ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2024-05

January 29, 2024

CITY OF EDMONTON

Case File Number 026502

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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 the Contract between the Public Body and PCL (the Third Party) for the construction of the LRT Metro Line Northwest.

The Public Body invited the Third Party to provide input regarding disclosure of the records relating to the Third Party. The Third Party proposed that specific information in the records be withheld under section 16(1). The Public Body informed the Third Party of its decisions regarding access, and the Third Party requested a review by this office of the Public Body's decision to disclose some information. The Third Party subsequently requested an inquiry.

The Adjudicator found that section 16(1) does not apply to the information at issue and ordered the Public Body to disclose it to the Applicant.

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

Orders Cited: AB: F2004-013, F2009-028, F2011-002, F2013-47, F2019-17, **BC:** F11-27, **Ont**: 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 (CanLII), *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 the Contract between the Public Body and PCL (the Third Party) for the construction of the LRT Metro Line Northwest (NAIT to Blatchford). The access request further specified that the Applicant was seeking the General Conditions, Supplementary General Conditions and the Special Provisions.

[para 2] The Public Body invited the Third Party to provide input regarding disclosure of the records relating to the Third Party. The Third Party proposed that specific information in the records be withheld under section 16(1). The Public Body informed the Third Party of its decisions regarding access, and the Third Party requested a review by this office of the Public Body's decision to disclose some information.

[para 3] The Commissioner assigned a senior information and privacy manager (SIPM) to investigate and attempt to settle the matter. At the conclusion of this process, the Third Party requested an inquiry.

[para 4] By letter dated July 27, 2023, the Third Party clarified the information in the records that it objects to being disclosed to the Applicant; this information appears on pages 3, 100, and 106 of the responsive records. This is the information at issue in this inquiry.

[para 5] The Applicant was invited to participate in the inquiry but did not respond to the invitation.

II. RECORDS AT ISSUE

[para 6] The record at issue consists of the Contract between the Third Party and the Public Body for the construction of the Metro Line LRT extension. The specific information at issue consists of monetary amounts appearing at pages 3, 100, and 106 of the Contract.

III. ISSUES

[para 7] The Notice of Inquiry, dated November 8, 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

Preliminary issue – Public Body's duty to the Applicant

[para 8] In the course of preparing this file for inquiry, I asked the Public Body whether it had provided copies of records to the Applicant that were not affected by the Third Party's objections to disclosure. The responsive record consists of a 233-page contract. The Public Body had decided to apply sections 16(1) and 25(1) to withhold discrete items of information in the record. The Third Party had objected to the disclosure of a few additional items of information in the record. The majority of the contract consists of information to which the Public Body has not applied an exception to access and the disclosure of which the Third Party has not objected.

[para 9] In a letter to the Public Body dated June 29, 2023, I said:

> In Order F2011-003, former Commissioner Work found that the FOIP Act does not permit a public body to cease processing an access request pending the outcome of a review of the application of section 16(1) (see also Order F2013-37). In other words, the Public Body's obligations under sections 12 and 13 of the Act continue to apply, requiring the Public Body to respond to the Applicant's request, including providing information to which no exceptions to access are being applied and/or information that is not at issue in this inquiry (i.e. that the Third Party has not objected to disclosing).
>
> Unless the Public Body is refusing access to the records in their entirety, the Public Body is required to respond to the Applicant by providing a copy of records containing information to which an exception has not been applied (or the disclosure of which the Third Party has not objected to). From the Public Body's response to my letter, it appears that the Public Body may not have done this.

[para 10] By letter dated July 20, 2023, I further explained:

> Where the Public Body has not applied section 16(1) (or any other exception to access) to information in the record *and* where the Third Party has had an opportunity to object to the disclosure of information in the record but has not, then there does not appear to be authority under the FOIP Act to continue to withhold that information from the Applicant. If the Public Body believes it is authorized or required to continue to withhold this information from the Applicant, I ask the Public Body to please clarify the source of that authority or requirement.

[para 11] Following this correspondence, the Public Body provided a response to the Applicant, providing pages of the contract that were not at issue. The Public Body also provided me with a copy of this response to the Applicant.

[para 12] This response indicates that the Public Body withheld pages 3, 100, and 106 from the Applicant in their entirety. These pages contain the information at issue in this inquiry. Specifically, the Third Party has objected to the disclosure of financial figures appearing on pages 3, 100 and 106. However, the Third Party has not objected to the disclosure of these pages in their entirety and the Public Body has not applied any exception to these pages in their entirety.

[para 13] I appreciate that the Public Body provided the Applicant with a copy of the pages of the Contract other than pages 3, 100 and 106 (with whatever exceptions the Public Body has

decided to apply to information in those pages). However, the Public Body continues to withhold information on pages 3, 100 and 106 to which the Public Body has not applied an exception to access, and the disclosure of which the Third Party has not objected. As explained in my letters, the Public Body does not appear to have any authority under the FOIP Act to continue to withhold that information from the Applicant awaiting the conclusion of this inquiry. While I can understand if the Public Body may believe it to be more efficient to provide a copy of these pages to the Applicant at the conclusion of this inquiry (i.e. once it is determined whether it must withhold or disclose the financial figures at issue here), that is not consistent with its obligations to the Applicant under the FOIP Act.

[para 14] The Public Body's response to the Applicant is not an issue in this inquiry and it has not made any submissions on this point. Therefore, I will not order the Public Body to undertake any particular action in this regard. However, I am recommending that the Public Body review its practices when dealing with third party objections in the course of processing access requests under the FOIP Act, to ensure that its practices are consistent with its obligations to applicants.

[para 15] For the reasons set out in the remainder of this Order, I will be ordering the Public Body to provide additional information to the Applicant such that the entirety of pages 3, 100, and 106 will be disclosed to the Applicant following this inquiry.

[para 16] However, should the Third Party apply for a judicial review of this Order such that the Public Body cannot disclose the information at issue in this inquiry to the Applicant until that judicial review proceeding has ended, the Public Body would still have an obligation under the FOIP Act to provide the Applicant with any information in pages 3, 100 and 106 to which the Public Body has not applied an exception to access and the disclosure of which the Third Party has not objected.

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

[para 17] 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 18] 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 19] 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 20] 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 21] 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 22] 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 23] The information the Third Party seeks to be withheld on pages 3, 100 and 106 all consist of financial amounts.

[para 24] The financial amounts on pages 3 and 100 are the Total Construction Management Fee (the Total Fee); page 3 also includes the sum of the Total Fee with GST. Based on the information before me, this Fee is the total compensation for the Construction Manager's (the Third Party's) costs, overhead and profit.

[para 25] The financial amount at issue on page 106 occurs twice; it is the "Core Management Team Sum". Page 106 includes a table listing the manager positions that are part of the Core Management Team. For each manager there is a weekly rate to be paid to that manager if certain specified circumstances exist. The weekly rates have been withheld by the Public Body and are not at issue in this inquiry. The Core Management Team Sum is not the total of all of the weekly rates.

[para 26] Neither the Third Party nor the Public Body have provided information about the context in which the table of weekly rates appears, or information about the Core Management Team Sum. However, the Public Body has provided this office with a complete copy of the entire Contract. The following discussion refers to information in the Contract to which the Public Body has not applied an exception and the disclosure of which the Third Party has not objected.

[para 27] The Core Management Team Sum on page 106, which is at issue in this inquiry, is part of Schedule A, in Section 6. While the Public Body has not provided any part of page 106 to the Applicant, the copy of the records before me also shows that the Public Body has decided not to withhold most of the information on that page, except the financial amounts.

[para 28] From what I understand, if the Public Body is satisfied with the Third Party's performance in the pre-construction phase of the project, the Public Body will ask the Third Party to provide a proposal for a contract price for the next phase of the project. Section 6 of Schedule A contemplates a circumstance that may or may not arise: if the Third Party is undertaking the next phase of the project but a contract has not yet been agreed to between the Public Body and Third Party for that phase, then the Public Body will pay the Third Party's Core Management Team pursuant to the weekly rates set out at page 106. However, the Contract stipulates that these payments for the Core Management Team will not exceed the Core Team Management Sum. In other words, the Third Party will be paid an amount equal to the weekly

rate for each member of the Core Management Team; however, the total payout from the Public Body for the duration of this scenario will not exceed the Core Management Team Sum. Presumably, the duration of this scenario is the time it takes for the parties to reach an agreement on a contract price for the construction phase of the project.

[para 29] With this background established, I will consider whether the Total Construction Management Fee and the Core Team Management Sum meet the test for section 16(1) to apply.

Section 16(1)(a)

[para 30] Section 16(1)(a) sets out the types of information to which this provision can apply.

[para 31] The Third Party argues that the financial amounts at issue are the Third Party's trade secret. Specifically, the Third Party argues that competitors would see this information to understand the Third Party's "strategy to 'win' the RFP scoring criteria, which qualifies as a strategy 'trade secret'" (November 24, 2022 letter attached to Request for Inquiry).

[para 32] Section 1(s) defines "trade secret" for the purposes of the FOIP Act. This provision states:

> *1 In this Act,*
>
> *...*
>
> *(s) "trade secret" means information, including a formula, pattern, compilation, program, device, product, method, technique or process*
>
> *(i) that is used, or may be used, in business or for any commercial purpose,*
>
> *(ii) that derives independent economic value, actual or potential, from not being generally known to anyone who can obtain economic value from its disclosure or use,*
>
> *(iii) that is the subject of reasonable efforts to prevent it from becoming generally known, and*
>
> *(iv) the disclosure of which would result in significant harm or undue financial loss or gain.*

[para 33] I will first consider whether the information falls within the terms of section 1(s) of the FOIP Act.

[para 34] The Third Party has not referred to the definition for 'trade secret' in section 1 of the FOIP Act, and has not explained how it is met in this case. It seems likely that the overall cost proposed by the Third Party in its bid was a significant factor in its being the successful bidder. However, the Total Construction Management Fee does not appear to consist of a formula, pattern, compilation etc. such that it meets the definition in section 1(s). It may be the case that the Total Construction Management Fee is the result of a formula, pattern, etc.; however, that

does not fulfill the requirements of the definition. It may also be the case that the Total Construction Management Fee could reveal an underlying formula, pattern, etc. If so, it is not clear from the records how this could be the case and the Third Party has not provided any support for such a conclusion. I find that the Total Construction Management Fee is not the Third Party's trade secret.

[para 35] The Third Party has also not explained how the Core Management Team Sum, which appears to be a cap on the total amount that will be paid by the Public Body to the Third Party for a particular service in the event that particular circumstances arise, can be characterized as the Third Party's trade secret. I find that it is not.

[para 36] The Third Party has also referred to the information at issue as financial and commercial information.

[para 37] 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 38] 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 39] I agree that the Total Construction Management Fee is the Third Party's commercial information as that phrase has been defined in past Orders.

[para 40] As the Core Management Team Sum appears to be a cap on total payments that will be made in a particular circumstance which may or may not arise, it is less clear that this financial figure constitutes the Third Party's commercial or financial information. However, for the reasons discussed below, I do not need to make a definitive finding on this point as this information does not meet the requirements of section 16(1)(b). For the purpose of the next section of this Order, I will assume that this information could be characterized as commercial or financial information of the Third Party.

Section 16(1)(b)

[para 41] 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.

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

[para 42] 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 43] 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 44] 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 45] 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). In that decision, the Court agreed that information in a negotiated contract might not be "supplied" by either party to the contract. The records at issue in that case consisted of a remediation agreement between parties, as well as attachments to that agreement. The Court said (at paras. 82-83, emphasis added):

> First of all, as previously noted, it is not the Remediation Agreement itself that must be the protected information. <u>There would be room to argue that negotiated contracts themselves are not "supplied" by either party to the agreement.</u> Imperial Oil did seek to prevent disclosure of the Remediation Agreement simply because it was an agreement,

> but that was based on it being privileged. 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] The Court's comments were summarized in Order F2015-03 (at para. 46):

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

[para 47] The Court in *ABC Benefits Corporation v. Alberta (Information and Privacy Commissioner)*, 2015 ABQB 662, made a similar point to the Court's in *Imperial Oil*: the fact that information appears in a contract or agreement does not 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 – the Total Construction Management Fee and Core Team Management Fee – can be withheld under section 16(1) only if they are either immutable, or reveal underlying non-negotiated information, as those exceptions have been discussed in *Imperial Oil* and *ABC Benefits*.

[para 51] In its Request for Inquiry, the Third Party specifies that the Contract includes "confidential information derived from the confidential RFP." In other words, the Third Party seems to argue that disclosing the information at issue would reveal underlying information that was supplied by the Third Party to the Public Body in confidence: namely, information provided in the Third Party's RFP (i.e. its bid proposal).

[para 52] The Third Party has argued that the relevant bid process was confidential; it states (November 24, 2022 attachment to the Request for Inquiry):

> The information was supplied to the Public Body (City of Edmonton) in confidence as a closed response to their request for proposal, which by nature, categorically implies confidentiality, as opposed to a public tender.

[para 53] The Public Body did not provide any information about the relevant bidding process.

[para 54] I will first consider the Total Construction Management Fee found on pages 3 and 100 of the records, then the Core Management Team Sum found on page 106.

Total Construction Management Fee

[para 55] The Total Construction Management Fee appears to be the total fee to be paid to the Third Party for the first phase of the project. The Third Party argues that disclosing this Fee will also disclose the amount included in its RFP. However, the case law from this office, as well as from other jurisdictions with substantially similar provisions, is clear that contract prices are negotiated information, even where the contract price is the unchanged from the price contained in the bid proposal. Therefore, based on the precedent set out above, the Total Construction Management Fee is negotiated information for the purposes of section 16(1)(b) *unless* it reveals immutable or otherwise non-negotiated information.

[para 56] Immutable information of an organization is information that is not subject to negotiation even when it is contained in the contract. In some cases, immutable or non-negotiated information, such as fixed costs or trade secrets, might be inferable from information in an agreement or contract, even if that immutable or non-negotiated information is not stated outright. In such a case, what would otherwise be negotiated information to which section 16(1) does not apply becomes information to which section 16(1) does apply, because of what can be inferred from that information. In this case, if the Total Construction Management Fee reveals immutable or otherwise non-negotiated information, then the conditions for section 16(1)(b) may be met.

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

[para 58] The Third Party has not provided any argument on the precedent set out above, nor has it provided any support for finding that this Total Construction Management Fee is immutable information. I have reviewed the Contract in its entirety, and it is not clear from that Contract how this Total Construction Management Fee could be characterized as immutable information.

[para 59] The Third Party has also not provided any reason to expect that this Total Construction Management Fee could reveal other non-negotiated information and a review of the Contract does not indicate that disclosing this Fee could reveal other non-negotiated information.

[para 60] Given this, the Third Party has not satisfied me that the Total Construction Management Fee appearing on pages 3 and 100 of the records at issue meets the requirements of section 16(1)(b).

Core Management Team Sum

[para 61] As discussed above, the Core Management Team Sum appearing in page 106 of the records appears to be a cap on the total payments that will be made to the Core Management Team in the event that particular circumstances arise.

[para 62] It is unclear that this cap would have been provided by the Third Party in its RFP. It seems just as likely to be a cap imposed by the Public Body during the contract negotiation process. I do not have copies of the Public Body's request for proposal documents so I do not know what the Public Body asked each bidder to provide in their proposals. It would have been helpful had the Public Body provided information about its bidding process.

[para 63] In any event, even if this figure were provided by the Third Party in its RFP, the same analysis applied to the Total Construction Management Fee applies equally here. The fact that this Core Management Team Sum appears in the Contract means that it is negotiated information, and not supplied within the terms of section 16(1)(b) unless it reveals immutable or other non-negotiated information.

[para 64] As with the Total Construction Management Fee, the Third Party has not provided any reason to expect that the Core Management Team Sum is immutable information; this is especially true as this Sum represents a *cap* on total payments, rather than any specific payment itself.

[para 65] The weekly amounts to be paid to each Core Management Team member appearing on page 106 have been withheld by the Public Body under sections 16(1) and 25(1) and are not at issue in this inquiry. While the Third Party has not said as much, it might be argued that disclosing the Core Management Team Sum could reveal the weekly rate for each of the Core Management Team members, which has been withheld on page 106. However, there is no

indication in the Contract how long payments will be made to the Core Management Team if the particular circumstances arise. The only information is the cap the on the total that will be paid to this Team (i.e. the Core Management Team Sum). In other words, disclosing the Core Management Team Sum would not appear to permit a person to calculate any of the weekly amounts to be paid to any Core Management Team member, or even the total weekly amount to be paid to the Core Management Team as a whole.

[para 66] Therefore, the Third Party has not satisfied me that the Core Management Team Sum appearing on page 106 of the records at issue meets the requirements of section 16(1)(b).

Conclusion regarding the application of section 16(1)

[para 67] As I have found that the Total Construction Management Fee and the Core Management Team Sum 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 68] I find that the Total Construction Management Fee and the Core Management Team Sum in the record at issue is not information to which section 16(1) applies.

[para 69] I will order the Public Body to disclose this information to the Applicant.

V. ORDER

[para 70] I make this Order under section 72 of the Act.

[para 71] I find that section 16(1) of the Act does not apply to the Total Construction Management Fee and the Core Management Team Sum appearing at pages 3, 100 and 106 of the records at issue. I order the Public Body to disclose this information to the Applicant.

[para 72] 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.

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Amanda Swanek
Adjudicator