Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3577

Appeal MA14-550

Regional Municipality of Waterloo

March 23, 2018

Summary: A journalist appealed a Regional Municipality of Waterloo (region) decision to deny access to portions of a project agreement for light rail transit in Kitchener-Waterloo. This order finds that the financial model at Schedule 32 of the agreement is in the custody or control of the region. The section 10(1) exemption for third party information does not apply to the withheld information because it is negotiated not supplied. The withheld information is ordered disclosed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1).

Orders and Investigation Reports Considered: Order MO-1706, PO-2435, PO-2018, PO-3598, PO-2384, PO-3011, PO-3072-R, MO-2671, PO-2433, Order 01-20, 2001 CanLII 21574 (BC IPC).

Cases Considered: *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner), 2011 ONSC 172 (CanLII); Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII); *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, 2005 CanLII 24249 (ON SCDC), leave to appeal dismissed, Doc. M32858 (C.A.).

OVERVIEW:

[1] Following a Request for Qualification process, the Regional Municipality of

Waterloo (the region) selected three teams to respond to a Request for Proposal (RFP) for a delivery model for light rail transit (LRT) in Kitchener-Waterloo. The LRT project is now known publically as ION. The region determined the purpose and scope of the project and required a private sector partner to submit a proposal to design, construct, finance, operate and maintain the LRT service in accordance with the requirements in the RFP. The affected party, as the successful proponent, entered into a project agreement (PA) with the region for the project.

[2] Most of the content of the highly detailed PA between the region and the affected party, which includes more than thirty schedules, is publically available on a website the region maintains for ION.

[3] The appellant, a journalist, submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the region for access to certain portions of the PA, including the financial model for the project, that the region withheld in the version of the agreement available on its website.

[4] In accordance with section 21(1)(a) of the *Act*, the region invited third parties whose interests it considered may be affected by disclosure of the information to provide their views on whether to disclose the requested information. The region then issued a decision, granting partial access to the records and relying on sections 10(1) (third party information) and 11 (economic or other interests) of the *Act* to withhold the remaining information.

[5] The appellant appealed the region's decision to this office. During mediation, the appellant explained it objected to the region withholding information under sections 10(1) and 11 and argued there was a public interest in disclosing the records under section 16 of the *Act*. The appellant also narrowed the scope of the appeal to pursue access only to specified parts of schedules 1 (page 3), 20 (pages 16-18, 28-35), 21 (page 11) and 25 (pages 12-13, 16-17, 20, 39, 40), and schedules 32 and 35, in their entirety.

[6] After further mediation, the region issued a revised access decision disclosing Schedule 35 entirely, and Schedules 1 and 21 in part.

[7] As mediation did not resolve all of the issues, the appeal proceeded to the adjudication stage, where an adjudicator conducts an inquiry.

[8] The inquiry began by sending a Notice of Inquiry outlining the remaining unresolved issues to the region and the affected party, inviting representations. The affected party was invited to provide representations on section 10(1), while the region was invited to provide submissions on section 11 and its exercise of discretion in claiming that exemption, in addition to sections 10(1) and 16.

[9] In its response to the Notice of Inquiry, the region withdrew its reliance on the section 11 exemption. Accordingly, the region issued a revised decision disclosing

Schedule 25, which had been withheld under section 11. The affected party also decided to revise its position and consented to disclosing additional portions of Schedules 1, 20 and 21. The region issued another revised decision making these disclosures.

[10] After reviewing the additional disclosures, the appellant decided to pursue access to the remaining withheld information. Accordingly, a Notice of Inquiry and copies of the representations submitted by the region and the affected party were sent to the appellant. Portions of those representations were withheld applying the confidentiality criteria in *IPC Practice Direction 7.*

[11] The affected party's representations raised a new argument, that Schedule 32 (Financial Model Excerpts) is not in the custody or under the control of the region and therefore not subject to the *Act.* The appellant was not asked to provide representations on this issue at that time.

[12] The appellant provided representations, and the region and the third party were provided with a copy of the appellant's non-confidential representations and invited to provide reply representations on the application of sections 10(1) and 16.

[13] The affected party's initial representations that raised the custody or control issue respecting Schedule 32 (Financial Model Excerpts) were shared with the region. The region and the affected party were invited to provide submissions on the issue of custody or control. The affected party provided further arguments on the issue, and on the other issues in the inquiry. The region declined to submit further representations, stating that it did not wish to comment on the custody or control issue.

[14] Finally, the appellant was given the opportunity to review and comment on the affected party's reply submissions on sections 10(1) and 16, as well as the issue of whether Schedule 32 (Financial Model Excerpts) is in the custody or under the control of the region. The appellant provided further representations in response.

[15] This order finds that the Schedule 32 financial model is in the custody or control of the region, and that section 10(1) does not apply to the withheld information.

RECORDS:

[16] Following the narrowing of the scope of the appellant's request and subsequent disclosures, the sections in the PA that contain information that remains at issue are the undisclosed portions of:

- Schedule 1 - Definitions;
- Schedule 20 - Payment Mechanism;

- Schedule 21 - Columns A - E of the Construction Period Payments table; and
- Schedule 32 - Financial Model Extracts (which has been withheld in full).

[17] In particular, the information in these records at issue is:

- at page 3 of Schedule 1, titled "Definitions", the percentage value contained in the definition of "Base Case Equity IRR";
- in Schedule 20, titled "Payment Mechanism", the escalation factor percentage weightings in the table in section 4.1 at the top of page 17 and the monthly service payment amounts for each contract month for the maintenance and operations components of the agreement that are used in calculating the monthly service payments for each contract month for Baseline Service Plans 2-7. This information is contained in a table in Part G, section 14.1 on pages 28-31 (maintenance amounts only), and in a table in Appendix A, section 1.1 at pages 32-35;
- the breakdown of construction and non-construction costs in columns A, B, C, C-1, D and E of Table A1: Capitalized Cost of Construction, Milestone Payments and Substantial Completion Payment in Attachment A at page 11 of Schedule 21, titled "Construction Period Payments". The affected party states that the title and totals for each of these five columns have been disclosed so that information is not at issue; and
- Schedule 32, titled "Financial Model Extracts" which contains the financial model for the agreement. The affected party's initial representations acknowledge that excerpts of the financial model are cited and have been made public in other schedules but do not elaborate further on the implications of this on its position that the financial model should be withheld.

ISSUES:

[18] The issues in this appeal are:

A. Is Schedule 32 of the project agreement "in the custody" or "under the control" of the region under section 4(1)?

B. Does the mandatory exemption at section 10(1) apply to the records?

C. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 10(1) exemption?

DISCUSSION:

A. Is Schedule 32 of the project agreement "in the custody" or "under the control" of the region under section 4(1)?

[19] During the inquiry, the affected party raised an argument that Schedule 32 is not in the custody or under the control of the region and therefore not subject to the *Act*.

[20] Section 4(1) reads, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[21] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution.

[22] A record will be subject to the *Act* if it is in the custody OR under the control of an institution; it need not be both.[1]

[23] The courts and this office have applied a broad and liberal approach to the custody or control question.[2]

Parties' arguments

[24] The affected party argues the region did not have custody or control of the financial model (Schedule 32). The region was invited to address the issue but chose not to.

[25] The affected party says that section 36 of the PA provides that

- the region does not have possession of the financial model and
- has no responsibility for its care and protection.

[26] The affected party also submits that section 36 provides that the financial model

- is a record generated by the affected party and
- that it is to be held separately from the region by a third party custodian, under the terms set out in the custody agreement (Schedule 3 of the PA).

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[1] Order P-239 and *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner), 2011 ONSC 172 (CanLII)*.

[2] *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.) and Order MO-1251.

[27] The affected party refers to provisions in the custody agreement that suggest the region's powers regarding the financial model are limited. It is not necessary for me to outline in detail the provisions in the custody agreement here.

[28] The appellant argues that Section 36 and Schedule 3, supported by Schedule 40, establish that the region has custody and control of the financial model. It also cites the Supreme Court of Canada's two-part test in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [3] on the question of whether an institution has control of records that are not in its physical possession:

> (1) Do the contents of the document relate to a departmental matter?
>
> (2) Could the government institution reasonably expect to obtain a copy of the document upon request?

[29] The appellant says that both elements of the test are met.

Analysis

[30] I am satisfied that the region has custody or control of the financial model. Section 36 of the PA states:

> 36.2 Delivery and Use of Financial Model
>
> (a) In accordance with Schedule 2 – Completion Documents, Project Co shall deliver copies of the Financial Model (1 printed copy and 2 copies on CD-Rom) to the Region and the Custodian to be held in custody on terms to be agreed by the Parties.
>
> (b) Following the approval by the Region of any amendment to the Financial Model, Project Co shall promptly deliver copies of the revised Financial Model, in the same form as the original Financial Model (or such other form as may be agreed by the Parties from time to time), to the Region and the Custodian.
>
> …
>
> (d) Project Co hereby grants to the Region an irrevocable, royalty free, perpetual, non-exclusive and transferable licence, including the right to grant sub-licences, to use the Financial Model or any revised Financial Model for any purpose in connection with this Project Agreement, whether during or after the Project Term.

[31] On their plain and ordinary meaning, sections 36.2 (a) and (b) clearly provide for

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[3] 2011 SCC 25, [2011] 2 SCR 306.

the region to have a copy of the financial model. Section 36.2(d) confirms the region's ability to use the copy of the financial model it has.

[32] The affected party emphasises the provisions of Section 36 of the agreement that provides for a copy of the financial model to be held by a custodian. Schedule 3 to the agreement provides further details on how that custody model works. It is clear from Section 36 that the custodian arrangement complements, rather than negates, the region's rights with respect to the financial model. The fact that the project agreement provides for a custodian to also keep copies of the financial model is not inconsistent with the region having custody of the financial model. In fact, section 36.2 (a) and (b) clearly provide for both the region and the custodian to have copies of it. Given that the custodian and the region's right of access to the financial model originate in the same provisions (cited above), it is difficult to argue that the custodian has custody of the financial model while maintaining that the region does not.

[33] As noted above, section 36 clearly states that the region is to be provided with a copy of the financial model. Accordingly, in my view I do not need to consider further the provisions of Schedule 3 that relate to arrangements regarding the custodian. The custodian may well have powers and duties regarding the financial model that go beyond those of the region, but that does not negate the region's powers regarding the model.

[34] Further, I note that Schedule 2 of the PA at section 1, under the heading "Documents to be delivered by Project Co" states:

> "Unless an original document is specifically required, a certified copy of each of the following documents is to be delivered by Project Co to the Region on or prior to the Financial Close Target Date:
>
> …
>
> 1.14 one (1) printed copy of the Financial Model and two (2) copies on CD-Rom;"

[35] Further support for the conclusion that the financial model is in the custody of the region comes from the financial model (schedule 32) being expressly incorporated into the PA[4] and its function in determining the final terms of the PA.

[36] Section 1.1(b) of the PA states:

> (b) This Project Agreement is comprised of this executed agreement and the following documents, all of which are hereby incorporated by reference into and form part of this Project Agreement.

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[4] At page 3.

> …
>
> Schedule 32 - Financial Model Extracts

[37] The financial model is incorporated into the project agreement because it determines the precise financial terms of the agreement. The agreement provides that after the "commercial close" of the agreement, a "financial close" occurs whereby the interest rates to be used for the financing components of the agreement are set, using the most up to date interest rate information. This rate information is calculated and contained in the financial model.

[38] As the region's March 2014 (public) report to the Planning and Works Committee sets out:

> Through the rate set protocol the financing costs for the project are finalized and the PA populated with the final pricing information as it relates to financing rates, and at that point the financial model is set and attached to the PA.

[39] As a party to the project agreement, the region must have a copy of the agreement, particularly given the function of the financial model in finalising the applicable interest rates for the agreement, because it provides certainty about an essential content of the project agreement. Though key outputs of the financial model such as payment amounts in the financial model are duplicated in other parts of the agreement, it is arguable the region may not have possession of the essential terms of the agreement if it did not have custody or control of the financial model. This would bring into question the validity of the agreement between the parties.

[40] The affected party argues in its initial submissions that the factors for finding custody and control under MFIPPA set out in Order MO-2890 are not made out. In its reply representations it cites Order MO-2671 as analogous to this appeal and applies the factors in that order to support its view that the region does not have custody or control of the financial model.

[41] In Order MO-2671 the institution clearly did not have custody of the record at issue. In contrast, for the reasons outlined above, the region clearly has custody of the financial model because it is expressly incorporated into, and is an essential part of, determining the final content of the agreement, and because section 36 of the project agreement sets out that the region is to be provided with a copy of it.

[42] Order MO-2671 can be further distinguished because a significant factor in determining that appeal was that the rights of the institution in relation to the record in the possession of the affected party were limited by the contract.

[43] There is ample evidence that the region has physical possession of the financial model. Physical possession does not necessarily equate to custody or control. However,

as noted by former Commissioner Linden in Order 120, physical possession is the best evidence of custody and only in rare cases can it be successfully argued that an institution does not have custody of a record in its actual possession.

[44] Therefore, the evidence of the region's possession of the financial model is a significant factor in support of a finding that the region has custody of it, though it is certainly not determinative.

[45] In determining whether the financial model is in the "custody or control" of the region, the factors must be considered contextually in light of the purpose of the legislation. Based on the evidence before me, I am not convinced that this is one of the rare cases contemplated by the former Commissioner, where possession amounts only to "bare possession."

[46] In *Ministry of the Attorney General v. Information and Privacy Commissioner*[5] the court found that the fact that the ministry acquired an ability to use the information from the reports at issue for purposes relating to its core, central and basic functions resulted in the reports being "in the custody" of the Ministry for the purposes of the *Act*. So too here, the region has, under the terms of its agreement with the affected party, possession of the financial model and the ability to use the financial model for purposes which relate to its core, central and basic functions relevant to its mandate. In this case the financial model forms a part of an agreement the region has entered to meet transportation needs in the region. The financial implications of that agreement, which are known and understood from the financial model, are significant for the region.

[47] I have considered the provisions of the agreement outlined above, the arguments of the parties relevant to the issue of custody or control, and the purpose of the legislation. For the reasons above, I am satisfied that the region has custody of the financial model for the purposes of the *Act*.

[48] I will now consider whether the financial model and the other withheld information in the project agreement qualify for exemption under section 10 of the *Act*.

B. Does the mandatory exemption at section 10(1) apply to the records?

[49] Section 10(1) states:

> 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, if the disclosure could reasonably be expected to,

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[5] *2011 ONSC 172 (CanLII).*

> (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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; …

[50] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[6] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[7]

[51] For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

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) and/or (d) of section 10(1) will occur.

Part 1: type of information

[52] The types of information listed in section 10(1) have been discussed in prior orders. Of particular relevance to this appeal are commercial and financial information:

> *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.[8]

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[6] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, 2005 CanLII 24249 (ON SCDC), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[7] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[8] Order PO-2010.

> *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.[9]

[53] The information appears in the context of an agreement for LRT in Kitchener-Waterloo. As the affected party describes it, the agreement sets out the commercial, financial, operating and contractual relationship of the affected party and the region in relation to the development of the light rail system. The appellant does not dispute that this first part of the test is met. It is clear that the information at issue comprises commercial and financial information. The first part of the section 10 test is satisfied.

Part 2: supplied in confidence

[54] The requirement that the information was "supplied" to the institution reflects the purpose of section 17(1) to protect the informational assets of third parties.[10]

[55] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract are generally treated 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.[11]

[56] There are two exceptions to this general rule regarding contracts, which are known as the "inferred disclosure" and "immutability" exceptions. A party asserting the exemption applies to contractual information must show, as a matter of fact on a balance of probabilities, that the "inferred disclosure" or "immutability" exception applies.[12]

[57] The inferred disclosure exception arises where information actually supplied does not appear in a contract but may be inferred from disclosing the contract. The onus is on the party to show "convincing evidence that disclosure of the information…would permit an accurate inference to be made of underlying non-negotiated confidential information supplied by the affected party…"[13]

[58] The "immutability" exception applies where a contract contains information supplied by a third party that is not susceptible to negotiation. Examples are financial

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[9] Order PO-2010.
[10] Order MO-1706.
[11] This approach was approved by the Divisional Court in *Boeing Co., cited above, and in Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).
[12] *Miller Transit,* cited above at para. 31.
[13] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

statements, underlying fixed costs and product samples or designs.[14]

[59] The affected party relies on both the inferred disclosure and immutability exceptions for the information at issue.

[60] The region's representations acknowledge the general rule regarding contracts but refer to the "inferred disclosure" exception without elaborating further on it.

[61] I will deal with the inferred disclosure and immutability exceptions in turn.

Does the "inferred disclosure" exception apply?

[62] As noted above, 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 the third party to the institution.

[63] The affected party argues that the inferred disclosure exception applies to all of the information at issue and provides evidence with respect to each portion of the PA. I will deal with the affected party's arguments regarding each section of the PA in turn.

Schedule 1- Section 1.28 "Base Case Equity IRR"

[64] The affected party seeks to withhold the percentage amount contained in the definition of Base Case Equity IRR contained in Schedule 1 of the PA. The affected party argues disclosure of the IRR percentage will allow inferred disclosure of other information.

[65] The Base Case Equity Internal Rate of Return (IRR) percentage amount represents the agreed internal rate of return on equity for the project for the affected party after factoring into the cashflows for the project the cost of the debt being used to partially fund the project.

Inferred disclosure of the NPV

[66] The affected party submits that disclosing the Base Case Equity IRR percentage will allow competitors to make a highly accurate inference about the net present value (NPV) of the project.

[67] The Canadian Council for Public-Private Partnership's publication *Public Private Partnerships A Guide for Municipalities*[15] defines NPV as the sum of the present value of all aspects of the project ([for example] design, construction, maintenance and

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[14] *Miller Transit*, cited above at para. 34.

[15] http://www.p3canada.ca/~/media/english/resources-library/files/p3%20guide%20for%20municipalities.pdf at page 8.

financing) expressed in today's dollars.

[68] The affected party refers to the NPV as representing the "value of the project" and says disclosure of the NPV reveals the net worth to the affected party of its entering the agreement at its current stage and in current values.

[69] The affected party says that the inferred disclosure of the NPV means the percentage amount of the equity IRR is "supplied".

[70] The other parties do not directly address the inferred disclosure argument.

Analysis

[71] As noted above, 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 the third party to the institution.[16] In other words, disclosure of some information allows other, non-contractual, confidentially supplied information to be inferred.

[72] In his analysis in Order 01-20[17], (then) British Columbia Commissioner Loukidelis spoke of an "exception to a general rule" in which negotiated information is not "supplied". He called this exception "inferred disclosure". In explaining the concept, he stated at paragraph 86:

> If the disclosure of information in a contract with a public body would permit an accurate inference to be made of underlying confidential information supplied by the contractor to the public body – such as the contractor's non-negotiated costs for materials, labour or administration – that inferred disclosure of information can be protected […].

[73] In the circumstances of Order 01-20, Commissioner Loukidelis did not find the evidence supported the application of the inferred disclosure exception.

[74] Order MO-1706 reached the same conclusion. That order found that the parties did not provide convincing evidence that disclosure of the information in the contract at issue for soft drink and snack vending machines would permit an accurate inference to be made of underlying non-negotiated confidential information supplied by the affected party to the Peel District School Board. The severed information was found to fall into the category of contractual terms and not non-negotiated contractual terms of the sort contemplated in Order 01-20.

[75] The NPV is contained in the financial model. The financial model was expressly

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[16] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[17] 2001 CanLII 21574 (BC IPC).

incorporated into the agreement, so the NPV is a part of the agreement and therefore cannot fall within the inferred disclose exception, because it is contained in the agreement itself.

[76] Even if the NPV was not explicitly part of the agreement via the incorporation of the financial model, I would still conclude that the NPV does not fall within the inferred disclosure exception. As noted above, the Canadian Council for Public-Private Partnership's publication *Public Private Partnerships A Guide for Municipalities*[18] defines NPV as the sum of the present value of all aspects of the project ([for example] design, construction, maintenance and financing) expressed in today's dollars. In the context of the project at issue, which involves regular payments over a long period, the NPV is a proxy for the cost or value of the agreement at the start of the agreement, as the affected party's own representations acknowledge. As the affected party also notes in its submissions, in a (public) report from region staff to the region's Planning and Works Committee recommending selection of the affected party's bid, the region refers to the affected party's bid as having "the lowest overall cost (lowest NPV)".[19] In other words, the NPV is synonymous and interchangeable with the cost. This is why the region required RFP proponents to include the NPV for their proposals in their bids. Having the NPV for each bid enabled the region to compare the costs of the bids and was used to score the bidders on the financial criteria component of the bid. The affected party submits that the NPV was the single most important criterion in the financial component of the bid evaluation, accounting for 90% of the financial component score.

[77] In the context of the agreement at issue, the NPV is the value or cost of the agreement. Putting aside the existence of the NPV in the financial model, the value of entering the agreement is revealed not by way of drawing an accurate inference from information in the contract to confidentially supplied information that is not in the contract. Rather it is simply another way of stating the (negotiated) content of the agreement. The NPV, or cost, of the agreement is not information that is distinct from the information in the agreement. It is not discerned by accurate inference, but by re-stating the information in the agreement in a way that adjusts the payments under the agreement to account for their timing. The NPV is not underlying supplied confidential information discerned by accurate inference from disclosure of the IRR percentage. Rather, the negotiated contract, when disclosed, reveals the agreed price or NPV agreed. It is the heart of the agreement negotiated between the parties.

[78] In my view, that the NPV may be calculated from the agreement, in the context, is not materially different from disclosing an agreed price in a contract. Knowing the price an institution is committing to in entering an agreement is an essential element of the transparency that the *Act* is intended to provide. The inferred disclosure exception

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[18] Ibid.

[19] *Stage 1 Light Rail Transit Project: Selection of a Design-Build-Finance-Operate-Maintain Consortium* available at http://rapidtransit.regionofwaterloo.ca/en/resourcesGeneral/PreferredTeamforION_CouncilReport.pdf

was conceived to protect underlying confidential information supplied by a proponent to an institution. The accurate inference exception cannot operate to withhold such essential elements of a contract.

Other inferences from the IRR

[79] The affected party also suggests disclosure of the equity IRR would disclose by inference the pricing of the risk agreed to be taken by the affected party's partners, who are the equity providers for the project. The affected party says that disclosing the IRR percentage would indicate to competitors how the affected party priced or assessed the risk to its partners, and enable them to gauge other confidential information about the affected party's financing structure.

[80] The affected party also says the IRR percentage can be used to calculate the NPV of any gain upon a refinancing and to discount the equity payment upon termination, so it would reveal these values if the IRR is disclosed.

[81] I do not accept that the inferred disclosure exception applies in these circumstances.

[82] Some of the inferences from disclosure of the IRR that the affected party asserts, for example that competitors could gauge certain detailed confidential information about the affected party's financing structure, are speculative. The affected party did not provide evidence to support that such inferences could be drawn or their likelihood. There is a lack of evidence that disclosing the IRR percentage would indicate to competitor's information about the financing structure for the project beyond what is already contained in the contract itself.

[83] Some of the information the affected party says is revealed by accurate inference, if it is revealed at all, is revealed by the operation of the contract. The gain upon a refinancing and the equity payment upon termination are matters that were negotiated, and are directly addressed in the PA, as the affected parties' representations acknowledge.[20] The affected party does not dispute that the base case equity IRR was negotiated with the region. But the payments by the region for the financing of the project by the affected party were also outlined and incorporated into the agreement.

[84] I find the statement of Assistant Commissioner Liang in Order PO-2018 pertinent to the affected party's inference argument:

> Although, in a sense, the terms of a contract reveal information about each of the contracting parties, in that they reveal the kind of

[20] I note also that for the reasons outlined above, I do not consider the NPV of the amounts that are revealed by the contract should be treated any differently from the amounts themselves.

> arrangements the parties agreed to accept, this information is not in itself considered a type of "informational asset" which qualifies for exemption under section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party.

[85] Order PO-3598 (upheld on judicial review) adopted this analysis in considering a contract between a university and a bank, stating:

> The fact that disclosure of the agreement may, in a general sense, provide information about the kinds of agreements that the bank enters into, including their structure, does not mean that the agreement itself is an "informational asset". If it were, this would greatly expand the number of contracts exempt under section 17, which would not be in keeping with the intent of the *Act*.

[86] I also note that the general structure of the affected party's financing arrangements is already publically known. The publically available RFP contains detailed requirements for the financial structure of a confirming bid. Subsequent communications, including the region's March 2014 report,[21] provide an overview of the structure of the financial plan of the affected party.[22] Elsewhere in the agreement the interest rate for the long term debt is set out and this information has been made public.

[87] I am not satisfied that the base case equity IRR percentage qualifies as supplied under the accurate inference exception. While disclosure reveals information about the affected parties financing arrangements, it does not go so far as to reveal the affected party's underlying costs or information about it's financing that is not already publically known. Rather it reveals the negotiated financing arrangements between the region and the affected party under the agreement.

Schedule 20 excerpts

[88] The affected party also seeks to withhold the escalation factor percentage amounts and the future Baseline Service Plan (BSP) amounts in Schedule 20, titled "Payment Mechanism". In particular, the information at issue is the percentage values in a table relating to Escalation Factors at the top of page 17, the unescalated monthly service payment amounts for each contract month for the maintenance component of

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[21] http://rapidtransit.regionofwaterloo.ca/en/resourcesGeneral/PreferredTeamforION_CouncilReport.pdf See pages 10-11.

[22] The report details that the affected party has arranged short-term construction financing through Alberta Treasury Branches, that the affected party's partners will fund the first 22.5% of the design-build (construction) costs and that the majority (80%) of the affected party's financing will be provided through issuing long term bonds underwritten by a named third party, with the remaining 20% provided by equity contributions from the five partners to the bid, which will also be repaid by the region during the 30-year term.

the monthly service plan payment amount for each of Baseline Service Plans 2-7 in the table at pages 28-31, and the unescalated monthly amounts for the maintenance (duplicates information withheld at pages 28-31) and operations components used in calculating the monthly service payment for each contract month for Baseline Service Plans 2-7 in the table at pages 32-35. I note this information also appears in the financial model.

[89] The percentage values in the Escalation Factors table provides some of the inputs for an equation in the agreement that increases monthly payments for several components of the agreement over time. The percentage values are tied to various public indexes of costs agreed to be applicable to that component of the agreement.

[90] The BSP information (at section 14.1 and Section 1 of Appendix 1 in Schedule 20 (pages 28-31 and 32-35 of Schedule 20, pages 17-23 of the records) sets out the agreed unescalated monthly service payment amounts for the maintenance and operations components, before any escalation of the payments by operation of the formula mentioned above. The monthly payment amounts for seven different baseline service plans are set out in the contract.[23] These baseline service plans are different options for LRT service levels (i.e. the number of trains operating) the region can choose to have the operator of the service provide. The amounts for baseline service plan 1 have been disclosed, the affected party submits that this is because it is in the interest of the public that the current BSP costs to the region are known.

Affected party's arguments

[91] With regard to the percentage amounts, the affected party submits that this would reveal its risk tolerance and internal budgeting for inflationary pressure over the operating categories and cost centres of the project. It submits that for example, disclosure of the percentage weights allocated to the escalation factor for labour costs would indicate what the affected party's internal budgeting for wages and benefits is. The affected party submits that disclosure of the percentage weightings given to the escalation factors would also provide competitors with valuable information about indexation management methodology employed by the affected party.

[92] The affected party submits that disclosing future monthly BSP payments would reveal the revenue and costs to the affected party if the future BSPs come into effect. It submits that the region is not obliged to implement future BSPs and can choose to renegotiate future vehicle kilometres or operating hours. It also submits that this means that the information is not useful to the public because it does not inform them about actual future costs, but is primarily useful to competitors.

[93] The affected party submits that the escalation factor weightings and the future BSP costs can be used to determine the affected party's "unique pricing strategy".

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[23] The information relating to BSP 1 has been disclosed in full already.

[94] The affected party submits that competitors could determine the hourly operations cost per vehicle and the construction partner's internal margin on maintenance costs.

[95] The affected party also submits that disclosure of the future BSP monthly costs will reveal the affected party's internal budgeting and its operation and maintenance costs for future expansion of the system. Its submissions explain how competitors will also be able to determine the affected party's unique internal pricing strategy in preparation of its bid response, through a comparison of present and future BSP costs with their own bids, and the affected party's risk appetite in respect of the possibility of future expansion of the system.

Analysis

[96] The affected party provided me with very detailed analyses of information that could be deduced about the project from the above information. Despite this, I am satisfied that the Escalation Factors and BSP information in schedule 20 does not fall within the inferred disclosure exception. The detailed evidence from the affected party about the information that can be deduced if the withheld information is disclosed all arise from disclosure of the negotiated terms of the contract. The affected party has not provided evidence of a link between the inferences that it outlines and any confidentially supplied information. Rather the affected party's analysis details the sort of general inferences that may be made about it from the terms of the contract it entered with the region. As I noted above, if section 17 protected such information, this exemption would be far broader in scope, which previous orders upheld on judicial review have found would be contrary to the purpose of the *Act*.[24] It is common for a contract, when disclosed, to provide insights into the nature of the bargain entered and therefore the way the parties conceive of risk and any number of other matters. The natural conclusion of the affected party's argument would be that most contracts would have to be withheld under section 17, a position which is clearly not supported by decisions of this office and upheld on judicial review.

[97] I am satisfied that the information the affected party says can be inferred is not underlying confidential supplied information distinct from the contractual information. It is information that is contained in, and revealed by, the contract itself. In other words, the information that the affected party says can be inferred, is inferred from the contract that the affected party negotiated. It reveals what the affected party agreed to. To the extent that what the parties agreed to reveals strategies and assumptions made by the affected party, this information still falls within the scope of information agreed to by the affected party.

[98] Further, I do not see any basis for distinguishing the amounts for BSP 2-7 from

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[24] See for example Order PO-3598 at paras. 36, 43, and 47, upheld on judicial review in *Toronto-Dominion Bank v. Ryerson University*, 2017 ONSC 1507.

BSP 1. That the information is about options the region may or may not exercise does not provide a basis to treat it differently to other information in the agreement. It is information that was clearly negotiated between the parties. It forms part of the agreement between the parties. Again, the inferences the affected party points to arise from the contract itself and not from underlying confidential information.

[99] I understand the affected party has heightened sensitivity about this information, because it reveals the terms the affected party has agreed to for something that the region may elect not to select. That the contract contains options is not a basis to withhold it. I note that given that the contract contains seven different BSPs, it was almost certain that some of those options would not be exercised. Nonetheless the nature of the agreements was such that the parties wanted certainty about costs and payments should various options be selected and that is what the parties negotiated.

[100] I have closely examined the affected party's submission that competitors could determine the hourly operations cost per vehicle and the internal margin on maintenance costs. The affected party's evidence recognizes that it is making certain assumptions in order to estimate the affected party's margins. While accepting that the agreement at issue contains very detailed information that a skilled professional can draw inferences from, I am satisfied that disclosure of the information at issue does not reveal the affected party's underlying costs. It appears to me that, in fact, in many cases the affected party does not itself know precisely its future underlying costs and ultimately its margins. In such a complex agreement that requires the performance of functions into the future, with the associated uncertainties that are inherent, it is not possible to know with certainty the precise cost of fulfilling a contractual obligation and therefore the ultimate margin under the agreement. This uncertainty is demonstrated by the provisions in the agreement regarding escalation of payments over time that attempt to ensure that the risk of such uncertainties is fairly allocated. If underlying costs were known with certainty, such provisions would not be necessary. For example, future labour costs are not known, the escalation factors are simply the affected party's best attempt to compensate for labour cost increases that may occur. I am satisfied therefore that it is not possible for disclosure of the escalation factors to reveal underlying costs, because, as in the case of future labour costs, these are not even known with certainty by the affected party.

[101] Finally, I reject the affected party's argument about disclosure of its pricing strategy. The format of the agreement, including escalation factors and alternative BSPs was part of the RFP designed by the region for conforming bids. There is no evidence to support the affected party's argument that the concept of escalation factors or BSPs was the affected party's.

Schedule 21 excerpts

[102] Columns A - E in Exhibit A contain the anticipated timing of milestone payments by the region for different components of the LRT system. The information reveals the

estimated or planned monthly construction and non-construction (including financing) payments that sum to the total payments for these components under the agreement. The construction payments are broken down into three categories. I note that the information at issue in Schedule 21 also appears in the financial model, which I will consider next.

[103] As the affected party acknowledges in its representations, the total cost of construction and the total payment amounts for each month have already been disclosed. The affected party's initial representations also submit that the totals for each category (the three construction categories and the one non-construction category) can be disclosed, because they do not disclose the level of detail about the internal planning and budgeting, or the detail about the timing of the construction phase financing as the monthly itemizations in Columns A – E do.[25]

[104] The affected party argues that the more detailed monthly amounts in Schedule 21 should be characterized as supplied on the basis of the inferred disclosure exception.

[105] In particular, the affected party submits that a competitor of the construction partner would be able to understand the internal planning and costing of the construction contractor/partner, based on a competitor's knowledge of the technical requirements of the construction phase and the milestone requirements, if the itemized detail in Columns A, B and D were to be disclosed.

[106] The affected party submits that disclosing Column E will reveal the timing of financing being drawn down by it during the construction phase, and the planning or budgeting of the construction financing component of its bid.

[107] The affected party submits as an example, a competitor could compare the running totals for construction costs and the timing of the costs as well as the financing costs in Column E with those in its own bid and understand that the affected party will have incurred greater or lesser financing costs at a given point in time, and can hence estimate with accuracy a lower or higher financing cost for the construction phase of the affected party's proposal.

[108] I find the inferred disclosure exception does not apply.

[109] First, the actual timing that the affected party incurs the costs is not disclosed by the information at issue. This is apparent from the structure of the agreement, which provides for milestone payments based on when costs are incurred rather than on the information at issue.

[110] I note also with respect to the affected party's argument that Column E "non-construction costs" allows accurate inferences about its financing costs, that, as the

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[25] Affected party's initial representations on Issue B at para. (b) (iv) on page 9.

affected party acknowledges in its representations, Column E does not just comprise financing costs but other costs, for example, taxes. Also, as noted above, the general structure of the affected party's financing arrangements is already publically known. As discussed above, the region's March 2014 report[26] provides an overview of the structure of the affected party's financial plan.

[111] I also do not find the affected party's representations about the inferences that can be drawn from the contractual information, to the extent they are not already revealed by the contract or otherwise publically known, are supported.

[112] I find that even the more detailed breakdown of the agreed timing of payments set out in the schedule does not allow an accurate inference about the underlying anticipated costs incurred by the affected party. The information reveals the anticipated timing of milestone payments negotiated between the region and the affected party. This does not reveal actual underlying costs. While the term "cost" is used in Schedule 21, and the affected party characterizes the information as internal costing information, Schedule 21 does not disclose or allow an accurate inference about the affected party's unchanging underlying or actual costs related to the project, before any profit margin. The detail in Schedule 21 exists because it was required by the region if the affected party wished to receive milestone payments during the construction phase of the project. The "costs" information represents a more detailed breakdown of the timing of payments to the affected party by the region that are within the overall price negotiated with the region. In my view, the information is analogous to an itemized bill or invoice, breaking down the total price for a job to show the price of the component parts that make up the job. It provides more detail than a global cost figure, but without disclosing underlying costs, because the information is still price information, not cost information.

[113] I also note that the information about financing costs and construction payments are disclosed elsewhere in the contract and indeed in Schedule 21, as has been outlined above.

[114] While not explicit, I believe it is implicit in the affected party's submission that confidential information that could be inferred from disclosing Schedule 21 comes from its RFP submission. While I am satisfied that much of the information the affected party submits can be inferred is already revealed by the contract, I note that the accurate inference argument has been considered and rejected as a basis for withholding information in a RFP submission in previous orders. In Order PO-2018, Assistant Commissioner Sherry Liang addressed the argument that, even if information in a contract was not "supplied", its disclosure would reveal the information supplied by the third party in its proposal to the Management Board Secretariat (MBS). Assistant

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[26] http://rapidtransit.regionofwaterloo.ca/en/resourcesGeneral/PreferredTeamforION_CouncilReport.pdf See pages 10-11.

Commissioner Liang, in rejecting this argument, stated as follows:

> MBS expresses a concern that even if the information in Articles 8.5(d), 12.1(a) and (c) is found not to have been "supplied" by the affected party, the disclosure of these terms would result in revealing information supplied confidentially to MBS during the RFP process. MBS submits that a comparison of the terms of the pro-forma agreement against the terms of the final agreement would allow the requester to determine substantially all of the information in the affected party's proposal.
>
> In my view, this concern is not a basis for exempting the information at issue from disclosure. If it were, then I would see no reason to distinguish the information in the specific articles in dispute, from the rest of the contract which has been disclosed to the requester. As a general proposition, this interpretation of section 17(1) would result in the exemption from disclosure of the terms of any number of contracts awarded through a similar process to that used in this case.
>
> Such a result would clearly not be in keeping with the intent of the *Act*. In any event, the disclosure of the final terms of a contract, and the comparison of those terms with the terms of a pro-forma agreement, would only indicate the starting point and concluding point of negotiations. It would not, with any precision, reveal all of the details of the two parties' positions during those negotiations and the various proposals, counterproposals and changes to positions that might have been involved.

[115] I am satisfied that the affected party has not established that disclosure of the negotiated information in the contract gives rise to accurate inferences about underlying non-negotiated confidentially supplied information.

[116] Some of the information that the affected party says can be inferred, such as general information about financing, is either already public or is revealed by the contract itself. Further, the information is about payments, not costs and is only forecast payments, not actual payment amounts. Therefore, its utility for drawing accurate inferences about costs and methodologies that underlie the affected party's agreement with the region is limited.

[117] While I have considered the merits of the affected party's arguments, I also consider that as Order PO-3598 explains, any other conclusion regarding the affected party's arguments would greatly expand the information withheld under the third party information exemption, which would not be in keeping with the intent of the *Act*. It would lead to negotiated information such as that in Schedule 21, which the parties clearly agreed to include in their contract, being withheld.

[118] Section 17 exists to protect information assets of third parties. By negotiating to incorporate the information at issue into the contract, the information effectively becomes the joint asset of the parties, though it may have originated with the affected party. It is understandable why the region would want to incorporate the information at issue into the contract, because it provides further detail on what the parties have agreed to, and because the information gives them a good idea of the likely timing and quantum of the milestone payments they have agreed to make under the agreement.

[119] The affected party also argues that the Schedule 21 information falls within the scope of the exception for immutable information, and I will consider that argument further below.

Schedule 32: "Financial Model Extracts"

[120] The affected party submits that the accurate inference exception applies to Schedule 32 because disclosure of it would reveal sensitive, confidential financial information about its internal operations costs and financing.

[121] The financial model in Schedule 32 was explicitly incorporated into the contract by the parties. The appellant does not explain how disclosure of the information in the contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution, apart from the information revealed by the contract itself, of which Schedule 32 is a part. The affected party states the financial model contains detailed costing reflecting third party agreements, but it does not provide evidence to support this statement, such as details of the third party agreements and the information they contain. In the absence of such evidence I find the accurate inference exception does not apply.

Does the "immutable" exception apply?

[122] The "immutability" exception applies where a contract contains information supplied by a third party that is not susceptible to negotiation. The word immutable means unchanging over time or unable to be changed. Examples are financial statements, underlying fixed costs and product samples or designs.[27] The onus is on the party resisting disclosure to show immutability.[28]

Schedule 21 excerpts

[123] The affected party submits that disclosure of Column E reveals details of the affected party's internal, budgeted financing costs. It submits that this information was prepared for the internal purposes of the affected party, and as a reference for the

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[27] *Miller Transit*, cited above at para. 34.
[28] Orders MO-1706, PO-2384, PO-2435, PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, (2008) CanLII 45005 (ON SCDC).

region to back up the total construction phase costs (which have been disclosed). The affected party submits that the disputed information in Schedule 21 was not the subject of negotiation with the region but appears in Schedule 21 only as an exhibit and back-up material, not as a negotiated item.

[124] To the extent that the affected party's argument is that the financial model was not the subject of negotiation and was therefore supplied, that argument does not establish that the information is immutable. As identified above, the information was clearly incorporated into the contract, and is therefore presumed to be negotiated. The issue is whether any of the information is immutable, in that it is not susceptible to negotiation, which is a different issue from whether it was in fact negotiated or not. If it is capable of negotiation, then it is not immutable.

[125] The implication of the affected party's statement that Schedule 21 reveals internal, budgeted financing costs is that this information is not susceptible of change in the negotiation process and in this way is immutable. I will therefore consider whether the information in Schedule 21 is of this type.

[126] In Order PO-2384 Adjudicator Faughnan stated:

> [O]ne of the factors to consider in deciding whether information is supplied is whether the information can be considered relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of section 17(1). Another example may be a third party producing its financial statements to the institution. It is also important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it. The intention of section 17(1) 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 was not, in fact, changed.

[127] This excerpt highlights the important distinction between information that is not susceptible to change, which is immutable, and information that is subject to change but is not, in fact changed, which is not immutable.

[128] Schedule 21 states "Pursuant to the Financial Model, Project Co has proposed and the Region has **accepted** the **projected** costs and payments schedule as reflected in Table A1." (emphasis added).

[129] This excerpt from Schedule 21 highlights two factors that suggest that the information in it is not immutable.

[130] The first is that the information in Schedule 21, as the use of the word "accepted" in the Schedule suggests, is information that is not immutable, because it is capable of change. However, I do not rely on the use of the word "accepted" as the sole indicator that the information is capable of being negotiated.

[131] While the term "cost" is used in Schedule 21, and the affected party characterizes the information as internal costing information, I am not satisfied that Schedule 21 discloses the affected party's unchanging underlying or actual costs related to the project, before any profit margin. The costs information rather represents a more detailed breakdown of the overall price negotiated with the region. In my view, the information is analogous to an itemized bill or invoice, breaking down the total price of a job to show the price of the component parts that make up the job. It provides more detail than a global cost figure, but without disclosing underlying costs. Of course there is likely a connection to the underlying costs to the affected party of fulfilling the agreement, but that is commonplace in a contract. A connection between actual underlying costs and the costs contained in a negotiated agreement is not sufficient for the immutable exception to apply. The immutable exception serves to protect information not susceptible to change such as underlying fixed costs.

[132] Because the information in Schedule 21 represents a breakdown of the agreed price under the agreement, this information is a key component of the bargain struck between the region and the affected party and is clearly capable of being negotiated. Any of the component costs and their timing are capable of being negotiated, they do not comprise underlying fixed costs. It is apparent from the agreement itself that the affected party prepared Schedule 21 to conform to certain requirements set out by the region in the RFP relating to the conditions under which the region would make milestone payments, for example that payments would not be made more frequently than monthly and not before the successful proponent had spent a certain amount of private capital on the project. This further demonstrates how the information in it was capable of being moulded and changed to meet the region's requirements.

[133] Further, as discussed above, the information withheld in Schedule 21 comprises *projected* costs and their timing, not actual costs, which also points to the information not be unchanging. As noted above, the parties explicitly acknowledge in Schedule 21 that the information is subject to change. Schedule 21 contains a mechanism that requires the affected party to request installment or milestone payments. This process requires the affected party to supply evidence of actual costs incurred. The actual timing and quantum of payments is contingent on actual costs and not the projected costs in Schedule 21. Therefore, withheld information in Schedule 21 is not immutable because it does not disclose actual underlying costs, but merely projected or estimated costs, which by definition are subject to change.

[134] As the excerpt from Schedule 21 above makes clear, the parties explicitly incorporated the projections into the agreement. As projections that reflect the proposed approach of the affected party to the project, they are capable of being negotiated by the parties and susceptible to change. Further, because the timing of the costs incurred directly effects the quantum and timing of milestone payments to the affected party, the region had reason to negotiate changes to the projected costs information in the agreement if it had wanted to signal a preferred timing for the completion of work and its resulting obligation to make installment payments. Whether the region did so or not is irrelevant, the point is that the information was capable of negotiation and not immutable.

[135] I note also with respect to the affected party's argument that Column E "non-construction costs" discloses the affected party's immutable financing costs, that, as the affected party acknowledges in its representations, Column E does not just comprise financing costs but other costs, for example, taxes.

Schedule 32: "Financial Model Extracts"

Arguments

[136] The affected party submits that the financial model consists entirely of immutable information.

[137] It submits that the financial model was not the subject of negotiation with the region, but was provided to it under the agreement as an explanation of how the affected party generated the costs associated with the project and of how the affected party would finance its construction, operation and maintenance works, as well as the fixed underlying costs and financing agreements between the affected party and others.

[138] The affected party submits that the financial model is a resource for the parties, subject to the strict controls in the custody agreement, and it is not a negotiated term or condition in the agreement. The affected party relies on the custody agreement to suggest that the financial model is to be used as a resource, or reference point for the parties, not as a negotiated set of terms and conditions, and that the region does not control access to the financial model.

[139] The affected party submits that the financial model is information that sets out and applies the "back-end formula" by which it determined its development, operating and maintenance costs and the financing for the project as part of its bid.

[140] The region's representations do not explicitly refer to the immutable exemption. However, in addressing possible harms from disclosure of the agreement the region's representations repeat the affected party's submissions that the financial model was not the subject of negotiation with the region during the proposal stage. It repeats the affected party's submission that the information was provided to the region as an explanation of how the affected party generated the costs associated with the project

and how the affected party would ultimately finance the project. Therefore, the region's representations endorse the affected party's position that the financial model is immutable.

Analysis

[141] The financial model was expressly incorporated into the contract by the parties, which creates a presumption that the financial model is negotiated not supplied. As the court stated in *Miller Transit*[29] a "party asserting the exemption applies to contractual information must show, as a matter of fact on a balance of probabilities, that the "inferred disclosure" or "immutability" exception applies."

Is the financial model as a whole immutable?

[142] I have already considered and rejected the affected party's arguments about custody and control of the financial model above. Accordingly, I do not accept the affected party's argument that the information in the financial model is immutable to the extent it relies on the same arguments about custody and control of the financial model discussed above.

[143] Previous orders have accepted that information is immutable when it reveals party's methodology or operating philosophy,[30] and the affected party's representations suggest this will occur if the financial model is disclosed. The affected party's submission that the entire financial model is immutable emphasizes the function and form of the financial model over its content. As the affected party describes it, the financial model explains how costs were generated and calculated for the contract.

[144] Having reviewed the financial model in its context, I do not accept that the financial model reveals the affected party's methodology or philosophy. While the financial model is very detailed, much of its format and content was proscribed by the region in the RFP it issued. For example, it was the region that specified how the project was to be funded, including what percentage of the cost of the project was required to be funded privately. Further, the region tightly proscribed the format of the financial model. Many of the spreadsheet tabs in the financial model were provided by the region and required only that the affected party populate certain cells in the spreadsheet with information. As I noted in discussing the custody and control issue, the affected party was required to populate and submit a financial model as part of submitting a conforming bid under the proposal process.[31] The RFP proposal states[32]:

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[29] *Miller Transit.*
[30] See for example Order PO-2433.
[31] Schedule 1 to the RFP Proposal at page 6, available on the region's website.
[32] Schedule 3 part 2

> The Proponent must provide the computer model it has used and which is proposed to become the Financial Model under the Project Agreement in the format specified in this Part 2 of Schedule 3 of the RFP. The file must meet the requirements below and must allow the viewer access to all internal formulas, data and assumptions together with a full print out of all model sheets. This computer model will ultimately become the Financial Model referred to in the Project Agreement.

[145] For this reason, I do not consider that the affected party's approach or methodology to agreements of this type is revealed by disclosure of the financial model. The financial model's form and methodology is primarily the work of and proscribed by the region. I note that the region had initially applied section 11 (economic and other interests) to the information at issue but withdrew that argument during the inquiry.

[146] The financial model may bear similarities to previous bids made for similar types of projects. However, because it needed to accommodate the very detailed requirements of the region's RFP, for example with respect to affordability, funding arrangements, timing and other matters it is a unique proposal. While it is common sense to assume the affected party drew on previous experience with similar types of projects in responding to the RFP, that falls short of the standard to make it immutable by way of disclosing the affected party's methodology.

[147] Another reason why I am satisfied that the entire financial model is not immutable is because the function of the financial model, as described in the affected party's representations, is to determine key terms of the agreement such as financing payments for the region and then populate other documents with that information. This function is demonstrated by the presence of a tab in the financial model called "references" which provides a summary of important information in the financial model that is carried over into the project agreement and other documents. The affected party acknowledges in its submissions that the financial model contains information that is duplicated elsewhere in the contract between the parties but does not elaborate on the implications of this for its claim that all information in the financial model is immutable. The information in Schedule 21 discussed above is another instance of information that appears in the financial model. To the extent that information, such as the information in Schedule 21 discussed above, is a key part of the agreement, it cannot then be immutable where it appears in the financial model. Its presence in the financial model does not change the nature of the information.

[148] In Order PO-3011[33], (now Commissioner) Beamish stated at para 36:

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[33] Order PO-3011 was the subject of a re-consideration order in PO-3072-R, but that decision, and a subsequent judicial review of both decisions in *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario*, 2013 ONSC 6776 (CanLII) which upheld the decision did not effect the analysis regarding the immutability exception.

> I have carefully examined the agreement at issue. In my view, the majority of the agreement, including the information contained in the schedules, is the end product of a negotiation process, and sets out mutually agreed upon terms. The parties chose to incorporate these terms into the agreement entered into between them. The agreement also clearly refers to all of the schedules as being incorporated into and forming part of the agreement. In doing so, the records cannot be considered to have been "supplied" by the affected party. They constitute the agreed, negotiated terms of the agreement.

[149] Despite this, Order PO-3011 found that some information, including a financial model, (schedule 30) met the "immutability" exception because the information disclosed fixed, underlying costs, including agreements struck between the affected party and other third parties.

[150] In reaching my conclusion I have considered Order PO-3011 and the reconsideration of that decision in PO-3072-R. Though I am not bound to follow those decisions, I have considered them closely because of the similarity in the facts between the appeals. Here, I lack evidence that the financial model is entirely comprised of underlying fixed costs, and I distinguish it from Order PO-3011 on that basis.

[151] I will now examine the content of the financial model in further detail to determine whether any information in it qualifies as supplied under the immutability exception.

Does the financial model contain some immutable information?

[152] While focussed on the financial model as a whole, the affected party's representations do address the content of the financial model to some extent. The affected party states that the model contains details about its costs and inputs and that "disclosure of each input would reveal [the affected party's] immutable internal cost for over 500 different inputs." However, the affected party does not provide support for this statement for any specific inputs. As the excerpt from Order PO-2384 set out above identified, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of section 17(1). The affected party has not provided evidence[34] that demonstrates that information in the financial model reveals underlying or pre-existing costs that were not capable of being negotiated with the region.

[153] In considering whether Schedule 21 contained immutable information, I discussed the distinction between pricing information and unchanging underlying costs, a distinction also made in previous orders. For example, in Order PO-2435

[34] For example, pre-existing contracts.

Commissioner Beamish observed that per diem rates provided by one party but incorporated into a contract were not "supplied", stating "It is also important to note that the per diem does not represent a fixed underlying cost, but rather, it is the amount being charged by the contracting party for providing a particular individual's services." The same distinction applies to some of the information in the financial model. Absent evidence from the affected party to the contrary, much of the cost information in the financial model is a more detailed breakdown of the price that the parties agreed to. I note this is not dissimilar to how the affected party describes the information in its submissions, and how it is characterized in the RFP documents issued by the region, which refer to the RFP containing pricing information. As with Schedule 21, while more detailed than a global price, this type of information does not contain the underlying costs of the work to be performed, revealing only the pricing of individual components' contribution to the total cost. This sort of pricing breakdown information is capable of negotiation, even if not negotiated.

[154] As the excerpt from Order PO-2384 above stated, the intention of section 17(1) 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 was not, in fact, changed.

[155] An important element of context is to understand the function of the financial model in the agreement. The project agreement provides that after the "commercial close" of the agreement, a "financial close" occurs whereby the interest rates to be used for key financing components of the agreement are set, using the most up to date interest rate information. This rate information is calculated in the financial model and then at a high level duplicated in the main project agreement document.

[156] As the region's (public) March 2014 report to the Planning and Works Committee sets out:

> Through the rate set protocol the financing costs for the project are finalized and the PA populated with the final pricing information as it relates to financing rates, and at that point the financial model is set and attached to the PA.

[157] The process outlined above means that the agreed terms extend to matters as detailed as the interest rates under the agreement, because these determine in part the payments the region is required to make under the PA.[35]

[158] Even the credit spread benchmark used to determine the interest rate for the senior bonds portion of the affected party's financing of the project was negotiated

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[35] For example, Schedule 1 of the PA defines "Senior Bonds" as "the 4.771% fully amortizing Series A Senior Bonds due March 31, 2047 issued from time to time by Project Co to the Initial Senior Bondholders under the Bond Indenture in an aggregate principal amount of up to $103,027,000."

between the parties. With regard to this credit spread benchmark, the RFP proposal states:[36]

> If in the Region's sole discretion the Indicative Credit Spread Benchmark(s) is unsatisfactory, the Region reserve the right to request that the Proponent clarify the submitted Indicative Credit Spread Benchmark(s) and/or require the Proponent to resubmit the Indicative Credit Spread Benchmark(s).

[159] Other negotiated items include the Equity IRR, which was discussed further above.

[160] Because the financing costs of the project impact the region's payments to the affected party under the agreement, the agreement contains detailed negotiated financial information, in several instances duplicating information in the financial model. All financing costs, including the costs of the affected party's financing and other corporate costs such as audit, legal, and agency rating fees affect the costs that the region ultimately repays under the agreement, so these costs are part of the overall agreement made between the affected party and the region. I am satisfied that in the context of the agreement between the region and the affected party that the financial model contains information that is negotiated not supplied because the content of the financial model was capable of being negotiated between the parties.

[161] The terms of the agreement were negotiated to an exceptional level of detail. This detail arises from the nature of the public-private partnership agreement, which creates unique risks to completion of the project that the region sought to mitigate through the project agreement. For example, recognizing that successful completion of the project relied upon the affected party maintaining appropriate financing and cashflows to successfully complete construction, the region sought to mitigate these risks by requiring extensive detail about financing, cashflows and even the affected party's return on investment in the financial model, which was then incorporated into the agreement. In other agreements this level of detail would not form a part of the agreement, but in the context of this agreement, where the affected party's financing arrangements, costs and financial health were critical factors in the project's success, this information had greater significance. As the Financial Submission Requirements in the Request for Proposal documents states "The Financial Submission must demonstrate that the Proponent's financial model and financing plan are well developed and robust and that it has sufficient support from lenders and equity investors to satisfy the Region." This statement succinctly summarises why so much detail was incorporated into the agreement via the financial model.

[162] Order PO-2433 reached the same conclusion in a similar context. At issue in that

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[36] Schedule 3 part 2 at para 2.9 on page 14

appeal was a contract including schedules agreed between a ministry and an affected party. The order states in part:

> Turning to the schedules, I find that the contents of Schedules A, C, D, E and F also comprise terms and conditions that were negotiated between the Ministry and the affected party, and cannot be described as the affected party's "informational assets".
>
> The following generic descriptions of the schedules support this conclusion:
>
> • Schedule A sets out the terms for payment of grant funding by the Ministry to the affected party
>
> • Schedule C sets out the timelines for completion of the project for which the Ministry has agreed to provide funding
>
> • Schedule D sets out the affected party's budget for specific cost categories, namely human resources, supplies and equipment and overhead that the affected party agreed to adhere to and which the Ministry accepted in agreeing to provide funding to the affected party
>
> • Schedule E sets out specific terms relating to the affected party's reporting obligations, to the Ministry, in accordance with a reporting plan provided in an appendix, as well as a statement of goals and deliverables for the project
>
> • Schedule F sets out terms governing the relationship between the affected party, its "collaborating parties" (sub-contractors) and the Ministry
>
> In my view, the information contained in these schedules sets out agreed upon contractual terms that govern the relationship between the Ministry and the affected party in regard to the implementation of the affected party's proposed project. With regard to Schedule C, in particular, while I understand that the affected party takes the position that the budgeting information was intended only to provide justification to the Ministry for its funding needs, it is clear that this document establishes clear contractual expectations regarding costing and funding and that these figures comprise agreed upon terms of the Agreement.
>
> The information contained in Schedules A, C, D, E and F is contractual in nature. None of the information qualifies as the affected parties'

> informational assets. Therefore, these schedules cannot be considered to have been supplied pursuant to part 2 of the test under section 17(1).[37]

[163] So too here, in the context, I am satisfied that the financial model sets out key financial information which was sufficiently significant to the affected party being selected as the preferred proponent by the region that the information in it was incorporated into the agreement between the region and the affected party.

Summary

[164] The financial model was incorporated into the agreement. The affected party submits that the financial model should be withheld because it reveals the affected party's:

- financial and project methodology
- internal operating costs; and
- private sector financing

[165] I am satisfied that the structure and methodology revealed in the financial model is the product of highly prescriptive requirements set out by the region in its RFP and therefore does not reveal the affected party's methodology or "informational assets".

[166] I have not been provided with evidence to support the affected party's claim that the financial model reveals its operating costs, as distinct from its pricing. In instances where prices are affected by arrangements with third parties, I am satisfied that the arrangements were open to negotiation with the region so that they legitimately fall within the scope of the negotiated terms of the agreement. In reaching this conclusion I am influenced by the lack of evidence that prices influenced by third parties were not negotiable. As the agreement was open to negotiation, absent evidence to the contrary, the affected party's agreements with third parties must also have been negotiable.

[167] Further, to the extent the financial model contains and reveals the financing arrangements of the affected party, I consider the financial model contains financial information that, in the context of the agreement, forms an essential term of the agreement between the parties. I also note that to some extent it duplicates information already publically disclosed about the financing agreements in the region's RFP and subsequent publically available documents.

[168] For these reasons I am satisfied that the affected party has not shown, as a matter of fact on a balance of probabilities, that the "inferred disclosure" or "immutability" exception applies to the financial model that was incorporated into the

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[37] Order PO-2433.

agreement.

[169] Overall, I am satisfied that the financial model contains essential information about the obligations and nature of the agreement between the region and the affected party. I accept that the detailed nature of the information makes the affected party sensitive about it's disclosure. However, section 17 requires disclosure of agreements with public bodies except in limited exceptions. I have carefully considered whether those exceptions apply and found that the evidence does not support a finding that would contradict the clearly expressed intention of the parties to incorporate the information into their contract.

[170] The proposal was one of three the region reviewed. The region decided to accept the financial model proposed by the affected party over those of the other bidders. The affected party's submission that "the financial component of [the affected party's] bid was the determining factor in the project award" illustrates the importance of the information in the financial model to the region selecting the affected party's bid. Further, the format of the financial model was almost entirely proscribed by the region. Its contents form an essential part of the bargain struck between the parties.

[171] While the financial model contains some pricing information that is largely driven by third parties, there is no evidence before me that the cost or price of these third parties' services, for example, underwriting fees, audit and legal costs were fixed before the proposal was accepted by the region. Immutable information is information that is fixed and not capable of negotiation, such as pre-existing labour cost agreements. Ultimately, the affected party has not provided me with evidence to demonstrate that it was constrained by any fixed costs prior to the region accepting the terms of its bid.

[172] In the context, the affected party's submission was a proposal, and the region had the ability to negotiate any part of its contents. It had the leverage of two other similarly detailed bids to assist it in doing so. Until the region agreed to the terms of the affected party's bid, its contents were open to negotiation and therefore not immutable.

[173] While the region required a very high level of specificity and detail about proposed arrangements with third parties from the affected party in its bid, this is not to be confused with pre-existing or unchangeable obligations.

[174] I am satisfied that all of the detail in the financial model formed an essential part of the agreement, primarily because it was the region that sought its inclusion in the agreement and it was a key factor in the affected party's success in being the winning bidder. The financial model represented a very detailed response to a detailed request for proposals.

[175] I believe this conclusion is consistent with the purpose of section 17 because it provides for disclosure of information that comprises or determines essential terms of the region's agreement. Section 17 provides protection for the informational assets of

third parties. While the detailed information in the agreement at issue may appear to reveal this type of information, I am satisfied that the information is the informational asset of the parties. It was sought out by the region in order to be clear about the respective responsibilities and risks of the parties, as well as to provide as much clarity as possible about its costs. Given this context, I am satisfied that the financial model was negotiated not supplied.

[176] I note also that to the extent this information is duplicated elsewhere in the contract and has already been disclosed, there can be no harm from its disclosure where it appears in the financial model.

[177] In summary, I find the information at issue is negotiated not supplied. It therefore cannot be withheld under section 10 of the Act.

Part 3: Harms and Public Interest Override

[178] Given my findings regarding the "supplied' component of the section 10 test, it is not necessary to consider Part 3 of the section 10 test regarding harms or the possible application of the public interest override to the withheld information.

ORDER:

I order the region to disclose the information at issue by **May 1, 2018** but not before **April 25, 2018**.

Original Signed by: March 23, 2018

Hamish Flanagan
Adjudicator