Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3266

Appeal PA12-105

Ontario Power Generation

October 23, 2013

Summary: The requester sought access to two agreements relating to the provision of transportation and customs brokerage management services by a third party to OPG. OPG granted full access to the two agreements. The third party appealed OPG's decision, arguing that the agreements were exempt under the mandatory third party information exemption in section 17(1). During the inquiry, the third party consented to some disclosures under section 17(3). OPG issued a revised decision accordingly, disclosing those portions of the records to the requester. In this order, the adjudicator finds that section 17(1) does not apply, upholds OPG's decision, and orders OPG to disclose the remaining portions of the records to the requester.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1)(a)-(c) and 28(1)(a).

Orders and Investigation Reports Considered: Orders PO-2371, PO-2632, PO-3038 and MO-2070.

Cases Considered: *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* [2002] B.C.J. No. 848 (S.C.).

OVERVIEW:

[1] This order addresses the issues raised by an individual's request to Ontario Power Generation (OPG) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> …a copy of the current agreement between OPG and the third party logistics provider [named company], including all rates & pricing agreed upon as of Nov. 21, 2011. A copy of the previous agreement that was in force until August 2011 is also required please.

[2] OPG notified the (third party) company named in the request under section 28(1)(a) of the *Act* to provide it with an opportunity to make submissions respecting disclosure of the agreements. After reviewing the third party's submissions opposing disclosure, OPG issued a decision granting the requester access to the responsive records, in their entirety.

[3] The third party appealed OPG's decision to this office, and a mediator was appointed to explore resolution. As a mediated resolution was not possible, the appeal was transferred to the adjudication stage for an inquiry under the *Act*. This office sent a Notice of Inquiry to OPG and to the third party appellant, initially, seeking representations. OPG declined to submit representations, advising that because of its view that section 17(1) did not apply to the records, it would "leave it to the appellant to demonstrate to the adjudicator's satisfaction that section 17 … applies." The appellant submitted representations.

[4] At that time, the appeal was transferred to me to continue the inquiry. It was necessary to resolve issues with the numbering and order of the records and their concordance with the third party appellant's representations. Contemporaneously with the resolution of these matters, the appellant advised that it was taking a revised position on disclosure. Following discussion with staff from this office, the appellant provided notice to OPG that it consented to further disclosure of the information in the records, pursuant to section 17(3) of the *Act.*

[5] Based on the appellant's revised position, this office also contacted the original requester to discuss the nature of the information to be disclosed. The original requester removed certain WSIB and health and safety information contained in the records from the scope of the appeal.[1] Once other matters related to the third party appellant's consent were resolved, OPG issued a revised decision letter to the original requester. After receiving the required fee, OPG provided the original requester with copies of the records for which the appellant's consent had been obtained. As the

[1] This information includes the third party appellant's WSIB numbers (at page 17 of the 2008 agreement and page 19 of the 2011 agreement) and its Health and Safety/Drug & Alcohol Policies and Procedures (2011 agreement, Attachment B, pp. 10-64).

original requester was not satisfied by the disclosed information, I sent him a modified Notice of Inquiry, along with the non-confidential representations of the appellant, seeking his representations. The original requester submitted brief representations for my consideration. During the preparation of this order, the requester also removed certain other information from the scope of his appeal.[2]

[6] In this order, I find that section 17(1) of the *Act* does not apply to the undisclosed information at issue, and I uphold OPG's decision to disclose the records, in their entirety, to the requester.

RECORDS:

[7] At issue are portions of two Transportation Management Services Agreements, dated September 2008 and September 2011.

ISSUES:

Preliminary Issue: Notification of the third party appellant's subcontractors

Does the mandatory exemption for confidential third party information in section 17(1) of the *Act* apply to the undisclosed portions of the agreements at issue?

DISCUSSION:

Preliminary Issue: Notification of third party appellant's subcontractors

[8] The appellant argued that I ought to notify the subcontractors who provide the logistics and transportation services to OPG on its behalf, in order to offer them an opportunity to make submissions in this appeal.[3] The appellant submits, for example, that:

> These companies surely did not consider that their negotiated rates with [the appellant] could be producible as a result of a contract between [the appellant] and a government entity, and therefore it would offend basic principles of privacy to make those documents public without at least inviting representations from those third parties.

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[2] Schedule 1.1(aa) to the 2011 agreement (Scope of Work): Attachment A, Bill of Lading and terms and conditions; and Attachment C, Certificate of Insurance.

[3] The definition of subcontractor in the 2011 agreement states: "Subcontractor means a Person … who supplies Services to OPG under an agreement with [the appellant], another Subcontractor or a combination of [the appellant] and another Subcontractor." The appellant's submissions appear as a preliminary matter and as part of its representations on the second and third parts of the section 17(1).

[9] Section 28(1) of the *Act* outlines an institution's obligations to notify an affected party where a record to be disclosed might contain information referred to in section 17(1), or where disclosure of information might constitute an unjustified invasion of personal privacy under section 21(1).[4] In this matter, OPG notified the third party, as the signatory of the agreements with OPG. OPG did not notify the third party's subcontractors. There is no evidence before me of a request for notification of the subcontractors, either during the initial processing of the request by OPG, or during the earlier stages of the appeal with this office. It appears that the request to notify the appellant's subcontractors was first made during the adjudication stage of the appeal. Notification during an inquiry occurs under the *IPC Code of Procedure*. The relevant provisions state:

> 7.06 In an appeal involving an affected person or persons,[5] the Adjudicator *may* send a Notice of Inquiry to the affected person or persons when their interests are engaged.
>
> 13.01 The IPC *may* notify and invite representations from any individual or organization who may be able to present useful information to aid in the disposition of an appeal.

[10] Evident from the wording of sections 7.06 and 13.01, above, is the fact that any decision to notify is discretionary. I considered the third party appellant's request that I ought to notify its subcontractors, along with the nature of their relationships with the appellant. With regard to the information remaining at issue, and as discussed in this order, I concluded that the information actually at issue does not include information about the subcontractors' fee arrangements with the appellant. I considered past practices of this office with regard to notification of persons or parties that are, themselves, not signatories to an agreement with an institution. I also considered the potential impact of such notification on the inquiry process. In the circumstances of this appeal, I exercised my discretion against granting the third party appellant's request that I notify and seek representations from its subcontractors.

Does the mandatory exemption for confidential third party information in section 17(1) of the *Act* apply to the undisclosed portions of the agreements?

[11] The third party claims that certain portions of the two transportation management services agreements that it signed with OPG are exempt under section

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[4] Relevant in this appeal is section 28(1)(a), which states: "Before a head grants a request for access to a record, that the head has reason to believe might contain information referred to in subsection 17(1) that affects the interest of a person other than the person requesting information … the head shall give written notice in accordance with subsection (2) to the person to whom the information relates."

[5] An "affected person" is defined in the *Code* as "an individual or organization whose interests may be affected by an appeal."

17(1) of the *Act*. The information remaining at issue includes the schedules outlining freight rates and service fees and the 2011 contract end date.

[12] I note that there were differences between the records submitted to this office by OPG and those submitted with the third party's representations. These discrepancies are found mainly in the versions of the 2008 agreement. Upon request, the third party provided an explanation comparing and contrasting its version with that provided by OPG.[6] For the purpose of my review under section 17(1), I confirm that I will be considering the undisclosed information as submitted by the third party, since it is only this party objecting to disclosure.

[13] The relevant parts of section 17(1) state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied; or
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or …

[14] Section 17(1) of the *Act* recognizes that in the course of carrying out public responsibilities, institutions sometimes receive information about the activities of private businesses. The intent of section 17(1) is to protect the confidential "informational assets" of businesses or other organizations that provide information to such government institutions.[7]

[15] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[8]

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[6] The appellant states that "Where the schedules to OPG's version of the 2008 agreement differ from those in [the appellant's] version, we are advised [by OPG] that [the appellant's] version is accurate and that it representations the agreement entered into between OPG and [the appellant] in 2008.

[7] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade),* [2005] O.J. No. 2851 (Div. Ct.); motion for leave to appeal dismissed, Doc.M32858 (C.A.).

[8] Orders PO-1805, PO-2018, PO-2371 and MO-1706.

[16] Section 53 of the *Act* provides that the burden of proof that a record falls within one of the specified exemptions in the *Act* lies with the head of the institution. Third parties who rely on the exemption provided by section 17(1) of the *Act* share the onus of proving that the exemption applies.[9] OPG's decision was to disclose the agreements, in their entirety. The only party resisting disclosure of the records in this appeal, therefore, is the company with which OPG signed the contracts. Consequently, the onus of proving that section 17(1) applies to the undisclosed information lies with the third party.

[17] For section 17(1) to apply, I must be satisfied that each part of the following three-part test is met:

> 1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
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> 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
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> 3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) or (d) of section 17(1) will occur.

[18] For the reasons set out below, I find that section 17(1) does not apply.

Part 1: type of information

[19] The first requirement in the test for exemption under section 17(1) is that the records must contain one of the listed types of information.

[20] The appellant submits that the information sought "relates to a number of categories of information that are subject to protection" under section 17(1), including technical, commercial and financial information and trade secrets.[10] The appellant sets out the definitions of these first three types of information and relates them to the information at issue in the appeal. The appellant states:

> All of the information in issue was supplied by [the appellant] in its responses to two RFPs issued by OPG (one in 2008 and another in 2011) for the provision of transportation management services. As such, all of the information relates to a proposed commercial enterprise to be entered into between OPG and the successful bidder and, in particular, to the

[9] Order P-203.

[10] The appellant's representations do not address "trade secret" information as that type has been considered in past orders such as Order PO-2010. The submissions that allude to this type of information relate to health and safety policies and procedures that are no longer at issue.

> marketing and sale of [the appellant's] services. Such information has been recognized by the IPC to qualify as commercial information…

[21] Respecting its service fees and freight rates,[11] including the "existing rates separately negotiated" with its own third party suppliers, the appellant submits that the information qualifies as financial and commercial information.

[22] The original requester does not specifically address the type of information in the records, except to say that he does not accept that the "historical details" he is requesting should "be considered to contain such details that [are in] the nature of 'trade secrets'." The requester also submits that:

> The object of the agreement was for a third party to provide Transportation Management Services for OPG. What could possibly be "a trade secret or scientific, technical, commercial, financial or labour relations information" so unique to this one organization as to how that is carried out?

Analysis and findings

[23] Although the appellant's representations also refer to the undisclosed portions of the records containing technical information, I find that there is nothing in those portions that could be said to relate to the construction, operation or maintenance of a structure, process, equipment or thing in the fields of applied sciences or mechanical arts.[12] However, I am satisfied that these records contain commercial and financial information, and I adopt the following definitions of these types from past orders:

> *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 (Order 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).

[11] Service Rates and Fees Schedule: Schedule 1.1(ee) in 2008 agreement and Schedule 1.1(gg) in 2011 agreement.
[12] According to the definition discussed in Order PO-2010 and adopted in many orders.

[24] Based on my review of the undisclosed portions of the two agreements at issue, I am satisfied that the undisclosed portions of the agreements and schedules outline the terms, and certain conditions, of the buying, selling or exchange of services by OPG with respect to the appellant. These records represent the formalizing of the commercial relationship between OPG and the appellant for transportation management services. Accordingly, I find that the records contain "commercial information" for the purpose of part 1 of the test in section 17(1).

[25] I am also satisfied that the records contain the financial information of the appellant for the purposes of the first part of the test under section 17(1). In particular, the service fees and rates in the schedules to both agreements include specific details about the scales to be applied to OPG's payments to the appellant under the contracts.

[26] Accordingly, I find that the requirements of part 1 of the section 17(1) test have been met because the records contain commercial information, as well as some financial information. I will now consider whether the records qualify as having been "supplied in confidence" to OPG for the purpose of part 2 of the test in section 17(1).

Part 2: supplied in confidence

[27] In order for me to find that the second part of the test under section 17(1) has been met, I must be satisfied by the evidence that the appellant "supplied" the information at issue to OPG in confidence, either implicitly or explicitly.

[28] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[13] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[14]

[29] The contents of a contract involving an institution and a third party will not usually qualify as having been "supplied" for the purpose of section 17(1) because contracts are viewed as mutually generated, rather than "supplied" by the third party. This is the case even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. Another way of expressing this is that, except in unusual circumstances, agreed-upon essential terms of a contract are considered to be the product of a negotiation process and are not, therefore, considered to be "supplied."[15] This approach was approved by the

[13] Order MO-1706.
[14] Orders PO-2020 and PO-2043.
[15] Orders MO-1706, PO-2371 and PO-2384.

Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, and several other decisions.[16]

[30] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by a third party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products.[17]

[31] In order to satisfy the "in confidence" component of part two, the party resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[18]

Representations

[32] The appellant's representations on the second part of the test under section 17(1) begin with submissions on the confidential nature of the agreements, relying on provisions contained in each the main agreements that define "confidential information."[19] Following a lengthy excerpt from the 2011 provision, the appellant emphasizes the reasonableness of its expectation that the information in the agreements would be kept confidential, "except in limited circumstances which are not met in this case." These arguments are developed more fully by the appellant, and I have considered them, in their entirety.

[33] On the "supplied" issue, the appellant submits that the undisclosed information falls within the two exceptions to the general rule that the contents of a contract between an institution and a third party are not considered to have been "supplied." In particular, the appellant submits that the information is "immutable" or subject to the "inferred disclosure" exception and should, therefore, be treated as having been supplied by it to OPG for the purpose of part two of the test under section 17(1). The appellant adds that all of the information was supplied by it to OPG in the tendering process and it appears in "the same (or substantially the same) form … in the ultimate contract between the parties."

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[16] *Supra*, footnote 6. See also Orders PO-2018, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan*, [2008] O.J. No. 2243 (Div. Ct.) and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, [2008] O.J. No. 3475 (Div. Ct.) (*CMPA*).

[17] Orders MO-1706, PO-2384, PO-2435 and PO-2497 upheld in *Canadian Medical Protective Association v. Loukidelis*, (cited above).

[18] Order PO-2020.

[19] Section 2.09 in the 2008 agreement and section 2.10 in the 2011 agreement.

[34] With respect to its freight and service rates, the appellant argues that these are "immutable," or fixed underlying costs, as discussed in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner).*[20] The appellant submits that the freight rates are non-negotiated and are analogous to "labour costs already set out in a collective agreement," an example mentioned by the court in *CPR,* because they represent rates in service contracts with its own various third party service providers. The appellant also submits that the rates:

> "determine a floor for a financial term in the contract" between [the appellant] and OPG, in the sense that the fees and rates provided by [the appellant] to OPG and incorporated into the Agreement are [the appellant's] freight costs (under its arrangements with third party carriers), subject to a standard "mark-up." [The appellant's] Management Fee is then calculated as a percentage of each invoice value, not including duties or taxes.

[35] The appellant argues that the rates – based on the fee arrangements in place with its suppliers - ought to be considered "supplied" under the inferred disclosure exception because their disclosure:

> … would allow a person knowledgeable about the transportation management industry to determine those fee arrangements [and the appellant's costs] by reviewing the service fee and rate information together with other publicly available financial information included in [the appellant's] Annual Reports.

[36] According to the appellant, its freight rates are distinguishable from other pricing in appeals with this office, where the sought after rates represented what the contracting third party was charging the government for the provision of services. The appellant argues that, unlike the rates in those situations (Order PO-2522) or *per diem* rates discussed in Order PO-2435, the freight rates at issue here are:

> … precisely [the appellant's] underlying fixed costs that have been negotiated with external providers (subject to [the appellant's] mark-up). They are not the per diem service charge that OPG would actually pay in respect of freight as other costs are incorporated into that total, including management fees.

[37] The original requester, while not specifically addressing the requirement that information be "supplied" under section 17(1), comments on the third party appellant's expectations in this situation. The requester states:

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[20] [2002] B.C.J. No. 848 (*CPR*). The appellant also relies on Orders PO-2371, PO-3038, MO-2299 and MO-2070.

> I am surprised at the response of the third party since any company that enters into a tender/negotiation of service agreement with a public company must understand that the records of any such agreement would become part of the public forum. … In addition, any 4th party suppliers included in the tender information or pricing submissions made to OPG would also understand that they are carrying out their contract/agreement or services rendered on behalf of [the appellant] for Ontario Power Generation and that these services/practices and costs would become part of the public record as well.

Analysis and findings

[38] At issue in this appeal are portions of the agreements signed by OPG in 2008 and 2011 with the appellant for transportation management services, particularly the rates that determine what OPG must pay to the appellant for various services provided under the agreements.

[39] In numerous past orders, agreements between institutions and third parties have been held not to reveal or contain information "supplied" by the third party because the contract is considered to represent the written expression of agreement between two parties. Although the terms of a contract may reveal information about what each of the parties was willing to agree to in order to enter into the arrangement with the other party, this information is not, in and of itself, considered to comprise the type of "informational asset" sought to be protected by section 17(1).[21]

[40] Section 17(1) protects sensitive business information in a contract only where it is demonstrably the same confidential "informational asset" originally supplied by a third party, and not where the evidence points to that same information representing the negotiated intention of the parties.[22] Section 17(1)'s protection of the "informational assets" of a third party, therefore, requires review of the quality and nature of the information in the particular circumstances of each case to make this determination.

[41] Based on my consideration of past orders, the representations of the third party appellant, and the information, I am not satisfied that there is anything unique about the undisclosed information in this appeal, such that it qualifies as "supplied" under section 17(1).

[42] In a previous decision regarding a contract entered into by OPG with an IT service provider, I stated the following about third party pricing:

> … I would reject the suggestion that immunity [from disclosure] should be created for information relating to the Company's, or other affected

[21] Orders PO-2018 and PO-2632.
[22] Order MO-1450.

> parties', pricing. In my view, where this information appears in the records, … it represents the clear contractual expectations of the parties regarding costing and payment for the performance of the terms of the Agreements and the associated service sub-contracts. If the pricing or rates submitted by the Company or other affected parties had been deemed by OPG to be too high, or otherwise unacceptable, OPG was in a position to accept or reject them. This is the form of negotiation envisaged by Assistant Commissioner Beamish in Order PO-2435. In my view, this information constitutes the key negotiated terms of the Agreements, and sub-contracts, and it was not, therefore, "supplied".[23]

[43] I accept and apply this line of reasoning in this appeal. I am not persuaded by the appellant's representations that the freight rates and service fee information is unique, or that it represents anything other than the contractually-confirmed intentions of the parties regarding payment for the provision of logistics services to OPG by the appellant. Even if, as asserted by the appellant, the rates appear in the same, or substantially the same, form in the agreement schedules as in its bid during the RFP phase, it does not change the presumption that their inclusion in "the ultimate contract between the parties" reflects the mutually agreed-upon terms upon which the appellant would be paid for its services. On a similar basis, I find that the termination date of the second (2011) agreement was not "supplied" by the appellant because it, too, represents a mutually agreed-upon term of the agreement between the two parties.[24] These findings are consistent with the *Boeing* case, cited above, and the line of orders that have confirmed an interpretation of the term "supplied" that supports the transparency purposes of the *Act.*

[44] In relation to the exceptions to the "supplied" rule described previously, I also find that I have not been provided with sufficient evidence to conclude that the freight and service rates, or the end-date of the 2011 agreement, reflect the appellant's "immutable" or fixed underlying costs, or that disclosure would somehow permit accurate inferences to be drawn about other, non-negotiated confidential information of the appellant.

[45] The appellant suggests that the freight rates and service fees are "immutable" because they are dependent on its business arrangements with suppliers and/or sub-contractors. The appellant relies on several Ontario orders, including Order PO-2371, and the Supreme Court of British Columbia case in *CPR*, cited above, which arose from the judicial review of a decision of the BC Information and Privacy Commissioner's office. However, the Ontario orders and the *CPR* decision are clear that this particular exemption is intended to protect information belonging to a third party that *cannot*

[23] Order PO-2632 at page 34.
[24] See also Order PO-2806.

change through negotiation, not that which could, *but was not*, changed.[25] I note also that the appellant refers to Orders PO-3038 and MO-2070, among others, in support of its position on the immutability of the freight rates. However, the information at issue in those orders consisted of a confidential customer list belonging to each of the third party appellants. These customer lists were considered to be "immutable," thus fitting within the exception and qualifying as "supplied." The information at issue in this appeal differs, and the findings in Orders PO-3038 and MO-2070 are distinguishable accordingly.

[46] In the circumstances of this appeal, I am not persuaded that the payments prescribed in the schedules to both agreements represent the appellant's "fixed costs" or "a floor for a financial term in the contract" in the sense contemplated in past orders that addressed this argument. Indeed, the language of each agreement clearly contemplates that the pricing is subject to change, pursuant to the triggering of an agreed-upon process.[26] This can be seen from a review of the portions of the 2008 and 2011 agreements already disclosed. Section 6.3(a) of the 2008 agreement [6.2(a) of the 2011 agreement], for example, refer to the "detailed rate and fee listing" in the service rate and fee schedules at issue in this appeal as "negotiated rates" that are only to be changed "as provided under this Agreement." Section 6.4(a) of the 2008 agreement allows for changes to service rates by the appellant upon 30 days written notice "to allow OPG to validate the information supporting the new rate or fee" and provides that the new rate will apply "upon written acceptance by OPG upon a date mutually agreeable to the Parties."[27] In my view, these provisions support the conclusion that the undisclosed freight rates and service fees are not "immutable," because they are subject to change according to the parties' mutual intentions, as expressly contemplated by the provisions in each agreement. I find that the "immutable" exception does not apply to the rates or to the end-date of the 2011 agreement.

[47] In addition, I conclude that the evidence is not sufficiently persuasive to enable me to find that disclosure of the rate information or the end-date of the 2011 agreement would permit the drawing of accurate inferences of underlying non-negotiated confidential information belonging to the appellant. Specifically, I am not satisfied by the evidence that the proposed disclosures of the "service fee and rate information together with other publicly available financial information" could allow inferences to be drawn about the appellant's "specialized financial models," its pricing strategies or otherwise provide specific insight into the appellant's own fee arrangements with its fourth party service providers. Even if some details of the arrangements between the appellant and fourth party providers could somehow be

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[25] See *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, *supra*; Orders PO-2371, PO-2435 and PO-2497, upheld in *CMPA, supra*.

[26] Section 6 of both agreements (Rates/Fees and Changes to Rates and Fees), as already disclosed.

[27] An exception is made for price adjustments relating to OPG's disqualification of a service provider pursuant to section 2.7(f).

inferred by an assiduous inquirer, I find that the "inferred disclosure" exception does not apply with respect to the undisclosed information the appellant claims it supplied to OPG in forming their 2008 and 2011 contracts.

[48] In sum, I find that the freight and service rates and the 2011 contract end date were not "supplied" within the meaning ascribed to that term in section 17(1) of the *Act*. All three parts of the test for exemption under section 17(1) must be met. Since the rates and service fees and the 2011 agreement termination date do not meet the requirements of the "supplied" portion of part 2 of the test, I find that this information is not exempt under section 17(1), and I uphold the OPG's decision to disclose it.

ORDER:

1. I order OPG to disclose the remaining undisclosed *responsive* portions of the agreements to the original requester by sending him a copy by **November 28, 2013**, but not earlier than **November 25, 2013**.

2. In order to verify compliance with this order, I reserve the right to require OPG to provide me with a copy of the records disclosed to the requester in accordance with provision 1 above.

Original signed by: October 23, 2013
Daphne Loukidelis
Adjudicator