to change) or that they were comprised of underlying non-negotiated confidential information supplied by the third party.

[para 47] The Third Party also cites *ABC Benefits Corporation v. Alberta (Information and Privacy Commissioner)*, 2015 ABQB 662, which makes a similar point to the Court's in *Imperial Oil*: the fact that information appears in a contract or agreement does not necessarily mean that it can be characterized as information negotiated between the parties. An agreement or contract can also include information that is not subject to negotiation (i.e. immutable information) such as fixed costs. The Court in *ABC Benefits* further noted that immutable costs must be accepted by a public body in order for an agreement to be reached; the fact that immutable costs (or other immutable information) must be accepted does not render it negotiated rather than supplied.

[para 48] I understand these cases to stand for the proposition that immutable or non-negotiated information that ends up as an agreed term in a contract does not thereby become negotiated for the purpose of section 16(1).

[para 49] However, neither *Imperial Oil* nor *ABC Benefits* rejected the long-standing principle that fees for service in a contract are generally accepted to be negotiated between the parties. Rather, these decisions appear to accept the premise set out in the case law cited above, that fees for service set out in an agreement or contract are generally found to be negotiated, rather than supplied by one party to another, even when the prices in the agreement are accepted from a proposal without change. The exceptions to this general rule are for information that is immutable or reveals underlying non-negotiated confidential information. The decisions in *Imperial Oil* and *ABC Benefits* primarily address what kind of information falls within these exceptions to the general rule.

[para 50] Therefore, I am proceeding with the analysis that information that the parties have agreed to in the Contract can be withheld under section 16(1) only if it is either immutable, or reveals underlying non-negotiated information, as those exceptions have been discussed in *Imperial Oil* and *ABC Benefits*.

[para 51] The Third Party asserts that the information it is seeking not to be disclosed is the non-fuel rates provided in its bid proposal to the Public Body. The Third Party argues that the fact that these rates were later copied into the agreement with the Public Body does not alter the fact that they were supplied by the Third Party. It cites Order F2019-17 in support of this argument. That Order considered, amongst other things, whether conditions precedent in a purchase agreement between a public body and an organization meet the test for section 16(1)(b). In the paragraph of that Order cited by the Third Party, I said that "information supplied by a third party is still supplied even if it was copied into another document or rewritten by a public body" (at para. 85). This statement is consistent with the *Imperial Oil* and *ABC Benefits* decisions, discussed above: information from one party that ends up in a contract might become negotiated information such that the requirements of section 16(1)(b) are not met; however, if that information is not subject to negotiation (i.e. it is immutable) then the requirements for section 16(1)(b) may still be met even if that information ends up in the contract.

[para 52] The Third Party also cites BC Order F20-55 with respect to information contained in RFPs; this Order states (footnotes omitted):

> [29] I am not persuaded by the applicant's argument. I agree that the information in the Proposal may have been subject to change through negotiation *after* the Proposal was submitted; however, *when* the Proposal was submitted, it was not the product of negotiation or agreement in the same way that a contract is. There is no evidence before me to establish that, before Manulife submitted the Proposal, the information in it was negotiated with, or agreed to by, BCIT or the Consortium. Accordingly, I find that the disputed information was not negotiated.
>
> [30] I am satisfied that the disputed information was supplied within the meaning of s. 21(1)(b). I accept BCIT's and Manulife's evidence that Manulife generated and provided the information to BCIT and the Consortium without their input or agreement. Therefore, I conclude that the information was supplied. This conclusion is consistent with many past orders which have held that information in a proponent's response to an RFP or in a business proposal is supplied within the meaning of s. 21(1)(b).

[para 53] BC Order F20-55 relates to information contained in a proposal made to a public body, rather than the contract or agreement resulting from the RFP process. I understand the Third Party's argument to be that because the rates in the record at issue reveal the rates in the initial Contract, and because the Public Body accepted the rates set out in its bid proposal without change (i.e. the rates in the Third Party's bid proposal are the same as the rates in the Contract), then disclosing the rates in the record at issue reveals the rates in the Third Party's bid proposal. The analysis in the BC order above, would appear to support the Third Party's argument.

[para 54] However, the information at issue in BC Order F20-55 is not equivalent to the final rates to be paid for a contracted service. In that case, the information at issue was characterized as methodologies for how the organization proposed to provide the contracted service. The organization was cited as arguing (at para. 25):

> [The organization] further submits that, "[u]nlike a proposal for fees, the methodologies and strategies for the services outlined are not subject to negotiation, they are not susceptible of change in the negotiation process"

[para 55] In that case, the organization distinguished between the fees it proposed to charge, which were susceptible to negotiation, and its methodologies that were not.

[para 56] A conflating factor arose in that case: the RFP process permitted bidders to amend their proposals during the RFP process; the applicant in that case argued that this indicated any information in the proposal was subject to negotiation. It is *this* argument that was rejected by the adjudicator in the excerpt cited by the Third Party, reproduced above. Specifically, the adjudicator found that information such as methodologies and strategies, which would usually be characterized as non-negotiated (or immutable) information, does not become negotiated information for the sole reason that the RFP process allows for bidders to make changes to their bid proposals.

[para 57] In my view, the analysis in this BC Order is consistent with the precedent discussed earlier in this order: contract prices are negotiated information, even where the contract price is the unchanged from the price contained in the bid proposal. However, immutable information of an organization is not subject to negotiation even when it is contained in the contract. The analysis in this BC Order applies only if the information in the record at issue would reveal similarly immutable or non-negotiated information of the Third Party.

[para 58] As discussed above, the Public Body's RFP document does not ask the bidders for a breakdown of the proposed non-fuel rates. From the records and submissions before me, I understand the non-fuel rates represent the Third Party's total rates for providing the services, absent the cost of fuel, which was set by the Public Body.

[para 59] In other words, the non-fuel rates are effectively the proposed total cost for providing the DATS services set out by the Third Party and accepted by the Public Body, to which the Public Body's fuel rates would be added.

[para 60] Given this, the non-fuel rates are not distinguishable from the total cost for providing a service discussed in the case law set out above, for the purposes of section 16(1)(b).

[para 61] The rates for the DATS services set out in the Third Party's bid proposal were accepted by the Public Body and incorporated into the Contract. The precedent discussed above, finding that fees for services set out in a contract are negotiated between the parties for the purposes of section 16(1)(b) even when the fees are accepted from a bid proposal without change, are directly on point here. In any of those cases where the proposed fees were incorporated without change into a contract, it could be said that the contract fees reveal the proposed fees; nevertheless, this information was found to be negotiated between the parties. The arguments made by the Third Party on this point are not consistent with the case law.

[para 62] Based on the precedent set out above, the rates set out in the record at issue are negotiated information for the purposes of section 16(1)(b) *unless* they reveal immutable or otherwise non-negotiated information.

[para 63] In some cases, immutable or non-negotiated information, such as fixed costs or trade secrets, might be inferable from information in an agreement or contract, even if that non-negotiated information is not stated outright. In such a case, what would otherwise be negotiated information to which section 16(1) does not apply becomes information to which section 16(1) does apply, because of what can be inferred from that information. In this case, if the non-fuel rates reveal immutable or otherwise non-negotiated information, then the conditions for section 16(1)(b) may be met.

[para 64] The Third Party cites the definition of "immutable information" from Order F2019-17, which is reproduced at paragraph 43, above.

[para 65] The Third Party also cites Ontario Order MO-3905, which discusses the type of information that may be characterized as immutable:

> [40] The board submits that the "immutability" and/or "inferred disclosure" exceptions apply to Schedule "H" of the record because Schedule "H" contains information "related to be the third parties' underlying fixed costs and/or would allow accurate inferences to be made with respect to such information." The board cites Order MO-3058-F in support of this position, but that case is not of assistance to the board because it did not involve a contract, which is the type of record at issue in this appeal. The board also provided a definition of the immutability exception from the case law, and cited Order PO-2383 in support of its submission that the IPC has held that overhead and labour costs would qualify for the immutability exception. In addition to these citations, the board offered the brief submission reproduced above, that sections 12.1-12.5 and Schedule "H" contain "detailed information related to the third parties' underlying fixed costs, including wages, building and property expenses, office and admin expenses, operations expenses and fixed vehicle costs." In the alternative, the board argues that the "inferred disclosure" exception applies because accurate inferences could still be made about the third parties' underlying fixed costs using the information about vehicle rates in the record, and reveal the third parties' underlying cost structures.
>
> [41] Based on my review of the record and the representations of the parties, I am prepared to accept that at least some of the detailed costs set out in these portions of the record were not negotiated with the board, but are immutable in nature, and qualify for the "immutability" exception. Given my findings below about part three of the test, it is unnecessary to make definitive findings about the various costs listed in these portions of sections 12.2 and 12.5, and Schedule "H."

[para 66] The example of immutable information discussed in *ABC Benefits* was fixed costs. In *Imperial Oil*, the Court primarily discussed reports that had been created for the organization and that were later appended to an agreement between the organization and a public body.

[para 67] The Third Party argues that its underlying costs can be inferred from the non-fuel rates. It states that its non-fuel rates were calculated to include "equipment acquisition and maintenance costs, insurance, building and storage expenses, driver remuneration and overhead costs" (initial submission, at para. 67). The Third Party further argues (initial submission, at paras. 105-106, footnotes omitted):

> It is not unusual in the para-transit business sector for drivers to share employment compensation information with competitors. Insurance and other vehicle costs are readily obtainable and calculable from public sources and inquiries.
>
> Accordingly, once a competitor is armed with information regarding driver compensation costs and insurance/vehicle costs, it can *easily* determine the administration fee and profit being earned by Prestige.

[para 68] The Affiant further elaborates on this point:

> 37. From previous experience, Prestige knows that drivers are more than willing to share with competitors, when asked, various details of their employment compensation, including wages and any bonuses paid. Other elements, such as vehicle and insurance costs, are readily obtainable and calculable from public sources and inquires.

> 38. If the TFR [total rate] is disclosed, competitors could simply take the known NFC [non-fuel rate], subtract the drivers' wages and bonuses, and insurance and vehicle costs, to ascertain Prestige's administration costs and profit on this para-transit business.
>
> 39. Therefore, by simply asking the drivers for the most basic of information, a competitor can easily determine the exact administration fee, bonus fees and profit being earned by Prestige. This is highly sensitive commercial information in its purest form.

[para 69] If the Third Party's underlying, fixed costs are inferable from the non-fuel rates in the record at issue, the test for section 16(1)(b) may be met.

[para 70] I have carefully reviewed the record at issue, along with the Third Party's arguments and other information provided in its submissions. From the information before me, I cannot see how the various fixed costs identified by the Third Party are inferable from the non-fuel rates in the record. I accept that if a person knew the non-fuel rate proposed by the Third Party, as well as all of the Third Party's costs, the Third Party's profit could be calculated. I also understand the Third Party's point that wages and other benefits paid to drivers may be obtained by other parties and subtracted from the non-fuel rates.

[para 71] However, to be able to accurately calculate the "administration fees and profits" which the Third Party says it wishes to protect, then in addition to drivers' wages, one would have to know and be able to quantify each of the categories or components of the "non-fuel costs". It would also have to be possible to calculate a fairly precise figure for each category. This would include costs such as the following: costs to acquire vehicles and other equipment; costs for buildings and storage; maintenance costs for vehicles and buildings; insurance costs for vehicles, buildings and other equipment; other administrative support costs; etc. The Third Party has not explained how all of these component costs would be known to a competitor or other third party, or how they could be revealed by (or calculated from) the overall non-fuel rate set out in the record at issue or the non-fuel rate set out in the Third Party's bid proposal, which was agreed to and incorporated into the original Contract. Hence I am not persuaded that these other costs could be determined with the degree of certainty necessary to be used for the purposes underlying the Third Party's argument.

[para 72] The Third Party has argued that insurance and vehicle costs are "readily obtainable and calculable from public sources and inquiries" but didn't provide any additional detail as to how these costs could be obtained by another party. The Third Party has identified a source for the labour costs (the drivers themselves), which is plausible, but has not identified a source for insurance or other vehicle costs. I can appreciate that such costs may be similar between businesses in the industry such that a competitor may be able to make an educated guess regarding these costs. However, this is not the same as saying that those costs are inferable from the total and non-fuel rates in the record at issue. Alternatively, if this information was readily obtainable by a competitor, it is not clear why the Third Party is concerned about revealing it in the record at issue.

[para 73] Further, the Third Party has listed other costs that are contained in the non-fuel rates, such as equipment acquisition and maintenance costs, building and storage expenses, and overhead costs. It has not explained how these costs are inferable from the non-fuel rates, nor has

it explained how these costs could be calculated from the non-fuel rates, even if the Third Party's labour rates for the same time period were known.

[para 74] As stated above, the FOIP Act places the burden on the Third Party of proving that the Applicant has no right of access to the record at issue (section 71(3), reproduced at para. 14 above). In this case, the Third Party has argued that the non-fuel rates in the record at issue reveal the non-fuel rates in its proposal to the Public Body in response to the RFP. I have accepted that this is the case. However, for the reasons discussed at paragraphs 44-62, the fact that the Third Party's rates in its proposal were accepted by the Public Body and incorporated into the agreement means that this information is negotiated between the parties such that section 16(1)(b) does not apply.

[para 75] The exception to the above rule is where the information is or could reveal immutable information. The Third Party has argued that disclosing the non-fuel rates could reveal its underlying fixed costs. For the reasons discussed at paragraphs 63-74, I find that the Third Party has not provided sufficient reason for me to accept its argument that the non-fuel rates in the record at issue could lead to an accurate inference of its underlying costs or profit. Given this, I find that the non-fuel rates in the record at issue cannot be said to have been supplied by the Third Party within the terms of section 16(1)(b). As such, the fact that the total rates in the record at issue reveal the non-fuel rates does not mean that the total rates can be withheld under section 16(1).

Additional arguments of the Third Party

[para 76] Lastly I will address the Third Party's argument regarding a related legal proceeding. The Third Party notes that disclosure of its bid proposal to the Public Body was sought by a competitor as part of a legal proceeding. In that proceeding, an order was agreed to between the Public Body, Third Party and the competitor, such that the Third Party's bid proposal was provided to the competitor's legal counsel only, with limits placed on counsel's use or disclosure of information in that proposal.

[para 77] This does not affect the outcome of my decision. The Third Party's entire bid proposal documentation is not at issue in this inquiry; only the rates schedule, which may be revealed by the information in the record at issue, is relevant. Further, an access request under the FOIP Act is a separate process from discovery in a legal proceeding, and I have no information as to why the three parties came to the agreement they did regarding the Third Party's bid proposal that is relevant to my decision in this case.

Conclusion regarding the application of section 16(1)

[para 78] As I have found that the non-fuel rates and total rates are not information that was supplied by the Third Party within the terms of section 16(1)(b), I do not need to consider the remainder of the test for the application of section 16(1).

[para 79] I find that the non-fuel rates in the record at issue is not information to which section 16(1) applies. As the fuel rate is information supplied by the Public Body, section 16(1) also

cannot apply to that information. The total rates in the record at issue are made up of only the fuel rates and non-fuel rates; as section 16(1) does not apply to either of these rates, the total rate is also not information to which section 16(1) can apply.

[para 80] I will order the Public Body to disclose the responsive portion of the record at issue to the Applicant.

V. ORDER

[para 81] I make this Order under section 72 of the Act.

[para 82] I find that section 16(1) of the Act does not apply to the responsive information in the record at issue. I order the Public Body to disclose this information to the Applicant.

[para 83] I further order the Public Body to notify me and the Third Party in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

_____
Amanda Swanek
Adjudicator