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Date: 20151218

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T-1481-14

Citation: 2015 FC 1392

Ottawa, Ontario, December 18, 2015

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

CALIAN LTD.

Applicant

And

ATTORNEY GENERAL OF CANADA and INFORMATION COMMISSIONER OF CANADA

Respondents

PUBLIC REASONS FOR JUDGMENT AND JUDGMENT
SAME AS PREVIOUSLY RELEASED CONFIDENTIAL VERSION

[1] This is an application by Calian Ltd. [the Applicant or Calian] under section 44 of the *Access to Information Act*, RSC 1985, c A-1 [*Act*] for judicial review of two materially identical decisions of the Minister of Public Works and Government Services Canada [PWGSC] refusing to redact portions of the Applicant's confidential business records under the *Act*. Except for the redactions requested, the Applicant agrees to the release of the records.

[2] In my opinion, this application should be granted for two reasons. First, the Applicant's Personnel Rates, which the head of the institution refused to redact, warrant exemptions under both paragraphs 20(1)(*c*) and (*d*) of the *Act*. Secondly, the head of the institution erred by failing to consider the discretion granted under subsection 20(5) of the *Act*, thus failing to carry out his or her statutory duty as required. Therefore, the two decisions at issue are set aside and remitted for re-determination.

I. Facts

[3] The Applicant is an Ottawa-based firm whose Business and Technology Services division provides flexible short-term and long-term placements for highly specialized and other research personnel professionals such as engineers, information technology specialists and healthcare consultants. The Applicant's Business and Technology Services division augments the workforces of its customers throughout Canada and around the world, by providing short- and long-term placements for various professionals such as engineers, information technology specialists and healthcare professionals. A significant proportion of the Applicant's business relates to the provision of personnel services to the Government of Canada.

[4] On September 4, 2009, PWGSC launched a request for standing offer [RFSO] to provide research assistants to the Royal Military College [RMC] in Kingston, Ontario. RMC is Canada's national military university based in Kingston, Ontario. RMC's mandate includes the provision of research for the Department of National Defence [DND] and other government departments. The RFSO required the bidding parties to include personnel rates or unit prices [Personnel Rates] for each labour category or type of specialist provided by the bidder. The Personnel Rates in

each of the many service categories were to be adjusted annually over the five-year life of the contract resulting from the RFSO. The RFSO also required the bidder to adhere to various clauses.

[5] The Applicant submitted an offer in response to the RFSO. On November 30, 2009, the Applicant won the bid and was awarded Standing Offer W0046-08001/001/TOR [the 2010-14 Standing Offer] for the "Provision of Research Assistants". The Applicant thereby became the exclusive supplier of specialized research personnel to RMC for the period of January 1, 2010 to December 31, 2014.

[6] This was the third competitive procurement the Applicant bid on and won to provide research assistants to RMC, having previously won standing offers tendered in both 1997 and again in 2002 [2003-09 Standing Offer].

[7] The Applicant's successful bid for the 2010-14 Standing Offer contained Personnel Rates for a wide range of specialized and technical fields, including specialists in counter-terrorism, environmental science and engineering, nuclear science and engineering, communications, undersea acoustics, advanced engineering materials, operations research, mathematical modelling and simulation.

[8] The sophistication of the research services required by RMC is established by the expected education and experience of personnel to be supplied by Calian. DND estimated that almost one-third of such personnel would require either a Master's degree or a Doctorate, and

one in ten would require a Doctorate and more than 20 relevant publications to their name. Calian is required to maintain an inventory of qualified candidates, and upon request undertake national and international searches for suitably qualified candidates. The Statement of Work for the 2010-14 Standing Offer emphasized it was "essential that well qualified researchers of high calibre be attracted to carry out the work and that a stable attractive environment be maintained to ensure continuity".

[9] The RFSO contained approximately 100 different categories of research assistants and professionals including those within the same labour category. There are many different skill levels within the same labour categories. The rates for each labour category change each year over the RFSO's five-year term. Thus, the unit rates [also called Personnel Rates] set approximately 500 different prices over the life of the contract (100 categories times five years).

II. The Disclosure Clause

[10] The RFSO and resulting contract contained the following Disclosure Clause:

> Disclosure of Information
>
> The Offeror agrees to the disclosure of its standing offer unit prices or rates by Canada, and further agrees that it will have no right to claim against Canada, the Identified User, their employees, agents or servants, or any of them, in relation to such disclosure.

III. No Disclosure of Personnel Rates in the Past

[11] The Applicant's evidence concerning the meaning of this clause is contained in the affidavit of Mr. Jerry Johnston, the Applicant's Vice President of Operations. His evidence was

almost entirely based on his direct experience with the Applicant going back to the Applicant's first RFSO in 1997, and before that, to when he started with the Applicant in 1992. He was not cross-examined. Mr. Johnston's evidence was that:

i. in all his years with Calian, Mr. Johnston could not recall a single occasion on which detailed billing rates in contracts were disclosed by the government over the objections of the Applicant;

ii. further, such information had always been protected by the government pursuant to the provisions of section 20 of the *Act*, despite being the subject of a number of requests for access under it;

iii. in light of that practice, it was not reasonable to expect the Applicant to have understood that the government's intention in respect of the disclosure clause was that it applied to the detailed billing rates [Personnel Rates, ed.] from the 2010-14 RFSO;

iv. while considering the Applicant's response to the current access to information request, Mr. Johnston consulted with colleagues at Calian as to their understanding of the reason for including such disclosure clauses in standing offers;

v. their collective best understanding, based on experience and discussions over the years with government contracting authorities, was that the disclosure provision had to be included in standing offers because it would allow the rates to be shared among the various government departments with access to a standing offer, and not that it would allow the rates to be disclosed to the public, particularly competitors; and

vi. over the years, a number of access requests had been made seeking the release of information similar to the Personnel Rates now in issue. In each case however, while the contracts themselves were released, the heads of institution redacted what are now called Personnel Rates, i.e., unit prices for the research services supplied under the RFSOs.

IV. The 2009 Access Request – Unit Prices were Redacted Under Paragraph 20(1)(*c*)

[12] In addition to the above, the Applicant provided detailed uncontradicted evidence concerning an access request made in 2009 that asked for essentially the same information requested now. It concerned the Applicant's previous standing offer for RMC, namely the 2003-09 Standing Offer. The 2009 access to information request was worded as follows:

> Copy of an existing contract between PWGSC and Calian, a defence contractor company, to provide research assistant personnel to RMC. Contract expires 31 Mar 09.

[13] While the head of the institution released the 2009 contract, he or she redacted all of the Applicant's information equivalent to the Personnel Rates at issue in today's application. In making these redactions, the head of the institution applied paragraph 20(1)(*c*) of the *Act*. This provision requires the exemption of "information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party."

[14] It is very important to note that the 2003-09 Standing Offer also contained a Disclosure Clause, worded almost identically to the Disclosure Clause in issue today. It read:

> The Offeror agrees to the disclosure of its Standing Offer unit prices or rates by Canada, and further agrees that it shall have no right to claim against Canada, the Minister, the Identified User, their employees, agents or servants, or any of them, in relation to such disclosure.

[15] For comparative purposes, the Disclosure Clause at issue in the case at bar (see para 10) states:

> The Offeror agrees to the disclosure of its standing offer unit prices or rates by Canada, and further agrees that it will have no right to claim against Canada, the Identified User, their employees, agents or servants, or any of them, in relation to such disclosure.

[16] In my respectful view, there is no difference between the Disclosure Clause at issue in this case and the one at issue in 2009, where, as here, the initial position of the head of the institution was to release the unit prices/Personnel Rates.

[17] The decision-maker at the time of the 2009 redactions was the DND. In the current request, the decision-maker is PWGSC. It seems that the portions of DND's contracting administration moved from DND to PWGSC; however, no material differences were identified between the two departments for the purposes of these consolidated proceedings.

V. The Current Access Request and its Processing

[18] The access request at issue now is dated October 29, 2013; it asks for the following records:

> Please provide a copy of all contracts, contract amendments, correspondence, and emails related to contract number W0046-08001/001/TOR (Military R&D) for the period of 2009/11/30 to 2013/03/01.

[19] PWGSC engaged the following process for handling this request. There is no objection to the process followed, only the resulting refusal to redact. First, PWGSC compiled a set of records containing the Applicant's potentially confidential third-party information. Then it sent these to the Applicant by letter dated November 21, 2013, and asked for the Applicant's representations as to what might be released, thereby initiating the consultation process with respect to third party information set out at section 27 of the *Act*:

27. (1) If the head of a government institution intends	27. (1) Le responsable d'une institution fédérale qui a

to disclose a record requested under this Act that contains or that the head has reason to believe might contain trade secrets of a third party, information described in paragraph 20(1)(*b*) or (*b.1*) that was supplied by a third party, or information the disclosure of which the head can reasonably foresee might effect a result described in paragraph 20(1)(*c*) or (*d*) in respect of a third party, the head shall make every reasonable effort to give the third party written notice of the request and of the head's intention to disclose within 30 days after the request is received.	l'intention de communiquer un document fait tous les efforts raisonnables pour donner au tiers intéressé, dans les trente jours suivant la réception de la demande, avis écrit de celle-ci ainsi que de son intention, si le document contient ou s'il est, selon lui, susceptible de contenir des secrets industriels du tiers, des renseignements visés aux alinéas 20(1)*b*) ou *b.1*) qui ont été fournis par le tiers ou des renseignements dont la communication risquerait vraisemblablement, selon lui, d'entraîner pour le tiers les conséquences visées aux alinéas 20(1)*c*) ou *d*).

[20] In a letter dated December 18, 2013, the Applicant opposed the disclosure by PWGSC, requesting redaction of its Personnel Rates including the redactions similar to those requested and granted in 2009.

VI. PWGSC's January 3, 2014 Decision Refusing to Redact – The First Decision Now Under Review

[21] On January 3, 2014, PWGSC issued a decision under section 28 of the *Act*. It found certain portions of the requested records were partially exempt from disclosure. However, in a break from past practice going back to 1997, the head of the institution declined to redact the Applicant's Personnel Rates, stating simply: "as the disclosure of information clause has already been incorporated in the [2010-2014] Standing Offer, the unit prices and rates cannot be

considered to be confidential third party information that would prejudice your competitive position and we must therefore release them."

[22] This decision led the Applicant to file an application for judicial review under section 44 of the *Act*, being Court File T-291-14, which led to the production of a Certified Tribunal Record.

VII. PWGSC's June 5, 2014 Decision Refusing to Redact – The Second Decision Under Review

[23] When the Applicant received and reviewed the Certified Tribunal Record, it became apparent that additional documents should have been but were not included in the original consultation process.

[24] Therefore, on May 2, 2014, PWGSC engaged a second round of consultations and sought the Applicant's position on the additional documents. In response, the Applicant requested redaction of Personnel Rates by letter dated May 21, 2014.

[25] On June 5, 2014, PWGSC issued a second decision under section 28 of the *Act*. Once again, while PWGSC decided certain portions of these additional records were partially exempt from disclosure, PWGSC declined to redact the Personnel Rates. As it had previously, PWGSC stated simply: "… the disclosure of information clause has already been incorporated in the [2010-2014] Standing Offer, the unit prices and rates cannot be considered to be confidential

third party information that would prejudice your competitive position and we must therefore release them."

[26] Therefore, the Applicant filed the second application for judicial review, being Court File T-1481-14.

VIII. The Two Current Requests Are Materially the Same: Applications Consolidated

[27] The two applications raise the same issues and by Order of this Court have been consolidated. PWGSC's justifications for not redacting are the same in both decisions under review. There are no material differences in the subject matter of the two applications for judicial review, which consist of the Applicant's Personnel Rates in addition to Travel and Living, and Overtime Rates as set out in its response to the 2010-14 RFSO. For ease of reference, I have and will continue to refer to all the confidential material in dispute as "Personnel Rates". The two applications were heard together. Therefore, these reasons apply to both applications without distinction, and a copy of these reasons will be placed in each of the two Court files.

IX. Decision under Review

[28] The matters under review are the January 3, 2014 and June 5, 2014 decisions by PWGSC not to redact the Applicant's Personnel Rates. Otherwise, the Applicant did not oppose release of the records.

X. Issues

[29] While the Applicant also requested redaction under paragraph 20(1)(*b*) and section 18 of the *Act*, in my view, the determinative issues are:

A. Are the Applicant's Personnel Rates entitled to redaction pursuant to paragraph 20(1)(*c*) of the *Act*, and is it affected by the Disclosure Clause?

B. Are the Applicant's Personnel Rates entitled to redaction pursuant to paragraph 20(1)(*d*) of the *Act*, and is it affected by the Disclosure Clause?

C. Was the head of the institution required to and, if so, did he or she consider the discretion to redact the Personnel Rates by subsection 20(5) of the *Act*?

XI. Relevant Legislation

[30] The relevant legislative provisions are sections 18 and section 20 of the *Act*:

18. The head of a government institution may refuse to disclose any record requested under this Act that contains	18. Le responsable d'une institution fédérale peut refuser la communication de documents contenant :
(*a*) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Canada or a government institution and has substantial value or is reasonably likely to have substantial value;	*a*) des secrets industriels ou des renseignements financiers, commerciaux, scientifiques ou techniques appartenant au gouvernement du Canada ou à une institution fédérale et ayant une valeur importante ou pouvant vraisemblablement en avoir une;
(*b*) information the disclosure of which could reasonably be expected to prejudice the competitive position of a	*b*) des renseignements dont la communication risquerait vraisemblablement de nuire à la compétitivité d'une

government institution or to interfere with contractual or other negotiations of a government institution;

institution fédérale ou d'entraver des négociations — contractuelles ou autres — menées par une institution fédérale;

(*c*) scientific or technical information obtained through research by an officer or employee of a government institution, the disclosure of which could reasonably be expected to deprive the officer or employee of priority of publication; or

c) des renseignements techniques ou scientifiques obtenus grâce à des recherches par un cadre ou employé d'une institution fédérale et dont la divulgation risquerait vraisemblablement de priver cette personne de sa priorité de publication;

(*d*) information the disclosure of which could reasonably be expected to be materially injurious to the financial interests of a government institution or to the ability of the Government of Canada to manage the economy of Canada or could reasonably be expected to result in an undue benefit to any person, including such information that relates to

d) des renseignements dont la communication risquerait vraisemblablement de porter un préjudice appréciable aux intérêts financiers d'une institution fédérale ou à la capacité du gouvernement du Canada de gérer l'économie du pays ou encore de causer des avantages injustifiés à une personne. Ces renseignements peuvent notamment porter sur :

(i) the currency, coinage or legal tender of Canada,

(i) la monnaie canadienne, son monnayage ou son pouvoir libératoire,

(ii) a contemplated change in the rate of bank interest or in government borrowing,

(ii) les projets de changement du taux d'intérêt bancaire ou du taux d'emprunt du gouvernement,

(iii) a contemplated change in tariff rates, taxes, duties or any other revenue source,

(iii) les projets de changement des taux tarifaires, des taxes, impôts ou droits ou des autres sources de revenu,

(iv) a contemplated change in the conditions of operation of

(iv) les projets de changement dans le mode de fonctionnement des institutions

financial institutions,

(v) a contemplated sale or purchase of securities or of foreign or Canadian currency, or

(vi) a contemplated sale or acquisition of land or property.

…

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

…

(*b*) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

…

(*c*) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

(*d*) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

financières,

(v) les projets de vente ou d'achat de valeurs mobilières ou de devises canadiennes ou étrangères,

(vi) les projets de vente ou d'acquisition de terrains ou autres biens.

…

20. (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :

…

b) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers;

…

c) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité;

d) des renseignements dont la divulgation risquerait vraisemblablement d'entraver des négociations menées par un tiers en vue de contrats ou à d'autres fins.

…	…
(5) The head of a government institution may disclose any record that contains information described in subsection (1) with the consent of the third party to whom the information relates.	(5) Le responsable d'une institution fédérale peut communiquer tout document contenant les renseignements visés au paragraphe (1) si le tiers que les renseignements concernent y consent.

XII. Standard of Review

[31] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57 and 62, the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." The Supreme Court of Canada's decision in *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 [*Merck*] did just that by determining the standard of review and degree of deference to be given to a decision-maker's application of paragraph 20(1)(*c*). I consider the same test applies to paragraphs 20(1)(*b*) and 20(1)(*d*). *Merck* holds there are no discretionary decisions under subsection 20(1) of the *Act*. The decision to disclose or not to disclose is judicially reviewed on the standard of correctness. This Court must determine whether the exemptions have been applied correctly to the requested records.

[32] Furthermore, there are no discretionary decisions in this case. No deference is owed to the decision-maker. This flows from the mandatory nature of the opening words of subsection 20(1) of the *Act*, which state: "Subject to this section, the head of a government institution shall refuse to disclose any record. …" In *Merck*, the Supreme Court of Canada said (at para 53):

> There are no discretionary decisions by the institutional head at issue in this case. Under s. 51 of the Act, the judge on review is to

> determine whether "the head of a government institution is required to refuse to disclose a record" and, if so, the judge must order the head not to disclose it. It follows that when a third party, such as Merck in this case, requests a "review" under s. 44 of the Act by the Federal Court of a decision by a head of a government institution to disclose all or part of a record, the Federal Court judge is to determine whether the institutional head has correctly applied the exemptions to the records in issue … . This review has sometimes been referred to as *de novo* assessment of whether the record is exempt from disclosure ... . The term "*de novo*" may not, strictly speaking, be apt; there is, however, no disagreement in the cases that the role of the judge on review in these types of cases is to determine whether the exemptions have been applied correctly to the contested records. Sections 44, 46 and 51 are the most relevant statutory provisions governing this review.
>
> [emphasis added; citations omitted]

[33] This law is well summarized by Justice Rennie (as he then was) in *Porter Airlines Inc v Canada (Attorney General)*, 2014 FC 392, where Justice Rennie stated that the standard of review is correctness (see paras 15–16): "The appropriate standard of review in this case is correctness. … [A]t issue is whether the Department correctly characterized the documents in question when it determined that they were not subject to the exemptions against disclosure under the *Act*."

[34] *Merck* is also important because it emphasizes the need for evidence-based analysis of the exemption claimed on a case by case basis. The Supreme Court of Canada in *Merck* repeatedly highlighted the evidence-dependent nature of this inquiry, the need to take care not to overgeneralize the holdings of particular cases, stating:

> [149] […] However, much will depend on the evidence in a particular case.
>
> [150] I underline this last point. Once the relevant legal principles are established, whether or not a record is confidential is primarily

> a question of fact. Care must be taken, therefore, not to over-generalize the holdings of particular cases, by failing to give due regard to the evidence which was before the court in those cases. … The key point is that these principles are not self-applying and must be considered in light of the evidence in each case.
>
> [151] It seems to me that the dispute between the parties on this point turns more on a question of fact rather than on a question of legal principle.
>
> […]
>
> [211] I now turn to address the parties' submissions about the type of harm on which a third party may rely in claiming the s. 20(1)(c) exemption. It is for the reviewing judge to decide whether the evidence shows that disclosure could reasonably be expected to result in harm of the nature specified in s. 20(1)(c). I mention this to underline the point that while the case law can set out general principles governing the provision's application, at the end of the day, there is a significant factual component to the inquiry which will turn on the particular circumstances and evidence in each case.
>
> [emphasis added]

XIII. Submissions of the Parties and Analysis

[35] The Applicant submits its Personnel Rates are covered by several mandatory statutory exemptions and therefore its Personnel Rates must be redacted by PWGSC. It further says the discretion under subsection 20(5) should have been but was not considered. In opposition, the Respondents say that none of the subsections apply essentially due to the existence of the Disclosure Clause. Its opposition to subsection 20(5) was necessarily muted given its reliance on consent under subsection 20(1) and the fairly obvious fact the decisions below are silent on the discretion under subsection 20(1).

[36] In my view, the determinative provisions for this application are paragraphs 20(1)(*c*) and (*d*), together with subsection 20(5) to which I will now turn. I will discuss paragraph 20(1)(*b*) and section 18 towards the end of these reasons.

A. *Are the Applicant's Personnel Rates entitled to redaction pursuant to paragraph 20(1)(c) of the Act, and is it affected by the Disclosure Clause?*

[37] Paragraph 20(1)(*c*) requires the redaction of third party documents containing, "information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party".

[38] *Merck* sets out the following legal principles governing the consideration and application of paragraph 20(1)(*c*):

i. the onus is on the Applicant to establish its entitlement to the exemption, which depends on the nature of the material and the particular context of the case: "a third party must establish that the statutory exemption applies on the balance of probabilities. However, what evidence will be required to reach that standard will be affected by the nature of the proposition the third party seeks to establish and the particular context of the case." (*Merck* at para 94);

ii. "[…] A third party claiming an exemption under s. 20(1)(c) of the Act must show that the risk of harm is considerably above a mere possibility, although not having to establish on the balance of probabilities that the harm will in fact occur.": *Merck* at para 199. The Court concluded at paragraph 206: "To conclude, the accepted formulation of "reasonable expectation of probable harm" captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm."; and

iii. the types of harm covered by paragraph 20(1)(*c*) are disjunctive: "It is sufficient for a third party to show that disclosure could reasonably be expected to result in any one of a financial loss or gain or in prejudice to the third party's competitive position. In other words, it is not necessary for the third party to show that the "prejudice" to his or her competitive position also results in "harm"": *Merck* at para 212.

XIV. Nature of the Personnel Rates

[39] The Applicant's Personnel Rates are the micro-level prices the Applicant will receive for each individual specialist within the very great number of different labour categories, plus relevant overtime and travel rates. As already noted, there are approximately 500 different labour categories over the five-year life of the RFSO. These micro-level prices are not the total price paid under the contract; the total price paid will depend on the type and frequency of specialists performing work. The Applicant does not object to disclosure of the total price paid under the RFSO, nor to that of the balance of the contract itself. The Applicant is only concerned with the Personnel Rates, and travel and overtime rates.

[40] The Applicant asks that Personnel Rates be redacted now, as was done in the past. I agree for the following reasons.

[41] In my assessment, the Personnel Rates individually and in the aggregate are the most significant factor in the success of the Applicant's bid; they were crucial to the Applicant's competitive position, and to its ability to win the contract in the highly competitive RFSO bidding process. I base this finding on, among other considerations, the fact that the decision to award the RFSO was weighted 60% on price and 40% on technical merit, and on the highly competitive nature of the RFSO process.

[42] In previous RFSOs, there was a "base price" for each labour category. The "base price" was set by the Crown. However, bidders were required to quote what was called a "fully-

burdened price" for each labour category. The "fully burdened price" was all inclusive; it included not only the government-set "base price", but in addition, it had to include the bidder's markup to cover overhead, all related bidder costs and the bidder's profit for each category. By deducting the published "base price" from the fully burdened price, competitors and others could ascertain the company's aggregate markup for overhead, other costs, and profit.

[43] The difference in the RFSO for the 2010-14 Standing Offer is important for several reasons. The government did not provide a "base price" for each labour category; instead, each bidder had to quote a complete all-inclusive price for each labour category. This change meant the Applicant had to develop Personnel Rates from the ground up. The Applicant and all bidders had to determine the complete price to be charged based on scores of individual compensation levels, the Applicant's confidential overhead, other related costs, and an element of profit.

[44] Importantly, the Applicant was able to and did rely on its own internal business analyses to develop each of the many Personnel Rates in its bid.

[45] The uncontested evidence which I accept is that the resulting ground-up development of Personnel Rates was the product of confidential and proprietary salary and other information that the Applicant itself obtained from, or negotiated with, the many individual potential providers of required specialist labour services. Mr. Johnston's affidavit makes it clear, and there is no dispute, that this information was not publicly released in the past. To each of those amounts, the Applicant added its acquired business analyses in addition to what it needed as overhead, other costs, and profit.

[46] Mr. Johnston gave credible uncontradicted evidence of harm resulting from disclosure, which is reliable and which I accept:

> 44. The competitive harm which would arise from disclosure of the bill rates that Calian bid in the 2009 RFSO competitive procurement is significantly increased because of the way that PWGSC changed the competitive procurement in 2009. In each of the 1997 and 2002 RFSO procurements for RMC research assistance, RMC provided all bidders with "base rates" for each category of research assistant, which were the minimum rate of pay that a contractor could pay personnel in each category of expertise. As noted above, bidders were only required to provide the "fully burdened rate", which was the actual salary and all applicable mark-ups to be charged back to RMC.
>
> 45. However in the 2009 RFSO, I understand that PWGSC refused to allow RMC to specify base rates for personnel. Accordingly, in the 2009 RFSO, there was no guidance to bidders as to an acceptable level of remuneration for personnel, and each bidder had to develop a competitive strategy for billing rates that also addressed concerns about recruitment and retention. In this regard, Calian relied on its extensive and proprietary skills in managing personnel services to develop a competitive bill rate matrix, and its proposal was considered to be the best value proposal received by PWGSC. Allowing disclosure of the rates that Calian bid in the competitive procurement would allow competitors to "free-ride" on the extensive work undertaken by Calian, and Calian would be at a significant disadvantage because it would not have access to the confidential information of any other bidder.

[47] In my respectful view, the Personnel Rates at issue in the 2010-14 Standing Offer do indeed contain a great deal more confidential information than previous Standing Offers; they contain the additional and very significant additional information namely the Applicant's own assessment of "base price". Previously, the base price was publicly available and set by the Crown. In my view, this change makes the current Personnel Rates very much more business-sensitive than the old fully burdened rates in previous standing offers. Effectively, the old "base rate" that had been set for all bidders by the Crown became an important new variable in this

highly-competitive bidding process. The resulting Personnel Rates are significantly more confidential than the fully burdened unit prices in issue in the 2003-09 Standing Offer.

[48] It is certainly not consistent for the head of the institution to refuse to redact information from the 2010-14 Standing Offer that is significantly more confidential and business-sensitive than information it consistently redacted before, and it specifically redacted in the 2003-09 Standing Offer. In my view, the disclosure of Personnel Rates would create a high degree of potential harm to the Applicant, and a risk of harm that is even higher than previously would have been the case. I consider this to be a factor in the reasonable expectations of harm analysis required under paragraph 20(1)(*c*) as discussed later.

XV. History of Dealings: Both Parties Consider and Treat Personnel Rates as Exempt

[49] In my view, the general history of dealings between the parties is another relevant factor in considering the nature of the Personnel Rates and the issue of reasonable expectations of harm outlined in paragraph 20(1)(*c*) of the *Act*. Such dealings put the 2010-14 Standing Offer and the access request in their proper evidentiary and factual contexts.

[50] It is well-established on the facts of this case, on credible evidence, that both parties treated the Personnel Rates, and the previous analogous "fully burdened" unit rates, as exempt from disclosure under the *Act* going back at least to 1997. Specifically, we know the Applicant went through an almost identical process five years earlier concerning the 2003-09 Standing Offer that it won in 2003. The 2003-09 and 2010-14 Standing Offers are essentially the same: both involved the same government contracting party, namely, the Crown (represented by DND

in 2003 and PWGSC in 2010), both were to supply specialized consultant services to RMC, and both contained materially identical Disclosure Clauses. The same access-related events followed each Standing Offer signing: there were access requests (in 2009 and 2014), the Applicant objected on the grounds of confidentiality. The same core issue arose, namely, whether to redact the micro-level labour category fully burdened unit rates in 2009 and Personnel Rates in 2014. A materially identical Disclosure Clause was common to both Standing Offers. In both cases I should add, the parties were and are sophisticated entities represented by good counsel.

[51] While the Respondents disagree, in my view, the inference arising from the parties' past dealings and course of conduct is compelling in terms of what is asked for under paragraph 20(1)(*c*) of the *Act*. In 2009, the Crown recognized that disclosure of the fully burdened unit prices could reasonably be expected to result in material financial loss to the Applicant, could reasonably be expected to result in material financial gain to a competitor, or could reasonably be expected to prejudice the Applicant's competitive position. While we know that paragraph 20(1)(*c*) was relied upon in 2009, we do not know which part(s) of it the head of the institution actually based his or her decision on. But we do know the head of the institution, as required by paragraph 20(1)(*c*), redacted the fully burdened unit price information from the disclosure and did so notwithstanding his or her consideration of the same Disclosure Clause now raised by the Respondents.

[52] Given the heightened confidential nature of the information presently being requested, in my respectful view, the head of the institution should have redacted the Personnel Rates; their

disclosure could even more reasonably be expected to result in material financial loss or be expected to prejudice the Applicant's competitive position than in 2009.

[53] The Respondents say that the 2009 decision involved a different decision-maker and a different subject matter, and therefore the 2009 decision should be ignored or discounted. The Respondents submit that the 2009 access request involved material covered by the *Defence Production Act*, RSC 1985, c D-1. It further says that *stare decisis* does not apply to administrative agencies, implying that institution heads may arrive at different results on materially the same facts.

[54] These are not persuasive grounds to deny the Applicant the statute's protection from public disclosure of the Personnel Rates. The institutions implementing and managing the RFSO processes and the processes under the *Act* in this case are materially the same, whether DND which redacted in 2009 or PWGSC which refused to redact in 2014. The executive authority in both cases is the Crown, acting through the relevant head of the institution. To accept otherwise would see form triumph over substance. There is no evidence the change of delegated contracting administration or management from DND to PWGSC made any difference to the outcome of this case, given the nature of the information is the same. And, as noted already, the Disclosure Clauses are materially the same.

[55] The Respondents properly conceded, and I agree, that PWGSC is not permitted to act in an arbitrary or capricious manner.

[56] In my respectful view, the present case does not involve *stare decisis*; rather, the issue is the correctness of the decisions in these two cases based on the evidence. In any event, this is not a case of *stare decisis* on these facts: the current Personnel Rates are more commercially sensitive than the previously-considered unit prices as discussed above.

XVI. Prejudice or Harm to the Applicant's "Competitive Position" Under Paragraph 20(1)(*c*)

[57] In terms of harm and prejudice to its competitive position, the Applicant relies on uncontradicted evidence which I accept. The evidence is that if the Applicant's Personnel Rates are not redacted, both the Applicant's confidential pricing and bid strategies will be revealed to its competitors. The bidding for this work is highly competitive. The release of the Personnel Rates would allow the Applicant's competitors to gain access to the totality of the Applicant's pricing and bid strategies.

[58] On these bases, I have no difficultly concluding that releasing the Applicant's detailed Personnel Rates will give its competitors a "free ride" on the complete range of Personnel Rates generated as by the Applicant through the use of the Applicant's business skills and experience. Such disclosure would thereby tilt the level playing field against the Applicant, and harm its ability to submit a winning bid.

[59] I make this finding based on credible evidence that disclosure of such proprietary information will provide competitors with invaluable insight into the Applicant's bid strategies, result in harm to its competitive position and/or material loss to it. In addition, once the current contract (including all option periods) expires, the Applicant has every reason to expect that this

same sort of bidding opportunity will again go out to tender. Therefore, disclosure of this level of information about the Applicant's pricing in the 2010-14 Standing Offer would almost certainly result in an increase in competitive harm to the Applicant's bid for procurement. Disclosure would grant the Applicant's competitors complete access to its confidential pricing information, disrupting the level competitive playing field that the RFSO process is meant to ensure. Disclosure would increase the likelihood that the Applicant would not succeed in submitting the winning bid by providing greater tools to other bidders to win the bid at no cost to them for business practice development. There was no serious challenge to this evidence of harm and financial loss, tendered again by Mr. Johnston, a very senior officer whose reliability and credibility is accepted.

[60] The record established that such harm is not hypothetical; the parties expected another RFSO would go to tender upon expiry of the 2010-14 Standing Offer (the Court has no information whether this has happened or not). I accept that if the Applicant's competitors have access to the Applicant's successful Personnel Rates, they will use this information to their own competitive advantage, and to the Applicant's disadvantage. Moreover, if the Personnel Rates are not redacted, the Applicant's competitors would compete using the Applicant's pricing information but without having to incur any of the costs of the Applicant's extensive research and business experience; i.e., at no cost to them. This evidence was placed on the record and not contradicted.

[61] The Applicant also contends, and I agree subject to a general caution concerning the application of other cases to the facts of a different case, that by disclosing the contract price,

there is a real, objective risk that this information will give competitors a head start or "spring board" in developing competitive bids against the Applicant for future contracts for data protection services. This risk is greater than a mere possibility: see for another example *Equifax Canada Co v Canada (Human Resources and Skills Development)*, 2014 FC 487 at para 30 [*Equifax*].

[62] The following passage from *CORADIX Technology Consulting Ltd v Canada (Minister of Public Works and Government Services)*, 2006 FC 1030 at para 31 [*Coradix*] applies to the case at bar:

> On a section 44 review, the Court must engage in a detailed scrutiny of the information to determine whether all or parts of the information should be withheld from disclosure. In the present case, there are a number of instances where when read in isolation it is not readily apparent how disclosure of a specific item could compromise the Applicant's competitive position. However, when read in its entirety, it becomes apparent that it is the composite of these various business and management strategies that constitute the Applicant's methodology and approach to its core business, successful human resource management and quality control. Viewed in this light, it becomes evident that should the Information be disclosed, a competitor could implement or replicate the Applicant's methodology in subsequent bids to its competitive advantage and to the detriment of the Applicant's competitive position.
>
> [emphasis added]

[63] I note that in *Coradix*, as was the case in the Applicant's previous dealings, the relevant heads of the institution agreed to redact the equivalent to Personnel Rates. That should have been done in this case as well, as explained above and amplified below.

[64] The Applicant's evidence also outlined a risk of potential harm from what it called "bid shopping". The Applicant's unchallenged evidence from its credible and experienced Vice President was that allowing disclosure of the Personnel Rates would effectively allow an undesirable form of "bid shopping", which is the practice of divulging a contractor's bid to other prospective contractors before the award of a contract in order to secure a lower bid. Such bid shopping is in my respectful view, yet another undesirable consequence of disclosure that would tilt the playing field against and create a risk of harm to the Applicant in the next procurement round.

XVII. Impact of the Disclosure Clause

[65] The Respondents, who filed no evidence on the foregoing issues, made a number of arguments to the effect that the Disclosure Clause defeats the Applicant's claim under paragraph 20(1)(*c*). It says that if the Applicant did not want to accept the potential for competitive harm, it should not have submitted a bid to a federal government agency, which is covered by the *Act*. The Respondents allege the Disclosure Clause consent breaks the required link between public access and loss or harm, and distinguishes *Equifax* because it had no Disclosure Clause. The Respondents argue the evidence of harm is speculative. With respect, I disagree.

[66] I accept the evidence of potential harm and commercial disadvantage referred to above, and consider the Respondents' arguments seem to be in part an effort to impose a higher burden under paragraph 20(1)(*c*) than allowed by the Supreme Court of Canada in *Merck*.

[67] Of course, I agree that the Applicant did not have to submit a bid. But this argument has no merit because, if accepted, it would defeat any claim for exemption. It is also flawed in that it is premised on the Respondents' view of the case being correct. More centrally, it misses the point, which is the right of the Applicant to redaction on the evidence of this case.

[68] I agree the *Equifax* decision did not deal with a disclosure clause; I rely on *Equifax* because it accepts that disclosure of unit pricing may give a competitor a head start, or free ride on the Applicant's unit pricing thereby giving rise to more than a mere possibility of harm to the competitive position of a third party such as the Applicant. Disclosure of unit prices had that potential effect in *Equifax*, and it has that effect here as well.

[69] I am respectfully unable to accept the Respondents' assertion that the Disclosure Clause prevents this Court from finding that the Personnel Rates warrant an exemption under paragraph 20(1)(*c*).

[70] I must come back to Parliament's legislation before us now. The exemption now under discussion (paragraph 20(1)(*c*)) and the case law cited above require the Court to review the evidence and facts to see if in this case there is "information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party". In my view, a determination of what "could reasonably be expected", requires an analysis of all the circumstances. This Court must consider all relevant facts, considerations and circumstances that "could reasonably be expected" to establish the listed consequences referred to in the legislation.

[71] The thrust of the Respondents' argument is that the required analysis begins and ends with the Disclosure Clause in the 2010-14 Standing Offer, which the Respondents say has the effect of preventing the Applicant from claiming protection provided by the *Act* against the risks of harm identified in paragraph 20(1)(*c*). For completeness, the Respondents urged the Court to find the Disclosure Clause a complete bar to the exemptions in section 20(1) of the *Act*.

[72] In my view, however, the Respondents' argument does not lead to the dismissal of this application. In my view, and logically taken from the above, if the Court may take the existence of the Disclosure Clause into consideration when assessing what "could reasonably be expected" per paragraph 20(1)(*c*) (which it must), the Court should also take into account other relevant facts and considerations. In other words, the *Act*, in asking what "could reasonably be expected" requires the Court to engage in a comprehensive analysis of relevant circumstances, not the one-dimensional truncated review advanced by the Respondents. Specifically, while I agree the Court must consider the Disclosure Clause, it must also assess the history of dealings between the parties, their past experiences dating back to 1997 including the 2009 access request, the 2009 decision to redact notwithstanding a materially identical Disclosure Clause. The Court for the same reasons must also assess and consider the Applicant's understanding of how and why that clause would be applied. These are components of the required analysis of the statutory test.

[73] The history of past dealings between these two parties is outlined above; all previous access requests going back to 1997 resulted in the Applicant's confidential pricing information being withheld. As a recent and specific example, the same sort of pricing information (except

then the information was less potentially harmful and prejudicial) was redacted under paragraph 20(1)(*c*) of the *Act* in 2009.

[74] I accept Mr. Johnston's uncontradicted and broadly-sourced evidence (he consulted others in his company) that when bidding on the 2010-14 Standing Offer, the Applicant had no reason to believe that the Disclosure Clause gave consent to the release of the Applicant's confidential Personnel Rate information to its competitors or the public. Given the evidence, that belief is credible and I accept it as reasonable. I accept his evidence that the Applicant's understanding of the Disclosure Clause was shaped by its years of experience and discussions with various government procurement officers. And I accept his evidence that the Applicant understood that provisions like the 2003-09 and 2010-14 Disclosure Clauses were only included to allow rates to be shared between various government entities. In my view, these are reasonable understandings for the Applicant's Vice President and other officers to have.

[75] In my view, the Disclosure Clause should therefore be interpreted in accordance with what I consider the reasonable understanding of the Applicant. The Respondents did not file any evidence as to what their understanding was as to the meaning of the Disclosure Clause; the facts are consistent with the parties sharing the view of the Applicant in that it was the Crown which in all previous instances had agreed to redact prior to the occasion leading to this litigation. In all the circumstances, it was reasonable for both the Applicant and Respondents to believe and understand that while the Disclosure Clause allowed PWGSC to share the Applicant's Personnel Rates with other government departments, it did not allow disclosure to the Applicant's competitors or the public.

[76] Assessing the matter generally, and assessing it at the time of signing the 2010-14 Standing Offer, which I believe is appropriate, the Applicant was reasonably expecting that any access request related to the Personnel Rates would have similar outcomes to the 2009 and other access requests, where the Crown redacted similar information under paragraph 20(1)(*c*). Indeed, it is likely this was the reasonable expectation of both parties given the 2010-14 Standing Offer was essentially contemporaneous with the 2009 decision to release with redactions. These facts, together with the Applicant's credible and reasonable understanding of the limited nature of the Disclosure Clause, and the fact that such rates were not disclosed over the Applicant's objections, in my respectful view, have the effect of depriving the Disclosure Clause of the determinative effect urged by the Respondents; the Disclosure Clause is not fatal to this application.

[77] Having regard to the above, taken as a whole, and on a standard considerably above a mere possibility, I am satisfied disclosure of the Personnel Rates creates a reasonable expectation of probable harm to the Applicant because such disclosure will result in a risk of harm that is considerably above and well beyond the merely possible or speculative. In my view, disclosure could reasonably be expected to result in financial loss to the Applicant and could reasonably be expected to result in prejudice to the Applicant's competitive position.

[78] Given these conclusions, an exemption for the Applicant's Personnel Rates is warranted under paragraph 20(1)(*c*) of the *Act*.

B. *Are the Applicant's Personnel Rates entitled to redaction pursuant to paragraph 20(1)(d) of the Act, and is it affected by the Disclosure Clause?*

[79] The Applicant also claims a right to redaction under paragraph 20(1)(*d*) of the *Act*; this paragraph requires the redaction of third party documents containing "information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party."

[80] The law in this regard establishes that the obstruction or interference with contractual or other negotiations of the third party, must be probable and not merely speculative, and may not merely consist of the heightening of competition: see *Burnbrae Farms Limited v Canada (Canadian Food Inspection Agency)*, 2014 FC 957.

[81] Here again, the issue is resolved on the evidence in this case as required by *Merck*. The Applicant's evidence, again uncontradicted, is that if the Personnel Rates, specifically the precise micro-level unit rates, are disclosed, the Applicant's other customers currently paying more will seek to pay less. The evidence is also that in such circumstances, customers might seek to improve their negotiating position, and to do so would be at the Applicant's expense or detriment. I am satisfied that it is probable and not merely speculative that such harm could reasonably be expected to interfere with contractual or other negotiations between the Applicant and such third parties.

[82] In addition, if the Applicant's specialized consultants discover or find out the rates at which they are charged out, which include salary plus all associated overhead, other costs and

profit margin, they too will probably put pressure on the Applicant to be paid at higher rates. This result is again not merely speculative but evidence-based.

[83] It is also probable that these pressures, both working against the Applicant (one driving revenues down, the other driving the Applicant's expenses up), will negatively impact the Applicant's negotiations with both its employees and potential suppliers, separately and in combination. The Applicant's evidence is that this risk is more acute given the upcoming tender. I accept the Applicant's evidence in this regard. None of this evidence relates to a feat by the Applicant of a heightening of competition.

[84] The Respondents rely on the Disclosure Clause, and allege that the evidentiary basis for this claim under paragraph 20(1)(*d*) is inadequate and speculative. I disagree.

[85] In terms of the evidence, the record establishes a reasonable expectation of probable harm. I do not agree that the Applicant's evidence is speculative. To the contrary, I find the evidence is credible and based on Mr. Johnston's many years of experience. In the matter of what the Disclosure Clause meant, he spoke both from his experience and for others in his company with whom he had consulted. Far from offering a speculative guess, Mr. Johnston is the Applicant's Vice President of Operations. His evidence is derived from personal knowledge and business consultations and experience going back with the Applicant more than two decades, i.e., since 1992 - and specifically since the first RFSO in 1997. This is evidence I expect he would know. Counsel for the Attorney General had every opportunity to cross-examine Mr. Johnston and to file contrary evidence, but did neither. Nor did counsel challenge either Mr. Johnston's

experience or credibility. While counsel for the Attorney General filed an affidavit, it is silent on these points. In the circumstances, I am unable to accept this challenge to Mr. Johnston's evidence.

[86] For essentially the same reasons as set out above regarding paragraph 20(1)(*c*) including the overall assessment of the reasonableness of the expectation of contractual interference under paragraph 20(1)(*d*), I reject the Respondents' assertion that the Disclosure Clause is fatal to the claim for redaction. Considering the Disclosure Clause along with the history of past dealings, and the understanding of the limited nature of the clause itself, it cannot be said that the Disclosure Clause bars the Applicant from obtaining the benefit of this statutory exemption.

[87] In these circumstances, I am satisfied the record establishes beyond mere speculation that disclosure of Personnel Rates could reasonably be expected to interfere with contractual or other negotiations of a third party. The obstruction or interference with such contractual negotiations is probable and not merely speculative, and does not merely consist in the heightening of competition.

[88] Therefore, an exemption is warranted under paragraph 20(1)(*d*).

C. *Was the head of the institution required to and if so, did he or she consider and apply the discretion to redact the Personnel Rates granted by subsection 20(5) of the Act?*

[89] Independent of the above, there is a further ground on which these two decisions must be set aside. In this connection and because of the Disclosure Clause, a further necessary step in the

Court's analysis is to review and determine whether the head of the institution properly considered his or her discretion under subsection 20(5) of the *Act*; this subsection provides:

20. (5) The head of a government institution may disclose any record that contains information described in subsection (1) with the consent of the third party to whom the information relates.	20. (5) Le responsable d'une institution fédérale peut communiquer tout document contenant les renseignements visés au paragraphe (1) si le tiers que les renseignements concernent y consent.

[emphasis added]

[90] Given my finding that the Disclosure Clause did not constitute a consent to disclosure of the confidential Personnel Rates except to other government departments, strictly speaking, it may not be necessary to consider subsection 20(5). That analysis took place in the context of assessing what "could reasonably be expected".

[91] For completeness, in my respectful view, the head of the institution also failed to discharge his or her legal duty to consider the discretion he or she had to refuse to disclose created by use of the word "may" in subsection 20(5).

[92] The two reasons given by or on behalf of the head of the institution for each decision under review are short:

> Consequently, as the disclosure of information clause has already been incorporated in the [2010-2014] Standing Offer, the unit prices and rates cannot be considered to be confidential third party information that would prejudice your competitive position and we must therefore release them.

[93] In my view, these two decisions are flawed because the decision-maker failed to consider the discretion as required. The Federal Court of Appeal, concerning a different but identically-worded discretion in subsection 15(1) of the same *Act*, held that: "the Act requires the respondent to consider the exercise of discretion": see *Attaran v Canada (Minister of Foreign Affairs)*, 2011 FCA 182 [*Attaran*]. In that case, the discretion was not considered and judicial review was therefore granted.

[94] In the case at bar, nothing on the record indicates PWGSC considered the exercise of discretion under subsection 20(5). Therefore, PWGSC failed in its legal duty as set out by the Federal Court of Appeal. In this connection, *Attaran* sets out the two-step process concerning the exercise of the *Act*'s discretion:

> [17] As stated by the Supreme Court in *Criminal Lawyers' Association* at paragraph 46, a discretion conferred by statute must be exercised consistently with the purposes underlying its grant. This is consistent with *Telezone* where this Court stated, at paragraph 47, "when the Act confers on the head of a government institution a discretion to refuse to disclose an exempted record, the lawfulness of its exercise is reviewed on the grounds normally available in administrative law for the review of administrative discretion, including unreasonableness." One ground of administrative review is that a discretion conferred by statute must be exercised within the boundaries imposed by the statute. See: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 56. Thus, the parties do not dispute that this Court may intervene if the respondent did not consider the exercise of discretion.
>
> [18] If the Court is satisfied that the discretion was exercised, the second question is whether the discretion was exercised reasonably.
>
> [emphasis added]

[95] I appreciate *Attaran* considered the discretion provided under subsection 15(1) of the *Act*. However, I see no reason why *Attaran*'s rationale does not apply to the discretion under subsection 20(5) of the same *Act*. The two subsections, 15(1) and 20(5), are worded very similarly. Subsection 15(1) creates a discretion to refuse to disclose, while subsection 20(1) creates a discretion to disclose. While the starting points differ and the factors to be considered will vary, in my view, the discretion is the same, namely to disclose or not:

15. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities, including, without restricting the generality of the foregoing, any such information	15. (1) Le responsable d'une institution fédérale peut refuser la communication de documents contenant des renseignements dont la divulgation risquerait vraisemblablement de porter préjudice à la conduite des affaires internationales, à la défense du Canada ou d'États alliés ou associés avec le Canada ou à la détection, à la prévention ou à la répression d'activités hostiles ou subversives, notamment :
…	…
20.(5) The head of a government institution may disclose any record that contains information described in subsection (1) with the consent of the third party to whom the information relates.	20.(5) Le responsable d'une institution fédérale peut communiquer tout document contenant les renseignements visés au paragraphe (1) si le tiers que les renseignements concernent y consent.

[96] The Respondents relied on *Newfoundland and Labrador Nurses' Union v Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] to ask this Court to find

the decision-maker's decision on subsection 20(5) reasonable having regard to para 15 which says: "[t]his means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome." While not a word is said about subsection 20(5) in either of the decisions, I am asked to assume it was properly considered and the discretion duly exercised in favour of disclosure. With respect, I am unable to accede to this request. This is not a case where I may read into this decision words considering and rejecting the exercise of the discretion. All I have is the statute and two short one sentence decisions.

[97] In *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11, Justice Rennie (as he then was) explained why *Newfoundland Nurses* does not save a decision like this:

> *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were not dots on the page.

[98] In this situation, I would have to write reasons for the head of the institution where in my respectful view, he or she did not even make a decision. It is for the head of the institution - and not the Court - to consider and exercise the discretion conferred by subsection 20(5).

[99] Close examination of the wording of the two decisions confirms that the exercise of this important discretion was not considered. The words used by the decision-maker are simply these: "the unit prices and rates cannot be considered to be confidential third party information that would prejudice your competitive position and we must therefore release them."

[100] The use of the word "therefore" in these decisions compels me to conclude that the refusal to release was caused by and resulted solely from the absence of an exemption. Put another way, the decision-maker decided not to redact *because of* the absence of an exemption, full stop. It is apparent he or she did so without considering the exercise of discretion. In doing so, he or she missed a critical step, namely, the legal requirement to consider the exercise of discretion under subsection 20(5).

[101] Therefore, the decisions must be set aside for failure to consider the exemption in subsection 20(5).

D. *Are the Applicant's Personnel Rates entitled to redaction pursuant to paragraph 20(1)(b) of the Act, and is it affected by the Disclosure Clause?*

[102] I said at the outset that I would return to the Applicant's claim for an exemption under paragraph 20(1)(*b*), and do so now. Paragraph 20(1)(*b*) requires the head of the institution to withhold or redact requested information in the following terms:

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains	20. (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de

	documents contenant :
…	…
(*b*) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party […].	*b*) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers […].

[103] I accept the argument of the Respondents that paragraph 20(1)(*b*) does not apply in this case. In short, having agreed to disclosure as set out in its understanding of the Disclosure Clause, the Applicant is unable to meet the requirement that the information be communicated with a reasonable expectation of confidentiality. The Applicant admits it agreed to allow the disclosure of Personnel Rates to other departments of government.

[104] To claim the exemption under paragraph 20(1)(*b*), the Applicant must meet the four-part test outlined in *Air Atonabee Ltd v Canada (Minister of Transport)*, [1989] FCJ No 453 at para 34 [*Air Atonabee*], which is summarized in *Canada Post Corporation v National Capital Commission*, 2002 FCT 700 at para 10. The four parts require that the requested information is:

> 1. financial, commercial, scientific or technical information as those terms are commonly understood;
>
> 2. confidential in its nature, according to an objective standard which takes into account the content of the information, its purposes and the conditions under which it was prepared and communicated;
>
> 3. supplied to a government institution by a third party; and
>
> 4. treated consistently in a confidential manner by the third party.

[105] While the first and third parts are met, I agree with the Respondents that neither the second nor the fourth are met in the present case because the Applicant agreed to disclosure as set out in its understanding of it, discussed above under paragraphs 20(1)(*c*) and (*d*).

[106] While the Personnel Rates are certainly confidential in nature, they were both prepared and communicated under an understanding of the Disclosure Clause which allowed disclosure to other government departments. In my view, this disclosure, limited as it was, had the effect of putting these Personnel Rates outside the second part of the test.

[107] For the same reasons, it cannot be said that information was "treated consistently in a confidential manner" as the fourth part of the *Air Atonabee* test requires.

[108] Therefore, the claim for protection under paragraph 20(1)(*b*) must fail. There is no need to consider the Disclosure Clause.

E. *Are the Applicant's Personnel Rates entitled to redaction pursuant to section 18 of the Act?*

[109] I said I would return to the claim for redaction under section 18 made by the Applicant. Section 18 provides:

18. The head of a government institution may refuse to disclose any record requested under this Act that contains	18. Le responsable d'une institution fédérale peut refuser la communication de documents contenant :
(*a*) trade secrets or financial, commercial, scientific or technical information that	*a*) des secrets industriels ou des renseignements financiers, commerciaux, scientifiques ou

belongs to the Government of Canada or a government institution and has substantial value or is reasonably likely to have substantial value;

techniques appartenant au gouvernement du Canada ou à une institution fédérale et ayant une valeur importante ou pouvant vraisemblablement en avoir une;

(*b*) information the disclosure of which could reasonably be expected to prejudice the competitive position of a government institution or to interfere with contractual or other negotiations of a government institution;

b) des renseignements dont la communication risquerait vraisemblablement de nuire à la compétitivité d'une institution fédérale ou d'entraver des négociations — contractuelles ou autres — menées par une institution fédérale;

(*c*) scientific or technical information obtained through research by an officer or employee of a government institution, the disclosure of which could reasonably be expected to deprive the officer or employee of priority of publication; or

c) des renseignements techniques ou scientifiques obtenus grâce à des recherches par un cadre ou employé d'une institution fédérale et dont la divulgation risquerait vraisemblablement de priver cette personne de sa priorité de publication;

(*d*) information the disclosure of which could reasonably be expected to be materially injurious to the financial interests of a government institution or to the ability of the Government of Canada to manage the economy of Canada or could reasonably be expected to result in an undue benefit to any person, including such information that relates to

d) des renseignements dont la communication risquerait vraisemblablement de porter un préjudice appréciable aux intérêts financiers d'une institution fédérale ou à la capacité du gouvernement du Canada de gérer l'économie du pays ou encore de causer des avantages injustifiés à une personne. Ces renseignements peuvent notamment porter sur :

(i) the currency, coinage or legal tender of Canada,

(i) la monnaie canadienne, son monnayage ou son pouvoir libératoire,

(ii) a contemplated change in the rate of bank interest or in

(ii) les projets de changement du taux d'intérêt bancaire ou

government borrowing,	du taux d'emprunt du gouvernement,
(iii) a contemplated change in tariff rates, taxes, duties or any other revenue source,	(iii) les projets de changement des taux tarifaires, des taxes, impôts ou droits ou des autres sources de revenu,
(iv) a contemplated change in the conditions of operation of financial institutions,	(iv) les projets de changement dans le mode de fonctionnement des institutions financières,
(v) a contemplated sale or purchase of securities or of foreign or Canadian currency, or	(v) les projets de vente ou d'achat de valeurs mobilières ou de devises canadiennes ou étrangères,
(vi) a contemplated sale or acquisition of land or property.	(vi) les projets de vente ou d'acquisition de terrains ou autres biens.

[110] In my respectful view, only subsections 18(*b*) or (*d*) could even remotely support the Applicant's claim. However, in my view, neither subsections 18(*b*) nor (*d*) may be relied on for redaction.

[111] To begin with, section 18 is headed by the words "Economic interests of Canada" which is, in my view, aptly descriptive of the purposes and context in which section 18 is intended to be applied. From that perspective, I have difficulty seeing how section 18 applies to the case at bar, because the Applicant's claim does not appear to relate to the "economic interests of the nation". If it did, no doubt a great many other government contracts would be subject to section 18 which I do not accept to be reflective of the legislative intent.

[112] Further, there is no evidence on which to conclude that the requested disclosure could reasonably be expected to either a) prejudice the competitive position of a government institution; or b) interfere with contractual or other negotiations of a government institution.

[113] Therefore, the claim under subsection 18(*b*) must fail.

[114] Insofar as subsection 18(*d*) is concerned, I agree that taken alone and in the abstract, this subsection might offer some support for the Applicant's position. However, in my view, subsection 18(*d*) may not be assessed outside the context and purposes for which it was enacted. Section 18 outlines a regime designed to authorize redactions or exemptions required by the economic interests of Canada as its heading suggests. Subsection 18(*d*) must be read in harmony with the rest of section 18. I apply the associated words interpretive doctrine *noscitur a sociis*; the meaning of a word may be known from its accompanying words. There was no evidence to substantiate the Applicant's claim to redaction under subsection 18(*d*).

[115] Therefore, the claim under subsection 18(*d*) must also fail.

[116] There is no need to consider the Disclosure Clause in this connection given this result.

XVIII. Remedy

[117] While in some circumstances it might be open for the Court to substitute its decision for that of the head of the institution, which the Applicant asked me to do, in my view, this decision should be remitted for re-determination as proposed by the Respondents by way of alternative

relief: *Canadian Council of Christian Charities v Canada (Minister of Finance)*, [1999] 4 FC 245 at para 19.

XIX. Information Commissioner

[118] Before concluding, I wish to note that the Information Commissioner did not file any additional evidence. The Information Commissioner supported the Respondent, the Attorney General of Canada's legal submissions, and made submissions directed to the legal and policy issues; counsel for the Attorney General having covered the evidence.

XX. Costs

[119] Counsel for the Applicant and for the Attorney General of Canada agreed to an all-inclusive award of costs in the amount of $5,000 which is reasonable and will be so ordered. Counsel also agreed no costs should be payable to or by the Information Commissioner. I agree and will so order also.

XXI. Conclusion

[120] The application for judicial review should be granted with costs in the case.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the decisions of the head of the institution or his or her delegate dated January 3, 2014 and June 5, 2014 are set aside and remitted for reconsideration by a differently-constituted decision-maker, a copy of these reasons shall be placed in each of the two Court files referred to on the first page hereof, the combined costs of these two judicial reviews are hereby fixed at $5,000 all-inclusive, to be paid to the successful party in the cause by the unsuccessful party in the cause, and no costs are payable either to or by the Information Commissioner of Canada.

"Henry S. Brown"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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