Federal Court  Cour fédérale

Date: 20240716

Docket: T-229-21

Citation: 2024 FC 916

Ottawa, Ontario, July 16, 2024

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

SARAH CLOWATER

Applicant

and

MINISTER OF INDUSTRY AND FORD MOTOR COMPANY OF CANADA, LIMITED

Respondents

PUBLIC JUDGMENT AND REASONS
(Confidential Judgment and Reasons issued June 14, 2024)

I. Overview

[1] The Applicant has brought this application pursuant to section 41 of the *Access to Information Act*, RSC, 1985, c A-1 [*ATIA*] for a review of the decision by Innovation, Science and Economic Development Canada [ISED] to refuse to grant the Applicant access to unredacted portions of a record following an investigation by the Office of the Information Commissioner of

Canada [OIC]. Notwithstanding the recommendation of the OIC to release additional portions of the record, ISED continues to assert that the redacted information is exempt from disclosure pursuant to paragraphs 20(1)(b) and 20(1)(c) of the *ATIA*. Ford Motor Company of Canada, Limited [Ford], the third party whose information is at issue, asserts that portions of the redacted information are also exempt from disclosure pursuant to paragraph 20(1)(d) of the *ATIA*.

[2] For the reasons that follow, I find that only a portion of the redacted information is exempt from disclosure pursuant to paragraphs 20(1)(b) and 20(1)(c) of the *ATIA* and that the balance of the redacted information must be disclosed by ISED to the Applicant.

II. Background

[3] As part of its mandate, ISED supports strategic investment into Canada's automotive sector through funding to the sector, such as the Automotive Innovation Fund [AIF]. The AIF was introduced in 2008 and extended until March of 2021 to support strategic, large-scale research and development projects in the automotive sector that support innovative, greener and more fuel-efficient vehicles.

[4] In January of 2017, Ford Motor Company and Ford sought government funding through the AIF for their $1 billion investment in "Project Caribou". According to Ford, Project Caribou focused on three key areas:

A. The launch of a new Connectivity Innovation Centre to undertake advanced research and development into connected vehicle technologies, creating 295 new

jobs. This centre focuses on hardware and software solutions in the areas of mobility, connectivity, data analytics and consumer interface.

B. Securing a new engine mandate at its Windsor Engine Plant, maintaining a further 500 jobs in Windsor, Ontario.

C. Strengthening research and development capacity in three primary areas: (i) advanced powertrain at its Advanced Powertrain Engineering Research and Development Centre in Windsor, Ontario; (ii) vehicle light-weighting technologies throughout the production process; and (iii) the reduction of stationary industrial facility emissions at its Fumes-to-Fuel R&D Centre of Excellence at the Oakville Assembly Complex.

[5] On January 25, 2017, Ford and the Government of Canada executed a Non-Disclosure Agreement [NDA] in relation to Project Caribou, which appears to have expired upon the signature of the Contribution Agreement (defined below).

A. *The Contribution Agreement*

[6] On March 31, 2017, Ford together with its parent company, Ford Motor Company, entered into an Agreement with Her Majesty the Queen in Right of Canada, as represented by the Minister of Industry, in relation to Project Caribou [Contribution Agreement]. The Contribution Agreement outlines ISED's commitment to provide a non-repayable contribution of $102.4 million toward Ford's installation of a new 7.XL engine program at Ford's plant in Windsor, Ontario, with the funds from the AIF.

[7] The Contribution Agreement is comprised of nine articles (referred to in the Schedules as "Articles of Agreement"), Schedule 1 entitled "General Conditions", Schedule 2 entitled "The Project", Schedule 3 entitled "Claims and AIF Project Cost Principles" and Schedule 4 entitled "Reporting Requirements". Ford is defined as the "Recipient" in the Contribution Agreement.

[8] Confidentiality is addressed in section 13 of Schedule 1, which provides, in part, as follows:

> 13.1 Consent Required
>
> Subject to section 8.20 of the Articles of Agreement, section 13.2 and 13.3 of this Schedule 1, and the *Access to Information Act*, each Party shall keep confidential and shall not without the written consent of the other Party disclose the contents of this Agreement and the documents pertaining thereto, whether provided before or after this Agreement was entered into, or of the transactions contemplated herein.
>
> 13.2 International Dispute
>
> The Minister is hereby authorized to disclose any of the information referred to in Section 13.1 above where, in the opinion of the Minister, such disclosure is required by an international trade panel for the purposes of conducting a dispute process in which Canada is a party or a third party intervener. The Minister shall give prior written notice to the Recipient of such disclosure.
>
> 13.3 Financing and Licensing
>
> The Minister hereby consents to the Recipient disclosing the contents of this Agreement or any portion thereof for the purposes of securing additional financing or of licensing for commercial exploitation, subject to the entity to which the information is disclosed executing a non-disclosure agreement prior to disclosure.

[9] Article 8.20 of the Articles of Agreement (as referenced in section 13 of Schedule 1) provides:

> 8.20 Communications
>
> The Parties will jointly develop a communications plan and coordinate public communications related to the Contribution, the Project and the Contribution Agreement. Drafts of any announcements will be delivered by either Party to the other Party as soon as reasonably possible, but in any event prior to the expected general release or publication. Each Party will inform the other Party in writing of any objection to such draft announcements. If a Party does not object in writing prior to the general release or publication, that Party will be deemed to have consented to the draft announcement and its dissemination provided that the notice that accompanies a draft explicitly refers to the deeming effect of non-objection. Subject to any public announcements which may be made and to legal obligations including judicial orders and the *Access to Information Act*, R.S.C. 1985, A.1, Ford and Canada shall keep confidential and shall not without the consent of each other disclose the contents of this contribution agreement and the documents pertaining thereto, or the transaction contemplated therein. Nothing in this section should be interpreted as preventing the fulfilment by Ford and/or Ford Motor Company of its reporting obligations under applicable securities law.

[10] On March 30, 2017, following the execution of the Contribution Agreement, Prime Minister Justin Trudeau issued a press release entitled “Prime Minister of Canada announces support to Ford of Canada to create and maintain almost 800 jobs for Canadian workers”. The press release included the following statements:

> “That is why the Prime Minister, Justin Trudeau, today announced an investment of $102.4 million to Ford Motor Company of Canada, Ltd. The Government of Ontario will contribute an additional $102.4 million in support of this project. These investments will attract an additional $1 billion in research and development spending from Ford of Canada, and lead to the creation and maintenance of almost 800 good, middle class jobs for Canadian workers”.

> "Today's announcement will help Ford of Canada transform its Windsor Operations into a world-class engine facility, which will result in an all-new global engine program…"
>
> "These investments will also strengthen Ford of Canada's research and development capacity at existing facilities, including the Powertrain Engineering Research and Development Centre in Windsor".
>
> "The funding will also help establish the new Research and Engineering Centre in Ottawa, with additional locations in Waterloo and Oakville, which will focus on connectivity research and development across infotainment, in-vehicle modems, gateway modules, driver-assist features, and self-driving cars. The Centre will support good, middle class jobs and equip Canadians working in this sector with the skills they need for the jobs of the future".
>
> "The Powertrain Engineering Research and Development Centre will develop technologies to make vehicles lighter and more fuel efficient".

B. *The ATIA Request*

[11] On November 13, 2017, the Applicant submitted a request to ISED pursuant to the *ATIA* seeking disclosure of the "funding agreements between the Government of Canada and Ford/Ford Company of Canada from the Automotive Innovation Fund since July 1, 2016".

[12] In December of 2017, ISED released the Contribution Agreement to the Applicant. However, the ISED applied extensive redactions to the Contribution Agreement pursuant to paragraph 13(1)(c), subsection 19(1) and paragraphs 20(1) (b) and (c) of the *ATIA.*

C. *The Applicant's Compliant to the OIC and the Resulting Investigation*

[13] On January 3, 2018, the Applicant filed a complaint with the OIC, contesting the redactions made by ISED pursuant to paragraphs 20(1)(b) and 20(1)(c) of the *ATIA*.

[14] On January 31, 2018, the OIC informed ISED that the Applicant had filed a complaint in which she alleged that ISED had improperly applied exemptions and unjustifiably denied the Applicant access to the record.

[15] Between October of 2018 and September of 2020, the OIC investigated the complaint and sought representations from Ford and ISED.

[16] On September 8, 2020, the OIC sent its initial report to ISED recommending the release of many sections of the redacted record. ISED subsequently provided the OIC with a version of the record that contained substantially fewer redactions than the record initially released to the Applicant in December of 2017. The information that ISED continued to redact belongs to Ford.

[17] On December 23, 2020, ISED received the OIC's final report, which concluded that a significant number of the redactions were not justified under the *ATIA*. The OIC recommended that ISED release portions of the redacted record, as identified in a table appended to the report.

[18] ISED did not accept the OIC's recommendations and refused to disclose most of the recommended information to the Applicant.

D. *Evidence Before the Court on this Application*

[19] In support of and, in response to this application, the Court has before it the following affidavits and exhibits thereto:

A. The affidavit of the Applicant affirmed October 12, 2021.

B. The affidavit of Jennifer McLean affirmed December 17, 2021 [McLean Affidavit], with a public and confidential version thereof. Ms. McLean is the Director of the Policy Research and Advice Directorate within the Automotive, Transportation and Digital Technologies Branch of ISED.

C. The affidavit of Christopher Parsons affirmed January 5, 2022 [Parsons Affidavit]. Mr. Parsons is the Director of Access to Information and Privacy Services at ISED.

D. The affidavit of Caroline Hughes sworn January 5, 2022 [Hughes Affidavit], with a public and confidential version thereof. Ms. Hughes is the Vice President, Government Relations at Ford.

E. The affidavit of Ms. Hughes sworn February 24, 2022 [Supplemental Hughes Affidavit].

F. The affidavit of Gillian Briscoe sworn December 20, 2021 [Briscoe Affidavit], with a public and confidential version thereof. Ms. Briscoe is the Manager, Employee Relations and People Strategy at Ford.

[20] No oral cross-examinations were conducted by any of the parties in relation to the affidavits. However, it would appear that a two-question written cross-examination was conducted of Ms. Hughes, which resulted in two answers being provided by way of the Supplemental Hughes Affidavit.

E. *The Disputed Information*

[21] The Applicant has not clearly set out for the Court the specific redacted information that she seeks from ISED on this application. In that regard, her Memorandum of Fact and Law does not define the disputed redactions and by way of relief, she seeks an order that ISED produce a copy of the Contribution Agreement with "only the redactions necessary to meet the strict requirements of s. 20(1)" of the *ATIA*.

[22] Based on my review of the materials, I am satisfied that the Applicant accepts the recommendations of the OIC that certain portions of the Contribution Agreement have been properly redacted and only asks this Court to order the release of the redacted information the OIC recommended be released to the Applicant.

[23] ISED requests that the Court exempt from disclosure the sections of the Contribution Agreement that are redacted in Exhibit "H" to the Parsons Affidavit. Next to each redaction in Exhibit "H" is ISED's claimed exemption(s).

[24] Ford requests that the Court exempt from disclosure the sections of the Contribution Agreement that are redacted in Exhibit “E” to the Hughes Affidavit. Ms. Hughes sets out in the body of her affidavit the exemptions claimed in relation to each redaction.

[25] Accordingly, the redactions in the following portions of the Contribution Agreement remain in dispute on this application [collectively, the Disputed Information]:

A. Article 4.1(1)(a)(i) and 4.1(b)(iii), page 5: redacted pursuant to paragraphs 20(1)(b) and 20(1)(c);

B. Article 4.3(a), page 6: redacted pursuant to paragraphs 20(1)(b), 20(1)(c) and 20(1)(d);

C. Article 8.4, page 8: redacted pursuant to paragraphs 20(1)(c) and 20(1)(d);

D. Article 8.10, page 9: redacted pursuant to paragraphs 20(1)(b), 20(1)(c) and 20(1)(d);

E. Article 8.11, page 9: redacted pursuant to paragraphs 20(1)(b), 20(1)(c) and 20(1)(d);

F. Article 8.12, page 9: redacted pursuant to paragraphs 20(1)(b), 20(1)(c) and 20(1)(d);

G. Article 8.13, pages 9-10: redacted pursuant to paragraphs 20(1)(b), 20(1)(c) and 20(1)(d);

H. Article 8.14, page 10: redacted pursuant to paragraphs 20(1)(b), 20(1)(c) and 20(1)(d);

I. Schedule 1, definition of “job”, pages 15-16: redacted pursuant to paragraphs 20(1)(b) and 20(1)(c);

J. Schedule 1, definition of “permanent cessation”, page 16: redacted pursuant to paragraphs 20(1)(b) and 20(1)(c);

K. Schedule 1, definition of “term”, page 18: redacted pursuant to paragraphs 20(1)(b), 20(1)(c) and 20(1)(d);

L. Schedule 1, section 3.3(iii), page 18: redacted pursuant to paragraphs 20(1)(b) and 20(1)(c);

M. Schedule 2, section 1.1, pages 28-29: redacted pursuant to paragraphs 20(1)(b) and 20(1)(c);

N. Schedule 2, Annex A, page 30: redacted pursuant to paragraphs 20(1)(b) and 20(1)(c);

O. Schedule 2, Annexes B1-B5, page 31: redacted pursuant to paragraphs 20(1)(b), 20(1)(c) and 20(1)(d); and

P. Schedule 2, Annex D, page 32: redacted pursuant to paragraphs 20(1)(b), 20(1)(c) and 20(1)(d).

[26] As noted above, the Applicant accepts the recommendations of the OIC, which includes that certain portions of the Contribution Agreement have been properly redacted. The OIC's findings included proper exemptions claimed in relation to the following portions of the Disputed Information:

A. A portion of Article 8.10: properly exempted pursuant to paragraph 20(1)(c);

B. A portion of Articles 8.12, 8.13 and 8.14: properly exempted pursuant to paragraph 20(1)(c); and

C. Schedule 2, Annexes A and B1-B5: properly exempted pursuant to paragraph 20(1)(c), but subject to limited severance under section 25 of the *ATIA*.

[27] As such, I will not consider these portions of the Disputed Information, other than in relation to severances under section 25 of the *ATIA*.

III. Preliminary Matters

A. *Ford to be Named a Respondent*

[28] At the commencement of the hearing, Ford requested it be named as a respondent in this application, rather than as an intervener. Subsection 41.2(1) of the *ATIA* provides that "If a person who receives a report under subsection 37(2) applies to the Court for a review under section 41, any other person who received the report under that subsection has the right to appear as a party to the review." No objections were raised to Ford's request.

[29] I am satisfied that Ford meets the criteria of subsection 41.2(1) and should be added as a respondent. The style of cause shall be amended, with immediate effect.

B. *Applicant's Access to the Confidential Material on this Application*

[30] In considering the submissions of the Applicant, I am mindful that the Applicant and her counsel have only been provided with a public version of the Contribution Agreement, as well as public versions of the affidavits and the Memoranda of Fact and Law filed by ISED and Ford, with all Confidential Material (as defined in this Court's Confidentiality Order dated September 1, 2021) redacted therefrom. As such, the Applicant has not seen all of the arguments raised by ISED and Ford in support of the claimed exemptions. At the time of the hearing, the Applicant was a lawyer at the law firm representing her in this matter and, as such, I understand that the parties agreed that it would be inappropriate to use a "counsel's eyes only" version of the materials or other mechanism so as to permit the Applicant's counsel to have access to the Confidential Material and to make submissions thereon.

[31] Thus, in considering the Applicant's submissions, I am mindful of the limitation to her ability to make more precise submissions in relation to the specific exemptions at issue. That said, it was certainly open to the Applicant to retain counsel from outside of her firm to enable them to view the Confidential Material on a counsel's eyes only basis, which she chose not to do.

IV. Issues

[32] The issues for determination on this application are as follows:

A. Whether any portion of the Disputed Information is exempt from disclosure pursuant to paragraph 20(1)(b) of the *ATIA*;

B. Whether any portion of the Disputed Information is exempt from disclosure pursuant to paragraph 20(1)(c) of the *ATIA*;

C. Whether any portion of the Disputed Information is exempt from disclosure pursuant to paragraph 20(1)(d) of the *ATIA*; and

D. If any of the Disputed Information is exempt from disclosure, whether there is an obligation to sever non-exempt information under section 25 of the *ATIA*.

V. Analysis

A. *Statutory Regime*

[33] Under subsection 41(1) of the *ATIA*, a person who makes a complaint and receives a final report by the OIC may apply to this Court for a review of the matter that is the subject of the complaint. This application is heard and determined as a new proceeding pursuant to section 44.1 of the *ATIA*. Thus, there is no applicable standard of review [see *Burlacu v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 1290 at para 14].

[34] The *ATIA* contains a number of exemptions from the general rule of disclosure [see *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 at paras 96-99 [*Merck Frosst*]]. Certain exemptions are class-based, while others are harm-based. A class-based exemption applies to all records determined to fall into that class of record. However, a harm-based

exemption applies only if the specified harm or risk of harm is present see: *Merck Frosst*, *supra* at para 97].

[35] At subsection 20(1), the *ATIA* sets out several exemptions related to third party information, including the following exemptions, which are relevant to this application:

Third party information	Renseignements de tiers
20 (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Part 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;
[…]	[…]
(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	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) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.	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.

[36] In considering whether a record must be disclosed, it is important for this Court to consider the tension at the heart of the *ATIA*, and the competing interests that the Court must balance in applying its provisions. While a Member of this Court, Madame Justice Mactavish addressed these competing interests in *Bombardier Inc v Canada (Attorney General)*, 2019 FC 207 at paragraphs 35-38 [*Bombardier*], where she stated:

> [35] The *ATIA* provides a right of timely access to information in records under the control of government institutions, and has been held to enshrine a quasi-constitutional right of access for the purpose of facilitating democracy: *Statham v. Canadian Broadcasting Corporation*, 2010 FCA 315 at para. 1, [2012] 2 F.C.R. 421; *Merck*, above at para. 1; *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 S.C.R. 403 at para. 61, [1997] S.C.J. No. 63, per La Forest J. (dissenting, but not on this point).
>
> [36] The *ATIA* facilitates democracy "by helping to ensure that citizens have the information required to participate meaningfully in the democratic process", and by assisting in holding politicians and officials to account: *Merck*, above at para. 22. As a consequence, access to information legislation is to be given a broad and purposive interpretation.
>
> [37] The Courts have, however, also recognized that other public and private interests may be engaged when access is sought to government information. Governments collect information from third parties that can include confidential commercial information that may be valuable to competitors, the disclosure of which may cause financial or other forms of harm to these third parties and discourage research and innovation: *Merck*, above at para. 2.
>
> [38] As a consequence, a careful balance must be struck between the competing interests of providing the public with access to government information and protecting the interests of third parties: *Merck*, above at paras. 2 and 4. The question for determination is whether that balance has been properly struck in this case.

[37] Therefore, this Court must examine the exemptions in section 20 in light of the purpose of the *ATIA*, which is to "enhance the accountability and transparency of federal institutions in

order to promote an open and democratic society and to enable public debate on the conduct of those institutions" [see *ATIA*, *supra* at s 2(1)]. However, the Court must also balance this right of access against the rights of affected third parties, such that "necessary exceptions to the right of access should be limited and specific" [see *Act*, *supra* at para 2(2)(a); *Samsung Electronics Canada Inc. v Canada (Health)*, 2020 FC 1103 at para 58 [*Samsung*]].

B. *Burden and Standard of Proof*

[38] There is no dispute between the parties that the party resisting disclosure bears the burden of showing why the disputed information should not be disclosed [see *Merck Frosst*, *supra* at paras 94-95].

[39] As to the standard of proof, the party resisting disclosure must establish on a balance of probabilities that the relevant statutory exemption applies. However, the evidence required to reach that standard will depend on the nature of the proposition the third party seeks to establish and the particular context of the case [see *Bombardier*, *supra* at para 40, citing *Merck Frosst*, *supra* at paras 94-95].

C. *Is any portion of the Disputed Information exempt from disclosure pursuant to paragraph 20(1)(b) of the ATIA?*

[40] The exemption established under paragraph 20(1)(b) of the *ATIA* is a class-based exemption. That means that once it has been shown that the disputed information contained in the record in question corresponds to the statutory provision, the information is exempted and the

head of government must refuse to disclose it [see *Bombardier*, *supra* at para 42, citing *Merck Frosst*, *supra* at para 99].

[41] For the exemption in paragraph 20(1)(b) of the *ATIA* to apply, the information must be: (i) financial, commercial, scientific or technical information, as those terms are commonly understood; (ii) 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; (iii) supplied to a government institution by a third party; and (iv) treated consistently in a confidential manner by the third party [see *Canada (Office of the Information Commissioner) v Calian Ltd*, 2017 FCA 135 at para 51 [*Calian*]; *Merck Frosst*, *supra* at para 133].

[42] This test is conjunctive, which means that the party refusing disclosure must satisfy all elements of the test to establish the information at issue is exempt from disclosure [see *Bombardier*, *supra* at para 44]. If the refusing party establishes all four criteria, the information will be exempt from disclosure under the *ATIA*, subject to any obligation to sever non-exempt information under section 25 of the *ATIA*, or any other statutory overrides. If any of the four criteria are not established, it is fatal to the exemption claim [see *Samsung*, *supra* at para 61].

[43] In this case, there is no dispute that the Disputed Information for which a paragraph 20(1)(b) exemption has been claimed is financial or commercial in nature. However, the parties disagree about whether the information is confidential (and has been treated consistently as such) and, whether the information was supplied by a third party.

[44] In determining whether the disputed information is confidential, this Court must consider the following:

> a) whether the content of the record is such that the information it contains is not available from sources otherwise accessible by the public, or could not be obtained by observation or independent study by a member of the public acting on his or her own;
>
> b) whether the information originated and was communicated in a reasonable expectation of confidence that it would not be disclosed; and
>
> c) whether the information was communicated (whether required by law or supplied gratuitously) in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication.
>
> [see *Bombardier*, *supra* at para 47, citing *Air Atonabee Ltd v Canada (Minister of Transport)*, 27 CPR (3d) 180 453 at paras 43-45, 27 FTR 194]

[45] The inquiry is primarily a question of fact, with careful regard to the specific evidence presented [see *Samsung*, *supra* at para 92, citing *Merck Frosst*, *supra* at para 150].

[46] The Applicant relies on this Court's decision in *Bombardier* to argue that the confidentiality clause in the Contribution Agreement (section 13 of Schedule 1)—which expressly subjects the agreement to disclosure under the *ATIA* and permits disclosure when required by an international trade panel—undermines Ford's claim that it expected the terms of the Contribution Agreement to remain confidential.

[47] While the contract at issue in *Bombardier* had a similar confidentiality clause to the one contained in the Contribution Agreement, the Court's finding that Bombardier could not have

had a reasonable expectation that certain information in the contract would not be disclosed turned on the fact that Bombardier had previously consented to the disclosure of that information. The Court's finding was not based on the fact that the contract was subject to the *ATIA* or to disclosure in the context of an international trade dispute. This is not surprising given that a contractual term that subjects an agreement to the *ATIA* also inherently exempts from disclosure certain third party information, as provided in subsection 20(1) of the *ATIA*. Moreover, any potential disclosure of the agreement in the context of an international trade dispute would be on notice to the third party, which would permit the third party to raise disclosure objections and limitations before the panel determining the trade dispute. As such, I do not find that the language of section 13, in and of itself, undermines to the confidentiality of the Disputed Information.

[48] Turning to the evidence before the Court, I am satisfied that the evidence demonstrates the Disputed Information is not publicly available and that the Disputed Information originated and was communicated with a reasonable expectation that it would not be disclosed. Ms. Hughes confirmed that the Disputed Information has not been shared with any external partners, individuals or organizations, except with auditors, counsel and the Government of Ontario, all of whom were subject to confidentiality agreements. Moreover, both Ms. Hughes and Ms. McLean gave evidence (which was not disputed) that both ISED and Ford had internal protocols in place to safeguard the Disputed Information, as well as a preliminary NDA as between them in order to protect the confidentiality of information before the Contribution Agreement was executed. This NDA required Ford and ISED to keep the content of the Contribution Agreement and the documents pertaining thereto confidential (subject to the limited exceptions noted above). Unlike in *Bombardier,* there is no evidence before the Court that Ford has ever consented to the

disclosure of the Disputed Information or otherwise waived the confidentiality protections in relation thereto.

[49] Further, I am satisfied that it is consistent with the public interest, and that the relationship between Ford and ISED would be fostered for the public benefit, by treating the Disputed Information as confidential. The evidence before the Court is that the AIF is designed to advance the public interest by supporting innovative, greener and fuel-efficient research and development in the automotive sector. The funds granted to Ford under the Contribution Agreement are intended to be used to create and maintain jobs in Ontario, support advanced and clean technologies and position Ford's Canadian operations to be globally competitive—all of which are goals that objectively benefit the Canadian economy. I agree with Ford that maintaining the confidentiality of the Disputed Information enables ISED to fulfill the objectives of the AIF and allocate funds with a view to public accountability, while ensuring that Ford can rely on the assurances given by the Government of Canada that its confidential information would be protected. Moreover, as noted by the Supreme Court of Canada in *Merck Frosst*, routine disclosure of information of this type might ultimately discourage research and innovation [see *Merck Frosst*, *supra* at para 2]. Balancing the competing interests of granting access to information, the need to protect the interests of third parties and the public interest in undertakings such as Project Caribou, I am satisfied that the public interest favours treating the information as confidential.

[50] As such, I am satisfied that the Disputed Information for which an exemption has been claimed under paragraph 20(1)(b) is confidential and has been treated consistently as such.

[51] In determining whether information has been supplied by a third party to a government institution, the Supreme Court of Canada summarized the applicable legal principles as follows in *Merck Frosst*:

> [158] To summarize, whether confidential information has been "supplied to a government institution by a third party" is a question of fact. The content rather than the form of the information must be considered: the mere fact that the information appears in a government document does not, on its own, resolve the issue. The exemption must be applied to information that reveals the confidential information supplied by the third party, as well as to that information itself. Judgments or conclusions expressed by officials based on their own observations generally cannot be said to be information supplied by a third party.
>
> [see *Merck Frosst*, supra at para 158]

[52] I agree with the Applicant that, generally, this Court has reached the conclusion that terms of a contract are considered to represent the product of negotiations and, therefore, will not ordinarily be treated as information supplied by a third party to a government institution [see *Export Development Canada v Canada (Information Commissioner)*, 2023 FC 1538 at para 54, citing *Canada Post Corp v National Capital Commission*, 2002 FCT 700 at para 14 [*Canada Post*], citing *Halifax Development Ltd v Canada (Minister of Public Works and Government Services)*, 1994 CarswellNat 3178, [1994] FCJ No 2035 (FCT) at para 3 [*Halifax Development*]; *Aventis Pasteur Ltd v Canada (Attorney General)*, 2004 FC 1371 at para 23 [*Aventis Pasteur*]].

[53] For instance, in *Canada Post*, this Court found that paragraph 20(1)(b) of the *ATIA* did not apply to negotiated amounts, because they could not be characterized as information "supplied to a government institution by a third party," as required by the statute:

> [14] In any event, I am of the opinion that paragraph 20(1)(b) of the *Act* does not apply to the case at bar for the reason that the

> negotiated amounts of the financial assistance cannot be characterized as information "supplied to a government institution by a third party" as required in paragraph 20(1)(b). See *Halifax Development Ltd.* v. *Canada (Minister of Public Works and Government Services)*, [1994] F.C.J. No. 2035 as per McGillis J. The intention of Parliament in exempting financial and commercial information from disclosure applies to confidential information submitted to the government, not negotiated amounts for goods or services. Otherwise, every contract amount with the government would be exempt from disclosure, and the public would have no access to this important information. Moreover, there would be no need for Parliament to have enacted paragraphs 20(1)(c) and 20(1)(d). Accordingly, paragraph 20(1)(b) is not a ground for an order that the information not be disclosed in this case.
>
> [see *Canada Post*, *supra* at para 14]

[54] Similarly, in *Halifax Development*, this Court held that the rental rates at issue were not "supplied" to a government institution, because they were negotiated between the applicant and respondent as a term of the leases [see *Halifax Development*, *supra* at para 3]. Thus, provisions of a contract negotiated between a government institution and another party are generally not considered to be "supplied" by a third party.

[55] That said, provincial courts have recognized two exceptions to this general principle. In *Accenture Inc v Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616 at paragraph 21, the Ontario Superior Court of Justice, Divisional Court described these exceptions as follows:

> [21] There are two exceptions to this rule: "inferred disclosure" which applies where disclosure would permit accurate inference to be made regarding non-negotiated confidential information supplied by the third party to the institution, and "immutability" which applies to information that is not susceptible to change such as the philosophy of a business or sample products.

[56] The Applicant does not take issue with the application of the immutability exception to the Disputed Information. However, the Applicant asserts that the inferred disclosure exception has not been, and should not be, applied in the *ATIA* context. The Applicant asserts that the inferred disclosure exception arose in jurisdictions like Ontario, where the provincial legislation only protects third party information that is supplied to the government. According to the Applicant, decisions in such jurisdictions have expanded the meaning of the term "supplied" to ensure that the protection of third party information is sufficiently robust to satisfy the purposes of such protection. However, unlike the provincial regimes, the *ATIA* protects more than just information supplied to a government institution. Paragraphs 20(1)(a) and 20(1)(c) also protect trade secrets or other commercially sensitive information with the requirement that the information be supplied to a government institution. As such, the Applicant asserts that if this Court were to apply the inferred disclosure exception to paragraph 20(1)(b) of the *ATIA*, it would render other paragraphs of subsection 20(1) redundant by duplicating their protections.

[57] ISED and Ford disagree with the Applicant and assert that the inferred disclosure exception applies to paragraph 20(1)(b), noting that this Court has never rejected its application to the *ATIA*. Moreover, Ford asserts that this Court's decision in *Aventis Pasteur* supports the proposition underlying the exception, as the Court found that negotiated information about quantities in a contract was exempt from disclosure under paragraph 20(1)(b), as its release would permit the calculation of approximate unit prices in the contract, which the Court found were confidential and had been supplied to the government institution. Moreover, Ford asserts that the inferred disclosure exception is also consistent with the Supreme Court's decision in *Merck Frosst* that the paragraph 20(1)(b) exception applies equally to information that reveals the confidential information supplied by a third party (as well as to that information itself) [see

Merck Frosst, supra at para 158]. I agree with Ford that the *Merck Frosst* and *Aventis Pasteur* decisions support the availability of the inferred disclosure exception to the application of paragraph 20(1)(b) of the *ATIA*.

[58] The starting point is an analysis of the evidence before the Court to determine whether the Disputed Information was, in fact, provided by Ford to ISED, having regard to the content of the Disputed Information. Ford's evidence is that all of the Disputed Information was provided by Ford to ISED and was not negotiated (i.e., it is immutable information), with four exceptions. Ford acknowledges that the following provisions of the Contribution Agreement were negotiated with ISED:

A. The [redacted] of Ford's costs that are eligible for contribution from ISED in Articles 4.1(a)(i) and 4.1(b)(iii).

B. The yearly dollar amounts which limit ISED's contribution to Ford's annual costs in Article 4.3(a).

C. Ford's [redacted] in Articles 8.12, 8.13 and 8.14.

D. The definition of "job" in Schedule 1.

[59] Accordingly, the burden rests on the Respondents to demonstrate that disclosure of each of the contractual provisions noted above would permit an accurate inference to be drawn regarding non-negotiated confidential information supplied by Ford to ISED.

[60] Ford asserts that it developed the Disputed Information, including the [redacted] over an extended period of time and at a substantial cost to Ford. Ford maintains that the Disputed Information is based upon, and would reveal if disclosed, hard-gained technical, business and industry knowledge acquired by and honed through Ford's research and development, as well as the efforts and skills of Ford's employees. Ms. Hughes' evidence is that disclosure of the four exceptions would allow an informed reader to make accurate inferences about various categories of Ford's confidential information. As Ford argues, this underlying confidential information in the Contribution Agreement originated with Ford and was not negotiated or susceptible to negotiation with ISED.

[61] In relation to Articles 4.1(a)(i) and 4.1(b)(iii), Ford asserts that disclosing the [redacted] of Ford's costs that are eligible for contribution would allow an informed reader to infer Ford's actual costs and spending related to the projects in the Contribution Agreement, or to infer unit pricing of Ford's new engine product (which is confidential information). However, Ford provides no explanation as to how that accurate inference could be drawn from the information in these Articles. Absent such an explanation, I am not satisfied that this information falls within the inferred disclosure exemption.

[62] In relation to Article 4.3(a), Ford asserts that disclosure of the yearly dollar amounts that limit ISED's contribution to Ford's annual costs would allow an informed reader to make accurate inferences regarding Ford's investment strategy, the project budget (including capital spending) and the timing of each investment. However, again, Ford has provided no explanation as to how such accurate inferences could actually be drawn. Once again, absent such an

explanation, I am not satisfied that it has been demonstrated that this information falls within the inferred disclosure exemption.

[63] In relation to Ford's [redacted] in Articles 8.12, 8.13 and 8.14, the OIC already accepted that this information was properly exempted and since the Applicant has not taken issue with the OIC's findings, I need not consider this issue.

[64] In relation to the definition of "job" in Schedule 1, Ford states in its Memorandum of Fact and Law that, although Ford negotiated with ISED to ensure the definition of "job" was incorporated into the Contribution Agreement, the definition itself was supplied by Ford and was not susceptible to negotiation. However, Ms. Hughes stated in her affidavit that the definition of "job" was negotiated with Ford. As such, I am not satisfied that Ford has established that the definition of "job" was supplied and not negotiated.

[65] Ms. Hughes' evidence was that the definition Ford asserts is its own unique definition of "job", [redacted] which would, if disclosed, permit an informed reader to accurately infer the number of workers required for the project. While one would have presumed that, if true, such an inferred calculation should be readily demonstrable, Ford has not explained how the number of workers required for the project could be inferred from the definition of job. As such, I am not satisfied that it has been demonstrated this information falls within the inferred disclosure exemption.

[66] Accordingly, I am not satisfied that the redacted information in Article 4.1(a)(i), Article 4.1(b)(iii), Article 4.3(a), Article 8.12, Article 8.13, Article 8.14 and the definition of "job" in Schedule 1 was "supplied" by Ford to ISED.

[67] I have also considered the balance of the Disputed Information for which a paragraph 20(1)(b) exemption has been claimed to determine whether it was "supplied" by Ford. Having considered the uncontested evidence provided in the Hughes Affidavit, I am satisfied that:

A. The definition of "permanent cessation" in Schedule 1 was supplied by Ford.

B. Information related to [redacted] in section 3.3(iii) of Schedule 1 was supplied by Ford.

C. The remaining portions of section 1.1 of Schedule 2 were supplied by Ford.

[68] Accordingly, I find that exemptions claimed under paragraph 20(1)(b) were proper in relation to: (a) the definition of "permanent cessation" in Schedule 1; (b) section 3.3(iii) of Schedule 1; and (c) the remaining portions of section 1.1 of Schedule 2. Having found these exemptions to be proper, I will not go on to consider whether any additional exemptions apply to this same information.

[69] I would note that only ISED included a paragraph 20(1)(b) claim in relation to Article 8.11, the definition of "term" in Schedule 1 and Annex D of Schedule 2, but provided no submissions related thereto. In the circumstances, I am not satisfied that it has been demonstrated the exemption applies to these portions of the Disputed Information.

D. *Is any portion of the Disputed Information exempt from disclosure pursuant to paragraph 20(1)(c) of the ATIA?*

[70] The exemption in paragraph 20(1)(c) of the *ATIA* is a harm-based exemption, which means that the onus is on the party invoking the exemption to establish, on a balance of probabilities, a reasonable expectation of probable harm arising from the disclosure of the information see: *American Iron & Metal Company Inc v Saint John Port Authority*, 2023 FC 1267 at para 55; *Merck Frosst, supra* at paras 192, 195. Once it is established the information falls within the exemption, the head of the government institution must refuse to disclose the information at issue see: *Bombardier, supra* at para 82.

[71] Paragraph 20(1)(c) of the *ATIA* exempts information from disclosure that could reasonably be expected to result in material financial loss or gain or prejudice to the competitive position of a third party. The list of harms identified in this paragraph are disjunctive. Therefore, it is sufficient for the party invoking the exemption to show either that the disclosure of the disputed information could reasonably be expected to cause it either financial loss or gain, or will prejudice its competitive position see: *Brookfield Lepage Johnson Controls Facility Management Services v Canada (Minister of Public Works and Government Services)*, 2004 FCA 214 at para 9; *Bombardier, supra* at para 81; *Merck Frosst, supra* at para 212.

[72] Although a third party need not show on a balance of probabilities that the harm will in fact come to pass if the records are disclosed in order to establish a reasonable expectation of probable harm, the third party must nevertheless “do more than show that such harm is simply possible” see: *Merck Frosst, supra* at para 196. Indeed, something “well beyond” or

"considerably above" a mere possibility of harm must be shown see *Bombardier*, *supra* at para 85, citing *Merck Frosst*, *supra* at paras 197, 199.

[73] Contrary to Ford's submissions, the Supreme Court of Canada has confirmed that the party invoking the exemption must demonstrate a causal link between the disclosure and the harm concerned, by providing proof of a "clear and direct connection between the disclosure of specific information and the injury that is alleged" [see *Merck Frosst*, *supra* at paras 197, 219]. This Court has described the proof required to establish the direct linkage as follows:

> The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged.
>
> *American Iron*, *supra* at para 56, citing *Canada (Information Commissioner) v Canada (Prime Minister)*, 1992 CanLII 2414 (FC) at p 479.

[74] Affidavit evidence simply attesting that harm will result is insufficient to discharge the burden, as is affidavit evidence that is vague or speculative [see *American Iron*, *supra* at para 57, citing *Canada (Information Commissioner) v Toronto Port Authority*, 2016 FC 683 at para 78; *Brainhunter (Ottawa) v Canada (Attorney General)*, 2009 FC 1172 at para 32.

[75] Ford asserts that the disclosure of the Disputed Information would reasonably be expected to result in material financial loss to Ford, undue gain to its competitors and harm to Ford's competitive position.

[76] In relation to Article 4.1(a)(i), 4.1(b)(iii) and 4.3(a), I am not satisfied that Ford's affiants have provided the requisite evidence to explain how a reader can make the asserted inferences (as set out in the chart at paragraph 25 to the Hughes Affidavit) such that it results in harm to Ford. Simply stating that an inference can be drawn, without further explanation, is not sufficient [see *American Iron, supra* at para 56]. As such, I am not satisfied that Ford has demonstrated a probable expectation of material harm as required by paragraph 20(1)(c).

[77] In relation to Articles 8.4 and 8.12, as well as the definition of "term" in Schedule 1, the redactions relate to the duration of Ford's obligations under the Contribution Agreement. Ford asserts that while the Contribution Agreement discloses that funding will be provided by ISED over a five-year period, disclosure of the duration of Ford's obligations under the Contribution Agreement would permit Ford's competitors to infer Ford's speed of production and the length of time for which Ford plans to keep the 7.X L engine in the marketplace. Ford notes that the automotive industry is very competitive and that their competitors collect and analyze information about each other, including Ford. Since Ford's research indicates that this engine will be one of the most competitive engines in its class with respect to fuel efficiency and performance, Ford asserts that safeguarding information that could reveal Ford's business plan or strategy with respect to this engine is vital to its competitive edge.

[78] I am not satisfied that Ford has adduced cogent and detailed evidence to demonstrate that it will suffer probable harm from the disclosure of the term of the Contribution Agreement. Ford has not explained how its competitors could infer Ford's speed of production and the intended marketplace plan for the engine based on disclosure of the term of the Contribution Agreement.

As such, I am not satisfied that the redacted information in Articles 8.4 or 8.12, or the definition of "term" in Schedule 1, are exempt from disclosure.

[79] In relation to the balance of the redactions made to Article 8.10 and with respect to Article 8.11, Ford asserts that information related to [redacted] I am satisfied that Ford has established that the disclosure of this information is likely to interfere with its competitive position and thus, the paragraph 20(1)(c) exemption was properly claimed in relation to Articles 8.10 and 8.11.

[80] In relation to Articles 8.13 and 8.14, Ford asserts that the consequences of Ford [redacted] are confidential and, if known, that information would be reasonably expected to harm Ford's competitive position. Ms. Hughes details in her affidavit how Ford's competitors could use this information to Ford's detriment. I am satisfied that Ford has established that the disclosure of this information is likely to interfere with its competitive position and thus, the paragraph 20(1)(c) exemption was properly claimed in relation to Articles 8.13 and 8.14 in their entirety.

[81] In relation to the definition of "job" in Schedule 1, Ford asserts that disclosure of its unique definition would give its competitors access to the calculation of a "job" for the purpose of the Contribution Agreement, which would allow them to infer the number of jobs required for the projects related to the Contribution Agreement and to determine a competitive benchmark

with respect to Ford's productivity, which would be harmful to Ford's competitive position in the market. However, Ford's evidence fails to explain how the number of jobs could be inferred or how a competitive benchmark would be determined. As such, I am not satisfied that Ford has demonstrated a reasonable expectation of probable harm as required by paragraph 20(1)(c).

[82] Accordingly, I find that the paragraph 20(1)(c) exemption was properly claimed in relation to the balance of Article 8.10, Article 8.11, Article 8.13 and Article 8.14. Having found these exemptions to be proper, I will not go on to consider whether any additional exemptions apply to this same information.

[83] I would note that only ISED included a paragraph 20(1)(c) claim in relation to Annex D of Schedule 2, but provided no submissions related thereto. In the circumstances, I am not satisfied that it has been demonstrated that the exemption applies to Annex D.

E. *Is any portion of the Disputed Information exempt from disclosure pursuant to paragraph 20(1)(d) of the ATIA?*

[84] Similar to paragraph 20(1)(c), the exemption in paragraph 20(1)(d) of the *ATIA* is a harm-based exemption that requires proof that, if disclosed, the information in dispute "could reasonably be expected to interfere with contractual or other negotiations of a third party" [see *American Iron*, *supra* at para 70; *Canadian Broadcasting Corp v National Capital Commission*, 1998 CanLII 7774 (FC) at para 29, 147 FTR 264 [*National Capital*].

[85] Thus, in order for the exemption in paragraph 20(1)(d) to apply, the party invoking the exemption must establish a reasonable expectation of probable harm, as described above in relation to paragraph 20(1)(c) of the *ATIA* [see *Saint John Shipbuilding Ltd v Canada (Minister of Supply and Services)*, 1990 CanLII 8108 (FCA), 107 NR 89]. The obstruction or interference with contractual or other negotiations of a third party must be probable and not merely speculative. Evidence of heightened competition or increased competitive pressure is insufficient. Hypothetical risk to future business opportunities also does not suffice. There must be evidence of the effect of disclosure on actual, specific or ongoing contractual negotiations [see *American Iron, supra* at para 71, citing *Calian, supra* at para 4; *Oceans Limited v Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2009 FC 974 at para 64*; National Capital, supra* at para 29; *A Inc v Canadian Museum for Human Rights*, 2022 FC 1115 at para 99; *Concord Premium Meats Ltd v Canada (Food Inspection Agency)*, 2020 FC 1166 at para 116; *Burnbrae Farms Limited v Canada (Canadian Food Inspection Agency)*, 2014 FC 957 at 124-125 [*Burnbrae*]].

[86] The Applicant asserts section 20 of the *ATIA* has never been applied by this Court to information that could be used for the purposes of collective bargaining. The Applicant notes that provincial access to information and privacy legislation in multiple provinces across Canada explicitly provides for the exclusion of labour relations information from disclosure. As no similar express exemption exists in the *ATIA*, the Applicant asserts that the Court should find labour relations information is not covered by the exemption in paragraph 20(1)(d).

[87] I find that the Applicant's focus on labour relations information is misplaced, as Ford is not seeking to withhold information simply because it could be characterized as labour relations information. Rather, Ford relies on paragraph 20(1)(d) to withhold information in the Contribution Agreement that Ford asserts is reasonably expected to interfere with its contractual negotiations—specifically, its contractual negotiations with Unifor, an employee trade union. I find that labour relations negotiations are clearly contractual negotiations and thus fall within paragraph 20(1)(d). The sole question is whether Ford has provided the required evidence to demonstrate a reasonable expectation of probable obstruction to, or interference with, its negotiations with Unifor, if the Disputed Information were disclosed.

[88] The evidence before the Court is that Ford will be entering into negotiations with Unifor in 2023 (with a previous round of negotiations having been concluded in 2020) and that negotiations between Ford and Unifor have been complex and hard-fought by both sides. Ms. Briscoe states that the Disputed Information has not been disclosed to Unifor because the information would be valuable to Unifor's position in collective bargaining and, as a corollary, would weaken Ford's position. Ford asserts that there is a reasonable expectation that the disclosure of the Disputed Information would obstruct Ford's ability to effectively negotiate a new collective agreement with Unifor, as Unifor would leverage its knowledge of the Disputed Information in order to obtain "maximum concessions" from Ford in the 2023 negotiations to the detriment of Ford's bargaining position.

[89] In relation to Article 4.3(a), the reference to the term in Article 8.4, Article 8.12 and the definition of "term" in Schedule 1, Ford asserts that it does not share its business cycle plans

(including investment costs and spending) with Unifor for years beyond the expiration of the current collective agreement. Were Unifor to have knowledge of Ford's continuing obligations under the Contribution Agreement until the end of the term, Ford asserts that it would likely be detrimental to Ford's bargaining position. Leaving aside the issue of whether making a concession in negotiations can constitute obstruction or interference with contractual negotiations as contemplated in paragraph 20(1)(d), the problem with Ford's position is its failure to articulate how Unifor's knowledge of this information would be detrimental to Ford.

[90] The same holds true in relation to Ford's claimed exemption over Annex D to Schedule 2. This annex lists the [redacted] Ford facilities [redacted] Ford asserts that disclosure of this annex would allow Unifor to infer that Ford has certain obligations pursuant to the Contribution Agreement in relation to the facilities [redacted] which would likely harm Ford's position in the upcoming labour negotiations, particularly with regard to the collective bargaining units at those facilities. Again, Ford's evidence does not include any explanation as to how Unifor could use this information to harm Ford's position in the collective bargaining negotiations. Moreover, I would note that information regarding the facilities that are project locations has already been disclosed, in part, in Annex C to Schedule 2.

[91] Accordingly, I find that Ford has failed to establish that any of its exemptions pursuant to paragraph 20(1)(d) were properly made.

F. *Is there an obligation to sever non-exempt information under section 25 of the ATIA?*

[92] Section 25 of the *Act* provides that where the head of a government institution is authorized to refuse to disclose information pursuant to subsection 20(1), they shall nevertheless disclose any part of that record that does not contain and can reasonably be severed from the exempt material:

Severability	Prélèvements
25 Notwithstanding any other provision of this Part, where a request is made to a government institution for access to a record that the head of the institution is authorized to refuse to disclose under this Part by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information or material	25 Le responsable d'une institution fédérale, dans les cas où il pourrait, vu la nature des renseignements contenus dans le document demandé, s'autoriser de la présente partie pour refuser la communication du document, est cependant tenu, nonobstant les autres dispositions de la présente partie, d'en communiquer les parties dépourvues des renseignements en cause, à condition que le prélèvement de ces parties ne pose pas de problèmes sérieux.

[93] Section 25 is designed to avoid the possible non-disclosure of an entire record on the ground that part of that record contains exempt information [see *Blank v Canada (Environment)*, 2007 FCA 289 at para 6].

[94] The onus rests on the government institution to justify why it cannot disclose part of the record through reasonable severance [see *Cain v Canada (Health)*, 2023 FC 55 at para 172 [*Cain*]].

[95] In *Merck Frosst*, the Supreme Court of Canada commented on the application of section 25 of the *ATIA* as follows:

> [237] The heart of the s. 25 exercise is determining when material subject to begin, it is important to recognize that applying s. 25 is mandatory, not discretionary. (Underlining added) The section directs that the institutional head "shall [not 'may'] disclose any part of the record that does not contain" exempted information, provided it can reasonably be severed: see *Dagg*, at para. 80. Thus, the institutional head has a duty to ensure compliance with s. 25 and to undertake a severance analysis wherever information is found to be exempt from the disclosure obligation "can reasonably be severed" from exempt material. In my view, this involves both a semantic and a cost-benefit analysis. The semantic analysis is concerned with whether what is left after excising exempted material has any meaning. If it does not, then the severance is not reasonable. As the Federal Court of Appeal put it in *Blank v. Canada (Minister of the Environment)*, 2007 FCA 289, 368 N.R. 279, at para. 7, "those parts which are not exempt continue to be subject to disclosure if disclosure is meaningful". The cost-benefit analysis considers whether the effort of redaction by the government institution is justified by the benefits of severing and disclosing the remaining information. Even where the severed text is not completely devoid of meaning, severance will be reasonable only if disclosure of the unexcised portions of the record would reasonably fulfill the purposes of the Act. Where severance leaves only "[d]isconnected snippets of releasable information", disclosure of that type of information does not fulfill the purpose of the Act and severance is not reasonable: *Canada (Information Commissioner) v. Canada (Solicitor General)*, 1988 CanLII 9396 (FC), [1988] 3 F.C. 551 (T.D.), at pp. 558-59; *SNC-Lavalin Inc.*, at para. 48. As Jerome A.C.J. put it in *Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs)*, 1988 CanLII 9466 (FC), [1989] 1 F.C. 143 (T.D.):
>
> > To attempt to comply with section 25 would result in the release of an entirely blacked-out document with, at most, two or three lines showing. Without the context of the rest of the statement, such information would be worthless. The effort such severance would require on the part of the Department is not reasonably proportionate to the quality of access it would provide. [Emphasis added; pp. 160-61.]

> [238] That said, one must not lose sight of the purpose of s. 25. It aims to facilitate access to the most information reasonably possible while giving effect to the limited and specific exemptions set out in the Act: *Ontario (Public Safety and Security)*, at para. 67.

[96] Thus, the test involves both a semantic and cost-benefit analysis [see *Cain, supra* at para 172]. As the Federal Court of Appeal recently summarized in *Beniey c Canada (Sécurité publique et Protection civile)*, 2024 CAF 11 at paragraph 62, the question is whether within any of the information withheld from disclosure there is information that should nevertheless have been disclosed by the government institution.

[97] In this case, none of the parties made any submissions to the Court as to whether any portion of the Disputed Information could be severed pursuant to section 25 of the *ATIA*. This is particularly troubling given that the issue of severance was expressly addressed by the OIC, who determined that portions of Annexes A and B1-B5 of Schedule 2 should be severed and disclosed to the Applicant. As such, it falls on the Court to consider whether any severances should be made.

[98] I will begin by considering severances to those portions of the Disputed Information that the OIC found to have been properly exempted. I adopt the recommendations of the OIC and I find that severances should be made so that the following information is disclosed to the Applicant:

A. Annex A to Schedule 2: information related to the [redacted]

B. Annexes B1-B5 to Schedule 2: titles of columns and rows, together with the [redacted]

[99] With respect to the remaining Disputed Information that I have found was properly exempted pursuant to subparagraphs 20(1)(b) or (c), I find that no further severances are required.

VI. Costs

[100] At the hearing of the application, the Applicant and Ford agreed that no costs would follow the result, but counsel for ISED did not yet have instructions on the issue of costs. Counsel were advised that they could get back to the Court with an agreement on costs, if one was reached. However, no further communications were sent to the Court on this issue following the hearing.

[101] In the event that the parties are unable to reach an agreement on costs, the parties shall, by no later than 14 days following the date of issuance of this Judgment, provide the Court with a jointly-proposed timetable for the delivery of cost submissions.

JUDGMENT in T-229-21

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended, *nunc pro tunc* to add Ford Motor Company of Canada, Limited as a Respondent.

2. ISED shall provide the Applicant with a further copy of the Contribution Agreement with the following redactions removed:

    a. Article 4.1(a)(i);

    b. Article 4.1(b)(iii);

    c. Article 4.3(a);

    d. Article 8.4;

    e. Article 8.12, with the exception of that portion found by the OIC to have been properly exempted;

    f. The definition of "term" in Schedule 1;

    g. The definition of "job" in Schedule 1;

    h. Annex A to Schedule 2: limited to information related to the program approval, the annual review and final review steps;

    i. Annexes B1-B5 to Schedule 2: limited to titles of columns and rows, together with the grant total amount for each year; and

    j. Annex D to Schedule 2.

3. In the event that the parties are unable to reach an agreement on costs, the parties shall, by no later than 14 days following the date of issuance of this Judgment,

provide the Court with a jointly proposed timetable for the delivery of cost submissions.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-229-21
STYLE OF CAUSE:	SARAH CLOWATER v MINISTER OF INDUSTRY AND FORD MOTOR COMPANY OF CANADA, LIMITED
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	JULY 20, 2022
JUDGMENT AND REASONS:	ELLIOTT J.
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