

ACCESS TO INFORMATION

Consolidated appeals from Federal Court (F.C.) decision (2015 FC 1392) allowing judicial review by respondent Calian Ltd. (Calian) of Public Works and Government Services Canada (PWGSC) decision under *Access to Information Act*, R.S.C., 1985, c. A-1, s. 28 rejecting Calian's request to redact personnel rates in procurement contract — Calian providing short-term personnel services — PWGSC launching tendering process by way of Request for Standing Offer (RFSO) for provision of research assistance to Royal Military College of Canada — RFSO requiring bidding parties to include detailed personnel rates, agree to disclosure of standing offer unit prices or rates (disclosure clause) — PWGSC receiving request (2013 Access Request) under Act for copy of all contracts, contract amendments, correspondence, e-mails relating to contract awarded to Calian — Inviting Calian to make representations as to why records subject to 2013 Access Request should not be disclosed — Notifying Calian that disclosure clause preventing Calian from treating its unit prices, personnel rates as confidential third party information — Calian arguing personnel rates proprietary in nature, thus exempt from disclosure — Further submitting disclosure thereof would result in substantial, important material financial loss — F.C. exempting disclosure of personnel rates, finding no basis upon which to treat 2013 Access Request differently than one submitted in 2009 in relation to previous successful bid by Calian resulting in exclusion from disclosure of unit prices — Concluding that disclosure of personnel rates prejudicial to Calian's competitive position — Finding that impact of disclosure clause but one factor to consider when determining what "could reasonably be expected" under Act, s. 20(1)(c) — Issues: whether personnel rates exempt from disclosure; proper interpretation of disclosure clause; how disclosure clause interacting with scheme of Act — PWGSC erring in determining that information requested could not be treated as third party exempt information under Act — F.C. correctly applying *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23 framework — Erring in taking history of past dealings between parties as factor to be considered — Such evidence should not have been considered when deciding whether s. 20(1)(c) exemption applying to information at issue herein — Interference with contractual or other negotiations resulting from disclosure not merely speculative but resting on cogent, credible, reliable evidence — Accordingly, open to F.C. to find that Calian could rely on Act, s. 20(1)(d) exemption to request redaction of its personnel rates — F.C. correctly finding that applicant having to meet four-part test outlined in *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 27 F.T.R. 194 (F.C.T.D.) to claim exemption under Act, s. 20(1)(b) — Erring in accepting Calian's subjective understanding of scope of disclosure clause — Disclosure clause unambiguous on its face — No explicit or implicit restriction to type of disclosure agreed upon by offeror regarding its standing offer unit prices or rates — This interpretation consistent with previous F.C. decisions confirming that clauses of this sort constituting consent to disclose records not only within government, but also to general public — Act not distinguishing between disclosure within government, disclosure to the public — Disclosure clause appearing superfluous if interpreted merely as licence for government departments to share between themselves standing offer unit prices or rates — PWGSC's reading of disclosure clause as waiver of claiming s. 20(1) exemptions at odds with scheme of Act — Agreeing to disclosure clause simply constituting sort of consent contemplated by Act, s. 20(5) — Clear that reasons behind a s. 28 decision must show that head of government institution turned its mind to discretion afforded to it under s. 20(5) — This was not done herein — PWGSC incorrectly interpreting terms of disclosure clause, not alive to situation codified in s. 20(5) under which Calian falling — Proper framework under ss. 20(1),(5) in face of disclosure clause requiring that head of government institution (1) determine whether information would otherwise be treated as exempt under Act, (2) decide whether any circumstance militating against information being shared with public — Appeals allowed in part; matters remitted back to PWGSC for redetermination in accordance with reasons.

CANADA (OFFICE OF THE INFORMATION COMMISSIONER) V. CALIAN LTD. (A-20-16, A-31-16, 2017 FCA 135, de Montigny J.A., judgment dated June 22, 2017, 39 pp.)